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The Structural Underpinnings of Access to Justice: Building A Solid Pro Bono Infrastructure

Latonia Haney Keith

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**THE STRUCTURAL UNDERPINNINGS OF ACCESS TO
JUSTICE: BUILDING A SOLID PRO BONO INFRASTRUCTURE**

Latonia Haney Keith[†]

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I. INTRODUCTION

When individuals in the United States face civil legal issues, they do not have a constitutional right to legal counsel and therefore must secure paid counsel, proceed pro se, or qualify for free or pro bono legal assistance.¹ The number of Americans who are unable to afford legal counsel is now at an all-time high, and studies have shown that roughly 80% of the civil legal needs of low-income and modest-means Americans go unmet.² Because the civil legal system is designed to

1. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (holding that in criminal cases where the defendant faces imprisonment or the loss of physical liberty, the defendant has a right to state-funded counsel). *But see* *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (declining to recognize a constitutional right to counsel for indigent persons facing civil contempt charges and the prospect of imprisonment); *Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981) (holding that the Due Process Clause of the United States Constitution did not provide for a right to appointed counsel for indigent parents facing the termination of their parental rights).

2. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 14 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/7Z5N-EZDQ>] (finding that “[e]ighty-six percent of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help”); Rebecca Buckwalter-Poza, *Making Justice Equal*, *CTR. FOR AM. PROGRESS* (Dec. 8, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal> [<https://perma.cc/73PY-QM4N>] (“Past estimates and more recent state-by-state studies suggest that about 80 percent of the civil legal needs of those living in poverty go unmet as well as 40 to 60 percent of the needs of middle-income Americans.”) (footnotes omitted); *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<https://perma.cc/WEB2-U5BS>] (“State studies consistently show a higher percentage (80%) of the civil legal needs of the eligible population are not being met.”).

require an attorney in most, if not all, legal situations,³ this ever-widening justice gap has sparked a national conversation on access to justice, particularly for those who cannot afford to pay for the legal assistance that they need.⁴

Indeed, a civil access to justice movement has emerged that is insisting, with increasing urgency, that these problems be confronted and solved, not only for the benefit of individuals, families, and communities, but also to promote the stability of the rule of law and of the larger society.⁵ As part of and in response to this movement, the

3. See Lincoln Caplan, *The Justice Gap: America's Unfulfilled Promise of "Equal Justice Under Law"*, HARV. MAGAZINE, Nov.-Dec. 2017, <https://harvardmagazine.com/2017/11/unequal-justice-america> [<https://perma.cc/R2QV-BTKQ>] (noting how Reginald Heber Smith's visionary book entitled *JUSTICE AND THE POOR* "recounted how American lawyers had devised a system of substantive law and legal procedure so convoluted that it denied access to justice to anyone who didn't have a lawyer to navigate it"); see also ALAN W. HOUSEMAN, *THE JUSTICE GAP: CIVIL LEGAL ASSISTANCE TODAY AND TOMORROW* 1, 3 (2011), <https://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf> [<https://perma.cc/JI9B-9NG2>] ("Without the services of a lawyer, low-income people with civil legal problems may have no practical way of protecting their rights and advancing their interests.").

4. See Caplan, *supra* note 3 (describing the access to justice debate as follows: "The main divisions in the debate today are about resources: between those who want to see [Reginald Heber] Smith's vision realized, with lawyers central to the story, and others who are convinced it's not possible to provide enough lawyers to meet the need—and who also believe that, in many instances, a lawyer isn't needed to solve the problem; and between those who think it's essential for the federal government to fund legal aid (with many convinced the government should provide much more money than it now does) and others, like officials in the Trump White House, who say the federal government should have no role in paying for legal aid."); see also Jennifer S. Bard & Larry Cunningham, *The Legal Profession is Failing Low-Income and Middle-Class People. Let's Fix That*, WASH. POST (June 5, 2017), https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html?utm_term=.211d75c9824c [<https://perma.cc/BM7E-XTN7>]; Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES (Mar. 15, 2013), <https://www.nytimes.com/2013/03/16/us/16gideon.html> [<https://perma.cc/9XKK-2W9V>]; Elizabeth Carr, *No Justice for Most: Brainstorming to Improve Access to Justice*, HARV. L. TODAY (Nov. 16, 2017), <https://today.law.harvard.edu/no-justice-brainstorming-improve-access-justice> [<https://perma.cc/26RP-JR6F>].

