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## The Unmet Legal Needs of the Poor in Maine: Is Mandatory Pro Bono The Answer?

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# THE UNMET LEGAL NEEDS OF THE POOR IN MAINE: IS MANDATORY PRO BONO THE ANSWER?

In 1989, the Maine Commission on Legal Needs was formed to study the civil legal needs of Maine's poor population and to develop a plan for meeting those needs. Similar projects have been undertaken in a number of other states and by the American Bar Association in recent years. Each study has revealed a significant unmet need among the poor for assistance with legal problems. There seems little doubt that the situation is serious and widespread. The difficulty lies in finding a solution. One proposal that has been advanced is mandatory pro bono, a program that would require attorneys to give uncompensated legal assistance to the needy. For years debate over this proposal has focused on whether such a program would violate the constitutional rights of attorneys. The debate has intensified with the recent group of studies highlighting the unmet legal needs of the poor.

This Comment will review the civil legal needs of Maine's poor and the currently available resources for meeting those needs. It will then consider the legal issues involved in requiring counsel to undertake representation of people unable to afford an attorney in civil cases. Do courts have the authority to require attorneys to represent those unable to pay? Although neither the United States Supreme Court nor the Maine Supreme Judicial Court has addressed the issue, a review of available case law and legal commentaries suggests that courts very likely do have such authority. This Comment concludes, however, that other approaches should be tried in Maine before requiring attorneys to take pro bono civil cases.

## I. THE LEGAL NEEDS STUDY

In 1989, the Maine Bar Foundation<sup>1</sup> and the Consortium on the Study of the Future of the Maine Legal Profession<sup>2</sup> established the

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1. The Maine Bar Foundation, incorporated in 1983, was established "to facilitate the administration of justice." Its primary purpose has been and is to assist Maine's poor in getting access to legal services. The Foundation's mission also includes encouraging legal education and scholarship and supporting law libraries. Under the management of a Board of Directors appointed by the President of the Maine State Bar Association, the Foundation's principal programs have been the establishment of the Volunteer Lawyers Project (VLP) and the Interest on Lawyer's Trust Accounts (IOLTA) program. MAINE BAR FOUND. 1989 ANNUAL REPORT.

2. Founded in 1982, the Consortium has nine member organizations: the Board of Bar Examiners, The Board of Overseers of the Bar, Legal Services for the Elderly, Inc., the Maine Judicial Council, the Maine State Bar Association, the Maine Trial Lawyers Association, the Office of the Attorney General, Pine Tree Legal Assistance, Inc., and the University of Maine School of Law. LEGAL NEEDS STUDY—STATE OF

Maine Commission on Legal Needs to oversee a study of the civil legal needs of Maine's poor population.<sup>3</sup> Its goal was to inventory existing resources available to the indigent, survey the needs of the poor, and develop a plan to meet those needs for the purpose of providing "access to justice for all Maine citizens."<sup>4</sup> The Commission, chaired by former Senator Edmund S. Muskie, began its work on May 1, 1989, and issued its final report one year later. In the months following its establishment, the Commission spent considerable time and effort gathering information through questionnaires,<sup>5</sup> a telephone survey,<sup>6</sup> and public hearings.<sup>7</sup>

The approach taken by the Maine Commission was similar to the approach taken by groups in other states that have examined the civil legal needs of the poor. Recent studies have been completed in Arizona, Illinois, Maryland, Massachusetts, New Jersey, and New York.<sup>8</sup> In addition, the American Bar Association conducted a nationwide survey during 1989.<sup>9</sup> Telephone surveys and questionnaires were the common means for obtaining information,<sup>10</sup> though no

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MAINE (Background Paper, 1989).

3. *Id.*

4. REPORT OF THE MAINE COMMISSION ON LEGAL NEEDS, AN ACTION PLAN FOR THE 1990's, at 1 (May 1, 1990) [hereinafter COMMISSION REPORT].

5. Questionnaires were sent to those working in the Maine court system (i.e., judges and court clerks), to public officials (e.g., members of the Maine Legislature), to major legal services providers (Pine Tree Legal Assistance, Legal Services for the Elderly (LSE), VLP, and the Cumberland Legal Aid Clinic), and to specialized providers (e.g., several family violence shelters, the Maine Civil Liberties Union, and the Consumer Division of the Attorney General's Office). *Id.* at A-4.

6. See *infra* notes 13-20 and accompanying text for an explanation of the survey and its results.

7. Eight public hearings occurred in October and November 1989 in Machias, Houlton, Caribou, Rockland, Lewiston, Bangor, Portland, and Augusta. The hearings provided an opportunity for low income people to speak directly to the Commission. Private attorneys and representatives of legal services providers also appeared. COMMISSION REPORT, *supra* note 4 at A-6.

8. See State Bar of Arizona, LEGAL SERVICES COMMITTEE MAJORITY REPORT (1989) [hereinafter ARIZONA MAJORITY REPORT]; ILLINOIS LEGAL NEEDS STUDY (Preliminary Summary and Findings) (undated but undertaken during 1989); Advisory Council of The Maryland Legal Services Corp., ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR (1988) [hereinafter MARYLAND ACTION PLAN]; Mass. Legal Assistance Corp., MASSACHUSETTS LEGAL SERVICES PLAN FOR ACTION (1987); L. Goodman, A PRELIMINARY REPORT ON A STUDY OF THE LEGAL NEEDS OF THE POOR IN NEW JERSEY (1986); Committee to Improve the Availability of Legal Services, PRELIMINARY REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1989) [hereinafter NEW YORK PRELIMINARY REPORT].

9. See ABA National Civil Legal Needs Survey Final Report (May 1989) [hereinafter ABA FINAL REPORT].

10. One state, New Jersey, utilized in-person interviews with the poor rather than a telephone survey. Arizona did not conduct a telephone or an in-person survey but reviewed such surveys from other states and applied the results by analogy. The New York report drew on results of studies done by other groups within that state. Illinois, Maryland, Massachusetts, and the ABA all used telephone surveys. See generally,

study appears to have utilized a public hearing approach in the way that Maine did.<sup>11</sup> All of the reports concluded that there was a significant unmet need for legal services among those who were poor.<sup>12</sup>

The Maine study likewise revealed a need for greater assistance for poor people experiencing civil legal problems. The telephone survey in Maine reached 521 low income households and resulted in a finding of slightly less than one civil legal problem per household per year.<sup>13</sup> More than three-fourths of the problems identified went without legal help.<sup>14</sup> The survey included questions covering thirty-nine different legal problems grouped into eleven categories.<sup>15</sup> Of these, the four categories most frequently cited by those surveyed

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*supra* note 8.

11. The Maryland and Massachusetts studies included public hearings, but these occurred in each case after a preliminary report was written. MARYLAND ACTION PLAN, *supra* note 8 at 4; MASSACHUSETTS LEGAL SERVICES PLAN FOR ACTION, *supra* note 8 at 17.

12. For example, the ABA telephone survey of 500 low income people revealed an average of 1.36 civil legal problems per household per year. Of the 682 problems reported, 80% involved no legal assistance. ABA FINAL REPORT, *supra* note 9, at 20, 48. The ABA study then converted its findings to correlate with the 17.569 million households with incomes at or below 125% of the official poverty level that existed in 1987 and determined that, on a nationwide basis, the indigent had 4.9 million problems for which legal help was provided but 19 million problems for which no legal help was provided. *Id.* at 48-49. The Illinois telephone survey of 1900 low income homes found 1.69 noncriminal legal problems per household per year for which there was no legal help. ILLINOIS LEGAL NEEDS STUDY, *supra* note 8, at 8. The Maryland telephone survey, which reached 800 households, indicated that low income households typically had 3.29 legal problems per year. Only 37% of the households reported having seen an attorney within the last five years. MARYLAND ACTION PLAN, *supra* note 8, at 8-10. The Massachusetts survey of 1082 households found nearly one unmet civil legal problem per household per year. MASSACHUSETTS LEGAL SERVICES PLAN FOR ACTION, *supra* note 8, at 6.

13. The actual number was .95. COMMISSION REPORT at 28. The survey was conducted by The Spangenberg Group of West Newton, Mass. This organization had previously conducted telephone surveys for Illinois, Massachusetts, New York, and the ABA. *Id.* at A-4. The Maine telephone survey was aimed at households with incomes at or below 125% of the federal poverty level, since this is the criterion used by Pine Tree Legal Assistance, Inc., the major legal services provider in Maine. The poverty level is established by the United States Office of Management and Budget. In 1989, 125% of this level was \$7,475 for one individual and \$15,125 for a family of four. *Id.* at 3. The first questions asked during the telephone interview were designed to ensure that the caller had reached a home that would be eligible for free legal services.

14. COMMISSION REPORT, *supra* note 4, at 39. There were 493 problems reported, of which 111 involved legal assistance. The Spangenberg Group, 1 MAINE LEGAL NEEDS STUDY TELEPHONE SURVEY FINAL REPORT, at 12 (1990) [hereinafter TELEPHONE SURVEY FINAL REPORT].

15. The categories were: consumer, utility, housing, employment, education, health, income maintenance, family, wills and estates, and discrimination. COMMISSION REPORT, *supra* note 4, at 28. In addition, the interviewer asked if there were any other noncriminal legal problems encountered by that household during the past year. *Id.*

were income maintenance, health, family, and utility problems.<sup>16</sup> About 65% of all problems reported involved basic necessities.<sup>17</sup>

In addition to obtaining information about the legal needs of the general population of poor people, the survey was designed to find out about three particular low income groups—the elderly, households that included a disabled or mentally ill person, and households headed by single female parents. Among these three groups, households headed by single females faced the greatest number of problems.<sup>18</sup> Another significant survey finding was that two-thirds of the low income population is unaware of the availability of free legal services.<sup>19</sup> Perhaps the most surprising survey result was that private attorneys who charged for their services handled the majority of cases that did receive legal help.<sup>20</sup>

The information obtained from the telephone survey prompted the Commission to find that “the poor face civil legal problems which are significant in number, fundamental in nature, and burdensome in effect.”<sup>21</sup> Moreover, the Commission determined that the poor are unable to pay for legal help and that the amount of free legal assistance presently available is “wholly inadequate.”<sup>22</sup>

It seems clear that even though Maine’s survey revealed a slightly smaller need than the other states’ recent surveys, there is a significant unmet need in Maine. If the survey results are correlated to the total estimated population of poor people in Maine,<sup>23</sup> the number of

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16. *Id.* at 4.

