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". . . And Justice For All"?--The Bar, the Indigent and Mandatory Pro Bono

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legal profession's ethical boundaries in drafting and enforcing partnership agreements.

Christine Ardita

“ . . . AND JUSTICE FOR ALL”? — THE BAR, THE INDIGENT AND MANDATORY PRO BONO

“ ‘Membership in the bar is a privilege burdened with conditions’ [A lawyer is] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice He might be assigned as counsel for the needy, in causes criminal or *civil*, serving without pay All this is undisputed.”¹

INTRODUCTION

Pro bono publico literally means “for the public good.”² The history of pro bono work can be traced back to the Roman era.³ The United States pro bono tradition is deeply rooted in English common law.⁴ Proposals to make pro bono obligatory have raised is-

¹ *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (emphasis added). See also O'Connor, *Legal Education and Social Responsibility*, 53 *FORDHAM L. REV.* 659, 661 (1985). “Implicit in all [pro bono programs] is the concept that lawyers have moral and social responsibilities in such instances and that those responsibilities need to be discharged by the Bar, willingly, and some would say, even unwillingly.” *Id.*

² *BLACK'S LAW DICTIONARY* 1203 (6th ed. 1990).

³ Maguire, *Poverty and Civil Litigation*, 36 *HARV. L. REV.* 361, 385 (1923) (Roman bar advocated legal service without recompense). See *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). A lawyer is subject to certain obligations “imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice” which include legal services to the indigent. *Id.* But see *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 343, 222 Cal. Rptr. 854, 858 (Cal. Ct. App. 1986). “A careful examination of the ‘deeply rooted’ and ‘ancient tradition’ reveals a custom far more honored in its breach than in its observance.” *Id.*; Shapiro, *The Enigma of The Lawyer's Duty to Serve*, 55 *N.Y.U. L. REV.* 735, 749 (1980) (claims reliance on Roman history is misplaced).

⁴ Tudzin, *Pro Bono Work: Should It Be Mandatory or Voluntary*, 12 *J. LEGAL PROF.* 103, 119 (1987). “Historically lawyers were considered to be ‘officers of the court.’ The term was used in England originally to express the view that special responsibilities and duties at-

sues which have been vigorously debated.⁵ Recently, one such proposal has been submitted in New York by the Committee to Improve the Availability of Legal Services.⁶ The Committee's purpose was to review and report on "the extent of the unmet need for civil legal services, the scope and operation of the existing networks recruiting private lawyers for pro bono assignments, and mechanisms for inducing cooperation and compliance and sanctioning the opposite."⁷ The Committee, in its Final Report (the

tached to the privilege of becoming a member of the legal profession." *Id. See Dillon*, 346 F.2d at 637 (appointment of counsel based on common law and expanded by implementation of colonial statutes); *In re Snyder*, 734 F.2d 334, 338-39 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985). "The profession of law rests upon its commitment to public service and has long been recognized as a profession that requires its membership to engage in *pro bono* activities." *Id.*; *House v. Whitis*, 64 Tenn. (5 Baxter) 690, 692 (1875). "The court has a right to command the services of counsel for persons unable to pay, in civil as well as criminal cases. Where a lawyer takes his license he takes it burdened with these honorary obligations." *Id.* (statutory citations omitted). Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 *CARDOZO L. REV.* 255, 257 (1981) (duty of mandatory pro bono is merely reaffirmation of professional tradition as evidenced by Canons of Professional Ethics enacted in 1908); Shapiro, *supra* note 3, at 756. "That federal courts may require lawyers to represent indigents without compensation, at least in criminal or quasi-criminal matters, seems well established." *Id.* (citations omitted). *See also* *HOLDSWORTH, A HISTORY OF ENGLISH LAW* 491 (1943). "Tradition of the representations of indigents has existed for nearly half a millenium." *Id.*; 11 Hen c.12 (1494). The Justice shall appoint attorneys for the fame poor person or persons. *Id.*; Anonymous, 88 Eng. Rep. 1535, 1535 (1894). "Trevanion . . . moved to have an attorney assigned [to] him, for none would voluntarily appear for him; and the Court appointed one at his own nomination." *But see Cunningham*, 177 Cal. App. 3d at 343, 222 Cal. Rptr. at 858. "Most of the cases that deal with the rights of indigents in civil cases have been decided within the last fifteen years." *Id.* (citations omitted); *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 767 (Mo. 1985) (rejects notion of ancient and established tradition giving rise to obligation to serve indigents).

⁵ *See* *The Florida Bar*, 432 So. 2d 39, 40. (Fla. 1983). A proposal requiring mandatory pro bono services by attorneys was sought by petitioners. *Id.* The proposal was rejected on the grounds that "[w]e are a democratic nation with heavy emphasis on the individual rights of all citizens." *Id.* The court reasoned that: "[w]e have been loathe to coerce involuntary servitude in all walks of life; we do not forceably take property without just compensation; we do not mandate acts of charity." *Id.* at 41. However, the court did urge voluntary participation by attorneys to provide free legal services for those unable to pay. *Id.* at 41-42. *See also* Carroll, *Current Professional Issues: Addressing Obligations and Exploring Opportunities*, N.Y.S. B.J. 10 (Feb. 1990) (in New York, 14 local bar associations have announced opposition to mandatory pro bono); Comment, *Mandatory Pro Bono: The Path to Equal Justice*, 16 *PEPPERDINE L. REV.* 355, 362-63 (1989) (Washington and Oregon state legislatures have studied mandatory pro bono program but neither has made it out of committee).

⁶ *See* Committee to Improve the Availability of Legal Services, Final Report, April 27, 1990 [hereinafter Marrero Report]. The Committee was appointed by Chief Judge Wachler of the New York Court of Appeals with Victor Marrero as its chairman. *Id.* at 148-49.

⁷ *Id.* at 148.

Marrero Report) established that the legal needs of the poor were not being met by current available resources⁸ and in response advanced mandatory pro bono as a mechanism to increase the access and availability of legal services to the indigent.⁹

The Marrero Report's proposal would require all lawyers admitted and actively practicing law in New York¹⁰ to contribute forty hours every two years¹¹ to qualifying pro bono services.¹² The obligation of each attorney could be satisfied through individual efforts or through services performed on the attorney's behalf as part of an aggregate effort.¹³ Additionally, attorneys who

⁸ *Id.* at 98-107 (describes extent of unmet legal needs and inadequacy of volunteer pro bono).

