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Benjamin L. Cardin

Robert J. Rhudy

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## Symposium

### EXPANDING PRO BONO LEGAL ASSISTANCE IN CIVIL CASES TO MARYLAND'S POOR

BENJAMIN L. CARDIN\*

ROBERT J. RHUDY\*\*

#### INTRODUCTION

On December 17, 1987, the Advisory Council of the Maryland Legal Services Corporation (MLSC)<sup>1</sup> promulgated an "Action Plan for Legal Services to Maryland's Poor."<sup>2</sup> The Action Plan was the result of a comprehensive study of the needs of Maryland's low-income population for civil legal assistance.<sup>3</sup> It included forty-one

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\* Member, United States House of Representatives from Maryland's 3d Congressional District; Chairman, Maryland Legal Services Corporation. B.A., University of Pittsburgh, 1964; J.D., University of Maryland School of Law, 1967.

\*\* Executive Director, Maryland Legal Services Corporation. B.A., Virginia Polytechnic Institute, 1969; J.D., University of Iowa College of Law, 1973.

The writers wish to state their appreciation to the Maryland Legal Services Corporation (MLSC).

1. The Advisory Council consisted of thirty members include bar leaders, judges, legislators, public officials, law school professors, and other concerned citizens. The members were named by Maryland Governor William Donald Schaefer, Attorney General J. Joseph Curran, Jr., House of Delegates Speaker R. Clayton Mitchell, chief judges of the federal and state courts, Maryland State Bar Association (MSBA) presidents, the MLSC, and others. The authors of this article served respectively as Advisory Council Chairman and Research Director. MARYLAND LEGAL SERVICES CORPORATION ADVISORY COUNCIL, ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR (1988) [hereinafter ACTION PLAN].

2. *Id.* For an extensive summary of the Action Plan, see Cardin & Rhudy, *Expanding Civil Legal Assistance to Maryland's Poor*, 11 MD. L. FORUM 5 (1988).

3. ACTION PLAN, *supra* note 1, at vi. The Maryland Legal Services Corporation Act directs the MLSC to set the eligibility standard for legal assistance at not greater than 50% of the state's median family income. MD. ANN. CODE art. 10, § 45G(e) (1987). As

recommendations for better serving those needs.<sup>4</sup> Of all its proposals, the Advisory Council's recommendation for a mandatory pro bono legal service requirement for all Maryland attorneys stimulated the most debate.<sup>5</sup> This article will describe the Action Plan's findings as to legal needs and inadequate services, and its delivery plan. It also will focus on the Advisory Council's mandatory pro bono recommendation, and describe the current efforts being taken by the Maryland Court of Appeals and the Maryland State Bar Association (MSBA) to determine whether voluntary pro bono efforts by Maryland's attorneys can be expanded sufficiently or whether the mandatory requirement should be imposed.

### I. BACKGROUND

The Advisory Council's mandatory pro bono and other proposals reflect the longstanding practice in western judicial systems of providing legal assistance for those who cannot afford it.<sup>6</sup> The English Magna Carta signed by King John in 1215 stated "To no one will we sell, to no one will we refuse or delay, right or justice."<sup>7</sup>

of July 1, 1987, the median income for a family of 4 was \$19,066. ACTION PLAN, *supra* note 1, at 6. At that time, 1,067,455 Maryland citizens qualified as low income. *Id.*

4. See ACTION PLAN, *supra* note 1, at 31-36.

5. See Feeley, *Bono Pro and Con*, WARFIELD'S, Jan. 1989, at 94 (discussing MSBA controversy over mandatory pro bono service); Ruoff, *Legal Community Splits Over Maryland's Pro Bono Debate*, BALTIMORE BUS. J., Jan. 9-15, 1989, at 1 ("push to require Maryland attorneys to provide free services to the poor has been a hot issue in local legal circles"); *Give the Poor Their Day in Court*, BALTIMORE BUS. J., Mar. 20-26, 1989, at 6 (editorial by Rep. Benjamin L. Cardin) (advocating increased legal services for the poor); Eveleth, *Court of Appeals Examines Pro Bono*, Md. St. B.A. Bull., Mar. 1989, at 1, col. 1 (reporting on the Court of Appeals hearing held Mar. 2, 1989); Eveleth, *Pro Bono Perspective*, Md. St. B.A. Bull., Mar. 1989, at 5, col. 1 (summarizing remarks of Paul Carlin, MSBA Executive Director, on recent Interest on Lawyer Trust Account Act (IOLTA) and mandatory pro bono service in Maryland); Eveleth, *Bar Favors Voluntary Pro Bono Over Mandated*, Md. St. B.A. Bull., Nov. 1988, at 1, col. 1 (MSBA endorses increased voluntary pro bono service over mandatory service); Titus, *Plain Talk About Pro Bono*, Md. St. B.A. Bull., Nov. 1988, at 1, col. 1 (pressing for government recognition of its responsibility to the poor and urging increased commitment to voluntary service); Eveleth, *Vote in on Cardin Report*, Md. St. B.A. Bull., Jan. 1988, at 1, col. 3 (MSBA voted to support IOLTA legislation and called for increased efforts to meet legal needs of the poor, but rejected imposition of \$25 fee upon the private bar); Michener, *Another Point of View*, Md. St. B.A. Bull., Jan. 1988, at 1, col. 1 (dismissing arguments against \$25 private bar fee and mandatory pro bono service).

6. See M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 6-28 (1975); Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A.L. REV. 341, 341-55 (1985).

