NOTES

MASSACHUSETTS RULE OF PROFESSIONAL CONDUCT 6.1: ONE SMALL, BUT NEEDED, STEP FOR LAWYERS, AN EVEN SMALLER STEP FOR THE COMMONWEALTH'S POOR

ERIKA MARTIN-DOYLE

I. INTRODUCTION

In January 1997, the Massachusetts Supreme Judicial Court ("SJC") established and charged the Supreme Judicial Court Committee on Pro Bono Legal Services ("Pro Bono Committee") with determining how to increase the amount of pro bono work done in the Commonwealth.[1] In response, the Pro Bono Committee gathered data, conducted focus groups, and proposed a rule of professional conduct that stated Massachusetts lawyers' obligation to perform legal services and articulated standards by which that pro bono work should be done.[2] The version of the rule adopted by the SJC in January 1999 is "aspirational" Massachusetts Rule of Professional Conduct 6.1,[3] which states that all attorneys *should* donate 25 hours annually of their time on a pro bono basis or contribute financially to those organizations that provide legal services to the poor.[4] The SJC adopted the final version of the rule and accompanying recommendations made by the Pro Bono Committee, making few changes to the rule or the commentary.[5]

This rule alone, however, will not achieve the SJC's goals. The rule contains no means by which to measure lawyers' compliance.[6] Buyout[7] and aggregation of

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[1] *See* SUPREME JUDICIAL COURT COMM. ON PRO BONO LEGAL SERVICES, REPORT TO THE SUPREME JUDICIAL COURT, at 3 (1998).

[2] *See id.* at 5.

[3] *See* MASS. R. PROF. C. 6.1 (1999).

[4] *See id.*

[5] *See* Eric T. Berkman, *SJC to All Lawyers: 'Do Pro Bono or Pay,'* MASS. L. WKLY, Jan 11, 1999, at A1.

[6] *See* MASS. R. PROF. C. 6.1 (1999).

[7] *See* Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services,* 3 B.U. PUB. INT. L. J. 215, 226 (1993). "Buyout" provisions are provisions by which a rule allows an attorney to be relieved of his service obligation by contributing financially to those who do provide the contemplated legal services. *See id.* at 219, n.11.

hours[8] provisions in the rule and commentary are vague enough that they arguably discriminate against lawyers not working at large firms. The rule does not exempt lawyers already performing legal services and public service work. Nor has the SJC established a means by which lawyers can get referrals to clients in need. The SJC has also failed to provide a concrete and easy means for non-legal service attorneys to gain the competence necessary for providing the types of legal services primarily contemplated by the rule.[9]

This Note summarizes the debate surrounding pro bono service in general by examining the arguments for and against the creation of either mandatory[10] or aspirational[11] pro bono rules.[12] The Note compares the Massachusetts rule with ABA Model Rule 6.1 and its predecessors and comments on state and academic proposals for optimizing pro bono rules. This Note analyzes the debate over the adoption of the pro bono rule in Massachusetts and concludes that despite its faults, the rule is a step in the right direction toward solving the legal needs of Massachusetts' poor. While not arguing for its repeal, this Note recommends changes to and clarifications of the rule that should silence most critics. This Note also sets out additional policy recommendations for how the SJC can achieve its goal of ensuring equal access to justice for the poor.

They may vary in several ways: buyouts can require a flat rate contribution, or can be based on some formula accounting for the "cost" to the lawyer of actually performing the service. *See id.* at 226, n.31. They can require that the attorney pay the buyout to a state-regulated fund, that is then disbursed like IOLTA funds. *See id.* at 225 and n.28. Buyouts also can be paid directly to the organizations or individuals providing the services contemplated by the rule. *See id.* at 224.

[8] *See* MASS R. PROF. C. 6.1 (1999). Under such provisions, lawyers working in firms would be able to "give" their obligation to another attorney who was willing to perform the pro bono service. *See id.* In practice, some firms may hire attorneys to specifically perform such work, which could create higher paying jobs for legal service attorneys.

[9] The means for gaining competence in the areas of law contemplated by the rule will have to be facilitated so that attorneys cannot cite that as a reason for not meeting their obligation. *See generally* William O. Flannery, *Corporate Law Department Pro Bono Programs*, BOSTON B. J., Nov./Dec. 1993, at 12.

[10] "Mandatory" means that the attorney must perform the service prescribed by the rule, or face disciplinary sanctions, potentially including disbarment.

[11] "Aspirational" means that attorneys are expected to work toward the standard embodied in the rule, but are not subject to disciplinary proceedings for failure to comply with the rule.

[12] While most arguments for and against pro bono rules are made in the context of discussing whether mandatory rules are legally permissible or politically wise, these arguments apply in most instances to aspirational rules as well. *See generally* Coombs, *supra* note 7; Michael Milleman, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18 (1990); Jennifer Murray, Comment, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29 TEX. TECH L. REV. 1141; and Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509, 511 (1998). Where the arguments differ for aspirational and mandatory rules, note will be made. In general, references to "pro bono rules" mean either mandatory or voluntary rules.

II. BACKGROUND: THE PRO BONO DEBATE

Debate over how much and what kind of pro bono service attorneys should provide has arisen most recently in light of the 1980s cuts in Congressional funding to Legal Services Corporation, the agency which provides most of the funding for state, city, and non-profit legal service providers in this country.[13] The perceived need for increased legal services for the poor is something few lawyers will debate.[14] But the debate does not center on why these needs exist and how they can be met. The real debate centers instead on the extent to which lawyers *should* or *must* provide those services without compensation;[15] those opposing pro bono rules question why and how lawyers become obliged, either as members of the general society, or as members of a specialized and monopolistic profession.[16]

At heart, the debate touches on central issues regarding how we, as attorneys, should conceive and perform our role as professionals, officers of the court, members of society, and individuals. The debate implicates our conceptions of social justice as well as our beliefs on whether, how, and when we can achieve it. The debate has been skewed, however, *away* from whether the poor need legal services, and *toward* whether *lawyers* should have to provide those services. This shift reinforces cynicism about a legal system that holds itself out as equally accessible to all, yet systematically fails to meet the needs of those whose lives are most subject to its actions. An overview of the arguments over whether lawyers have a pro bono responsibility is set out in Part A of this section.

State bar associations and high courts have taken many approaches with pro bono rules in trying to meet the legal needs of the poor. Most have chosen to promulgate voluntary or "aspirational" rules in conjunction with structural improvements to existing legal service providers and educational campaigns aimed at raising the bar's awareness and competence in the pro bono area. Florida has mandated reporting of pro bono work actually done.[17] The greatest criticism arises in response to proposals for mandatory rules that require attorneys to donate a set amount of pro bono service per year. Even aspirational rules spark severe criticism, however, fueled by some critics' "slippery slope" arguments that the enactment of an aspirational rule necessarily paves the way for a future mandatory rule.

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[13] *See* Murray, *supra* note 12, at 1174-76 (1998) (detailing the nature of cuts to funding for legal services). *See also* Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631, 634-36 (1993) [hereinafter *Tributaries of Justice*].

[14] *See* Douglas W. Salvesen, *The Mandatory Pro Bono Service Dilemma: A Way Out of the Thicket*, 82 MASS. L. REV. 197 (1997).

[15] *See* Murray, *supra* note 12, at 1143.

[16] *See generally* Murray, *supra* note 12, Milliman, *supra* note 12, Coombs, *supra* note 7, and Steven Lubet & Cathryn Stewart, *A Public Assets Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1260 (1997).

[17] *See* FLA. R. PROF. C. § 6.1(d) (1997).

A. An Act of Charity or Professional Obligation? And Whose Obligation Is It, Anyway?

1. Opponents of Pro Bono Rules

Many attorneys feel that they cannot be required or requested to perform pro bono service because any rule, mandatory or aspirational, to be promulgated would be unconstitutional under the First,[18] Fifth,[19] and Thirteenth Amendments,[20] via their incorporation against the states by the Fourteenth Amendment.[21] The First Amendment is arguably violated since mandatory rules may coerce attorneys to perform work for groups or individuals whose beliefs differ radically from the attorneys' own, and that they should not be forced to serve anyone whose beliefs run counter to their own.[22] Critics likewise argue that mandatory pro bono rules violate the Fifth Amendment, since such rules "take" lawyers' personal property in the form of their professional services and put it to public service without just compensation.[23] The Thirteenth Amendment is violated, they further argue, in that mandatory pro bono service constitutes involuntary servitude imposed on lawyers by the state.[24] Such service allegedly violates the Fourteenth Amendment's due process clause.[25] The equal protection clause is allegedly violated where such rules single out lawyers and impose a burden on them not shared by others in society.[26]

Assuming arguendo that these constitutional objections are valid, an aspirational rule could not be enforced or taken into consideration in other disciplinary proceedings, since such consideration would render the aspiration effectively mandatory and run into the constitutional objections.

Other opponents of pro bono rules feel that regardless of the rule's constitutionality, it is undemocratic and discriminatory to require only lawyers to perform public service as a condition of their continued license to practice.[27] These critics argue that other professions are not required to donate their services to the poor, so neither should lawyers.[28]

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[18] *See* Phillip P. Houle, *Is Mandatory Uncompensated Pro Bono in Civil Cases Constitutional?,* NEV. LAW., June 1995, at 20, 24-25. *See also* Murray, *supra* note 12, at 1156 - 1157.

[19] *See* Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More than Charity?,* 96 W. VA. L. REV. 367, 393, n.100 (1993). *See also* Murray, *supra* note 12, at 1157.

[20] *See* Murray, *supra* note 12, at 1160.

[21] *See* Eldred & Schoenherr, *supra* note 16, at 393, n.100. *See also* Murray, *supra* note 12, at 1161-62.

[22] *See* Murray, *supra* note 12, at 1156.

[23] *See id.* at 1157.

[24] *See id.* at 1160.

[25] *See id.* at 1161.

[26] *See id.* at 1162.

[27] *See* Lubet & Stewart, *supra* note 16, at 1260. *See also* Murray, *supra* note 12, at 1153.

[28] *See* Lubet & Stewart, *supra* note 16, at 1260. This ignores aspects of the social welfare system that attempt to compensate for professional monopolies. For example, the Medicaid

Many critics reject the argument that pro bono service is a professional obligation. In doing so, they make two assumptions: First, that a rule directing where attorneys' time should be donated interferes with their individual right to do charity as they see fit.[29] Secondly, neither attorneys nor individuals have a duty to perform charity for others but rather are free to choose how they distribute their legal work.[30] In addition, opponents of pro bono question the barriers to the poor's access to the system, noting an individual's right to proceed pro se.[31]

Some critics of pro bono rules reject the argument that pro bono service is a professional obligation; they argue instead that it is society's obligation as a whole to ensure equal access to justice, and that the only solution to the problem is increased state and federal funding for legal services programs.[32] In the same vein, core notions of liberty are arguably undermined by requiring attorneys to perform work they chose not to specialize in.[33] Attorneys who face outside practice restrictions from government or corporate employers also risk violating their job restrictions if forced to perform pro bono work.[34] Services actually provided by those lawyers will be colorably incompetent by reason of inexperience, resentment, and lack of motivation.[35] Lawyers would not only be subject to a certain amount of

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system attempts to provide health care to some of those citizens who cannot afford the normal prices charged for healthcare. *See* Milliman, *supra* note 12, at 71. There is no "Medicaid" for citizens in need of emergency legal care. It is this which proponents of pro bono programs hope to provide in some small way. *See id.*

[29] *See* Lubet & Stewart, *supra* note 16, at 1248.