⁹ *See id.* at 8-9, 13-14, 115-23. The Committee, in recognizing the problem as societal in nature, not just peculiar to the bar, has suggested additional measures such as increased funding of legal assistance projects and expansion of appointments under the Article 18-B panel program (program, pursuant to statute, for paid representation of indigents in criminal matters). *Id.* at 13-14.

¹⁰ *See* Marrero Report, *supra* note 6, at 9-11, 36, 150. All attorneys would be required to perform pro bono services, including attorneys working in "government agencies, legal services and public interest organizations . . . and law school faculty . . ." *Id.* at 10-11. The committee recommended exemptions for judges and non-practicing or retired attorneys. *Id.* at 10-11, 151-52. The proposal also recommends exemptions from the program for "extraordinary circumstances such as illness, incapacity, long-term personal or business absence from the jurisdiction and other special financial or personal hardships occurring in any particular year." *Id.* at 11.

¹¹ *Id.* at 10-11, 34, 150. *See* Report of the Commission on Professionalism, 112 F.R.D. 243, 297 (1986). "The number of hours given by a lawyer [through pro bono] will in most cases be insignificant to his or her practice, while the benefits to the recipients can be considerable." *Id.* *See also* Cunningham v. Superior Court, 177 Cal. App. 3d 336, 349-350, 222 Cal. Rptr. 854, 862-63 (Cal. Ct. App. 1986) (raises issue of attorneys who are admitted to a jurisdiction but do not practice there); Smith, *A Mandatory Pro Bono Service Standard-Its Time Has Come*, 35 U. MIAMI L. REV. 727, 731-32 (1981). "Financial contributions, no matter how substantial, cannot always discharge the individual attorney's obligation. The legal profession is not an elitist organization in which wealth can buy amnesty for failing to do what all lawyers are obligated to do These obligations must be nontransferable." *Id.*

¹² Marrero Report, *supra* note 6, at 10, 150-51. Qualifying pro bono services include: [a] those rendered in civil matters to persons who cannot afford to pay counsel, and also legal services in criminal matters for which there is no government obligation to provide funds for legal representation; [b] those related to improvement of the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to poor persons; and [c] those provided to charitable, public interest organizations on matters which are designed predominantly to address the needs of poor persons.

Id. at 10. *See also id.* at 47-53 (detailed discussion of above categories).

¹³ *Id.* at 11, 57-59, 151. Attorneys could aggregate their individual requirements and satisfy their obligation by one or more members of the group performing the required services. *Id.* *But cf.* Faulkner, *At Issue: Mandatory Pro Bono*, 75 A.B.A. J. 53 (Oct. 1989). "[F]irms will pay pro-bono counsel a fraction of that paid to entry-level associates. The proposal apparently reflects the view that the wealthy should be able to buy their way out

are practicing in firms of ten lawyers or less would be entitled to utilize a buyout provision, whereby the equivalent cash value of all or part of the required service¹⁴ would be contributed to an eligible legal services or public interest organization.¹⁵ Attorneys would be required to certify on their biennial registration statements that they have complied with the program.¹⁶

I. THE DISPUTE

While it is undeniable that a substantial gap exists between the need for and the availability of legal services for the poor,¹⁷ there is discord in the legal community as to how this need should be met.¹⁸ Mandatory pro bono, as a major component of a compre-

of public service, and that representing the poor is less important than representing paying clients." *Id.*

¹⁴ Marrero Report, *supra* note 6, at 11, 59-72, 151. Attorneys in firms of ten lawyers or less could make a monetary contribution of \$50 per hour for "all or any part of the obligation" to "an eligible legal services or public interest organization." *Id.* at 11. *See also* Shapiro, *supra* note 3, at 781 (promoting option of cash buyout); *Pro Bono Legal Service: An Executive Committee Position*, 36 REC. A.B. CITY N.Y. 9, 11 (1981) (financial support as useful as service therefore should discharge obligation). *Contra* Marrero Report, *supra* note 6, at 141. Sol Neil Corbin, a member of the Committee states: "If compulsory service is indeed justified, it should not be possible to evade that duty by hiring someone else to perform the work or by purchasing an exemption." *Id.*; Smith, *supra* note 11, at 781 (buyout option viewed by some as "copout").

¹⁵ Marrero Report, *supra* note 6, at 11. *See also id.* at 53-54, 150-52 (discussing types of organizations that qualify for monetary contribution option).

¹⁶ *Id.* at 10-11, 151-52.

¹⁷ *See* New York Legal Needs Study, Draft Final Report, Oct. 11, 1989 (analysis of legal problems facing poor in New York State). *See also* Report of Comm'n on Professionalism, 112 F.R.D. 243, 299 (1986). "It should come as no surprise to anyone that the poor are among the least represented members of our society, especially in civil matters." *Id.*; Smith, *supra* note 11, at 727 (attorneys aware of failure of profession to meet needs of poor despite voluntary pro bono efforts); Tudzin, *supra* note 4, at 110. Many of the poor are never afforded their day in court "due to attorney inaccessibility and prohibitive costs." *Id.*; Committee to Increase the Availability of Legal Services, *At Issue: Mandatory Pro Bono*, 75 A.B.A. J. 52 (Oct. 1989).

[T]he imbalance between the need for legal services and their availability undermines the legitimacy of the legal system itself. It is grotesque to have a system in which the law guarantees to the poor that their basic human needs will be met but which provides individuals no realistic means of enforcing that right.

Id.; Gallett, *Who Loves a Lawyer*, N.Y.L.J. Sept. 24, 1981, at 3, col.1. "[E]veryone must have access to . . . legal representation [and it] ought not to be considered a luxury. Our Constitution guarantees the same protection to all, but the concept that we are all equal before the law is mocked if access to the judicial system depends on one's financial means." *Id.*

¹⁸ *See generally* Annotation, *Court Appointment of Attorney to Represent, Without Compensation Indigent in Civil Action*, 52 A.L.R. 4th 1063, 1066-67 (1987) (outlining jurisdictional discord).

hensive plan,¹⁹ is a suggested remedy which has met with a great deal of criticism.²⁰ This controversy over mandatory pro bono has implicated constitutional,²¹ as well as non-constitutional,²² issues. It will be the objective of this Survey to outline the primary elements of the conflict over the implementation of mandatory pro bono programs.

