

PRO BONO WORK: SHOULD IT BE MANDATORY OR VOLUNTARY?

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I. INTRODUCTION

Attorneys enjoy special privileges as a profession that few other professions can claim. The practice of law is limited to only those people who satisfy educational, testing, and character requirements as established by the American Bar Association and the various state bar associations. These stringent standards serve to exclude people who fail to meet those requirements, for whatever reason. Basically two options exist for those non-lawyers. First, they may seek representation by someone who was fortunate enough to meet the standards and most likely charges a princely sum for that representation. Few public interest law firms or legal aid services are available today, although some do exist. Those generally operate for the underprivileged and lack the staff and the funds to provide more than the absolute minimum service. The second alternative for non-lawyers is to attempt to represent themselves in *propria persona* in an adversarial system structured for and by the legally educated. The latter option is realistically no more than a last resort for most people who simply cannot afford the high cost of legal services.

This Article analyzes the duties lawyers do have and should have to provide pro bono services in light of their exclusive privileges and professional knowledge. First, it sets out the primary issues raised by a discussion of pro bono work and the development of the current duty imposed on lawyers to provide pro bono services. In drafting a pro bono provision, the American Bar Association steadily retreated from a defined duty requirement toward a general statement merely encouraging such activity. Second, this paper looks at the policy considerations for and against a mandatory requirement and concludes that the benefits gained from mandatory pro bono programs outweigh the objections and uncertainties of those programs. Finally, this paper examines the case law with regard to whether a bar association's mandatory pro

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bono requirement would violate lawyers' constitutional rights, under the fifth, thirteenth or fourteenth amendments of the United States Constitution.

As part of each section, the El Paso Bar Association's mandatory pro bono program, one of the few programs currently implemented, will be considered regarding its nature, force, and effect. The program requires all members of the El Paso Bar Association to represent indigents in not more than two domestic relations cases. The scope of those cases is currently limited to uncontested divorces and name changes, however desire has been expressed from within the Pro Bono Committee to expand the types of cases which would satisfy the requirement.

The importance of this topic is clear in light of the declining services available to indigents with legal needs. The government is not providing the necessary funds to help establish and maintain legal services organizations. Attorneys who do participate in pro bono work cannot meet the indigents' needs alone. Therefore, a new approach to the problem is required. Organizations like the Bar need to implement standards for minimum pro bono work by members of the profession so that the burden of indigent legal needs will be served.

II. THE ISSUES RAISED AND THE CURRENT STATUS OF THE ABA CODE AND MODEL RULES PROVISIONS REGARDING A LAWYER'S DUTY TO PROVIDE PRO BONO SERVICES

Several issues are raised by a discussion of whether pro bono work should be mandated by case law or code. Constitutionally, how far can a court or bar association go in requiring an attorney to provide free legal services? Furthermore, what is the desirability of compelling attorneys to donate services? Is this fair, especially in light of the fact that no other professional has similar dictates? How do we balance the rights of indigents and the elderly to receive adequate representation in order to participate in our legal system against an attorney's right to act freely and practice his or her chosen profession in the manner preferred? How should we resolve the conflict between the government's desire to increase the realm of representation and attorney freedom and autonomy? The aim of this paper is to examine and consider these issues toward an understanding of what role mandatory pro bono work should play within the legal profession.

Requirements to perform mandatory pro bono work can take several forms. There can be court-ordered representation for criminal cases with or without compensation, court-ordered representation for

civil cases, again with or without compensation, or pro bono requirements promulgated by professional codes or local bar associations. As will be discussed, the current status with regard to the actual existence of programs today, as well as today's judgments about the legality of mandatory pro bono requirements, generally favors attorney freedom over public service with few exceptions.

One exception is in the area of court-ordered representation for indigent criminal defendants. The case law is clear that a court may require an attorney to represent a criminal defendant, with or without compensation, thus placing greater importance with the defendant's sixth amendment right than with any of the attorney's own constitutional rights.

The status of court-ordered representation for civil cases is less clear-cut and tends to follow the mold favoring attorney independence. The cases are split on the issue of whether compelled legal representation in a civil context might be a more private matter requiring primary respect for the attorney's constitutional rights. While the case law often reflects a recognition of the importance of civil pro bono work, courts seem to hold that court-compelled representation is not appropriate in the civil arena. There is some indication that compensation might make the difference between an appropriate and an inappropriate appointment, however this is not dispositive. Moreover it is unclear that compensated appointments would satisfy a "pro bono" definition because the attorney would no longer be donating his or her services in the truest sense. Most courts support the attorney's desire to be free from court control in this area.

Today's legal professional codes also follow the mold respecting an attorney's constitutional rights over those of the indigent and undereducated. The ABA Model Code Disciplinary Rules contain no provision explicitly requiring attorneys to participate in pro bono activities. A few of the Code's Canons and Ethical Considerations refer to the fact that every lawyer should find time to serve the disadvantaged, and encourage and aid in the making of improvements in the legal system. Canon 2, for example, states that a lawyer should assist in making legal counsel available.¹ Ethical Consideration 8-3 ambiguously states that "[t]hose persons unable to pay for legal services should be provided needed services."² EC 2-29 states that when a lawyer is appointed by a court to serve as counsel for someone who is unable to afford repre-

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979).

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-3 (1979).

sentation, that lawyer "should not seek to be excused from undertaking the representation except for compelling reasons."³ Beyond these perfunctory statements the Model Code contains nothing affirmative about an attorney's duty to provide free or limited-fee services to citizens who are not otherwise able to afford to exercise their right to participate in the legal system. The Model Code has provided the non-legal community with nothing more than recognition that the underprivileged deserve assistance. Any mandatory calling for lawyers to satisfy those needs has been deleted and what is left, in the form of Ethical Considerations, is merely suggestive and only aspirational.