[30] *See id.*

[31] *See generally* Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998).

[32] *See* Coombs, *supra* note 7, at 218, nn. 8-9. While this may be true, given recent cuts in federal funding to the Legal Services Corporation, as well as changes to statutes affecting the entitlements of the poor, it is disingenuous to insist that increased funding is the only effective means. While it may be the most effective in ensuring that legal services agencies have the funding to pay attorneys who wish to specialize in this area, it lets other attorneys off the hook in their professional role and allows them to fade into the electorate of the representatives who cut the funding. Without lobbying by the organized bar, cuts will continue to be made in accordance with the unfortunate truth that the poor are a politically unpopular and powerless group.

[33] *See* Spaulding, *supra* note 31, at 1398. *See also* Flannery, *supra* note 9, at 13 (noting that issues of competence aside, corporate attorneys' outside practice restrictions and their employers' willingness (or not) to allow their employees to spend time doing pro bono work also operates as a bar to such lawyers' performance of pro bono service).

[34] *See* Flannery, *supra* note 9, at 27.

[35] *See* Murray, *supra* note 12, at 1163; Milleman, *supra* note 12, at 60-62. Persons making such arguments are nonetheless bound by national and state Professional Rules regarding the level of diligence and competency required of the lawyer in all her work. *See* AZ. R. PROF. C. ER Rule 6.1(a) (1990) (50 hours); D. C. R. PROF. C. Rule 6.1, cmt. [5], (1996) (40 hours); FLA. R. PROF. C. Rule 4-6.1(b)(1) (1997) (20 hours); GA. CODE OF PROF. RESP., Canon 2, EC 2-25(c) (1994) (40 hours); HAW. R. PROF. C. Rule 6.1(a) (1994) (50 hours); KY. R. PROF. C. Rule 6.1 (1994) (50 hours). Failure to perform in a competent

pro bono work per year, but also face the threat of malpractice suits from those same clients.[36] These arguments assume an individualist philosophy, meaning that even if a person of his own free will chooses to perform charity, he cannot be required to direct that charity to an area chosen by the state. Such an approach assumes the individual's absolute right of personal choice and ignores current social reality: we live in a state where nearly every aspect of our daily lives is regulated by some arm of the government.[37]

Critics further reject the argument that the profession retains monopolistic control over meaningful access to the legal system.[38] These critics cite to the number of lawyers practicing and range of rates available for different services.[39] They argue that since the profession is competitive, lawyers therefore do not owe a special duty to the public.[40]

Opponents of pro bono rules further argue that the benefits gained by increased legal services to the poor would be offset both by the administrative costs[41] and the economic costs accrued by attorneys in forgoing more lucrative practice.[42] Critics argue that statewide pro bono programs are too costly to implement, as they require the implementation of enforcement and monitoring apparatus and means for referring attorneys to pro bono opportunities would have to be established.[43]

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manner would leave the attorney potentially subject to disciplinary proceedings and potential disbarment. *See* Murray, *supra* note 12, at 1163-64 and Jacobs, *supra* note 12, at 511. Even though the rules regarding diligence and competence are mandatory, they may be underenforced, since clients often may not know that they have been deprived of adequate representation, and may find it difficult to procure counsel to litigate a claim against another lawyer. *See* Jacobs, *supra* note 12, at 511. In this regard, pro bono clients are in an even worse position than clients with more means, since they are both less likely to know they have been disserved and less likely to find another attorney to take their case. The client would be either unable to pay or the attorney unwilling to litigate against a fellow member of the bar who was only trying to meet his pro bono hours for the year.

[36] *See* Murray, *supra* note 12, at 1163.

[37] Regardless of whether absolute free choice has ever existed, today we live in societies formed by citizens who surrendered absolute control of their choices to the state, in exchange for the benefits to be reaped by association with others. It is too late in the day to argue against social compact theory and renew the argument that people have an absolute right to not be regulated by the state. And it is certainly hypocritical to argue such after receiving the benefits of that same system. Persons still insisting on their right to free choice can vote with their feet and exit the profession if they do not like the conditions it imposes on itself. *See* Jacobs, *supra* note 12, at 510.

[38] *See id.* at 1151.

[39] *See id.*

[40] *See* Murray, *supra* note 12, at 1151.

[41] *See id.* at 1162-65.

[42] Attorneys might find not only that they lose income by not receiving fees from pro bono work, but also by not being able to take as many paying cases while performing their pro bono work competently.

[43] *See* Murray, *supra* note 12, at 1162-65.

Additionally, critics argue that the minimal hours contemplated by most pro bono rules do not meet the level of need the rules target, since even if every attorney were to perform the requisite hours, the need for services would persist.[44] They take the argument a step further in asserting that because pro bono service does not attack the causes of the client's need for free legal services (namely, poverty itself), pro bono rules are a wasteful and unfair imposition on the attorney's time.[45]

Opponents of pro bono rules further argue that meeting the most pressing legal needs of the poor, including representation in eviction, divorce, and government entitlement proceedings, requires far more than the twenty-five or fifty hours usually requested by the rules.[46] Attorneys will need far more time to prepare competently for such cases. It is arguably wasteful and/or unfair for non-litigators and those not specializing in legal services work to perform time-consuming research and investigation that a legal services lawyer has already internalized.[47]

Critics of pro bono rules further argue that the type of legal services work contemplated by most pro bono rules will ultimately decrease the overall amount of time a lawyer already spends volunteering.[48] First, the lawyer will perform only the amount of hours set by the rule and no more, as he might otherwise be inclined to do.[49] Second, since rules often target specific types of pro bono work to be done, the time the lawyer will be able or willing to devote to other areas of social need will decrease in proportion.[50]

In addition, opponents of pro bono rules have often pointed to specific provisions of proposed rules as the basis for objection. Critics have argued that "buyout" provisions and firm aggregation of hours discriminate against solo and small firm practitioners,[51] as well as any attorney earning a relatively low income. Since they cannot afford the buyout or do not have associates with whom they can aggregate hours, their only recourse is to actually provide the contemplated service. These critics liken buyouts and aggregation of hours to the papal indulgences of the

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[44] *See id.*

[45] *See id.*

[46] *See id.* at 1187-88.

[47] *See* Milliman, *supra* note 12 at 60.

[48] *See id.* at 60-62.

[49] *See id.*

[50] *See id.* Some critics have argued that their volunteer work at food pantries, soup kitchens, homeless shelters, and fundraising activities for causes furthering social justice will decrease in proportion, since the time needed to competently handle a pro bono case will take up the time they previously spent. *See* Salvesen, *supra* note 14, 199-200; and Coombs, *supra* note 7, at 229. Others have argued that their work for their churches, community schools, and other groups, while not directly and primarily serving the legal needs of the poor, does serve the entire community, and ought not to be discounted simply because it does not fit within the conception of pro bono work articulated by a rule's drafters. *See* Coombs, *supra* note 7, at 229.

[51] *See* Murray, *supra* note 12, at 1164-65.

Roman Catholic Church,[52] implying that such provisions thereby fail to meet the aim of pro bono rules—reinforcing the attorney's professional obligations.[53]

2. Proponents of Pro Bono Rules

Those in favor of pro bono rules muster several arguments in response to those advanced by their opponents. First, they cite to the principles of American democracy, arguing that democracy requires equal access to justice, regardless of ability to pay.[54] They argue that pro bono rules are within the inherent and express power of the states.[55] This power to mandate is not just part of the state's generic power to regulate economic activity, but it is also consistent with, and a logical extension of, the court's power to appoint attorneys in criminal defense cases.[56] This latter power inheres in the court's power to ensure the proper administration of justice,[57] as well as in the lawyer's historic role as an officer of the court.[58]

Proponents argue that conditions on legal practice are not new; in the proper conception of the law as a learned profession, lawyers are obligated to perform public service.[59] Since the lawyer has received special training not quickly or easily available to the general public, the lawyer is under an obligation to help those without that knowledge, regardless of their ability to pay.[60] Proponents argue that meaningful access to justice requires the assistance of counsel, since the rights of the poor are defined by the law and adjudicated in legal proceedings.[61] Since the procedures by which these rights are adjudicated are complex and binding, lawyers are necessary to navigate the process.[62]

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[52] *See* Anonymous, Opinion, *Merge Pro Bono's Medieval Model with Modern Market*, MASS. B. ASS'N L. J., May 1998, at 6.

[53] *See id.*

[54] *See* Barbara Jordan, *Pro Bono Programs: Democracy's Guarantor*, UTAH B. J., Nov. 1992, at 30.

[55] *See* Milleman, *supra* note 12, at 49-51. *See generally* Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545 (1991) (arguing that federal courts and many state courts constitutionally retain the inherent power to order pro bono service in civil cases insofar as it ensures the proper administration of justice).

[56] *See* Milleman, *supra* note 12, at 50.

[57] *See id.* at 52.

[58] *See id.* at 33-44. *See generally* Bruce A. Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981).

[59] *See generally* Eldred & Schoenherr, *supra* note 19.

[60] *See* Green, *supra* note 57, at 366.

[61] *See* Milleman, *supra* note 26, at 52.

[62] *See id.* These critics have argued that the answer to this argument is not pro bono service, but procedural reform, so that the poor may litigate their issues pro se without having to deal with a tangle of rules before getting their day in court. *See id.* This may be true, but such a response begs further questions. Who will bring the cause to the legislature? Who will draft the proposed new procedures? And what happens to those still subject to

This series of arguments can be brought together under the term of "monopoly theory," where the lawyer's control over access to the legal system constitutes a monopoly.[63] That monopolistic status in turn contains the obligation to serve the public, since the barriers to a lay person's performing the same tasks as lawyers are too high to surmount.[64] As a refinement on the monopoly theory, some proponents of pro bono rules have argued that confidentiality, a key aspect of lawyer's work, is a "public asset" and that lawyers, in controlling the invocation and protection of that right, gain benefits that they are then obligated to share with the public.[65] Pro bono service would be one way of meeting that obligation.

Proponents of pro bono rules meet constitutional arguments with the general contention that no person retains a fundamental right to a particular profession. The requirements serve merely as terms of employment, and so long as attorneys accept the privileges that come with being lawyers, they must also accept the obligations that accompany such privileges.