II. NON-CONSTITUTIONAL ASPECTS

There has been considerable controversy over the precise position an attorney occupies and his corresponding duties to the profession, the bar and the public.²³

A. Professional Responsibility as Officer of the Court

Lawyers assume certain obligations as a *quid pro quo* for the rights and privileges they enjoy.²⁴ These obligations arise from their position as officers of the court²⁵ and as professionals

¹⁹ See *supra* note 9 and accompanying text (setting forth additional remedies); Report of Comm'n on Professionalism, 112 F.R.D. 243, 299 (1986). "Pro bono [programs] while no panacea, are a first step." *Id.*

²⁰ See Graham, *Mandatory Pro Bono—The Shape of Things to Come?*, 73 A.B.A. J. 62, 62-63 (Dec. 1987). "Many view mandatory pro bono as a fundamentally flawed concept [which] threatens the effective delivery of legal services to the poor." *Id.* But see Tudzin, *supra* note 4, at 117 (pro bono program should be implemented even if change is minimal).

²¹ See *infra* notes 44-71 and accompanying text.

²² See *infra* notes 23-43 and accompanying text.

²³ See *infra* notes 24-43 and accompanying text.

²⁴ See The Florida Bar, 432 So. 2d 39, 40 (Fla. 1983) (emphasizing lawyers duty to provide indigents with legal services due to unique position in society); HENRY S. DRINKERS, *LEGAL ETHICS* 62 (1953) (recognizing lawyers' duty to represent indigents in civil and criminal matters); Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 443 (1965) (exclusive franchise to practice law brings responsibility to assure services available to needy); Tudzin, *supra* note 4, at 111 (obligation to provide free or reduced fee legal services to poor based on privileges and responsibilities lawyers derive from society). See also *Rucknbrod v. Mullins*, 102 Utah 548, 552, 133 P.2d 325, 326 (1943) (majority of courts recognize attorney as "officer of the court" with duty to render services to poor gratuitously by custom).

²⁵ See *In re Griffiths*, 413 U.S. 717, 728 (1973). "It has been stated many times that lawyers are officers of the court." *Id.* (quoting *Cammer v. United States*, 350 U.S. 399 (1956)); *In re Snyder*, 734 F.2d 334, 339 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985). "[C]ourt has consistently recognized the duty of an attorney practicing in the federal courts, as an implied obligation, to serve willingly as an officer of the court in a capacity *pro bono publico* . . ." *Id.*; Rosenfeld, *supra* note 4, at 273. "[T]he attorney has a duty to assist in the administration of justice as a condition of the license to practice and/or as an officer of the court, and that accepting court appointments is part of that duty." *Id.* But see *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 344, 222 Cal. Rptr. 854,

charged with "promot[ing] the legitimacy, efficacy and equity of the legal system"²⁶ Courts have held that these responsibilities include the rendering of legal services to the needy without compensation.²⁷ And while it is noted that "critics suggest the administrative burdens of monitoring compliance with such a system would be . . . difficult,"²⁸ it is argued that faithful execution of this

859 (Ct. App. 1986); *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 767 (Mo. 1985) (rejecting view of attorney as officer of the court). "Those precedents that seemingly support a court's power to conscript an unwilling attorney on the notion that an attorney is an 'officer of the court,' are based upon a misunderstanding of the structure of the British court system." *Id.*; Shapiro, *supra* note 3, at 753. "To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there." *Id.*

²⁶ Marrero Report, *supra* note 6, at 27. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). "[L]awyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.'" *Id.*; H. DRINKERS, *supra* note 24, at 313. Canon 12 of the 1908 Canons of Professional Ethics asserted that "it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." *Id.*; Smith, *supra* note 11, at 729 (onus on lawyers to utilize "special and unique skills in the public interest"); Discussion Draft of ABA Model Rules, 48 U.S.L.W. 1, 27 (1980). ABA Delegates stated: "[I]t is the basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services. This responsibility derives from the lawyers commitment to the laws ideal of equal justice." *Id.* Cf. *Cunningham*, 177 Cal. App. 3d at 355, 222 Cal. Rptr. at 866 (attorney has duty to client, courts and justice system to render legal assistance in accordance with resources he possesses); Cahn and Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1012 n.16 (1970). "The market is not for 'legal services;' the market is for justice." *Id.* But see Rosenfeld, *supra* note 4, at 266 (contending availability of free legal assistance will increase meritless litigation and further burden courts); Shapiro, *supra* note 3, at 779 (same).

²⁷ See *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (attorneys bound to serve when appointed as officers of the court); *Dillon v. United States*, 346 F.2d 633, 637 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). "Lawyers traditional obligation to represent indigents did not include any right to compensation." *Id.*; *State v. Green*, 470 S.W.2d 571, 574 (Mo. 1971) (Seiler, J., concurring). "The lawyers cannot escape being officers of the court and cannot escape a certain amount of *pro bono publico* work, which inevitably go with the special and exclusive privilege of being allowed to represent others in the court." *Id.* See also *Ruchenbrod*, 102 Utah at 563, 133 P.2d at 331. "The attorney, because of his position as officer of the court, can be compelled by the court to render gratuitous services in the defense of indigents, and an attorney who has been so appointed is not entitled to compensation" *Id.*; *Jacox v. Jacox*, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 437 (2d Dep't 1974). The members of the Bar have a personal obligation "to willingly accept assignments made by the Bench and to help those who cannot afford financially to help themselves." *Id.*

²⁸ Tudzin, *supra* note 4, at 118. See generally *Webb v. Baird*, 6 Ind. 13, 15-16 (1854). Commenting on *pro bono*, the court stated that "honorary duties are hardly susceptible of enforcement in a court of law." *Id.*; Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 1985 MICH. B.J., 280 (Mar. 1985) (describing "coupon plan" method of enforcement); Rosenfeld, *supra* note 4, at 269 (profession must be willing to take on obligation before it can be enforced). But see Rosenfeld, *supra* note 4, at 264. "Beyond the simple self-

obligation is imperative to discharge duties as officers of the court,²⁹ to maintain the integrity of the profession³⁰ and to en-

forcement system, the proposed new obligation would be enforced in the same ways as the Disciplinary Rules have always been enforced" (referring to biennial reporting proposal under 1979 plan - duplicative of current proposal). *Id.* "Biennial certification by the attorney of compliance with the program will satisfy the obligation without violating the attorney-client privilege." *Id.* at 268-69. *But cf. Pro Bono Legal Service, An Executive Committee Position*, 36 REC. A.B. CTRY N.Y. 9, 13 (1981). "Reporting requirement would suggest an unwarranted lack of confidence in the members of the profession therefore no requirement of reporting is appropriate." *Id.*