7. MAGNA CARTA, art. 40, reprinted in W. McKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1960).

Beginning in the fifteenth century, English attorneys were required to assist without compensation persons who were unable to pay for private counsel.<sup>8</sup> As a reaction to the formalistic and complicated English legal system that necessitated the assistance of counsel, the American colonists attempted to simplify the administration of justice, even abolishing the practice of law by attorneys in some instances.<sup>9</sup> As a result of this simplification, the provision of legal counsel in the United States was not viewed as necessary to obtain justice. While American common law incorporated the English edict that no one should be denied justice because of their inability to afford counsel, its provision of appointed counsel for indigents appears doubtful.<sup>10</sup>

In the 1880s legal aid offices, supported by local charities and bar associations or pro bono attorneys, began operating in several American cities to protect recent immigrants from unscrupulous employers, landlords, and businesses.<sup>11</sup> By 1917 forty-one cities, including Baltimore, had legal aid offices that provided some basic services to all indigents.<sup>12</sup>

Private legal aid societies continued to expand sporadically throughout the United States following World War I, but neverthe-

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8. 11 Hen. 7, ch. 12 (1495), reprinted in R. SMITH, *JUSTICE AND THE POOR* 21 (3d ed. 1924). The statute provided:

That every poor person or persons which have or hereafter shall have causes of action against any person within this realm shall have by the discretion of the Chancellor of this realm, for the time being, writs or writs original, and subpoenas according to the nature of their causes, therefore nothing paying to your Highness for the seals of the same, nor to any person for the writing of the said writs to be hereafter sued; and that the said Chancellor shall assign clerks to write the same writs ready to be sealed; and also learned counsel and attorneys for the same, without any reward taken therefor; and if the said writ or writs be returned before the king in his bench, the justices shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same; and the justices shall likewise appoint attorney for such poor person or persons and all other officers requisite and necessary to be had for the speed of the said suits, which shall do their duties without any reward for their counsels, help and business in the same; and the same law shall be observed of all such suits to be made before the King's justices of his Common place, and barons of his Exchequer, and all other justices in the courts of record where any such suit shall be.

*Id.*

9. E. JOHNSON, *JUSTICE AND REFORM* 4 (2d ed. 1978).

10. See R. SMITH, *supra* note 8, at 21-22.

11. See E. BROWNELL, *LEGAL AID IN THE UNITED STATES* 170-72 (1951 & Supp. 1961); E. JOHNSON, *supra* note 9, at 4-5; J. MAGUIRE, *LANCE OF JUSTICE* 16-19 (1928); R. SMITH, *supra* note 8, at app., Table I.

12. R. SMITH, *supra* note 8, at 147-48. Baltimore's Legal Aid Bureau was founded in 1911. *Id.* at 145.

less were nonexistent in most of the country and could not meet the demand where located.<sup>13</sup> In the Great Depression of the 1930s, at a time of great need for legal assistance by increasing numbers of poor persons, the resources of such legal aid societies actually declined.<sup>14</sup>

The first federal program to provide funding for civil legal services in the United States began in 1965 with the creation of the United States Office of Economic Opportunity's Legal Services Program (OEO Legal Services Program).<sup>15</sup> This program gave grants to existing and newly created civil legal service programs throughout the United States, and by 1973, made annual grants totalling \$60,000,000 to over 200 programs with more than 900 offices.<sup>16</sup>

In 1974, Congress replaced the OEO Legal Services Program with the Legal Services Corporation (LSC), an independent non-profit organization governed by an eleven-member Board of Directors appointed by the President and confirmed by the Senate.<sup>17</sup> By 1981, LSC's annual appropriation from Congress reached \$321,300,000, providing grants to over 300 legal services programs with over 8000 attorneys in the United States, Puerto Rico, the Virgin Islands, Guam, and American Micronesia.<sup>18</sup>

President Ronald Reagan, however, repeatedly attempted to eliminate federal funding for civil legal services to the poor during his administration.<sup>19</sup> While Congress refused, LSC's funding was cut back to \$241,000,000 in 1982, and at the 1989 level of \$308,000,000 was nearly forty percent lower per capita when ad-

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13. E. BROWNELL, *supra* note 11, at 19 (approximately one-half of the demand for legal services was being met in 1916).

14. Brief in Support of the Reauthorization and Continued Funding of the Legal Services Corporation, *In re* the Legal Services Corporation in the Congress of the United States 6 (1981) (brief of the New York Lawyers' Committee to Preserve Legal Services).

15. Economic Opportunity Amendments of 1965, Pub. L. No. 89-253, § 12, 79 Stat. 973.

16. *See* Economic Opportunity Amendments of 1966, Pub. L. No. 89-794, 80 Stat. 1451; E. JOHNSON, *supra* note 9, at ix; *see also* Pious, *Congress, The Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418 (discussing federal efforts to provide legal services from 1964 to 1972); Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME LAW. 860, 866-73 (1966) (discussing participation of bar associations in development of legal services of the Office of Economic Opportunity Legal Service Program).

17. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996i (1982)).

18. THE LEGAL SERVICES CORPORATION, AN AMERICAN INSTITUTION 8-10, 22-24 (1981).

19. *See* J. DOOLEY & A. HOUSEMAN, LEGAL SERVICES HISTORY, ch. 4, at 1, 25 (2d draft 1985) (reporting that the Reagan Administration initially proposed to eliminate funding for Legal Services Corporation (LSC) and managed to reduce the funding by 25%).

justed for inflation than in 1981.<sup>20</sup>

In Maryland, state and local governments began in the early 1970s to provide financial support to organizations serving the civil legal needs of the poor.<sup>21</sup> In 1982 the state legislature enacted a voluntary Interest on Lawyer Trust Account (IOLTA) program to generate additional legal services revenues,<sup>22</sup> and established the MLSC to oversee the collection and allocation of the IOLTA funds.<sup>23</sup> By 1987, however, the MLSC perceived that its available resources could not satisfy the growing demand for its services. To address this issue, the MLSC convened the Advisory Council.