17. *Id.* The report defines “basic necessities” as “income maintenance and employment, health, utility problems, housing, and education.” *Id.*

18. *Id.* at 30, 32. The survey revealed that households headed by single female parents experienced an average of 2.1 civil legal problems per year as compared to approximately one problem per household per year experienced by the general sample. By contrast, the elderly had a much lower problem rate: 86% of respondents 65 and older said they had experienced no civil legal problems in the past year. Households that included someone with a disability or mental illness were closer to the general sample. Those households reported 1.3 problems per year. *Id.*

19. Fifty-one percent of those interviewed stated that there were no free legal services; 16% said they did not know if such services were available. *Id.* at 37.

20. Those surveyed were asked to identify the source of any legal help they received. The data indicated that private attorneys handled 58.8% of the problems for which there was legal assistance. The next largest category was “other,” a category that was not defined; 30.1% of those who received legal help said it fell under this category. 1 TELEPHONE SURVEY FINAL REPORT, *supra* note 14, at 126. The Spangenberg Group felt this category should be interpreted with caution, however, and suggested that many of these problems may have been handled by Pine Tree Legal Assistance or through the VLP but that those surveyed did not remember the names of these organizations. *Id.* at 128. In any event, less than one-quarter of all problems identified in the survey involved professional legal assistance. *Id.* at 12.

21. COMMISSION REPORT, *supra* note 4, at 4.

22. *Id.*

23. The Commission estimates that 230,000 people in Maine currently live below 125% of the federal poverty level. This translates to about 85,000 households. *Id.* at 3.

civil problems the poor experience each year approximates 80,750, for which three-fourths receive no legal assistance.<sup>24</sup>

## II. EXISTING RESOURCES

### A. Legal Services Providers

Even though there are significant unmet legal needs in Maine, a number of currently existing programs already address the legal needs of Maine's poor.<sup>25</sup>

The largest provider, and the one in operation the longest, is Pine Tree Legal Assistance, Inc.<sup>26</sup> With six offices around the state, it handles a variety of civil cases with an emphasis on housing and income maintenance matters.<sup>27</sup> Funded primarily by the federal government, Pine Tree went through a very difficult period in the 1980's following major funding cutbacks during the Reagan administration.<sup>28</sup> Not surprisingly, the funding cutbacks resulted in the need to cut staff. Staffing is still below the 1980 level.<sup>29</sup> The cut-

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24. 1 TELEPHONE SURVEY FINAL REPORT, *supra* note 14, at 211. It should be noted, however, that not all low income households have legal problems. From the survey of 521 homes, 493 problems were reported. These problems were concentrated in 33% of the households surveyed. *Id.* at 11-12. In other words, approximately two-thirds of the households surveyed reported no problems at all. Those households reporting problems had an average of nearly three per household. *Id.* at 43. Moreover, there is no way to determine from the telephone survey the particulars of the problems identified and how many actually constitute problems that would be appropriate for resolution by the legal system.

25. The unmet needs are not a reflection of the providers' quality of services. However, two criticisms relating to the providers did surface. One applied particularly to the VLP. See *infra* notes 46-49 and accompanying text for an explanation of this program. The Commission learned that more phone lines were needed since many people had been unable to reach that office despite repeated efforts to do so. The other problem was common to all the providers and involved referrals from one provider to another. The Commission learned that referrals were sometimes made without any knowledge as to whether the next provider handled the particular type of problem, resulting in frustration for the poor, who were referred from one provider to another without getting any real assistance. COMMISSION REPORT, *supra* note 4, at 64.

26. Created in 1966, Pine Tree's parent organization is the Legal Services Corporation (LSC) in Washington, D.C., an organization set up by the United States Congress. See 42 U.S.C. § 2996 (1982). LSC closely regulates the work undertaken by Pine Tree through various statutory provisions and regulations that establish which types of cases may or may not be handled. For example, Pine Tree is prohibited from handling cases involving desegregation or abortion. Pine Tree's work involves only civil cases for individuals whose income is below 125% of the federal poverty level. COMMISSION REPORT, *supra* note 4, at 48.

27. The offices are located in Portland, Lewiston, Augusta, Bangor, Machias, and Presque Isle. Small specialized offices for migrant farmworkers and Native Americans are located in the Bangor and Augusta offices respectively. *Id.*

28. COMMISSION REPORT, *supra* note 4, at 52. Funding for fiscal year 1982 was reduced by 25%. During the period from 1980 to 1988 federal funds decreased by 34%, after adjusting for inflation. *Id.* at 52-53.

29. Pine Tree employed 27 attorneys in 1980 and 23 in 1988. Overall, the total

backs necessitated further restrictions in the cases handled by Pine Tree through a priority-setting process adopted by the organization statewide and in the individual offices.<sup>30</sup> The cutbacks also resulted in an increase in "brief service" assistance to clients and a decrease in extended representation and litigation.<sup>31</sup> In 1988, Pine Tree was involved in litigation in 995 cases, represented clients without litigation in another 772 cases, and gave brief service in 9,439 cases.<sup>32</sup>

In the 1980's, Pine Tree began to spend a percentage of its federal funds on private bar involvement, that is, on involving private practitioners in representing the poor without compensation.<sup>33</sup> Since the establishment of the Volunteer Lawyers Project (VLP),<sup>34</sup> Pine Tree has chosen to spend its private bar involvement monies by helping to fund VLP.<sup>35</sup>

A second major legal services provider is the organization known as Legal Services for the Elderly (LSE).<sup>36</sup> Established in 1974, LSE handles civil cases for individuals sixty years of age or older.<sup>37</sup> It is difficult to know how many low income people benefit from LSE since it has no financial eligibility requirements, and its statistics, therefore, reflect matters handled for people of all income levels.<sup>38</sup> However, it is believed that a large majority of LSE's clients have incomes below 125% of the poverty level.<sup>39</sup> For LSE, unlike Pine Tree, the 1980's were an era of progress in funding, staff levels, and numbers of cases handled. Funding more than doubled, the number

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staff went from 71 in 1980 to 56 in 1988. *Id.* at 53, n.44.

30. *Id.* at 48.

31. *Id.* at 60. Brief service may include formal advice or a referral elsewhere and generally involves only one contact. Extended representation means a longer, more extensive attorney-client relationship. Litigation involves representation in judicial or administrative proceedings. *Id.* at 58-59 nn.66-68.

32. *Id.* at 59. These figures are in contrast to those in 1980, when Pine Tree litigated 1,463 cases, represented another 972 clients, and gave brief service in 6,992 cases. *Id.*

33. *Id.* at 53. This was mandated by the Legal Services Corporation. Originally Pine Tree was required to spend 10% of its federal funds for this purpose. The figure was later increased to 12.5%, the current percentage. *Id.*

34. See *infra* notes 46-49 and accompanying text for an explanation of this program.

35. COMMISSION REPORT, *supra* note 4, at 53. In 1988, Pine Tree contributed more than \$150,000 of VLP's \$197,522 budget. VOLUNTEER LAWYERS PROJECT 1988 ANNUAL REPORT (1989) [hereinafter VLP ANNUAL REPORT].

36. Like Pine Tree, LSE has offices around the state—in Portland, Lewiston, Augusta, Brewer, and Presque Isle—with a number of additional part-time outreach offices. There is also an Advocates for Medicare Patients office in Augusta. COMMISSION REPORT, *supra* note 4, at 48-49.

37. *Id.* at 49. LSE handles many cases involving income, individual rights, housing, and health issues for the elderly. *Id.*

38. Financial eligibility requirements are prohibited by the Older Americans Act, 42 U.S.C. §§ 3001-3058d (1982). COMMISSION REPORT, *supra* note 4, at 49.

39. COMMISSION REPORT, *supra* note 4, at 49.

of attorneys went from two to seven, and the total number of cases increased from 997 to 3,272.<sup>40</sup> LSE clearly was a bright spot in the 1980's legal services picture.

A third organization is the Cumberland Legal Aid Clinic. Founded in 1971, it is associated with the University of Maine School of Law and provides practical experience for law students, supervised by faculty, in representing clients in both civil and criminal matters.<sup>41</sup> The clinic only represents individuals whose incomes are below 125% of the poverty level.<sup>42</sup> Thus its focus is on helping Maine's poor with their legal needs. However, because of its size and location (handling cases primarily from Cumberland and York Counties), the clinic is not equipped to handle a large volume of cases from around the state.<sup>43</sup>

There is a range of other organizations within the state that provide services to the poor. Several are mentioned in the Commission's report.<sup>44</sup> The fact that they are not discussed in this Comment is not an indication of a lack of importance, but is rather a function of the lack of statistics in the report and an inability to determine how many low income people receive legal assistance through them.

### B. VLP and IOLTA

Two other programs in Maine provide legal assistance to the poor: the Volunteer Lawyers Project (VLP) and IOLTA (Interest on Lawyers' Trust Accounts). Both have their origins in the Maine Bar Foundation.<sup>45</sup>

The Volunteer Lawyers Project, begun in 1983, provides pro bono legal services to Maine's indigent population by referring eligible individuals to members of a statewide panel of volunteer attorneys.<sup>46</sup> Located in Portland, VLP utilizes a toll free number so that individuals from around the state may make use of the service. It is principally a referral service that screens callers to be certain they meet financial eligibility requirements and then refers them to agencies that might be of assistance (such as one of the legal services provid-

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40. Funding under the Older Americans Act went from approximately \$60,000 in 1980 to \$133,000 in 1988. *Id.* at 51. Not only did the number of attorneys increase, but the total staff rose from six to 17. *Id.* at 57-58. Of the 3,272 cases handled in 1988, 1,305 involved brief service, 1,611 involved representation without litigation, and the remaining 356 involved litigation. *Id.* at 59.

41. *Id.* at 49.

42. *Id.*

43. In 1988, the clinic litigated 53 civil cases. During that same period 520 civil cases received "brief service" from the clinic and another four civil matters involved representation without litigation. *Id.* at 59 n.69.

44. *See id.* at 50-51.

45. *See supra* note 1.