²⁹ See *Bradshaw v. United States Dist. Ct. for the So. Dist. of Cal.*, 742 F.2d 515, 518 (9th Cir. 1984). "Failure to come forward to assist indigent litigants at the request of the court is an indication of loss of professionalism. It is also a violation of the spirit, if not the letter, of ethical considerations . . ." *Id.*; *United States v. Dillon*, 346 F.2d 633, 635 (4th Cir. 1965) (discussing representing indigents as condition to practicing law), *cert. denied*, 382 U.S. 978 (1966); *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala.), *appeal dismissed*, 444 U.S. 803 (1979) (representing indigents duty owed by profession); *People v. Randolph*, 35 Ill. 2d 24, 28, 219 N.E.2d 337, 340 (1966). "An attorney is an officer of the court and his license to practice comes with it the *steadfast* obligation to serve the court whenever called upon to do so." *Id.* (emphasis in original). *Yarborough v. Superior Court of Napa County*, 150 Cal. App. 3d 388, 395, 197 Cal. Rptr. 737, 741 (Ct. App. 1983). "An attorney is an officer of the court before which he or she was admitted to practice and is expected to discharge his or her professional responsibilities [to represent indigents] at all times, particularly when expressly called upon by the courts to do so." *Id.*; T. COOLEY, CONSTITUTIONAL LIMITATIONS 334 (1868). "[Representing indigent defendants] is a duty the lawyer owes to his profession, the court and the cause of justice to serve without compensation. No one is at liberty to decline such an appointment, and it is to be hoped that few would be disposed to do so." *Id.* *But see Scott*, 688 S.W.2d at 769. "The courts of this state have no inherent power to appoint or compel attorneys to serve in civil actions without compensation." *Id.*; *Caruth v. Pickney*, 683 F.2d 1044, 1049 (7th Cir. 1982) (court can only request, not require, attorney to represent indigent), *cert. denied*, 459 U.S. 1214 (1983).

³⁰ See *Bradshaw*, 742 F.2d at 518 (professionalism demands that attorneys render assistance to indigents); *In re Smiley*, 36 N.Y.2d 433, 441, 330 N.E.2d 53, 58, 369 N.Y.S.2d 87, 94 (1975) (attorneys, pursuant to canons of profession, have obligation to perform services for indigents). ABA Model Rule 6.1 states:

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983). The comment to Rule 6.1 states: [T]his rule expresses [the basic responsibility of lawyers to provide public interest legal services] but is not intended to be enforced through the disciplinary process. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet that need.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 comment 3 (1983). See also *Luban*, *supra* note 28, at 283 (Mar. 1985). "Pro bono should not be viewed as conscription but rather a reshaping of the lawyers professional role." *Id.*; *Shapiro*, *supra* note 3, at 789. "Lawyers . . . can perhaps do the most to reduce the general level of dissatisfaction by working for those changes that will reduce the demand for their services." *Id.*; *Smith*, *supra* note 11, at

hance the public image of the Bar.³¹

B. Monopoly and the Right to Regulate

Attorneys have been granted a monopoly over the practice of law³² and with this exclusive privilege they "hold the key to the system of justice."³³ Proponents of mandatory pro bono urge that this privilege brings with it the responsibility to insure that representation is available to those who need it but are unable to obtain proper legal assistance.³⁴ Without an attorney, a layman will usu-

734 (law profession is dynamic and lawyers should seek changes to meet society's needs); Tudzin, *supra* note 4, at 106. "The Model Code contains nothing affirmative about an attorney's duty to provide free or limited fee services to [the poor]. Any mandatory calling for lawyers to satisfy those needs has been deleted and what is left . . . is merely suggestive and aspirational." *Id.*

³¹ See *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) (Marshall, J.). "The profession of an attorney is of great importance to an individual . . . [o]n the other hand the respectability of the bar should be maintained." *Id.* See also *In re Griffiths*, 413 U.S. 717, 723-24 (1973). "[Lawyers should] function in a manner which will foster public confidence in the profession and, consequently, the judicial system." *Id.*; *At Issue*, *supra* note 17, at 52. "It is insufficient for individual lawyers to expect that some amorphous entity comprising 'the profession' will answer [the] needs [of the poor]. Each lawyer has [that] responsibility . . . and lawyers fail the poor, the public interest, the profession and themselves when they fail to do so." *Id.*; Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958). "Popular misconceptions of the advocate's function disappear when the lawyer pleads without a fee, and true value of his service to society is immediately perceived." *Id.*; Shapiro, *supra* note 3, at 789. "When a lawyer comes forward to perform a service because of a sense of responsibility to the profession and to society, something is surely gained in the measure of public respect for the calling." *Id.* But see Lardent, *At Issue: Mandatory Pro Bono*, 74 A.B.A. J. 47 (May 1988). "Compelling attorneys to provide mandatory pro bono will detract from public's perception of profession." *Id.*; Smith, *supra* note 11, at 727. "The legal profession will not maintain the public's respect if it supports a random and haphazard standard under which some lawyers contribute pro bono service while others contribute little or none." *Id.* But cf. Shapiro, *supra* note 3, at 789. "When unwilling lawyers are drafted into service, with all quarrels over the nature and extent of their duty that are bound to occur, public esteem may well decline." *Id.*

³² See *In re Snyder*, 472 U.S. 634, 644 (1985). "As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers." *Id.*; Tudzin, *supra* note 4, at 111. "Lawyers' monopoly of the legal market requires them to provide free/reduced fee legal services." *Id.* *Contra* Shapiro, *supra* note 3, at 777. "To say, then, that lawyers have a monopoly, or even a powerful cartel, is to misrepresent the dynamics of the present-day practice of the law." *Id.*

³³ Forger, *At Issue: Mandatory Pro Bono*, 74 A.B.A. J. 46 (May 1988). See *Powell v. Alabama*, 287 U.S. 45, 67-69 (1932). "The right to be heard would be . . . of little avail [without] counsel." *Id.*; Rosenfeld, *supra* note 4, at 279. "[S]ubstantive rights and procedural remedies for the benefit and protection of the poor . . . become empty promises without lawyers to vindicate the rights and pursue the remedies." *Id.* (citations omitted).

