New York State Unified Court System

Pro Bono Convocation:
Working to Design a Pro Bono System for New York

Background Paper

The Challenge in New York

The unmet legal needs of poor New Yorkers are well documented.[1] Studies have found that these individuals encounter significant legal problems each year[2] and either ignore the problems or try to resolve them on their own without the assistance of an attorney. For many of these individuals, timely legal help could prevent crises and dire consequences such as eviction or foreclosure, loss of income or entitlements, and deportation.

Despite the unmet needs, legal services budgets continue to be cut and thousands of individuals turned away each year.[3] Clearly, legal services programs cannot meet the needs of the indigent. The result? A two-tier system of justice where those with lawyers are able to address their legal needs and those without are not.[4]

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[1] New York State Bar Association, *The New York Legal Needs Study 1990* (revised 1993) ("Legal Needs Study"). *See also* Legal Services Project, *Funding Civil Legal Services for the Poor: Report to the Chief Judge*, at 3-4 (May 1998) ("Legal Services Project").

[2] Assuming the current accuracy of the Legal Needs Study finding that poor households in New York experience 2.37 unmet legal needs each year, poor New Yorkers encounter approximately 2.5 million legal needs annually without the assistance of an attorney.

[3] In New York, funding from the two primary funders for civil legal services – the federally-funded Legal Services Corporation ("LSC") and the Interest on Lawyers Account Fund ("IOLA") – has decreased by approximately 40% since the early 1990s. While state and local government has sought to address the funding cuts in the form of discretionary budget appropriations and earmarked grants, they have not made up for these drastic reductions in resources. For example, an internal review conducted by the Legal Aid Society in Spring 2001 found that the Society turns away six applicants for every one it accepts. *See also* Legal Services Project, supra note 1 at 5-6.

[4] For those who opt to resolve matters on their own, the road is difficult. Studies have found that represented litigants fare much better than those who appear without counsel. *See, e.g.*, Carroll Seron, Gregg Van Ryzin and Martin Frankel, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Society Rev. 419 (2001); *see also* Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 Fordham L. Rev. 1987 (1999).

To ensure equal access to the justice system for all requires a multi-prong approach with a primary emphasis on increasing public funding for civil legal services. Expanding the level of pro bono activity of the New York bar is also an essential part of the solution. Clearly, pro bono cannot or should not be viewed as the means to assure the provision of civil legal services for all those unable to afford them. However, combined with increased funding levels as well as other initiatives, it can be a means to narrowing the existing gap.

In the aftermath of the horrific events of September 11, 2001, New York lawyers embraced their professional responsibility and committed themselves to assisting on a pro bono basis those affected by the terrorist attacks. More than ever, lawyers recognized the importance of their services to those in crisis. Their response demonstrated that it is possible to overcome the obstacles most often cited by attorneys for not undertaking pro bono.[5]

Without a doubt, the current enthusiasm of lawyers to aid their fellow citizens needs to be sustained to ensure that low and moderate income New Yorkers have pro bono services available to them to assist with their complex legal needs. But how do we accomplish this? What can be done to raise the consciousness of the bar that poor and low income New Yorkers face crises on a daily basis and that these individuals desperately need the assistance of lawyers if they are to address their legal needs? In the alternative, how can pro bono be made attractive to those individuals who may not be interested in serving the disadvantaged but yet wish to fulfill their ethical obligation? This is the current pro bono challenge.

And this is not a challenge unique to New York. Around the country, justice leaders are struggling with the issue of ensuring access to justice for all and the role that pro bono plays in that equation. This paper is intended to provide a background on pro bono initiatives both in New York and nationally, and serve as a starting point in the discussion of what is possible in New York.

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[5] A recent pro bono survey found that the top five reasons attorneys do not undertake pro bono are: lack of time; lack of expertise; lack/insufficient office support; lack of interest in undertaking specific type of work; and financial inability. New York State Unified Court System, *Report on the Pro Bono Activities of the New York State Bar* (February 1999).

History of Pro Bono in New York

In the late 1980s, the widening gap between the legal needs of the poor and the resources available to meet those needs became apparent.[6] To address the matter, the former Chief Judge appointed the Committee to Improve the Availability of Legal Services (commonly known as the "Marrero Commission") to review the extent of the unmet legal needs of the poor and to explore the scope and operation of legal services then being provided. The Marreo Commission was also charged with devising a plan to increase legal services to the poor.

