

## Law and Policy Issues concerning the Provision of Adequate Legal Services for the Poor

Quintin Johnstone

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# ARTICLE

## LAW AND POLICY ISSUES CONCERNING THE PROVISION OF ADEQUATE LEGAL SERVICES FOR THE POOR

*Quintin Johnstone\**

*One of this country's most serious legal problems is the shortage of adequate legal services for poor persons. This shortage has long prevailed in this country and may become even greater in the future. Lack of sufficient funding is one reason for the shortage but not the only one. The principal focus of this Article is on the often highly controversial law and policy issues relevant to providing and funding increased legal services for the poor by significant providers or funders of such services in the United States in the recent past. Proposals are also made for how each issue should be resolved in the future and strategies are considered for attaining proposal objectives. The Article also recommends a very important role for the American Bar Association.*

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## INTRODUCTION

Each year a vast number of poor persons in the United States are in need of legal services from qualified legal service providers that they cannot pay for.<sup>1</sup> Some of these poor persons have the knowledge and ability to provide the needed services themselves without undue risk, but most do not. Many service providers have long been available to provide legal services to poor persons in need of legal services they cannot pay for.<sup>2</sup> Those currently available include legal aid, public defender, and other nonprofit organizations staffed by lawyers and their support staff personnel,<sup>3</sup> many lawyers in private practice who have volunteered some of their time and that of their support staff to providing legal services for the poor at no fee, and many law school faculty members and students, and court-appointed lawyers.<sup>4</sup> Some judges and some of their support staff personnel also provide helpful information about the law and court procedures to some of the parties appearing pro se before their court, including many poor persons appearing pro se. Although precise data is lacking, and probably unascertainable, as to the total number of qualified persons in the United States who currently are active in providing legal services to the poor who cannot pay for needed services, there are no

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<sup>1</sup> The term “poor persons” in this Article generally means those persons each of whose income is at or below 125% of the poverty level, a definition of low-income persons followed by the Legal Services Corporation. See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA E-2 (2005) [hereinafter LSC, JUSTICE GAP, 2005]; LEGAL SERVICES CORPORATION, WHAT IS THE LEGAL SERVICES CORPORATION? 2 (1997). Comparable terms are indigent persons and persons of limited means. The number of individuals living below 125% of the federal poverty level in the United States increased from 49.6 million in 2005 to 53.8 million in 2008. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 6 (3d ed. 2009) [hereinafter LSC, JUSTICE GAP, 2009]. Not considered in this Article to be poor persons in need of legal services are those poor persons who lack available funds to pay for needed legal services but who obtain needed representation from a law firm on a contingent fee basis, the law firm receiving a percentage of any recovery as its only fee. No recovery, no fee. Such a poor person is considered able to pay because of the apparent value of the claim.

<sup>2</sup> On the history of legal assistance to the poor, see generally ALAN W. HOUSEMAN & JOHN A. DOOLEY, LEGAL SERVICES HISTORY (1984); ALAN W. HOUSEMAN & LINDA E. PERLE, CENTER FOR LAW AND SOCIAL POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES (2003); Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223 (1998); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

<sup>3</sup> Some of these organizations provide legal services only to certain kinds of poor persons with legal problems. Examples of such organizations in Connecticut are the Center for Children's Advocacy, the Children's Law Center, and the Connecticut Fair Housing Center.

<sup>4</sup> On court appointments, see Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 10 (2004). However, court appointments at no compensation to the appointee have been held unconstitutional in some states. See *infra* note 178.

doubt many thousands of them and their total number has increased substantially in recent years.<sup>5</sup>

An increasingly prevalent form of legal representation in this country is pro se representation, those in need of legal services providing the services themselves. Many pro se parties are poor persons who were unable to obtain the needed services from available qualified legal service providers for the poor because of the inadequate supply of such providers. In many U.S. communities, assistance is available to help pro se parties, including many poor persons, represent themselves more effectively.

Despite the substantial number of qualified persons and their support staff personnel available to provide legal services to the poor who cannot pay for the services, the number is far short of what is needed. This has resulted in many poor persons who have sought legal services from qualified providers being denied such services or provided only limited services. Denial was usually due to a provider being fully booked-up when the request was made. Limited legal service usually occurred because the provider was willing to take on more poor clients than it could fully serve but to provide only limited help to many of them, with those receiving limited help often expected to provide the remaining needed services pro se.

The shortage of legal services for the poor, inadequate in volume and often in quality, has long existed in the United States. In recent years the shortage has been so great that in the recent past, millions of poor people in this country who were in need of legal services and who sought help from one or more qualified providers never received any services or only inadequate services from the requested qualified providers.<sup>6</sup> Stated very succinctly, the increase in demand has greatly exceeded

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<sup>5</sup> For example, the Legal Services Corporation (LSC) has estimated that in 2007 the total number of legal aid lawyers in the United States was 7,931, a ratio of 1 lawyer to 6,415 low-income persons in the United States. LSC, *JUSTICE GAP*, 2009, *supra* note 1, at 21. But in 2007, the ratio of all lawyers providing legal services to the general population was one lawyer to 429 persons in the general population, a numerical indicator of the shortage in the United States of available legal services for the poor. *Id.* Of the 7,931 legal aid lawyers in 2007, 53% of them worked in LSC-funded programs. *Id.*

<sup>6</sup> The LSC has estimated that in 2009, 944,000 low-income persons in need of civil legal services will have sought help from LSC-funded providers of legal services for the poor and were rejected because of insufficient program resources. *Id.* at 12. Further, “[t]his means that for every client served by an LSC-funded program, at least one eligible person seeking help will be turned down.” *Id.* The 2009 Justice Gap Report also has these conclusions:

As an initial critical goal, there must be enough funding to serve all of those currently seeking help from LSC grantees. This requires a doubling of LSC funds and a doubling of the state, local, and private funds that also support LSC grantees.

[S]tate legal needs studies conducted from 2000 to 2009 generally indicate that less than one in five low-income persons get the legal assistance they need. To fund this need, the federal government share must grow to be five times greater than it is

the available supply. In addition to those poor persons in need of legal services from qualified legal service providers who requested the needed services from qualified providers but whose requests were denied or not adequately fulfilled, there have been far more poor persons in the recent past that had a legal problem but who never sought help. Hence their needs were never adequately fulfilled.<sup>7</sup> Due to the shortage of supply, many in this latter group also would have been unsuccessful in acquiring the services they needed had they sought them from qualified providers. The supply shortage in most U.S. communities is more acute for those persons with civil legal problems than for those with criminal legal problems. The principal reason for this is that every defendant in a criminal case in which a prison sentence may be imposed has a constitutional right to appointment of counsel if the defendant cannot afford to retain counsel. However, there is no comparable constitutional right to counsel if a party in a civil case cannot afford counsel.<sup>8</sup> A few state courts have held parties in some very limited types of civil cases to be entitled to counsel at public expense.<sup>9</sup> Some state statutes also confer on indigent parties the right to counsel in a few very limited types of civil cases.<sup>10</sup>

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now, or \$1.6 billion. IOLTA and other state, local and private funding sources, which are being hard hit by the economic downturn at present, will also have to grow in the future to contribute their proportionate share of the increase necessary to fund civil legal services.

*Id.* at 3. The 2009 Justice Gap Report also discusses some of the recent state studies on legal needs of low-income people. *Id.* at A-1-D-1.

<sup>7</sup> *Id.* at 9. Many of these persons were unaware of the availability of legal service assistance, or of their eligibility for legal services from a qualified provider at no fee, or they believed that the provider would not be able to assist them. *Id.* at 10. Many of them no doubt were also unaware that their problem was a legal one. *Id.*

<sup>8</sup> The right of defendants in criminal cases to counsel is a Sixth Amendment right, and the most frequently referred to case on this right is *Gideon v. Wainwright*, 372 U.S. 335 (1963). But the U.S. Supreme Court in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), with a 5-4 decision, held that an indigent mother in proceedings to terminate her right to custody of her minor child was not constitutionally entitled to appointment of counsel, an opinion widely perceived as holding that indigents generally are not constitutionally entitled to appointment of counsel in civil cases unless the indigent person's physical liberty is threatened by the court's decision. On the *Lassiter* case, see Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & CIV. RTS. L. REV. 635 (2006); Eric Buermann, *Lassiter v. Department of Social Services: The Right to Counsel in Parental Termination Proceedings*, 36 U. MIAMI L. REV. 337 (1982); Earl Johnson, Jr., "And Justice for All," *When Will the Pledge Be Fulfilled*, 47 JUDGES J. 5 (2008). Johnson was for many years a judge on the California Court of Appeals. In this Article he strongly recommends a more extensive judicial recognition of right to counsel in civil cases.

<sup>9</sup> See Clara Pastore, *Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 188 (2006).

<sup>10</sup> For a brief review of the law as to the right of indigent parties to counsel in civil cases and a recommendation urging federal, state, and local governments to provide legal counsel as a matter of legal right at public expense in those categories of adversarial proceedings where basic human rights are at stake, see ABA TASK FORCE ON ACCESS TO JUSTICE, REPORT TO THE HOUSE OF DELEGATES 520 (2006). A number of other bar associations joined in making this

However, despite court decisions holding that poor persons charged with crimes have a constitutional right to counsel, in many U.S. jurisdictions the number of public defenders or other lawyers available to represent poor persons charged with crimes is inadequate. This has resulted in many poor persons charged with crimes, and who sought help from qualified legal service providers, receiving no representation or insufficient representation, a violation of their constitutional right to counsel.<sup>11</sup>

There obviously has been a tremendous increase over time in the number of poor people in the United States in need of legal services from qualified legal service providers, a number that obviously has continued to outpace available supply. But why this tremendous increase? There are many reasons but two of the most obvious and important ones are the great expansion that has occurred over time in the U.S. population, a population that always has had a high percentage of poor people,<sup>12</sup> and the adoption of new laws that add to the number of different kinds of legal problems that the poor commonly encounter. Many of these new laws establish or modify government aid programs that many poor people benefit from—programs such as Social Security, Medicaid, and public housing. Fluctuations in national or regional economic prosperity also influence not only the number of poor persons in need of legal services but the available supply of such services. Economic recessions, such as the recent one, result in sharp increases in the number of poor persons in need of legal services, and, due largely to decreased funding of legal service providers for the poor, a decline in the supply of legal services for the poor.<sup>13</sup>

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recommendation. For a copy of the ABA Report and a series of articles generally supportive of the right of indigent persons to counsel in civil cases, see Edward V. Sparer Symposium, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (2006).

<sup>11</sup> ABA COMM. ON LEGAL AID AND INDIGENT DEFENDERS, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Cases 38 (2004) [hereinafter ABA, *GIDEON'S BROKEN PROMISE*]; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1073 (2006); Steven B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 785–86.

<sup>12</sup> For example, in 2008 the U.S. resident population was 304 million; in 1980 it was 228 million; in 1950 it was 151 million; in 1900 it was 76 million. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010 8–9 (2009). The U.S. Census Bureau estimate of the U.S. resident population in 2050 is 439 million. *Id.* at 10.

<sup>13</sup> In the recent recession, for example, funding of legal aid agencies has declined substantially due to the decreased income from lawyer trust account income. On this decline and its impact, see Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid Groups*, N.Y. TIMES, Jan. 19, 2009, at A12. On the recent decline in IOLTA income see Jane E. Curran, *Recovery: What IOLTA Programs Can Do Now to Maximize Revenue and Protect Revenue in the Future*, 13 DIALOGUE 7 (2009). In some states the decline in legal aid agency funding has been reduced somewhat by recent laws that add to that funding. For example, CONN. GEN. STAT. ANN. §52-259c (West 2011) increases state court filing fees, the increases to go mostly

The response of some legal service providers to the continued severe shortage of legal services for the poor, particularly the response of some legal aid agencies and some law school faculty members and students, has been to focus their efforts, or more of their efforts, not on representing poor persons individually but on more comprehensively reducing poverty or the consequences of poverty. Among actions taken to achieve these more comprehensive objectives are selecting and vigorously litigating cases, some of them class actions that will be lead cases in benefiting many poor persons; lobbying government officials and agencies to help achieve laws beneficial to poor persons; and educating groups of poor persons as to laws and legal remedies relevant to them. These actions taken by some legal service providers and prospects for more such actions resulted in very restrictive and controversial legislation by Congress on funding of legal services for the poor by the Legal Services Corporation (LSC), a federal government agency. These restrictions are considered in the discussion hereafter of the LSC.

The principal focus of this Article is on law and policy issues relevant to the provision or funding of legal services for the poor by significant providers or funders of such services in the United States during the recent past and how each issue should be resolved. In the consideration of most every issue a proposal is made as to action that should be taken to resolve or help resolve the issue. Most of these proposals are not new but it is here urged that each of them merits high priority support by proponents of more adequate legal services for the poor. The Conclusion of this Article considers the strategies that proponents may engage in to help in achieving adoption of the proposals. In this Article an issue is a question with alternative possible solutions that merit consideration as to which solution is preferable; a legal issue is a question as to the meaning, enforcement, or legal validity of an existing or proposed law; and a policy issue is a question as to what is the justified objective for action taken or proposed to help resolve or alleviate a social problem. Legal and policy issues often are interrelated, as solution of many legal issues is often determined or influenced by one or more policy issue solutions. Most every law is adopted to resolve or help resolve one or more policy issues and many laws, either expressly or by implication, indicate what policy or policies they are intended to further. Lawmaking bodies, their committees, or their individual members also often make statements helpful

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to legal aid agencies in the state. IOLTA revenues in Connecticut declined from \$21 million in 2007 to an estimated \$4 million in 2009. Christian Nolan, *Help For Legal Aid, Higher Bills for Others*, CONN. L. TRIB., July 6, 2009, at 3. The new filing fee increases are expected to raise \$7.7 million in the fiscal year following their adoption, assuming the volume of new court cases filed does not decline. *Id.*; see also Margaret G. Tebo, *Aiding Legal Aid: Some States Are Looking at Court Fees as a Way to Provide Legal Services for the Poor*, 88 A.B.A. J. 28 (2002).

in ascertaining the intended policies of particular laws. The policy or policies that a particular law is intended to further can be very important in the law's interpretation and its applicability.

Law and policy issues commonly arise when new laws, including repeal or revision of existing laws, are under consideration by lawmaking bodies or by others in government or the private sector that are proposing, opposing, or critically evaluating proposed new laws. Included in this latter group are academic scholars whose books and articles include proposed new laws or evaluations of law reform proposals made by others.

The multistate aspect of U.S. government has increased the volume and frequency of law and policy issues in this country. Many states often are faced with the same or a very similar problem, and if any one of these states adopts an innovative law to reduce or eliminate the problem, the issue often emerges as to whether one or more other states should adopt a similar law. Our multistate structure is helpful in providing new and innovative solutions to law and policy issues, but this often is accompanied by law and policy controversies over whether a solution in one state should be adopted in other states.

How particular law and policy issues should be resolved can be very controversial and many law and policy issues, including some of those concerning legal services for the poor, have resulted in extensive and protracted controversy over how the particular issues should be resolved. Most of these controversies are cyclical, increasing in intensity over time as the problem the controversy is concerned with becomes more severe or more extensively publicized, and as more participants who attempt to influence how the controversy should be resolved increase in number.<sup>14</sup> A law and policy controversy also usually declines in intensity over time, and may even vanish, if the underlying problem the controversy is focused on becomes less severe or disappears, or if a new law is adopted that satisfactorily resolves the concerns of those who had been active participants in the controversy.

Many law and policy controversies concerning the provision of adequate legal services for the poor are over proposals to increase the volume or impact of such services. In these controversies, support for such increases often has come from those currently providing legal services for the poor, some bar associations or bar association committees, cause-organizations that serve or further the interests of the poor, and more liberal government or political party officials or organizations. Opposi-

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<sup>14</sup> On the cyclical nature of many law and policy issues, see Anthony Downs, *The Issue-Attention Cycle and the Political Economy of Improving Our Environment*, in *THE POLITICAL ECONOMY OF ENVIRONMENTAL CONTROLS* 9 (Joe S. Bains & Warren F. Ilchman eds., 1972). The analysis by Downs concentrates on environmental issues.



tion to such increases often has come from business interests that will be adversely affected financially by the enhanced legal services resulting from the increases; conservative individuals and conservative cause organizations opposed to most all forms of expanded government assistance and intervention; and, in funding controversies, the recipients or potential recipients of funding who may receive less funding from the government or other sources of funding if legal services for the poor is increased.

In most law and policy controversies, including those concerning the provision of adequate legal services for the poor, a policy that many participants often are seeking to further is a solution that they perceive will be in their own self-interest. They take or propose certain action because they have concluded that the action, or the proposed action if implemented, will be beneficial to them or, if they represent an organization, beneficial to the organization's members. The self-interest being furthered commonly is enhanced monetary income. Self-interest policies often are not publicly declared but are implicit given who is taking or proposing action and what action is being taken or proposed. Examples of what appear to be implicit self-interest policies in controversies concerning issues relevant to adequate legal services for the poor are the opposition of many lawyers and law firms to legally imposing a mandatory pro bono requirement on lawyers; opposition of many banks to a legal requirement that they pay interest or dividends on Interest on Lawyer Trust Account (IOLTA) accounts comparable to what they pay on non-IOLTA accounts; and support by many lawyers in private law practice of unauthorized practice laws that prohibit nonlawyers from providing legal services to others, including the poor, and who also support proposals for more vigorous enforcement of such laws.

Who the ultimate decision maker is with the requisite authority and influence to make a decision that at least for the time being would purportedly resolve any one of the controversial issues considered in this Article may vary with the type of issue. The ultimate decision maker in most controversial issues concerning government funding of adequate legal services for the poor usually is the funding jurisdiction's legislature. In controversial issues involving IOLTA it usually is the state courts; in controversial issues concerning pro bono legal services for the poor it usually is the state courts; in controversial issues concerning provision of legal services by law schools or law school personnel it usually is each law school; in controversial issues concerning assistance to poor persons representing themselves pro se it usually is legal aid or other organizations whose activities are concentrated on providing legal services for the poor or it is the courts. But as is quite apparent in Parts I to V of this Article that on some issues in each of the five categories of issues being considered, the ultimate decision maker may be a decision maker other

than the usual one. Also, as to some issues, the authority of the ultimate decision maker has been delegated to it by another authoritative body that could terminate the delegation. For example, delegation by the U.S. Congress to the LSC of authority to allocate appropriated federal funds to various organizations that provide civil legal services for the poor.

This Article considers these particularly significant law and policy issues concerning the provision of adequate legal services for the poor in the United States as follows: Part I, Issues Concerning the Legal Services Corporation; Part II, Issues Concerning Interest on Lawyer Trust Account (IOLTA) Programs; Part III, Issues Concerning Pro Bono Legal Services for the Poor; Part IV, Issues Concerning Provision of Legal Services for the Poor By Law Schools, Their Students, and Their Faculty Members; and Part V, Issues Concerning Assistance to Poor Persons Representing Themselves Pro Se. The Conclusion, in addition to a consideration of strategies for achieving proposal adoptions, recommends a much expanded role for the American Bar Association in increasing the volume of adequate legal services for the poor in the United States.

#### I. ISSUES CONCERNING THE LEGAL SERVICES CORPORATION

In recent years the largest single source of funding of civil legal services for the U.S. poor has been the Legal Services Corporation (LSC), a private corporation funded by the federal government.<sup>15</sup> Other funding sources for civil legal services for the U.S. poor are IOLTA, other federal grants, state and local government grants, private grants,<sup>16</sup> and miscellaneous sources. In 2008, funding from the LSC for civil legal services for the U.S. poor totaled \$355 million. The total that year from all other sources totaled about \$528 million.<sup>17</sup> Although in recent years the LSC has been the largest single source of funding of civil legal services for the poor, Congress has retained the right to determine the amount of annual funding of the LSC, to impose restrictions on those receiving LSC funding, to alter the powers of the LSC board, and to

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<sup>15</sup> LEGAL SERVICES CORPORATION, FACT BOOK 2008 8 (2009) [hereinafter LSC FACT BOOK 2008]. An estimate of the total in 2005 is \$983 million. Alan W. Houseman, *Future Changes and Prospects for Legal Aid and Public Defender Organizations*, 24 QUINNIPIAC L. REV. 557, 562–63 (2006).

<sup>16</sup> For example, United Way, foundation grants, bar association grants.

<sup>17</sup> LSC FACT BOOK 2008, *supra* note 15, at 8. For the year 2008, funding from these other sources was: IOLTA, \$112 million; other federal grants, \$63 million; state and local government grants, \$194 million; private grants, \$51 million; and miscellaneous sources, \$108 million, \$61 million of which were carryover funds. *Id.* The total of \$883 million also includes \$1.7 million from client service income, mostly fees and receipts from client services. *Id.* These statistical calculations include not only the totals of 2008 funding of civil legal services for the poor in U.S. states and the District of Columbia but also the funding of civil legal services for the poor in certain territories including Guam, Micronesia, Puerto Rico, and the Virgin Islands. *Id.* at 5–6.

abolish the corporation. The LSC was initially established by the Legal Services Corporation Act of 1974,<sup>18</sup> an act that has had a number of amendments.<sup>19</sup> The LSC is funded by annual Congressional appropriations and these annual appropriations have varied considerably.<sup>20</sup> The 2010 fiscal year appropriation for the LSC was \$420 million,<sup>21</sup> up from \$390 million in fiscal year 2009<sup>22</sup> and \$351 million in fiscal year 2008.<sup>23</sup> The 2010 fiscal year appropriation was the largest ever for the LSC, but adjusted for inflation, the largest LSC appropriation was \$400 million in 1994.<sup>24</sup> The 1994 fiscal year appropriation adjusted for inflation would be about \$600 million in 2010 dollars. In the past fifteen years the smallest fiscal year appropriation for the LSC was \$283 million in 1997<sup>25</sup> and also in 1998.<sup>26</sup>

The LSC allocates funds for civil legal services for the poor to recipients in all states, the District of Columbia, and several territories.<sup>27</sup> The allocation to each recipient jurisdiction is based on the percentage of the total population of poor persons<sup>28</sup> in all recipient jurisdictions (the states, the District of Columbia, and the territories) that are in each recipient jurisdiction as determined by the most recent U.S. Bureau of the Census decennial census data.<sup>29</sup> In fiscal year 2008, the jurisdictions with the greatest LSC funding for civil legal services for the poor were California, \$46 million; Texas, \$30 million; and New York, \$26 mil-

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<sup>18</sup> Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974).