46. *Id.* The term "pro bono" is used to indicate that the lawyer's services are offered free of charge.



ers) or to private attorneys who have agreed to handle up to three cases per year on a pro bono basis.<sup>47</sup> VLP has a small staff and relies on lay volunteers to handle the calls and on "lawyers of the day" to make the actual referrals.<sup>48</sup> At present, approximately 60% of the Maine Bar has agreed to accept pro bono cases through VLP, a much higher percentage than the national average of 15%.<sup>49</sup>

The IOLTA began in 1986 after the Maine Supreme Judicial Court amended Maine Bar Rule 3.6(f) to permit a voluntary interest-on-lawyers'-trust-accounts program.<sup>50</sup> Under the program, a lawyer or law firm may establish "a pooled, insured, interest-bearing account for the deposit of all client funds that are not reasonably and in good faith expected to bear net interest . . ." and "[t]he lawyer or law firm shall direct the depository institution to remit any net interest that may accrue on this account to the Maine Bar Foundation . . . ."<sup>51</sup> In other words, client funds that would be held for too short a time period to earn interest for the client may be placed in a pooled account with other similarly situated client funds, the interest on which is then paid to the Maine Bar Foundation. In 1989, over \$665,000 was raised through the IOLTA program with

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47. VLP ANNUAL REPORT, *supra* note 35. COMMISSION REPORT, *supra* note 4, at 49. VLP uses the same financial eligibility standards as does Pine Tree Legal Assistance. In addition to referring callers to other agencies and to private attorneys for pro bono representation, VLP provides brief service and sends material to others who call but are not referred. In 1988, 7,120 calls to VLP resulted in 1,198 referrals to private attorneys for representation and 1,027 referrals to Pine Tree and other agencies. Another 890 callers were told about the Maine Lawyer Referral Service, a service of the state bar association that makes referrals to participating private attorneys who charge fees for their services. Brief service or materials were given to another 2,239 individuals who called VLP. The remainder were ineligible under the financial criteria or were unable to be referred by VLP. VLP ANNUAL REPORT. It should be noted that the Commission Report provides different caseload statistics for VLP in 1988. Total calls are shown to be 5,285, with 360 of these resulting in litigation, 538 in representation without litigation, and 4,387 in brief service. COMMISSION REPORT, *supra* note 4, at 59.

48. A "lawyer of the day" is an attorney, usually from Cumberland County, who volunteers time to review cases received by VLP and refers them to a private attorney on VLP's statewide panel for pro bono representation. When this program started, it was the first of its kind in the country. VLP ANNUAL REPORT.

49. MAINE BAR FOUND. 1989 ANNUAL REPORT. This translates to a panel of approximately 1,500 lawyers. COMMISSION REPORT, *supra* note 4, at 5.

50. Amendments to Maine Bar Rules, Me. Rptr., 498-509 A.2d XCVI-XCVII (1986).

51. M. Bar R. 3.6(f)(5). The explanation accompanying the 1986 amendment of the rule states that the program was "intended to provide funds for the support of legal services to the poor of Maine." Me. Rptr., 498-509 A.2d C (1986). When the program was first established, a law firm could designate any nonprofit corporation to receive the funds. *Id.* at XCVI. With the further amendment of M. Bar R. 3.6(f) in 1989, the Maine Bar Foundation became the sole designee for IOLTA revenues. Me. Rptr., 551-562 A.2d CLXI (1989).

more than 70% of Maine's attorneys participating.<sup>52</sup> IOLTA grants have been awarded by the Maine Bar Foundation to a number of groups, with the largest amounts going to Pine Tree Legal Assistance, the Volunteer Lawyers Project, Legal Services for the Elderly, the State Court Library Committee (to upgrade county law libraries), and the Cumberland Legal Aid Clinic.<sup>53</sup>

### C. Statutes

The Maine Legislature has also passed laws designed to help those in financial need resolve their problems without the necessity of resorting to the court system. Examples of such laws include the statute relating to termination of utility services<sup>54</sup> and the statutes involving enforcement of child support obligations.<sup>55</sup> These laws establish procedures by which those threatened with the shut-off of a vital service and those unable to collect money owed for support can resolve their problems without going to court. The underlying assumption appears to be that these individuals are among those least able to afford an attorney and that at least some problems lend themselves to solutions without the necessity of court supervision.<sup>56</sup>

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52. MAINE BAR FOUND. 1989 ANNUAL REPORT. Maine has the highest participation rate of any voluntary program in the country.

53. *Id.* The Bar Foundation distributes IOLTA funds by means of automatic grants and discretionary grants. Pine Tree, LSE, and the Clinic are recipients of automatic grants each year. Support for VLP is a line item in the Bar Foundation's budget. COMMISSION REPORT, *supra* note 4 at 54.

54. ME. REV. STAT. ANN. tit. 35-A, § 704 (1988 & Supp. 1989) provides that a utility must give a residential customer written notice prior to termination of service for nonpayment of a bill. It also gives the customer a right to enter into reasonable installment payment arrangements prior to termination. Any dispute concerning the proposed termination is to be settled at an informal hearing between the customer and the utility, with the customer given a right of appeal to the Public Utilities Commission.

55. ME. REV. STAT. ANN. tit. 19, § 448-A (Supp. 1989) empowers the Department of Human Services (DHS) to locate absent parents, defend against support obligations, seek motions to increase such obligations, and to enforce obligations. Although the statute provides that DHS be paid a fee for such services, the department may defer or waive the fee. Other sections give DHS broad enforcement powers. *See, e.g.*, title 19, § 503 which permits the department to file a lien against property of the responsible parent and title 19, § 504-A which authorizes the commissioner to direct a person to withhold a parent's wages.

56. The effectiveness of the statute relating to termination of utility services is questionable in view of the fact that utility problems were one of the four problems most frequently identified by the telephone survey. It is quite possible, however, that many low income people are unaware of or do not understand their statutory rights. Moreover, there is a difference between not needing to go to court and not needing legal guidance. Therefore, even though statutory procedures provide an alternative to the court system, there may still be a need for an attorney's assistance.

### III. ADDRESSING THE UNMET NEEDS

Despite all of the services and programs presently in place in Maine, there is still a large gap between the services available to the poor and the legal needs of that group. The Maine Legal Needs Commission determined that more than 200 additional legal services lawyers are needed to meet the current need.<sup>57</sup> Since it is highly unlikely that public funds (or private contributions) will be available to pay the salaries of so many attorneys, it is apparent that other solutions must be considered if we are to provide legal access for all Maine citizens.

A proposal that has been receiving increased attention around the country is one that would require all attorneys to devote a certain amount of time each year to assisting indigent citizens with their legal needs without charge, the so-called mandatory pro bono approach.<sup>58</sup> Can such a requirement be imposed? The proposal has generated much debate with the arguments often focusing on an attorney's constitutional rights. For example, would mandatory pro bono amount to involuntary servitude, deprive an attorney of equal protection of the laws, or result in a taking of private property for public use without just compensation?

Before examining the legality of a profession-wide pro bono requirement, this Comment will review cases in which courts have had to decide whether they had inherent authority to require an attorney to represent an individual without pay.<sup>59</sup> In one sense the concept of mandatory pro bono for all attorneys is but a larger application of the question whether a court has such authority over individual attorneys.

#### A. *No Constitutional Right to Counsel in Civil Cases*

As an initial matter, it is well-settled that those individuals unable to afford an attorney have a constitutional right to representation when defending themselves against criminal charges resulting in im-

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57. COMMISSION REPORT, *supra* note 4, at 5. The Commission estimated there are 61,000 civil legal problems of the poor in Maine that go without legal assistance each year. It then assumed that half of these problems would require extended representation or litigation. In order to meet the need, not only would the legal services providers require 232 additional lawyers, but all 2,700 private attorneys would need to take three pro bono cases per year, and the Law School Clinic would need to double its workload. *Id.* Moreover, assuming the other half of the 61,000 problems could be handled by brief service, an additional 30 paralegals would need to be hired by the legal services providers to meet that need. *Id.* at 6.

58. The Maine Commission did not focus its attention on mandatory pro bono but did recommend that the matter be studied. COMMISSION REPORT, *supra* note 4 at 6.

59. The Maine Supreme Judicial Court is not one of the courts that has been faced with this issue.

prisonment.<sup>60</sup> This right is grounded in the sixth amendment of the United States Constitution and has been made applicable to the states through the fourteenth amendment.<sup>61</sup>

The United States Supreme Court, however, has recognized no such absolute right to counsel in civil cases. In *Lassiter v. Department of Social Services*,<sup>62</sup> the Court indicated that a right to appointed counsel could exist under the due process clause.<sup>63</sup> The Court made it clear, however, that such a right must be determined on a case-by-case basis and set forth guidelines for doing so. First, the Court said a presumption exists that there is no right to appointed counsel unless losing the case could deprive the indigent party of physical liberty.<sup>64</sup> The other guidelines stem from the Court's decision in *Mathews v. Eldridge*<sup>65</sup> and include consideration of the private interest at stake, the government's interest, and the risk that there will be an erroneous decision resulting from the procedures used.<sup>66</sup> The three *Mathews* guidelines must be balanced against each other and then weighed against the presumption.<sup>67</sup>

In a recent Maine case the Supreme Judicial Court, sitting as the Law Court, applied the *Lassiter* criteria and determined that there was no constitutional right to appointed counsel in an action to establish paternity.<sup>68</sup> It follows from these cases that very few low income people in Maine will be entitled to court-appointed counsel as a matter of constitutional right in civil matters.<sup>69</sup>

60. See, e.g., *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

61. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335.

62. 452 U.S. 18 (1981).

63. *Id.* at 25.

64. *Id.* at 26-27. The issue in the underlying case was whether the petitioner's parental rights should be terminated.

65. 424 U.S. 319 (1976).

66. *Lassiter v. Department of Social Servs.*, 452 U.S. at 27.

67. *Id.* In *Lassiter*, the Court held that the trial judge did not err when he failed to appoint counsel the petitioner. *Id.* at 33.

68. *Department of Human Servs. v. Tarvers*, 561 A.2d 1029, 1030 (Me. 1989). The court applied the *Mathews* balancing test in upholding the superior court's denial of appointed counsel to the individual who was the claimed father.