The Committee's report, issued in April 1990, found that there was an enormous unmet need which in effect was causing a crisis in the legal system.[7] Based upon these findings, the Committee concluded that the current voluntary pro bono efforts combined with the publicly-funded legal services programs, were and would continue to be inadequate to met the legal needs of the poor. The Committee recommended that a mandatory pro bono requirement be adopted in New York, proscribing that each member of the Bar be required to perform a minimum of 20 hours a year of qualifying pro bono service or contribute financially to organizations addressing the legal needs of the poor. Qualifying pro bono was defined as:

- legal service rendered in civil matter to persons who cannot afford to pay counsel, or to such persons in criminal matters for which there is no government obligation to provide funds for legal representation;

- activity related to simplifying the legal process for, or increasing the availability and quality of legal services to the poor; and

- legal services provided to charitable, public interest organizations on matters which are designed predominantly to address the needs of the poor.

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[6] During this time, the New York State Bar Association undertook a study of the unmet legal needs of New York's poor. *Legal Needs Study, supra* note 1.

[7] The Marrero Commission relied in large part on the findings of the Legal Needs Study (*id.*), the most significant being that only 14% of the overall civil legal needs of New York's poor were being met and that funding for legal services programs in New York was inadequate to serve more than 4% of the civil legal needs of the poor. Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York* (April 1990), *reprinted in* 19 Hofstra L. Rev. 755 (1991).

The former Chief Judge accepted the Committee's findings but deferred decision on its recommendations concerning mandatory pro bono given the significant resistance demonstrated by the bar.[8] Believing that voluntary pro bono efforts would be more acceptable than the imposition of a mandatory system, the former Chief Judge called upon the bar to demonstrate that pro bono service could be increased through voluntary efforts.[9] To monitor the Bar's pro bono activities, in 1990 he appointed a Pro Bono Review Committee ("Review Committee") to determine the amount and types of pro bono work being done by New York lawyers and the impact of the bar's renewed voluntary efforts. That committee surveyed New York lawyers about their pro bono work, including the number of hours performed and the reasons for not engaging in pro bono, over a three year period. In April 1994, the Review Committee issued its final report. Although there had been much positive activity toward increasing pro bono[10] between 1990 and 1994, the survey results were disappointing – the percentage of lawyers doing pro bono remained relatively consistent, with only 47% to 48% of New York attorneys providing pro bono services.

In February 1997, the Association of the Bar of the City of New York proposed that New York lawyers be required to report their voluntary pro bono efforts in conjunction with their biennial registrations. The proposal adopted the Marrero Committee definition of pro bono and suggested that the aspirational goal for any individual attorney should include a commitment of 20 hours per year or a financial contribution to organizations providing free legal services to the poor. As before, the private bar was not receptive and the issue of reporting was rejected altogether. The bar concluded that mandatory reporting

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[8] Prior to the Committee's issuance of its final report, the State Bar Association issued a report acknowledging the unmet legal needs of the poor but opposing mandatory pro bono as the solution. The State Bar urged the Chief Judge not to consider any mandatory plan for at least three years during which time the State Bar would work to stimulate greater voluntary efforts.

[9] In deferring a decision on mandatory pro bono, the former Chief Judge cautioned the bar that if the voluntary efforts were not successful in increasing pro bono activity, he would seek implementation of the mandatory plan proposed by the Marrero Commission. Hon. Sol Wachlter, *Symposium on Mandatory Pro Bono: Introduction*, 19 Hofstra L. Rev. 739 (1991).

[10] Among the numerous initiatives undertaken were: projects developed by the organized bar, including the creation of the New York State Bar Association's Department of Pro Bono Affairs; creation of new organizations to connect lawyers with pro bono matters; expansion of existing pro bono programs; increased use of technology to promote pro bono opportunities; implementation of mandatory pro bono at some law schools; and the establishment of the ABA Pro Bono Challenge (*see infra* p. 11).

would be the first step toward mandatory pro bono service. Instead, in May 1997, the Administrative Board of the Courts adopted a resolution which urged attorneys to provide 20 hours of pro bono service annually (using the Marrero definition) and to support financially the work of organizations that provide legal services to the poor. A copy of the resolution is enclosed in every New York attorney's biennial registration materials.

Following the adoption of the Resolution, the Administrative Board sought to assess the pro bono efforts of the New York Bar. It authorized a survey of the 1997 pro bono activities of the New York State Bar in order to establish a benchmark. A second survey also was authorized to be undertaken at a later date to measure the impact of the Resolution. The results of the benchmark survey were shockingly similar to the earlier results. In 1997, 47% of the New Yorker lawyers whose principal place of business was in New York performed qualifying pro bono services.[11] The survey found a slight decrease in the percentage of attorneys who reported doing 20 or more hours of pro bono (from 26 in 1992 to 24 in 1997). A positive note from the survey was that those who did qualifying pro bono averaged significantly more hours, from 44 in 1992 to 53 in 1997.