<sup>19</sup> For the act's current provisions see 42 U.S.C. § 2296 (2006). The LSC has adopted regulations, some of them clarifying the statutory restriction, 45 C.F.R. §§ 1600-1644 (2009).

<sup>20</sup> For a list of all fiscal year appropriations for the LSC from 1976 to 2008 see LSC FACT BOOK 2008, *supra* note 15, at 3.

<sup>21</sup> Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3148 (2009). This appropriation was to be used for the following: \$394,400,000 for basic field programs and required independent audits; \$4,200,000 for the Office of Inspector General; \$17,000,000 for management and grants oversight; \$3,400,000 for client help and informational technology; \$1,000,000 for loan repayment assistance. *Id.*

<sup>22</sup> Omnibus Appropriations Act, 2009, Pub. L. No. 111-008, 123 Stat. 524, 593 (2009).

<sup>23</sup> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1923 (2007).

<sup>24</sup> Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1759 (1994).

<sup>25</sup> Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2472 (1997).

<sup>26</sup> Omnibus Consolidated Appropriations, Pub. L. No. 105-277, 112 Stat. 2681, 2681-107 (1998).

<sup>27</sup> Territories that received LSC funding in fiscal 2008 are Guam, Micronesia, Puerto Rico and the Virgin Islands. CARMEN SOLOMON-FEARS, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING (2010).

<sup>28</sup> Poor persons are those whose household incomes do not exceed 125% of the federal poverty guidelines. *Id.* at 1-2. In 2007, 125% of the federal poverty guidelines was \$25,813 for a household of four, but somewhat higher in Alaska and Hawaii. *Id.*

<sup>29</sup> *Id.* at 12.

lion.<sup>30</sup> In that fiscal year the jurisdictions with the smallest LSC funding for such services were Guam, \$312,000; Virgin Islands, \$313,000; Vermont, \$607,000; and Delaware, \$646,000.<sup>31</sup> In fiscal year 2008, jurisdictions for which LSC funding was the largest percentage of total funding of legal services for the poor were Wyoming, 100%; Vermont, 90.4%; and Alabama, 86.4%.<sup>32</sup> In that fiscal year, jurisdictions for which LSC funding was the smallest percentage of total funding of legal services for the poor were New Jersey, 14.3%; Maryland, 17.7%; and Ohio, 18.4%.<sup>33</sup> In fiscal year 2008, the percentage of total funding of civil legal services for the poor in some of the larger population states was 51% in California, 39.1% in Illinois, 28.4% in New York, 32.6% in Pennsylvania, and 57.4% in Texas.<sup>34</sup>

There were 137 programs that received LSC funding in fiscal year 2008.<sup>35</sup> In 2008, these programs served 888,000 clients,<sup>36</sup> opened 235,000 cases, and closed 889,000 cases.<sup>37</sup> The types of cases closed in 2008 by percentage were: family, 35.1%;<sup>38</sup> housing, 25.8%;<sup>39</sup> consumer/finance, 12.2%;<sup>40</sup> income maintenance, 11.1%;<sup>41</sup> health, 3.5%;<sup>42</sup> employment, 3.0%;<sup>43</sup> juvenile, 1.7%;<sup>44</sup> individual rights, 1.5%;<sup>45</sup> education, 0.8%;<sup>46</sup> and miscellaneous, 5.4%.<sup>47</sup> Only 8.5% of the cases closed in 2008 were closed as the result of a court decision.<sup>48</sup> The most common

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<sup>30</sup> *Id.* at 12–14.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See LSC FACT BOOK 2008, *supra* note 15, at 1.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* The number of clients served is less than the number of cases closed because some clients were each served by LSC programs in more than one case. *Id.*

<sup>38</sup> *Id.* at 15. For example, divorce/separation, 119,415 cases; custody/visitation, 89,056 cases; domestic abuse, 44,719 cases; support, 28,241 cases. *Id.* at 16.

<sup>39</sup> *Id.* Many of these cases were eviction cases. SOLOMON-FEARS, *supra* note 27, at 4.

<sup>40</sup> LSC FACT BOOK 2008, *supra* note 15, at 16. For example, collections, 50,419 cases; bankruptcy/debtor relief, 31,663 cases. *Id.*

<sup>41</sup> *Id.* For example, SSI, 33,373 cases; unemployment compensation, 15,154 cases; food stamps, 13,018 cases.

<sup>42</sup> *Id.* For example, Medicaid, 19,075 cases.

<sup>43</sup> *Id.* For example, wage claims and other FLSA issues, 3,921 cases; taxes, 3,656 cases; employment discrimination, 3,226 cases.

<sup>44</sup> *Id.* For example, minor guardian/conservatorships, 5,577 cases; neglected/abused/dependent, 4,334 cases; delinquent, 2,529 cases.

<sup>45</sup> *Id.* For example, immigration/naturalization, 5,115 cases.

<sup>46</sup> *Id.* For example, special education/learning disabilities, 1,629 cases; discipline, 1,026 cases.

<sup>47</sup> *Id.* For example, wills/estates, 17,898 cases.

<sup>48</sup> *Id.* at 11.

reason for case closure that year was advice by counsel, 60.3% of case closures.<sup>49</sup>

The function of the LSC is to distribute federal funding to various organizations that provide legal services to the poor and to monitor these grantees to assure that the allocated funds are being properly utilized. It was anticipated that this intermediary format by a private corporation would prevent the political favoritism in many funding allocations that would exist if such allocations were made by a government agency. It also would permit more centralized control over federal anti-poverty programs.<sup>50</sup>

The annual congressional appropriations for the LSC have often been highly controversial. But even more controversial have been the statutory restrictions imposed on the activities of recipients of such funds, restrictions that must be complied with if the recipients are granted and accept LSC funding.<sup>51</sup> Some of these restrictions were imposed by the 1974 act creating the LSC, others were later imposed, and a number of them were imposed by the Omnibus Consolidated Revisions and Appropriations Act of 1996.<sup>52</sup> LSC regulations have amplified some of the restrictions. Among the activities of LSC recipients prohibited by laws currently in effect are these: lobbying legislative bodies,<sup>53</sup> supporting or conducting training that advocates particular public policies,<sup>54</sup> initiating or participating in class actions,<sup>55</sup> participating in any litigation

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<sup>49</sup> *Id.* (“[T]he advocate ascertained and reviewed relevant facts, exercised judgment in interpreting the particular facts presented by the client and in applying the relevant law to the facts presented, and counseled the client on his or her legal problems.”). The percentage of other LSC funded program case closures in 2008 were settlement without litigation, 4.6%; limited action, 18.7% (e.g., communication with a third party or preparation of a simple legal document); agency decision, 3.2%; extensive services, 2.4% (e.g., preparation of complex legal documents or provision of extensive transactional work); and other closure methods, 0.6%. *Id.*

<sup>50</sup> John A. Dooley, *Legal Services in the 1990s*, in *CIVIL JUSTICE: AN AGENDA FOR THE 1990S: PAPERS OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990s* 219, 223 (1991).

<sup>51</sup> On the restrictions, see Carmen Solomon-Fears, *Legal Services Corporation: Restrictions on Activities*, in *LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION* (Carl T. Donovan ed., 2010).

<sup>52</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321–50 (1996). Other restrictions and restriction modifications or clarifications were added in 1997 and 2009. Assisted Suicide Funding Restriction Act of 1997, Pub. L. No. 105-12, 111 Stat. 23, 28 (1997); Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2510 (1997); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009). On the current restrictions, see 42 U.S.C. § 2996e(d)–(e) (2006); 42 U.S.C. § 2996f(f).

<sup>53</sup> 42 U.S.C. § 2996e (c) (2006); 45 C.F.R. § 1612 (2009).

<sup>54</sup> 42 U.S.C. § 2996e (e) (2006); 45 C.F.R. § 1612.8(a) (2009).

<sup>55</sup> 42 U.S.C. § 2996e(d)(5) (2006); 45 C.F.R. § 1617 (2009).

involving abortion,<sup>56</sup> representing most aliens not lawfully present in the United States,<sup>57</sup> challenging or reforming state or federal welfare reform laws,<sup>58</sup> and representing persons charged with crimes.<sup>59</sup> Recipients of LSC funds with funding from other sources also may not use the non-LSC funds for most any of the restricted activities,<sup>60</sup> but they may transfer their non-LSC funds to an individual or entity that uses the funds for restricted activities.<sup>61</sup>

Many aspects of the LSC's operations and those of recipients of its funding have raised important and often controversial law and policy issues ever since the LSC was initially established in 1974. The most significant and persistently controversial of these issues are: (1) whether the LSC should be abolished; (2) whether extensive legal restrictions should be imposed by the federal government on recipients of LSC funding and, if so, what restrictions; and (3) how much should the federal government appropriate each year for the LSC. Some of the pro and con arguments that have been advanced on each side of these three controversial issues are considered below.

#### A. *Should the LSC be Abolished?*

On the abolition of the LSC, one conservative publication observes, "While the stated purpose of Congress in setting up the Legal Services Corporation as an independent entity was to make it 'free from the influence or use of it by political pressures,' what Congress actually accomplished was merely to insulate it from political accountability."<sup>62</sup> Many politically conservative proponents of abolishing the LSC also have asserted that the LSC should be abolished because it cannot effectively be reformed. They assert that not only does the LSC's independent entity status make it difficult to reform, but efforts by Congress to reform the LSC and those to whom the LSC allocates funding have been ignored or circumvented.<sup>63</sup> Political conservatives also have argued that, what they

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<sup>56</sup> 42 U.S.C. § 2996f(b)(8) (2006).

<sup>57</sup> 45 C.F.R. § 1626 (2009).

<sup>58</sup> 45 C.F.R. § 1639 (2009).

<sup>59</sup> 42 U.S.C. § 2996f(2) (2006).

<sup>60</sup> 45 C.F.R. § 1610.03-04 (2009).

<sup>61</sup> 45 C.F.R. § 1610.7 (2009). On these transfer rights, see Alan W. Houseman, *Interpretation of LSC Restrictions*, 25 *FORDHAM URB. L.J.* 285, 294-96 (1998).

<sup>62</sup> RAEL J. ISAAC & ERICH ISAAC, *THE COERCIVE UTOPIANS, SOCIAL DECEPTION BY AMERICA'S POWER PLAYERS* 241 (1983).

<sup>63</sup> See KENNETH F. BOEHM & PETER T. FLAHERTY, *WHY THE LEGAL SERVICES CORPORATION MUST BE ABOLISHED* (1995), available at [www.heritage.org/research/legalissues/bg1057.cfm](http://www.heritage.org/research/legalissues/bg1057.cfm). Similar arguments are made in Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-poor, Beyond Reform and Unnecessary*, 17 *ST. LOUIS U. PUB. L. REV.* 321, 322-27, 367 (1998); see also William J. Olson, *Program Monitoring*, in *LEGAL SERVICES FOR THE POOR, TIME FOR REFORM* 123 (Douglas J. Besharov ed., 1990); Howard

claim is, the LSC's liberal political activism and bias justify its abolition. This argument is typified in the following 1997 agenda statement of the Conservative Action Team, a group of seventy right-wing Republican Party members of the U.S. House of Representatives:

We will eliminate funding for the Legal Services Corporation (LSC) [and thereby effectively abolish it], a reckless agency that under the guise of helping poor people with legal assistance, uses tax dollars to advance a radical, left-wing agenda. We intend to pull the plug [on this program] not simply because it is the fiscally responsible thing to do, but more importantly because we believe in reinstating the proper limits of government and respecting the values of the American people.<sup>64</sup>

Some LSC opponents also argue that the LSC should be abolished because it funds efforts by its grantees to further antisocial conduct, including welfare dependency, drug and alcohol abuse, criminal conduct, unemployment, and broken homes.<sup>65</sup> Among the many other examples of such alleged antisocial efforts by LSC grantees that have occurred are seeking social security disability benefits for alcoholics and drug addicts,<sup>66</sup> and discouraging mediation as a reasonable alternative prior to a divorce proceeding.<sup>67</sup>

One solution that has been proposed by some who favor abolishing the LSC is to replace the LSC with a federal government agency having similar funding allocation functions but that would be directly accountable to Congress.<sup>68</sup> One problem with this proposal, that obviously makes it unsatisfactory to many political conservatives, is that if and when Congress is dominated by liberal members, many recipients of the federal agency's funding quite likely would engage in the same or similar political and ideological activities to those that some recipients of LSC funding currently engage in and that conservatives find unacceptable.<sup>69</sup>

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Phillips, *Legal Services Should Not Be Federally Funded*, CONSERVATIVE DIG., July 1980, at 16.

<sup>64</sup> John Kilwein, *The Decline of the Legal Services Corporation: It's "Ideological Stupid,"* in THE TRANSFORMATION OF LEGAL AID, COMPARATIVE AND HISTORICAL STUDIES 61 (Francis Regal et al. eds., 1999).

<sup>65</sup> See, e.g., Boehm, *supra* note 63, at 336-57.

<sup>66</sup> See *id.* at 344-45.

<sup>67</sup> See *id.* at 355. Boehm provides additional examples of LSC grantees' allegedly antisocial activities that are no longer permissible because of statutory restrictions added in 1996. See *id.* at 343 (describing representation of drug criminals in eviction cases); *id.* at 347-48 (describing representation of prisoners); *id.* at 348 (describing representation of illegal aliens).

<sup>68</sup> E.g., Douglas J. Besharov, *Legal Services for the Poor, Time for Reform*, in CIVIL JUSTICE: AN AGENDA FOR 1990s; *supra* note 50, at 536-37.

<sup>69</sup> See BOEHM & FLAHERTY, *supra* note 63.

LSC proponents argue that the LSC should not be abolished. They assert that the LSC performs an essential role that should be retained.<sup>70</sup> As the then-Chairman of the LSC stated in an article supportive of the LSC published in 1997:

[LSC's] role has always been conceived as providing a national foundation for the provision of access to justice on which others can and should build. While other funding sources may have an increased significance within the delivery system today, LSC's leadership is still crucial in two important respects. First, the corporation is the steward of the federal government's commitment to equal justice for all . . . . Second, as part of its role in providing a national foundation for the delivery of legal services to low-income people, LSC has a responsibility to ensure that the delivery system provides through-out the country cost-effective assistance that meets the highest standards of thoroughness, quality, and professionalism.<sup>71</sup>

A similar view was expressed a few years later in an article by the then-President of the LSC in describing what he would be doing to help achieve a more effective legal services system—what he refers to as the LSC's new vision.<sup>72</sup> He denies that dissolution of the LSC would fulfill a conservative mandate<sup>73</sup> and says this in discussing LSC's goal:

As a conservative Republican and a long-time legal aid volunteer, I firmly believe that federally funded legal services are critical to the vitality of our nation's justice system. Our goal is to create the model public-private partnership. To this end the principal objective must be to bring justice into the lives of every low-income American. This new vision of legal services will allow the government to finally fulfill its twenty-five-year-old promise [of equal justice for all Americans].<sup>74</sup>

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<sup>70</sup> See Douglas S. Eakeley, *Role of the Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 743–45.

<sup>71</sup> *Id.* at 744–45.

<sup>72</sup> See John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 102–103 (2000).

<sup>73</sup> *Id.* at 108.

<sup>74</sup> *Id.* at 102–03.



*Proposal*

The LSC should not be abolished. It has been an effective and desirable intermediary agency between Congress and the providers of civil legal assistance to poor persons in need of legal services, prevented some of the political favoritism that would have resulted in less-merited allocations of federal funds, made available some helpful leadership to providers of civil legal services for the poor, and conducted and publicized useful studies on the shortage of civil legal services for the poor.<sup>75</sup> There is, of course, the risk that the pro-legal services role of the LSC could be substantially reduced if conservative political interests again dominate Congress and the federal administration as they did in the mid-1990s.<sup>76</sup>

*B. Should Extensive Legal Restrictions Be Imposed by the Federal Government on Recipients of LSC Funding and, If So, What Restrictions?*

Controversy over the issue of restrictions on recipients of LSC funding has existed throughout the history of the LSC and began even before the LSC was established by passage of the Legal Services Corporation Act of 1974.<sup>77</sup> This controversy was most intense in the mid-1990s when Congress was considering more extensive restrictions that culminated in passage of the Omnibus Consolidated Reversions and Appropriations Act of 1996 that added important new restrictions on LSC recipients, restrictions that are still in effect.<sup>78</sup>

The usual argument advanced by those favoring a wide range of restrictions on LSC recipients is that federal funding of legal services for the poor should be limited to funding legal services for individual persons needing such services, not to promoting political or ideological causes.<sup>79</sup> The existing legal restrictions obviously are helpful in fulfilling this objective by expressly specifying some of the cause-related ac-

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<sup>75</sup> See, e.g., LSC, JUSTICE GAP, 2009, *supra* note 1; LSC, JUSTICE GAP, 2005, *supra* note 1.

<sup>76</sup> See BOEHM & FLAHERTY, *supra* note 63; Eakeley, *supra* note 70, at 743–44.

<sup>77</sup> For the development of the concept of a separate and independent legal services corporation outside the executive branch of government, including the emergence of controversy over appropriate restrictions on such a corporation, see Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 681–700 (1976). For additional information concerning the controversy over the restrictions, see SOLOMON-FEARS, *supra* note 27, at 2–5. Solomon-Fear's report concerning the background and funding of the Legal Services Corporation also includes a summary of Congressional actions pertaining to restrictions on LSC funding. See *id.* at 6–8.

<sup>78</sup> For the restrictions created by the 1996 act, see Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub L. No. 104-34, §§ 501-504, 110 Stat. 1321, 1350–59 (1996).

<sup>79</sup> See, e.g., McKay, *supra* note 72, at 110–13.

tivities that are prohibited.<sup>80</sup> Some who support the existing restrictions stress that the restrictions merit support because since 1996 these restrictions have had a very favorable result.<sup>81</sup> They assert that once the contentious and bitter dispute over the LSC and its continued existence was resolved in 1996 with passage of the Omnibus Consolidated Reversions and Appropriations Act of 1996 an acceptable message emerged.<sup>82</sup> That message is that, due to the restrictions, recipients of LSC funding are no longer engaged in furthering political and ideological causes but are focused entirely on providing legal services to low-income clients in need of legal services, who are too poor to pay for the services—an objective that most Americans approve of.<sup>83</sup> The new message, it is asserted, has resulted in eliminating much of the support in Congress for eliminating the LSC and its funding, and it has also attracted many new and influential political allies for the LSC and its programs.<sup>84</sup> Very briefly, what the new messengers are arguing is that retaining the restrictions has had such favorable consequences for the continued much needed LSC funding of legal services for the poor that this funding source should not be threatened by efforts to remove the restrictions.<sup>85</sup>

The new message, however, has not convinced many prominent opponents of the restrictions to abandon their opposition. As one of these opponents said:

[T]he understandable desire to put a happy face on the present situation also threatens to obscure the reality of how legal services function under the system. While new ideas are needed to expand funding for civil legal services and to improve the effectiveness of legal services programs, and while these ideas should be fully developed and implemented as appropriate, a focus on new ideas should not inhibit discussion about the true

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<sup>80</sup> See *id.* A few of the restrictions, however, are also indicative of some politically influential groups favoring exclusion of LSC funding recipients from opposing these groups' interests in a particular kind of legal proceeding. See, e.g., 42 U.S.C. § 2996f(b)(8) (2006) (regarding abortion proceedings); 42 U.S.C. § 2996f(b)(9) (2006) (regarding desegregation of any elementary or secondary school or school system).

<sup>81</sup> See Mauricio Vivero, *From "Renegade" Agency to Institution of Justice: The Transformation of Legal Services Corporation*, 29 *FORDHAM URB. L.J.* 1323, 1325 (2002). When his article was published Vivero was Vice President for Governmental Relations and Public Affairs at the Legal Services Corporation. See *id.* at 1323.

<sup>82</sup> See *id.* at 1339–45; see also James D. Lorenz, Jr., *Almost the Last Word on Legal Services: Congress Can Do Pretty Much What It Likes*, 17 *ST. LOUIS U. PUB. L. REV.* 295, 318–19 (1998); McKay, *supra* note 72.

<sup>83</sup> See Vivero, *supra* note 81, at 1339–45.

<sup>84</sup> See *id.* at 1343–44.

<sup>85</sup> See *id.*

impact of the restrictions and about strategies to obtain their rescission.<sup>86</sup>

Other opponents of the restrictions have continued their opposition because they consider the restrictions serious impediments that must eventually be removed. One such opponent condemns them as silencing doctrines that prevent attorneys from advocating for many poor people in need of legal services, but who have no recourse to non-LSC advocates.<sup>87</sup> Another opponent asserts that “the[ ] restrictions cannot be justified as reasonable limitations, nor is there any compelling rationale for most of them.”<sup>88</sup> He then adds:

To remove existing restrictions and prevent new restrictions from being added, the civil legal assistance community will have to build a broad base of support among federal and state legislative bodies and the public for the need for advocacy beyond advice on legal representation in individual cases. In order to build broad public support, it is critical to reach beyond bar leaders to state and local leaders, the press, businesses, labor, and human services and civic organizations.<sup>89</sup>

Restrictions perceived by many of the opponents as having especially adverse consequences for legal services programs serving the poor are the prohibition on lobbying of government bodies by LSC recipients of its funding, the prohibition on LSC recipients bringing class actions, and the prohibition on LSC-funded recipients providing legal assistance in

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<sup>86</sup> David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL’Y REV. 337, 367–68 (1998). Elsewhere Udell has expressed similar opposition to the restrictions. See David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895, 902 (1998) [hereinafter Udell, *Implications*] (“In light of LSC’s auspicious origins, the restrictions that Congress imposed on Legal Services lawyers in its 1996 appropriation are a flagrant betrayal of the ideal of equal justice under the law.”).

<sup>87</sup> See David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 222 (2003).

<sup>88</sup> Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1230 (2002). Alan Houseman was the director of the Center for Law and Social Policy when he wrote his article, a position he still holds. Early in his career he created and directed the Research Institute at the LSC. He has written extensively on legal aid and has published far more articles concerning the LSC than any other author.