First Amendment arguments against pro bono rules fail, since their authors draft them in such a way as to allow the attorney some latitude in choosing how to fulfill the obligation.[66] The attorney therefore has a means by which to avoid having to serve those whose beliefs run counter to those of the attorney's.[67] In addition, proponents of pro bono rules argue that First Amendment issues have already been met, since the legal profession has never required an attorney to personally adopt the views of their client as a condition of representation.[68] Additionally, "buyout" provisions provide an alternate means for attorneys to avoid representing persons or organizations that conflict with their beliefs; rather than represent someone with an offending belief, the attorney can donate money to organizations that are willing to do such work.[69] Fifth Amendment objections to pro bono rules fail, proponents argue, because an attorney's personal services are not "property" under Fifth Amendment jurisprudence;[70] furthermore, "takings" cases are concerned with the taking of a person's entire property.[71] Pro bono rules only require part of an attorney's time. Proponents of pro bono rules argue that Thirteenth Amendment objections to the rule fail, since the lawyer has a choice of whether or not to

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existing procedures while such reforms are being sought? Others have argued that the answer lies in the government subsidization of positions. The fact remains, however, that to date, no such jobs exist, even given the clear legal crisis faced by the poor. *See* Coombs, *supra* note 7, at 218 and n.9.

[63] *See* Lubet & Stewart, *supra* note 16, at 1248.

[64] *See id.*

[65] *See id.*

[66] *See* Murray, *supra* note 12, at 1157.

[67] *See id.*

[68] *See* Jacobs, *supra* note 12, at 511.

[69] *See* Murray, *supra* note 12, at 1157. Such buyout provisions, to pass muster, would have to be feasible for all attorneys, at all levels of income. *See* Coombs, *supra* note 7, at 226-228.

[70] *See id.* at 1158-59.

[71] *See id.* at 1158-59, n.137 (citing U.S. v Dillon, 346 F.2d 633, n.3 (9th Cir. 1965)).

perform the pro bono service.[72] They are not physically compelled to perform the service,[73] and if they find the notion so offensive, they are free to leave the practice of law and enter a profession with no such obligation.[74] Fourteenth Amendment arguments fail, it is argued, in two ways. First, like the Fifth Amendment argument, the due process argument fails because a person's labor does not constitute property.[75] Secondly, the equal protection argument fails because under the rational relationship test, a mandatory requirement that attorneys meet the legal needs of the poor is a legitimate classification and a rational means.[76] Nor are attorneys a protected class.[77]

While those who favor pro bono rules further argue that while it may well be society's, and not the profession's, obligation to meet the needs of the poor, the fact remains that the organized, task-oriented nature of the legal profession makes lawyer's pro bono service the best place to start.[78] Attorneys form a powerful lobbying group for enacting legislative change, and so are the most logical group to begin tackling the problem.[79] Proponents also argue that the legal crisis has continued in the face of societal apathy, and so attorneys must galvanize society by starting to deal with the problem, despite the fact that they may not, as a profession, have a particular obligation to the poor.[80] They also question the logic behind lawyers' denying a professional obligation but claiming a broader social obligation to provide voluntary pro bono service, since even as mere members of society, lawyers are in a position to help the poor.

Supporters of pro bono rules note that pro bono opponents' arguments that administrative costs of such programs would be overwhelming are purely speculative.[81] They point to the administrative abilities of state and local bar, private non-profit legal service and pro bono groups as proof that pro bono referral and monitoring systems can be feasibly accomplished.[82]

Proponents of pro bono rules refute their critics' "lack of competence" arguments by noting that attorneys are nonetheless bound by national and state Professional Rules regarding the level of diligence and competency required of a

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[72] *See id.* at 1160. "Involuntary servitude" under the Thirteenth Amendment has been held to apply to situations like slavery. Duties owed by the individual to the state, as proponents of pro bono service assume is the case, are beyond the scope of the amendment. *See id. See also* Jacobs, *supra* note 12, at 510.

[73] *See* Murray, *supra* note 12, at 1160.

[74] *See id.* at 1160-61.

[75] *See id.* at 1161.

[76] *See id.* at 1162.

[77] *See* Jacobs, *supra* note 12, at 511.

[78] *See* Milleman, *supra* note 12, at 72-73.

[79] *See id.* at 73 (suggesting that lawyers should join with government in changing current levels of legal aid being directed to the poor).

[80] *See id.*

[81] *See* Murray, *supra* note 12, at 1163.

[82] *See id.*

lawyer in all her work.[83] Failure to perform in a competent manner potentially leaves an attorney subject to disciplinary proceedings and disbarment.[84] Likewise, even though attorneys may lack competence in poverty law as a legal specialty, they still retain the means for gaining competence by merit of their legal education—an advantage pro bono clients do not have.[85]

These supporters also argue that the potential disparate impact of buyout options and aggregation of hours provisions on small firm practitioners, solo practitioners, and lower paid lawyers are both irrelevant and avoidable.[86] Such arguments are irrelevant since disparate impact alone is not a basis for invalidating a rule; a discriminatory purpose must also be shown.[87] The drafters of pro bono rules avoid these arguments by designing these provisions with flexibility in mind. Buyout provisions can be set at a rate affordable to all lawyers,[88] and aggregation of hours provisions can be designed so that attorneys outside of firms can make use of bar association resources to design a program that meets their needs. [89]

Proponents of pro bono also argue that the promulgation of pro bono rules is unlikely to cause attorneys already performing pro bono work to cap their hours at the amount set by the rule.[90] Those who claim to be so offended by the mere articulation of a rule that they must, "in principle," refuse to perform pro bono service for the poor are more likely to be the attorneys the rule targets, namely, those who are already failing to perform the work voluntarily.[91] Likewise, proponents argue that those already volunteering are unlikely to stop because a rule makes them feel as if the emotional benefits of volunteering have been undermined; they at least have already recognized the need and have lent their help without having to be prompted.[92]

Some proponents of pro bono argue that the primary goal of such rules is not to reinforce the attorney's professional responsibility, but rather to meet the basic legal needs of the poor.[93] Under this view, arguments about individual choice in

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[83] *See id.* at 1163-64.

[84] *See id.*

[85] *See* Milleman, *supra* note 12, at 60-62.

[86] *See* Murray, *supra* note 12, at 1164-65. *See also* Coombs, *supra* note 7, at 226, 235. These objections are also irrelevant in that the differences between lawyers' practices and incomes is not a product of the same situations causing the legal needs of the poor, but is instead a product of the profession's structure and the attorney's own choice of where to work.

[87] *See* Murray, *supra* note 12, at 1164-65, n.200 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).

[88] *See* Coombs, *supra* note 7, at 226, n.32 (discussing how flat-rate and flexible buy-out options can distort lawyers' decisionmaking with regard to doing pro-bono or choosing the buyout option).

[89] *See id.*

[90] *See* Milleman, *supra* note 12, at 64-65.

[91] *See id.* at 65.

[92] *See* Milleman, *supra* note 12, at 64. *See also* Coombs, *supra* note 7, at 229-31.

[93] *See* Milleman, *supra* note 12, at 64.

providing charity are secondary to the needs faced by the poor; regardless of the merit of those arguments, the legal needs of the poor remain primary.

B. Existing Pro Bono Rules

1. ABA Pro Bono Rule

States adopting pro bono rules, including Massachusetts, have used ABA Model Rule 6.1 as either their model or their point of departure. Since its inception, the ABA has made various attempts at articulating the principle that all attorneys should perform pro bono work, beginning with its 1908 Canons.[94] Those canons were silent on the explicit provision of free legal services to the poor, but the Canons did remind the attorney that "the profession is a branch of the administration of justice and not merely a money-getting trade,"[95] implying to some that there will be times when a lawyer will be called upon to uphold the administration of justice, despite lack of profit.

The 1969 Model Code expressed the pro bono obligations of attorneys in the form of ethical considerations. The Code's disciplinary rules set out minimum behavior standard to measure whether lawyers have breached their professional ethics.[96] In 1977, the ABA revised its rules again.[97] The commission in charge of drafting the rule worked through several proposals,[98] eventually promulgating the forerunner to the current rule:

> 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

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[94] *See* James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession, and Legal Education*, 13 LAW & INEQ. 51, 55 (1994).

[95] *Id.*

[96] *See id.* at 55-56. Ethical Consideration ("EC") 2-25 stated that there has been an ongoing tradition of pro bono legal service by the profession to the poor and that the "basic responsibility" rests on each individual lawyer. *See* MODEL CODE OF PROF. RESP. EC 2-25 (1999). EC 2-25 stressed the inherent rewards of doing such work, noting that workload or prominence did not relieve an attorney of his duty. *See id.* EC 2-25 went on to state that since individual efforts did not always meet the level of need, all lawyers should also contribute financially to those legal services programs designed to meet those needs. *See id.*

[97] *See* Baille & Bernstein-Baker, *supra* note 94 at 55-56.

[98] *See id.* These proposals included one featuring a mandatory requirement that lawyers provide 40 hours of service per year, but the first published draft removed the mandatory provision and inserted a mandatory reporting requirement in its place. *See* MODEL RULES OF PROF. CONDUCT Rule 8.1 (Discussion Draft 1980). Severe criticism of the reporting requirement, however, led to the substitution of "should" for "shall" in a subsequent draft, and in the version finally promulgated in 1983, the reporting provision was dropped entirely. *See* MODEL RULES OF PROF. CONDUCT Rule 6.1 (1999).

or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[99]

The accompanying commentary defined "legal services" broadly, including "poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice"[100] and noted that the disciplinary process should not be used to enforce the rule.[101] The commentary further stressed that given the increasingly legal means used by which citizens' rights and responsibilities are expressed,[102] legal assistance in navigating those laws was "imperative for persons of modest and limited means, as well as for the relatively well-to-do."[103] The comments also re-emphasized that individual efforts would not meet existing needs and that attorneys should financially support legal services programs in addition to whatever pro bono service they performed.[104]

The ABA again revised its vision of pro bono service in 1993. Its latest formulation reads as follows:

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.

In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional legal services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic,

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[99] MODEL RULES OF PROF. CONDUCT Rule. 6.1, *reprinted in* PRO BONO PUBLIC SERVICE, PROF RESP.: STANDARDS, RULES AND STATUTES 103 (West 1998-1999).

[100] *Id.* at cmt [1].

[101] *See id.*

[102] *See id.* Our daily lives are subject to a variety of laws and regulations, none more so than the poor. Entitlement programs including housing, disability, medical insurance, food stamps and job training are overseen by courts and government agencies with elaborate administrative mechanisms for determining eligibility, and a decision by the agency to cut off a poor person's benefits affects his or her most basic standard of living. Without the aid of an attorney to explain the procedures used by the agency and to advocate on the client's behalf, many become lost in the many steps needed to assert to continued benefits.

[103] *Id.* at cmt [2].

[104] *See id.* at cmt [3].

> community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system, or the legal profession.
>
> In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.[105]

The accompanying commentary phrases the obligation as one of professional responsibility, accruing to every lawyer.[106] While noting that states can define their hours and scope of obligation, and conceding that attorneys will not always be able to meet the suggested amount each year, Model Rule 6.1 states that on average, all attorneys should be able to complete a minimum of fifty hours of work per year throughout their legal careers.[107] The rule commentary again defines legal services broadly, such that non-litigators and attorneys with outside practice restrictions can fulfill their responsibility via means other than direct representation.[108] The rule excludes from its ambit legal services required by the Constitution or state law, namely appointed counsel work.[109]

In apparent recognition of congressional cuts to funding and eligibility for legal services,[110] the commentary defines "persons of limited means" as those qualifying for funding under Legal Services Corporation guidelines, as well as those whose incomes exceed the guidelines but who nonetheless cannot afford attorneys' fees.[111] The commentary stresses that all fifty hours should be provided to persons of limited means, but notes that judges, corporate, and government attorneys with outside practice restrictions may meet their obligation through the means outlined in part (b) of the rule.[112] The rule echoes the 1983 rule by encouraging attorneys to also contribute financial support to legal services organizations,[113] and again stresses that it is not intended to be enforced through the disciplinary process.[114]

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[105] MODEL RULES OF PROF. C. Rule 6.1, *supra* note 99.