Recognizing the need for greater focus by the courts on access to justice issues, in July 1999, the Administrative Board of the Courts created the post of Deputy Chief Administrative Judge for Justice Initiatives and appointed Judge Juanita Bing Newton to the position. Among her many responsibilities is the challenge of increasing the provision of pro bono services. Soon after her appointment, she recommended the amendment of the Continuing Legal Education rules to allow CLE credit for the performance of pro bono work. In Spring 2000, the CLE Board adopted this proposal, making New York the third state in the nation to grant attorneys CLE credit for pro bono service. Specifically, up to six such hours may be earned, at a six-to-one ratio, for performing uncompensated legal services for clients unable to afford counsel.

Immediately following September 11th, there was a surge in pro bono activity that had not been experienced before in New York. The post-September 11th pro bono effort drew volunteer attorneys from a wider cross section of the bar, with a large portion of these lawyers engaging in pro bono for the first time in their careers.[12] With the bar associations

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[11] New York State Unified Court System, *supra* note 5.

[12] This conclusion is based upon the research of Fordham University School of Law students who studied the post-September 11th pro bono activities for their course "Advanced Seminar in Public Interest Law." The students found that a large number of the lawyers came from small and medium sized firms, as opposed to larger firms with established pro bono programs.

at the helm, a coordinated system was developed that promptly identified needs and divided up tasks among the various participating groups to ensure that services were provided most efficiently and without duplication. An effective mentoring/facilitator system was established to assist those attorneys with limited experience in the substantive areas of law and in dealing with those in crisis. Clearly, without the collaboration and coordination among leading organizations, the needs of the victims and their loved ones would not have been addressed.

In late 2002, the Unified Court System will again survey the New York Bar to assess the level of pro bono activity. While the survey will track the questions of the 1997 survey, it will also seek additional information about the bar's response after September 11th.

Statewide Pro Bono Models

Voluntary Pro Bono with Mandatory Reporting

A number of states have considered a voluntary pro bono plan with mandatory reporting.[13] All but two – Florida and Maryland – have rejected such a scheme.

Florida

In 1993, after four years of intense debate on how best to improve and expand the delivery of legal services to the poor, Florida became the first state to adopt a statewide voluntary pro bono plan with a mandatory reporting requirement. Under Florida's rule,[14] attorneys are expected to render pro bono legal services to the poor, and participate in other pro bono service that is directly related to the legal needs of the poor.[15] To discharge this responsibility, an attorney may either annually provide 20 hours of pro bono legal service to the poor or contribute $350.00 to a legal aid organization.[16] While the rule sets aspirational

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[13] These states include Colorado, Indiana, Massachusetts, Minnesota, Nevada, New York, Tennessee and Utah.

[14] Fla. Bar R. Prof. Conduct 4-6.1.

[15] Fla. Bar R. Prof. Conduct 4-6.1(a).

[16] The rule exempts, among others, the judiciary and their staff and government attorneys. This exemption is being reviewed, by the statewide Standing Committee as it pertains to government attorneys, and a Supreme Court Task Force as it relates to judges and their staff.

goals, it mandates reporting.[17] Failure to report the information constitutes a disciplinary offense.

Florida's plan also requires the appointment of Circuit Committees for each of the twenty judicial circuits within the state. The Committees are responsible for assessment of the legal needs, and the availability of services to meet those needs, within each circuit. Pursuant to the rule, the Committees are required to establish plans for their respective legal communities to address the unmet needs through pro bono service, and to promote participation in pro bono legal services. A statewide Standing Committee also was created by the rule, with responsibility, among others, to receive, review and evaluate the Circuit Committee's pro bono plans and reports.

The system has elicited high response rates: 90% in 1997 and 1998; 87% in 1999 and 88% in 2000. The circuit court pro bono committee system has also brought about significant increases in pro bono activities as can be seen in the following chart which compares the 1994-1995 base year data with 1999-2000 data:[18]

	1994-1995	1999-2000	% Change
Members Providing Services	22,283	26,897	21%
Hours of Service	561,352	1,146,502	104%
Contributors	3,608	6,230	73%
Amount of Contributions	$876,837	$1,642,033	87%
Lawyers in Firm Plans*	823	1,120	36%
Hours of Service in Firm Plans*	19,698	84,483	329%

* Data is for calendar years 1994 and 2000.

[17] In adopting the rules, the Florida Supreme Court recognized the necessity of reporting: "We believe that accurate reporting is essential for evaluating this program and for determining what services are being provided under the program. This, in turn, will allow us to determine the areas in which the legal needs of the poor are or are not being met." *In re Amendments to Rules Regulating the Florida Bar–1-3.1(a) and Rules of Judicial Administration – 2.065* (Legal Aid), 630 So.2d 501, 502-503 (Fla. 1993).