## II. THE ADVISORY COUNCIL

The Advisory Council held public hearings with representatives of the state government, the judiciary, law schools, bar associations, legal services organizations, client groups, and other interested persons to address increased demand for legal services.<sup>24</sup> The Advisory Council also commissioned a survey to assess the nature and frequency of legal problems encountered by low-income households in Maryland.<sup>25</sup> The survey indicated that the typical low-income household in Maryland experienced more than three legal

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20. See ACTION PLAN, *supra* note 1, at 17; Legal Services Corporation, Budget Request for Fiscal Year 1987, at 1 (1986) [hereinafter LSC Budget Request] (requesting an appropriation of \$305,500,000); Memorandum from Bob Clyde, Co-Chair, Project Advisory Group Funding Criteria Committee, to Members and Board of Directors of the LSC (Oct. 31, 1986) (recommending "that LSC request from Congress an appropriation of \$391 million for fiscal year 1988"). In the Departments of the Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act, 1990 Pub. L. No. 101-162, 103 Stat. 988 (1989), the United States Congress approved a \$321,000,000 appropriation for the LSC for FY 1990, but this will be reduced by approximately 1.9% pursuant to the terms of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106.

21. See ACTION PLAN, *supra* note 1, at 1.

22. Act of June 1, 1982, ch. 830, 1982 Md. Laws 4576 (codified at MD. ANN. CODE art. 10, § 44 (1987) (recodified at MD. BUS. OCC. CODE ANN. § 10-303 (1989))) (making IOLTA mandatory). For a further discussion of mandatory IOLTA, see Rhudy, *Mandatory IOLTA Passes*, 22 MD. B.J. 2 (July/Aug. 1989).

23. Act of June 1, 1982, ch. 829, 1982 Md. Laws 4564 (codified at MD. ANN. CODE art. 10, §§ 45A-45N (1987 & Supp. 1989)).

24. ACTION PLAN, *supra* note 1, app. at 1, Summary of Public Response to Draft "Action Plan for Legal Services to Maryland's Poor." The meetings were held in Baltimore and Annapolis, Maryland. *Id.*

25. *Id.* at 8-10; see Mason-Dixon Opinion Research, Inc., *Legal Needs of the Poor in Maryland: General Summary and Analysis* (July 1987) [hereinafter *Mason-Dixon Opinion*] (copy on file with *Maryland Law Review*). The survey instrument, with changes by the Advisory Council, originally was prepared by Jessica Pearson, Ph.D., and Nancy Thoennes, Ph.D., of the Center for Policy Research, for a Colorado legal needs study conducted by the Colorado Bar Association, Colorado Bar Foundation, and Legal Aid

problems each year which merited the professional attention and advice of an attorney.<sup>26</sup> Of the 67.5 percent of the respondents who experienced such problems, only 37 percent indicated they had seen an attorney in the last 5 years.<sup>27</sup> Upon comparing the legal needs data with the resources of Maryland legal services programs, the Advisory Council found that the programs were able to provide legal assistance in less than twenty percent of the estimated instances of legal need.<sup>28</sup>

The Advisory Council also gathered information on public entitlement programs serving low-income persons in the state.<sup>29</sup> The results demonstrated the effectiveness of, and concomitant need for, legal counsel in contested administrative agency hearings.<sup>30</sup>

The Action Plan demonstrated that federal funding for legal services had diminished substantially per capita since 1981.<sup>31</sup> In fiscal year 1980, Maryland civil legal services received approximately \$6.9 million from federal, state, and private sources. Federal sources supplied approximately forty-seven percent of the total, state sources forty-six percent, and private sources seven percent.<sup>32</sup>

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Foundation of Colorado. See Pearson & Thoennes, *Assessing the Legal Needs of the Poor in Colorado*, 20 CLEARINGHOUSE REV. 200 (1986).

26. ACTION PLAN, *supra* note 1, at 9. The results of the survey of Maryland's poor showed the average number of legal problems per household per year (exclusive of repeat occurrences) in the following categories: consumer—.61; public benefits—.58; utility—.50; health—.44; housing—.43; employment—.31; family/domestic—.20; other—.26; total—3.29. Mason-Dixon Opinion, *supra* note 25, at 22. The survey consisted of telephone interviews with 800 Maryland households. ACTION PLAN, *supra* note 1, at 8. The survey results showed percentages of households reporting one or more legal problems in the past year in the following categories: consumer—39%; utility—34%; health—28%; public benefits—29%; housing—20%; employment—19%; family/domestic—12%; other—20%. *Id.* at 9.

27. ACTION PLAN, *supra* note 1, at 9-10.

28. *Id.* at 27.

29. *Id.* at 10-12. During the previous year, 251, 531 of the 860,504 applications filed for benefits under these programs were denied. *Id.*

30. *Id.* The Department of Human Resources' staff estimated that counsel was present for approximately 15% of its contested hearings, and that there was a reversal rate in favor of the claimant of 79-80% with counsel, compared to 40-45% without. Similarly, the Department of Health and Mental Hygiene estimated a 76% reversal rate with counsel, as compared with 46% without. The reversal figures for the Social Security Administration were 60% with counsel, 36% without. *Id.*

31. *Id.*; see LSC Budget Request, *supra* note 20, at 3-4. The LSC received \$321.3 million in 1981, but was cut to \$241 million in 1982. Since 1982 the funding level has gradually risen to \$308 million in fiscal year 1989, and will be approximately \$315 million in fiscal year 1990. ACTION PLAN, *supra* note 1, at 10-12; the Deficit Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; the Departments of Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act, 1990 Pub. L. No. 101-162, 103 Stat. 988 (1989).