[106] *See id.* at cmt [1].

[107] *See id.*

[108] *See id.* at cmt [2]. Among the alternatives such lawyers may choose in fulfilling their professional responsibility are: individual or class representation, legislative lobbying, legal advice, administrative rule making, and training and mentoring those who do provide direct legal services. *See id.* at cmt. [2].

[109] *See id.* at cmt [1].

[110] *See supra* p. 103 and note 12.

[111] *See* MODEL RULES OF PROF. C. Rule 6.1, *supra* note 99, at cmt [3].

[112] *See id.* at cmt [5].

[113] *See id.* at cmt [10].

[114] *See id.* at cmt [11].

Two portions of the commentary, however, underscore portions of the ongoing pro bono debate. They touch upon two issues: 1) the tension caused by the disparities of wealth and relevant experience among attorneys who are required to meet the same standard, and 2) the credibility of anecdotal assertions made by attorneys that they do in fact meet the requirements for pro bono service. If attorneys do meet the requirement, then why is there an ongoing and growing need for their services? Is it simply a matter of too many legal needs and not enough lawyers? Or are lawyers' assertions of compliance untrue and merely self-serving? The fact that the rule has become more and more specific over the years indicates that these statements are not true, but that the profession, to avoid that conclusion, instead assumes that the problem merely lies in attorneys' misunderstanding of the real areas of need.

Noncompliance and less-than-good intentions could be the only sources for the commentary's statement that "the intent of the lawyer to render free legal services is essential to the work performed to fall within the meaning of [the rule] . . . [s]ervices rendered cannot be considered pro bono if an anticipated fee is uncollected."[115] Surely attorneys would not try to qualify work done for clients who later failed to pay as pro bono work—since the work had been contracted in anticipation of payment. The mere presence of this portion of the commentary proves anecdotal protests of compliance wrong in part, if not in the main.

The 1993 commentary to the rule also contains both a "buyout" provision and an aggregation of hours provision that do not appear in the text of the rule itself. Noting that it will not always be "feasible" for individual attorneys to provide legal services, the commentary states that attorneys may instead discharge this obligation by giving financial support to organizations providing legal services to those of limited means.[116] The commentary goes on to note that "[s]uch financial support should be reasonably equivalent to the value of the hours of service that would otherwise have been provided," and that "[i]n addition, at times it may be more feasible to satisfy the . . . responsibility collectively, as by a firm's aggregate pro bono activities."[117]

These provisions, not contained in the rule itself, nonetheless provide attorneys with a significant means to evade actual contact with persons of limited means. As noted in Section II (A)(1) of this Note, buyout provisions and firm aggregation of hours may discriminate against the solo and small firm practitioner, as well as any attorney earning a relatively low income. These attorneys' only recourse is to provide the contemplated service. If the purpose of the rule is to remind attorneys of their professional obligations, then such provisions do not meet the goal. But if instead, the goal is to meet the legal needs of the poor, then an attorney exercising the buyout option or the aggregation provision is at least contributing toward the provision of the needed legal services by someone with the time and the will to do the work.

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[115] *Id.* at cmt. [4].

[116] *See id.* at cmt. [9].

[117] MODEL RULES OF PROF. C. Rule 6.1, *supra* note 99.

2. State Rules

No state has adopted a mandatory rule requiring pro bono legal service of its attorneys. Florida, however, has enacted a mandatory reporting provision requiring attorneys to report whether they actually performed pro bono legal services as a part of their annual registration with the bar.[118] Those states adopting pro bono rules have used language similar to the ABA rule.[119] Of these states, thirty-three allow buyout options,[120] and six states recommend a set amount of hours, ranging from twenty to fifty hours.[121]

3. Academic Proposals

Several academic proposals outline ways to avoid problems with pro bono rules. Some, attempting to both allay opponents' fears regarding enforcement of pro bono rules and yet assure proponents that there would be some incentive for attorneys to do pro bono work, suggest a system of passive enforcement where the performance of (or failure to do) pro bono work would be considered only after independent ethical allegations have been levied against an attorney.[122]

Others have suggested that pro bono opponents' arguments regarding lack of competency could be met by counting attorneys' participation in necessary continuing legal education courses toward the state's pro bono suggestion.[123] Yet others have suggested that the pro bono ethic is best instilled by mandating pro bono service during law school,[124] arguing that by integrating pro bono service into the law school curriculum, future lawyers will gain both an appreciation for the legal needs of the poor and benefit from practical work experience.[125]

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[118] *See* FLA. R. PROF. C. Rule 4-6.1(d) (1997).

[119] *See* Salvesen, *supra* note 14, at 199. *See also* Eldred & Schoenherr, *supra* note 9, at 394-95.

[120] *See* Salvesen, *supra* note 14, at 199.

[121] *See* AZ. R. PROF. C. ER Rule 6.1(a) (1990) (50 hours); D. C. R. PROF. C. Rule 6.1, cmt. [5], (1996) (40 hours); FLA. R. PROF. C. Rule 4-6.1(b)(1) (1997) (20 hours); GA. CODE OF PROF. RESP., Canon 2, EC 2-25(c) (1994) (40 hours); HAW. R. PROF. C. Rule 6.1(a) (1994) (50 hours); KY. R. PROF. C. Rule 6.1 (1994) (50 hours).

[122] *See* Salvesen, *supra* note 14, at 201.

[123] *See* Milleman, *supra* note 12, at 76-77. *See also* Talbot D'Alemberte, *Lawyers Have a Duty to Serve the Poor. . .and Judges Have a Duty to See That They Do*, 3 JUDGE'S J. 18, 37 (1992) [hereinafter *Lawyers Have a Duty*].

[124] *See generally* Lawrence Bortstein, et. al., Notes and Commentary, *Mandatory Pro Bono for Law Students: Another Dimension in Legal Education*, 1 J. L. & POL'Y 95 (1993).

[125] *See id.*

III. MASSACHUSETTS RULE OF PROFESSIONAL CONDUCT 6.1

A. Overview of the Massachusetts Rule

Massachusetts Rule of Professional Conduct 6.1 is, by its terms, an "aspirational rule."[126] It suggests that the attorney devote a substantial majority of twenty-five hours of pro bono work annually to provide legal services to "persons of limited means."[127] Such legal services are construed broadly, limited only by the suggestion that persons of limited means be the primary beneficiaries.[128] An attorney may represent an individual or a class, provide legal advice to, or lobby the legislature on behalf of persons or organizations working to improve the lives of persons of limited means.[129] An attorney may also work to change administrative rules affecting such persons, provide community legal education, and train or mentor others who do represent those of limited means.[130] As an alternative to the actual provision of legal services, the rule suggests that the attorney contribute $250 or 1% of the attorney's yearly taxable income to organizations that provide the needed services.[131]

In many ways, the rule is similar to the ABA rule, but the ABA rule serves more as a jumping-off point than a model for the Massachusetts rule. The Massachusetts rule focuses more on legal services for those of limited means and reduces the number of hours needed to meet the obligation. The ABA rule's suggestion that lawyers donate money to legal services groups is made more specific in the Massachusetts rule. The Massachusetts rule articulates the obligation more concretely, impressing upon bar members that if they cannot actually serve, they ought at least to contribute financially to the groups who do serve the legal needs of those of limited means.[132]

1. Text and Commentary

The first portion of the final version of the rule did not change in any relevant respect from the first version of the proposed rule. The first version differs in relevant part from the final version as follows:

> (b) If a lawyer is unable to provide 25 hours of *pro bono publico* legal services, as described in (a) above, the lawyer may meet this professional responsibility by contributing money to organizations that provide or support legal services to persons of limited means. The contribution should be the greater of:

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[126] *See* MASS. R. PROF C. Rule 6.1 (1999).
[127] *Id.*
[128] *See id.*
[129] *See id.*
[130] *See id.*
[131] *See id.*.
[132] *See* MASS. R. PROF. C. Rule 6.1 (1999).

1. $250, or,

2. an amount equal to the difference between 25 and the number of hours of *pro bono publico* legal services the lawyer provided multiplied by one-third of the lawyer's usual hourly fee, or if the lawyer receives a salary, one-third of that lawyer's hourly compensation.

For each of the three years following the effective date of this rule, a lawyer *shall* (emphasis added) annually report to the Board of Bar Overseers on an anonymous basis the number of hours of *pro bono publico* legal services provided and the amounts of contributions made in lieu of services.[133]

The final version reads as follows:

A lawyer should provide annually at least 25 hours of *pro bono publico* legal services for the benefit of persons of limited means. In providing these professional services, the lawyer should:

a) provide all or most of the 25 hours of *pro bono publico* legal services without compensation or expectation of compensation to person of limited means, or to charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of person of limited means. The lawyer may provide any remaining hours by delivering legal services at substantially reduced compensation to persons of limited means or by participating in activities for improving the law, the legal system, or the legal profession that are primarily intended to benefit persons of limited means; or

(b) contribute from $250 to 1% of the lawyer's annual taxable professional income to one or more organizations that provide or support legal services to person of limited means.[134]

The Pro Bono Committee made no changes to the definition of eligible legal services or the alternatives to actual legal service provision between the first and final version of the rule. They did, however, remove the mandatory reporting provision of the earlier version of the rule and simplify the financial contribution option.[135] The final version of the rule also no longer indicates a preference between $250 or 1% of the lawyer's annual taxable income, seemingly leaving it to the individual lawyer's discretion to determine what amount they will give.[136]

The commentary accompanying the final version of the rule articulates the Pro Bono Committee's understanding of the pro bono obligation as one of professional

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[133] SUPREME JUDICIAL COURT COMM. ON PRO BONO LEGAL SERVICES, PRELIMINARY REPORT TO THE SUPREME JUDICIAL COURT, at 19 (1998).

[134] MASS. R. PROF C. Rule 6.1 (1999).

[135] *See* William T.G. Litant, *Pro Bono Buy-out Could Cost Average Lawyer $1,125 a Year*, MASS. B. ASS'N L. J., May 1998, at 2 (analyzing how the buyout provision in the first version of the rule would impact Massachusetts attorneys).

[136] *See* MASS. R. PROF C. Rule 6.1, cmt. [9].

responsibility and echoes the ABA's language about average contributions[137] and non-appointment legal work.[138] Comment 1 stresses that the rule is aspirational and failure to fulfill the obligation will not subject a lawyer to discipline.[139] In addition, the commentary notes that the rule contemplates only twenty-five hours of service per year,[140] since the Massachusetts rule's purpose lies in "increasing the *pro bono publico* legal services available to all persons of limited means"[141] and not in increasing more general pro bono work.[142] This is also implied in the wording of the rule, which specifically delineates eligible work.