[18] The Standing Committee on Pro Bono Legal Services, *Report to the Supreme Court of Florida, the Florida Bar, and the Florida Bar Foundation on the Voluntary Pro Bono Attorney Plan* (December 2001).

Despite the rule's apparent success, the debate over mandatory reporting was quite lengthy and contentious. In 1996, the State Bar petitioned the Supreme Court to rescind the rule, arguing that rescission would reduce the "unnecessary hostility" within the Bar and thus increase pro bono activities. In 1997, the Supreme Court denied the Bar's petition and reaffirmed the importance of mandatory reporting.[19] An unsuccessful federal lawsuit also was brought challenging the constitutionality of the pro bono rule.[20]

Maryland

In February 2002, Maryland followed Florida's lead in adopting a voluntary pro bono plan with mandatory reporting. Previously, Maryland had rejected a mandatory pro bono proposal and adopted a voluntary recruitment plan.[21] While these efforts were successful, in the late 1990s, the pro bono commitment throughout the state diminished. Recognizing the need for strong and visible leadership by the Judiciary in this area, the Chief Judge appointed the Maryland Judicial Commission on Pro Bono in 1998 to investigate and make recommendations about the role the Judiciary can and should play in expanding pro bono service in Maryland.

Guided by the Commission's recommendations,[22] the Maryland Court of Appeals voted to revise the Maryland Rules of Professional Conduct to encourage attorneys to render at least 50 hours of pro bono service each year, with a substantial portion of those hours devoted to helping the poor.[23] A financial contribution can be made in lieu of service. Two related rules also were adopted: one calling for mandatory pro bono reporting by attorneys;[24] and another creating a Statewide Standing Committee on Pro Bono Service

[19] *In re Amendments to Rule 4-6.1 of the Rules Regulating the Florida Bar–Pro Bono Publico Service*, 696 So.2d 734 (Fla. 1997).

[20] *Schwarz v Kogan*, 132 F.2d 1387 (11th Cir. 1998), *cert. denied*, 524 U.S. 954 (1998).

[21] Maryland adopted voluntary reporting in 1994. However, in any given year, less than 7% of licensed attorneys reported their pro bono services.

[22] The Maryland Judicial Commission on Pro Bono, *Report and Recommendations* (March 2000).

[23] Maryland Rules of Professional Conduct 6.1. The rule change is effective July 1, 2002.

[24] Maryland Rules of Procedure 16-903.

and a network of local county pro bono committees to augment legal services to the poor.[25] Under the reporting requirement, every Maryland attorney must submit an annual pro bono report describing the nature of his or her pro bono service or face decertification. The data is intended to be used by the Standing Committee to monitor the amount of pro bono service being performed by lawyers and the success of pro bono projects. While it is too soon to draw any conclusions about the new system, there is much optimism that it will increase pro bono service dramatically.

Voluntary Pro Bono with Voluntary Reporting

According to the American Bar Association, currently 13 states have a voluntary reporting requirement: Arizona, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, Texas, Utah and Virginia. Under these schemes, lawyers generally report the hours of pro bono service on their annual dues statement (integrated bar), a separate form included with the dues statement (integrated bar) or the attorney registration statement (non-integrated bar). While voluntary reporting is a less controversial means of collecting pro bono data, the compliance rates tend to be significantly lower and thus do not provide the necessary information about pro bono that is essential for planning purposes. A sample of available response rates are as follows: Arizona - 31% (1995), 35% (1996), 16% (2001); Georgia - 8% (1998); Hawaii - 10% (1995), 33% (1996), 33.5% (1997); Illinois - 3-5% (1998); Kentucky - 12% (1996), 15% (1998); Louisiana - 8-9% (1998), 12.66% (2001); Missouri - 10% (2001); New Mexico - 32% (1997), 33% (1998); and Texas - 39.5% (1994-95), 38.5% (1995-96), 34.7% (1996-97), 27% (1997-98).

Voluntary Pro Bono with Statewide and Local Pro Bono Committees

Another model that has been adopted in Indiana is a voluntary pro bono plan with both statewide and local committees. Under Indiana's rules, lawyers are obligated to render free or reduced fee services to persons of limited means, or public service or charitable organizations, and to financially support organizations that provide legal services to persons of limited means.[26] To ensure that this obligation is met, the Supreme Court adopted a rule establishing the Indiana Pro Bono Commission and the framework for fourteen District Committees.[27]

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[25] Maryland Rules of Procedure 16-901 (State Pro Bono Committee and Plans) and 16-902 (Local Pro Bono Committees and Plans).