The initial draft of the Model Rules of Professional Conduct contained the following provision relating to a lawyer's duty to provide public service legal aid:

A lawyer may discharge [his public service] responsibility by rendering professional service at no fee or substantially reduced fee to persons of limited means, by serving programs that provide legal assistance to such persons or further the improvement of the administration of the law as it affects such persons, or by making financial contributions to such programs. *A lawyer shall give forty hours per year to such service, or the equivalent thereof.* [emphasis added]⁴

The Rule was not extremely harsh, considering that the requirement constituted less than one hour a week per year of public service and would have allowed a lawyer to satisfy this duty by providing, among other services, "assistance to relatives in temporarily straitened circumstances or service on bar committees."⁵

Nevertheless, faced with loud protest, the Commission drafting the rule eventually deleted the mandatory minimum provision. The force of the provision actually proposed to the ABA was severely weakened. Omitting a definite forty hour per year requirement, Rule 8.1 stated simply:

An attorney is bound to perform "unpaid public interest legal service" and to make an annual report to "appropriate regulatory authority" on what he or she has done. Acceptable service would include "activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1979).

4. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Code*, 59 TEXAS L. REV. 689, 698 n.54 (1981).

5. *Id.* at 698.

limited means or to public service groups or organizations."⁶

While the final proposed draft attempted to define more carefully those services which would satisfy a pro bono requirement, the Rule backed away from any strong statement specifying an exact amount of time attorneys would be required to spend performing services beneficial to the community.

The standard set out in the current ABA Model Rules, adopted finally in 1983, retreats even further by dropping from Rule 6.1 the annual reporting requirement leaving nothing more than a suggestion without much force as follows:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.⁷

The comment following Rule 6.1 appropriately sums up the Rule's force (or lack of it) by stating that "[t]his Rule expresses that policy but is not intended to be enforced through disciplinary process."⁸

Generally, the local bar associations take no action to improve upon the ABA's lack of a pro bono requirement. The El Paso Bar Association in Texas (EPBA) is the only Bar known to this author which has adopted a provision strongly and explicitly imposing a mandatory requirement on its lawyers to perform pro bono services. In September of 1982 the EPBA membership passed a resolution requesting the ten district court judges to enter the following court order (in part):

AND NOW, THEREFORE, BE IT FURTHER RESOLVED that the El Paso Bar Association endorses the implementation of a mandatory *pro bono* program in which each participating attorney shall accept and represent indigent clients in not more than two cases per year involving two civil legal matters, which at this time would be domestic cases.

AND NOW, THEREFORE, BE IT FURTHER RESOLVED AND SUBJECT TO APPROVAL BY THE BAR ASSOCIATION that the El Paso Bar Association encourages the local county and district court

6. Slonim, *What's in the Proposed Model Rules of Professional Conduct*, 66 A.B.A.J. 279, 279 (1980).

7. MODEL RULES OF PROFESSIONAL RESPONSIBILITY RULE 6.1 (1983).

8. MODEL RULES OF PROFESSIONAL RESPONSIBILITY RULE 6.1 comment (1983).

judges of El Paso County to participate in the pro bono program endorsed herein by enforcing each attorney's ethical obligation to represent indigent persons through the use of the power vested in the by Articles 1958 and 1917, respectively, of the Texas Revised Civil Statutes, and to "appoint counsel to attend to the cause of any party who makes affidavit that he is too poor to employ counsel. . . ." In this regard the Association's Board authorizes its President to request an appropriate order from the courts with the stipulation that the same would be subject to the approval by the El Paso Bar Association.

The ten district court judges unanimously signed the resolution. Because the order is unusual, it is included here in full:

ORDER

ON THIS DAY the Courts did consider the motion of the EL PASO BAR ASSOCIATION to implement a *pro bono publico* plan in El Paso County, Texas. The motion of the EL PASO BAR ASSOCIATION is granted.

The undersigned District Courts of El Paso County, Texas, ORDER the following:

1. Pursuant to Art. 1917 of the Texas Revised Civil Statutes, the undersigned courts do authorize the appointment of all lawyers holding an active Texas law license and who practice or are employed in El Paso County, Texas.

2. Such lawyers shall be appointed under this program to no more than two domestic matters each fiscal year (October 1 to September 30).

3. The EL PASO BAR ASSOCIATION or its delegate shall screen applicants to the program to determine indigency.

4. Indigency for purposes of this program shall be that defined by Legal Services Corporation guidelines and regulations.

5. The EL PASO BAR ASSOCIATION or its delegate shall notify an attorney of the appointment.

6. A pauper's affidavit shall be executed by the client prior to the making of an appointment.

7. Uncooperative clients shall be dismissed from the *pro bono publico* program.

8. An attorney may be excused from the program for good cause shown to the appropriate committee of the EL PASO BAR ASSOCIATION.

9. Participating attorneys will be provided with professional liability coverage.

[No item 10 appears on the order]

11. The Courts are encouraged to accept simplified pleadings in *pro bono* cases.

SIGNED AND ORDERED this 24th day of September, 1982.

The adoption of this resolution by the EPBA and the subsequent order signed by *all* of the district court judges reflects this bar association's ability to confront the problem of providing legal services for indigent clients directly. Both the provision itself and the bar's willingness to take such strong affirmative steps in this direction are unusual in the legal community today as evidenced by the fact that the provision is the only one of its kind currently in use. As will be discussed, the EPBA was careful to implement a program which responded to objections by opponents to the plan. The issues raised by opponents related to vagueness in the requirements, increased liability from providing representation in unfamiliar areas of law, language barriers, and budgeting for the potentially high costs of a lengthy litigation battle.

III. DESIRABILITY OF MANDATORY PRO BONO PROGRAMS

What are the pros and cons of requiring attorneys to serve a specified amount of their time engaged in public service and what would the effects be on society? The balance depends upon how the benefits of a mandatory program are weighed against the burdens imposed by such a system. Within the balance, two considerations are made, generally; what society would gain from mandatory pro bono programs and why attorneys are obligated to contribute in this way for the benefit of society.