<sup>89</sup> *Id.* at 1232. For a similar position, see Robert R. Kuehn, *Undermining Justice: The Legal Profession’s Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1079 (2006) (concluding that “[t]he legal profession must cease to be an accomplice in efforts to provide ‘liberty and justice for some.’ The profession cannot paradoxically proclaim its commitment to access to legal representation and yet subvert that very goal by imposing restrictions on unpopular clients or types of legal services. If the principles of the legal profession mean anything, then all lawyers, courts, and bar organizations need to fight to ensure access to justice is truly equal and without restrictions.”).

most fee-generating cases.<sup>90</sup> Some opponents have concentrated their opposition on one or more of these restrictions.<sup>91</sup> Other opponents consider some of the restrictions to be unconstitutional, and believe that more litigation is needed challenging these unconstitutional restrictions in court.<sup>92</sup> So far there have been few court cases challenging the constitutionality of any of the restrictions, and only one of them, *Legal Services Corporation v. Velazquez*,<sup>93</sup> has had any appreciable invalidation impact. In *Velazquez*, the U.S. Supreme Court held the statutory restriction prohibiting LSC grantees from challenging existing welfare laws to be an unconstitutional First Amendment violation.<sup>94</sup> There also are opponents who assert that some of the restrictions should be eliminated because they prevent lawyers funded by the LSC from complying with rules of professional responsibility that all U.S. lawyers must abide by.<sup>95</sup> As committees of the Association of the Bar of the City of New York concluded in a report urging elimination of the restrictions: restrictions on the steps that an attorney can take on behalf of a client and the advice an attorney can render “conflict with the basic ethical precepts requiring

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<sup>90</sup> See, e.g., BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER (2000), available at [http://brennan.3cdn.net/3cbbeedd52806583b1\\_osm6blo8g.pdf](http://brennan.3cdn.net/3cbbeedd52806583b1_osm6blo8g.pdf).

<sup>91</sup> See Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 67–73 (2007).

<sup>92</sup> See Ilisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693, 694–97; Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 107–11 (1998) (arguing that the restrictions violate the First Amendment by prohibiting certain types of litigation and political activity and asserting that the restrictions violate the equal protection component of the Constitution because of their negative impact on the poor); Udell, *Implications*, *supra* note 86, at 908–19 (arguing that some of the restrictions violate First Amendment rights).

<sup>93</sup> 531 U.S. 533 (2000).

<sup>94</sup> See *id.* at 540–49. The Omnibus Consolidated Rescissions and Appropriations Act of 1996 imposed the restriction prohibiting challenges to existing welfare laws. This restriction prohibits the LSC from funding any organization:

that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, § 504(a)(16), 110 Stat. 1321, 1355–56 (1996). For a detailed analysis of the *Velazquez* case, a 5–4 decision, see Bornstein, *supra* note 92, at 697–99. On the limited impact of the *Velazquez* case, see Houseman, *supra* note 88, at 1232–33.

<sup>95</sup> See Ass’n of the Bar of the City of N.Y., *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 RECORD OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. 13, 55 (1998).

an attorney to act in the client's best interest, to represent the client zealously and to exercise independent professional judgment."<sup>96</sup>

### *Proposal*

Additional legal restrictions should not be imposed on activities of recipients of LSC funds, and existing restrictions imposed by federal statutes pertaining to the LSC should be eliminated. These restrictions unjustifiably prevent many poor persons in need of legal services from receiving such services, and they prevent many kinds of impact action by those restricted that would help reduce the shortage in legal services for the poor.

#### *C. How Much Should the Federal Government Appropriate Each Year for the LSC?*

Controversy over the amount of LSC funding has occurred most every year during the annual federal budgeting and appropriations process, and most every year the LSC competes with many other requests for federal funding. It is obvious to most everyone who requests substantial funding from the federal government that the federal government will not provide sufficient funding to fully fund all requests, that some requests will be denied, and that some will be considered higher priority than others. Recognizing that sufficient federal funding will not be forthcoming to enable LSC recipients to close the gap in needed civil legal services for the poor, LSC proponents keep pushing for what they perceive is a justifiable share of the annual federal budget in enabling LSC recipients to reduce the gap. Some of the opponents of the LSC have argued that the LSC should receive no federal funding, thereby abolishing it.<sup>97</sup> But the most frequent opposition to LSC funding apparently has not been that such funding should be totally eliminated, but that it should be more limited in amount than what the LSC is requesting, so as to add to federal funding needs perceived by some funding proponents to be of higher priority than civil legal services for the poor—needs such as health care, housing, national defense, or reversing serious declines in

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<sup>96</sup> *Id.* For a discussion of the professional ethics issues raised by the congressional restrictions on LSC-funded lawyers at length, see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187, 2240 (1999) ("The restrictions do make it difficult for legal services attorneys to act ethically, and do force LSC recipients to refuse cases that should be taken or to withdraw from ongoing representation that is essential to vindicate the rights of low-income persons eligible for legal services. . . . Because of the danger that future restrictions will force attorneys into ethical dilemmas requiring withdrawal, and because many of the restrictions on the type of client and the scope of representation are unjustified under the principles of equal access to justice, every possible effort must be made to remove such existing restrictions and prevent future restrictions from being imposed.").

<sup>97</sup> See Kilwein, *supra* note 64 and accompanying text.

the national economy. Federal funding of the LSC, as commonly occurs when most every kind of government funding proposal is made, involves competition with other funding proponents.

### *Proposal*

The federal government should appropriate for the LSC at least as much as the \$400 million it appropriated in fiscal year 1995<sup>98</sup> adjusted for inflation since 1995. This would amount to about \$600 million in 2010, an appropriation far below what is needed, but a reasonable sum given the multitude of legitimate and meritorious demands that will be made on the federal budget, most of which, if federally-funded, will also be far less than what is needed.

## II. ISSUES CONCERNING INTEREST ON LAWYER TRUST ACCOUNT (IOLTA) PROGRAMS

In most states, interest on lawyers' trust accounts, commonly referred to as IOLTA accounts, has been an important and often controversial issue concerning the funding of adequate legal services for the poor. Most law firms in the United States maintain a separate IOLTA account in a financial institution, and each firm deposits in this account client funds for very short periods of time, a few days or less, before distributing the funds to the clients.<sup>99</sup> Most of these accounts are in banks but some are in other financial institutions, such as savings and loans.<sup>100</sup> Interest rates on IOLTA accounts frequently fluctuate due to market influences. Typical funds received by the law firm for transfer to the client are payments for sale of real property, when the law firm represented the seller, or payment of a judgment sum awarded to the client. However, such client funds, or a portion of them, may be retained by the firm as payment for fees or expenses owed the firm by the client. Funds of a client deposited in an IOLTA account are promptly forwarded by the firm to the client entitled to the funds.<sup>101</sup> Each firm has only one account for funds of *all* its clients, each of whom is entitled to promptly receive the amount deposited and over which there is no controversy as to the client's right to payment or prompt payment. Such a multi-client fund account is generally referred to, and in this Article referred to, as an IOLTA account. If a controversy exists as to the right of the client to

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<sup>98</sup> Adjusted for inflation, the 1995 appropriation for the LSC would be the largest appropriation that has been made for the LSC. For annual LSC appropriations that have been made, not adjusted for inflation, see *supra* notes 20–26 and accompanying text.

<sup>99</sup> See Katharine L. Smith, *IOLTA In The Balance: The Battle of Legality and Morality Between Robin Hood and the Miser*, 34 ST. MARY'S L.J. 969, 975–77 (2003).

<sup>100</sup> See, e.g., MINN. RULES OF PROF'L CONDUCT R. 1.15(o).

<sup>101</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2010).

payment or prompt payment, the law firm must open a separate account in which only those funds, no other funds, are deposited.<sup>102</sup> Such an account is not an IOLTA account. Maintaining one such account for all clients is far more efficient and less costly than opening and quickly closing a separate bank account for each payment received by the firm for prompt transmission to each separate client.<sup>103</sup> Failure of a law firm to properly safeguard the rights of a client or any others whose funds have been deposited in an IOLTA account can result in the lawyers responsible for the improper action being sanctioned for unprofessional conduct.<sup>104</sup>

IOLTA accounts are interest-bearing accounts.<sup>105</sup> Who receives this interest and how much of the interest have been controversial issues since the early 1980s, when, by federal statute, banks and savings and loans were authorized to make interest payments on demand deposits, the beneficial interest in which is held by nonprofit individuals or organizations engaged in charitable type activities. The federal statute also authorized law firms to make withdrawals from such accounts for the purpose of making transfers to third persons.<sup>106</sup> Shortly after these statutory authorizations some states established IOLTA programs for allocating much of the interest on lawyer trust accounts to organizations engaged in charitable type activities, including nonprofit lawyer organizations engaged in providing legal services for the poor, or otherwise expanding or clarifying legal rights of the poor.<sup>107</sup> Florida was the first state to establish an IOLTA program.<sup>108</sup> Other states soon followed, and every state now has such a program.<sup>109</sup> By court rule or statute—in most

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<sup>102</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15(e) (2010).

<sup>103</sup> See TAITA L. MORRIS, Note, *The Dog in the Manger: The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605, 611–20 (2005).

<sup>104</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15 (2010). Many states have adopted this as a court rule, with some states modifying and adding provisions to the rule. This ABA rule imposes professional obligations on a lawyer as to safeguarding funds or other property, of clients or others, in the lawyers' possession; this includes funds that have been deposited in a client trust account. See *id.* Failure of the lawyer to comply with the obligations imposed by Rule 1.15 can result in the lawyer being sanctioned and, if the violations are considered serious enough, even disbarred. See *id.*

<sup>105</sup> Morris, *supra* note 103, at 607.

<sup>106</sup> See *id.* at 607–08; see also Consumer Checking Account Act, 12 U.S.C. § 1832 (2006). On this 1980 legislation and its effect on lawyer trust accounts for clients, see the majority opinion by Chief Justice Rehnquist in *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 159–161 (1998). Prior to 1980 lawyer trust accounts and other bank checking accounts were prohibited by federal law from paying interest.

<sup>107</sup> See Morris, *supra* note 103, at 607.

<sup>108</sup> On the origins of Florida's IOLTA program, see Arthur J. England Jr. & Russell E. Carlisle, *History of Interest on Trust Accounts Program*, 56 FLA. B.J. 101 (Feb. 1982).

<sup>109</sup> Morris, *supra* note 103, at 608. For a discussion on other countries that also have IOLTA-type programs, see England & Carlisle, *supra* note 108, at 102–03; Johnson, *supra* note 8, at 730–31.

states by court rule—every state requires each law firm in the state to have a bank or other financial institution trust account for client funds that the law firm possesses.<sup>110</sup> State laws also require that banks or other institutions with IOLTA accounts periodically distribute the IOLTA program's share of interest on these accounts to a particular public or non-profit agency authorized to receive and distribute these funds for legal services to the poor and other legally designated purposes.<sup>111</sup> The interest on IOLTA accounts has long been ruled excludable from the client's or law firm's gross taxable income, which has added to the support for IOLTA.<sup>112</sup> IOLTA income allocated to legal services for the poor or other charitable purposes totaled \$215 million in 2008,<sup>113</sup> a considerable decline from recent previous years. The principal reasons for the decline obviously were a lower total volume of funds in IOLTA accounts due to the effect of the recession in reducing the number and the dollar amount of transactions by law firms that result in IOLTA account deposits and also a reduction in the amount of interest that many banks were paying on IOLTA accounts compared to what they were paying on comparable accounts.

IOLTA programs have generated considerable controversy, as is to be expected, as they take interest belonging to individual clients and give

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<sup>110</sup> See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 221–22 (2003). In most states this requirement is imposed by a court rule that is the same or similar to ABA Model Rules of Professional Conduct, Rule 1.15. In some states, the rule also includes additional regulatory coverage. ABA Rule 1.15, in part, is as follows:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person . . . .

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

MODEL RULES OF PROF'L CONDUCT R. 1.15 (2010). For state statutes on law firm maintenance of IOLTA accounts see, for example, CAL. BUS. & PROF. CODE § 6211 (2010); CONN. GEN. STAT. ANN. § 51-81c (West 2010); OHIO REV. CODE ANN. § 4705.09 (West 2006); N.Y. JUDICIARY LAW § 487 (McKinney 2005).

<sup>111</sup> See *infra* notes 146, 148–52 and accompanying text.

<sup>112</sup> See I.R.C. § 642(c)(1) (2006); Rev. Rul. 81-209, 1981-2 C.B. 16.

<sup>113</sup> LSC FACT BOOK 2008, *supra* note 15, at 8.



it to others.<sup>114</sup> Moreover, the ultimate recipients of these interest payments spend them for authorized purposes that often are controversial.<sup>115</sup> The reason that the interest on lawyer trust accounts is not paid to each client whose funds are earning the interest is that it would be too costly to ascertain how much of the interest on each such account belongs to each client whose funds were briefly deposited in the account.<sup>116</sup> The technology currently exists to make such calculations but the calculations would cost more than each client's share of the interest, a share that usually is less than five or ten dollars.<sup>117</sup> Technological advances may occur in the future that would greatly reduce this client share calculation cost, but such technology does not exist today.

The following are particularly troublesome and controversial issues concerning the IOLTA program and they are separately considered in the pages that follow: (1) whether IOLTA programs are constitutional; (2) whether participation in IOLTA programs should be mandatory for all law firms that have IOLTA accounts, or should it be discretionary with each such law firm; (3) to what programs and what recipients should IOLTA funds be allocated; (4) whether the banks and other financial institutions with IOLTA accounts should be required to pay interest or dividends on those accounts at comparable rates to what the institutions pay on similar non-IOLTA accounts. These controversial issues commonly emerged when the adoption of an IOLTA program was first being considered by a state's courts or legislature. They have thereafter been intermittently controversial due to efforts to legally terminate or legally modify the existing programs, or to influence how they are administered. The federal government has also become heavily involved in some of these controversies, most notably the U.S. Supreme Court in its decisions on whether or not IOLTA programs violate the U.S. Constitution.<sup>118</sup>

#### A. *Are IOLTA Programs Constitutional?*

The issue as to constitutionality of IOLTA programs has focused primarily on whether IOLTA programs violate the Fifth Amendment Takings Clause of the U.S. Constitution.<sup>119</sup> The key questions that the courts have dealt with in deciding whether the interest on IOLTA ac-

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<sup>114</sup> See Morris, *supra* note 103, at 607–08.

<sup>115</sup> See Kilwein, *supra* note 64 and accompanying text.

<sup>116</sup> See *Brown v. Washington*, 538 U.S. 216, 225 (2003) (quoting IOLTA Adoption Order, 102 Wash.2d 1101 (1984)).

<sup>117</sup> For example, estimated interest was only \$4.96 on a \$90,521.29 deposit in an IOLTA account in which one of the parties in a recent lead case on the constitutionality of IOLTA accounts was involved. See *id.* at 229–30. The party in question is one of the parties who was challenging the constitutionality of IOLTA accounts in the *Brown* case. See *id.* at 229.

<sup>118</sup> See, e.g., *Brown v. Washington*, 538 U.S. 216, 225 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

<sup>119</sup> See, e.g., *Phillips*, 524 U.S. at 156.

counts violates the Fifth Amendment Takings Clause are these: is the interest the private property of the owner of the principal, the client whose funds are earning the interest?; if the interest does belong to the owner of the principal, does paying it to others constitute a Fifth Amendment taking?; and, if there has been a Fifth Amendment taking, have the owners of the principal been provided with just compensation.<sup>120</sup> The U.S. Supreme Court considered these questions in *Phillips v. Washington Legal Foundation*, a 5–4 decision.<sup>121</sup> Petitioners in the *Phillips* case alleged that the Texas IOLTA program, a typical IOLTA program, violated the Fifth Amendment.<sup>122</sup> The Supreme Court, in a majority opinion by Chief Justice Rehnquist, held that interest earned on an IOLTA account is the private property of the owner of the principal, the client whose funds are deposited in the account.<sup>123</sup> And it is the private property of the owner of the principal even though it lacks positive economic or market value to the owner, as “possession, control and disposition are nonetheless valuable rights that inhere in the property.”<sup>124</sup> However, the majority refused to rule on whether interest generated by IOLTA funds has been taken from its owners in violation of the Fifth Amendment’s Taking Clause or on the amount of any just compensation owed the respondents in the *Phillips* case.<sup>125</sup> The majority opinion refused to rule on these questions because they were not raised in the petition for certiorari, and it is the court’s practice to consider only questions set forth in the petition for certiorari.<sup>126</sup>

The *Phillips* opinion created great concern among those receiving and distributing IOLTA funds as to what the inevitable future U.S. Supreme Court decision would be on the constitutional takings and compensation questions that the majority opinion in the *Phillips* case refused to answer.<sup>127</sup> There was even some concern that the officers and board members of distributees of IOLTA funds would be personally responsible for distributions of IOLTA funds that a later opinion might classify as unconstitutional takings.

The inevitable U.S. Supreme Court opinion was handed down in 2003. The majority opinion in *Brown v. Legal Foundation of Washington*, a 5–4 decision, was written by Justice Stevens, with the dissenting

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<sup>120</sup> See, e.g., *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> *Id.* at 172.

<sup>124</sup> *Id.* at 169–70.

<sup>125</sup> See *Phillips*, 524 U.S. at 164 n.4.

<sup>126</sup> *Id.*

<sup>127</sup> See *Morris*, *supra* note 103, at 614–15.

opinions written by Justices Scalia and Kennedy.<sup>128</sup> The majority in the *Brown* case held that the interest earned on an IOLTA account that was allocated to legal services for needy persons constituted a taking as that term is used in the Fifth Amendment but was not a violation of the Fifth Amendment.<sup>129</sup> The last clause of the Fifth Amendment states that “property shall not be taken for public use without just compensation,”<sup>130</sup> and the allocation of interest earned on an IOLTA account to legal services for needy persons is a taking for a public use.<sup>131</sup> But the majority held that the allocation of interest from an IOLTA account to legal services for the needy does not unconstitutionally deprive each client (each owner of principal in an IOLTA account) of just compensation required by the Fifth Amendment.<sup>132</sup> No unconstitutional deprivation occurred because each client’s funds generated no net income to the client, as the cost of ascertaining and distributing that interest to the individual client owning the funds on which the interest is owed would be greater than the amount of the interest.<sup>133</sup> The monetary loss to the individual client is nil, so the Fifth Amendment requires no compensation to any such client.<sup>134</sup> Even if the best modern technology is used in determining the interest on each client’s share, the cost is greater than the amount of that interest. Contributing to the high calculation cost is the short period of time in which each client’s fund is in the IOLTA account (usually only a few days and often only overnight) the substantial number of different client funds that are in an IOLTA account at any one time (in many IOLTA accounts hundreds of such funds), and variations among the funds in amount and duration of deposit. If a client fund is held by a law firm for client distribution and the client fund is big enough or held long enough to result in net interest to be allocated to the client, the law firm is legally obligated to deposit the fund in a separate account in which other funds are not deposited.<sup>135</sup> It is quite possible that future advances in technology will enable the net interest on each client fund to be ascertainable at a low enough cost that the net interest must be paid to the client. This will result in an elimination of the net interest on IOLTA

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<sup>128</sup> See *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003). For a discussion on the *Phillips* and *Brown* decisions, see Morris, *supra* note 103, at 611–20; Smith, *supra* note 99, at 989–1001.

<sup>129</sup> *Brown*, 538 U.S. at 240–41.

<sup>130</sup> U.S. CONST. amend V.

<sup>131</sup> See *Brown*, 538 U.S. at 232.

<sup>132</sup> See *id.* at 235–40.

<sup>133</sup> See *id.*

<sup>134</sup> *Id.*

<sup>135</sup> Typical of the very small amount of interest earned on a client fund deposited in an IOLTA account is the estimated interest on the client fund of one of the parties in the *Brown* case who asserted that IOLTA accounts are unconstitutional. The total interest that this party estimated has been earned on his fund of \$90,521.29 deposited for two days in an IOLTA account was \$4.96. *Id.* at 229–30 (1993).

accounts as a source of funding of legal services for the poor or other charitable purposes, unless the client owners choose to donate the interest for such purposes.<sup>136</sup>

Although the *Brown* decision appears to have resolved the controversy over IOLTA programs' compliance with the Fifth Amendment,<sup>137</sup> IOLTA programs remain vulnerable to attack as violating freedom of speech and association rights protected by the First Amendment. Justice Kennedy referred to this vulnerability in his dissenting opinion in the *Brown* case.<sup>138</sup> In that opinion he makes this observation:

The First Amendment consequences of the state's action have not been addressed in this case, but the potential for a serious violation is there. . . . Today's holding, then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.<sup>139</sup>

The First Amendment argument, as briefly summarized by the U.S. First Circuit Court of Appeals in a 1993 opinion, is that the rule on how IOLTA account interest must be distributed "burdens protected speech by forcing expression, [by clients whose funds are in IOLTA accounts] through compelled support of organizations espousing ideologies or engaging in political activities," and the rule does not serve compelling state interests.<sup>140</sup> However, the court in this 1993 opinion held that the interest generated by the client funds does not belong to the clients, so the clients have not been compelled to contribute their money to the IOLTA program recipients.<sup>141</sup> As to ownership of interest on client funds in IOLTA accounts, although the U.S. Supreme Court a few years later, in the *Phillips* case, took a contrary position on who owns the interest on an IOLTA account,<sup>142</sup> it has never considered the IOLTA First Amendment issue. So it seems quite likely, as Justice Kennedy infers in his *Brown* dissent,<sup>143</sup> that the U.S. Supreme Court may later take up and

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<sup>136</sup> Justice Stevens, in his *Brown* case majority opinion, mentions the prospect of future advances in technology but concludes that under the State of Washington court rule regulating IOLTA programs, such advances would have no effect on the constitutionality of IOLTA programs in Washington; that rule is "self-adjusting and is adequately designed to accommodate changes in banking technology without running afoul of the state or federal constitutions." *Brown*, 538 U.S. at 227.

<sup>137</sup> See *Brown*, 538 U.S. 216 (2003).

<sup>138</sup> See *id.* at 253 (Kennedy, J., dissenting).

<sup>139</sup> *Id.*

<sup>140</sup> Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 977 (1993).

<sup>141</sup> See *id.* at 980.

<sup>142</sup> See *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

<sup>143</sup> See *Brown*, 538 U.S. at 253 (Kennedy, J., dissenting).

resolve the First Amendment issue as to distribution of interest on client funds in IOLTA accounts.<sup>144</sup>

No proposal is advanced in this Article as to the constitutionality of IOLTA programs. The U.S. Supreme Court's decision in *Brown v. Legal Foundation of Washington* seems to have permanently resolved the Fifth Amendment constitutionality of IOLTA programs.<sup>145</sup> But the U.S. Supreme Court has not as yet ruled on the First Amendment constitutionality of IOLTA programs and it appears unlikely that it will do so any time soon. Moreover, if the opportunity is sufficiently delayed the issue may become moot due to possible advances in technology that result in the net interest on each client fund to be ascertainable at a low enough cost for that net interest to be paid to the client. If such an advance in technology occurs IOLTA programs will then disappear.