The commentary to the rule, echoing the expansive itemization of qualified work in part (a) of the rule, stresses that the expansive definition is meant to provide sufficient opportunities to reflect attorneys' varying skills, time and financial commitments.[143] Comment 7 indicates that the skills of the non-litigator and the outside work restrictions on government and corporate counsel are specifically accounted for in the rule,[144] since "these activities should facilitate participation by government and corporate attorneys, even when restrictions exist on their engaging in the outside practice of law."[145] In doing so, Comment 3 provides that:

> Such legal services consist of a full range of activities on behalf of persons of limited means, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, community legal education, and the provision of free training or mentoring to those who represent persons of limited means.[146]

In clarifying the range of clients attorneys may serve in order to fulfill their obligations, Comment 4 defines persons eligible for service as:

> those who qualify for publicly-funded legal service programs and those whose incomes and financial resources are above the guidelines used by such programs but who, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations composed of low-income people, to organizations that serve those of limited means, such as homeless shelters. . . or to those organizations which pursue civil rights, civil liberties, and public rights on behalf of persons of limited means. Providing legal advice, counsel and assistance to an organization consisting or serving persons of limited

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[137] *See id.* at cmt. [1].

[138] *See id.*

[139] *See id.*

[140] *Id.*

[141] *Id.*at cmt. [2].

[142] *See* MASS. R. PROF. C. Rule 6.1. The Commentary notes that while commendable, work for non-profit and civil rights organizations not directly serving those of limited means is not counted toward the Massachusetts obligation, unlike the ABA rule. *See id.*

[143] *See id.* at cmts. [3] and [4].

[144] *See id.* at cmt. [7].

[145] *Id.*

[146] *Id.* at cmt. [3].

means while a member of its board . . . would be *pro bono publico* . . . under this rule. [147]

By allowing attorneys to count work on boards of directors or serve as counsel to groups providing legal services to the target population, the rule and commentary make clear that the skills of the tax attorney, the real estate attorney, and the non-litigator can be lent to those groups needing such advice. Since groups providing legal services to the poor are usually non-profit, the donated services are ones that the group can little afford otherwise.

Attorneys prevented by outside practice restrictions from donating such services, may fulfill their obligation either by attempting to improve the law, legal system or the legal profession to the benefit of persons of limited means[148] or by making the financial contribution contemplated in part (b) of the rule.[149]

While stressing that lawyers should fulfill their obligation primarily by actually providing pro bono publico legal services, the commentary acknowledges that some attorneys will need or will choose to meet their obligations in other ways.[150] The rule envisions that such attorneys will either serve organizations, work toward law reform, provide mentoring and training to other attorneys doing such service, provide their services at reduced fee, or conduct community legal education.[151] The rule also recognizes that some attorneys will opt to meet part or all of their obligation through the "buyout" option contained in part (b) of the rule.[152] If lawyers make this choice, they "should contribute from $250 to 1% of [their] adjusted net Massachusetts income . . . [while taking] into account [their] own specific circumstances and obligations in determining [their] contribution."[153] Thus it is the lawyer's choice whether to make a financial contribution in lieu of providing pro bono services.

The Pro Bono Committee's commentary noted that attorneys who perform the contemplated legal services should *still* contribute financially to legal services programs, since "the efforts of individual lawyers are not enough to meet the need for free legal services"[154] and the "government and the profession have funded programs to provide a portion of such services."[155] The SJC, however, did not include this comment in the final version.[156]

One final portion of the commentary accompanying the rule deserves attention. In addition to direct legal services, reform work, and financial contributions, the

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[147] *See id.* at cmt. [4].
[148] *See* MASS. R. PROF. C. 6.1 at cmt [7].
[149] *See id.*
[150] *See id.* at cmts. [6] and [9].
[151] *See id.* at cmt. [8].
[152] *See id.* at cmts. [7] and [9].
[153] *Id.* at cmt. [9].
[154] MASS. R. PROF. C. 6.1 at cmt [11].
[155] *Id.*
[156] *See id.*

rule allows for "collective" satisfaction of the pro bono requirement. [157] As the commentary recognizes, "it may be more feasible to act collectively, for example, by a firm's providing through one or more lawyers an amount of *pro bono publico* legal services sufficient to satisfy the aggregate amount of hours expected from all lawyers in the firm."[158] Although this provision allows for aggregation of hours on a firm-wide basis, the use of the term "for example" seems to indicate that there may be *other* ways of meeting the individual responsibility in a collective manner, outside the firm setting.[159]

2. Pro Bono Committee Report and Recommendations

The final version of the Rule was sent to the SJC in several parts: a cover letter, a detailed report of the committee's activities, three appendices, and two separate concurring reports by committee members.[160] In its cover letter, the Pro Bono Committee asserts the necessity of the aspirational rule to increase pro bono legal assistance and outlines its suggested strategy, involving "expanded roles for the judiciary, the organized bar, law schools and existing *pro bono* programs."[161] As part of that strategy, the Pro Bono Committee recommends that the SJC establish a standing committee to monitor and support pro bono work in the state.[162]

The Pro Bono Committee's Report notes at the outset that Massachusetts attorneys take an oath of office, swearing to be champions for justice and acknowledging citizen's rights to justice without obligation to pay for it.[163] Stating that "expanding access to justice . . . is a societal obligation and not solely the responsibility of the bar,"[164] the Report emphasizes that "while lawyers alone cannot satisfy all of the unmet legal needs of the poor, without the sacrifice and leadership of lawyers justice will continue to be an illusion"[165] for many Massachusetts citizens. Citing the SJC's finding that the practice of law is a monopoly, the Report finds that lawyers do have an independent professional obligation to do pro bono work.[166] Recognizing that its recommendations, even fully implemented, will address only part of the problem, the Report also stresses

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[157] *See id.* cmt. [1].

[158] *Id.*

[159] Although the rule does not explain what it means by "for example," it seems to indicate that lower paid lawyers find a way to use the rule to their advantage.

[160] *See* COVER LETTER FROM THE SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES TO THE CHIEF JUSTICE, (Nov. 5, 1998) (on file with MASS. LAW. WKLY.).

[161] *Id.*

[162] *See id.*

[163] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 1.

[164] *Id.* at 2.

[165] *Id.*

[166] *See id.*

the need of increased participation on the part of government, business, and individuals.[167]

The Pro Bono Committee recognizes that many Massachusetts attorneys already meet their obligation and more,[168] but in proposing a rule, the implication is that the current need for civil legal services in the Commonwealth demands that a call to service be raised formally, despite the good works performed by many in the bar. Existing legal services in the Commonwealth meet only 20% of the need, such that 225,000 legal problems go unmet each year.[169]

Rather than conduct their own independent analysis of "how best to encourage and support pro bono efforts,"[170] as charged by the SJC, the Pro Bono Committee relies on reports compiled by others between 1987 and 1996[171] to reach these conclusions. The Pro Bono Committee also relies on reports, surveys and studies compiled by existing pro bono programs, large Boston law firms, voluntary responses to a Massachusetts Lawyers Weekly survey, and focus groups held in 1997 throughout the state.[172] Based on its analysis of those materials, the Pro Bono Committee concludes that if each Massachusetts attorney took one pro bono case a year, "counsel could be provided to at least forty percent of those in need."[173]

The Pro Bono Committee cites several reasons for drafting the rule. If adopted, they note that the Commonwealth would join the ranks of the thirty-seven other states with similar rules.[174] The Pro Bono Committee states that the rule is an aspirational one in recognition of the work already being done by the Massachusetts Bar, as well as because "an aspirational rule is more consistent with the deeply felt individualistic and voluntary aspects of pro bono practice . . . [already a] part of the [Massachusetts] Bar's rich history."[175]

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[167] *See id.*

[168] *See id.* at 3.

[169] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 1.

[170] *Id.* at 3.

[171] *See id.* at 5-6, footnotes accompanying text. The committee relied on the following studies in making its conclusions: MASSACHUSETTS LEGAL SERVICES: PLAN FOR ACTION, 1987, jointly prepared by the Massachusetts Bar Association, the Boston Bar Association, and Massachusetts Legal Assistance Corporation; AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE—FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY, 1996, by the American Bar Association; and EQUAL ACCESS TO JUSTICE: RENEWING THE COMMITMENT, 1996, by the Massachusetts Commission on Equal Justice.

[172] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 6.

[173] *Id.*

[174] *See id.* at 8.

[175] *Id.*

In drafting the rule, the Committee assumes that the "first goal of pro bono legal assistance is to remedy the denial of access to justice because of lack of money."[176] The Committee notes that as the rule focuses on the needs of persons of limited means, only twenty-five hours were requested, so that attorneys doing pro bono work not eligible under the Massachusetts rule would be able to continue that work in order to meet the fifty hours contemplated by ABA Model Rule 6.1.[177] The Committee believes that the twenty-five hours "may essentially translate to one case per year per lawyer,"[178] and notes their expectation that it would be an "overall career effort of twenty-five hours per year on [ ]average."[179] The Pro Bono Committee concedes that in some years an attorney might not be able to provide the entire twenty-five hours given their workload or financial situation, but restates their expectation that in other years, each attorney would meet or surpass the obligation.[180] In addition, the Pro Bono Committee notes that an attorney's area of practice may not fit with the legal needs contemplated by the rule.[181] In any of these instances, however, the Pro Bono Committee recommends that attorneys donate money to organizations serving the needs targeted in order to fulfill part or all of that year's professional obligation.[182]

In addition to the proposed rule, the Pro Bono Committee also made policy recommendations to the SJC regarding the means by which to achieve the Rule's purpose. These recommendations included an expanded role for the judiciary,[183] the enlistment of the organized bar associations,[184] the integration of law schools into the Commonwealth's pro bono efforts,[185] the utilization of existing pro bono

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[176] *Id.*

[177] *See id.* at 8-9.

[178] SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 8.

[179] *Id.* at 9.

[180] *See id.*

[181] *See id.* An attorney who does not litigate or specialize in poverty law issues would arguably have no services he could lend the poor in attempting to meet his or her obligation.