32. ACTION PLAN, *supra* note 1, at 18-20.

By contrast, in fiscal year 1987, total funding for Maryland legal services programs was approximately \$10.4 million. State allocations comprised forty-nine percent of the total, federal grants thirty-seven percent, and private sources fourteen percent.<sup>33</sup> The Advisory Council additionally found that total funding for legal services from all sources had declined from approximately \$9.04 per eligible person in 1980 to \$7.24 per eligible person in 1987, when adjusted for inflation and increases in the Maryland income eligible population.<sup>34</sup>

To achieve a minimally adequate level of provision of legal services, the Advisory Council estimated that resources allocated to serving the legal needs of Maryland's poor had to be doubled.<sup>35</sup> The Action Plan set forth numerous policy recommendations designed to allocate this burden fairly among the appropriate institutions and organizations.<sup>36</sup>

Since adoption of the Action Plan, many of the Advisory Council's recommendations have been implemented. These include enactment of a mandatory IOLTA program,<sup>37</sup> clinical requirements for graduation from the University of Maryland School of Law,<sup>38</sup> increased state funding for legal services and law school clinical programs,<sup>39</sup> initiation of a school loan forgiveness program for law school graduates taking lower paying public service positions,<sup>40</sup> creation of a Maryland Attorney General's pro bono program,<sup>41</sup> and

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33. *Id.*

34. *Id.* at 19-20.

35. *Id.* at 28-29.

36. *Id.* at 31-36. The recommendations included, among others: required participation in IOLTA; mandatory pro bono; increased general fund appropriations; filing fee surcharges; expanded pro bono, outreach, and education programs by legal services providers and bar associations; required clinical experience for law school students; a law school loan forgiveness program for recent law graduates taking legal services positions; and other programs providing legal assistance to poor persons. *Id.*

37. Act of May 19, 1989, ch. 502, 1989 Md. Laws 3162 (codified at Md. Bus. Occ. CODE ANN. § 10-303 (1989)).

38. See Faculty Council Minutes of the University of Maryland School of Law (Dec. 1, 1988) (copy on file with *Maryland Law Review*). "Clinical" in this context encompasses both actual and simulated client contact.

39. The Maryland General Assembly used the increased appropriations for various legal services programs including Judicare and the Legal Aid Bureau's representation of children in Child in Need of Assistance hearings and to the University of Maryland School of Law and the University of Baltimore School of Law for their clinical programs.

40. MD. EDUC. CODE ANN. §§ 18-1601 to -1604 (Supp. 1989). In 1988, the Maryland General Assembly created a school loan forgiveness program administered by the Maryland State Scholarship Board. *Id.*

41. See Feeley, *AG Announces Pro Bono Plan*, *The Daily Record*, Nov. 1, 1988, at 1, col. 3; Office of the Maryland Attorney General, Policy Guidelines for Pro Bono Representa-



several innovative activities by the MLSC.<sup>42</sup>

### III. MANDATORY PRO BONO LEGAL SERVICES

#### A. *Pro Bono In Maryland*

As noted above, the mandatory pro bono attorney service proposal generated the greatest amount of discussion and controversy.<sup>43</sup> The following section will discuss the Advisory Council's basis for that recommendation, briefly address points raised in opposition to the proposal, and describe activities in Maryland in response to the pro bono proposal.

In the summer of 1987, there were at least 13,695 attorneys, excluding nonresidents, eligible to practice in Maryland.<sup>44</sup> Of this total approximately 3370 participated in 1 of the 4 organized pro bono legal services programs for the poor.<sup>45</sup> Some private attorneys also participated in various "reduced fee" programs in which low-income persons paid a reduced fee or hourly rate for certain services. Such programs included a state-wide MSBA "60 Plus Wills Project" and projects offered by the Baltimore City, Baltimore County, and Prince George's County Bar associations.<sup>46</sup> In addition to participating in such organized bar programs, the Advisory Council noted that many attorneys provided pro bono or reduced fee services to their low-income clients, but statistics on such contributions were not available.<sup>47</sup> Maryland Volunteer Lawyers Service (MVLS) and the various bar association pro bono and reduced fee projects reported a total of 3289 cases served by participating pri-

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tion Program (Oct. 21, 1988) (rev. ed. May 24, 1989) (copy on file with *Maryland Law Review*).

42. For example, recent activities by the MLSC include creation of a new "Small Innovative Grant" program providing challenge grants of \$10,000 each to 9 programs beginning January 1989; the adoption of future planning priorities by the MLSC Board of Directors in June 1989 including an intention to conduct an "Action Plan to Expand Legal Assistance in Domestic Cases" in 1990; initiation of a major technical assistance and evaluation project for MLSC's largest grantee; and funding for the major project by the Maryland Court of Appeals and MSBA to expand pro bono services.

43. See *supra* note 5.

44. ACTION PLAN, *supra* note 1, app., Maryland State Bar Association Membership Count. The 13,695 figure is derived by using the Client Security Trust Fund payee list of 17,034 and deducting 3339 out-of-state Maryland-admitted members.

45. *Id.* at 14 (the Maryland Volunteer Lawyers Service (1600), the Montgomery County Bar Foundation (720), the Prince George's County Bar Association (600), and the Baltimore City Bar Association (450)).