5. See Mary E. McClymont, *A Solution for the Access Crisis in our Civil Justice System, Voices of the Governing Institute*, GOVERNING (Mar. 30, 2017), <http://www.governing.com/gov-institute/voices/col-access-crisis-civil-justice-system-access-for-all-project.html> [<https://perma.cc/5V78-MZ58>] ("[T]here is both widespread awareness of the crisis in our civil justice system and a formidable will to

National Center for Access to Justice (NCAJ) at Fordham University School of Law created the Justice Index in 2014 with the goal of supporting the expansion of access to justice in state justice systems.⁶ The Justice Index, the first online resource of its kind,⁷ provides a comprehensive, visual picture of selected best law, rules, and policies for ensuring access to justice across the United States.⁸ The Justice Index relies on data-analytics tools to score and rank the fifty states, the District of Columbia, and Puerto Rico on their adoption of these selected best practices, making it easy for advocates to champion, and creating an incentive for state officials to replicate those practices.⁹ The Justice Index, in essence, seeks to “ensure that a person’s ability to protect and vindicate her rights in a state justice system does not depend on whether she can afford a lawyer, speak and understand English, or navigate the legal system without an accommodation due to a physical or mental disability.”¹⁰

In evaluating each jurisdiction’s infrastructure, the Justice Index incorporates indicators that are widely accepted by civil legal aid and public interest organizations, the courts, and experts in the field.¹¹ The NCAJ chose indicators that it believes address essential elements for expanding access to justice and provide a broader sense of the level of commitment made by each jurisdiction to an accessible legal system.¹² In line with the Conference of Chief Justices and Conference of State Court Administrators’ resolution, which encourages state

come together to remedy it.”); see also John Pollock, *It’s All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 HUM. RTS. 4, 12–13 (2013) (“[I]t is our hope, and our mission, to ensure that new rights to counsel are accompanied by sufficient funding in order to avoid the nightmare caseload scenario that has plagued indigent defense.”); Carr, *supra* note 4 (“[T]he legal profession should look to other industries that have overcome similar issues surrounding access to services”).

6. *About the Justice Index*, JUSTICE INDEX, <https://justiceindex.org/about> [https://perma.cc/5SF4-KZEU].

7. *Meet the Leader Series: Advancing Equity Through Criminal Justice Reform and Social Policy*, GEPHARDT INST. FOR CIVIC & COMMUNITY ENGAGEMENT, <https://gephardt.institute.wustl.edu/meet-the-leader-series-criminal-justice-organizations> [https://perma.cc/UMG7-U7VJ].

8. *Overall Scores and Rankings*, JUSTICE INDEX, <https://justiceindex.org/2016-findings/findings> [https://perma.cc/T94Y-D7N8].

9. See *About the Justice Index*, *supra* note 6.

10. *Id.*

11. *General Methodology*, JUSTICE INDEX, <https://justiceindex.org/methodology> [https://perma.cc/5RUW-4UV6].

12. *Id.*

courts to assure “100 percent access to effective assistance for essential civil legal needs,”¹³ the Justice Index sorts its indicators into four key categories: (1) attorney access (the number of lawyers serving low-income communities) (hereinafter referred to as the Attorney Access Index); (2) self-representation (access for people without lawyers); (3) language access (access for people with limited English proficiency); and (5) disability access (access for people with disabilities).¹⁴ Pursuant to its vision, “[t]he laws, rules and policies tracked by the Justice Index represent a critical framework . . . [that jurisdictions should adopt in order] to provide access to justice to their most vulnerable residents.”¹⁵