Dean S. Spencer's article correctly states that "[n]eed is the primary motivating factor in the call for public service: unmet legal need which falls most heavily on the poor, the elderly, and various minority groups."⁹ In a statement before a congressional hearing by John Mola, co-chair of the Funding Criteria Committee, Project Advisory Group for the Legal Services Corporation, Mr. Mola points to census statistics showing an increase in America's poverty population from 29.5 million in 1980 to 35.3 million in 1983. The number could have risen, he says, to 37 million in 1985.¹⁰ An overwhelming number of poor people have

9. Spencer, *Mandatory Public Service For Attorneys: A Proposal For The Future* 12 SW. L. REV. 493, 494 (1981).

10. Suggestions to expedite Immigration and Naturalization Service airport procedures; need for continued congressional control over Legal Services Corp. (LSC) appropriations in light of viewed programs mismanagement (related memo, p. 123-128); re-

legal needs which are never attended to by the present legal system and the situation threatens to worsen with the Reagan Administration's proposal to abolish the Legal Services Corporation. "Congress has defined a funding goal of \$13.57 per poor person, yet the funds allocated in 1985 to field programs amount to \$8.43 per poor person, about 62% of that goal. This is certainly an inadequate sum with which to meet one's legal need for a year."¹¹ Mr. Mola further points to the losses these people face daily, in the areas of income, jobs, health, shelter, children, and possessions."¹² As Spencer states, "we are not (only) talking about financial inconveniences; we are talking about pain and survival."¹³ The need is qualitative as well as quantitative.

The argument in favor of creating a mandatory public service program is easily established. It begins with the premise that all citizens of the United States are equally entitled to have their day in court. It is highly likely that a legal situation will confront most, if not all, citizens during their lifetime. Mola's report recognizes various surveys of the legal needs of the poor which "reveal that the typical low-income family experiences *from one to seven or more serious civil legal problems each and every year.*"¹⁴ Attorneys are the only members of our society who are trained and licensed to provide legal services and expertise. Unfortunately, many people of this group suffer unjust wrongs or injuries which are never redressed by the legal system because those people may be deterred or prevented from seeking assistance due to attorney inaccessibility and prohibitive costs. This was substantiated by the Washington Council of Lawyers' survey in 1983 which measured the impact of reduced funding on the scope and quality of legal representation to the poor. Among the findings, it was evident that "programs have lost an average of 30% of their staff attorneys . . . hundreds of thousands of poor people have been denied access to legal services because of the closing of offices, dismantling of specialized units, and reduced access in rural areas . . . programs have been forced to handle primarily emergency cases . . ." ¹⁵ Overall, "the denial of legal services has exacerbated the sense of frustration and de-

quest for adequate LSC funding for FY86 to meet rising legal services need: Hearings before the Subcomm. on Commerce, Justice, State, and Judiciary Appropriations, 99th Cong., (1985) (statement of John Mola, co-chair, Project Advisory Group) p. 108.

11. *Id.* at 118.

12. *Id.* at 109.

13. Spencer, *supra* note 9, at 496-97.

14. Mola, at 119 (emphasis added).

15. *Id.* at 120.

spair already felt by many poor people, creating either a sense of total resignation or total disillusionment with the American ideal of justice.”¹⁶ The conclusion to this argument is, therefore, that the legal system in general, and attorneys specifically, need to provide services in a different way in order to meet the legal needs of all citizens.

There are generally four interrelated parts to the argument that it is a lawyer’s responsibility to answer this tremendous need. First, if we all have a societal responsibility to take steps toward advancing the public good for fellow human beings, then it should be the duty of the legal profession to provide for the desperate legal needs of the poor, the elderly, and the minority groups. Everyone derives benefits from living in our society. Therefore we all have a moral duty to contribute back to society and share those benefits with others. Of course not everyone has the same capacity, educationally or monetarily, to give in the same way. However, contributions should be in the form most beneficial to society, according to a person’s capacity. The underlying premise is that those who enjoy greater achievements and rewards should have some moral obligation to help people who are less fortunate. Lawyers enjoy achievements and rewards in the field of law. Much the same way that practicing medicine requires specialized knowledge and experience without which one could not effectively participate in the profession, the practice of law requires specialized training as well. The majority of non-lawyers are required, and can afford, to seek representation in personal legal matters by paying the market price. Some, however, are unable to afford any price for legal representation, yet still have legal problems which need to be addressed. The conclusion therefore follows that because lawyers as members of society have a moral obligation to fulfill, and because they have chosen a field designed to address legal problems and have been trained with the skills needed to do so, morality dictates that they provide free or reduced-fee services for the poor.

Second, the monopoly that lawyers hold on the legal market requires them to provide this service. By establishing stringent requirements of admission to the profession and in creating a duty for lawyers to prevent the unauthorized practice of law, lawyers have delegated the responsibility to themselves to practice law in a way that will serve the greatest good. Certainly, these standards serve as protections for the community against fraudulent or incapable representation (not guaranteed protections, of course). There is a second effect, however,

16. *Id.*

of eliminating a large part of the population from the profession and restricting practice to a selected few. Some are unable to meet the requirements, while others choose not to enter the profession. But when these people need the skills of the profession, they should not be penalized for their inabilities or choices. If there is no duty placed on the members of the profession to help those who need legal assistance, then the lack of services to the indigent will continue to be a problem. The balance of lawyers' freedom within the monopoly to distribute their knowledge as they wish against the value of all people to have an effective way to vindicate their rights favors the indigents' rights. Therefore, the people who are lucky enough to be admitted to the profession of their choice should disburse services to paying customers as well as those who cannot afford to pay, because lawyers are the only members of society who can provide the services of the legal profession.

The third argument put forth is that lawyers have a moral duty to provide pro bono services as part of the obligations undertaken upon becoming a member of the Bar. This is the weakest argument in favor of compelled pro bono programs. While the Professional Responsibility Code may express a preference for providing legal representation to those who cannot afford to pay, there is no mandatory language or enforcement mechanisms behind that expression. Upon becoming a member of the Bar, no real duty is imposed upon a lawyer to provide free or reduced fee services. Perhaps the only statement that could be made in this regard is that a lawyer adopts the implicit, as well as the explicit, values of the Code.