[26] Indiana Rules of Professional Conduct 6.1.

[27] Indiana Rules of Professional Conduct 6.5.

The Pro Bono Commission is a partnership of the Indiana Bar Foundation and the Supreme Court. It consists of 21 members – 11 appointed by the Supreme Court and 10 appointed by the Bar Foundation – and has overall responsibility and authority for management of the voluntary pro bono plan, including supervision of the district pro bono committees. The primary responsibility of the Commission is to evaluate the district plans and allocate IOLTA funds (through the Bar Foundation) to the local committees for implementation of their plans.[28] To date, the Pro Bono Commission has provided funding of nearly $1 million to the 14 district committees.

The 14 District Committees are each chaired by a local trial judge who is responsible for appointing the committee consisting of local bar leaders, law school representatives, judges and individuals who have benefitted from pro bono. The committees are required to develop pro bono plans that address how legal needs in their community will be met. In order to carry out this responsibility, the committees monitor the pro bono activity of local attorneys and the gaps in the provision of legal services.

During the program's first full year, the number of people working toward developing pro bono resources in Indiana increased exponentially. Moreover, the provision of pro bono services became more organized and efficient. The District Committees focused on their local needs and developing systems and programs that would ensure that those needs were met.[29]

Law Firm Initiatives

Large law firms, with their wealth of attorneys and resources, appear to be a logical resource for expanding pro bono to meet the legal needs of the poor. While many of the largest firms contribute significant number of pro bono hours per year, there is still room for greater provision of pro bono services.

To support and increase the pro bono activities of large firms, in 1993 the Pro Bono Institute and the American Bar Association's Standing Committee on Pro Bono and Public Service established the Pro Bono Project. Funded by member law firms and the ABA's

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[28] Indiana Rules of Professional Conduct 1.15(d)(8) provides that IOLTA funds shall be used, among other purposes, to assist or establish approved pro bono programs pursuant to Rule 6.5.

[29] Indiana Pro Bono Commission, *2000 Annual Pro Bono Report and Plan* (available on the web at www.in.gov/judiciary/probono/attorneys/2000_annual_report.html).

Fund for Justice and Education, the Project assists law firms in developing effective pro bono programs and in integrating those programs into the practice, philosophy and culture of the firms. The Project focuses on the nation's 850 largest law firms – those firms with 50 or more attorneys – because of the unique role and resources of these firms.

In 1993, the Project developed the Pro Bono Challenge, a national aspirational standard targeted to large firms. As part of the Challenge, law firms sign a Statement of Principles in which they pledge, among other things, to (1) promulgate and maintain a clearly articulated and commonly understood firm policy which unequivocally states the firm's commitment to pro bono work, and (2) commit either three or five percent of their total billable hours annually or 60 to 100 hours per lawyer to providing free legal assistance to those of limited means.[30]

Since the inception of the Project, over 150 firms have signed onto the Challenge. In addition to increased pro bono hours, initiatives have included modifications to internal firm structures and staffing to encourage and promote pro bono; expansion of pro bono matters to include transactional work; and establishment of public interest rotation and fellowship programs.

Following the "challenge" concept, in 2001, the Chief Judges of the District of Columbia Court of Appeals, the District of Columbia Superior Court, the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia urged the District's largest firms to renew and increase their commitment to pro bono service. In response, 41 of the District's largest firms have agreed to commit to three or five percent of billable hours and/or undertake new pro bono initiatives. The firms made additional commitments to undertake specific management steps to ensure the goals are met and to report their progress to the DC Bar Pro Bono Program annually.[31]

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[30] See www.probonoinst.org for the text of the Challenge and the list of signatories.

[31] DC Bar Pro Bono Program, *District's Largest Firms Answer "Yes" to Challenge For Renewed and Increased Commitment to Pro Bono*, Press Release (undated); DC Bar Pro Bono Program, *Renewing Pro Bono Commitments: Law Firm Responses* (April 2002).

Initiatives in Government

At all levels of government there has been recognition that government attorneys should be involved in pro bono activities. In 1996, President Clinton issued an executive order directing federal agencies to develop appropriate programs to foster pro bono programs for government employees.[32] Following the enactment, the United States Department of Justice established a pro bono policy that encouraged its attorneys to undertake 50 hours of pro bono service each year. Additional agencies that have established policies include the Office of Government Ethics, the Department of the Navy, the Equal Employment Opportunity Commission, the National Labor Relations Board and the Federal Deposit Insurance Corporation.