[182] *See id.*

[183] *See id.* at 7-9. Noting that judges' encouragement and recognition of pro bono work by attorneys would provide incentives to the bar and give a means of raising awareness, the Pro Bono Committee suggested that the SJC enlist the aid of the judiciary in "developing pro bono plans, removing barriers to participation . . . and . . . supporting and extending . . . participation throughout the bar." *Id.*

[184] SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 9-10. The Pro Bono Committee noted that bar associations' communications with members provided an important means of communicating pro bono needs and opportunities. Also, noting the role of the bar in continuing legal education, the Pro Bono Committee suggested tailoring some courses and perhaps offering them for free to those accepting referrals. *Id.*

[185] *See id.* at 10-11. The Pro Bono Committee noted the role law schools play in instilling professional values, and suggested that "[t]he bar and pro bono programs should work more closely with law schools to ensure that. . .pro bono opportunities are available for law students in the Commonwealth's law schools." *See also* David Hall, *The Law School's Role in Cultivating a Commitment to Pro Bono,* BOSTON B.J., May/June 1998, at 4.

projects in the Commonwealth,[186] and the creation of a Standing Committee on Pro Bono Legal Services.[187]

As envisioned by the Pro Bono Committee, the Standing Committee will have the heady task of doing the following:[188] monitoring compliance with the rule,[189] sharing successful approaches across the state, correcting regional disparities in the practice of law that prevent compliance with the rule, and conducting a statewide educational campaign regarding the need for and the support of pro bono legal services.[190] The Pro Bono Committee also notes that the Standing Committee should assist non-litigators in meeting their pro bono obligations by publicizing service opportunities that make use of their existing skills.[191] The Pro Bono Committee further concedes that the Standing Committee will need a staff to accomplish these goals, but left the decision of staffing to the Committee's discretion.[192] The Pro Bono Committee also notes that malpractice insurance would be a concern that the Standing Committee should consider in working with existing pro bono programs.[193]

3. Concurring Reports

The Report sent to the Chief Justice includes two separate concurrences to the rule, wherein the authors note their concerns about the Pro Bono Committee's rule and recommendations. The authors of the first concurrence[194] note that while they believe that the recommendations set forth by the Pro Bono Committee are an important attempt to educate the bar about the extent of need in the Commonwealth, they feel that the Committee's recommendation "fails to adequately recognize and encourage the on-going pro bono efforts of a substantial majority of the bar."[195] They also reiterate their belief that it is inappropriate to

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[186] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 12. The Pro Bono Committee noted that existing programs should serve as the infrastructure for an expanded statewide system, and suggested that they should provide the screening for referrals to members of the bar at large. In so doing, the Pro Bono Committee noted that this may require existing pro bono programs to design new procedures for case screening and service delivery.

[187] *See id.* at 13-16.

[188] *See id.*

[189] *See id.* at 13. Compliance is to be monitored by conducting a statewide survey of the bar's pro bono activity at semi-yearly intervals, including the type of work performed and what barriers lawyers face in meeting their obligations.

[190] *See id.*

[191] *See id.* at 15.

[192] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, *supra* note 1, at 16.

[193] *See id.* at 14.

[194] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, CONCURRING REPORT OF COMMITTEE MEMBERS MATTHEW J. MCDONNELL, ESQ. AND DAVID A. MILLS, ESQ., Nov, 1998.

[195] *Id.* at 1.

include a non-enforced principle of professionalism in the disciplinary rules, noting that "the inclusion of precatory language in disciplinary rules could serve to erode the seriousness or respect that one owes to rules governing bar discipline."[196] The authors of the first concurrence stress that the rule essentially attempts to "legislate morality"[197] and note their belief that the desire to perform pro bono work is innate.[198] They also stress their belief that "[t]he inclusion of a requirement (to do good) in our disciplinary code presupposes that the profession has failed to step up to the plate, and may well have the unintended consequences of affronted individuals resisting this 'compulsory' mandate."[199] The authors also state their belief that the narrow target of the rule (persons of limited means) "discriminates against those practitioners who donate substantial *pro bono* work to entities which may indeed help persons of limited means but were not primarily designed to address those individuals."[200]

While the concerns mentioned in this concurrence reflect many of the criticisms raised against the rule, they are made despite the fact that the Pro Bono Committee specifically addressed many of these concerns in the Rule, the Commentary, and their report to the SJC. [201] The Pro Bono Committee recognized the wide variety of legal work already done in the Commonwealth, including work not eligible under the Massachusetts rule, yet nonetheless stressed that given the severity of the needs of those of limited means, the rule was necessary to begin to meet their needs.[202] Likewise, in explaining why they chose twenty-five rather than fifty hours, the Pro Bono Committee expressed their belief that the lower number would allow attorneys to continue doing the other pro bono work that meets the ABA definition of eligible legal services.[203] With regard to the innately personal nature of pro bono work, the Pro Bono Committee noted this as a factor in the decision to articulate the rule as aspirational.[204]

As a common sense note, the rule is aspirational, carries no disciplinary sanctions, contains no enforcement mechanism, and accords the individual attorney significant discretion in deciding how to fulfill the obligation. Those attorneys who are affronted by the formal articulation of a rule and its placement in the disciplinary rules[205] are ignoring the real legal needs sought to be served in favor of

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[196] *Id.* While this may be true, the fact remains that even disciplinary rules worded in a mandatory manner accord the individual attorney great discretion in determining whether his behavior comports with the standard.

[197] *See id.*

[198] *See id.*

[199] *Id.* at 1-2.

[200] SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, CONCURRING REPORT OF COMMITTEE MEMBERS MATTHEW J. MCDONNELL, ESQ. & DAVID A. MILLS, ESQ., *supra* note 193, at 2.

[201] *See supra* pp. 121-24.

[202] *See id.*

[203] *See supra* pp. 122-23.

[204] *See supra* p. 122.

[205] The fact remains that those whose main concern is the placement of the aspiration in the

engaging in semantics.

The authors of the second concurring report[206] criticize the Pro Bono Committee for promulgating a rule and a set of recommendations that are not strong enough to achieve the goals set for them by the SJC. Their main ground for criticizing the Pro Bono Committee lies in their belief that the majority of the Pro Bono Committee erred in dropping the mandatory reporting requirement contained in the first version of the rule.[207] They argue that without the mandated reporting "the Court and the legal community will never know whether pro bono publico has been meaningfully encouraged or supported, and further attempts to make improvements will take place in . . . a vacuum."[208] They further argue that the surveys suggested by the Pro Bono Committee do not "fill the data gap"[209] and that the Pro Bono Committee's tentative suggestion that the surveys be voluntarily funded by the bar or by IOLTA funds[210] provides no sure means for assessing the rule's success.[211]

The authors of the second concurrence then stress that the mandatory reporting provision of the first version of the rule made the reports anonymous,[212] exempt from public disclosure,[213] and inadmissible in any legal proceeding.[214] They reiterate that the purpose of the reporting requirement is to gain as accurate a picture as possible of the success of the rule and its accompanying

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disciplinary rules have not suggested another place in the rule for the SJC's statements on the profession.

[206] *See* SUPREME JUDICIAL COURT COMMITTEE ON PRO BONO LEGAL SERVICES, CONCURRING REPORT OF COMMITTEE MEMBERS, MARY M. CONNOLLY, ESQ., MARGARET B. DREW, ESQ., PROVOST DAVID HALL, P. KEYBURN HOLLISTER, ESQ., & GERRY SINGSEN, ESQ., Nov., 1998.

[207] *See id.* at 1.

[208] *Id.*

[209] *Id.*

[210] For a discussion of IOLTA in Massachusetts, *see generally* Joseph L. Kociubes, *IOLTA Wars,* BOSTON B.J., May/June 1998, at 15.

[211] *See* CONNOLLY ET AL., *supra* note 206, at 1, n.2. In addition, the authors of the second concurrence discussed the reliability of such surveys and the costs of obtaining reliable information that could otherwise be collected by mandated reporting. *See id.* They concluded that "surveys will not be adequate as a source of data, given the high rhetoric and passionate anxiety of . . . opponents. [D]ata from a properly prepared survey can provide useful information, and a survey conducted by the Standing Committee would undoubtedly be better than other recent surveys." *Id.* at 6. They then argued that since there was no funding in place for the surveys contemplated by the Pro Bono Committee's recommendation, and since "random sample surveys producing statistically reliable data . . . [on a state-wide basis] might well cost much more than mandatory reporting," any surveys undertaken would be less successful than "the results of a 100% survey with a very high response rate . . . [since in] any random sample survey . . . half the sample may refuse to respond and the other half have no particular incentive either to gather or to report accurate information." *Id.* at 6-7.

[212] *See id.* at 2.

[213] *See id.*

[214] *See id.*

recommendations, in order to determine whether to keep, repeal, or revise the rule.[215] Discussing the objection raised by the Board of Bar Overseers, that the reporting provision would impose too high an administrative burden, the second concurrence's authors conclude that while the concern was real, the reporting was necessary and the cost worth assuming.[216] The authors also argue that the actual costs and possible alternatives should have been probed before the requirement was dropped from the rule.[217] The authors then discuss Florida's experience with its mandatory reporting requirement, provide an annual means of stepping up educational, promotional, and administrative support of the rule.[218]

The authors of this second concurrence finally conclude that reporting is needed because otherwise:

> we will not know whether actions to support and encourage pro bono publico have worked if we don't have information about what is going on at the beginning of the effort, what changes occur as we progress and what is going on at the end. We will, instead, have the kind of anecdotal and subjective claims that many made in support of the current pro bono publico work of lawyers during the comment period. Such claims prove nothing, or too much . . . Uncertainty about the facts contributes to endless talk rather than proposed action. The appropriate role for government funding, private contribution and self-help are difficult to determine in the absence of information about what is already being done.[219]

The authors also address the criticisms of opponents of the rule, who had argued that "mandatory reporting would inevitably lead to mandatory pro bono publico."[220] They state, "[w]e think this prediction is wrong. Mandatory reporting is only intended to provide information about the effectiveness of the Committee's proposed strategies for improving pro bono publico in the Commonwealth."[221]

The authors conclude that without the reporting requirement, "the efforts to plan for and actually provide equal justice for the poor . . . will continue to suffer from unproven allegations, assumptions, and self-serving declarations . . . [s]urveys will not give reliable information about this, nor will they reliably track progress in achieving improvements and enhancements . . . [r]eporting will."[222]

4. Supreme Judicial Court Action and Commentary

The SJC adopted the rule recommended by the Pro Bono Committee on January 4, 1999 with few revisions to the rule.[223] All the Justices voted for the rule, with

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[215] *See id.* at 3.
[216] *See id.* at 1, n.2.
[217] *See* CONNOLLY ET AL., *supra* note 206, at 1, n.2.
[218] *See id.* at 3-6.
[219] *Id.* at 6.
[220] *Id.* at 3.
[221] *Id.* at 1, n.2.
[222] *Id.* at 7.
[223] *See* Berkman, *supra* note 5, at A1. Changes are noted *supra* in text, section III (A) (1).

the exception of Justice Neil L. Lynch, who did not approve of the buyout provision contained in paragraph (b).[224] The SJC accepted the recommendation of the Pro Bono Committee and has established a Standing Committee to monitor the implementation of the rule. After announcing the new rule, Chief Justice Herbert P. Wilkins noted that it will serve and emphasize the critical role that attorneys' pro bono participation plays in meeting the legal needs of the poor, stating that "[pro bono activity] is one of the features that makes the practice of law a profession and not just a trade."[225] He also noted that while many critics of the rule have argued that it is confusing to include a non-mandatory provision in the Commonwealth's disciplinary rules, "that hasn't troubled about three-quarters of the states [adopting similar rules]."[226] Since the adoption of the rule, Chief Justice Wilkins has noted that "the involvement and commitment of the Justices of the SJC . . . are essential to the effective administration" and support of new and existing pro bono programs.[227] Regarding critics' insistence that the enactment of the aspirational rule paves the way for a mandatory rule, Chief Justice Wilkins noted that "[t]he opposition to even reporting pro bono activity was so strong that I can't imagine [a mandatory rule] would ever be done in the foreseeable future."[228]

5. Excerpts from the Massachusetts Debate

a. Opponents of the Massachusetts Rule

Most of the critics of the Massachusetts rule reiterate the common objections to pro bono rules. Some critics suggested that unwilling lawyers fulfilling their obligations would do a disservice to their clients.[229] Others raised the discrimination specter, since other professionals are not required to serve the public as the rule states.[230] Yet others took offense at the suggestion that lawyers were not doing enough and must be made to by the state.[231] Many have argued that the voluntary rule paves the way for mandatory rules, noting the similar history of IOLTA in Massachusetts.[232]

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[224] *See id.*

[225] *Id.*

[226] *Id*

[227] Herbert P. Wilkins, *Keynote Address to the Massachusetts Bar Association Annual Meeting*, MASS. LAW. WKLY., January 18, 1999, at 12.