69. Even if the Law Court were to decide that some civil proceedings warranted court-appointed counsel on constitutional grounds, the court would face an additional issue relating to compensation. Would such attorneys be compensated? If so, does the court have authority to authorize payment to such court-appointed attorneys, or would any payment need to be authorized by the Legislature? If attorneys were expected to take such cases on a nonpaying basis, the same constitutional objections (claims of involuntary servitude or a taking of property without just compensation) could be raised as are made in connection with the mandatory pro bono proposal. See discussion *infra* in part III(D). Of course, the Legislature could resolve the issue by providing for payment to court-appointed attorneys in any civil case where the court had ruled a party was constitutionally entitled to representation. The Legislature has, for example, authorized payment to court-appointed counsel in child protection proceedings. ME. REV. STAT. ANN. tit. 22, § 4005 (Supp. 1989).

### B. In Forma Pauperis Statutes

Apart from the issue of a constitutional right to counsel, some states provide statutory authority for indigents to proceed *in forma pauperis* and permit courts to appoint counsel in such cases.<sup>70</sup> Congress has also adopted an *in forma pauperis* statute for use in federal courts.<sup>71</sup> Recently, in *Mallard v. United States District Court for the Southern District of Iowa*,<sup>72</sup> the United States Supreme Court interpreted this statute to mean that there is no court authority to *require* an unwilling attorney to represent an indigent civil litigant.<sup>73</sup> Even in states that have statutes authorizing the assignment of counsel, courts have not found an absolute right to counsel once an indigent party requests an attorney, but rather have determined that such assignment is discretionary with the court.<sup>74</sup> Other states, including Maine, have no statutes addressing the *in forma pauperis* rights of civil litigants.<sup>75</sup>

### C. Inherent Authority and Officers of the Court

The answer to the problem of inadequate legal assistance for the

70. See, e.g., ILL. ANN. STAT., ch. 110, § 5-105 (Smith-Hurd Supp. 1989); MO. ANN. STAT. § 514.040 (Vernon 1949); N.Y. CIV. PRAC. L. & R. 1102(a) (McKinney 1976). Such statutes typically authorize individuals found indigent by a court to proceed without liability for court fees or costs. They also allow the court in its discretion to appoint counsel. Some statutes explicitly provide that the attorney will serve without compensation (Illinois and Missouri); others are silent on the issue (New York).

71. 28 U.S.C. § 1915 (1982) provides in part:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor.

....

(d) The court may request an attorney to represent any such person unable to employ counsel . . . .

72. 490 U.S. 296 (1989).

73. The Court split 5-4 in reaching its decision. The majority held that the word "request" in 28 U.S.C. § 1915(d) (1982) is precatory and an attorney may not be penalized for failing to agree to a court's request. *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296. The dissent took the position that unless "request" were construed to mean "respectfully command," the statute was essentially meaningless. *Id.* at 317 (Stevens, J., dissenting). It should be noted that even the majority made it clear that all it was doing was interpreting the statute. The Court specifically declined to address the question whether federal courts possess inherent authority to require lawyers to accept appointment since that had not been the basis for the court's decision below. *Id.* at 310.

74. See, e.g., *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53 (1975). In that case the court declined to mandate the assignment of counsel in all matrimonial cases involving indigents. *Id.* at 440, 330 N.E.2d at 57.

75. Maine does have a civil rule addressing *in forma pauperis* proceedings. While the rule provides for the waiver of fees and costs, it says nothing about the appointment of an attorney. M.R. Civ. P. 91.

poor does not necessarily lie in making the federal statute more stringent or in working for passage of *in forma pauperis* statutes in all of the states. The more fundamental issue is whether courts have inherent authority to appoint (unwilling) counsel to represent an indigent party in a civil case. If they do, then *in forma pauperis* statutes serve merely to confirm what a court may do on its own authority.<sup>76</sup>

In the criminal context the sixth amendment right to counsel has provided a sufficient basis for courts to exercise their authority to appoint attorneys to represent indigent defendants and to override any objections made by attorneys that their constitutional rights are violated by such appointments.<sup>77</sup> In a civil matter where no absolute right to counsel exists, the inherent authority of the court to appoint counsel is not as clear. The extent of inherent judicial power is an important issue, and must be discussed not only in the context of the needs of indigents but also in terms of the claimed constitutional rights of lawyers. It is necessary, then, to examine the concept of the inherent authority of the court, to consider its derivation, and to see how it has been applied, particularly in Maine.

The concept of inherent authority is most often discussed by the Maine Supreme Judicial Court in terms of regulating the practice of law. In *In re Feingold*,<sup>78</sup> the court spoke of "the authority and power inherent in the court" in the context of an attorney's appeal from a decision not to admit him to the bar.<sup>79</sup> The court took the opportunity to discuss statutory provisions respecting admission and disbarment as they relate to the court's inherent authority in this area.

Statutory provisions purporting to confer authority upon the Supreme Judicial Court respecting the admission or reinstatement of attorneys to, and suspension or disbarment from, the practice of law are not exclusive. Such provisions are in aid of the authority and power inherent in the court. . . . [I]n this area, the judicial branch of the government, acting through the courts, has exclusive jurisdiction and the legislative branch, acting through the Legislature, can in no way limit this inherent power and authority of the

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76. This is the position of the New York Court of Appeals. *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53 (1975). It appears that an *in forma pauperis* statute is necessary only if a state's highest court decides there is no inherent authority to order counsel to represent indigents in a civil matter. A court could not, however, order counsel to undertake such representation on its own authority or pursuant to statute if any of the constitutional attacks on mandatory pro bono are sustained. These are discussed *infra* in part III(D).

77. See, e.g., *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966). Of course, there are now statutes and court rules that codify the authority of the court to appoint counsel for an indigent in a criminal matter. In Maine, ME. REV. STAT. ANN. tit. 15, § 810 (1980) and M.R. CRIM. P. 44 address this topic.

78. 296 A.2d 492 (Me. 1972).

79. *Id.* at 495-96.

court.<sup>80</sup>

In essence, the court stated its inherent power derives from the fact that it has sole authority to govern the judicial branch of the government. In other words, the derivation of its inherent authority lies in the separation of powers contained in the Maine Constitution.<sup>81</sup> The court restated its position more explicitly in a later case, *Board of Overseers of the Bar v. Lee*.<sup>82</sup> There the court quoted pertinent sections of the Maine Constitution and then said:

It is a fundamental principle of constitutional law that each department in our tri-partite scheme has, without any express grant, the inherent right to accomplish all objects necessarily within the orbit of that department when not expressly allocated to, or limited by the existence of a similar power in, one of the other departments. The inherent power of the Supreme Judicial Court, therefore, arises from the very fact that it is a court and connotes that which is essential to its existence and functioning as a court. . . .

. . . The power to define and regulate the practice of law naturally and logically belongs to the judicial department. The admission and disbarment of attorneys is the ultimate exercise of that power and is a judicial act.<sup>83</sup>

Later Maine cases confirm this inherent power of the court to regulate the conduct of attorneys. These cases utilize additional language from *Lee* that identified attorneys as "officers of the court."<sup>84</sup> Thus trial courts have power to impose discovery sanctions on attorneys as officers of the court as "an inherent part of the court's au-

80. *Id.* at 496.

81. The Maine Constitution provides:

Section 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

ME. CONST. art. III, §§ 1, 2.

82. 422 A.2d 998 (Me. 1980). In *Lee* an attorney challenged the Maine bar rule that required him to pay an annual registration fee if he wished to actively practice law. Upon his failure to pay the fee, Lee was suspended from the practice of law in accordance with the rule. The court upheld the rule against various constitutional attacks.

83. *Id.* at 1002. The court noted in its opinion that there are other applications of the doctrine of inherent judicial power, and cited cases from other jurisdictions where courts have compelled allocation of public funds to the judicial department and where courts have exercised their power to administer funds free from legislative or executive interference. *Id.* at 1003 n.11.

84. *Board of Overseers of the Bar v. Campbell*, 539 A.2d 208, 209 (Me. 1988); *State v. Grant*, 487 A.2d 627, 629-30 (Me. 1985); *Battryn v. Indian Oil Co.*, 472 A.2d 937, 942 (Me. 1984). The court first used the term "officer of the court" in describing an attorney in an 1875 disbarment case, *Sanborn v. Kimball*, 64 Me. 140, 143 (1875) ("An attorney at law is an officer of the court as appears from the terms of his oath of office . . .").

thority to regulate the conduct of proceedings before it."<sup>85</sup> Similarly, trial courts have inherent authority to inquire into an attorney's conduct and take appropriate action to protect the integrity of the judicial system.<sup>86</sup> Moreover, the Maine Bar Rules, promulgated by the Maine Supreme Judicial Court, refer to an attorney as an officer of the court and state that "[a]ny attorney admitted to, or engaging in, the practice of law in this State shall be subject to the Court's supervision and disciplinary jurisdiction . . . ."<sup>87</sup>

The Maine Supreme Judicial Court has not addressed the concepts of attorneys as officers of the court and inherent authority of the court in the context of assigning counsel to an indigent litigant. These terms have appeared, however, in decisions made in other jurisdictions where the issue has been presented. The decisions are not uniform in result, though the majority of courts considering the issue appear to agree that the judiciary does have the power to appoint counsel in a civil case.<sup>88</sup> These cases also serve as a springboard for considering the constitutional issues most often raised by those objecting to the uncompensated assignment of counsel.

Some cases discuss the court's authority to appoint attorneys in the context of a criminal setting, although the relevant language is broad enough to encompass civil matters. A frequently cited United States Supreme Court decision, *Powell v. Alabama*,<sup>89</sup> stated that: "Attorneys are officers of the court, and are bound to render service when required by such an appointment."<sup>90</sup> A more recent decision

85. *Battryn v. Indian Oil Co.*, 472 A.2d at 942.

86. *State v. Grant*, 487 A.2d at 629.

87. M. Bar R. 1(a).

88. Commentators disagree in their analysis of the various cases. One commentator has stated:

Although the courts have usually been reluctant to grant litigants a *right* to counsel in civil litigations, they have repeatedly reaffirmed their own power to appoint counsel in civil cases where, in the exercise of judicial discretion, such assignment is deemed warranted. . . . Such a professional obligation of each lawyer to accept appointment without compensation is widely recognized in almost every state, and has been codified by statute in more than half the states and in the federal system.

Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 275-76 (1981) (footnotes omitted). On the other hand, a different commentator who surveyed the various decisions made this observation:

Since lawyers first began to raise the question whether they could be required to represent civil or criminal litigants for little or no pay, the response of the courts has been varied and, in many instances, tentative and troubled. Yet it has often been asserted that a "vast majority" of courts hold that a lawyer may be compelled to serve.

Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 753-54 (1980). Shapiro did find, however, that in a majority of the jurisdictions with relevant precedents, there was an enforceable duty to represent an indigent. *Id.* at 756.

89. 287 U.S. 45 (1932).

90. *Id.* at 73. In this case involving a capital criminal offense, the defendants had



by the Ninth Circuit Court of Appeals, *United States v. Dillon*,<sup>91</sup> echoed the statement made in *Powell* and further said:

An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.<sup>92</sup>

It is perhaps noteworthy that the Ninth Circuit's opinion was later cited with approval by the United States Supreme Court.<sup>93</sup> Moreover, in its recent decision regarding the federal *in forma pauperis* statute,<sup>94</sup> the dissent quoted the above language from *Dillon*.<sup>95</sup>

State courts have also considered the issue of their authority to assign counsel in the context of both civil and criminal cases. In Alabama, the supreme court upheld the constitutionality of an indigent defense system established by a circuit judge and, in language almost identical to *Dillon*, said:

An applicant for admission to practice law may rightfully be deemed to be cognizant of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.<sup>96</sup>

New Jersey likewise upheld the constitutionality of its assignment system, though for policy reasons the court declined to require the

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been unable to employ counsel. The Court said it was the trial court's duty to assign counsel for them and then made the statement that attorneys as officers of the court are bound to accept such appointment. It is noteworthy that this decision occurred 30 years before the Court decided *Gideon v. Wainwright*, 372 U.S. 335 (1963), the landmark case announcing the right to counsel in criminal cases in state court grounded in the sixth and fourteenth amendments. There is no discussion in *Powell* as to the meaning of the term "officers of the court."

91. 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

92. *Id.* at 635. This case also involved a criminal matter. Here the defendant sought counsel in a proceeding to vacate his conviction and set aside his sentence. At the conclusion of the proceedings, the attorney assigned to the matter sought compensation, raising a constitutional issue. The attorney claimed that requiring him to serve without compensation was a taking of private property for public use without just compensation in violation of the fifth amendment. It was in this context that the court ruled against him and made its statement about his obligation as an officer of the court.

93. See *Hurtado v. United States*, 410 U.S. 578, 589 (1973) (one dollar statutory per diem for incarcerated witnesses prior to trial does not constitute a "taking" of property under the fifth amendment since that amendment does not require payment by the government for performance of a public duty it is already owed).

94. *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, (1989). See *supra* notes 72-73 and accompanying text.

95. *Id.* at 317 n.7.

96. *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala. 1979). The constitutional attack was grounded in the fifth amendment's prohibition against the taking of private property for public use without just compensation.

bar to take on assignments without compensation.<sup>97</sup>

New York, Louisiana, and California have considered the matter of assigned counsel in civil cases.<sup>98</sup> The courts in all three states have made clear there was inherent authority to assign attorneys, although the California court's ruling was more limited and had constitutional underpinnings.<sup>99</sup> The Louisiana court went so far as to say that its inherent authority to appoint counsel also included the power to require the state or its subdivision to provide for payment of counsel fees where reasonably necessary.<sup>100</sup> Neither the New York

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97. *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966). The system had been challenged on the basis of the fifth and fourteenth amendments to the United States Constitution. The court said "what we have meets the constitutional demand, and . . . we are satisfied that our assignment system does not fall short because assigned counsel are unpaid." *Id.* at 407, 217 A.2d at 445. Nevertheless, the court refused to hold attorneys to the obligation of representing indigents in criminal cases without pay because of the unfair burden that would be placed on them in view of the number and complexity of such cases; the court then called on the legislature to provide funding to compensate those handling indigent criminal cases. *Id.* at 414-15, 217 A.2d 448-49.

98. *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53 (1975); *State ex rel. Johnson*, 475 So. 2d 340 (La. 1985); *Yarbrough v. Superior Court of Napa County*, 39 Cal. 3d 197, 216 Cal. Rptr. 425, 702 P.2d 583 (1985).

99. *In re Smiley*, 36 N.Y.2d at 438, 330 N.E.2d at 55-56; *State ex rel. Johnson*, 475 So. 2d at 342; *Yarbrough v. Superior Court of Napa County*, 39 Cal. 3d at 200, 216 Cal. Rptr. at 427, 702 P.2d at 585. As discussed earlier, New York has an *in forma pauperis* statute authorizing assignment of counsel in a civil case. See *supra* note 70 and accompanying text. The court, however, did not rely on the statute in reaching its decision. Rather, it relied on the inherent authority of New York courts:

Inherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants. Such counsel serve without compensation. Statutes codify the inherent power of the courts.

*In re Smiley*, 36 N.Y.2d at 438, 330 N.E.2d at 55 (citations omitted).

In *Johnson*, a child abandonment proceeding, the Louisiana court stated that its inherent authority derived from the separation of powers established in that state's constitution and then specifically announced: "[A] court has the inherent power to require an attorney to represent an indigent, with or without compensation, as an obligation burdening his privileges to practice and to serve as an officer of court." *State ex rel. Johnson*, 475 So. 2d at 342.

In *Yarbrough*, the California Supreme Court reaffirmed an earlier decision, *Payne v. Superior Court*, 17 Cal. 3d 908, 132 Cal. Rptr. 405, 553 P.2d 565 (1976), in which the court determined that a trial court had authority to appoint counsel for an indigent prisoner made a defendant in a civil action. *Yarbrough v. Superior Court of Napa County*, 39 Cal. 3d at 200, 216 Cal. Rptr. at 427, 702 P.2d at 585. This right arose out of the indigent's due process and equal protection rights under the federal and California Constitutions entitling the prisoner to have access to the courts. *Id.* The court said that appointment of counsel was "a last alternative" and stressed that access to the courts, not a right to counsel, was the key point. *Id.* at 200-201, 216 Cal. Rptr. at 427, 702 P.2d at 585.

100. *State ex rel. Johnson*, 475 So. 2d at 342.

court nor the California court took this position.<sup>101</sup> On the other hand, the Missouri Supreme Court has made it clear that courts in that state do not have inherent authority to appoint unwilling counsel in civil cases without compensation.<sup>102</sup>

One of the interesting points of comparison among most of the above court decisions is the lack of discussion concerning the meaning of "inherent power of the court" or "officer of the court."<sup>103</sup> The phrases are used as a means of supporting the result in a given case, but there is very little explanation of their derivation, of what they mean or of how they relate to requiring attorneys to represent indigents. A recent article takes the position that the origin and meaning of "officer of the court" are "elusive" and that the term is often used by courts and commentators to "refer generically and conveniently" to various ethical responsibilities of attorneys.<sup>104</sup> Nor does

101. The New York court stated that under the state constitution it could not "arrogate the power to appropriate and provide funds." *In re Smiley*, 36 N.Y.2d at 438, 330 N.E.2d at 56. The California court said that the power to appoint was independent of the power to compensate and left the question whether it had power to compensate to another day. *Yarbrough v. Superior Court of Napa County*, 39 Cal. 3d at 201, 207, 216 Cal. Rptr. at 427, 431, 702 P.2d at 585, 589.

102. *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985). Missouri has an *in forma pauperis* statute, but the court determined the plaintiff was not eligible for relief under that statute. The Missouri court's decision has been criticized both in its approach to the *in forma pauperis* statute and in its statements about the inherent authority of the courts. Fisch, *Coercive Appointments of Counsel in Civil Cases In Forma Pauperis: An Easy Case Makes Hard Law*, 50 Mo. L. Rev. 527 (1985). The article traces the court's earlier cases regarding its inherent authority, including such authority as it relates to appointment of counsel in criminal cases, and concludes the *Scott* case is out of line with the court's earlier pronouncements. *Id.* at 531.

103. There are two exceptions. One is *United States v. Dillon*, 346 F.2d 633 (1965), *cert. denied*, 382 U.S. 978 (1966), which included an appendix (originally a portion of the government's brief) detailing the history of court appointments to represent indigents. The emphasis, however, was on tradition and not on any explanation of the term "officer of the court." *Id.* at 636-38. The other is *State ex rel. Johnson*, 475 So. 2d 340 (La. 1985), in which the court indicated its inherent authority derived from the separation of powers contained in the Louisiana Constitution and then said:

Among the purposes for which inherent judicial power may be exerted are the issuance of needful orders in aid of a court's jurisdiction and the regulation of the practice of law. In aid of these purposes, a court has the inherent power to require an attorney to represent an indigent, with or without compensation, as an obligation burdening his privileges to practice and to serve as an officer of court.

*Id.* at 341-42 (citations omitted). There is, however, no explanation of "officer of court."

104. Gaetke, *Lawyers as Officers of the Court*, 42 VAN. L. REV. 39, 42 (1989). The author's thesis is that lawyers have two roles—as zealous advocates and as officers of the court. Lawyers like to refer to themselves as officers of the court, but in fact the term has very little meaning although it creates a good public image for the profession. The author reviews the existing duties of an attorney as an officer of the court and proposes modifications of the rules of professional responsibility to bring the ob-

the Maine court's characterization of the lawyer as an officer of the court<sup>105</sup> offer a complete explanation of the term or provide much insight into what duties the attorney owes the court as one of its officers. The Maine court's analysis of its inherent authority, however, is more extensive than the analysis found in the decisions from other jurisdictions reviewed in this Comment.