On the state level, a number of executives also have developed pro bono policies. For example, in Ohio, the governor adopted a pro bono policy that encourages lawyers to participate in pro bono activities that do not interfere with their work on behalf of the government.[33] In January 2002, the New York State Attorney General issued an Executive Order that permits attorneys to engage in pro bono services which do not conflict with the purposes and activities of the Law Department's work. Under the policy, an attorney can engage in specified pro bono activities, excluding litigated matters, so long as permission is obtained prior to the activities and the activities are within the guidelines.[34] In Florida, the Standing Committee on Pro Bono Legal Services has recommended that government attorneys no longer be "deferred" or exempted from the pro bono rules.[35]

The Florida Supreme Court has gone one step further by appointing a task force to work with the Pro Bono Standing Committee to propose a plan that will facilitate participation in pro bono activities by the judiciary and judicial staff. In April 2002, the Task Force Report filed its report with the Supreme Court, recommending that Rule 4-6.1 of the Florida Bar Rules of Professional Conduct be amended to remove the "deferral" for judges and their staff, and to include them in the pro bono reporting provision of the rule. The Task Force also recommended modifications to the Code of Judicial Conduct to clarify the aspirational pro bono professional responsibility and appropriate activities which can be

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[32] Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

[33] Exec. Order 2000-17T (June 12, 2000).

[34] Attorney General of the State of New York, Administrative Memorandum No. 80.04 (dated January 7, 2002).

[35] *See* Fla. Bar R. Prof. Conduct 4-6.1(a).

undertaken by judges and judicial staff. The Supreme Court is accepting comments on the Task Force Report through September 3, 2002.

In New York, the Rules of the Chief Judge permit attorneys employed by the court system to undertake pro bono activities which do not interfere with the performance of their job, including contested and uncontested litigation brought in courts other than where the attorney is employed.[36] Prior to undertaking the pro bono activity, permission must be obtained from the appropriate Administrative Judge and Deputy Chief Administrative Judge for Justice Initiatives.

At least one state is looking beyond government attorneys and trying to increase the pro bono activities of private attorneys who do business with the state. California recently enacted legislature, effective January 2003, which requires all law firms with state contracts greater than $50,000 to make a good faith effort of providing a specified minimum hours of pro bono service during the term of the contract.[37] Santa Clara County, California currently is considering implementing a similar policy for law firms that do business with the county.[38]

Law School Initiatives

The law school community has a wealth of resources that can be tapped to expand the provision of pro bono services. In 1996, the ABA formally recognized this when it amended its accreditation standards to call on schools to "encourage students to participate in pro bono activities and to provide opportunities for them to do so."[39] The revised ABA standards also encourage schools to address the obligations of faculty, including participation in pro bono activities.

Following these revisions, the American Association of Law Schools created a Commission on Pro Bono and Public Service Opportunities to study the programs and policies of the law schools. The Commission issued its report in 1999 finding that "law schools should do more" and making specific recommendations regarding pro bono

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[36] McKinney's 2002 New York Rules of Court § 25.40(c)(1) (22 NYCRR 25.40[c][1]).

[37] Cal. Bus. & Prof. Code § 6072.

[38] Bartindale, *Supervisors Back Proposal to Mandate Free Legal Work*, San Jose Mercury News, Apr. 14, 2002, at 1B.

[39] ABA Accreditation Standard 302(e)(Curriculum).

programs in American legal education.[40] The two most significant recommendations were: 1) that law schools make available to all students at least once during their law school careers a well-supervised law-related pro bono opportunity and either require participation or find ways to attract the great majority of students to volunteer;[41] and 2) that all law schools adopt a formal policy to encourage and support faculty members to perform pro bono work."[42] To accomplish its goals, the Commission recommended that AALS create a new section on public service programs as a forum for exchanging information and ideas. This was done in 1999. The Commission also assisted in obtaining funding for additional staff to launch the section and to assist individual law schools create and expand programs.

Since the publication of *Learning to Serve*, the number and quality of pro bono programs in law schools have increased. In June 2001, the AALS Pro Bono Project published a Handbook on Law School Pro Bono Programs which provides a wealth of information and materials on creating and expanding pro bono programs.[43]

In New York, the law schools provide a range of programs that promote pro bono service for students. Columbia, CUNY and Touro have mandatory programs which require that students perform a set number of hours of pro bono or public service prior to graduation. A number of schools have public interest law centers that either develop and promote voluntary pro bono placements or serve as a clearinghouse for student-initiated pro bono and community service projects.[44] Others, such as Albany and Brooklyn, have active student-run groups that provide pro bono services in specific areas of law. While some schools are working to involve faculty members in the pro bono effort, much more needs to

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[40] Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, *Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities* (October 1999) (available on the web at www.aals.org/probono/ report.html).