46. *Id.*

47. *Id.* at 15. One purpose of the "Pro Bono Publico Service Questionnaire" is to derive additional information on such pro bono activities which are not related to any ongoing bar or other program service. See *infra* text pp. 15-16.

vate attorneys during the 1987 fiscal year.<sup>48</sup>

Relying on information provided by the MVLS, the Advisory Council estimated that the average pro bono service required approximately ten hours of legal work.<sup>49</sup> The Advisory Council determined that if the Maryland Court of Appeals required that all resident Maryland attorneys perform at least one pro bono case or appropriate alternative service annually on behalf of indigent persons, this would produce an estimated additional 100,000 hours, or 10,000 cases, of attorney service annually.<sup>50</sup> This also would achieve nearly one-quarter of the Advisory Council's goal of doubling existing services for civil legal services to Maryland's low-income population.<sup>51</sup>

The Advisory Council considered a number of factors in formulating its mandatory pro bono proposal, including the obligations imposed upon attorneys by the Rules of Professional Conduct,<sup>52</sup> survey responses, particularly from judges and bar leaders, favoring mandatory pro bono; a belief that increased governmental and private funding could be contingent upon expanded pro bono efforts by attorneys; and skepticism as to whether pro bono work can be expanded substantially without a mandate.

In September 1987, the Advisory Council distributed a preliminary report, which included the mandatory pro bono proposal, for public discussion.<sup>53</sup> As indicated above, the Advisory Council received fifty-five responses on behalf of interested organizations and

48. ACTION PLAN, *supra* note 1, at 15-16.

49. *Id.* at 25.

50. *Id.*

51. *Id.* at 27-29, 36.

52. THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT, Preamble and Rule 6.1 (1989). The relevant portion of the preamble states:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf.

Rule 6.1, addressing "Pro Bono Publico" service 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 or improving the law, the legal system or the legal profession, or by financial support for organizations that provide legal services to persons of limited means.

53. ACTION PLAN, *supra* note 1, at ix; *see also* Sherman, *Cardin Issues Report on Legal Needs of the Poor*, *The Daily Record*, Oct. 5, 1987, at 1, col. 3; Wentzel, *Bringing Legal Aid to*

individuals regarding the preliminary report.<sup>54</sup> Numerous comments, including those of Maryland's Attorney General, the MSBA's Delivery of Legal Services Section Counsel, and the Executive Council of the Bar Association of Baltimore City, supported the proposal.<sup>55</sup>

During the public hearings, many of the concerns expressed by opponents of mandatory pro bono were addressed. For example, some attorneys believed that a lawyer might not be trained adequately to handle a particular pro bono civil case for an indigent person. Considering the wide range of legal matters for which poor persons need legal assistance,<sup>56</sup> many of which do not require court appearances, and the extensive support services provided to attor-

*State's Poor*, Evening Sun (Baltimore), Oct. 2, 1987, at 1, col. 2; Eveleth, *Legal Services Sought for Maryland's Poor*, Md. St. B.A. Bull., Oct. 1987, at 1, col. 1.

54. See ACTION PLAN, *supra* note 1, app. at 1, Summary of Public Response to Draft "Action Plan for Legal Services to Maryland's Poor."

55. See *id.* at 1-2; see also Supreme Court v. Piper, 470 U.S. 274, 287 & n.22 (1985) (speculating in dicta that "a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal aid work," and acknowledging but not evaluating a mandatory pro bono program in El Paso, Texas); Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981); Spencer, *Mandatory Public Service for Attorneys: A Proposal for the Future*, 12 Sw. U.L. REV. 493, 520 (1981) (suggesting, among other things, that "[s]ome form of public service internship should be a requirement of legal practice"); *Mandatory Pro Bono: Should the New York Bar Require 20 Hours of Pro Bono a Year?*, 75 A.B.A. J. 52, 52 (Oct. 1989) (excerpting the report of a New York task force, the court-appointed Committee to Improve the Availability of Legal Services, which proposed a requirement that "every attorney perform a minimum of 40 hours of qualifying pro bono services every two years," although an exception would "permit attorneys to contribute money to an approved legal services organization or other public service group"); Bourne, *State Bar Ducks Charity Case Requirement*, The Sun (Baltimore), Oct. 23, 1988, at C1, col. 3; Margolick, *Lawyers and Compulsory Public Service: Resisting the Inevitable*, N.Y. Times, July 15, 1988, at B9, col. 1; *Lawyers and the Poor*, The Sun (Baltimore), Dec. 15, 1987, at A12, col. 1 (editorial); Margolick, *New York Panel Urges Lawyers to Aid the Poor*, N.Y. Times, July 11, 1979, at A1, col. 1 (discussing the New York task force report).

56. See Mason-Dixon Opinion, *supra* note 25, at 22; *supra* note 26 and accompanying text; see also B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 161, 260 (1977) (reporting, based on a national survey, the probability that an individual will see a lawyer for various problems within the broad categories of real property, employment matters, consumer matters, estate planning, estate settlement, marital matters, governmental matters, torts, constitutional rights, and juvenile matters); Bainbridge, *Pro Bono Service: What's a Lawyer to Do?*, 22 MD. B.J. 13, 14-15 (Sept./Oct. 1989) (noting the "broad range of areas" in which attorneys can supply pro bono services); Herald, *Volunteer Child Advocates—Guardians Ad Litem*, 59 FLA. B.J. 57, 59-60 (Dec. 1985) (discussing a Florida corporate/real estate attorney's experience as a pro bono representative of children); Hill & Calvocoressi, *The Corporate Counsel and Pro Bono Service*, 42 BUS. LAW. 675, 684-93 (1987) (discussing successful pro bono programs at several large corporations); Wohlst, *Pro Bono Work in the Real Property, Probate and Trust Law Area*, 59 FLA. B.J. 61, 61-62 (Dec. 1985) (suggesting potential pro bono areas for estate planners and real property attorneys).

neys by legal services programs,<sup>57</sup> this risk appears to be no greater in the pro bono context than in privately compensated cases. While some attorneys questioned the constitutionality of mandatory pro bono, it is the Advisory Council's legal opinion that a "nominal pro bono requirement imposed equitably on all Maryland attorneys" would be constitutional.<sup>58</sup> Some responses raised the problem of

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57. See, e.g., MICPEL, REPRESENTING HOMELESS, ELDERLY, AND OTHER LOW-INCOME PERSONS—PRO BONO DESK MANUAL § 2.1 (1989).