Finally, it is in the interests of the legal community to uphold and maintain the profession's integrity. The public should know that lawyers have broader social interests beyond their own financial concerns. Public confidence in the legal profession might grow if citizens see that lawyers reach out to meet the needs of everyone, rather than a selected and fortunate few. By providing legal services to less fortunate members of the community, perhaps the legal profession can start to shed its "money-hungry" reputation and gain the reputation of a profession that can be motivated by altruism.

In sum, as Spencer stresses, citing Robert J. Kutak, former chairperson of the Commission on Evaluation of Professional Standards, "[b]eyond the historical precedent for a mandatory pro bono obligation and the understanding that lawyers are the only people able to

provide legal services, lies the simple fact of compelling need."¹⁷

The arguments against creating a mandatory public service program are slightly more complicated and are best discussed one at a time, followed by the proponents' response. Critics of mandatory pro bono programs advance the following four basic criticisms: (1) Why lawyers?, (2) Unfairness of compelling charity, (3) Vagueness intrinsic in definitions of what time commitment is required and what constitutes "public service," and (4) Inefficiency.

Critics argue that lawyers should not be held responsible for a pervasive social problem which requires a solution from society as a whole. This argument breaks down into two smaller issues. First, it is unfair to impose such a duty upon lawyers if other professions do not have corresponding responsibilities. "Requiring lawyers to provide these services free of charge, without parallel requirements placed on other professionals to contribute their services, amounts to an excise tax on attorneys."¹⁸ Second, society as a whole should serve, not just lawyers. Mandatory pro bono programs would be unduly burdensome and unfair to lawyers, stating that "it is impractical and inappropriate to think that constitutional rights and national needs can or should be met by the part-time volunteer efforts of one profession. A public responsibility requires a public commitment."¹⁹ A better suggestion perhaps would be to impose a legal tax on society as a whole rather than to put the whole burden on lawyers' shoulders.

The response to these issues returns to the theory that lawyers enjoy a monopoly in the practice of law. While a legal tax of some sort might be useful in deferring costs, lawyers alone can provide legal services. Until a tax system could be created, and even once the funds were available, the work would still have to fall into the responsibility of those with the education and admittance to the Bar. Most likely the funds would not be equal to the full range of expenses related to the practice of law, but would merely be supplementary. There is nothing morally wrong with requiring lawyers to utilize their skills for the betterment of society. In fact, professionalism would seem to require that lawyers take on this imposition. Professions in general should seek to address weak areas of practice and to improve the public image of its participants so as to gain support from the community. Legal profes-

17. Spencer, *supra* note 9, at 499.

18. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A.J. 564, 565 (1979).

19. Tate, *Access to Justice*, 65 A.B.A.J. 904, 905 (1979).

sionalism requires that lawyers work to do the same within their own area of expertise. Furthermore, the fact that similar obligations are not yet required of other professions does not give credence to the legal profession's failure to actively aid the advancement of social goals. As observed earlier, it would also be desirable for the medical profession to bear the burden of providing free medical services to the poor, elderly, and minority groups who cannot afford exorbitant health care costs. Perhaps one day this will be accomplished as well. Thus, even though the poor suffer deprivations beyond legal matters, this is the area in which lawyers are trained and expected to provide services as a start toward improving the overall plight of the indigent in our country.

Some critics believe that "[a]ny mandatory requirement that service be donated is seen as an effort to compel charity."²⁰ Instead, public service should be completely voluntary on the part of individuals who wish to donate their services. The American Trial Lawyers' Association's drafting committee proposed a code of professional conduct without any mandatory public service requirement because they felt it was not clear that

the organized bar, or the courts or the legislatures should be telling lawyers how they must spend their non-business time. If a lawyer prefers to do work for his church or synagogue, or contribute non-professional services to the Red Cross or to a famine relief organization, it seems absurd to say that the lawyer should be professionally disciplined for failing, instead, to serve on the board of a legal aid society or a bar association.²¹

This attitude reflects a notion that you cannot and should not force someone to be charitable. After all, society has decided that no one has a duty to be a "good samaritan." In tort law, for instance, no one has an affirmative duty to save a life they did not endanger. Those who do make an effort to save a drowning child or a car accident victim are praised as going beyond the call of duty. Those who have an opportunity to save someone and choose for whatever reason not to, however, are not charged with liability. Perhaps it would be immoral or uncaring not to extend a hand, especially if no inconvenience is caused by doing so, but it is not illegal. The "compelling charity" criticism of mandatory pro bono programs can be extended to include the concern that these programs create a duty for lawyers to act as good sa-

20. Spencer, *supra* note 9, at 501.

21. *Id.* at 501, citing Report, *Public Discussion Draft-June 1980 American Lawyer's Code of Conduct*, 16 TRIAL 44, 59-60 (1980).

maritans which is not imposed upon the rest of society.

Spencer sets out the strongest response to these criticisms. Regardless of its desirability, "a mandatory public service requirement seems more like a restriction on the way in which the law may be practiced, analogous to competency, continuing education requirements, bar association dues, or any other ethical restriction on behavior."²² Although lawyers may feel it is undesirable to be restricted to representing only one party's in a litigation matter (because representing both parties in what seems to be a fairly straight-forward issue would be more profitable), the restriction still stands for lawyers to follow. The focus of pro bono programs is on both providing charity and on its centrality to becoming a member of the legal profession. Just as there are restrictions on who a lawyer may serve in the event of potential conflicts of interest, for example, the bar should be able to institute requirements on how each lawyer should spend part of his or her business (not "non-business") time. Public service, then, could be thought of as an integral part of the job, not an additional burden imposed on lawyers' free time.

The third criticism is that mandatory pro bono service requirements are generally too vague. What is a lawyer required to do and how much time commitment is involved? What is public service exactly?

Reference to the EPBA's pro bono program is helpful here to illustrate how these concerns are easily overcome. The provision detailing the requirements of that program are very specific. The EPBA Pro Bono Committee who created the program meets regularly to consider any questions or concerns which arise from the participating attorneys. For instance, at the September, 1982, Bar meeting, when the resolution was originally presented, the committee answered the following objections.