³⁴ The Florida Bar, 432 So. 2d 39, 41 (Fla. 1983). "There are people in need of legal

ally be incapable of adequately representing himself,³⁵ especially when opposed by "practiced and carefully counselled adversaries."³⁶ To meet the shortage of representation for the indigent, courts have held that a state can prescribe mandatory pro bono as a condition for the granting of a license to practice law.³⁷ If the Bar refuses to adhere to this condition, it is feasible that the state and society could abolish the lawyers' monopoly and employ alternative means to satisfy the public's legal needs.³⁸

services who are unable to pay for those services. All persons, however, should have the opportunity of obtaining effective legal services and should have meaningful access to the courts." *Id.* See also *Payne v. Superior Court*, 17 Cal. 3d 908, 918, 553 P.2d 565, 573, 132 Cal. Rptr. 405, 413 (1976) (indigent defendant in civil lawsuit entitled to appointment of counsel); *In re Smiley*, 36 N.Y.2d 433, 437, 330 N.E.2d 53, 55-56, 369 N.Y.S.2d 87, 90 (1975) (right to counsel and due process carry with them provision of counsel if defendant unable to afford it); *Rosenfeld*, *supra* note 4, at 274 (civil litigants entitled to appointed counsel if case adversely affects fundamental rights). *But see* *Tudzin*, *supra* note 4, at 105 (compelled representation inappropriate in civil cases). See generally Note, *The Indigents Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967) (discussing problems indigents have in obtaining counsel, unfair contingency agreements and solution for granting indigents counsel).

³⁵ See *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (even the most dedicated trial judges are bound to overlook meritorious cases without counsel focusing issues); *Powell*, 287 U.S. at 69. "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.*; *Godpuster*, *The Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970) (discussing difficulty indigents have bringing case to trial). See generally *Douglas*, *The Right to Counsel*, 45 MINN. L. REV. 693, 694 (1961) (indigents subject to discrimination due to lack of availability of competent counsel). *But see* *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 765 (Mo. 1985) (en banc). In rejecting the monopoly argument, the *Scott* court stated that "no individual is denied an opportunity to argue his own cause." *Id.*; *Shapiro*, *supra* note 3, at 776. "[O]utside the courtroom, a person has many alternatives to the hiring of a lawyer, ranging from self help with the aid of an increasing number of books and manuals to the assistance of a trained adviser without a law degree." *Id.*

³⁶ *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 7 (1963).

³⁷ See *Mallard v. United States Dist. Ct. for the So. Dist. of Iowa*, 490 U.S. 296, 109 S.Ct. 1814, 1824 (1989) (Stevens, J., dissenting) "[A] court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar." *Id.* (citations omitted); *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 349, 222 Cal. Rptr. 854, 862 (Cal. Ct. App. 1986) (imposition of burden as condition to licensure permissible provided it is borne equally by all lawyers). See also *Rosenfeld*, *supra* note 4, at 295 (licensing imposes obligations on professionals). *But see* *DeLisio v. Alaska Superior Court*, 740 P.2d at 440 (Alaska 1987) (license to practice law protected by due process, therefore cannot be arbitrarily revoked); *Ruckenbrod v. Mullins*, 102 Utah 548, 553, 133 P.2d 325, 327 (1943) (power of state to impose duty to render gratuitous services must be based on more than power to license).

³⁸ See *Scott*, 688 S.W.2d at 765. "Limiting the number of persons who can practice law is for the benefit of the public." *Id.* *Smith*, *supra* note 11, at 734. "If the legal profession does not address society's needs, society will satisfy those needs through other means, thus reducing the autonomy that the profession currently enjoys." *Id.*; *Tudzin*, *supra* note 4, at

C. *Effective Assistance of Counsel*

Opponents of mandatory pro bono contend that such a program, through representation by inexperienced attorneys, may "deprive the indigent of effective assistance of counsel."³⁹ Conversely, it is asserted that "[m]ost civil lawyers are generalists,"⁴⁰ engaged in a comprehensive practice, after a broad based legal education.⁴¹ A difficulty may arise if a lawyer encounters a legal situation with which he is unfamiliar or uncomfortable,⁴² however, the "problem is easily rectified by providing supervision and

111. "Lawyers have been *allowed* to have the monopoly." *Id.* (emphasis added). *Cf.* Smith, *supra* note 11, at 733 (asserting that public grants lawyers exclusive right to practice therefore, public should receive some benefit in return).

³⁹ See *Cunningham*, 177 Cal. App. 3d at 353, 222 Cal. Rptr. at 865. See also Report of Commission on Professionalism, 112 F.R.D. 243, 298 (1986). "Commission . . . does not recommend mandatory pro bono because 1) antithetical to conscript lawyers 2) would create situations whereby lawyers unwillingly represent clients to the detriment of those clients." *Id.*; Graham, *supra* note 20, at 64 (widespread concern about inferior legal services for poor). *But see infra* notes 40-43 and accompanying text (setting forth proposition that potential for deprivation of effective assistance of counsel is easily remedied).

⁴⁰ *In re Snyder*, 734 F.2d 334, 340 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985). See *State v. Rush*, 46 N.J. 399, 406, 217 A.2d 441, 444-45 (1966). The court stated:

The law is a vast field and no man is in command of all of it. Lawyers . . . move from scene to scene, absorbing the special features of each. A capacity to that end goes to the essence of the practice of law. A lawyer's training equips him for it . . . [A]nd although a new scene may demand a greater initial effort, the newcomer may well bring a zeal and a freshness long lost to a tired or comfortable expert.

Id. *But see* *Luke v. County of Los Angeles*, 269 Cal. App. 2d 495, 499, 74 Cal. Rptr. 771, 773-75 (Cal. Ct. App. 1969). "[T]oday's law comprehends a myriad of different processes, and lawyers must necessarily specialize in only a few of them in order to achieve and maintain competency in their work." *Id.* See generally *Mindes, Proliferation, Specialization and Certification: The Splitting of the Bar*, 11 U. Tol. L. Rev. 273, 274 (1980) (recent studies on growth and diversity of Bar characterize the profession as a complex "galaxy of non-interchange specialists").

⁴¹ See *Rush*, 46 N.J. at 406, 217 A.2d at 444. *But see* BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951) *passim* (contends assigning of pro bono attorneys depends in large part on newly admitted lawyers seeking to gain experience).