[228] *Id.*

[229] *See* John S. McCann, *Pro Bono Report Suggests 'Coerced Counsel,'* MASS. LAW. WKLY., May 11, 1998, at A11.

[230] *See* Edwin L. Wallace, *Doing the Right Thing*, MASS. LAW. WKLY., May 18, 1998, at B9.

[231] *See id.*

[232] *See* Eric T. Berkman, *Step Toward Mandatory Pro Bono is Seen: Scenario Similar to 'Voluntary' IOLTA?*, MASS. LAW. WKLY., May 25 1998, at A1.

Other opponents claimed that the rule discriminates against solo or small firm practitioners, as well as against lawyers who do not specialize in poverty law.[233] These critics suggest that rather than ask attorneys to provide pro bono work, the Commonwealth should establish a firm to provide the needed services.[234] That firm would be funded by a mandatory fee imposed on each law firm as a progressively rising percentage of its billings.[235] Others stressed that funding for legal services should fall on society, not just the bar, arguing that an increased state income tax would be a better option.[236]

Many criticized the use of precatory language in disciplinary rules, arguing that it undermines the power of the other, mandatory rules.[237] Some opponents questioned the precatory language's effectiveness and reiterated their disgust for the court's attempt to "micro manag[e] the daily lives of attorneys."[238] Others criticized the Pro Bono Committee's refusal to credit time spent on court-appointed cases toward satisfaction of the rule, noting that the rate of compensation in such cases is so low that lawyers taking such cases endure "considerable financial sacrifice."[239] Even after the elimination of mandatory reporting, some were *still* concerned about the prospect of a mandatory rule. These critics stressed that the creation of the Standing Committee to monitor the voluntary rule's success raises the specter of a mandatory rule's enactment should the voluntary rule not succeed.[240]

Opponents of the rule reiterated their right to use their time as they see fit[241] and objected to doing pro bono work "for a favorite charity of someone else."[242] Others cited their status as solo practitioners and their current volunteer work as impeding their ability to meet the obligation, calling the buyout option a "tax" that decreases their ability to give to their chosen charities.[243] These critics believed that IOLTA

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[233] *See* Donald M. Solomon, *Pro Bono Plan: Small Firms and Solos Will Lose*, MASS. LAW. WKLY., June 1, 1998, at A11.

[234] *See id.*

[235] *See id.*

[236] *See* Marc Middleton, Letter to the Editor, *Increased Funding Would Put the 'Public' in Publico*, MASS. B. ASS'N. LAW. J., Jan. 1998, at 8.

[237] *See* e.g., Marilyn A. Beck, *MBA's Response to Pro Bono Committee's Report*, MASS. LAW. WKLY, June 8, 1998, at A11; Shirley A. Doyle, Letter to the Editor, *Pro Bono Rule: 'Illegal Involuntary Servitude,'* MASS. LAW. WKLY., June 8, 1998, at A10.

[238] Paul J. Martinek, Editorial, *SJC to all Lawyers: 'Call Your Mother!'*, MASS. LAW. WKLY., Jan. 25, 1999, at A11.

[239] Boston Bar Association, *Statement on the Proposed Pro Bono Rule*, MASS. LAW. WKLY., June 22, 1998, at A11.

[240] *See* Berkman, *supra* note 5, at A1.

[241] *See* Steven M. Glovsky, Letter to the Editor, *Adoption of Pro Bono Rule Precipitates 'Doubt,'* MASS. LAW. WKLY., Feb. 8, 1999, at A10.

[242] George T. Obrine, Letter to the Editor, *'Victim' Says He Won't Follow Pro Bono Rule*, MASS. LAW. WKLY., Feb. 15, 1999, at A10.

[243] *See* William S. Bellino, Letter to the Editor, *IOLTA Funds Should be Enough For the Indigent*, MASS. LAW. WKLY., Mar. 1, 1999, at A10.

contributions "should be sufficient to support the... legal needs of indigent clients."[244] They further noted that only law students graduating from 1999 on should be bound by the rule, because "all current lawyers [did not] rel[y] on [the rule] when they chose to become lawyers."[245] Some opponents, noting the problem of malpractice liability, argued that attorneys without insurance covering their pro bono work might be deterred from doing work by the threat of malpractice suits.[246]

Former Presidents of the Massachusetts Bar Association harshly criticized the rule. Camille F. Sarrouf, 1998-1999 President of the MBA, argued that the rule "paints lawyers as mercenaries"[247] and discriminates against lawyers already volunteering to groups whose activities indirectly benefit the poor.[248] Likewise, 1997-1998 President Marilyn A. Beck noted concern for a possible decrease in volunteerism.[249]

b. Proponents of the Massachusetts Rule

Many of the arguments in support of the Massachusetts pro bono rule echoed the sentiments previously noted, reminding attorneys of their oath, the monopolistic status of the profession, and the statistics about unmet legal needs among the poor.[250] The rule's supporters responded to critics by stressing that the rule *requests*, but does not *require* pro bono service, and that anyone can choose not to do the work.[251] They also commented that the rule allows attorneys to fulfill their obligation in merely two hours per month.[252]

Others noted that despite critics' protestations about prohibitive workloads, "it is often the busiest among us who somehow make the time."[253] Proponents emphasized that besides the personal satisfaction to be gained by doing pro bono work, it affords young lawyers the practical legal skills they may not otherwise acquire in their first years of practice.[254]

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[244] *Id.*

[245] *Id.* This comment is puzzling, since lawyers have been subject to some form of pro bono expectation under the ABA rules since 1908.

[246] *See* Kenneth L. Carson, *From the Storefront Clinic to the Web Site: Liability Considerations for Attorneys Who Give Free Advice*, BOSTON B.J., May/June 1998, at 18.

[247] William T.G. Litant, *Revised Pro Bono Rule Draws Fire From MBA*, MASS. B. ASS'N. LAW. J., Dec. 1998, at 1, 17.

[248] *See id.* at 17.

[249] *See* Marilyn A. Beck, President's View, *Pro Bono Rules Could Discourage Volunteerism*, MASS. B. ASS'N. LAW. J., Jan. 1998, at 6.

[250] *See* Karen F. Green, Mary B. Strother, *Justice for All*, BOSTON B.J., May/June 1998, at 17.

[251] *See* Melissa L. Wilkinson, Letter to the Editor, *New Rule on Pro Bono Will "Improve Lives,"* MASS. LAW. WKLY., Feb. 1, 1999, at A11.

[252] *See id.*

[253] Joel M. Reck, President's Page, *Professional Fulfillment and Public Service*, BOSTON B. J., Jan./Feb. 1997, at 28.

[254] *See* Maren Robinson, *The Benefits of Volunteerism in the Law*, BOSTON B.J., May/June 1998, at 8.

B. Advantages of the Rule

Despite the debate over what form the rule should take, it at least formally articulates the principle that all attorneys have an obligation to aid those of limited means, whether as a rule of professional or social responsibility. The rule re-invigorates the debate over the needs of the poor, forcing the legal profession to look critically at the system's operation. Because the rule calls attention to the legal system's problems and may inspire some attorneys to perform pro bono work, the rule benefits not only the system, but the poor.

From an idealist perspective, the rule reemphasizes the larger principle of lending aid to our fellow man and stresses the idea that the practice of law is a privilege, not a right. All attorneys may not accept these principles, but in a legal system that purports to insure equal justice to all, they must be reiterated constantly to remind lawyers of their purpose. From a pragmatic perspective, the rule at least points out some ways in which attorneys can begin to meet the legal needs of those of limited means. Despite its problems, the rule fills a void in the Massachusetts Bar's official conception of its professional role and creates a baseline against which to measure later pro bono work. In addition, the recommendations made by the Pro Bono Committee as to the support of pro bono efforts indicate an understanding of the realities faced by attorneys in the Commonwealth.

The rule's aggregation of pro bono hours is an advantage, because it allows busy attorneys to make up their hours in another year. In addition, attorneys who are unwilling or do not feel competent to perform the contemplated pro bono service can at least support an attorney hired by the firm to serve as the aggregate. Insofar as the rule aims to help the poor more than reinforce professional responsibility, firms that prefer to hire a full-time attorney just to perform the firm's pro bono work may do so, and the attorneys willing to do this work will be paid a higher salary than they would earn working for a legal services agency.[255]

In addition, the rule's buyout provision allows attorneys to meet their obligation despite limitations on their time, skills, or special circumstances. The rule's buyout provision will not result in the economic and professional difficulties predicted for attorneys who do not earn large salaries, because attorneys have discretion in determining at what level they will contribute.[256] Unlike the first version of the rule, the final version makes no distinction as to whether $250 or 1% of the attorney's annual taxable income should be given to Massachusetts legal services; the decision is left to the attorney's discretion. Attorneys earning more than $25,000 a year may donate one percent of their salary or the $250. While a

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[255] *See* Coombs *supra* note 7, at 220-21.

[256] *See* Marilyn A. Beck, President's View, *Going by the Numbers*, MASS. B. ASS'N LAW. J., May 1998, at 8 (citing MBA survey results regarding the numbers and incomes of part time and low paid attorneys). Even at the numbers cited in the article, a buyout contribution at one percent exacts less hardship on the attorney than the equivalent fee paid by a person of limited means. And 1% of the income of an attorney earning less than $25,000 per year also allows them to still meet the obligation without feeling that they must give more than they can afford.

decision by an attorney earning $90,000 a year to provide only $250 may seem niggardly, at least the attorney has contributed something toward the legal needs of the poor. Attorneys earning less than $25,000 can donate 1% of their salaries and know that they too have met their obligation. The buyout provision responds, in part, to "choice" arguments against pro bono rules, because the attorney has a choice of whether to actually perform the service. He can instead contribute money to meet his obligation. In addition, the rule's broad definition of eligible legal work accounts for the expertise of lawyers who are neither litigators nor specialists in poverty law.[257]

C. Problems With the Rule and Suggestions for Improvement

Despite the fact that the rule's mere presence will likely raise attorney consciousness and increase, at least to a small degree, the amount of legal services done, the final version of the aspirational rule contains provisions that undermine its effectiveness. Although the rule may lead to a slight increase in the overall quantity of pro bono work provided in the Commonwealth, neither the rule nor the accompanying commentary and report dispel the critics' concerns. The remainder of this section notes these problems and suggests ways to solve them.