Attorneys were concerned about the increased risk of liability, especially for those who did not usually practice domestic relations law. The committee responded that the Pro Bono Project was to be supplied with additional professional malpractice coverage for private attorney involvement. Also, services of lawyers who had experience in domestic relations law were available as consultants and co-counsel or lawyers could utilize the informal buy-out system whereby another lawyer would handle the case while the first would retain a duty to insure that the client was properly represented and the case concluded.

22. *Id.* at 502.

A second issue involved a language barrier between a majority of lawyers who only spoke English and a large portion of clientele who only spoke Spanish. The Pro Bono Committee assured that attempts would be made to match lawyers and clients of similar language backgrounds and efforts were also being made to recruit university Spanish majors as volunteers.

The Committee told lawyers that the Project's budget would contain money for litigation expenses in response to the concern that perhaps filing fees and court costs would impede lawyer participation. Lawyers would be reimbursed for out-of-pocket expenditures. Any expenses greater than \$25.00 would have to be approved in advance by the Legal Aid Program Director.

A final issue raised by the El Paso plan was the possibility of any valid exemptions. The resolution provided for exemptions for "good cause demonstrated." They have been granted to the United States Attorney's Office, state and federal law clerks, and to the Staff Judge Advocate's Corps. Exemptions have also been granted to lawyers over sixty years old, those on maternity leave, and to lawyers who have physical disabilities or suffer severe health problems. Finally, lawyers who maintain their licenses but are engaged in some other non-legal occupation have also been exempted.

In large part, the EPBA provision's lack of ambiguity results from the bar association's limiting the plan to domestic relations cases. All participating lawyers know exactly what will satisfy the requirement of public service. Individual bar associations could specify other areas of law that would adequately serve the needs of the community in which its lawyers practice. If, however, a bar association wished to leave open the types of cases a lawyer could handle, it would have to more explicitly define public service than the EPBA did.

Given the specificity of the resolution and the cooperation of the Pro Bono Project committee, the EPBA's program is relatively free of ambiguity and appears to run efficiently. According to records the Project keeps, lawyers handle approximately one and a half out of the two required cases per year. The average length of time per case has been about ten hours. The average time commitment by the lawyers, therefore, is only about fifteen hours per year. Thus, this program could very well serve as a guide for other bar associations in designing their own programs. Vagueness could be avoided by analyzing the EPBA's problems and anticipating others. It appears that under the EPBA program few of the participants are unsure about what is expected of them or what constitutes pro bono work for the purpose of satisfying

the requirement.

The final criticism advanced by opponents to the El Paso plan points to the limited resources, administrative burdens, and inefficiencies of carrying out a mandatory pro bono program. Spencer characterizes this argument as stating that because of "the overwhelming nature of the need contrasted to the limited extent of resources available, the alleged lack of enthusiasm and competence for public service work, the unfairness of the mechanics, or the barriers of any number of administrative problems—mandatory public service will make an already poor situation worse."²³ However, when the arguments are broken down they are easily refuted individually. Together they carry slightly more weight, but are not strong enough to tip the balance against pro bono programs.

The position that the need for public services is far greater than the available resources to serve that need is not an effective argument against instituting a pro bono program. Rather, it seems to argue more strongly in favor of one. A solution must have a starting ground. Any pro bono program would be a step towards improving a situation which can otherwise only worsen. However small the dent would be in helping the poor, the elderly, and minority groups exercise their legal rights, it would be better than ignoring a tremendous social problem. No one is suggesting that one type of program can be successful at solving the whole problem. However, the creation of mandatory public service programs will aid, to some extent, in starting to redistribute legal resources and can be adequately justified on that basis alone.

The lack of competence in areas of needed legal services which leads to inefficient representation is of no great concern either. Using the EPBA's provision as a model once again, this problem is easily rectified by providing supervision and resources to lawyers unskilled in the area of law to which they are donating their time. Also, training sessions for participating lawyers could be offered and, perhaps, calculated into time requirements under mandatory provisions. Some critics suggest that administrative problems would arise in that the already congested court system would suffer greater congestion and delay. This argument is very unpersuasive. While court congestion and delay is certainly a problem, it should not be used to justify denying access to the poor who have equal rights to the justice system. Critics who give credence to this argument would seem to suggest, or at least might agree that perhaps the cost of litigation should be increased further to

23. *Id.* at 508-09.

eliminate middle class access and claims as well. This would clearly be abhorrent to public policy and notions of justice.

Finally, critics suggest that the administrative burdens of monitoring compliance with such a system would be costly and enforcement would be difficult. "Many critics believe that a mandatory service requirement would be unenforced and unenforceable," comments Spencer, "and, therefore, a hypocritical gesture that may do more to increase public distrust and suspicion of the bar than to alleviate it."²⁴ However, there are ways of reducing these costs. For instance, costs and inconsistencies can be reduced through local enforcement by city bar associations of their own members. Spencer suggests that random and selective sampling of records similar to tax enforcement by the Internal Revenue Service would also help. Hopefully, the legal community could rely on, and would ultimately have to rely on, voluntary compliance.

The opponents to mandatory pro bono requirements raise several valid criticisms and concerns. Some are easily overcome either with a little thought or by example. Others deserve more consideration and might have to be worked out over time. However, the needs and justifications for instituting this type of program strongly outweigh these concerns. It seems extremely desirable to create a system which would serve the presently unaddressed legal needs of the poor, elderly, and minority members of our society to whatever extent possible. Opponents fail to offer proposals of how the legal community can otherwise focus on these problems.

IV. THE CONSTITUTIONALITY OF REQUIRING ATTORNEYS TO PARTICIPATE IN A MANDATORY PRO BONO PROGRAM

While the current Professional Responsibility Code contains no language imposing a mandatory duty on lawyers to provide pro bono services, it certainly expresses the value of such services and the preference that lawyers engage in this type of work. Could a state or local bar association constitutionally institute its own mandatory program requiring all of its members to provide pro bono services?