58. Memorandum from Robert J. Rhudy, Maryland Legal Services Corporation, to Maryland State Bar Association Special Committee on Pro Bono Services (Aug. 17, 1988) (discussing the "constitutionality of a nominal mandatory pro bono attorney service rule") (copy on file with *Maryland Law Review*); see also Fisch, *Coercive Appointments of Counsel in Civil Cases in Forma Pauperis: An Easy Case Makes Hard Law*, 50 MO. L. REV. 527 (1985).

The power to appoint an unwilling attorney, whether judicial or statutory in origin, has been challenged in principle on three grounds, founded in the Federal Constitution and its state counterparts: (i) that to require the lawyer to serve constitutes involuntary servitude, within the meaning of the thirteenth amendment; (ii) that it constitutes an unlawful taking of property, or at the very least constitutes a taking for a public use which requires just compensation, under the fifth amendment; and (iii) that to subject attorneys as a class to such an obligation constitutes discrimination which would deny them equal protection of the laws, under the fourteenth amendment.

*Id.* at 529 (footnotes omitted). Other courts and commentators have rejected these arguments. See, e.g., *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), reasoning that:

An applicant for admission to the bar may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court, obligated to represent indigents for little or no compensation upon court order. Thus the lawyer has consented to and assumed this obligation, and when he is called upon to fulfill it he cannot contend that there is a taking.

*Id.* at 638. See generally Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973, 988 (1987) (suggesting that a mandatory pro bono plan in Florida would be constitutional); Rosenfeld, *supra* note 55, at 286 (noting that "[e]ach [constitutional] challenge . . . has been rejected by the vast majority of the courts that have addressed these issues"); Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 366 (1981) (concluding that "there is no constitutional bar to compelling attorneys to render uncompensated legal assistance to poor litigants in civil cases"). But see *Mallard v. United States Dist. Court*, 109 S. Ct. 1814, 1823 (1989) (holding that a particular federal statute "does not authorize the federal courts to make coercive appointments of counsel[,]") but not reaching the question of "whether the federal courts possess inherent authority to require lawyers to serve"; *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (overruling earlier Alaska authority by holding that rule "requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney" and violates the takings clause of the Alaska constitution); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 361, 747 P.2d 816, 836 (1987) ("the State has an obligation to compensate attorneys appointed to represent indigent defendants accused of crime"); Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 756-62 (1980) (questioning the general belief that a

inadequate service by the "reluctant advocate" who is forced to serve; the Advisory Council believes that the Rules of Professional Conduct impose an enforceable obligation upon attorneys to serve clients with the same degree of professional competence and commitment regardless of whether the attorney is compensated.<sup>59</sup> Some attorneys were concerned that their malpractice insurance policy would not cover pro bono cases. The Advisory Council believed that in most instances this simply was not accurate. Additionally, it learned that some of Maryland's pro bono referral programs provide separate malpractice insurance for attorneys accepting their cases.<sup>60</sup>

Finally "[a] number of lawyers have opposed the proposal, arguing that the burden of providing legal services should be carried by the whole society . . ." <sup>61</sup> The Advisory Council and all parties involved agreed that there is a governmental responsibility to provide access to justice for all persons, and most of the Action Plan recommendations addressed the need to change public policies. During the public hearings, however, nearly all those who addressed the issue agreed that lawyers have a professional responsibility to help provide equal access for the poor to the legal system.<sup>62</sup> In contrast to other professions and occupations, the practice of law carries with it a special element of civic responsibility.<sup>63</sup> The Advisory

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"vast majority" of courts have upheld the constitutionality of mandatory pro bono and collecting cases).

59. See THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT, Preamble and Rules 1.1, 1.3, 3.1, 6.1, 6.2 (1989). For the text of the Preamble and Rule 6.1, see *supra* note 52.

60. See, e.g., Maryland Volunteer Lawyers Service, "Tentative Approach for Administering Mandatory Pro Bono" (Oct. 28, 1987) (Maryland Volunteer Lawyers Service "provides \$1,000,000 of primary professional liability insurance covering attorneys and their employers for any cases referred by MVLS under its case monitoring and quality control checks"), reprinted in ACTION PLAN, *supra* note 1, app. 3.

61. ACTION PLAN, *supra* note 1, app. at 2, Summary of Public Responses to Draft "Action Plan for Legal Services to Maryland's Poor."

62. See, e.g., Advisory Council of the Maryland Legal Services Corporation, First Hearing on the Draft Report of the Advisory Council of the Maryland Legal Services Corporation, Summary of Testimony Presented (Oct. 19, 1987) (copy on file with *Maryland Law Review*).

63. See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957):

[A]ll the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," . . . in defense of right and to ward off wrong.

*Id.* at 247 (Frankfurter, J., concurring); see also *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 courts'").

Council believes that attorneys must take the lead in helping to serve the legal needs of the poor as a prerequisite to seeking additional governmental support.

It became obvious during the public hearings that an additional benefit of the pro bono program would be to make individual practitioners more sensitive to the problems poor people encounter within our legal system. As the custodians of our system of justice, lawyers have a special obligation to assure that law works for all citizens. The Advisory Council concluded that its mandatory pro bono proposal would improve Maryland's laws, legal system, and lawyers, and would expand access to justice for the poor.