### B. *To What Programs and What Recipients Should IOLTA Funds Be Allocated?*

Most states have dealt with the IOLTA funds allocation issue by a court rule or statute that requires the distributing agency to allocate IOLTA funds for certain programs or to certain kinds of recipients.<sup>146</sup> In

<sup>144</sup> On First Amendment challenges to IOLTA, see Morris, *supra* note 103, at 621–24. Morris also considers another legal argument against IOLTA—that it is a veiled and improper tax. *Id.* at 625–30.

<sup>145</sup> See *Brown*, 538 U.S. 216.

<sup>146</sup> For example, the Minnesota Supreme Court established the Lawyer Trust Account Board, Minnesota's distributing agency, via a court rule. See MINN. RULES OF PROF'L CONDUCT R. 1.15(o)(1) (2010). The Lawyer Trust Account Board has been granted very extensive authority to determine which recipients shall receive IOLTA funds. The Minnesota Rules of Lawyer Trust Account Board Rule 2, provides as follows: "(c) Disbursement of funds. The Board shall, by grants and appropriations it deems appropriate, disburse funds for the tax exempt public purpose which the Board may prescribe from time to time consistent with Internal Revenue Code Regulations and rulings, including those under Section 501(c)(3)." MINN. R. LAWYER TRUST ACCOUNT Bd. R. 2(c).

The distributing agency in New York is the Board of Trustees of the New York Interest on Lawyer Account (IOLA) Fund, a fiduciary fund in the custody of the state comptroller. N.Y. STATE FIN. LAW § 97v-1 (McKinney 2009). On fund distribution, the relevant statute states the following:

b. No less than seventy-five percent of the total funds distributed in any fiscal year shall be allocated to not-for-profit tax-exempt providers for the purpose of delivering civil legal services to the poor. The funds distributed annually to legal services providers shall be allocated according to the geographical distribution of poor persons throughout the state based on the latest available figures from the United States department of commerce, bureau of census, as prescribed by rules and regulations of the board of trustees.

c. The remaining funds shall be allocated for purposes related to the improvement of the administration of justice, including, but not limited to, the provision of civil legal services to groups currently underserved by legal services, such as the elderly and the disabled, and the enhancement of civil legal services to the poor through innovative and cost-effective means, such as volunteer lawyer programs and support and training services.

many states the distributing agency also receives funds from other sources that it distributes to recipients. The policy obviously is to use IOLTA funds for worthy causes that are in need of added funding. But the states vary considerably as to which programs or recipients should receive IOLTA funds, although recipients who provide legal services to the poor in civil law matters universally are one kind of authorized recipient and, in most all states, receive a majority of the available IOLTA funding.<sup>147</sup> Examples of other statutory or court rule-authorized uses of IOLTA funds in some states are law school legal clinic programs,<sup>148</sup> law student loans or scholarships,<sup>149</sup> education of lay persons in legal and justice-related areas,<sup>150</sup> and improvement of the administration of justice.<sup>151</sup> Administrative costs of the distributing agency also are quite universally authorized uses of IOLTA funds.<sup>152</sup>

In determining who receives funding and how much each recipient should receive, the distributing agency often is confronted with difficult issues. Examples of such issues are these: what priority, if any, should legal services for the poor be given over other organizations or programs that the agency is authorized to fund? What percentage of available funding should be allocated to each general purpose legal services organization in the state that provides legal services to the poor? Should legal service organizations in the state that provide legal services only to a limited group of poor persons—such as juveniles, the physically disabled, or immigrants—be funded and, if funded, what percentage of available funding? Resolving these issues can be highly controversial among those within the distributing agency who make allocation decisions, as each of the organizations or purposes is meritorious and in need of additional funding.

State court rules or statutes in many states limit the decision making responsibilities of the distributing agency in their state by imposing percentage limits on how much funding should be awarded particular kinds

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N.Y. STATE FIN. LAW § 97v-3 (McKinney 2009).

<sup>147</sup> Some commentators are strongly opposed to allocation of IOLTA funds to recipients other than those providing legal services for the poor. See, e.g., Arthur J. England, Jr., *Modern Day Alchemy: Interest on Lawyers' Trust Accounts*, in CIVIL JUSTICE: AN AGENDA FOR THE 1990s 563, 566–67 (“A . . . threat to IOLTA programs has been the effort by some state legislatures to divert IOLTA funds from their designated purposes to other legislative priorities.”).

<sup>148</sup> See, e.g., PA. RULES OF PROF'L CONDUCT R. 1.15(h)(2) (2010).

<sup>149</sup> See, e.g., CONN. GEN. STAT. ANN. § 51-81c(a)(2) (West 2010); FLA. BAR FOUNDATION CHARTER art. 2.1(h)(2).

<sup>150</sup> See, e.g., N.J. CT. R. 1:28A-4(b)(3) (2010).

<sup>151</sup> See, e.g., FLA. BAR FOUND. CHARTER art. 2.1(h)(3); N.J. CT. R. 1:28A-4(b)(2) (2010).

<sup>152</sup> See, e.g., CAL. BUS. & PROF. CODE § 62.16(a) (West 2003); PA. RULES OF PROF'L CONDUCT R. 1.5(s)(3) (2010).

of recipients.<sup>153</sup> The distributing agency in most states also is subject to oversight by the state supreme court or some other body as to the agency's operations, including its distribution to recipients.<sup>154</sup> The oversight body can influence and presumably even determine who receives IOLTA funds and how much each recipient receives.<sup>155</sup>

### *Proposal*

IOLTA funds should be allocated only to those individuals or organizations providing legal services to the poor, informing poor persons of their legal rights, assisting poor persons to represent themselves pro se, and the administrative expenses of the distributing agency and the recipients of IOLTA funds. The distributing agency should determine who receives how much available IOLTA funds, but should be subject to continuing meaningful oversight by the state's supreme court.

#### *C. Should Participation in IOLTA Programs Be Mandatory, Opt-out, or Voluntary for Each Law Firm with One or More IOLTA Accounts?*

This issue has been controversial at one time or another in many states since the early 1980s when IOLTA programs were first estab-

<sup>153</sup> See, e.g., CAL. BUS. & PROF. CODE § 6216(b)(1) (West 2003); N.Y. STATE FIN. LAW § 97v (McKinney 2009).

<sup>154</sup> See, e.g., CAL. BUS. & PROF. CODE § 6145 (West 2003) (requiring the state bar to submit an annual financial statement and audit to the Chief Justice of the Supreme Court of California, the State Assembly, and Senate Committees on the Judiciary); CONN. GEN. STAT. ANN. § 51-81c(e) (West 2010) (providing that oversight is by a five-member advisory panel that reports to the state legislature and Chief Court Administrator, and whose functions are these: "(e) The advisory panel shall: (1) consult with and make recommendations to the tax-exempt organization administering the program regarding the implementation and administration of the program, including the methods of allocation and the allocation of funds to be disbursed under the program; (2) review and evaluate, and monitor the impact of the program; and (3) report on the program to the joint standing committee of the General Assembly having cognizance of matters relating to the judiciary and to the Chief Court Administrator, as may from time to time be requested."); N.J. CT. R. 1:28A-3(a) (requiring the state bar to submit an annual report to the State Supreme Court, including an annual audit reviewing in detail the administration of the IOLTA fund during the previous year); PA. RULES OF PROF'L CONDUCT R. 1.15(q) (2010) (noting that disbursement and allocation of IOLTA Funds shall be subject to the *prior* approval of the Supreme Court, thus requiring that the IOLTA Board submit to the Supreme Court for its approval a copy of the Board's audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program, and a copy of the IOLTA Board's proposed annual budget, designating the uses to which IOLTA funds are recommended). However, a statutory proposal of possible benefit to the banks was rejected. It was that the advisory panel would consist of ten members, three of whom "shall be appointed by the co-chairpersons of the joint standing committee of the General Assembly having cognizance of matters related to banking, which members shall represent the interests of banks in this state and which members shall have experience in deposit-related functions as an employee or former employee of a banking institution in this state." Gen. Assem., S.B. 1142 (d) (Conn. 2007).

<sup>155</sup> See N.J. Ct. R. Rule 1:28A-4(b)(2) (2010).

lished. In states with a mandatory program, all law firms with one or more IOLTA accounts must participate in the IOLTA program.<sup>156</sup> In opt-out states, each law firm with one or more IOLTA accounts must participate in the IOLTA program unless it decides not to and notifies a designated agency of its decision. In a voluntary state, if a law firm with one or more IOLTA accounts decides not to participate in the IOLTA program, it need not do so, and need not notify any agency of its decision.<sup>157</sup> In some opt-out states, each year at a designated date law firms with IOLTA accounts may elect to opt-out of the IOLTA program.<sup>158</sup> In most states, IOLTA programs initially were opt-out or voluntary, but in 1988 the ABA strongly recommended that all states adopt mandatory programs,<sup>159</sup> and this helped influence more states to do so. Currently most states have mandatory programs; only one state, South Dakota, has a voluntary program; and the number of opt-out states has been declining.<sup>160</sup>

The major advantage of mandatory IOLTA is that it assures more funding for legal services for the poor and other authorized meritorious purposes. Some arguments against mandatory IOLTA that have influenced some law firms and other interest groups to oppose it are the increased administrative and record-keeping burdens that mandatory IOLTA imposes on law firms, the funding of some programs that some law firms and some law firm clients are opposed to, and it permits IOLTA funds to be used for initiating and litigating class actions and lawsuits against government agencies—proceedings opposed by many conservative interest groups.<sup>161</sup>

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<sup>156</sup> See, e.g., CONN. RULES OF PROF'L CONDUCT R. 1.15(b) (2010); N.J. RULES PROF'L CONDUCT R. 1.15(a) (2010); WASH. RULES OF PROF'L CONDUCT R. 1.15A(c) (2009).

<sup>157</sup> See, e.g., S.D. RULES OF PROF. CONDUCT R. 1.15(d)(4), (e)(1) (2008).

<sup>158</sup> See, e.g., DEL. RULES OF PROF. CONDUCT R. 1.15(k)(1) (2008); N.M. RULES OF PROF. CONDUCT R. 16-115D(8) (2008). Justice Kogan favored a unique form of opt-out in his dissenting opinion in *In re Interest on Trust Accounts*, 538 So.2d 448, 454 (Fla. 1989), a case which required creation of a mandatory IOLTA program in Florida. Justice Kogan's opt-out program would allow a client, by an affirmative act, to prevent the use of his or her account funds for the IOLTA program. He concluded, "[T]hose clients who do not want to pay the legal fees of those persons whose financial and philosophical pursuits are adverse to their interests need not be required to contribute thereto." *Id.*

<sup>159</sup> See AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 101 (1988).

<sup>160</sup> Alabama, Maine, and Missouri are among the states that have recently shifted from opt-out to mandatory programs. However, Missouri's mandatory program has an unusual exception: a lawyer or law firm is exempted if it "establishes that no eligible institution within reasonable proximity to his, her or its office offers IOLTA accounts." MO. RULES OF PROF'L CONDUCT R. 4-1.15(i)(5)(B) (2008).

<sup>161</sup> This latter argument was the determining factor that prevented the Texas legislature from adopting a mandatory IOLTA requirement in 1983. See Johnson, *supra* note 8, at 736. The next year, the Texas Supreme Court adopted a court rule creating an IOLTA program, but excepted most class action lawsuits, lawsuits against governmental agencies, and lobbying efforts for any candidate or issue. *Id.* at 737, 742. For a summary of arguments against



*Proposal*

Participation in an IOLTA program should be mandatory, with no opt-out for any law firm with one or more IOLTA accounts. The needs that IOLTA programs help fulfill are so great that all law firms with IOLTA accounts should be legally required to participate even though participation may add some costs to the law firms or the IOLTA funds may be used for programs that the firms oppose.

*D. Should Banks and Other Financial Institutions with IOLTA Accounts Be Required to Pay Interest or Dividends on Those Accounts at Rates Comparable to What the Institutions Pay on Comparable Non-IOLTA Accounts?*

Whether banks and other financial institutions with IOLTA accounts should be required to pay interest or dividends on those accounts at rates comparable to what such institutions pay on comparable non-IOLTA accounts has been another highly controversial IOLTA-related issue. For some years, many banks and other financial institutions with IOLTA accounts paid considerably less in interest or dividends on these accounts than what they paid on comparable non-IOLTA accounts. About half the states now have a comparability requirement. This requirement is that financial institutions with IOLTA accounts must pay on those accounts the highest interest rate or dividend generally available at the institution to other accounts when the IOLTA accounts meet the same minimum balance or other qualifications.<sup>162</sup> Reasonable service fees, however, may be charged by financial institutions on their IOLTA accounts.<sup>163</sup> Some financial institutions with IOLTA accounts waive the service fees as a gesture of cooperation with the IOLTA program.<sup>164</sup>

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mandatory IOLTA in Florida, see *In re Interest on Trust Accounts*, 538 So.2d 448, 454 (Fla. 1989).

<sup>162</sup> See, e.g., CONN. RULES OF PROF'L CONDUCT R. 1.15(g)(3)(A) (2010) ("eligible institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any"); FLA. CT. R. 5-1.1(g)(5)(A), (B); N.Y. JUDICIARY LAW § 497-6.b (McKinney 2005). On the impact of comparability requirements, see Terry Carter, *Expressing Their Interest: Rise in Rates Swells IOLTA, and Legal Services Gain*, 93 A.B.A. J. 22 (2007).

<sup>163</sup> See, e.g., MO. RULES OF PROF'L CONDUCT R. 4-1.15(b) (providing that: "[A]llowable reasonable fees' are per check charges, per deposit charges, a fee in lieu of minimum balance, sweep fees, and a reasonable IOLTA account administrative fee. Allowable reasonable fees may be deducted from interest or dividends earned on an IOLTA account, provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers.").

<sup>164</sup> Some states expressly authorize, but do not require, waiver of service charges by institutions with IOLTA accounts—an obvious attempt to encourage waiver. See, e.g., ME. BAR R. 6(a)(4)(C)(2) (2010) ("[N]othing contained in this Rule [the rule on IOLTA interest and dividend rates] shall be deemed to prohibit an institution from paying a higher interest rate or

### *Proposal*

Every state should adopt a legal requirement that every bank or other financial institution doing business in the state (that includes opening and maintaining IOLTA accounts) should pay interest on IOLTA accounts that is the same or higher than what the bank or other financial institution is paying on comparable accounts. However, the financial institutions should be permitted to charge reasonable service fees for both IOLTA and comparable accounts.

Given the need for increased funding of legal services for the poor, financial institutions with IOLTA accounts should not be permitted to benefit more extensively from IOLTA accounts than from comparable accounts.

### III. ISSUES CONCERNING PRO BONO LEGAL SERVICES FOR THE POOR

Pro bono legal services—legal services provided at no fee to poor persons and other worthy clients or worthy causes—has long been considered an acceptable and generally commendable practice when performed voluntarily by lawyers, including lawyers actively engaged in the practice of law.<sup>165</sup> There is some evidence that a majority of U.S. lawyers, including many lawyers in large law firms, have each year in the recent past provided some pro bono legal services to the poor, or to organizations serving the poor.<sup>166</sup> But there are many, including many within

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dividend on IOLTA accounts than required by this Rule or from electing to waive any fees and service charges on IOLTA accounts than required by this Rule or from electing to waive any fees and service charges on an IOLTA account.”).

<sup>165</sup> On the history of pro bono legal services, see ABA COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 6–7 (2005) [hereinafter ABA, SUPPORTING JUSTICE]; see also DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 3–6 (2005) [hereinafter RHODE, PRO BONO IN PRINCIPLE AND PRACTICE]. On the history of the pro bono ethical and professional obligations of lawyers, see Judith L. Maute, *Changing Conceptions of Lawyers Pro Bono Responsibilities*, 77 TULANE L. REV. 91 (2002). On the increased institutionalization of pro bono over the past quarter century, see Cummings, *supra* note 4 at 6–41.

<sup>166</sup> See, e.g., ABA, SUPPORTING JUSTICE, *supra* note 165. This report summarizes the results of a study by the American Bar Association Committee on the pro bono activity of a sample of full-time practicing lawyers throughout the United States during a year-long period ending in November 2004. The sample consisted of 1100 responding lawyers and included lawyers in private practice (81%), house counsel (9%), government (8%), and academia (11%). *Id.* at 9. Those lawyers selected were interviewed by telephone. Among the findings of the report are:

- Two thirds of respondents (66%) reported doing some level of free pro bono service to people of limited means and/or organizations serving the poor. *Id.* at 4
- Attorneys surveyed, on average, reported providing approximately 39 hours of free pro bono legal services to organizations serving the poor. *Id.*
- The main discouragement from doing—or doing more—pro bono, is a lack of time (69%). Other disincentives include employer-related issues (15%), such as billable hours expectations, and the lack of specific expertise or skills in the re-

the legal profession, who are of the opinion that lawyers engaged in the practice of law should be doing more pro bono work, and that more poor people in need of legal services should receive the services they need from these lawyers pro bono.<sup>167</sup> Countering this support for the provision of more pro bono services by lawyers is the consistent opposition by many practicing lawyers to requiring or otherwise pressuring them to provide pro bono legal services to the poor or any other group or cause, or to requiring or urging them to provide any set number of hours that they should devote each year to providing pro bono legal services. Different reasons exist for this opposition but a principal reason, publicly declared or not, undoubtedly is self-interest. The lawyers are opposed because it would be too costly to them in time or in money, or in other respects would be contrary to their perceived self-interests.<sup>168</sup> As one observer has remarked: “A system that depends on private lawyers is ultimately dependent on their interests.”<sup>169</sup>

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quired practice areas. (Among more specific discouraging factors listed were a commitment to family obligations, discouragement from the employer, lack of administrative support or resources, lack of malpractice insurance and lack of desire). *Id.* at 18.

- Attorneys surveyed, on average, said they provided an additional 38 hours of free pro bono services to individuals or groups seeking to secure or protect civil rights, to community organizations and other non-profits and to efforts to improve the legal system. *Id.* at 5.

Of those respondents who indicated doing free pro bono work for poor people or organizations that address the needs of the poor, the percentages of work they conducted in particular areas were: family (34%), business/corporate (31%), consumer (26%), estates/probate (22%), elder (19%), housing/evictions (19%), civil rights (16%), public benefits (12%). *Id.* at 10. On how large law firm pro bono programs might improve, see Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357 (2010). The Cummings & Rhode article includes empirical data on large law firm pro bono programs obtained from interviews with pro bono counsel from thirty law firms in different regions of the United States. A pro bono counsel is a person in a large firm responsible for overseeing the design, coordination, and evaluation of a law firm’s pro bono program. *Id.* at 2360.

Paralegals also provide poor persons some pro bono legal services. *See, e.g.*, Lori Thompson, *The CASA Movement: How Paralegals Can Use Their Skills to Advocate for Children*, 24 *LEGAL ASSISTANT TODAY* 81 (July/Aug. 2007) (discussing a program that allows paralegals to be involved in child-abuse court cases and passing child-protection legislation).

<sup>167</sup> Among organizations supporting such enhanced efforts, including efforts to energize and strengthen pro bono initiatives at the state and local level, is the ABA. *See* ABA SUPPORTING JUSTICE, *supra* note 165, at 21–22.

<sup>168</sup> Self-interest related factors were among those that lawyers participating in a recent pro bono study stated as factors discouraging them from performing pro bono work. *Id.* at 18. It is quite possible that these discouraging factors were actually even greater deterrents to many of the lawyers than they indicated, as being asked to publicly declare their motivation might have caused some to downplay the importance of the self-interest factors. *Id.*

<sup>169</sup> Cummings, *supra* note 4, at 147. Cummings also notes this weakness in the current pro bono system: “Pro bono lawyers do not invest heavily in gaining substantive expertise, getting to know the broader public interest field, or understanding the long-range goals of client groups.” *Id.* at 148.

A. *Should Pro Bono Legal Services for the Poor Be Mandatory for All Licensed Lawyers?*

This has long been a very controversial issue but mandatory pro bono for all licensed lawyers has lacked sufficient support, especially from lawyers and law firms, for it to become an obligatory legal requirement. The principal pro-mandatory pro bono arguments are that there continues to be a very serious shortage of adequate legal services for the poor that mandatory pro bono would be more effective in reducing than voluntary pro bono has been,<sup>170</sup> mandatory pro bono by lawyers is a reasonable quid pro quo for lawyers' legal monopoly over the practice of law,<sup>171</sup> and a mandatory pro bono requirement for lawyers would improve the popular image of lawyers.<sup>172</sup>

Many arguments can be advanced against mandatory pro bono. One such argument is that mandatory pro bono is a very inefficient way of increasing legal services for the poor. It would force many lawyers to forego some higher hourly rate work that much lower-paid lawyers—if added to legal aid or public defender agencies—could perform if the funds were available to employ more of these lower paid lawyers. Adding to the alleged inefficiency of mandatory pro bono is that many practicing lawyers lack familiarity with the legal problems of the poor, and if these lawyers take on such representation, they must spend additional

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<sup>170</sup> See DAVID LUBAN, *LAWYERS AND JUSTICE, AN ETHICAL STUDY* 277–82 (1988) (proposing a plan for mandatory pro bono); RHODE, *PRO BONO IN PRINCIPLE AND PRACTICE*, *supra* note 165, at 171–72 (2005) (“[M]andating some market [pro bono] contribution of services or support from practicing lawyers seems justifiable in principle . . . a modest obligation of time or money would be worth trying.”); Roger C. Cramton, *Mandatory Pro Bono*, 19 *HOFSTRA L. REV.* 1113, 1126 (1991); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 *MD. L. REV.* 78, 87–88 (1990).

<sup>171</sup> Lardent, *supra* note 170, at 87; Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 *MD. L. REV.* 18, 74–75 (1990); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415, 2419 (1999).

<sup>172</sup> Steven Wechsler, *Attorneys' Attitudes Toward Mandatory Pro Bono*, 41 *SYRACUSE L. REV.* 909, 925 (1990).