The case law does not speak directly to the constitutionality of a mandatory program instituted by a state or local bar association. However, there is sufficient case law on court-compelled appointments in criminal and civil cases to infer what the outcome to a challenge against El Paso's program, for instance, would be. The situations are fairly anal-

24. *Id.* at 512.

ogous because both involve state action for constitutional purposes and an effort to compel lawyers to provide services which they might not otherwise have provided.

The courts, in considering this issue, generally begin by examining the role and position attorneys have taken in society. The inquiry is relevant in answering the question about what attorneys can be expected to give to society within constitutional boundaries because how one's role is defined dictates what can be expected from that person. Historically, lawyers were considered to be "officers of the court." The term was used in England originally to express the view that special responsibilities and duties attached to the privilege of becoming a member of the legal profession. English barristers owed a duty to the judicial system to see that the truth was brought out and justice was served.

The Supreme Court of the United States, in *In re Griffiths*,²⁵ distinguished the historical meaning of "officer" from the term as it is used in this country. The American legal system does not give the same weight and connotations of duty to the term as does the English system. The Court in *Griffiths* did, however, recognize that lawyers "do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts."²⁶ The dissent, in concluding that "officer of the court" was a role upon which the State could rely to exclude aliens from practice (the main issue in that case), applied the term with the weight given it in any other context. "By virtue of his admission," the dissent remarked, "a lawyer is granted what can fairly be called a monopoly of sorts. . . [t]he broad monopoly granted to lawyers is the authority to practice a profession and by virtue of that to do things other citizens may not lawfully do."²⁷

While the image of an American lawyer as "officer of the court" in its full weight has been denigrated to some extent, the feeling still remains that lawyers do enjoy a monopoly of privileges and responsibilities that others do not enjoy. Moreover, the courts do recognize that a lawyer is subject to certain obligations "imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice," including the obligation to provide legal

25. 413 U.S. 717 (1973).

26. *Id.* at 729.

27. *Id.* at 731.

services to the indigent in some circumstances.²⁸

The discussion of case law relating to the constitutionality of compelled representation can most easily be broken down into two main areas: criminal cases and civil cases. Within these two categories, the issues revolve around the fifth, thirteenth, and fourteenth amendments.

A. *Criminal Cases*

The case law has fairly well settled the issue of compelled representation in criminal cases. Objections to compelled representation in the criminal context have arisen under the fifth, thirteenth, and fourteenth amendments. The courts agree, however, that there is no violation of an attorney's constitutional rights where appointment is made either with or without compensation.

Specifically, regarding the Thirteenth Amendment right, the argument has been made that compelling representation constitutes involuntary servitude and is, therefore, unconstitutional. Attorneys should have the constitutional freedom to choose to work for whom they wish and under whatever conditions of payment are desired. Courts have routinely rejected this argument as lacking merit. The Thirteenth Amendment has continued to be narrowly construed in the absence of a congressional statute to the contrary. Absent any statute, the courts use it to protect only against racial slavery.²⁹ The notion of involuntary servitude simply does not apply to court-compelled representation according to the Missouri courts, the D.C. Circuit, and the Fifth, Eighth, and Ninth circuits.³⁰

United States v. Dillon,³¹ a Fifth Amendment case, expressed the Ninth Circuit's view that attorney appointments in criminal cases with or without compensation are not unconstitutional. This position is still generally accepted by that circuit and the other circuits today. The Ninth Circuit Court of Appeals in *Dillon* reversed the lower court's decision to grant the appointed attorney in that case compensation for his services provided. The district court ordered compensation holding that "its order requiring Mr. Strayer to represent Dillon was a taking of Mr.

28. *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965).

29. See *Memphis v. Greene*, 451 U.S. 100 (1981).

30. *State ex rel Scott v. Roper*, 688 S.W.2d 757, 758 n. 1 (Mo. 1985) (en banc); *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 704-05 (D.C. Cir. 1984); *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205, n. 3 (5th Cir. 1981); *Williamson v. Vardeman*, 674 F.2d 1211, 1214-15 (8th Cir. 1982); *Bradshaw v. United States District Court for Southern District of California*, 742 F.2d 515, 517, n. 2 (9th Cir. 1984).

31. 346 F.2d 633 (9th Cir. 1965).

Strayer's property for a public use, within the meaning of the Fifth Amendment, and that just compensation was therefore payable."³² The court ordered that Mr. Strayer receive both an hourly rate for the amount of time spent representing Dillon and reimbursement for expenses. In its reversal, the Court of Appeals relied heavily on the appellant, United States' brief, contending that the attorney did not have a right under the Fifth Amendment to compensation for services because (1) there had been no "taking" and (2) "property" as used in the Just Compensation clause of the Fifth Amendment did not include personal services. No Thirteenth Amendment claim was brought in this case. The appellee, in his brief, conceded that "a court may issue a valid order compelling a lawyer to represent an indigent. The enforcement of civil rights by compelling the incidental giving of personal services cannot be considered an imposition of involuntary servitude."³³

The court agreed with appellant that

the obligation of the legal profession to serve indigents on court order is an ancient and established tradition, and that appointed counsel have generally been compensated, if at all, only by statutory fees which would be inadequate under just compensation principles, and which are usually payable only in limited types of cases.³⁴

The court went on to say that representation without compensation

is a condition under which lawyers are licensed to practice as officers of the court . . . [a]n applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession . . . [t]hus the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking" of his services.³⁵

Therefore, under the court's holding, any reimbursement from a state statutory scheme would be a gift not to be relied upon by the lawyer.

Dillon stands for the proposition that requiring lawyers to represent indigents in criminal cases with or without compensation is not unconstitutional. The case law in opposition to *Dillon* is scarce. Courts that may not agree completely with the Ninth Circuit's reasoning still appear to uphold the general principle. Because of the duties imposed

32. *Id.* at 634.

33. *Id.*

34. *Id.* at 635.

35. *Id.*

on lawyers to provide such services, by tradition and notice, there is no Fifth Amendment violation since there is no "taking." Compensation need not be provided and any statutory compensation is optional with the state. Those fees, if they exist, are generally used only to help with some of the litigation expenses.