[41] *Id.* at 7. In its report, the Commission differentiates between clinical courses and pro bono projects. The report specifically states that law schools should not assume that a good pro bono program is a substitute for a clinical program, or that a good clinical program eliminates the need for a law school to support student pro bono projects.

[42] *Id.* at 18.

[43] Association of American Law Schools Pro Bono Project, *A Handbook on Law School Pro Bono Programs* (June 2001) (available on the web at www.aals.org/probono/probono.pdf).

[44] These schools include Fordham, New York University and New York Law School.

be done in this area. Clearly, the law schools are vital partners in any plan to expand pro bono in the State.

Alternatives to Traditional Representation

While many attorneys are committed to providing pro bono services, they are unable to provide full representation in litigated matters due to the commitment of time and resources that such representation requires. To address this issue, many states and bar associations are studying the concept of "discrete task representation" or "unbundled services" as an alternative to traditional full-service representation. Under an unbundled model of representation, the attorney and client agree that the scope of legal services to be performed will be limited to defined tasks, with the remaining tasks to be performed by the client on his or her own. For example, the client could decide to self-represent in court but retain an attorney to review completed papers and provide advice and research on the law.

Although unbundled services is being advanced as a new concept, the practice has been used for years in certain areas of the law, particularly in non-litigation matters. Attention is now being focused on how unbundling can be applied in the litigation setting. In May 2001, the American Bar Association Ethics 2000 Commission submitted its proposed changes to the Model Rules of Professional Conduct, which aim to clarify and encourage the use of unbundled legal services.[45] Many states have followed the ABA's lead, examining how their rules and statutes might be modified to permit unbundling.[46] Two states, Maine and Colorado, have already enacted appropriate changes.[47] In Maine, these changes permit limited appearances by an attorney in a litigated matter[48] and address issues such as the status of the litigant, service of papers and communicating with adverse

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[45] Margaret Colgate Love, ABA Ethics 2000 Commission Final Report – Summary of Recommendations (2000) (available on the web at www.abanet.org/cpr/e2k-mlove_article.html).

[46] *See, e.g.,* California Commission on Access to Justice Limited Representation Committee, *Report on Limited Scope Legal Assistance with Initial Recommendations* (Oct. 2001); *In re Proposed Amendments to the Rules Regulating the Florida Bar (Unbundled Legal Services)*, No. AOSC00-5 (Oct. 2001).

[47] *See* amendments to the Maine Bar Rules 3.4(i), 3.5(a)(4), 3.6(a)(2), 3.6(f) and 3.4(j) (effective July 1, 2001) (Docket No. SJC-51) and amendments to the Maine Rules of Civil Procedure 5(b) and 11 (effective July 1, 2001) (Docket No. SJC-11); Colorado Rules of Civil Procedure 11 and 311; Colorado Rules of Professional Conduct 1.2.

[48] Maine Rules of Civil Procedure Rule 11(b); Maine Bar Rule 3.4(i).

parties.[49] The rules also include a model "Limited Representation Agreement" that satisfies the requirements of the rules.

Unbundling raises a number of ethical concerns including the existence and adequacy of client autonomy, confidentiality, competence, continuity of representation, communication with represented parties and candor to the court.[50] It also raises malpractice fears in attorneys. However, these concerns can be surmounted if the lawyer conducts the unbundled representation appropriately – fully assessing the case and client to determine not only the merits but the ability of the client to adequately represent herself in the balance of the matter and to understand the limited scope of the representation. Attorneys who undertake unbundled services must ensure that the advice they render is complete, including addressing ancillary issues pertinent to the client's problem.[51]

In New York, unbundled legal services has been getting greater and greater attention. The New York State Bar Association Commission on Providing Access to Legal Services for Middle Income Consumers has been studying the issue of unbundling and examining the necessary changes or additions to the CPLR, the Code of Professional Responsibility and court rules to accommodate unbundling. Its final report and recommendations are expected to be submitted to the State Bar Executive Committee in the near future. The Association of the Bar of the City of New York also has begun to look into the topic. In conjunction with the Unified Court System's Access to Justice Conference, Administrative Judge Fern Fisher of the Civil Court of the City of New York co-authored a law review article urging that unbundled legal services be adopted in New York and recommending how that could be accomplished.[52] In June 2002, the New York

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[49] Maine Rules of Civil Procedure Rule 11(b); Maine Rules of Civil Procedure Rule 5(b); Maine Bar Rule 3.6(f).

[50] *See* Hon. Fern Fisher-Brandveen and Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State,* 29 Fordham Urb. L.J. 1107 (2002) (*citing* Sylvia Stevens, *Understanding 'Unbundling' Creating a Menu of Legal Services May Improve Accessibility*, Or. St. B. Bull., Nov. 1998, at 25).