On other arguments that have been advanced in support of mandatory pro bono, see Lardent, *supra* note 172, at 86–88; Reed E. Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 *GEO. J. LEGAL ETHICS* 459, 462–66, 505–07 (2001). One such argument is that if a mandatory pro bono program is properly structured it can contribute to the moral development of lawyers. *Id.* at 505; see also Lawrence J. Fox, *Should We Mandate Doing Well by Doing Good?*, in *RAISE THE BAR* 251 (Lawrence J. Fox ed., 2007) (explaining why the author, a large law firm partner, is a proponent of mandatory pro bono); Fiona McLeay, *The Legal Profession's Beautiful Myth: Surveying the Justifications for the Lawyer's Obligation to Provide Pro Bono Work*, 15 *INTL. J. OF THE LEGAL PROF.* 249, 251 (2008) (analyzing what the author, an Australian lawyer and pro bono coordinator at a large Australian law firm, considers to be the main arguments that have been advanced for mandatory pro bono, and concluding that all of these arguments are of questionable validity but that they have been very helpful motivating inducements for many lawyers to provide much needed pro bono work).

time acquiring the background knowledge needed to provide competent representation of the poor.<sup>173</sup> It would be more efficient, some argue, not to mandate pro bono services by all practicing lawyers but to impose an annual fee on those practicing lawyers who elect not to provide pro bono services during the year—the funds thereby obtained would then be used to increase the number of full-time legal aid lawyers.<sup>174</sup> Opponents of mandatory pro bono have also argued that mandatory pro bono is inefficient and wasteful because legal services are of low priority in the list of what most poor people with legal problems consider their unfilled needs.<sup>175</sup> It would be preferable, this opponent argues, if funds made available for the poor by lawyers were distributed to poor persons to be used for whatever needs each distributee considers preferable.<sup>176</sup> Another argument against mandatory pro bono is that it would impose a severe financial burden on many solo and small firm lawyers who, despite working long hours, are earning a net return at or below an acceptable middle class standard of living.<sup>177</sup> Still another anti-mandatory pro bono argument is that it would be unconstitutional—a violation of the First, Fifth, Thirteenth, and Fourteenth Amendments of the U.S. Constitution—although due to lack of adoptions of mandatory pro bono there is no case law authority clearly so holding.<sup>178</sup> Some less convincing arguments against mandatory pro bono are that it is wasteful because some unworthy clients will receive pro bono legal representation, it is unfairly selective because only lawyers and no other professionals are required to

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<sup>173</sup> See Cramton, *supra* note 170, at 1127; see also Charles Silver & Frank B. Cross, *What's Not To Like About Being a Lawyer*, 109 *YALE L.J.* 1443, 1484–85 (2000).

<sup>174</sup> See Cramton, *supra* note 170, at 1128–29; Lardent, *supra* note 170, at 85.

<sup>175</sup> See Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich*, 77 *CORNELL L. REV.* 1115, 1116 (1992); see also Silver & Cross, *supra* note 175, at 1482–83.

<sup>176</sup> See Macey, *supra* note 175, at 1116–18.

<sup>177</sup> See Cramton, *supra* note 170, at 1128; Cummings & Rhode, *supra* note 166, at 2365; Lardent, *supra* note 170, at 99–100; Macey, *supra* note 175, at 1120.

<sup>178</sup> For analysis of these constitutional arguments see RHODE, *PRO BONO IN PRINCIPLE AND PRACTICE*, *supra* note 165, at 10; Cramton, *supra* note 170, at 1131–32; David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 *N.Y.U. L. REV.* 735, 762–77 (1980); see also John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 *HOFSTRA L. REV.* 1229, 1244–61 (1991) (analyzing the constitutionality of recommendations in the Marrero Committee Report). The Marrero Committee was appointed by the Chief Judge of the New York Court of Appeals, and recommended mandatory pro bono for New York lawyers. Scully was counsel for the Washington Legal Foundation, a politically conservative organization. *Id.*

Of some relevance to the constitutionality of mandatory pro bono for lawyers, is case law suggesting that court appointment of an attorney to represent an indigent person without compensation, a requirement very analogous to mandatory pro bono, is unconstitutional. See, e.g., *State ex rel Stephan v. Smith*, 747 P.2d 816, 842 (Kan. 1987) (holding that mandatory pro bono violates the Fifth and Fourteenth amendments of the U.S. Constitution); *Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) (holding that court appointments without compensation in civil cases violate the Missouri constitution).

serve the poor, and it is ethically suspect if it permits a buy-out option for lawyers subject to the mandatory service requirement.<sup>179</sup>

An important sub-issue in the debate over legally mandated pro bono is what activities of lawyers should satisfy the pro bono requirement. In addition to legal services for the poor, should legal services without a fee suffice if the services are provided to any public service type organization or to any efforts to improve the law, the legal system, or the legal profession. If other kinds of worthy legal services or efforts will fulfill the mandatory pro bono requirement, it is quite conceivable that mandatory pro bono would add no additional, or perhaps even fewer, legal services for the poor than what currently is being provided by lawyers' voluntary pro bono legal services for the poor. This is possible because if uncompensated services other than legal services for the poor could fulfill the mandatory pro bono requirement, most lawyers might decide to provide these other kinds of uncompensated services.<sup>180</sup>

### *Proposal*

Mandatory pro bono legal services for the poor should be required, with some exceptions, of all lawyers licensed to practice law in any U.S. jurisdiction. However, any lawyer subject to the requirement should have the option to buy-out of the requirement by paying an annual fee to an organization that provides legal services to the poor pro bono. The fee should be the equivalent of the average two-week salary of full-time legal aid lawyers engaged in the provision of legal services for the poor in the state where the licensed lawyer maintains his or her principal office. The law of each state should set forth rules clarifying which legal service providers for the poor lawyers and law firms should pay or allocate their fees. But the fees should be allocated only for the provision of legal services for the poor. Law firms should be permitted to delegate the pro bono service obligation of one or more designated lawyers in the firm to one or more other lawyers in the firm. Exempted from the mandatory pro bono requirement should be licensed lawyers over sixty-five years of age, who no longer are employed or practicing law full-time, and full-time judges.

The shortage of adequate legal services for the poor by lawyers is so great and the adverse consequences of that shortage are so extensive and harmful that every licensed lawyer, with some exceptions, should be re-

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<sup>179</sup> These arguments are considered, along with other arguments, in a book-length analysis by Ronald Silverman on the 1990 Marrero Committee report. Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 956-58 (1991). On the Marrero Committee Report, see also Scully, *supra* note 178.

<sup>180</sup> See Cramton, *supra* note 170, at 1129; Lardent, *supra* note 170, at 100; Luban, *supra* note 170, at 278-79.

quired not just as a professional obligation or moral obligation, but also as a legal obligation, to provide to the poor appreciable needed legal services or the financial equivalent of such services.

*B. Should Efforts be Made to Increase the Volume and Quality of Lawyers' Voluntary Pro Bono Legal Services for the Poor?*

Although mandatory pro bono has failed to be adopted there is extensive support for increasing the number of lawyers who voluntarily provide pro bono legal services for poor people at no fee and for increasing the total volume and quality of such voluntary services by lawyers. But how this should be done raises issues as to what action should be taken and by whom. Further, most proposals for action have encountered substantial resistance from many practicing lawyers.<sup>181</sup> One such issue is whether the rules of professional conduct adopted by the courts include one or more rules setting forth the nonmandatory professional responsibility of lawyers to provide pro bono legal services for the poor who are in need of legal services. In an attempt to resolve this issue, the ABA adopted Rule 6.1 of the Model Rules of Professional Conduct, a rule that has been adopted as a court rule in most all states, although in some states it has been adopted with modifications.<sup>182</sup> Rule 6.1 declares that every lawyer has a professional responsibility to provide legal services to those unable to pay, but this responsibility is only aspirational not legally binding. It then states that “[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year,” and in fulfilling this responsibility should provide legal services at no fee or a substantially reduced fee to any of a wide variety of recipients, including persons of limited means, or should participate in activities for improving the law, the legal system, or the legal profession.<sup>183</sup> Rule 6.1 does,

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<sup>181</sup> On these issues and emphasizing that law firm pro bono programs too often stress quantity over quality and easy wins over social impact, see Deborah Rhode, *Pro Bono! For Whose Good?*, AM. LAW., July 2009, at 56.

<sup>182</sup> For a recent state-by-state listing of each state's pro bono professional responsibility rule, including whether each state had adopted the then current version of ABA Rule 6.1, an earlier version of ABA Rule 6.1, or some other pro bono rule, see *State-By-State Pro Bono Service Rules*, AM. BAR ASS'N, available at <http://www.abanet.org/legalservices/probono/stateethicsrules.html> (last visited Feb. 25, 2011).

<sup>183</sup> The comment to ABA Model Rule 6.1 says that “States, however, may decide to choose a higher or lower number of hours of annual pro bono service.” MODEL RULES OF PROF'L CONDUCT R. 6.1. The New York version of Rule 6.1 includes the following: “Every lawyer should aspire to: (1) provide at least 20 hours of pro bono each year to poor persons; and (2) contribute financially to organizations that provide legal services to poor persons.” N.Y. RULES OF PROF'L CONDUCT § 1200.45(d) (2010) (emphasis added).

Arizona Rule 6.1(c) permits the pro bono work of some lawyers to be allocated to other lawyers. Arizona Rule 6.1(c) provides that:

A law firm or other group of lawyers may satisfy their responsibility under this Rule, if they desire, collectively. For example, the designation of one or more law-

however, state that a substantial majority of the fifty hours of pro bono legal services without fee or expectation of fee should be legal services provided to persons of limited means or for legal services provided to certain kinds of organizations “in matters designed primarily to address the needs of persons of limited means.” A comment to Rule 6.1 adds that: “The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.”<sup>184</sup>

Current ABA Model Rule 6.1 obviously is a compromise solution to the legal and policy issues of whether or not the rules of professional conduct should include a voluntary pro bono rule and, if such a rule is included, what it should provide. A few states have refused to adopt the current version of ABA Model Rule 6.1, but have adopted and retained a less detailed and somewhat less demanding pro bono rule.<sup>185</sup> In an apparent effort to remind lawyers of their pro bono responsibilities and also to induce more lawyers to increase the volume of their pro bono services, a minority of states have added to Rule 6.1, or some other court rule, a requirement that each lawyer annually report to a state agency or to the state bar association the extent of the lawyer’s pro bono activities in the previous year.<sup>186</sup> A few states also have added a buy-out provision to the Rule 6.1 pro bono aspirational responsibility of each lawyer.<sup>187</sup>

Another type of voluntary pro bono legal requirement, one that has been adopted by a small minority of states, is to create a voluntary pro bono program in each locality within the state, each program adminis-

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yers to work on pro bono publico matters may be attributed to other lawyers within the firm or group who support the representation. Other forms of collective activity, if approved by the State Bar, may also satisfy the responsibility.

ARIZ. RULES OF PROF’L CONDUCT R. 6.1.

<sup>184</sup> MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. [12]. The New York version of Rule 6.1 includes the ABA comment on the rule and adds: “[F]ailure to fulfill the aspirational goals contained herein should be without legal consequences.” N.Y. RULES OF PROF’L CONDUCT § 1200.45(d) (2010).

<sup>185</sup> See, e.g., IND. RULES OF PROF’L CONDUCT R. 6.1 (2008); MICH. RULES OF PROF’L CONDUCT R. 6.1 (2008).

<sup>186</sup> See, e.g., ILL. SUP. CT. R. 756(f); NEV. RULES OF PROF’L CONDUCT R. 6.1(b)(1) (2010); WASH. RULES OF PROF’L CONDUCT R. 6.1(b) (2010). The Washington Rule further states that lawyers providing a minimum of 50 hours of pro bono service also shall receive a commendation from the Washington State Bar Association. WASH. RULES OF PROF’L CONDUCT R. 6.1 (2010).

<sup>187</sup> See, e.g., FLA. RULES OF PROF. CONDUCT R. 4-6.1(b) (2010). Florida’s rule states that to fulfill the lawyer’s aspirational responsibility, each lawyer should provide twenty hours of pro bono legal services to the poor, or in lieu thereof, make an annual contribution of \$350 to a legal aid organization. *Id.*; see also MASS. RULES OF PROF’L CONDUCT R. 6.1 (2010) (stating that a lawyer should provide annually twenty-five hours of pro bono legal services to persons of limited means or to “charitable, religious, civic, community, governmental, and educational organizations in matters that are designated primarily to address the needs of persons of limited means” or “contribute from \$250 to 1% of the lawyer’s annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means”).



tered by a local committee, most of whom are local lawyers. Among the legally declared objectives of some such programs is not only to increase the volume of voluntary pro bono legal services in each locality, but also to better evaluate the locality's needs for pro bono legal services.<sup>188</sup> A few states, by court rule, have also sought to increase the volume of lawyer voluntary pro bono by granting a lawyer an exemption from the state's annual continuing legal education requirement proportionate to the hours during the year that the lawyer provided pro bono legal services to poor people.<sup>189</sup>

Bar associations also have made efforts to increase the volume and the quality of pro bono legal services by lawyers. The ABA, for example, operates a Litigation Assistance Partnership Program to match significant pro bono cases with law firms willing and well-qualified to provide the needed pro bono legal services, has issued a Pro Bono and Public Service Best Practices Resource Guide, and, for many years, operated a Child Custody and Adoption Pro Bono Project that enhanced pro bono legal services for children in custody cases that are in need of legal services.<sup>190</sup> Some state and local bar associations also have sought to increase the volume and quality of lawyer voluntary pro bono legal services by providing training programs for lawyers who have volunteered to provide pro bono legal services for the poor and by providing malpractice insurance for some of these lawyers.<sup>191</sup>

### *Proposal*

Efforts to increase voluntary pro bono legal services for the poor by lawyers in each U.S. jurisdiction should continue and be accelerated as a compromise measure until the jurisdiction has adopted a satisfactory mandatory pro bono legal services for the poor requirement that is the same or substantially the same as the mandatory pro bono for lawyers proposal made above in this Article. Among efforts to increase voluntary pro bono legal services for the poor that merit increased support are

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<sup>188</sup> See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4.6-1(a), (c)(2)(A), (c)(2)(E) (2010); see also IND. RULES OF PROF'L CONDUCT R. 6.6(a) (2010).

<sup>189</sup> See, e.g., TENN. SUP. CT. R. 21, § 4.07(c); WASH. ADMISSION TO PRACTICE R. 104 (2009).

<sup>190</sup> For brief descriptions of these ABA activities, see Joanne Martin & Stephen Daniels, *Pro Bono: More than a Professional Responsibility*, in RAISE THE BAR 232-33 (Lawrence J. Fox ed., 2007); Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 5, 16 (2001); ABA COMM. ON PRO BONO AND PUBLIC SERVICE & ABA FAM. L. SEC., ENHANCING THE REPRESENTATION OF CHILDREN IN PRIVATE CUSTODY CASES: RESOURCES AND LESSONS LEARNED FROM THE ABA CHILD CUSTODY AND ADOPTION PRO BONO PROJECT 2001-2008, 7-8 (2008). Most ABA actions concerning lawyer pro bono legal services are supported by the ABA Standing Committee on Pro Bono and Public Services and the ABA Center for Pro Bono.

<sup>191</sup> See RHODE, PRO BONO IN PRINCIPLE AND PRACTICE, *supra* note 165, at 173-77.

adoption of ABA Model Rule 6.1, without any significant modifications, in every U.S. jurisdiction, and more in-person or online information and training services on representation of clients pro bono made available by bar associations to lawyer pro bono volunteers.

#### IV. ISSUES CONCERNING PROVISION OF LEGAL SERVICES OR OTHER BENEFITS FOR THE POOR BY LAW SCHOOLS, THEIR STUDENTS, AND THEIR FACULTY MEMBERS

Some students and faculty members in most U.S. law schools are involved in providing legal or other legal services in furtherance of what the law school or the legal service providers consider worthy objectives, and legal service courses and law student pro bono programs are the principal means of their doing so.<sup>192</sup> One of the major objectives of many legal service courses and many law student pro bono programs is providing legal services or other legal benefits to poor persons. Many law schools also have one or more separate organizations referred to as legal clinics, with a separate staff, including full-time faculty members, some of whom may be tenured and classified as clinical professors.<sup>193</sup>

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<sup>192</sup> In this Article the term “legal service course” is a course offered by a law school in which students provide or assist in the provision of legal services pro bono under the supervision or guidance of one or more law school faculty members or outside lawyers and for which course credit is granted if the student’s legal services and any other course assignments are satisfactorily fulfilled. Legal service courses provide law students opportunities to represent clients, assist others in representing a client, or as the opportunity to lecture groups of persons as to their legal rights or duties, educating school children on some laws or legal institutions, and lobbying members of law making bodies to adopt or reject certain proposed laws. A legal service course also may, and often does, include class sessions for which background reading assignments are made and at which discussions occur on the law and policy issues relevant to the kinds of legal services that the students in the course have been or will be providing. In their course descriptions of legal service courses some law schools use the term legal clinic, legal clinic seminar, workshop, or student laboratory to designate what this Article designates as a legal service course.

In this Article the term “law student pro bono program” is a project of a law school or a student organization in a law school in which students provide legal or other services pro bono in furtherance of law or policy objectives that the law school or the law student organization considers to be highly desirable. Advice or guidance, if any, of students actively involved in providing law student pro bono program services is provided by law school faculty members, staff members of outside organizations, or other law students, usually more experienced law students. Most all law schools will not grant course credit for student participation in a law school pro bono program. In a few law schools, however, course credit may be granted for some student program activities.

<sup>193</sup> On the objectives of law school legal clinics, and also the objectives of many legal service courses, see ASS’N OF AM. L. SCH., COMMISSION ON PRO BONO AND PUBLIC SERVICES OPPORTUNITIES, REPORT 3 (1999), available at [www.aals.org/probono/report.html](http://www.aals.org/probono/report.html); Peter T. Hoffman, *Clinical Scholarship and Skills Training*, 1 CLINICAL L. REV. 93 (1994); Edmund Kitch, *Foreword*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE, U. CHI. LAW SCHOOL CONFERENCE SERIES NO. 20, at 13–20 (Edmund Kitch ed., 1965); *Twelfth Annual Liman Public Interest Colloquium*, YALE LAW SCHOOL, available at [www.law.yale.edu/intellectuallife/8288.htm](http://www.law.yale.edu/intellectuallife/8288.htm) [hereinafter YALE SYMPOSIUM] (last visited Feb. 25, 2010); Stephen

The principal function of many legal clinic staff members is teaching legal service courses, including supervision or guidance of students in the students' provision of legal services. Clinical staff members themselves provide some of the legal services required in many of the litigated cases in which students are also providing some of the legal services. Other functions commonly performed by clinical staff members are developing and administering law student pro bono programs, providing advice or guidance to students in law student pro bono programs, and writing articles for scholarly publications.

The number of legal service courses offered by many law schools has increased since the 1960s, as funding for legal clinics and legal service courses has increased and as support for these courses as helpful means of student legal education has increased.<sup>194</sup> Some law schools in recent academic years have been offering a dozen or more different legal service courses in each academic year, some of these courses offered in

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Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997 (2004); *Panel on Law Schools' Commitments to Clinical Education: Structure, Stature, and Subsidies*, *YALE SYMPOSIUM*, *supra* note 193; see also ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007) (considering, in considerable detail, how law schools could most effectively prepare students for practice with a separate chapter on Best Practices for Experiential Courses and separate consideration of simulation-based courses and legal service courses.); Ass'n of Am. L. Sch., *Report of the Committee on the Future of the In-House Clinic; Report of the Subcommittee on Pedagogical Goals of In-House, Live-Client Clinics*, 42 *J. LEGAL EDUC.* 511 (1992) (setting forth the following goals of law school clinics: developing modes of planning and analysis for dealing with in structural situations; providing professional skills instruction; teaching means of learning from experience; instructing students in professional responsibility; exposing students to the demands and methods of acting in role; providing opportunities for collaborative learning; imparting the obligation of service to indigent clients, information about how to engage in such representation, and knowledge concerning the impact of the legal system on poor people; providing the opportunity for examining the impact of legal doctrine on real life; and providing a laboratory in which students and faculty members study particular areas of the law; and critique the capacities and limitations of lawyers and the legal system).

<sup>194</sup> For a history of legal clinics and legal service courses in the United States, see William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 *AKRON L. REV.* 463, 465–71 (1975); Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 *U. KAN. L. REV.* 509, 513–16 (2003); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1930–34 (2002). See also Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 *TENN. L. REV.* 1099 (1997). Robert MacCrate was chairman of an ABA Task Force that issued an influential report on proposed improvements in legal education, often referred to as the MacCrate report. See ABA SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF THE LAW SCHOOLS* (1979).

For a very comprehensive bibliography of books and articles concerning law school legal clinics and their legal service activities, see J.P. Ogilvy & Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography*, 11 *CLINICAL L. REV.* 1 (Special Issue 2) (2005). For a recent overview of law school clinics at Yale Law School and elsewhere, see *YALE SYMPOSIUM*, *supra* note 193.

both the fall and spring semesters.<sup>195</sup> But a deterrent to many law schools increasing the number of legal service courses has been and will continue to be the financial cost of most such courses. Legal service courses at many law schools are expensive, each more expensive in dollar cost than the average cost of their other law school courses. This is because the average student enrollment in most legal service courses at many law schools is much lower than the average student enrollment in other courses.<sup>196</sup> The lower student enrollment in most legal service courses is essential to enable proper faculty supervision and guidance of students in most such courses. Enrollment limits for some legal service courses at some law schools are increased by, in each such course, assigning more than one faculty member to providing supervision and guidance to students in the students' provision of legal services. But this can increase the financial cost of these courses by the added cost to the law school of multiple instructors in each such course.

The principal objectives of most law school legal service courses are furthering social justice, as by providing legal services to the poor in need of such services; increasing student skills needed in the practice of law, and instilling and intensifying in students the professional and moral norms that they should adhere to as lawyers. Law school legal service courses commonly seek to increase student skills in one or more of the following: drafting legal instruments, counseling clients, interviewing clients and witnesses, engaging in courtroom trial or appellate advocacy, and providing informative and persuasive oral presentations to courts or to interest groups. In some of these courses an important means of increasing student litigation skills is for students to make court appearances on behalf of clients, appearances that are authorized by court rule in many states.<sup>197</sup>

Law student pro bono programs have become increasingly prevalent over time in many law schools and most law schools now have one or more such programs, some law schools many more.<sup>198</sup> These programs

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<sup>195</sup> See, for example, the recent course listings of Cornell Law School, New York University Law School, and Yale Law School. Cornell Law School, despite being located a great distance from any big city, is offering nineteen legal service courses in academic year 2010–11. See *Spring 2011 Course Offerings and Descriptions*, CORNELL LAW SCHOOL, available at [https://support.law.cornell.edu/students/forms/Registrar\\_Course\\_Descriptions.pdf](https://support.law.cornell.edu/students/forms/Registrar_Course_Descriptions.pdf).