⁴² See *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) (en banc) (contending quality of representation will decrease proportionately to loss of choice of attorney); *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 355, 222 Cal. Rptr. 854, 866 (Cal. Ct. App. 1986) (attorney has duty to client, courts and judicial system to render legal assistance in accordance with the resources he possesses); Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564, 566 (Apr. 1979) (legal problems of the poor are not simple or unimportant and deserve adequate time and skill). *Cf.* Lardent, *supra* note 31, at 47. "[M]any attorneys won't do work outside their specialty because they don't want to do a bad job." *Id.* THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101 (West 1989) states: "A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle . . . [or] handle a legal matter without preparation adequate in the circumstances." *Id.*

resources”⁴³

III. CONSTITUTIONAL ASPECTS

When a state seeks to require a lawyer to perform mandatory pro bono, opponents contend there are constitutional issues which undermine the legitimacy of such a requirement.⁴⁴ Constitutional objections are set forth primarily⁴⁵ under the fifth,⁴⁶ thirteenth⁴⁷ and fourteenth⁴⁸ amendments to the United States Constitution.

A. *The Fifth Amendment*

Opponents of mandatory pro bono classify legal services, the “lawyers stock in trade,”⁴⁹ as property, suggesting they are enti-

⁴³ Tudzin, *supra* note 4, at 117. See Forger, *At Issue: Mandatory Pro Bono*, 74 A.B.A. J. 46 (May 1988). “There is not a single skill that can’t be devoted to the poor, including anti-trust and tax ‘I’m not qualified is a cop-out.’” *Id.*; Marin-Rosa and Stepter, *Orange County-Mandatory Pro Bono in a Voluntary Bar Association*, 59 FLA. B.J. 21, 22 (Dec. 1985). “The funds collected in lieu of services are used to staff an office with attorneys and paralegals. Services performed are aimed at the specific needs of the poor.” *Id.*

⁴⁴ See, e.g., *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 347, 222 Cal. Rptr. 854, 861 (Cal. Ct. App. 1986). “The right to practice law . . . must not be predicated upon the relinquishment of constitutional rights.” *Id.* (citations omitted). See generally Shapiro, *supra* note 3, at 738-39 (discussing constitutional issues raised by state-implemented mandatory pro bono).

⁴⁵ Opponents of mandatory pro bono programs have raised an argument under the first amendment contending that compelled representation deprives the lawyer of an element of professional choice and freedom of association. See e.g., *Scott*, 688 S.W.2d at 768. See also *Cunningham*, 177 Cal. App. 3d at 356, 222 Cal. Rptr. at 867. “Mandatory pro bono representation prevents an attorney from making a determination as to whom he or she wishes to represent.” *Id.*; Shapiro, *supra* note 3, at 763 (Supreme Court extends free speech to include right to associate with others and “to be free from coerced association with causes, ideas, and conduct espoused or engaged in by others.”) (citations omitted); Rosenfeld, *supra* note 4, at 268. Critics contend that a “mandatory obligation would necessarily involve inquiry by an enforcement body into the nature of attorney-client relationships, and provide at least a ‘chilling effect’ upon the exercise of first amendment freedoms by both lawyers and their clients.” *Id.*

⁴⁶ See *infra* notes 49-56 and accompanying text (discussion of fifth amendment issues arising from mandatory pro bono programs).

⁴⁷ See *infra* notes 57-63 and accompanying text (discussion of thirteenth amendment issues arising from mandatory pro bono programs).

⁴⁸ See *infra* notes 64-71 and accompanying text (discussion of fourteenth amendment issues arising from mandatory pro bono programs).

⁴⁹ See *Webb v. Baird*, 6 Ind. 13, 17 (1854). In this case the court noted that:

To the attorney his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic.

Id. See also Cheatham, *supra* note 24, at 444. “The lawyer’s stock in trade is intangible - his

tled to protection under the fifth amendment.⁵⁰ This argument frequently analogizes a lawyer to a grocer, concluding that it would be as unfair to deprive the lawyer of his services as it would be to deprive the grocer of his goods to feed the hungry.⁵¹ However, proponents argue that "the grocer does not make the hungry worse off by selling to the cash customer; grocery retailing is not an adversarial profession [while] law retailing is."⁵² Furthermore, because of the long standing tradition of the profession engaging in pro bono work, which the lawyer is deemed to be aware of, he cannot object to mandatory pro bono as an "involuntary taking."⁵³ When confronted with the issue, the majority of courts

time is fortified by his intellectual and personal qualities, and burdened by his office expenses. To take his stock in trade is like stripping the shelves of the grocer or taking over a subdivision of the builder." *Id.*

⁵⁰ See U.S. CONST. amend. V. This amendment provides in pertinent part: "nor shall private property be taken for public use, without just compensation." *Id.*; *Menin v. Menin*, 79 Misc. 2d 285, 292, 359 N.Y.S.2d 721, 728 (Sup. Ct. Westchester County 1974), *aff'd mem.*, 48 App. Div. 2d 904, 372 N.Y.S.2d 985 (2d Dep't 1975). "It has been said that the right to practice in any profession is a 'valuable property right, in which, under the Constitution and the laws of the State, one is entitled to be protected and secured.'" (quoting *In re Bender v. Board of Regents of Univ. of State of New York*, 226 App. Div. 627, 631, 30 N.Y.S.2d 779, 784 (1941)) *Id.*; Shapiro, *supra* note 3, at 771. "[S]ervice, with or without a financial alternative, might be asserted to be a taking without just compensation." *Id. Contra* "The claim [that mandatory pro bono is not a taking] has been put on the basis that the authorization to practice law, is a privilege conferred by the state, not a protected property interest." *Id.* (citations omitted).

⁵¹ See Cheatham, *supra* note 24, at 445.

It is unfair to put on any working group the burden for providing for the needy out of its stock and trade. No one would suggest that the individual grocer or builder should take the responsibility of providing the food and shelter needed by the poor. The same conclusion applies to the lawyer.

Id. See also Ellman, *Book Review Essay: Lawyering for Justice in a Flawed Democracy. Lawyers and Justice an Ethical Study*, 90 COLUM. L. REV. 116, 168 (1990) (concurring with book author's assertions regarding requirement of legal service for poor and grocer analogy). Cf. Caplow, *Under Adversement: Attorney Fee Forfeiture and The Supreme Court*, 55 BROOKLYN L. REV. 111, 134 (1989) (analogizing payments by economically deprived to attorneys with payments for other necessities such as groceries).

⁵² Luban, *supra* note 28, at 283. See *Ex parte Dibble* 310 S.E.2d 440, 442 (S.C. Ct. App. 1983) (disagreeing with proposition that there is no difference between service of lawyer and grocer based on necessity of judicial system to society).