[51] Forrest S. Mosten, *Unbundling Legal Services Servicing Clients Within Their Ability to Pay*, Judges' J., Winter 2002, at 17 (*cited in* Fisher-Brandveen and Klempner, *supra* note 47, at 1115).

[52] Fisher-Brandveen & Klempner, *supra* note 47 at 1122-1123 (recommending among other things that (1) CPLR 321(b) be amended to clarify that assistance in preparing court documents does not constitute an appearance; (2) amending the rules to permit limited appearances by an attorney pursuant to a written agreement; (3) clarifying the rules of withdrawal to allow an attorney to step out of a case upon completion of agreed upon tasks; and (4) amending NYCRR 130 to allow for limited representation signature certification by an attorney).

State Judicial Institute on Professional and the Law will be examining unbundled legal services as it pertains to the provision of legal services through technology and the Internet.

Clearly, unbundled legal services is another important means of expanding pro bono in New York. However, to accomplish unbundling in the state, much further discussion and consensus building among the major stakeholders is necessary. It is anticipated that as an outgrowth of the Pro Bono Convocations, those discussions will take place and move the issue forward in New York.

Expanding Pro Bono Through Continuing Legal Education

Three states have recognized the utility of awarding CLE credit for pro bono service: Delaware, Tennessee and New York. Under Delaware's scheme, an attorney may earn one CLE credit for every six hours of uncompensated legal services (up to a maximum of 6 credits) performed pursuant to a court appointment or assignment from a legal services provider.[53] Tennessee's CLE rule allows attorneys to earn one credit of ethics CLE credit for every eight hours of pro bono service provided through court appointment, an organized bar association program or legal services organization, or court-mandated pro bono mediation services.[54]

In 2000, New York enacted a Pro Bono CLE rule. That rule awards one CLE credit hour for every six 50-minute hours of eligible pro bono service (up to a maximum of 6 credits).[55] Eligible pro bono service is defined as uncompensated legal services for those unable to afford counsel that is performed pursuant to court assignment or through a program of a bar association or legal services provider accredited by the CLE Board.[56] Following the adoption of the implementing regulations, a number of issues arose that were not directly addressed by the regulations, including whether credit could be earned for:

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[53] Delaware Rules for Continuing Legal Education 8(D).

[54] Tennessee Rule for Mandatory Continuing Legal Education 4.07(c).

[55] 22 NYCRR 1500.22(j).

[56] Pursuant to the Regulations, the CLE Board will only accredit pro bono programs of (1) legal services organizations or their subsidiaries which have as their primary purpose the furnishing of legal services to indigent persons and have filed a statement with their respective Appellate Division pursuant to Judiciary Law § 496, and (2) bar associations which have as their primary purpose the furnishing of legal services to the indigent. CLE Board Regulations & Guidelines (Fall 2001) § 3(D)(11)(c)(i).

undertaking legal work for a not-for profit corporation which serves an indigent population; participating in volunteer efforts on a hot line or open clinic; or serving as a mediator. The CLE Board is reviewing these matters and expects to clarify the regulations in Summer 2002.

While the CLE Board has taken a positive step forward by broadening the CLE rules to award credit for eligible pro bono work, further expansion should be explored that would serve as greater incentive for attorneys to meet their CLE obligations through pro bono service. Some recommendations include increasing the ratio of earned credit hours to hours of service performed; increasing the maximum number of credit hours that can be earned in a reporting cycle; and expanding the types of organizations that can apply for accredited status for their programs.[57]

Conclusion

The Convocation is envisioned as a working meeting that will produce tangible results – i.e., ideas and strategies that the court system and its justice partners can implement to further pro bono in New York. This paper outlines various models and initiatives, each achieving some level of success in furthering pro bono but not without controversy. At the Convocation, we will discuss in greater detail the elements of these schemes to determine what can and should be adopted for use in New York. More specifically, we will discuss:

1. What must be done to make lawyers not only understand the current needs of the poor and the crisis in the justice system but motivate them to want to provide pro bono services?

2. Is there a way to increase the provision of pro bono services other than by instituting a mandatory requirement?

3. Should there be a more structured pro bono delivery system in New York? If so, what should it look like?

4. What are the major obstacles to establishing a Statewide pro bono system?

5. If New York is to adopt some aspect of "unbundled legal services" for litigated matters, how would this be accomplished?

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[57] *See, e.g.,* Hon. Anthony J. Fiorella, Jr., *Making Pro Bono Pay Off*, NYLJ, May 1, 2002, p. S4, col. 3.