### *B. Action On The Pro Bono Proposal*

During preparation of the Action Plan, Advisory Council Vice Chairman Richard O. Berndt and Research Director Robert Rhudy met with the Honorable Robert C. Murphy, Chief Judge of the Maryland Court of Appeals, to request that he consider recommendations for court action, including the adoption of a mandatory pro bono rule. In December 1987, Chief Judge Murphy requested the Honorable Alan M. Wilner, Associate Judge of the Maryland Court of Special Appeals and Chairman of the Court of Appeals' Standing Committee on Rules of Practice and Procedure, to consider the Advisory Council's recommendations and report to the Court of Appeals.<sup>64</sup> Judge Wilner immediately appointed a special subcommittee chaired by District Court Judge Francis M. Arnold to conduct the Rules Committee's work on this project.<sup>65</sup>

At approximately the same time, MSBA President Cleaveland D. Miller appointed a committee to analyze and make recommendations on the Advisory Council's proposals.<sup>66</sup> Prior to issuing an interim report, the MSBA Committee conducted two public hearings in Annapolis and Frederick, Maryland, which received mixed reactions to amending the Maryland Lawyers' Rules of Professional Conduct to require all attorneys to volunteer for some level of public service.<sup>67</sup>

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64. See Report of the Standing Committee on Rules of Practice and Procedure, 16 MD. REG. 60 (1989).

65. *Id.*

66. Wentzel, *State Bar Backs Law to Require Help to Poor*, The Evening Sun (Baltimore), Dec. 16, 1987, at D2, col. 4. This committee was chaired by Thomas Craven. Boinest, *Hearing Held on Proposals for Mandatory Pro Bono*, The Daily Record, Aug. 18, 1988, at 1, col. 3.

67. Boinest, *supra* note 66, at 1, col. 3 (reporting comments from the hearings).

The consideration of pro bono services continued under MSBA President Roger W. Titus, who succeeded Miller in June 1988. In August 1988, Judge Wilner convened a meeting with Titus, Legal Aid Bureau Executive Director Charles Dorsey, Congressman Benjamin Cardin, and others to consider possible approaches to the pro bono proposal. In September, the MSBA Special Committee on Pro Bono Services adopted a report that acknowledged the Advisory Council's findings of legal need and recognized the responsibility of every lawyer to provide pro bono service.<sup>68</sup> The Committee recommended that there should be "no change in Rule 6.1 at this time," but requested that the Maryland Court of Appeals "communicate with all members of the Bar to remind them of the urgent need for, and their obligation to perform, pro bono publico service and request them to provide information concerning their pro bono activities."<sup>69</sup> The committee also suggested that the MSBA,

in cooperation with the Court of Appeals and other interested institutions and organizations . . . attempt to increase the level of support and resources to effectively expand pro bono publico services by lawyers, explore additional mechanisms and methods to facilitate the provision of pro bono publico service by the entire bar in Maryland and assess the current level of pro bono activity.<sup>70</sup>

On October 2, 1988, the MSBA Board of Governors adopted the recommendations of its Special Committee on Pro Bono Services.<sup>71</sup> Following the Board of Governors action, the Standing Committee on Rules of Practice and Procedure received and adopted a report of its subcommittee making the following recommendations to the Court of Appeals on the pro bono proposal:

. . . . .

(2) That the Court direct a letter to every member of the Maryland Bar calling attention to Rule 6.1, impressing on the lawyers the particular need for service to low-income persons, informing them of the State Bar Association initiative, and directing them to return to the Court a questionnaire enclosed with the letter;

. . . . .

(4) That the Court defer consideration of any

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68. Draft Report of the Maryland State Bar Association Special Committee on Pro Bono Services (Sept. 1988) (copy on file with *Maryland Law Review*).

69. *Id.* at 3.

70. *Id.*

71. Feeley, *MSBA Decides on Pro Bono*, *The Daily Record*, Oct. 3, 1988, at 1, col. 3.

amendment to Rule 6.1 for a reasonable time, approximately two years, to give this program a fair trial.<sup>72</sup>

The Committee's "Notice of Proposed Recommendations to the Court of Appeals Concerning Pro Bono Publico Service" was published for notice and comment in the *Maryland Register*.<sup>73</sup> Accompanying this publication, the Committee also published its draft "Pro Bono Publico Service Questionnaire," which the Rules Committee had designed with the cooperation of various representatives of the MSBA, Legal Aid Bureau, MVLS, MLSC, and others.<sup>74</sup>

On March 2, 1989, the Maryland Court of Appeals held a public hearing on the Rules Committee's pro bono recommendations.<sup>75</sup> At a public work session following the formal hearing, the court indicated its tentative approval of the Rules Committee's recommendations.<sup>76</sup> Responding to concerns raised in public testimony, Chief Judge Murphy urged the interested parties to work together on a final survey format and timetable. Chief Judge Murphy expected the court to take formal action after reviewing the final survey.<sup>77</sup>

On June 11, 1989, Herbert S. Garten, incoming president of the MSBA, made the expansion of "people's pro bono" by attorneys to persons unable to afford private legal services the central focus of his acceptance address to the MSBA. He noted his expectation that the MSBA would expand pro bono activities in the coming year.<sup>78</sup>

On October 11, 1989, the Maryland Court of Appeals and MSBA mailed the pro bono survey with a letter from Chief Judge Murphy to over 16,000 attorneys admitted to practice in Maryland.<sup>79</sup> Attorneys were requested to return the pro bono survey to the Court of Appeals by October 31, 1989.<sup>80</sup> MSBA mounted an

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72. Report of the Standing Committee on Rules of Practice and Procedure, 16 MD. REG. 60, 61 (1989).