<sup>196</sup> On the greater cost of legal service courses due to their smaller numbers of students than most traditional law school courses, see Robert D. Dinerstein, *Remarks at the Panel on Law Schools' Commitment to Clinical Education: Structure, Status, and Subsidies*, in YALE SYMPOSIUM, *supra* note 193.

<sup>197</sup> For court rules authorizing law students to make court appearances on behalf of clients, see, for example, CAL. R. CT. 9.42 (2007); CONN. SUP. CT. R. 3.14–3.21 (2010); and FLA. CT. R. 11-2.

<sup>198</sup> A listing and brief description of these programs in many law schools appears in ABA STANDING COMMITTEE ON PRO BONO & PUBLIC SERVICE AND CENTER FOR PRO BONO, DIRECTORY OF LAW SCHOOL PUBLIC INTEREST AND PRO BONO PROGRAMS, LAW SCHOOL PRO BONO

are indicative of the desire of many law students to engage in a wider range of pro bono activities or to benefit a wider range of persons or causes than what their law school provides in its legal service courses. It also is indicative of a desire by many law students to, on their own, with little or no supervision by law faculty members, other faculty staff, or persons from outside the law school, initiate and implement pro bono projects that the students consider highly desirable. Law student pro bono programs presumably are viewed very favorably by some law school administrations and more such programs encouraged by the administrations because the added programs could avoid the financial cost of adding more legal service courses at their school, courses far more financially costly to their school than most law student pro bono programs.

A. *Should Every Law School Legal Service Course Concentrate on Providing Legal Services to the Poor or for the Benefit of the Poor?*

As the potential of law school legal service courses to be a very helpful and expanded form of legal education has become more widely recognized, many law schools have added legal service courses that concentrate on providing legal services in furtherance of causes that the law schools consider merit support but that have little or nothing to do with benefiting the poor.<sup>199</sup> But given the tremendous shortage of adequate

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PROGRAMS-STUDENT RUN PRO BONO GROUPS AND SPECIALIZED LAW EDUCATION PROGRAMS (2008), <http://www.abanet.org/legalservices/probono/lawschools> [hereinafter ABA PRO BONO DIRECTORY]. The Arizona State College of Law, Columbia University School of Law, and New York University School of Law each have an unusually large number of such programs. *Id.* Among the Arizona State University programs are the Advocacy Program for Battered Women, in which students assist attorneys in providing legal information and referrals to domestic violence victims at eight women's hospitals; the Eloy INS Detention Center Project, in which students teach immigrants detained by the Immigration and Naturalization Service how they can represent themselves in immigration court; and the Student Animal Legal Defense Organization, in which students assist attorneys with research, litigation and lobbying to help companion, wildlife, and laboratory animals. *Id.* at 3-4. Among the Columbia University School of Law programs are the Civilian Oversight of the Police Project, in which a lawyer-supervised group of students advocate on behalf of complainants who have reported police misconduct to the Civilian Complaint Review Board; the Rights Link project, in which students provide legal documents and research to various organizations throughout the world; and the U.S. Attorney's Office Project, in which students assist federal prosecutors in Manhattan by such means as researching and drafting trial and appellate briefs. *Id.* Among the New York University School of Law programs are those of the law school's High School Law Institute, that among other activities, offers courses in constitutional law and criminal law and procedure to 10th and 11th grade students at some New York City public high schools; programs of the law school's Prisoner's Rights Education Project, a student organization that teaches legal research skills to inmates of New York state prisons; and programs of the NYU Youth and Criminal Justice Society that hosts lunch speakers and performs services to further youth and criminal justice. *Id.*

<sup>199</sup> For a definition of "legal service course," see *supra* note 192.

legal services for the poor and the need for more laws that are beneficial to the poor, should law schools be permitted to offer legal service courses in which the services provided are not to or for the benefit of poor people or large groups of people most of whom are poor? The proposal below is a response to this law and policy issue.

### *Proposal*

Law school legal service courses that concentrate on providing legal services to achieving objectives that have little or nothing to do with legal service needs or legal benefits for the poor should be permitted, even encouraged. But to assure that the legal service courses in each law school are providing an acceptable share of legal services to or for the benefit of the poor, a majority of legal service courses in each law school should be courses that concentrate predominantly on providing legal services to or for the benefit of the poor or large groups of people, most of whom are poor. This concentration requirement should be imposed by the law of each state and also as a condition to law school accreditation.

#### *B. Should Law School Faculty Members Be More Frequently and Extensively Involved in Efforts to Benefit Poor People by Being Actively Involved in the Litigation of One or More Major Cases Concerning the Interests of the Poor, Providing Their Services Pro Bono?*

A major case concerning the poor is one that seems likely to result in a final judicial decision that establishes, expands, sustains, or reduces highly important legal rights or benefits of many poor people. Usually each such case is bitterly contested, involves a very controversial law or policy issue, generates considerable interest and often apprehension in partisan interest groups nationally or in a particular state, and is ultimately decided by an appellate court.<sup>200</sup>

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<sup>200</sup> Examples of major litigated cases concerning interests of the poor that are cited, or cited and discussed elsewhere in this Article are *Gideon v. Wainwright*, 372 U.S. 335 (1963), see *supra* note 8 and accompanying text; *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998), see *supra* notes 118–126 and accompanying text; *In re Interest on Trust Accounts*, 588 So. 2d 448 (Fla. 1989), see *supra* note 158 and accompanying text; and *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987), see *supra* note 178 and accompanying text.

Cases focusing on very controversial constitutional issues concerning interests of the poor, particularly very controversial issues as to the scope or meaning of relevant U.S. constitutional concepts, are likely to become future major litigated cases concerning interests of the poor. Examples of possible future such constitutional cases are these: a case as to whether or not poor people have a constitutional right to counsel in civil cases similar to what the U.S. Supreme Court held in *Gideon v. Wainwright* they had in criminal cases, see *supra* note 8; for cases as to whether or not IOLTA programs violate the First Amendment of the U.S. Constitution, see *supra* notes 139–44 and accompanying text; for cases as to whether or not mandatory pro bono for lawyers, if adopted, would violate the U.S. Constitution, see *supra* note 178 and accompanying text; a case or cases as to whether or not each of the statutory restrictions on

Many more major litigated cases concerning the poor should be brought by proponents of increased legal rights and benefits for the poor and who will continue their involvement in the case until it is finally decided. In each such case the pro-interest of the poor proponent should be represented by one or more lawyers committed to furthering the interests of the poor and with the ability, available time, and the needed staff support personnel to assure that at every stage in the litigation proceedings, including the likely appeal to a state supreme court or the U.S. Supreme Court, sufficient efforts are being made to achieve the objective of a final decision favorable to the poor.

More efforts should also be made to provide reliable research data on the variety of possible litigation opportunities concerning the poor and also on identifying which of these possible cases appear to have sufficient prospect of a final decision favorable to the poor that proponents of increased legal rights and benefits for the poor will seriously consider bringing. But even if a particular major litigated case concerning the poor currently appears to have a reasonable prospect of a final decision favorable to the poor, the high prospective financial cost to the proponent of representation by a private law firm in a major litigated case concerning the poor prevents many proponents of increased legal rights and benefits for the poor from bringing such a case. This high prospective financial cost of a private law firm is due principally to the extensive time that the firm's lawyers and support staff personnel in all probability must spend in fully and properly representing the proponent at each stage of the proceeding, including likely appeal to one or more appellate courts, before the case is finally decided, law firm personnel time that the client must pay for.

The high financial cost to the proponent of representation by a private law firm in a major litigated case concerning the poor occasionally can be avoided by a legal aid, public defender, or other nonprofit organization whose activities are concentrated on providing legal services pro bono to many poor people, providing, at the request of the proponent, all the legal services needed to fully and properly represent the proponent who brings a major litigated case. But seldom will any such organization agree to do so, or as an alternative become the proponent as well as legal service provider in furthering the interests of the poor in a major litigated case concerning the poor. The reason that these organizations generally avoid extensive involvement in providing legal services in such a case is

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recipients of Legal Service Corporation funding is constitutional, see *supra* notes 92–94 and accompanying text. An example of a possible future non-constitutional major litigated case concerning interests of the poor is a case as to whether or not judges should be prohibited from providing any assistance to pro se parties because judges providing any such assistance violates judges' obligation of impartiality and fairness. See *infra* note 225 and accompanying text.

that the involvement would require such extensive allocation of their lawyers and other personnel as to require a very substantial reduction in the number of poor people in need of legal services to whom they will provide representation or other legal assistance. It is also very unlikely that any private law firm lawyer who occasionally provides pro bono legal services to poor persons will agree to provide pro bono all or a substantial portion of the legal services needed in representing a proponent of increased legal rights and benefits for the poor if the proponent brings a major litigated case concerning the poor. Such an agreement is unlikely because the representation would probably necessitate the lawyer, for many months, greatly reducing the legal services that he or she provides to fee-paying clients.

There obviously has been, and continues to be, a shortage of both proponents of increased legal rights and benefits for the poor who will bring such cases and legal service providers who will fully and competently provide the legal services, including staff support services, needed in representing these proponents on terms the proponents will accept. There is, however, a potential source both of more such proponents and more such legal and staff support service providers. This source also could be very helpful in providing legal and staff support services pro bono to some defendants in major litigated cases concerning the poor who are opposing plaintiffs' efforts to eliminate or erode some legal rights or benefits of the poor. The source is U.S. law school faculty members who favor increased legal rights and benefits for the poor, probably a majority of faculty members at most every U.S. law school. Each of these faculty members is capable of competently providing or competently assisting others in providing at least some of the legal services needed in litigating a major case concerning the poor. Even law school faculty members who never graduated from a law school or never were students at a law school have the capability of assisting in providing at least some of the staff support services needed in litigating a major case concerning the poor and are legally authorized to do so. Extensive and protracted faculty member participation in a particular major case concerning the poor is more likely to occur, and if it does occur, more likely to be most effectively and competently performed if multiple faculty members at one or more law schools collaborate and share the service providing obligations.

There are, of course, potential costs to a faculty member who becomes extensively involved in the litigation of a major case concerning the poor, especially if the faculty member's services are provided pro bono as they often would be. There also are potential costs to the law school employing the faculty member if the faculty member becomes extensively involved in the litigation of a major case concerning the



poor. But as to both faculty member and law school employing the faculty member the advantages generally outweigh the disadvantages of extensive faculty member involvement in a major case concerning the poor if the objective of the faculty member's involvement in providing the services is furthering the interests of the poor.<sup>201</sup>

### *Proposal*

Many more U.S. law school faculty members who favor increased legal rights and benefits for the poor should be involved in representing or assisting others in representing parties in major cases concerning the poor whose objective as parties is obtaining a final decision in a case that is favorable to the interests of the poor. Also, services provided by such faculty members in representing or assisting others in representing such parties in a major case concerning the poor should be offered and provided pro bono if this would substantially increase the likelihood that a proponent of the interests of the poor would bring such a case or substantially increase the likelihood that such a party, whether plaintiff or defendant, would be willing or able to fund or acquire the funding from others to facilitate the case to be adequately litigate. More law school faculty members also should be involved in persuading individuals or organizations who favor increased legal rights or benefits for the poor, including other law school faculty members, to bring, or join with them in bringing, a major litigated case concerning the poor with the objective of obtaining a final judicial decision increasing the legal rights or benefits of the poor.

The above is a policy proposal not a legal proposal, and its implementation does not require extensive, new, or revised laws. There are, however, some changes in the law that could and should be made. If made, these changes would help somewhat in implementing the above proposals. Examples of such changes are adoption in some or all states of a mandatory pro bono by lawyers court rule,<sup>202</sup> increased funding by the state legislatures of each and every state university law school in their state,<sup>203</sup> and adoption of laws that would enable lawyers licensed to prac-

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<sup>201</sup> For further consideration of costs and benefits of law faculty members becoming involved in providing legal services in litigated cases concerning the poor see *infra* Part IV.C. That consideration of costs and benefits is focused on faculty member services provided pro bono would also be relevant to most any faculty member services in furthering interests of the poor in any major litigated case, even if the faculty member's services were not being provided pro bono.

<sup>202</sup> On the benefits of such a mandatory pro bono requirement and a proposal on mandatory pro bono, see *supra* Part III.A.

<sup>203</sup> This could result in more state law school faculty members' teaching obligations being reduced with the consequences that more faculty members favorable to increased legal rights and benefits for the poor would become involved in a major litigated case concerning the poor with the objective of helping achieve a final decision favorable to the poor.

tice law in another state but not in the state where a particular case is pending to more quickly and more assuredly become legally authorized to represent a party in the particular case.<sup>204</sup>

There is a great variety of helpful and merited actions that could be taken by law schools and proponents of increased legal rights and remedies for the poor to increase prospects of the proposal just above being implemented or more extensively and effectively implemented. Among such actions are: advocating changes in the law that could be helpful in implementing the above proposals; much more extensive publicizing of the potential of possible future major cases of benefit to the poor and the potential of some possible future major cases of harm to the poor; much more extensive publicizing of the potential of law school faculty members who favor increased legal rights and benefits for the poor to make a contribution, often a very substantial contribution, to furthering or preventing the deletion of major legal rights or benefits of the poor by becoming actively involved in representing or assisting others in representing parties in major cases concerning the poor when the objective of the parties being represented is achieving a final judicial decision beneficial to the poor; more law schools facilitating and encouraging their faculty members who favor increased legal rights and benefits for the poor to become involved or more extensively involved in representing or assisting others in representing parties in major cases concerning the poor when the objective of the parties being represented is achieving a final decision beneficial to the poor; more faculty members who favor increased legal rights and benefits for the poor attempting to persuade additional faculty members to join them in representing parties in a major litigated case concerning the poor, or assisting others who are representing such parties, when the objective of the parties being represented is achieving a final decision favorable to the poor; and more faculty members who favor increased legal rights and benefits for the poor attempting to persuade additional faculty members to join them in bringing a major litigated case concerning the poor the objective of which will be a final decision increasing the legal rights or benefits of the poor.

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<sup>204</sup> Such laws would enable more U.S. faculty members who favor increased legal rights and benefits for the poor to more quickly and assuredly become involved in representing parties in major litigated cases, whose objective is a final decision favorable to the poor, concerning the poor.

C. *Should Each Law School Require All Its Faculty Members, Including Those Who Have Never Been Licensed to Practice Law, to Perform Annually or Periodically at Least a Certain Designated Minimum Number of Hours Providing, or Assisting Others in Providing, Pro Bono Legal Services for the Poor, for Other Deserving Clients or in Furtherance of Other Worthy Causes?*

Two law schools have reported that they have imposed such a requirement on their full-time faculty members.<sup>205</sup> Some law schools have reported that they “encourage” their faculty members to engage in pro bono activities but apparently impose no sanction on any faculty member who does not do so.<sup>206</sup>

One argument in support of such a requirement is that more such pro bono legal services are very much needed and all law school faculty members should help fulfill this need. Even those law school faculty members who never were licensed to practice law or whose license to practice law has expired and not been renewed can and arguably should be involved in helping fulfill this need as they can be of help by providing assistance to licensed lawyers who are principally responsible for providing the legal services. The law school requirement that all their full-time faculty members annually provide a certain designated amount of time each year to providing pro bono legal services to the poor or other deserving clients or causes also would constitute a message to law firms and corporate law departments as to what they should be doing—if we, the law schools, have such a pro bono requirement, you should too. Another argument in support of the requirement is that if faculty pro bono activities are made known to students—and they should be—this would be a reminder to the students of a pro bono obligation that they should assume, and competently seek to fulfill both while they are law students and thereafter. Also, the likely diversity of faculty pro bono endeavors would provide law students with varied examples of the dif-

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<sup>205</sup> The two law schools are Chapman University School of Law (no set number of pro bono service hours required); and Charleston School of Law (30 hours of pro bono service hours required every three years). ABA. PRO BONO DIRECTORY, *supra* note 198.

<sup>206</sup> On Harvard Law School, the ABA report includes the following:

It is expected that all members of the regular, full-time teaching faculty will perform, on the average, at least a similar amount of pro bono activity to what is required of students (40 hours). Since all members of the faculty are not practicing lawyers, the qualifying services for faculty members should be rendered to the listed organizations in the fields of their respective expertness. The aspirational goal with respect to faculty service is included to stress the professional value of pro bono service. Since there are no sanctions or reporting requirements, faculty members seeking to comply are expected to follow their own common sense in deciding to their own satisfaction whether they had met the guidelines.

*Id.*

ferent kinds of pro bono needs, and what is required to fulfill those needs.

An argument against the above requirement is that it could require many law school faculty members to divert time from teaching and scholarly research and writing that is of greater importance to them than their pro bono legal services would be. This faculty time diversion also could be costly to the law schools, as their teaching and scholarly resources would be reduced or to prevent this resource reduction they would have to employ and pay additional faculty members. If the law schools avoided these costs to them by requiring all their full-time faculty members to engage in pro bono activities in addition to what had been, prior to the requirement, the time expected of them in teaching and scholarly research and writing, this could extensively and unjustifiably interfere with the faculty members' family, recreational or other non-work related activities.

### *Proposal*

No law school should require *all* its full-time faculty members to annually or periodically provide any amount of time to providing or assisting others in providing pro bono legal services for the poor, for other deserving persons or for worthy causes. But each law school should, to the extent it considers it reasonable to do so, require certain of its full-time faculty members to regularly provide pro bono legal services for the poor, other worthy individuals, or worthy causes or assist others in doing so. Also, each law school, to the extent it considers it reasonable to do so, should encourage each of its faculty members, full-time and part-time, to regularly provide pro bono legal services for the poor, other worthy individuals or worthy causes or assist others in doing so, but no faculty member should be censured for not doing so.

The above proposal, if adopted, in effect imposes a mandatory pro bono service obligation on all full-time faculty members of a law school if reasonable exceptions are made, each law school having considerable discretion as to what those exceptions would be. Examples of faculty members who it presumably would be reasonable for each law school to exempt from both the service obligation and law school encouragement obligation are the following: faculty members whose involvement in pro bono service endeavors would seriously encroach on their very demanding and time-consuming law school administrative duties; faculty members currently involved in major very demanding and time-consuming legal research projects, projects that would be seriously handicapped if the faculty members involved in them diverted time to pro bono endeavors; and part-time faculty members, with non-law school employers, em-

ployers who would greatly resent any diversion of their employees' time to pro bono endeavors.

*D. As a Prerequisite to Graduation Should Every Law School Require that Each of Its Students, while Enrolled as a Law Student, Have Performed a Designated Number of Hours of Pro Bono Services for the Poor, for Other Deserving Clients or in Furtherance of Some Other Worthy Cause?*

A minority of law schools have considered participation of law students in some form of pro bono activity, whether in legal service courses or some other pro bono programs, so desirable that they have adopted a requirement that as a condition to graduation each law student must have engaged in a set number of hours of pro bono services.<sup>207</sup> An obvious benefit of such a requirement is that it increases somewhat needed legal services for deserving clients or worthy causes. By personally involving more law students in performing pro bono services it also provides opportunities for more law students to become more knowledgeable about the legal needs of the socially disadvantaged and the procedures involved in helping to fulfill those needs. The law schools could also benefit by a mandatory pro bono requirement as it would be viewed very favorably by many of their alumni and by many other possible funding donors.

An argument in opposition to law schools imposing a mandatory pro bono requirement on their students is that the requirement would be deeply resented by some law students and this resentment could result in opposition by these students to pro bono legal services, mandatory or nonmandatory, opposition that could carry over and persist after they became lawyers. Another anti-mandatory student pro bono service requirement argument is that as pro bono services can be very time con-

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<sup>207</sup> Of the 176 law schools that responded to a recent ABA survey of law school pro bono and public interest programs, twenty-one law schools as of 2008 required, as a condition to graduation, that each student provide a certain number of hours of pro bono legal service; the hours varied among the schools from twenty to seventy. The students may not be paid or receive course credit for these services. For a listing of the twenty-one schools, see ABA PRO BONO DIRECTORY, *supra* note 198. Thirteen additional law schools reported that they had a public service requirement for their students as a graduation requirement and four law schools reported that they had a community service requirement for their students as a graduation requirement. *Id.* On the pros and cons of mandatory pro bono for law students, see RHODE, PRO BONO IN PRINCIPLE AND PRACTICE, *supra* note 165 at 49–54; Committee on Legal Assistance, ASSN. of the Bar of the City of N.Y., *Mandatory Law School Pro Bono Programs: Preparing Students to Meet Their Ethical Obligations*, 50 THE RECORD 170 (1995) (this report is in favor of law schools requiring student participation in pro bono); ASS'N OF AMERICAN LAW SCHOOLS, COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES, LEARNING TO SERVE 3–4 (1999), available at <http://www.aals.org/probono/report.html> (stating that “[o]ur central recommendation is that law schools make available to all law students at least once during their law school careers a well-supervised pro bono opportunity and either require the students’ participation or find ways to attract the great majority of students to volunteer”).

suming; requiring such services on some students could be unduly and unjustifiably burdensome on them. Examples of students on whom the burden could be unduly and unjustifiably burdensome are many part-time law students who hold full-time jobs while enrolled as law students and law students committed to personally providing very extensive time to care of their children when they, the parents, are enrolled as law students.

### *Proposal*

There should be no legal or accreditation requirement that any law school impose a designated number of hours or other mandated pro bono requirement of any kind on any of their students while enrolled as law students. Whether or not to adopt a mandated pro bono service requirement of any kind on their students should be discretionary with each law school.

How best to balance the arguments for and against a mandatory pro bono requirement on law students can vary among law schools so the decision as to whether or not to adopt, or adopt and sustain, such a requirement should be discretionary with each law school. But every law school should be fully aware of the potential advantages of adopting such a requirement, and periodically should consider whether or not to adopt such a requirement, or, if adopted, to expand the number of hours of pro bono services that are required.