Among the rule's problems is that it fails to fully address how government and corporate attorneys, much less judges, with outside practice restrictions can meet their obligation. The rule is vague on *how* lawyers whose expertise lie outside traditional legal services[258] can competently meet their obligation. There is also the paradox inherent in something defined both as "aspirational" and as a "rule." Many Massachusetts bar members may be left wondering whether this juxtaposition of terms indicates an intent to make the rule mandatory; if not, does the term merely reflect the debate over whether pro bono work is "aspirational" as a matter of personal charity or a "rule" of professional responsibility? The Pro Bono Committee and the SJC have denied any intent to make the rule mandatory, but critics nonetheless insist that the rule represents the first in a progression of more stringent revisions, resulting in a mandatory rule. These critics believe that the initial articulation and acceptance of the aspirational standard is the first step toward a mandatory rule, because once resistance is broken down to having a "rule" at all, it will be easier for the SJC to revise, ever more strictly, the existing rule. It is not entirely clear how much longer the SJC will have to say they do not intend to make the rule mandatory for them to be believed, but lawyers are clever. If the SJC does make pro bono service mandatory at a later date, someone will surely make

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[257] *See* Maribeth Perry, *The Role of Transactional Attorneys in Providing Pro Bono Legal Services*, BOSTON B.J., May/June 1998, at 16 (detailing the existence of referral programs designed with transactional attorneys in mind).

[258] Meaning litigation and matters involving housing law, immigration law, divorce and family law, social security disability and old age benefits law, unemployment insurance law, and other government entitlements comprising the majority of the legal services needs of the poor.

the reliance argument, referencing the current denials of movement toward mandatory pro bono service.

If such concerns prove true, then by eliminating the reporting requirement, the SJC and the Pro Bono Committee have divested themselves of the only real means of deciding whether a mandatory rule will later be needed, because there will be nothing but voluntary (and self-serving) reporting of pro bono services rendered.[259] To justify and institute a mandatory rule, the SJC would have to commission a study of its own to determine what change, if any, had occurred in unmet legal needs since the enactment of the rule, and would have to measure anew the level of need, because the studies on which the original rule was based will be outdated. As noted, the Pro Bono Committee relied on reports compiled by others between 1987 and 1996,[260] and summarily concluded that 80% or more of the poor's legal needs were unmet each year in the Commonwealth. [261] The Pro Bono Committee also relied on reports, surveys, and studies compiled by existing pro bono programs, large Boston law firms, voluntary responses to a Massachusetts Lawyers Weekly survey, and focus groups held in 1997 throughout the state.[262]

Despite the Pro Bono Committee's obvious hard work, the lack of an independent study confirming the level of need is troubling, especially since the Pro Bono Committee itself notes that "there is a paucity of hard data available, making it impossible to gauge fully the extent of current pro bono activity."[263] A rule that affects the entire legal profession in the Commonwealth should be based on data that accounts for the various interests of the compilers of each study. Information gained from voluntary participation in surveys and focus groups does not fully represent the profession, because those participating are likely already in compliance or are making self-serving statements.[264] Law firms' studies are biased by an interest in displaying their own pro bono efforts in the best light, and legal services agencies have an interest in increasing donations and referrals to their organizations. This does not mean that the information in these reports is false, but in relying on studies compiled from such various sources to determine something affecting all practicing lawyers, the Pro Bono Committee has not accounted for the competing factors involved in the commission of those studies. The Pro Bono Committee instead assumes that the amount of pro bono work actually being done is underreported, yet still comes to the conclusion that more work needs to be done.[265]

In enacting the rule despite this admitted lack of knowledge, the SJC assumes attorneys' good faith efforts to comply with the rule; in so doing, however, they ignore the fact that Massachusetts lawyers were previously bound by a good faith

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[259] *See* CONNOLLY ET AL., *supra* note 206, at 5.
[260] *See id.*
[261] *See id.*
[262] *See id.* at 6.
[263] *Id.*
[264] *See supra*, Part III(A)(3), p. 124.
[265] *See id.*

effort to comply with the ABA rule. But if Massachusetts attorneys had, in fact, complied with that rule, then the Massachusetts rule should be unnecessary. Since the rule *has* been deemed necessary, then the good-faith assumption fails.

The earliest version of the proposed rule included a mandatory reporting requirement, due on the payment of each year's bar registration fee. After much protest, the Pro Bono Committee eliminated this provision, giving themselves no means but voluntary reporting by which to measure compliance. Without being able to accurately measure attorney's compliance with the rule, the SJC will have a hard time determining not only if the poor's legal needs are being met, but also how the current rule does or does not succeed in meeting that goal.[266]

The SJC should amend the rule to include the mandatory reporting provision included in the first version of the rule. If they are unwilling to do so, they must either assume the costs of accurate surveys themselves or secure sure commitments from outside sources so that the Standing Committee is provided with an accurate basis for assessing the rule's success.

The rule's buyout provision will likely not result in the economic and professional difficulties predicted for attorneys not earning large salaries, because the attorneys can escape their obligation by donating either $250 or 1% of their annual professional taxable income.[267] Unlike the first version of the rule, there is no indication of a preference for the greater number, leaving to the attorney's discretion how much to contribute.[268] The rule, however, fails to specifically address the situations of attorneys whose financial situations prevent any donation, or a donation at the requested level. The Rule's language regarding $250 or 1% should be kept, but language should be amended to allow these attorneys to instead donate whatever they are able. Further language indicating the expectation that in future years the attorney will make up the amount not paid in any given year should also be included.

The rule also fails to, and should, exempt attorneys who are already practicing in pro bono areas. Legal service, civil rights, law reform, and government attorneys whose duties include advocacy on behalf of the poor should be exempted, because they have already accepted their professional responsibility to the poor. It does not make sense to burden these attorneys with an additional obligation to essentially work longer at their own jobs.

The rule's aggregation provision also prevents problems. The commentary's language is exemplary in allowing firms to aggregate pro bono hours performed, but this is the only example. It does not address whether there are other ways to collectively meet the obligation. This may have been simply due to lack of imagination on the part of the Pro Bono Committee, but for now, future attempts to aggregate hours will take place in the shadow of doubt as to whether the "for example" actually means "only by." This confusion revives arguments about economic discrimination against small firms, solo, and part-time practitioners,

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[266] *See supra* p. 126.

[267] *See* text and accompanying footnotes, *supra*, at p. 131.

[268] *See supra* p. 126.

since unlike larger or wealthier firms, they will have neither a pre-existing network through which to aggregate their hours nor the resources with which to hire someone to perform the pro bono service contemplated. Although the primary purpose of the rule is to meet the poor's legal needs, it seems counter to the rule's statements regarding professional responsibility to allow those with the resources to evade any service at all.

The rule also fails to account for inexperienced new attorneys, who are struggling to find paying clients, start repayment of their undergraduate and law school loans, and learning the ropes of the profession. It is a much-bemoaned fact that the overwhelming majority of graduating law students have little to no practical experience, much less the type of legal service and litigation experience primarily contemplated by the rule.[269] Unless the recent graduate took part in a clinical program or a legal services internship, he will lack the advantages of experienced attorneys, who have had time to make contacts in the community that will aid them in learning the necessary skills for providing legal services.

The Standing Committee should subsidize or provide the costs of attending CLE courses designed to help new attorneys gain the competence needed to adequately serve the needs of their new pro bono clients.[270] Likewise, the Standing Committee would do well to inquire into offering discounted or group rates for attorneys without malpractice insurance for their pro bono work.[271]

The Pro Bono Committee's recommendations for establishing an infrastructure in which the new rule will operate are fine ideas, but their problems should be addressed. In suggesting that the Standing Committee conduct surveys of bar members' compliance with the rule, the Pro Bono Committee does not address the fact that only members who complied will respond, thus not providing adequate representation of members. There is no incentive save good faith for the members of the bar to return the surveys, as there would be with a mandatory reporting requirement.[272] A mandatory reporting requirement will provide the necessary[273] incentive for members to return the surveys.

Other recommendations rely on the good will of the organized bar to exhort their members and tailor and discount their continuing legal education programs. While this good will likely exists, local bar associations' resources only extend so far, and the Pro Bono Committee makes no suggestions as to how the extra costs of such efforts should be met. In addition, the Pro Bono Committee states that existing pro bono and legal service groups should serve as the infrastructure in which the rule

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[269] *See* Jacobs, *supra* note 12, at 519.

[270] *See* Marilyn A. Beck, *Mass. Bar Ass'n Response to Pro Bono Committee's Report*, MASS. LAW. WKLY., June 8, 1998, at 11 (noting that the Massachusetts. Bar Association operates a referral service and a voucher program for attorneys taking pro bono cases).

[271] *See* Beth I.Z. Boland, *Lauding the "Principle" Behind Pro Bono Report*, MASS. LAW. WKLY., August 24, 1998, at 11.

[272] *See* CONNOLLY ET AL., *supra* note 206.

[273] As noted *supra* at pp. 128-130 and accompanying footnotes, measuring whether the aim of the rule (meeting the 80% of unmet legal needs of the poor) is necessary to continue to justify the rule's enactment.

will be implemented. While this acknowledges the role these groups have played to date in pro bono work, the Pro Bono Committee fails to account for how these groups are to pay for the additional administrative costs that will be incurred in screening referrals and streamlining service delivery.

The Rule could help answer these questions if it explained how the buyout option allows attorneys to pay the contribution. But these questions remain unanswered. Do they pay it directly to those organizations already serving the targeted population? If so, how evenly would those contributions be spread? Would organizations receiving more contributions than others be able to keep the donations, or would they have to spread those donations across all groups providing legal services to those of limited means? And how would those donations be spread? Who would monitor the process? Or should attorneys instead pay their buyout into a fund overseen by the Standing Committee and disbursed along the lines of IOLTA funding? The SJC should clarify how to make these contributions.

The aspirational rule and the accompanying recommendations articulated by the Pro Bono Committee seem, in the end, to be a compromise compiling the least objectionable provisions. Despite its faults, however, the rule is a much-needed step toward meeting the poor's legal needs. The suggested changes to the rule should be considered, however, if the rule is to approach its goal of serving the legal needs of the poor.

IV. CONCLUSION

Massachusetts Rule of Professional Conduct 6.1 suffers from several problems, but they are primarily logistical and not substantive. Though the rule and the accompanying recommendations will not solve all the problems of Massachusetts' poor, and will not meet all their legal needs, they take a step in the right direction. Even if the rule only prompts some attorneys to donate a quarter of the suggested hours, that is an increase in services not rendered before the rule's adoption. It is unrealistic to assume all attorneys in the Commonwealth will feel a change of heart about doing pro bono work but in re-igniting the debate over the poor's needs and the attorney's obligations, the rule and commentary should prompt even those opposed to the rule into some form of action. And it is inaction which the rule aims to prevent. The Rule's critics would do better to work toward eliminating the needs prompting the rule, since once the justification is gone, they will have better leverage for arguing its repeal.

As long as 80% of the poor's legal needs remain unmet, the argument that it is unfair to make attorneys do pro bono work is countered by the question: "Is it acceptable to let the poor, or anyone, suffer injustice?" The answer to that question is no. Massachusetts Rule of Professional Conduct 6.1 makes that clear. The attorneys in the Commonwealth must now show that while reasonable attorneys may differ on the means, they can agree that the end is worthwhile.