More thought needs to be given to the meaning of the term "officer of the court" and its connection to a court's inherent authority if these are to be used as justifications for requiring attorneys to accept court appointments. One commentator has suggested that the term "connote[s] a mandatory public interest role for lawyers."<sup>106</sup> In other words, in serving as an officer of the court, an attorney owes duties to the judicial system and the public and not just to individual clients. The New Jersey Supreme Court expressed a similar idea when it said:

The duty to defend the indigent without charge is not a personal duty in the conventional sense of an obligation owed by one man to another . . . . Rather the duty is owed to the Court, and it is the Court's call that he is obliged to answer. The duty is to assist the Court in the business before it.<sup>107</sup>

To carry the point one step further, the duty to represent the indigent as an officer of the court is one that an attorney acquires upon licensure to practice. This might well provide a basis for requiring attorneys to assist the public and the courts by representing indigents in civil matters and thereby furthering access to justice for all, since courts have made it clear that the power to regulate the practice of law belongs to the judicial department.<sup>108</sup>

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ligations into line with what the author feels the term "officer of the court" should include. One of the recommendations is that attorneys be required to do pro bono work. *Id.* at 40-48, 84. For additional information on the history of the term and its use by the courts, see Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown Off the Bar*, 35 S.C.L. Rev. 541 (1984). The author states that the term is "used almost as an incantation with little or no analysis of what the title means or why a particular result should flow from it." *Id.* at 541.

105. See *supra* notes 84-87 and accompanying text.

106. Gaetke, *supra* note 104, at 48. Gaetke goes on to say that "[t]he primary distinguishing characteristic of the duties making up the officer of the court obligation . . . must be their subordination of the interests of the client and the lawyer to those of the judicial system and the public." *Id.*

107. *State v. Rush*, 46 N.J. 399, 410, 217 A.2d 441, 447 (1966).

108. Indeed, the New Jersey and Louisiana courts have said as much in the context of requiring attorneys to represent indigents. *State v. Rush*, 46 N.J. at 410, 217 A.2d at 447; *State ex rel. Johnson*, 475 So.2d 340, 341-42 (La. 1985). The Maine court likewise has stated that the power to regulate the practice of law inheres in the judiciary. *Board of Overseers of the Bar v. Lee*, 422 A.2d 998, 1002 (Me. 1980). See *supra* note 83 and accompanying text.

#### D. Claimed Constitutional Violations

Even if the concepts "inherent authority" and "officer of the court" were clarified, a mandatory pro bono requirement for attorneys could not be imposed if there were constitutional impediments to such a requirement, for a court does not have inherent authority to order, nor can an officer of the court be required to undertake, an assignment that violates constitutional rights. Nor could an *in forma pauperis* statute impose such a burden. A number of claimed constitutional violations related to mandatory pro bono, on an individual or profession-wide basis, have been raised over the years. These are based primarily on the fifth, thirteenth, and fourteenth amendments to the United States Constitution.<sup>109</sup> Although commentators and a few courts have addressed the constitutional claims, the United States Supreme Court has yet to reach them.<sup>110</sup>

One argument is that mandatory pro bono would violate the thirteenth amendment's prohibition of involuntary servitude.<sup>111</sup> According to this argument, forcing attorneys to accept an uncompensated assignment against their will amounts to involuntary servitude. One federal court has agreed, and refused to coerce an attorney into representing a complainant in a civil case.<sup>112</sup> No other court has taken such a position, and commentators are in general agreement that the thirteenth amendment is not a likely basis upon which to defeat mandatory pro bono.<sup>113</sup> The better reasoning appears to be that the application of the thirteenth amendment to mandatory pro bono would be excluded under the line of cases giving the state power to requisition services to meet a public need.<sup>114</sup>

The fourteenth amendment's guarantee of equal protection is also

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109. Other arguments, advanced less frequently, claim a due process violation or a violation of an attorney's freedom of association. See, e.g., Comment, *Mandatory Pro Bono: The Path to Equal Justice*, 16 PEPPERDINE L. REV. 355, 368-69 (1989) [hereinafter Comment, *Mandatory Pro Bono*].

110. In its recent decision on the federal *in forma pauperis* statute, the Court specifically left open this question. *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296 (1989) ("Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve.").

111. This amendment provides in pertinent part: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." U.S. CONST. amend. XIII, § 1.

112. *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F.Supp. 87 (N.D. Ala. 1979). The court said: "It is a fundamental concept that compulsory rendition of service creates an involuntary servitude . . . Plainly the attorney who is coerced into representing a Title VII complainant is placed into involuntary servitude, in violation of the thirteenth amendment to the United States Constitution." *Id.* at 88.

113. See, e.g., Rosenfeld, *supra* note 88, at 290-94; Shapiro, *supra* note 88, at 767-70; Comment, *Mandatory Pro Bono*, *supra* note 109, at 368.

114. Shapiro, *supra* note 88, at 769. For example, military conscription has been upheld against a thirteenth amendment challenge. *The Selective Draft Law Cases*, 245 U.S. 366 (1917). See also Rosenfeld, *supra* note 88, at 290-94.

advanced as a reason why pro bono service may not be mandated.<sup>115</sup> Here the argument runs that a lawyer may not be singled out from other citizens or other professionals and required to give services free of charge without violating the lawyer's equal protection rights. No cases have upheld a claim based on this alleged constitutional defect, and it has been pointed out by commentators that courts have upheld obligations of and restrictions on professionals as a condition of licensing.<sup>116</sup> In order to survive an equal protection challenge, a professional regulation must be rationally related to a legitimate public purpose.<sup>117</sup> There is a readily apparent relationship between mandatory pro bono and the valid public purpose of providing access to the judicial process for all.

Perhaps the strongest constitutional challenge derives from the fifth amendment and centers around the taking of property without just compensation.<sup>118</sup> The theory is that to require attorneys to provide services without receiving any payment in return equals a taking of their private property for public use without just compensation. This contention has been rejected by some courts.<sup>119</sup> Commentators also reject it, although at least one sees it as a very close call.<sup>120</sup> There are two major arguments marshaled against the

115. This amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

116. Rosenfeld, *supra* note 88, at 294-95; Comment, *Mandatory Pro Bono*, *supra* note 109, at 367-68.

117. *Williamson v. Lee Optical, Co.*, 348 U.S. 483, 488 (1955).

118. This amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

119. *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). The court specifically held there was no taking of the attorney's services, grounding its decision on the notion that a lawyer is "an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.'" *Id.* at 635. *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala. 1979) ("A Fifth Amendment 'taking' of property does not occur when the state simply requires an individual to fulfill a commitment he has made."). Although the quoted language from these two cases is not limited to the criminal context, it should be noted that both decisions involved criminal matters. This raises the question whether there is a distinction between obligations of attorneys to accept cases where criminal charges have been brought against individuals who have a constitutional right to counsel and obligations of attorneys to represent individuals in private litigation. To the author's knowledge this distinction has not been addressed in a court case.

120. Those rejecting it include Rosenfeld, *supra* note 88, at 287-90; Comment, *Mandatory Pro Bono*, *supra* note 109, at 366-67. Shapiro, *supra* note 88, at 777 says that such a challenge "might fail, but only by a whisker." Shapiro balances the factors courts have traditionally looked to in eminent domain cases (the extent to which there has been a direct physical invasion of the person's property, the degree of harm to the property, also known as the extent of interference with "investment-backed

fifth amendment challenge. One centers around the notion that "the enforcement of an obligation already owed to the public cannot constitute a taking for public use within the fifth amendment's strictures."<sup>121</sup> The other has to do with the fact that lawyers enjoy a monopoly on the practice of law and that "the economic benefit of this monopoly offsets the burden of accepting court appointments."<sup>122</sup> The courts appear to have grounded their decisions on the first of these arguments.<sup>123</sup>

As may be seen from the foregoing, cases in which attorneys have successfully argued that their rights will be violated if they are coerced into providing uncompensated representation are almost nonexistent. In the few instances where attorneys have succeeded in their challenges to coerced representation, reasons other than those based on constitutional amendments have been advanced by courts to justify the result.<sup>124</sup>

### E. Policy Considerations

Aside from any claimed constitutional violations, a number of policy arguments have been advanced against a mandatory pro bono program. These include such objections as: 1) there is no guarantee it will solve the problem; 2) the quality of representation may not be very high if attorneys are coerced into representing the poor or are forced to represent them in matters in which the attorney lacks ex-

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expectations," and the extent to which the state's action is designed to extract public good or to prevent harmful uses) against the arguments relating to the history and tradition of the bar to serve without compensation and the monopoly on the practice of law that attorneys enjoy. *Id.* at 773-76.

121. Rosenfeld, *supra* note 88, at 288 (footnote omitted). This rationale was used by the United States Supreme Court in a case upholding the detaining of a material witness at compensation of one dollar per day. *Hurtado v. United States*, 410 U.S. 578 (1973).

122. Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 Col. L. Rev. 366, 388 (1981). A monopoly by itself does not distinguish lawyers from other groups subject to licensing, but it has been suggested that "[n]o other profession has a similarly indispensable relationship to a major branch of government responsible for the formulation and implementation of public policy, and in none other is public service so much a part of the licensed activity." Fisch, *supra* note 102, at 539. Others have suggested that if the profession is unwilling to make its advocacy skills available to the indigent, the public will have no choice but to permit encroachment by nonlawyers; that is, to break up the monopoly of the practice of law. Smith, *A Mandatory Pro Bono Service Standard—Its Time Has Come*, 35 U. MIAMI L. REV. 727, 734-35 (1981).

123. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965); *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala. 1979).

124. See, e.g., *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985) (Missouri courts have no inherent authority to appoint unwilling counsel in civil cases without compensation); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (burden of representing the indigent in criminal matters without compensation has become more than the legal profession alone should bear).

pertise; 3) providing the poor with more legal help will flood the court system; 4) the economic burden of such representation will really fall on newly admitted attorneys and/or on small firms or sole practitioners; and 5) there would be too many administrative and enforcement problems with a mandatory pro bono program.<sup>125</sup> None of these policy arguments appears strong enough to tip the scale against the establishment of such a program.

With respect to whether mandatory pro bono will actually solve the problem of lack of legal representation for the poor, a perusal of the Maine Commission's Report suggests that it would not.<sup>126</sup> Advocates of a mandatory program, however, view it as one step among several that collectively will address the problem.<sup>127</sup> Moreover, it is more meaningful to ask whether mandatory pro bono is a significant step that will improve the situation, not whether mandatory pro bono alone will solve the problem of legal representation of the poor.<sup>128</sup>

The answer to the argument that coerced representation will result in poorer quality representation lies in the fact that all representation is governed by a code of professional responsibility to which lawyers are expected to adhere and for which they may be disciplined if they do not.<sup>129</sup> It is therefore anticipated that attorneys would bring the same level of professionalism to their work for the indigent as they would to any other client.