B. Civil Cases

The constitutionality of court-compelled appointments in civil cases, with or without compensation, is more ambiguous than in the criminal context. The "tradition" which exists of providing representation for indigents convicted of criminal offenses does not exist for indigents involved in civil matters. Still, a lawyer's duty to provide legal services to those who cannot otherwise afford it remains the same. The issue then becomes whether lawyers have a duty to respond to court-compelled representation in a civil context which might be considered a more private sphere than the criminal context. There is a split of opinion among the courts, illustrated by the Ninth Circuit's position in favor of court-compelled appointments and the Missouri Court's view opposing appointments, especially without compensation.

*Bradshaw v. United States District Court for the Southern District of California*³⁶ demonstrates the Ninth Circuit's endorsement of compelled representation. The court examined this issue on appeal from the lower court's refusal to coercively appoint representation for the plaintiff. The plaintiff sought appointment of counsel to represent her in a Title VII action. The district court entered findings of fact as to its complete, but unsuccessful, attempt to appoint counsel. On appeal, the Ninth Circuit denied the plaintiff's petition for a writ of mandamus to compel the district court to appoint representation. It was in this context that the court considered issues of the constitutionality and appropriateness of court-compelled representation.

The district court's findings showed that after a thirteen month search it was unable to find an attorney who would volunteer to represent Bradshaw. Attorneys declined on several bases including lack of compensation, prohibitive costs of such a suit, and fear that representing this particular plaintiff might result in malpractice claims or state bar proceedings. Apparently, Bradshaw had a reputation for being especially litigious and for frequently calling into question the competency of attorneys who would represent her.

Although the court held that it was not an abuse of discretion for

36. 742 F.2d 515 (9th Cir. 1984).

the district court to fail to coercively appoint counsel here, the decision was explicitly qualified and appears to be limited to the facts of this case. "Were the lack of compensation the only reason for the bar's recalcitrance," the court stated, "we would be far less inclined to accept the district court's failure to make a coercive appointment. Another factor is present here which causes members of the bar concern."³⁷ Strong consideration was given to the particular litigant involved as an additional factor to be weighed in deciding whether or not to appoint counsel. The three primary factors to consider, and which were properly weighed by the district court were: "(1) the plaintiff's financial resources, (2) the efforts made by the plaintiff to secure counsel, and (3) whether the plaintiff's claim had merit."³⁸ In concluding, the Court of Appeals stressed that "this is an extreme case. Each case is to be judged individually depending on the circumstances . . . we do not mean to suggest that coercive appointments are never proper. In some situations they will be. We only hold that this is not such a case."³⁹

Before closing its discussion, the court strongly reprimanded the community lawyers and the bar association for failing to come forward in response to requests for assistance. Recognizing that pro bono work is part of a lawyer's public service obligation, it expressed its view that "[f]ailure to come forward to assist indigent litigants at the request of the court is an indication of loss of professionalism. It is also a violation of the spirit, if not the letter, of ethical considerations"⁴⁰ The concurring opinion further qualified the reach of the decision and reiterated that "unless exceptional circumstances exist, [plaintiffs are] entitled to the appointment of counsel whenever the three criteria set forth in 'Bradshaw II' are met. . . in the rare case in which the services of a volunteer cannot be obtained, the district court must nevertheless make an appointment."⁴¹

The Supreme Court of Missouri took the completely opposite view of an attorney's duty in civil cases and the court's power to compel representation in that context. However, its decision in *State ex rel Scott v. Roper*,⁴² has interesting implications for mandatory pro bono

37. *Id.* at 517.

38. *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301, 1318 (9th Cir. 1981) ("Bradshaw II").

39. *Dillon*, 742 F.2d at 518.

40. *Id.*

41. *Id.* at 520.

42. 688 S.W.2d 757 (Mo. 1985) (en banc).

programs promulgated by bar associations.⁴³ The Court in *Roper* held that (1) an attorney could not be compelled to spend his own funds for litigation expenses, and (2) courts have no inherent power to appoint or compel attorneys to serve in civil actions without compensation. The case involved an attorney who sought to prohibit a judge from appointing him to represent an indigent in a medical malpractice action. The attorney argued that the appointment would be an unconstitutional taking of his property without just compensation and a violation of his due process rights that amounted to an involuntary servitude. The State Attorney General, on behalf of the judge, responded that this was a duty imposed on the attorney as "a professional obligation to represent an indigent plaintiff as part of his duties as an officer of the court."⁴⁴

Consistent with the other jurisdictions, the court first declined to answer the attorney's involuntary servitude argument. In a footnote, the court stated that "we need not pass on relator's argument that uncompensated compelled appointments are an involuntary servitude in violation of the Thirteenth Amendment . . . [w]e observe, however, that such arguments have uniformly been rejected as without merit."⁴⁵

The court then went on to analyze the history of court-compelled appointments and the notion that lawyers are "officers of the court" who hold a monopoly on the profession. First, it recognized that the majority of courts would not require compensation in criminal case appointments while a minority of courts still adhere to the position that compelled representation is unconstitutional. Second, the court pointed out that "the doctrine that lawyers are officers of the court and accorded certain privileges is generally attributed to the common law of England. Few courts, however, discussed the doctrine's application in this country."⁴⁶ It cited several criticisms to the notion of lawyer as "officer" and suggested that "the majority of commentators also appear to reject the reasoning in *United States v. Dillon*" which imposed an obligation to serve indigents that arose out of ancient and established tradition.⁴⁷ Third, the court rejected the monopoly argument as "fraught with conceptual difficulties," enumerated as (1) no individual is denied an opportunity to argue his own cause, (2) limiting the persons who can practice the profession is for the benefit of the public, and (3)

43. *Id.*

44. *Id.* at 758.

45. *Id.* at n. 1.

46. *Id.* at 761.