⁵³ See *In re Snyder* 734 F.2d 334, 338-39 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985). "The profession of law rests upon its commitment to public service and has long been recognized as a profession that requires its membership to engage in pro bono activities." *Id.*; *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966) (applicant for admission to bar is deemed cognizant of tradition of pro bono, thus consenting to this obligation and is precluded from raising "involuntary taking" argument) (citing *Kunhardt & Co., Inc. v. United States*, 266 U.S. 537 (1925); *House v. Whitis*, 64 Tenn. (5 Baxter) 690, 692 (1875) (license to practice law carries with it obliga-

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reject the position that mandatory pro bono is a taking of property.⁵⁴ Similarly, pro bono has been regarded by some as an obligation⁵⁵ and "the Fifth Amendment does not require [payment] for the performance of a public duty [that is] already owed."⁵⁶

B. The Thirteenth Amendment

The thirteenth amendment⁵⁷ was enacted to protect against "involuntary servitude."⁵⁸ Opponents of mandatory pro bono suggest that this protection encompasses the idea of compelled representation,⁵⁹ because such compulsion removes, to some extent, the

tion to serve indigents). *See also* Dibble, 310 S.E.2d at 441. "For many years courts have viewed uncompensated service as a duty attendant to the public office which the lawyer voluntarily seeks. For this reason, the lawyer is not a private citizen being deprived of property without just compensation or due process." *Id.*

⁵⁴ *See* Dillon, 346 F.2d at 636 (held attorney did not have right to compensation under fifth amendment because there had been no taking); *Weiner v. Fulton County*, 113 Ga. App. 343, 347-48, 148 S.E.2d 143, 146 (Ga. Ct. App.), *cert. denied*, 385 U.S. 958 (1966) (overwhelming majority of jurisdictions reject argument that mandatory pro bono is taking of property). *But see* Shapiro, *supra* note 3, at 755 (asserting that "claimed majority is not nearly so solid nor so monolithic").

⁵⁵ *See supra* notes 24-31 and accompanying text (discussing pro bono as obligation of the Bar).

⁵⁶ *Hurtado v. United States*, 410 U.S. 578, 588 (1973). *See* Rosenfeld, *supra* note 4, at 258 (recognizing that the obligation of pro bono is well established, and as such cannot constitute a taking). *See also* Dillon, 346 F.2d at 636 (court appointment of counsel not taking because lawyer is obligated to serve court without compensation). *Cf.* *Butler v. Perry* 240 U.S. 328, 329 (1916). State statute required "every able-bodied male person" between ages of 21 and 45 to work without pay "on the roads and bridges of the several counties" for six ten hour days each year. *Id.* Such forced labor by every male was not involuntary servitude because it was "part of the duty which he owes the public." *Id.* at 330 (statutory citation omitted); *Maricopa County v. Clifford Corp.*, 44 Ariz. 506, 507, 39 P.2d 351, 352 (1934) (citizens obligated to perform services such as jury duty without compensation unless a statute otherwise provides).

⁵⁷ *See* U.S. CONST. amend. XIII, § 1. This amendment provides in pertinent part: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." *Id.*

⁵⁸ *See* *The Butchers' Benevolent Ass'n of New Orleans v. The Crescent City Live-Stock Landing and Slaughter House Co.* (The Slaughter House cases), 83 U.S. (16 Wall.) 36, 69 (1872) (Court stated obvious purpose of thirteenth amendment was to abolish "all shades and conditions of African slavery"). *See generally* C. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* §§ 220-22 (1922) (discussing purpose and application of thirteenth amendment).

⁵⁹ *See* *The Florida Bar*, 432 So. 2d 39, 41 (Fla. 1983). "We have been loathe to coerce involuntary servitude in all walks of life; we do not mandate acts of charity." *Id.*; Humbach, *supra* note 42, at 566. Mandatory pro bono "would not violate the letter of thirteenth amendment but it would surely violate the amendment's spirit." *Id.* *See, e.g.*, *Bedford v. Salt Lake County*, 22 Utah 2d 12, 14, 447 P.2d 193, 195 (1968) (court held uncompensated service was involuntary servitude in violation of thirteenth amendment). *But see* Rosenfeld,

attorney's ability to choose for whom he works.⁶⁰ However, mandatory pro bono "bears little resemblance to the bondage of Afro-Americans which was the amendment's principal target,"⁶¹ and courts consistently construe the amendment in accordance with this narrow purpose.⁶² It is noted that critics of mandatory pro bono fail to reconcile the propriety of coerced service to indigents in criminal cases with the alleged impropriety in the civil context.⁶³

C. The Fourteenth Amendment

The Equal Protection Clause of the fourteenth amendment⁶⁴ provides that similarly situated people should be treated in a like

supra note 4, at 292. "Since *Butler*, the courts have recognized in numerous contexts that mandated service [such as military conscription] to meet a public need does not offend the thirteenth amendment." *Id.*

⁶⁰ See Shapiro, *supra* note 3, at 774. "An obligation to perform certain work, backed by the sanction of contempt, professional discipline, or loss of livelihood, is about as direct an invasion of a person's control over his labor as can be imagined." *Id.* See also *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) (compelled service denies attorney professional choice).

⁶¹ Shapiro, *supra* note 3, at 768. Cf. *Butler v. Perry*, 240 U.S. 328, 332 (1916) (duties owed society not akin to African slavery).

⁶² See, e.g., Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 704-05 (D.C. Cir. 1984) (dismissed thirteenth amendment argument in case of non-compensated representation); *Williamson v. Vandeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) (thirteenth amendment never forbade compulsion of non-compensatory public service); *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205 n.3 (5th Cir. 1981) (noncompensable appointments constitutional under thirteenth amendment); Rosenfeld, *supra* note 4, at 290. "[F]ew of the critics or courts that have advanced [the involuntary servitude] argument have advanced it on any historical analysis of that Civil War enactment, or of the numerous decisions interpreting it over the course of a century." (citations omitted); *Tudzin*, *supra* note 4, at 120 (discussing thirteenth amendment arguments). *Contra* *Pollack v. Williams*, 322 U.S. 4, 17 (1944). The *Pollack* Court suggested that the thirteenth amendment was intended "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." *Id.*

⁶³ See *Scott*, 688 S.W.2d at 773 (Blackmar, J., dissenting). "If the requirement of uncompensated services in a criminal case does not constitute a 'taking of property' or an 'involuntary servitude' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not in quality." *Id.*; Rosenfeld, *supra* note 4, at 292. The thirteenth amendment argument "never explains why coerced service to indigents in criminal cases does not offend the perceived right under the thirteenth amendment of 'all to labor in freedom' while in civil cases the violation of the provision 'is clear.'" *Id.*