The suggestion that providing the poor with legal help will flood an already overcrowded court system appears to work in direct opposition to the notion of equal justice for all. Apart from the fact that the poor have not caused the overcrowding because they have had limited access to the system, how can it be "just" to manage court dockets on the basis of whether someone can afford an attorney? Moreover, many of the problems of the poor identified by the Maine Commission relate to basic needs that may, with the help of an advocate, lend themselves to resolution outside of a courtroom.

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125. Comment, *Mandatory Pro Bono*, *supra* note 109, at 369-74.

126. The findings and recommendations of the Maine Commission are that there must be a multi-pronged approach to solving the problem. Not only would it be necessary for all active attorneys to do pro bono work, but also a large increase in the number of lawyers and paralegals who work for legal services providers would be needed if the poor in Maine are to have adequate legal representation. COMMISSION REPORT, *supra* note 4, at 5-6.

127. MARYLAND ACTION PLAN, *supra* note 8, at x-xi; NEW YORK PRELIMINARY REPORT, *supra* note 8, at 22. Among the other steps that have been recommended are: increased state and federal spending, increased community education, a law school loan forgiveness program for those who work for the indigent, increased use of paralegals, and a comprehensive IOLTA program. See COMMISSION REPORT (Maine), MARYLAND ACTION PLAN, *supra* note 8, at 31-36 and NEW YORK PRELIMINARY REPORT, *supra* note 8, at 59-64 for more expansive lists.

128. Comment, *Mandatory Pro Bono*, *supra* note 109, at 372.

129. In Maine, the Code of Professional Responsibility is set forth in M. Bar R. 3.



The other policy arguments (poorer quality representation where an attorney must represent an individual in an area of the law in which he or she lacks expertise, the economic burden of such representation falling on newly admitted attorneys or on small firms, as well as administrative and enforcement problems) are not insurmountable, but may be resolved through the careful design of a mandatory pro bono program. For example, lack of expertise can be addressed either through training programs for attorneys or by allowing attorneys to satisfy their pro bono obligation through participation in a program such as the Volunteer Lawyers Project, where an attorney's skills can be matched with a client's needs. One writer has countered the economic burden argument by suggesting that a "hard-luck" exception be incorporated in the mandatory program and that new attorneys attempting to build a client base be relieved of their pro bono obligation for a few years.<sup>130</sup>

The various policy objections do point out the need to thoughtfully consider and address a number of different questions in order to structure and implement a fair pro bono program.<sup>131</sup> Among the matters to be addressed are these: 1) who would be required to donate services; 2) how is the donated service to be measured; 3) what type of service qualifies to meet the obligation; 4) how are cases to be matched with attorneys both to ensure a fair allocation of the burden of service and to ensure that attorneys are given cases that match their expertise; 5) may attorneys fulfill their obligation through group activities; 6) may an attorney "buy out" of his obligation by contributing money instead of services; 7) are there any reasons that would justify excusing an attorney from performing the required service; 8) how will the program be administered; and 9) how will the body administering it determine a violation has occurred and what will be the penalty for such a violation? Working out the answers to these questions would require a collective effort. The best approach may be to assign a group of attorneys within a state the responsibility for fashioning a program, with a period of time for comment by all members of the profession prior to adoption by a state's highest court through amendment of the bar rules. Only in this way will a workable system, adapted to the needs of each state and perceived as fair by the members of the profession practicing in that state, emerge.

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130. Comment, *Mandatory Pro Bono*, *supra* note 109, at 373. The hard-luck exception would be one granted in a very limited number of circumstances for a particular year's service requirement. *Id.*

131. There is not necessarily a "best way" to proceed inasmuch as no state has yet adopted such a program. As seen from the New York and Maryland legal needs studies, there is a divergence of opinion even on the issue of whether the service requirement should be measured in terms of the number of cases accepted (Maryland approach) or in terms of the number of hours donated (New York approach). See *infra* note 134.

*F. Existing Rules and Calls for Change*

At the present time there is no state that imposes a mandatory pro bono requirement on all its attorneys. Until this happens, it is unlikely that the constitutional issues will be definitively resolved or the policy issues squarely addressed. The unsettled nature of the matter has not silenced the call for mandatory pro bono in some states and within the American Bar Association. Following the studies of legal needs within their states, the Maryland Advisory Council<sup>132</sup> and New York Committee to Improve the Availability of Legal Services<sup>133</sup> both recommended a mandatory pro bono requirement through changes in bar rules.<sup>134</sup> The mandatory pro bono requirement was by no means the only recommendation of either group, but in spite of a variety of other proposals to help the indigent with obtaining legal assistance, the mandatory pro bono program was considered necessary.<sup>135</sup> The Arizona Legal Services Committee<sup>136</sup>

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132. The Advisory Council was established by the Maryland Legal Services Corporation to study the needs of the poor. Chaired by Congressman Benjamin Cardin, the Council included a cross section of lawyers, public officials, legislators, judges, and human services leaders. MARYLAND ACTION PLAN, *supra* note 8, at 2.

133. The New York Committee was appointed by the Chief Judge of the State of New York. Its mission was similar to the Maryland Council and its membership included private practitioners, legal services providers, academics, and public officials. NEW YORK PRELIMINARY REPORT, *supra* note 8, at 1-2.

134. The Maryland Council recommended that the Maryland Court of Appeals : Adopt a rule requiring all private attorneys to accept at least one civil case annually on behalf of an indigent person without compensation upon referral from the Maryland Volunteer Lawyers Service, Legal Aid Bureau, Maryland Disability Law Center, or other nonprofit or bar association-sponsored program providing civil legal assistance to low-income persons under guidelines established by the Maryland Legal Services Corporation Act; and requiring all other licensed attorneys to perform some form of appropriate law related services on behalf of low-income persons.

MARYLAND ACTION PLAN, *supra* note 8, at 32. For an excellent series of articles on the subject of expanding pro bono services in Maryland, written after the above recommendation was made, see *Symposium*, 49 Md. L. Rev. 1-102 (1990).

The New York Committee proposed the following requirement:

Except as otherwise provided . . . every attorney who is required to file a registration statement . . . shall have the obligation to perform a minimum of forty (40) hours of qualifying services during each two (2) year registration period. This obligation shall be performed personally, except as otherwise permitted . . .

NEW YORK PRELIMINARY REPORT, *supra* note 8, at 78. The Committee further recommended that a group of attorneys be allowed to work together to fulfill the requirement provided records of the group's activities were kept. Members of a group, however, must have been admitted to practice in the state for more than two years. *Id.* at 79. Attorneys who practice in firms with fewer than 10 attorneys and who have been admitted to practice for more than two years also were given the option of satisfying all or part of their service requirement by paying \$50 per hour of qualifying services not performed. *Id.* at 79-80. The money could be paid to any of several approved programs. *Id.* at 80.

135. The Maryland Council recommended, among other things, increased federal

also focused much of its attention on mandatory pro bono but declined to recommend a mandatory requirement.<sup>137</sup> The Arizona Committee instead decided to promote a debate and dialogue concerning mandatory, as distinguished from voluntary, pro bono among members of the bar during 1990.<sup>138</sup> It further specified that the "debate take place against a backdrop that the State Bar will assess, in one year's time, whether volunteerism is working."<sup>139</sup> If volunteerism did not work, then the Committee was prepared to recommend abandoning a voluntary rule for a mandatory one.<sup>140</sup>

Ten years ago the ABA Commission on Evaluation of Professional Standards (known as the Kutak Commission) included in its discussion draft of the proposed Model Rules of Professional Conduct a rule that would have required attorneys to provide unpaid public service and to make annual reports concerning such service.<sup>141</sup> The rule met with such resistance that the entire set of model rules was threatened, and the Commission decided to eliminate its proposed requirement.<sup>142</sup> At present, the ABA's Model Rule 6.1 contains non-

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and state funding; a mandatory IOLTA program; surcharges on civil filing fees; mandatory pro bono for law school students; a law school loan forgiveness program for those entering public service careers; and expanded education and public information programs. MARYLAND ACTION PLAN, *supra* note 8, at 31-36.

The New York Committee recommended, in addition to mandatory pro bono, a law school loan forgiveness program; increased use of retired lawyers; increased use of paralegals; increased community education; increased federal and state funding; and the expansion of compensated appointed counsel in areas relating to housing, public assistance, matrimonial and child support. NEW YORK PRELIMINARY REPORT, *supra* note 8, at 59-64.

136. The Arizona Committee is a committee of the state bar association that was formed in 1982. In 1988 the bar association's board of governors asked the committee to study ways to improve and expand the delivery of legal services to the poor. ARIZONA MAJORITY REPORT, *supra* note 8, at 51, 55.

137. The Committee stated in its report that a majority of the committee favored a mandatory requirement but felt the state bar was not ready for such a step. *Id.* at 5. A separate Minority Report was written, and that report specifically recommended a mandatory pro bono requirement. State Bar of Arizona, LEGAL SERVICES COMMITTEE MINORITY REPORT at 34-35 (1989).

138. ARIZONA MAJORITY REPORT, *supra* note 8, at 5-6. The Committee felt a debate would, among other things, focus attention on the needs of the poor and encourage greater voluntary efforts by the bar. *Id.* at 6.

139. *Id.* at 6. The report recommended that a survey of attorneys be conducted during the year to determine how many hours are being devoted to pro bono work. *Id.* at 6-11.

140. *Id.* at 6.

141. Smith, *supra* note 122, at 727-28.

142. *Id.* at 728. Opposition arose for both philosophical and political reasons and because of several shortcomings of the rule as proposed. *Id.* For example, the rule did not specify how many hours should be devoted to pro bono work, and the annual reporting system appeared cumbersome and reflected an unwarranted lack of confidence in lawyers. *Id.* Constitutional arguments based on the fifth and fourteenth amendments were also voiced, though they do not appear to have been the centerpiece of the objections. See 1 G. HAZARD & W. HODES, THE LAW OF LAWYERING: A

enforceable language stating that "[a] lawyer should render public interest legal service."<sup>143</sup>

Maine also has a rule regarding public interest legal service. It is found in Maine Bar Rule 3.10, which reads in part: "A lawyer engaged in active practice in the State of Maine should render unpaid public interest legal service of a type and amount reasonable in all the circumstances."<sup>144</sup> It is an entirely voluntary rule without any guidelines as to what constitutes a reasonable amount of service. It does, however, spell out the types of service that qualify under the rule.<sup>145</sup>

Despite the lack of any statewide program mandating pro bono services or of a stronger ABA model rule, a few local bar associations have incorporated mandatory pro bono requirements in their regulations.<sup>146</sup> The Orange County Bar Association of Florida is an example of such a program. Membership is voluntary but those who join are required to accept two pro bono referrals each year or to pay \$250 in lieu of accepting such referrals.<sup>147</sup> The Orange County program has approximately 13,500 public contacts a year and repre-

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HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 491-92 (1989). No mention of the constitutional arguments is made in the Smith article, *supra* note 122.