## V. ISSUES CONCERNING ASSISTANCE TO POOR PERSONS REPRESENTING THEMSELVES PRO SE IN CASES BEFORE THE COURTS, OR IN MATTERS THAT MAY COME BEFORE THE COURTS

As the number of poor persons in need of legal services who are unable to obtain the needed legal services has escalated in recent years,<sup>208</sup> more poor persons are representing themselves pro se in cases before the courts or in matters likely to come before the courts. Pro se representation by poor persons is particularly prevalent in litigated domestic relations, child custody, landlord-tenant, small claims, and minor criminal cases.<sup>209</sup> In some of these cases both the plaintiff and defendant are pro se parties. Many persons who are able to pay for needed legal services represent themselves pro se in cases before the courts or in matters that may come before the courts, and the usual motivation for their doing so obviously is to avoid paying for the needed legal services. Un-

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<sup>208</sup> For major reasons for this see *supra* notes 10–11 and accompanying text.

<sup>209</sup> DEBORAH L. RHODE, ACCESS TO JUSTICE 82 (2004) [RHODE, ACCESS TO JUSTICE]; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047–69 (1988).

doubtedly, however, a high proportion of pro se parties are poor persons who represent themselves pro se not only because they cannot afford to retain needed legal service providers but because they also were unaware of available legal aid or other no cost to client legal service providers, or because those providers were overbooked so could not provide the services needed and requested of them.

In many U.S. communities limited assistance by some government or private nonprofit organizations is made available at no fee or only a modest fee to parties requesting assistance and who are representing themselves pro se in cases, or preparing to representing themselves pro se in cases.<sup>210</sup> Obvious objectives of each of these forms of assistance is enabling pro se parties to be more knowledgeable and competent to represent themselves and reducing the risk of an adverse decision by the court because of the pro se parties' lack of knowledge or competence to provide or properly provide some essential services that may be needed in their representation. A substantial percentage of those who seek such assistance are poor persons representing themselves pro se or who are preparing to do so.<sup>211</sup>

Much of this assistance is provided by pro se assistance centers. Each of these centers, often referred to as clinics, provide one or more forms of assistance to pro se parties at no fee or only a very modest fee—some of the centers limit their assistance to matters before a particular court or concerning a particular field of law.<sup>212</sup> There are centers that also make helpful information available to pro se parties at kiosks, by telephone, or online.<sup>213</sup> Some of the pro se assistance centers have been established by courts and are staffed by court personnel, some of them also by volunteer lawyers whose assistance is provided pro bono.<sup>214</sup> Bar associations or legal aid organizations have established and operate most

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<sup>210</sup> See Margaret M. Barry, *Assessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them*, 67 *FORDHAM L. REV.* 1879, 1891–1918 (1999).

<sup>211</sup> See *id.* at 1884.

<sup>212</sup> On the pro se services provided by particular pro se assistance centers, see JONA GOLDSCHMIDT ET AL., *MEETING THE CHALLENGE OF PRO SE LITIGATION, A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* 73–104 (1998); Brenda S. Adams, “*Unbundled Legal Services*”: *A Solution to the Problems Caused by Pro Se Litigation in Massachusetts Courts*, 40 *NEW ENG. L. REV.* 303, 322–32 (2005); Barry, *supra* note 210, at 1891–1918; Engler, *supra* note 209 at 2057–69; Amanda Bronstad, *Federal Courts React to the Tide of Pro Se Litigants*, *NAT’L. L.J.* 6 (Mar. 9, 2009); Judith L. Maute & Cheryl Lynn Wofford Hill, *Delivery Systems Under Construction: Ongoing Works in Progress*, 72 *U. MO. K.C. L. REV.* 377, 394–407 (2003); Frances H. Thompson, *Access to Justice in Idaho*, 29 *FORDHAM URB. L. REV.* 1313 (2002).

<sup>213</sup> See Barry, *supra* note 210, at 1895, 1915; Margaret B. Flaherty, Note, *How Courts Help You Help Yourself, the Internet and the Pro Se Litigant*, 40 *FAM. CT. REV.* 91 (2002); Maute & Wofford, *supra* note 212, at 412–20.

<sup>214</sup> See, e.g., Goldschmidt et al., *supra* note 212, at 68–85. Some of the court-initiated programs charge modest fees for some of the services they provide pro se parties, i.e., program

of the other centers, many of them with staffing help from volunteer lawyers whose assistance is provided pro bono. Funding of the centers comes principally from the organizations operating them. Assistance to pro se parties at no fee or only a modest fee also is provided by other legal service providers unaffiliated with or not acting for a pro se assistance center, among them some law school legal clinics, some legal aid agencies, and some other legal service organizations whose activities are concentrated principally on providing legal services to the poor. This assistance is provided at no fee or only a very modest fee.

In addition to limited assistance to pro se parties by pro se assistance centers, limited assistance to pro se parties is provided by many judges when pro se parties appear before them. There is, however, considerable variation among judges as to what assistance, if any, each judge will provide pro se parties when it becomes apparent that the parties before them are in need of help. Judges who provide assistance to pro se parties generally will do so irrespective of whether or not the pro se parties are rich or poor, but as a substantial percentage of pro se parties are poor many pro se parties who are poor obviously are receiving assistance from judges. Other court personnel, particularly court clerks, in the course of their daily duties, also often provide helpful information about judicial proceedings to pro se parties before the court to which the court personnel are assigned, but they generally are prohibited from providing legal advice.<sup>215</sup> Many such court personnel also assist some pro se parties by selecting and filling in needed court forms or advising the parties on how to fill in the forms.<sup>216</sup> If a court is very understaffed in numbers of judges and as a result its judges are very overworked, the judges are less likely to provide assistance to pro se parties if doing so would add to the judges' workload. Extensive understaffing of court clerks and comparable court personnel assigned to a court is likely to have a similar result—less assistance by such court personnel to pro se parties if this would add to the court personnel's workload. Judges also may refuse to provide assistance to pro se parties if doing so would, they believe, be unjustifiably prejudicial to the pro se parties' opponents and thereby violate the impartiality and fairness obligation of judges.<sup>217</sup>

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kiosk user fees of ten dollars by a program in Utah, up to twenty dollars by a program in Arizona. *Id.* at 77.

<sup>215</sup> See Engler, *supra* note 209, at 2026–27, 2036–40; RHODE, ACCESS TO JUSTICE, *supra* note 209, at 83. On the ambiguity of the concept of legal advice when provided by court personnel to parties in cases before the court, see John M. Graecen, "No Legal Advice from Court Personnel" *What Does That Mean?*, 34 JUDGES J. 10, 14–15 (1995); see also Goldschmidt et al., *supra* note 212, at 41–45.

<sup>216</sup> See Goldschmidt et al., *supra* note 212, at 35–40.

<sup>217</sup> On the impartiality and fairness obligation of judges see, for example, MODEL CODE OF JUDICIAL CONDUCT Canon 2, Pt. A & B (2007), which have been adopted as a court rule by courts in many U.S. jurisdictions.



Assistance to pro se parties raises a number of issues. One issue is should pro se parties who can afford to retain counsel, but chose not to do so, receive assistance from pro se assistance centers or others at no charge? Arguably this assistance is an undeserved subsidy. Another issue is should legal aid and other organizations that concentrate on providing legal services for the poor increase the number of poor people they can assist by providing only limited legal services to many of these poor persons, those assisted providing the remaining services pro se. There also is an issue as to whether judges should be authorized, and if authorized required, to provide needed assistance to pro se parties. The trend has been not only to authorize judicial assistance to pro se parties but to expand and clarify the authorized judicial assistance.<sup>218</sup> Considerable uncertainty, however, remains as to exactly which pro se party assistance efforts by judges are authorized and which are not. Assistance to pro se parties by court personnel also raises troublesome issues: whether court personnel are sufficiently knowledgeable, competent, and qualified to provide the assistance; and if they provide such assistance, whether they are benefiting pro se parties and thereby violating the impartiality required of court personnel as well as judges.

- A. *What Assistance, If Any, Should Pro Se Assistance Centers, Law School Legal Clinics, and Legal Aid and Other Nonprofit Legal Service Organizations Whose Activities are Concentrated Principally on Providing Legal Services for the Poor Provide Affluent Pro Se Parties Who Choose to Represent Themselves in Cases Before the Courts or in Matters that May Come Before the Courts and in Doing so Request Assistance from One of the Above Organizations? Also, If Any of the Above Organizations Should Provide Assistance to Affluent Pro Se Parties Should the Assisting Organization Have the Option of Charging the Pro Se Party a Modest Fee for the Assistance Provided, a Fee that if Charged Would Be No Greater than the Fee the Provider Charges Poor Pro Se Parties for Whom the Assisting Organization Provides Similar Assistance?*

Arguably any assistance to affluent pro se parties by any of the above organizations is an unjustified subsidy, especially if the assistance would add to the financial costs of the assisting organization or reduce the volume or quality of the assisting organization's other activities. A counter argument is that the right of self-representation is such an important legal right that all of the above organizations, when competent and legally authorized to do so, should provide assistance requested of them

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<sup>218</sup> On this trend, see Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367 (2008).

by pro se parties representing themselves or seeking to represent themselves in cases before the courts and these organizations should do so irrespective of how poor or affluent any of the requesting pro se parties may be. Moreover, if a fee is charged by any of the above organizations to pro se parties for assistance provided, the fee should be modest and be the same for rich or poor persons receiving similar assistance.

### *Proposal*

Affluent pro se parties in cases before the courts or in matters that may come before the courts should receive assistance at no fee or only a modest fee when they request assistance from assistance centers, law school legal clinics, or legal aid and other legal service organizations whose activities are concentrated principally on providing legal services for the poor if the assistance can be provided at little or no cost to the assisting organization in time or money,<sup>219</sup> and if the assisting organizations providing the assistance are competent and legally authorized to provide the assistance. If, however, assistance to affluent pro se parties would result in substantial cost to the assisting organization in time or money, the assisting organization should have the option to accept or reject requests by affluent pro se parties for assistance. If requests are accepted, the option to charge an appropriate fee for the assistance provided should be available. The fee should be comparable to what a lawyer in private practice would charge an affluent client for similar services. An affluent pro se party is a party with sufficient available financial resources to pay for any and all legal services that would be needed if the pro se party chose not to proceed pro se in a case before a court, or in a matter that may come before a court, but instead retained competent legal counsel to provide all needed legal services with the expectation of paying counsel the usual market rate for the legal services provided.

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<sup>219</sup> Examples of assistance to affluent pro se parties requesting assistance from one of the designated nonprofit organizations that may require little or no time or money cost to the assisting organization are: an assisting organization employee, following a brief discussion with a pro se party, referring the pro se party to a source of needed information available by telephone, online or at nearby kiosks, or by providing the pro se party with a needed legal form for the pro se party to fill out and helping the pro se party in filling out the form. On information that may be available by telephone, online, or at nearby kiosks see *supra* note 213 and accompanying text. Some relevant legal advice on the law also might be provided to an affluent pro se party at little or no cost, such as whether or not postponement of a set court date is possible or the statute of limitations period applicable to a particular type of contract breach, if the period is clearly set forth in a statute and is not being challenged. Some of the above organizations also may consider it desirable to provide assistance to a pro se party despite the high cost in time or money in doing so. For example, a law school legal clinic may do so because the assistance involves an unusual legal problem and, even though assisting the pro se party would require extensive expenditure of time by clinic students and faculty members, the assistance would provide educational benefits to students.

The right of all persons to represent themselves pro se is such an important right that many nonprofit organizations should be active in providing assistance to affluent pro se parties who choose to represent themselves in cases before the courts or in matters that may come before the courts. The above proposal briefly outlines when, and at what fee, if any, certain kinds of nonprofit organizations should be active, or have the option of being active, in assisting affluent pro se parties in cases before the courts or in matters that may come before the courts. The proposal seeks to balance the interests of affluent pro se parties and their right to self-representation with the interests of others who are served by the nonprofit organizations, many of whom are poor persons in need of legal representation and with a right to legal representation.

*B. Should Many More Poor Persons in Need of Legal Services Receive Only Limited (Unbundled) Legal Services from Legal Aid and Other Organizations that Concentrate on Providing Legal Services for the Poor, Those Poor Persons Receiving Only Limited Legal Services Providing the Remaining Services Pro Se?*

The provision of limited legal services to pro se parties is often referred to as unbundling of legal services, especially when engaged in by lawyers in private law practice who are paid for the limited services provided.<sup>220</sup> Unbundling is an increasing form of legal services by lawyers who are paid for the limited services provided and some organizations that concentrate on providing legal services to the poor are also providing some unbundled legal services to their clients at no fee or only a very modest fee. When legal services are unbundled the lawyer provides only one legal service, or frequently several legal services, the client providing the remaining services pro se. A legal service that the lawyer commonly provides in unbundled situations is the drafting of documents to be presented to the court. Among other services, one or more of which the lawyer may perform in unbundled situations, are representing the client in a trial or other proceedings before a judge, negotiations with the opposing party, legal research, obtaining factual evidence, and legal advice. When legal services are unbundled the lawyer often is legally required to file an appearance.<sup>221</sup>

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<sup>220</sup> On unbundling see FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES, A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000) [hereinafter UNBUNDLING]; FORREST S. MOSTEN, *Unbundling Legal Services, Serving Clients Within Their Ability to Pay*, 40 JUDGES J. 15, 17 (2001); RHODE, ACCESS TO JUSTICE, *supra* note 209, at 100–01. For statistical data on the volume of pro se representation in cases before the courts in recent years see Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 988–91 (2007).

<sup>221</sup> Failure of a lawyer to file an appearance with the court when drafting pleadings or other documents for a pro se party when the documents are filed in court is often referred to as

The principal argument in support of all legal aid and other organizations that concentrate on providing legal services to the poor providing only unbundled legal services to many or more of their clients, the clients providing the remaining services pro se, is that this would enable each of these organizations to very substantially increase the number of poor persons to whom they could provide at least some legal services. Further, it would result in far fewer poor persons that the organizations would have to deny providing any legal services.

A counter argument is that many of the pro se clients would be much less effective in providing the remaining legal services than if the assisting organization provided all the needed legal services, and as a result many more pro se clients would fail to achieve their litigation objectives.<sup>222</sup> This could mean that on balance it would be preferable if the legal services organization provided full representation to fewer poor clients. Another counter argument is that the pro se clients receiving limited legal services could frequently become effective in providing the remaining legal services if the assisting organization also held sufficient advisory or training sessions with the pro se clients. But, for these sessions to enable the clients to effectively provide the remaining legal services it frequently would be necessary for the advisory and training sessions to be more time consuming and costly to the assisting organization than if the organization provided full representation to the clients.

### *Proposal*

Most legal aid and other organizations that concentrate on providing legal services to the poor should provide only limited (unbundled) legal services to many of the poor persons in need of legal services who have applied to the organizations for assistance, those poor persons receiving

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“ghostwriting,” as the judge usually assumes that the pro se party drafted the documents without assistance, and the judge may be more lenient in determining the meaning and adequacy of the documents. On this leniency, see Fern Fisher-Brandveen & Rochelle Klemptner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1122 (2002); John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687 (1989). *But see* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002) (concluding that ghostwriting does not give pro se litigants an undue advantage.); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-4461 (2007) (concluding that ghostwriting does not violate any of the ABA Model Rules of Professional Conduct and states that the Committee does not share the concern that ghostwritten pleadings or other ghostwritten documents filed in court result in the pro se parties receiving an unfair benefit).

Unbundling also increases the risks of malpractice liability of lawyers providing unbundled legal services to pro se parties. *See* Fisher-Brandveen & Klemptner, *supra* note 221 at 1114–16; Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 306–08 (1997); Mosten, *supra* note 220, at 16–18.

<sup>222</sup> *See* Rothermich, *supra* note 221, at 2708–19.

only limited legal services, and providing the remaining legal services pro se. If an organization has been providing such limited legal services to some poor applicants for legal services, with the applicants expected to provide the remaining services pro se, the organization should increase the number of poor persons to whom the organization is providing only limited legal services. However, before any of the organizations offer to provide such limited legal services to any poor applicant, organization personnel should have determined, following a sufficiently thorough evaluation of the applicant's capability and legal needs, that there is a sufficient probability that the poor applicant is able to competently provide the remaining legal services pro se. If it is determined, following the evaluation, that the applicant is not sufficiently competent, the organization should, if it seems merited and reasonable for the organization to do so, provide instruction and training to the applicant directed at making the applicant sufficiently competent to provide the remaining legal services pro se. If the applicant ultimately is determined not to be sufficiently competent to provide the remaining legal services pro se, the organization should offer to fully represent the applicant, refer the applicant to another legal service provider that provides legal services to poor people, or regretfully reject the applicant's request for further assistance. Even some public defender and other organizations that concentrate on providing legal services to poor persons charged with crimes may have such a shortage of staff that they cannot fully and adequately represent all the poor defendants that they are expected to represent and there is no other available qualified source that will do so.<sup>223</sup> If a criminal defense organization for the poor encounters such a situation it should give serious consideration to providing limited legal services to some defendants, following a sufficiently thorough evaluation of each such defendant's capability and defense prospects, with the defendants providing the remaining services pro se.

The provision of limited legal services by lawyers to clients who provide the remaining legal services pro se is permitted under the widely adopted ABA Model Rules of Professional Conduct, Rule 1.2(c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Rule 1.2(c) is applicable whether the lawyers are paid for the legal services they provide or provide the services at no fee. Some of the other widely adopted ABA Model Rules of Professional Conduct also are particularly relevant to lawyers who provide limited legal services to pro se clients and specify what conduct by these lawyers may be necessary to

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<sup>223</sup> On the constitutional right of defendants in criminal cases to counsel and the shortage of counsel in many jurisdictions for poor persons who are defendants in criminal cases see *supra* notes 8, 11, and accompanying text.

comply with the rules. Among such rules are Rule 1.1 which provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”; Rule 1.3 which provides that “[a] lawyer shall act with reasonable diligence in representing a client”; and Rule 1.4(b) which provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>224</sup>

C. *What Assistance, If Any, Should a Judge Provide Pro Se Parties in Cases Assigned to the Judge and Should a Pro Se Party’s Economic Status be a Relevant Consideration by a Judge in Determining Whether or Not the Judge Will Provide Assistance to a Pro Se Party, How Much Assistance, or the Kind of Assistance?*

An argument has been advanced that if literally applied without exception could resolve each of the issues just above. The argument is that a judge should provide no assistance to any pro se parties, poor or affluent, because doing so would constitute a violation of the judge’s very basic and fundamental duty of impartiality and fairness. This duty is very succinctly set forth in Rule 2.2 of the ABA Model Code of Judicial Conduct that has been adopted by many U.S. jurisdictions. Rule 2.2, entitled Impartiality and Fairness, provides that “[a] judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.”<sup>225</sup> A counter argument to the impartiality and fairness argument is that if applied without exception or qualification to all cases assigned to a judge in which there are one or more pro se parties in need of assistance that the judge could provide, the result would be that many of these pro se parties would be unable to represent themselves pro se adequately—a very fundamental access to justice right. This argument is particularly convincing if the pro se parties are poor, were unaware of help that might be available from legal aid or other providers of legal

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<sup>224</sup> Each of these rules, including Rule 1.2(c), is highly ambiguous as to what the term “reasonable” means. Comments to some of the rules are somewhat helpful in clarifying the meaning of “reasonable.” See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 7; R. 1.3 cmt. 3; R. 1.4 cmt. 5 & 6.

<sup>225</sup> Recently-added comment 4 to Canon 2, Rule 2.2, however, states this: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.2 cmt. 4 (2007); see also MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.3A (adding the following to judicial duties that obviously are applicable to assistance by a judge to pro se parties: “A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”).

On arguments for and against judges providing assistance to pro se parties, with many case citations, see Engler, *supra* note 209 at 2012–15, 2028–31; see also Engler, *supra* note 218 (stressing the recent trend toward increased support for a more active judicial role in providing assistance to pro se parties).

assistance to the poor or had sought help from such providers but were denied needed assistance because the providers were accepting no additional clients due to lack of sufficient staff. An argument against a judge assisting pro se parties on some aspects of some cases is that the assistance could result in the final decision in each such case being delayed, a result that might be unacceptable because it would be very disadvantageous to the assisted pro se parties' opponents.<sup>226</sup> It also could result in increasing the case overload of judges in some high-volume courts, such as some small claims, housing, or family courts in some big cities—courts before whom many of the parties are self-represented and in need of assistance in doing so. One solution to the case overload problem is more judges for courts with high case volumes and a shortage of judges.<sup>227</sup> However, it seems inevitable, due largely to funding shortages, that many high case volume U.S. courts not only will continue to have too few judges, but that the shortage may become even more acute in the future.

Determining what the proper solution should be to the issue of what assistance, if any, a judge should provide pro se parties in cases assigned to the judge can be a very difficult undertaking. The solution should recognize that both the impartiality and fairness argument and the pro se access to justice argument have merit. It also should recognize that there are many factual variables that are relevant and should be considered in developing a solution to the issue. The factual variables include: whether or not the pro se party in need of assistance requested assistance of the judge, the capability of the pro se party to understand assistance proposals made by the judge, the competence of the pro se party to implement some of the assistance proposals made by the judge, the time available to the judge to properly prepare and provide assistance to pro se parties with more complex legal or factual problems, whether or not the judge has available qualified staff personnel to whom the judge could assign the duty of providing or implementing assistance to pro se parties, and the impact that the judge's assistance may have on the pro se parties opponents' interests and the justifications, if any, for such impact.

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<sup>226</sup> The delay often would be due to the added time required for the judge to determine what assistance to provide. For example, the assistance would require extensive legal research by the judge. Or the delay might be due to the added time required for the pro se party to obtain the help from other sources recommended by the assisting judge.

<sup>227</sup> There also are a variety of techniques or procedures available to many trial judges for reducing the overload problem when one or both parties are self-represented. On these techniques or procedures, see Mark A. Junas et al., *Self-Represented Cases, 15 Techniques for Saving Money in Tough Times*, 49 JUDGES J. 18 (2010).