47. *Id.* at 764.

other members of licensed occupations are not compelled to render gratuitous service.⁴⁸

It is interesting to note, however, that while holding the courts have no inherent power to compel uncompensated representation in civil matters, the court distinguished between pro bono legal services and court compelled legal services, stating that the same principles are not applicable to both. The court said that pro bono work involves a choice to donate services that is absent where representation is compelled by a court. "It is the choice that makes the rendering of the service fulfilling, pleasant, interesting, and successful. Compelling the service deprives the professional of the element of professional choice."⁴⁹ In holding that courts have no authority to compel uncompensated representation in civil matters, the Missouri court concluded, "we deem it admirable for either individual attorneys or associations of attorneys to volunteer pro bono legal representation. . .it is both permissible and proper for voluntary associations of attorneys to condition membership upon members doing a certain amount of pro bono representation"⁵⁰ The court appeared to leave open to bar associations the options to create pro bono programs similar to the one in El Paso.

While the court's distinction between court-compelled representation and general pro bono services given at the desire of an attorney is meaningful, it is not clear that the same distinction makes sense when applied to mandatory pro bono programs. Once pro bono becomes required, it more closely resembles compelled action than voluntary choice. Presently, there have been no known challenges in court which could rely on the *Roper* court's discussion which seems in favor of such a pro bono requirement. Although a bar association defending its program might be able to point to the court's language, it would still have to completely separate that part of the discussion from the rest which clearly states that compelled civil representation violates constitutional rights. This is the more pervasive tone of the opinion.

The remaining case law seems to be fairly equally divided along the lines of either the Ninth Circuit or the Missouri courts. Either the role of a lawyer is viewed as encompassing certain responsibilities and duties owed to society and, therefore, justifying compelled representation, even in civil matters, or it is viewed as not including any duties

48. *Id.* at 765.

49. *Id.* at 768.

50. *Id.* at 769.

different from other professionals and, therefore, compelled representation is an unfair and unconstitutional burden on members of the legal community. These two arguments are more fully developed in the following section.

While *Bradshaw* and *Roper* clearly contain opposite holdings with regard to court-compelled representation with or without compensation, both cases address policies condoning pro bono work. If, indeed, the courts would not strike down a pro bono program as unconstitutional, then the EPBA could withstand any challenges made by disgruntled attorneys in that community. Additionally, other bar associations as well as the ABA itself might seriously consider promulgating their own programs as Model Rules to be adopted by the states and, if so, could feel confident that they would be supported by the courts taking the Ninth Circuit's position, and perhaps eventually by those who follow the Missouri point of view. Members of these bar associations could be required to meet the pro bono requirements if they choose to maintain their membership.

The argument that lawyers do not owe anything special to society by the mere fact that they are members of the profession is not convincing. The premise that we all have a moral duty to donate some time or services to society arises from the fact that everyone derives benefits from living in our society and should share those benefits with others. In fulfilling that moral duty to engage in some sort of public service for the betterment of the society, citizens should use those skills which are most developed because not everyone shares the same talents. Some members of society have resources or special knowledge which increase their abilities to fulfill this duty more effectively in certain areas than others. Lawyers have the knowledge in the legal field to provide public service in the capacity of a lawyer. It is professionally correct that he or she should apply that knowledge toward fulfilling a moral obligation. It is also more efficient for those who have the knowledge already to use it, rather than for others without the skills to have to develop them solely to provide public service.

Furthermore, contrary to the court's view in *Roper*, the monopoly argument is extremely convincing. Citizens who become lawyers do so only after overcoming many hurdles. These hurdles insulate the profession, which admits only a selected few. There are educational requirements as well as testing and character standards which have to be met. Those who fail to meet the requirements are barred from the practice of law. Their failures may not reflect individual downfalls, but rather social or sociological disadvantages. Those who are able to meet the

standards are fortunate enough to be able to pursue their chosen profession. In choosing that profession the applicant is correctly deemed by the court in *Dillon* to be aware of the "ancient and established traditions" that accompany the profession.

Declaring mandatory pro bono programs as unconstitutional would insulate those successful few from any responsibility toward the rest of society. Lawyers would feel free to choose only desirable and high-paying clients to the exclusion of the needy. Likewise, wealthier members of society would be able to pursue any and all arising legal disputes, whereas the poor, elderly, and minorities would suffer severe social injustices by being excluded (in practicality, if not reality) from legal forums. It would, of course, be ultimately desirable to rely on each attorney's own feelings of social responsibility to perform gratuitous services. Unfortunately, the needs of the indigent would most likely not be met in that case. Because courts seem willing to accept some sort of required program mandated through associations, and further because society's need is great, those associations should take affirmative steps like the EPBA in instituting public services programs.

V. CONCLUSION

The EPBA's mandatory pro bono program, currently in use, presents an extremely viable alternative to the vague and unenforceable provisions of the current professional code. Such a program appears to be able to withstand constitutional attacks. Although the case law does not give a clear indication to that effect, it does seem to leave room for this type of compelled representation. While loud opposition to such a program would certainly be voiced (as it most likely was in El Paso) if it was proposed elsewhere, sufficient measures could be taken to develop a program that would suit the needs of that particular community with enough certainty to encourage lawyers to participate in the program.

As suggested, self-compliance would probably be the most realistic enforcement, and those who were vehemently opposed to the idea would simply not comply. But the number of lawyers who would participate might actually be surprising. Young associates, for example, who are at the bottom of a partnership ladder might welcome a mandatory requirement allowing them to volunteer services occasionally, which they would not otherwise be able to do while the firm still "owned" their time. Lawyers who have busy schedules but wish to provide pro bono services once in a while might find that the program would give them an excuse to make the time to do so. Finally, those

who never had a desire to donate public service time might still participate in the program as required out of the sense of professional obligation imposed upon them.

Aside from the speculation about who actually will participate, it is clear that instituting a mandatory program would begin to address the problems of unmet legal needs in American communities. The immense size of the problem should not be a deterrent to starting such a program, but rather should be used as the impetus behind one. Neither should the criticisms against mandatory public service by lawyers stop a program's development; instead, they should help guide its design and function. Millions of citizens are being denied their constitutional rights to access to the legal system and those rights cannot be returned without the help of the people who have knowledge, training, and experience to make the legal system work — lawyers.