143. MODEL RULE OF PROFESSIONAL CONDUCT Rule 6.1. Recently the ABA's House of Delegates adopted a resolution to the effect that lawyers should devote at least 50 hours to pro bono work. Marcotte, *Pro Bono Policy Passed*, 74 ABA J. 140 (Oct. 1988).

144. When proposed, the rule used the words "shall render unpaid public interest legal service" rather than "should render unpaid public interest legal service." See PROPOSED RULE 3.10, Supp. Report of the Advisory Comm. on Code of Prof. Resp. (Nov. 3, 1983) (on file with the author). It appears that opposition to a mandatory rule was so strong that the Maine Supreme Judicial Court promulgated it using the word "should."

145. This includes services provided to persons of limited means at no fee or at a reduced fee; participation in a program such as VLP; services at no fee or a reduced fee for charitable organizations that provide support for the indigent; and services aimed at improving the law, the legal system or the legal profession. M. Bar R. 3.10. The types of service found in the Maine rule are more narrowly drawn and more demanding than those listed in its ABA counterpart. See Me. Rptr., 467-78 A.2d xxviii LIX.

146. See Comment, *Mandatory Pro Bono*, *supra* note 109, at 365.

147. Marin-Rosa & Stepter, *Orange County—Mandatory Pro Bono in a Voluntary Bar Association*, 59 FLA. B. J. 21 (Dec. 1985). The Orange County Bar Association formed a nonprofit corporation, The Legal Aid Society of the Orange County Bar Association, Inc., which serves both as a law firm and as the referral mechanism for all lawyers in the bar association not opting to pay \$250 in lieu of service. *Id.* The Bar Association made a decision not to try to obtain federal funding for its Legal Aid Society because of the loss of local control over the program and the uncertainty of future federal funding. *Id.* The Society's budget, approximately \$450,000 in 1984, is derived from surcharges on Orange County court filing fees, the amounts paid by members in lieu of service contributions, and grants. *Id.* at 21-22. There are approximately 1,500 members of the bar association. *Id.* at 22.

sents about 1,500 persons in litigation.<sup>148</sup> This shows what can be accomplished by a well-organized group with a high participation rate.

Another type of mandatory program that has begun to take root involves law schools. In 1987, Tulane Law School became the first law school in the country to require students to perform a specified number of hours of legal service on behalf of indigents in order to graduate.<sup>149</sup> The University of Pennsylvania Law School followed suit in 1989 by adding a graduation requirement of free public service work for its students.<sup>150</sup> The schools see benefits for both the students and those receiving legal services. The students learn practical skills, have the opportunity to develop a "mentor relationship" with a practicing attorney,<sup>151</sup> and, it is hoped, are instilled with a sense of public service that will carry over into their careers.<sup>152</sup>

#### IV. SHOULD MAINE ADOPT A MANDATORY PRO BONO RULE?

The study completed by the Maine Commission on Legal Needs has documented the need for a greatly increased level of legal services for Maine's poor.<sup>153</sup> Given existing resources, the major legal services providers and the referral system of the Volunteer Lawyers Project cannot meet that need. It seems clear that a much higher level of attorney participation is necessary if the goal of providing access to justice for all of Maine's citizens is to be achieved. The obvious way to increase attorney participation is to mandate it. Not only would the goal come closer to realization, but also the higher level of attorney participation in work that assists the poor would contribute to an improved public image for the profession.

One way of mandating pro bono work would be to bring a case before the Maine Supreme Judicial Court that raises the issue of the judiciary's inherent authority to appoint counsel for indigents in civil matters. Assuming, however, that the Maine court decides that such authority exists, this would, at best, approach the problem in a piecemeal fashion. It would not result in profession-wide pro bono work, but would simply give the trial court discretion to appoint counsel for indigent litigants.

Involving the entire profession in pro bono work would be accom-

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148. *Id.* at 22.

149. 1988-1989 Tulane Law School Catalog. The requirement is 20 hours of service. Students are assigned to an attorney who has been allocated a case by the New Orleans Pro Bono Project. *Id.*

150. *Penn Law School Move on Pro Bono Work Courts Public Service in Young Lawyers*, Wall St. J., May 22, 1989. The Penn Law School requirement involves 35 hours in each of the second and third years of school. *Id.*

151. *Id.* Students may also benefit by obtaining a job reference or possibly even a future employer. *Id.*

152. 1988-1989 Tulane Law School Catalog.

153. *See supra* notes 13-23 and accompanying text.

plished most easily by having the Maine Supreme Judicial Court amend the Maine Bar Rules to mandate it. Such an amendment would amount to an exercise of the court's inherent authority to regulate the practice of law. Any changes in the rules, however, should come only after a careful and thorough consideration of the policy issues and other matters raised in part III(E) of this Comment, in order to ensure that a fair and workable pro bono system is the result. Is Maine ready for such a step?

Adopting a bar rule in Maine that would mandate pro bono efforts may be premature at this juncture. This is so not because of the various constitutional objections that have been raised or because of the complexities in fashioning a program, and certainly not because there is little need for lawyers to participate. Rather, it is because Maine already has built a good base founded on volunteerism.<sup>154</sup> Maine attorneys should be given an opportunity to build on this base with state and local bar associations taking the lead.<sup>155</sup>

The various bar associations should actively encourage greater participation in the Volunteer Lawyers Project<sup>156</sup> by providing incentives and benefits to attorneys who take cases referred by VLP.<sup>157</sup> They should go a step further by giving serious consideration to making participation in VLP a requirement of membership. They should assume a key role in helping to make Maine's poor

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154. Maine not only has the highest participation rate (over 70%) in its IOLTA program among voluntary state programs, but also the attorney participation rate in VLP (about 60%) is far higher than the national average of 15%. Schendel, *Message from the President*, MAINE BAR FOUND. 1989 ANNUAL REPORT.

155. While the problem of access to justice for all is really a problem for all Maine citizens to help resolve, it is not the purpose of this Comment to focus on what public officials or the average citizen should do. It does seem appropriate, however, for attorneys to take the lead in solving the problem inasmuch as attorneys, by virtue of their licensing monopoly, are the only ones in a position to provide the needed services.

156. It is clear that VLP is underutilized in its present form. In other words, VLP could handle more cases than it does with the lawyers already participating in the program. VLP has a panel of approximately 1,500 lawyers willing to accept up to three cases per year. Statistics show that 898 cases were referred for pro bono representation (either with or without litigation) in 1988, well under the three cases per attorney limit. COMMISSION REPORT, *supra* note 4, at 59. It is quite likely the underutilization results from the fact that many were not able to reach VLP by telephone due to an insufficient number of phone lines and from the fact that many of Maine's poor are unaware of the free legal assistance available to them. These facts were documented by the Maine Commission on Legal Needs. See *supra* notes 19 and 25 and accompanying text. State and local bar associations can help solve the underutilization problem by taking the initiative to inform the public of this resource.

157. One possible benefit is to provide free legal training and education for attorneys willing to take indigent cases outside their areas of expertise. Such training could prove useful in their regular law practices. Another incentive involves publicly recognizing attorneys who are making significant contributions in the public interest area, not only through bar association publicity but also through media coverage. A third possibility is to establish a fund so that attorneys representing the indigent can be reimbursed for their out-of-pocket expenses.

population aware of the free services available, and they should cooperate in the effort to provide Maine's rural poor with access to more attorneys.<sup>158</sup> Moreover, the State Bar Association should recommend changes in the Maine Bar Rule governing public interest legal service so that the importance of such service is given greater emphasis, and guidelines are established for what constitutes a reasonable amount of such service.<sup>159</sup> Most important of all, the State Bar Association and its members should take an active role in seeing that the recommendations of the Maine Legal Needs Commission are implemented. These recommendations include: establishing a comprehensive IOLTA program, seeking greater federal and state appropriations for legal services organizations, soliciting private contributions for legal assistance for the poor, and developing sliding fee scales to make legal services available to the near poor.<sup>160</sup> In addition, the University of Maine School of Law should adopt a mandatory pro bono requirement for its students, many of whom will become members of Maine's bar associations.<sup>161</sup> Newly admitted attorneys will then already have experience assisting the poor and will be prepared to carry on with such work in their careers.

Maine's attorneys should be given an opportunity to voluntarily respond to the indigent's need for legal services. If the response is not forthcoming, however, serious consideration must then be given to adopting a mandatory pro bono requirement.

Wendy F. Rau

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158. A 1988 survey of the practice of law in Maine revealed that nearly 75% of all lawyers practicing in Maine are working in either the greater Portland area, one of the larger cities (defined as Lewiston/Auburn, Bangor/Brewer and Biddeford/Saco), or one of the smaller cities (Augusta, Waterville, Brunswick, Sanford, Presque Isle, Caribou). THE 1988 SURVEY OF THE PRACTICE OF LAW IN MAINE FINAL REPORT (Nov. 1988) at 5 and Figure 8. Also noteworthy is the fact that only 2.2% of Maine's attorneys work in legal aid. *Id.* Figure 12.

159. A reasonable amount of service can be defined either in terms of the number of hours devoted to public service work or in terms of accepting a specified number of cases per year.

160. COMMISSION REPORT, *supra* note 4, at 12, 16.

161. Such a program would benefit the students and the poor alike and hopefully instill newly admitted lawyers with a continuing appreciation of the need to assist the indigent. A suggested approach for the University of Maine School of Law is to require students to complete 20 hours in each of the second and third years of school. A coordinator at the law school could work with VLP and the various legal services providers to assign students to assist an attorney working on a pro bono case. Enough flexibility should be built into the program to enable students to put forward their own proposals for satisfying the requirement with approval of the school.