⁶⁴ See U.S. CONST. amend. XIV, § 1. This amendment provides in pertinent part: "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." *Id.*

manner.⁶⁵ Challengers of mandatory pro bono claim that this principle is violated when lawyers are "singled out from among all citizens or all other professionals and alone required to donate services free of charge."⁶⁶ This onus has been regarded as an unjust tax on the legal profession⁶⁷ for an obligation that should be borne by society as a whole.⁶⁸ Notwithstanding this assertion, proponents argue that "so long as the regulation imposed on [a particular] profession is rationally related to a legitimate public purpose it will withstand an equal protection challenge."⁶⁹ In

⁶⁵ See *Southern Ry. Co. v. Green*, 216 U.S. 400, 412 (1910). "[T]he equal protection of the laws means subjection to equal laws, applying alike to all in the same situation." *Id.* See also *infra* notes 70-71 (discussing state regulation of similar professionals under equal protection). See generally C. BURDICK, *supra* note 58, at §§ 279-82 (discussing application of law under equal protection clause to similar persons under dissimilar circumstances).

⁶⁶ Rosenfeld, *supra* note 4, at 294. See *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 348, 222 Cal. Rptr. 854, 861-62 (Cal. Ct. App. 1986). "It is a denial of equal protection when the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons . . ." *Id.* (citing *Norwood v. Baker*, 172 U.S. 269, 279 (1898). But see *Ruckenbrod v. Mullins*, 102 Utah 548, 561, 133 P.2d 325, 331 (1943) "[T]he right to practice law in the state courts is not a privilege or an immunity . . . which is protected by the 14th [sic] amendment." *Id.* See generally Rosenfeld, *supra* note 4, at 294 (pointing out when equal protection of lawyer is violated); Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 Ky. L.J. 710, 714-15 (1972) (same).

⁶⁷ See *Cunningham*, 177 Cal. App. 3d at 352, 222 Cal. Rptr. at 864 (state should not single out lawyers to underwrite an obligation of the tax-paying public); Humbach, *supra* note 42, at 566 (discussing pro bono as special excise tax on legal profession); Shapiro, *supra* note 3, at 783. "To the extent that the tax is borne by lawyers themselves, a critical question is whether they are a more appropriate group to bear the burden than society as a whole." *Id.* [A] tax or service obligation imposed on lawyers is not a desirable approach, at least if the amount of the tax or the level of the obligation constitutes a substantial burden." *Id.* at 784. But see *Tudzin*, *supra* note 4, at 113. "Legal tax is the answer - not paid Pro Bono."

⁶⁸ See *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987). "Because the appointment thus benefits all persons equally the cast should be borne by all rather than shunted to specific persons or specifically identifiable classes or persons." *Id.* (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)); *The Florida Bar*, 432 So. 2d 39, 41 (Fla. 1983). "The assurance that effective legal services are available to all is not the sole responsibility of lawyers but is one to be shared by the government and society." *Id.*; *Ex parte Dibble*, 310 S.E.2d 440, 443 (S.C. Ct. App. 1983). "It is unfair to cast on [lawyers], alone, the burden of serving the needs of the whole society without compensation." *Id.* See also *Graham*, *supra* note 20, at 64 (obligation is that of society, not solely lawyers); *Tudzin*, *supra* note 4, at 113. "Lawyers should not be held responsible for a pervasive social problem which requires a solution from society as a whole." *Id.* See generally *Lundberg & Bodine*, *50 Hours for the Poor*, 73 A.B.A. J. 55 (Dec. 1987) (A.B.A. & A.M.A. state 50 hours is proper pro bono requirement).

⁶⁹ Rosenfeld, *supra* note 4, at 295. Cf. *Tudzin*, *supra* note 4, at 113. "[F]act that similar obligations are not yet required of other professions does not give credence to the legal profession's failure to actively aid in the advancement of social goals." *Id.* But see *Knox*

furtherance thereof, the state is not constrained to regulate all professions identically⁷⁰ "so long as all members of the group [are] being regulated in a similar manner."⁷¹

CONCLUSION

There are valid arguments in opposition to a mandatory pro bono program. When considering the magnitude of the unmet legal needs of indigents and the immediacy of the problem, it is suggested that these arguments are not sufficiently persuasive. Concededly, the exclusive solution is not a mandatory pro bono program. The Bar, through such a program, has the unique ability to respond swiftly and effectively to this egregious problem. Attorneys occupy a distinguished position in our society. Performing pro bono legal services for the indigent is a responsibility that is commensurate with that position.

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County v. McCormick 217 Ind. 493, 500, 29 N.E.2d 405, 408 (1940). "[T]he public can no longer justly demand of a [lawyer] any gratuitous services which would not be demanded of every other [profession]." *Id.*

⁷⁰ See *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935). Addressing a regulation that was limited to one profession, the Court stated: "The state was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. [The State] could deal with the different professions according to the needs of the public in relation to each." *Id.*; *Cunningham*, 177 Cal. App. 3d at 348, 222 Cal. Rptr. 861-62. It has been noted that "an attorney who is appointed to represent an indigent without compensation is effectively forced to give away a portion of his property-his livelihood. Other professionals, merchants and state licensees are not similarly required to donate services and goods to the poor." *Id.*; Shapiro, *supra* note 3, at 775. "Reciprocity for the burdens imposed or sought to be imposed upon the legal field has often been asserted to exist in the 'monopoly' granted to lawyers for the practice of law. [W]hile a lawyer . . . must share the burden, it is hard to find comparable burdens being imposed on any other groups - even other [professionals]." *Id.* Cf. *Webb v. Baird*, 6 Ind. 13, 16 (1854).

The idea of [lawyers] enjoying peculiar privileges, and therefore being more honorable . . . is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.

Id.

⁷¹ *Rosenfeld*, *supra* note 4, at 296. See *Cunningham*, 177 Cal. App. 3d 336, 351, 222 Cal. Rptr. 854, 863 (Cal. Ct. App. 1986). "Equal protection principles are violated when one attempts to apply a general rule of forced pro bono representation on such a diverse class as lawyers." *Id.*; Shapiro, *supra* note 3, at 770. "The treatment of some or all lawyers might be seen to be different from the treatment of other lawyers [and as such] to constitute a denial of equal protection." *Id.*