73. *Id.*

74. *Id.*

75. Warmkessel, *Court Joins State Bar, Supports Pro Bono Plan*, The Sun (Baltimore), Mar. 3, 1989, at D12, col. 1; Feeley, *CA Tentatively Approves MSBA's Pro Bono Survey*, The Daily Record, Mar. 3, 1989, at 5, col. 1; Eveleth, *Court of Appeals Examines Pro Bono*, Md. St. B.A. Bull., Mar. 1989, at 1, col. 1.

76. Warmkessel, *supra* note 75, at D12, col. 1.

77. *Id.*

78. Garten, *People's Pro Bono—The Highest Form of Professionalism*, 22 MD. B.J. 8, 10 (Sept./Oct. 1989). In July 1989, President Garten appointed an expanded MSBA Special Committee on Pro Bono Services chaired by Stephen Noland.

79. See Feeley, *MSBA Sends Pro Bono Survey to Md. Lawyers*, The Daily Record, Oct. 13, 1989, at 1, col. 3.

80. Letter from Chief Judge Robert C. Murphy to Maryland attorneys (October 11, 1989) (copy on file with *Maryland Law Review*); see Feeley, *supra* note 79, at 1, col. 3.



extensive publicity campaign to encourage attorneys to respond to the survey,<sup>81</sup> and Governor William Donald Schaefer proclaimed October 16-20 as "Peoples Pro Bono Week in Maryland."<sup>82</sup> Survey responses are being received and analyzed as this article is being finished.<sup>83</sup> MSBA and legal services provider programs are working together with a consultant retained by MLSC to develop a statewide plan for effectively providing pro bono civil legal services to low income persons.<sup>84</sup> MSBA also has created a new non-profit organization, People's Pro Bono Action Center, Inc., funded by MSBA, Maryland State Bar Foundation, and MLSC, to coordinate pro bono activities throughout Maryland.<sup>85</sup>

### CONCLUSION

In the "Action Plan for Legal Services to Maryland's Poor," the Advisory Council demonstrated that there is a substantial unmet need for civil legal assistance for Maryland's low-income population. Persons who do not have access to effective legal counsel frequently do not understand their legal rights and responsibilities and consequently lose available rights and remedies. These circumstances conflict with Maryland's historic commitment to afford equal access to justice to all our citizens, a commitment manifested in the belief that our government and bar have a responsibility to assist in providing legal counsel to persons unable to afford it.

After reviewing Maryland resources and the experience of other jurisdictions, the Advisory Council made forty-one recommendations which collectively could double the level of legal assistance available to Maryland's low-income population in civil matters. Since the "Action Plan" was distributed in January 1988, many of

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81. See, e.g., Warmkessel, *Maryland Lawyers Pressed to Donate Services to the Poor*, *The Sun* (Baltimore), Oct. 22, 1989, at B11, col. 2; Miller, *ABA President-Elect Attends 'Pro Bono' Week Proclamation*, *The Daily Record*, Oct. 19, 1989, at 8, col. 1; Torry, *Md. Bar Campaign Urges Members to Volunteer Legal Services*, *Wash. Post*, Oct. 17, 1989, at B8, col. 2; *People's Pro Bono Week is Here*, *Md. St. B.A. Bull.*, Oct. 1989, at 1, col. 1; Eveleth, *Pro Bono Survey Coming*, *Md. St. B.A. Bull.*, Sept. 1989, at 1, col. 1.

82. See Feeley, *Schaefer Lends Support to MSBA's Pro Bono Campaign*, *The Daily Record*, Oct. 17, 1989, at 8, col. 2; Thompson, *Lawyers urged to give free help to the poor*, *The Evening Sun* (Baltimore), Oct. 16, 1989, at C3, col. 1.

83. See *Bar Association Reports on Survey*, *The Sun* (Baltimore), Oct. 31, 1989, at D2, col. 6.

84. See Memorandum from Terry Roche, Consultant, to MSBA Pro Bono Committee and Providers' Coordinating Committee (Dec. 4, 1989) (describing a Preliminary Proposal of a coordinated, statewide *pro bono* delivery system) (copy on file with *Maryland Law Review*).

85. See Feeley, *Response on MSBA Pro Bono Survey Climbs to 55 Percent*, *The Daily Record*, Dec. 21, 1989, at 1, col. 3.

the Advisory Council's recommendations have been implemented. The recommendation for a court rule establishing a minimal mandatory pro bono service by all attorneys to assist low-income persons in civil matters, however, is still under consideration.

Members of the MLSC Advisory Council have worked with the Maryland Court of Appeals Rules Committee, MSBA, and other interested parties to develop and implement the current pro bono survey and attorney recruitment campaign. MSBA leadership opposed a mandatory pro bono rule until the effects of efforts to expand voluntary pro bono efforts under concerted bar, court, and legal services program cooperation have been tried and accessed.

This approach is not contrary to the Advisory Council's recommendations, and hopefully it will produce the level of services sought by the Action Plan. The Maryland Court of Appeals, the MSBA leadership, and the Advisory Council share the same objective. Lawyers must be in the forefront in helping to meet the tremendous needs of poor people for adequate representation in civil legal matters. Pro bono programs must be expanded and all lawyers should participate.

If the current approach achieves this objective, the Advisory Council's goal will be satisfied. If it does not, the Advisory Council hopes the Maryland Court of Appeals will take the next logical step and adopt a rule change or take other appropriate action to require every attorney to meet his or her professional responsibility to provide pro bono legal assistance to the poor.