*Proposal*

In each U.S. jurisdiction, the appropriate court or courts legally authorized to do so, should adopt guidelines as to the assistance that a judge should and should not provide pro se parties in cases assigned to the judge. The appropriate court should be the highest court with legal authority to adopt such guidelines and that court, if legally authorized to do so, may delegate that authority to lower or specialty courts, which should then adopt such guidelines. The guidelines should permit assistance to pro se parties irrespective of the pro se parties' income or wealth. The guidelines should not disfavor more affluent pro se parties merely because of their affluence. The guidelines also should be sufficiently detailed to explicitly cover what the judge should or should not do in many of the variable factual situations that can arise pertaining to assistance by a judge to pro se parties. And the guidelines should reflect, to the extent merited, both the obligation of judges to be impartial and fair and the access to justice aspect of the pro se representation right. The guidelines should be detailed and may vary depending on the types of cases that come before the court to which the judge is assigned and whether or not judges in that court are assigned an overload of cases, more cases than they can fully and adequately consider, in many instances even if each judge devotes an excessive number of hours to adjudicative duties. To increase the prospects of judges understanding and complying with the guidelines there should be informative sessions on the guidelines available to all parties. Attendance at the informative sessions should be mandatory for all judges shortly after the initial adoption of the guidelines, thereafter attendance should be mandatory only for new judges, those without prior experience as judges, or if major changes are made in the guidelines. There also should be oversight procedures in effect for determining whether or not each judge is complying with the guidelines, and judges should be subject to appropriate sanctions for persistent failure to comply with the guidelines.

The above proposal as to guidelines should be adopted and implemented by appropriate U.S. courts, and detailed guidelines concerning judicial assistance to pro se parties should be in effect in every court and applicable to every judge in each court. There are so many relevant variables as to the circumstances in which a judge should provide assistance and what assistance should be rendered to pro se parties in cases assigned to the judge that each judge should have considerable discretion in determining whether or not to provide assistance, and what assistance to pro se parties. However, there should be limits on the discretion of a judge as to what kinds of assistance, if any, the judge provides pro se parties in cases assigned to the judge, and the guidelines should set limits on that discretion—limits that the judge should adhere to.



There is some state and federal case law that can provide helpful guidance as to what assistance, if any, a judge should and should not provide pro se parties in certain situations.<sup>228</sup> But the case law decisions are scattered over time and among different jurisdictions, the facts to which each decision applies are in most cases quite limited, and the factual scope of the authoritative principals stated by the court in justifying its decisions are in most cases ambiguous. More comprehensive and currently relevant judicial guidance is needed—guidance that a proper set of judicial guidelines could provide.<sup>229</sup> Such guidelines, often referred to as protocols or best practices, have been adopted in a few U.S. jurisdictions for some courts or some judicial proceedings and can be helpful models for other courts in drafting guidelines for their judges. Massachusetts's *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants* is a particularly helpful model.<sup>230</sup>

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<sup>228</sup> For brief summaries of some of these cases, see Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES J. 16, 19–23 (2003).

<sup>229</sup> On the guidelines issue see CONFERENCE OF STATE COURT ADMINISTRATION, POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000) (recommending increased consideration and action by the Conference of State Court Administrators and Conference of Chief Justices to the needs of self-represented litigants); NEW YORK COUNTY LAWYERS' ASSOCIATION, REPORT ON PROTOCOL FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN HOUSING COURT (2006) (including a detailed set of proposed protocols for the New York City Housing Court); Engler, *supra* note 218; Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons From the Canadian Experience*, 17 MICH. ST. J. INT'L L. 601, 625–29 (2008–2009) (considering guidelines adopted by the Canadian Judicial Council and the Australian Family Court); CYNTHIA GRAY, REACHING OUT OR OVERREACHING, JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS, STATE JUSTICE INST. (2005), available at [www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf](http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf) (including a detailed list of proposed best practices for cases involving self-represented litigants).

<sup>230</sup> See, e.g., SUBCOMMITTEE ON JUDICIAL GUIDELINES OF THE MASSACHUSETTS JUDICIAL COURT STEERING COMMITTEE ON SELF-REPRESENTED LITIGANTS, JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS WITH COMMENTARY (2006) available at <http://www.mass.gov/courts/judguidelinescivhearingstoc.html>. [hereinafter MASSACHUSETTS JUDICIAL GUIDELINES]. The introduction states that:

The Guidelines were developed specifically for interactions with self-represented litigants in civil cases in which there is no right to counsel. Although the Guidelines may be a helpful resource in criminal cases and civil cases in which there is a right to counsel, they must be applied in light of the special considerations those cases present.

The Guidelines are advisory. The issues and challenges presented by self-represented litigants may vary in different court departments. Judges, therefore, are encouraged to use the Guidelines in a way that best suits the needs of their court and the litigants before them. To the extent that there is any conflict between the Guidelines and the Code of Judicial Conduct, the Code governs.

*Id.*

The commentary states:

This Commentary is intended to supply suggestions and resources for judges who wish to exercise their discretion consistent with the Guidelines. It was authored by the Subcommittee on Judicial Guidelines of the Supreme Judicial Court Steering Committee on Self-Represented Litigants, and endorsed by the full Committee. It has not been reviewed by the Justices of the Supreme Judicial Court.

*D. What Assistance, If Any, Should Court Personnel, Other than Judges, Provide Pro Se Parties in Cases Before the Court to Which the Court Personnel is Assigned?*

Court clerks also often provide helpful information to parties who come before the court, including many pro se parties, but court clerks are quite universally prohibited from giving legal advice to any parties.<sup>231</sup> As court employees the clerks should be impartial and giving legal advice often would be indicative of partiality to the party receiving the advice.<sup>232</sup> Also, most court clerks are nonlawyers, and if nonlawyer clerks provide legal advice to those who come before the court they would be engaged in the unauthorized practice of law. However, a troublesome issue is what constitutes legal advice, as the term is highly ambiguous, with considerable uncertainty as to just what information provided others is legal advice.<sup>233</sup> Most court clerks apparently will not provide information to parties before the court that the clerks consider to be legal advice. But clerks in many courts will assist pro se parties by selecting and filling in needed court forms, assistance that may be the unauthorized practice of law.

Arguments can be advanced both in opposition to and in support of court personnel, other than judges, providing assistance to pro se parties in cases before the court to which the non-judge court personnel are assigned. Some of these arguments are similar to those applicable to judges. Arguments against court personnel who are not judges providing needed assistance to pro se parties, other than noncontroversial information such as directions to the courtroom where a party's case will be heard or the scheduled date and time for trial of a party's case, include the following: the assistance would violate the fairness and impartiality obligation of all court personnel to all opposing parties in cases before the court where the court personnel are assigned, and the fairness and impartiality obligation is not restricted to court personnel who are judges; if the assistance needed includes legal advice, court personnel providing

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*Id.*

The Massachusetts Guidelines cover the following: 1. General Practice (1.1. Plain English, 1.2. Language Barriers, 1.3. Legal representation, 1.4. application of the law, 1.5. Materials and services for self-represented litigants), 2. Guidelines for Pre-Hearing Interaction (2.1. Trial process, 2.2. Settlement, 2.3. Alternative dispute resolution), 3. Guidelines for Conducting Hearings (3.1. Courtroom Decorum, 3.2. Evidence, 3.3. Right of Self-Representation, 3.4. Approval of Settlement Agreements), 4. Guidelines for Post-Hearing Interaction (4.1. Issuing the Decision, 4.2. Appeal). *See id.*

A shorter set of guidelines for judicial officers during hearings involving pro se parties has been adopted in Minnesota and are reprinted in Albrecht et al., *supra* note 228, at 18.

<sup>231</sup> *See* Graecen, *supra* note 215, at 10.

<sup>232</sup> On the obligation of court clerk impartiality, see Graecen, *supra* note 215, at 14–15; *see also* Goldschmidt et al., *supra* note 212, at 41–45.

<sup>233</sup> *See* Goldschmidt et al., *supra* note 212, at 34–35; Graecen, *supra* note 215, at 10–12.

the assistance who are not lawyers, and most such personnel are not lawyers, would be acting illegally as they are engaged in the unauthorized practice of law; and many of the court personnel in every court, including many who have been providing such assistance, lack the knowledge and ability to competently provide the assistance needed without undue risk that their assistance will be inadequate and even detrimental to the parties they are assisting. Arguments in support of court personnel who are not judges, providing assistance to pro se parties before the courts to which the non-judge court personnel are assigned, include: the assistance would enable many more pro se parties, including many who are poor, to effectively and properly represent themselves pro se in the proceedings before the court; the assistance frequently would eliminate the need for a judge to provide assistance to pro se parties in cases assigned to the judge. This could not only reduce the time a judge must spend on some cases, but it would eliminate the possibility of a judge being accused of impartiality breaches by providing assistance to pro se parties. Judges are far more vulnerable to such accusations if they assist pro se parties than are other court personnel who provide the same assistance to such parties. The accusations, even though unjustifiable, can be more harmful to the justice system if directed at judges than if directed at other court personnel who are providing the same assistance.

### *Proposal*

In each U.S. jurisdiction, the appropriate court or courts legally authorized to do so, should adopt a court rule as to the assistance that court personnel should and should not provide pro se parties in cases before the court to which the court personnel are assigned. The appropriate court should be the highest court with legal authority to adopt such a court rule and that court, if legally authorized to do so, may delegate that authority to lower or specialty courts which should then adopt such a rule. The rule should authorize assistance by court personnel to pro se parties irrespective of the pro se parties' income or wealth. The rule also should be sufficiently detailed to explicitly cover what different court personnel, including court personnel who are lawyers and those who are not lawyers, may do to assist pro se parties. The rule should define the term "legal advice" and should modify unauthorized practice laws to permit certain types of nonlawyer court personnel to provide specified kinds of legal services to pro se parties, including certain kinds of legal advice, that without such modification would be the unauthorized practice of law if provided pro se parties by nonlawyer court personnel.<sup>234</sup> Attendance at training sessions as to what the applicable rule does and does not per-

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<sup>234</sup> On the ambiguity of what constitutes legal advice, see Graecen, *supra* note 215.

mit should be required of all personnel authorized by the rule to provide assistance to pro se parties.

A helpful court rule model on assistance that court personnel, other than judges, are permitted to provide pro se parties is the Florida Supreme Court's Rule 12-750, Family Self-Help Programs.<sup>235</sup> Although this rule is applicable only to Florida family courts for which a self-help program has been established, many of its provisions, particularly the Services Provided section and the Limitations on Services section, could be helpful models for any court in any U.S. jurisdiction in drafting a rule for assistance of pro se parties by court personnel other than judges.<sup>236</sup> Another helpful model is the self-help friendly court as proposed by

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<sup>235</sup> FLA. R. OF COURT, FAMILY LAW R. OF P. R. 12.750 (2009).

<sup>236</sup> *Id.* The Florida Rule 12.750 sections on Services Provided and Limitations on Services are as follows:

(c) Services Provided. Self-help personnel may: (1) encourage self-represented litigants to obtain legal advice; (2) provide information about available pro bono legal services, low cost legal services, legal aid programs, and lawyer referral services; (3) provide information about available approved forms, without providing advice or recommendation as to any specific course of action; (4) provide approved forms and approved instructions on how to complete the forms; (5) engage in limited oral communications to assist a person in the completion of blanks on approved forms; (6) record information provided by a self-represented litigant on approved forms; (7) provide, either orally or in writing, definitions of legal terminology from widely accepted legal dictionaries or other dictionaries without advising whether or not a particular definition is applicable to the self-represented litigant's situation; (8) provide, either orally in writing, citations of statutes and rules, without advising whether or not a particular statute or rule is applicable to the self-represented litigant's situation; (9) provide docketed case information; (10) provide general information about court process, practice, and procedure; (11) provide information about mediation, required parenting courses, and courses for children of divorcing parents; (12) provide, either orally or in writing, information from local rules or administrative orders; (13) provide general information about local court operations; (14) provide information about community services; and (15) facilitate the setting of hearings.

(d) Limitations on Services. Self-help personnel shall not: (1) provide legal advice or recommend a specific course of action for a self-represented litigant; (2) provide interpretation of legal terminology, statutes, rules, orders, cases, or the constitution; (3) provide information that must be kept confidential by statute, rule, or case law; (4) deny a litigant's access to the court; (5) encourage or discourage litigation; (6) record information on forms for a self-represented litigant, except as otherwise provided by this rule; (7) engage in oral communications other than those reasonably necessary to elicit factual information to complete the blanks on forms except as otherwise authorized by this rule; (8) perform legal research for litigants; (9) represent litigants in court; and (10) lead litigants to believe that they are representing them as lawyers in any capacity or induce the public to rely upon them for legal advice.

*Id.*

Among helpful comments following Rule 12.750 are these:

Subdivision (c)(3). In order to avoid the practice of law, the self-help personnel should not recommend a specific course of action.

Subdivision (c)(5). Self-help personnel should not suggest the specific information to be included in the blanks on the forms. Oral communications between the

Richard Zorza in a publication of the National Center for State Courts.<sup>237</sup> This court model includes proposals for a broad and well-trained self-help team for assisting pro se parties, a caseflow assistance process helpful in preparing the pro se litigant for each step in the litigation process, and redesigned courthouses and available technology to make them more helpful to pro se parties.

#### CONCLUSION

The shortage of adequate legal services for the poor in need of such services has long prevailed throughout the United States and the shortage may become even greater in the future. It is one of this country's most serious unresolved problems. In very general terms what needs to be done to substantially reduce this shortage is:

- Enhance throughout the United States recognition of the seriousness and present and prospective adverse consequences of the current and continued shortage in adequate legal services for the poor. Not only should lawyers, judges, and legislators persistently be reminded of the shortage and its adverse consequences, but so should members of the general public, as widespread public recognition of the adverse implications of a serious social problem often leads to greater and more successful efforts to resolve the problem.
- Expand and intensify efforts to reduce the shortage of adequate legal services for the poor throughout the United States, including enhanced funding of such services and an enhanced volume of such services provided by qualified legal service personnel and organizations at a new fee. It merits reiteration here that the term "adequate legal services for the poor" as used in this Article means services that are sufficiently comprehensive and are competently performed.

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self-help personnel and the self-represented litigant should be focused on the type of information the form is designed to elicit.

Subdivision (c)(8). Self-help personnel should be familiar with the court rules and the most commonly used statutory provisions. Requests for information beyond these commonly used statutory provisions would require legal research, which is prohibited by subdivision (d)(8).

Subdivision (f). Because an attorney-client relationship is not formed, the information provided by a self-represented litigant is not confidential or privileged.

Subdivision (g). Because an attorney-client relationship is not formed, there is no conflict in providing the limited services authorized under this rule to both parties.

*Id.*

<sup>237</sup> RICHARD ZORZA, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* (2002). For other proposals to guide court staff in providing information and assistance to pro se parties, see Goldschmidt et al., *supra* note 212, at 41-45.

- Due to the current shortage of adequate legal services for the poor and the likelihood of an appreciable shortage of such services continuing indefinitely even if the shortage is somewhat reduced in the short term, increased efforts should be made to more efficiently and effectively utilize available personnel who provide legal services for the poor. This more efficient and effective utilization of personnel should include allocating a greater proportion of available legal services personnel to projects that could greatly increase the number of poor persons benefited. Among such projects are preparing for and litigating more major cases concerning the poor, providing limited (un-bundled) legal services to many more poor persons who would provide the remaining services *pro se*, and assisting many more persons to fully and competently represent themselves *pro se*.

As is evident from the above coverage in Parts I to V, how the shortage problem should best be dealt with raises many law and policy issues, solutions which currently are, or soon will become, highly controversial. Proposals that are here recommended for resolving many of these issues are included in Parts I to V. Alternative proposals can be made to each of the above-recommended proposals, and some of these alternatives may have considerable merit. But each of the alternatives with considerable merit is less desirable than the comparable recommended proposal above because its prospects for adoption are less effective, or if adopted would have a less effective impact. Some of these alternative proposals, however, merit not only support but also adoption as a substitute for the comparable preferred recommended proposals above if it becomes obvious that the comparable preferred proposals above will not be adopted in the near future. An example of such an alternative proposal is the one made above as to efforts to increase voluntary *pro bono* for the poor in each U.S. jurisdiction.<sup>238</sup>

Adoption of most any law or policy proposal requires that proponents of the proposal effectively engage in one or more strategies. To achieve adoption, the scope and intensity of proponent strategic actions usually must be greater if the proposal is highly controversial. What strategies may be useful, even essential, can vary with who the current or prospective proposal proponents and opponents are, why the proposal is or may be supported and opposed, and who the ultimate decision maker will be. There are many different strategies that may be useful, some of them even essential, to successfully achieving adoption of any proposal to help resolve a law or policy issue, including the recommended proposals in Parts I to V above. Among such strategies are: acquiring reliable

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<sup>238</sup> See *supra* Part III.B.

data on the need for the proposal and the proposal's likely favorable impact if adopted; obtaining popular, trade journal, or professional journal publicity favorable to or indicating the need for the proposal; in-person meetings with influential prospective proponents of the proposal to obtain their active support of the proposal; in-person meetings with actual or prospective opponents of the proposal to try and persuade them not to oppose the proposal and possibly even to support it; instituting litigation that may result in a judicial decision that adopts or requires adoption of the proposal; providing testimony or evidence in support of the proposal at hearings held by decision makers on whether or not to adopt the proposal; and working cooperatively with other proponents of the proposal to develop and implement programs of action to obtain proposal adoption. Useful strategies in achieving adoption of any particular proposal may vary over time, among jurisdictions, with who the ultimate decision maker is, and with who the actual or prospective proponents and opponents are. All of the recommended proposals in Parts I to V currently are or may become highly controversial. To enhance adoption prospects for any proposal, proponents should become aware of all the strategies available to them for achieving adoption and should select and sufficiently implement those strategies available to them that are most likely to achieve adoption of the proposal.

A strategy that usually is very essential to obtain adoption of most every proposal to increase adequate legal services for the poor, including most all of the above recommended proposals, is developing and sustaining cooperative relations with others who support the proposal. The proposal adoption process usually is a collective endeavor. But to enhance the effectiveness of this endeavor as to proposals to increase adequate legal services for the poor what is very much needed is a national organization with the requisite resources, influence and commitment to provide comprehensive leadership, support and assistance to proponents of each proposal. Among activities that this organization should engage in are thoroughly evaluating all proposals to increase adequate legal services and for the poor to determine which proposals merit support and, if so, what support and the timing of support activities; providing supplemental support and assistance to other organizations and individuals in their efforts to obtain adoption of proposals meriting support; forming coalitions of organizations and individuals who support a proposal meriting support and providing coordination, guidance and supplemental support and assistance to each such coalition in its efforts to obtain adoption of a proposal meriting support; engaging on its own in efforts to achieve adoption of proposals that it considers merit support, efforts such as publicizing the proposal and its merits in its publications, exerting political pressure on government decision makers who will determine whether or

not to adopt a particular proposal; and engaging in empirical research that provides data it publicizes supportive of a particular proposal. This national organization should be active in providing leadership, support and assistance not only to proposals that are applicable throughout the United States but to many of the proposals that are applicable only to a particular state or locality. It should also be of help in determining which proposals meriting support should receive priority over other proposals when the proposals are competitive with one another, as is common with many of the above proposals, particularly funding proposals. In addition, when it would be helpful, the national organization should be capable of developing new proposals or revising existing proposals to enhance their prospects of adoption.

Some national organizations currently exist that to some extent, and as to some kinds of proposals, provide needed leadership, support, and assistance. Among these national organizations are the LSC, ABA, National Lawyers' Guild, Federal Bar Association, American College of Trial Lawyers, National Legal Aid and Defenders Association, National District Attorneys Association, National Conference of Federal Trial Judges, and Association of American Law Schools. Unfortunately, none of these organizations fully and adequately provides the comprehensive and integrative support that is needed and is possible. Fortunately, however, a national organization does exist with the realistic potential for doing so. That organization is the ABA, and it is here recommended that the ABA make and fulfill the commitment necessary to become such an organization. It is possible that a new organization could be established to fill the needed role but it is very unlikely that such an organization will be established, and if established the prospects for it to fully and adequately fill the need are negligible. The ABA is a far better prospect. The ABA is a very large and influential national organization. It has a membership of 350,000 U.S. lawyers and about 50,000 affiliate members, 80% of whom are law students and 20% are associates—i.e., foreign lawyers not admitted to practice law in this country and U.S. paralegals. It also has a large paid staff and many very active committees, sections and other subunits of members.<sup>239</sup> Two ABA standing committees, the Committee on Legal Aid and Indigent Defendants and the Committee on Pro Bono and Public Service are principally concerned with expanding and improving legal services for the poor. Among other ABA subunits, some of whose activities are very relevant to issues concerning the provision of adequate legal services for the poor, are the Standing Committee on Ethics and Professional Responsibility; Ethics,

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<sup>239</sup> For a listing of the many hundreds of ABA subunits and their officers, see ABA LEADERSHIP DIRECTORY, 37-235, available at <https://www.abanet.org/lsc/leadership/nmdirectory.html> (2010).



Gideon and Professionalism Committee of the Criminal Justice Section's Professional Development Division; Special Committee on Coalition for Justice; Commission on Interest on Lawyer Trust Accounts; Accreditation Committee of the Legal Education and Admission to the Bar Section; and Pro Bono Committees of some ABA sections. The ABA Board of Governors and House of Delegates also often become involved in issues concerning more adequate legal services for the poor. The ABA maintains close operational relations with state and local bar associations, and with twenty-eight affiliated organizations, including the American Judicature Society, the Association of American Law Schools, and the National Legal Aid and Defender Association.<sup>240</sup> With some expansion of its activities to increase adequate legal services for the poor and considerable enhanced coordination of those activities, the ABA could become the needed national organization and should be pressured to do so. It could replicate for legal services for the poor the tremendous influence it has had and continues to have on professional conduct requirements for lawyers and judges.<sup>241</sup> There, of course, is the possibility that on occasion, as to some issues relevant to increased adequate legal services for the poor, opposition from some segments of its membership would prevent the ABA from supporting or fully supporting some proposals favored by most providers of legal services for the poor. But the ABA is an unusual organization in the extent to which it has enabled different interest groups within its membership to pursue objectives opposed by other interest groups within its membership. The ABA has been moving in the direction of becoming the national organization that will provide the needed comprehensive leadership, support and assistance to proponents of proposals for increased adequate legal services for the poor, including proposals such as those in Parts I to V above. This movement should be accelerated and fully realized as soon as possible. If fully realized it would greatly increase the prospects for far more poor persons in the United States in need of legal services having their legal needs adequately fulfilled, and thereby substantially reducing the scope and severity of one of this nation's most serious unresolved problems.

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<sup>240</sup> For a list of the ABA's twenty-eight affiliated organizations, including each affiliated organization's ABA House of Delegates Representative, see *id.* at 237–54.

<sup>241</sup> On the history of the ABA's involvement in developing and influencing the adoption of legal canons, codes and rules of professional conduct for lawyers, see ABA CTR. FOR PROF'L RESPONSIBILITY, *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT* (1987); GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* §1.10–1.18 (3d ed. 2010).