However, in evaluating attorney access, the Justice Index has yet to incorporate a critical indicator—pro bono legal services provided by the private bar. Currently, for the Attorney Access Index, the Justice Index relies on a single criterion: the “civil legal aid attorney ratio.”¹⁶ To calculate this ratio, the NCAJ divides “the number of full-time-equivalent civil legal aid attorneys employed in the state by the number of people in the state with incomes at or below 200% of the federal poverty [guidelines].”¹⁷ Incorporating pro bono legal assistance as an indicator within the Attorney Access Index is challenging; largely due to the complexity and inconsistency of data collection across the public interest community, as well as the lack of

13. CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL 1 (2015), https://www.ncsc.org/~media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx [<https://perma.cc/5HHE-C2S8>]. The Justice Index’s indicators also parallel the criteria identified by Justice for All, a project supported by the Public Welfare Foundation and housed at the National Center for State Courts that aims to support the efforts of states to realize the vision articulated in Resolution 5. See *Justice for All Implementation Awards Announced*, CTR. ON COURT ACCESS TO JUSTICE FOR ALL, <https://www.ncsc.org/microsites/access-to-justice/home/Justice-for-All-Project.aspx> [<https://perma.cc/8LTA-MHXG>].

14. *Justice Index 2016 Findings*, THE JUSTICE INDEX, <https://justiceindex.org/2016-findings> [<https://perma.cc/BTL7-HDVM>].

15. *Why Access to Justice Matters*, THE JUSTICE INDEX, <https://justiceindex.org/our-vision/#site-navigation> [<https://perma.cc/B6CZ-AXEJ>].

16. *Counting the Number of Lawyers for the Poor*, THE JUSTICE INDEX, <https://justiceindex.org/methodology/overall-methodology/> [<https://perma.cc/ZQ R3-C8LZ>].

17. *Id.*

analysis surrounding the best practices necessary for states to develop a pro bono infrastructure to expand access to justice.¹⁸

As the NCAJ is embarking on its third rendition of the Justice Index in 2018,¹⁹ now is the time to revise the Attorney Access Index to incorporate not only the “civil legal aid attorney ratio” but also civil Gideon laws²⁰ and the best practices or best models for developing a strong pro bono infrastructure.²¹ As such, this article will explore and evaluate the laws, rules, and policies that some states have adopted and the public interest community has proffered as best practices for promoting pro bono. Such policies include: (1) the adoption of ABA Model Rules 6.1 and 6.5 and ABA Model Code of Judicial Conduct Rule 3.7(B); (2) requiring pro bono service as a condition to becoming licensed for law practice; (3) permitting attorneys who take pro bono

18. See Phoebe A. Haddon, Dean, Univ. of Md. Francis King Carey School of Law, Too Many Lawyers? Too Few Jobs? Bridging the Justice Gap, Address Before the American Law Institute Annual Meeting (May 20, 2014), <https://vimeo.com/americanlawinstitute/portfolio/video/97545999> [<https://perma.cc/HE9U-PSNV>] (“[T]here is no uniform national compilation of statistics on unrepresented litigants. *None* . . . The absence of uniform statistical data on unrepresented litigants prevents us from fully grasping the dimensions of this access problem and the complexities of solutions that might actually succeed. I think it compromises our ability to really think very constructively and make sound strategic decisions. *We don’t know* how to allocate scarce resources or which kind of initiatives ought to take priority over others. *We need* sustained evidence-based studies to inform our access work.” (emphasis added)); see also Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 59 (2016), <https://scholarship.law.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3397&context=lawreview> [<http://perma.cc/VMK2-3YTG>] (“[D]ue to a high degree of fragmentation in the civil legal aid system, a comprehensive national study does not exist to provide a clear picture.”).

19. Telephone Interview with David Udell, Exec. Dir., Nat’l Ctr. for Access to Justice, and Jamie Gamble, Senior Counsel & Dir., Justice Index Project, Nat’l Ctr. for Access to Justice (June 26, 2017). The NCAJ originally launched the Justice Index in 2014 using data collected in 2012 and 2013. *About the Justice Index*, *supra* note 6. The NCAJ refined its methodology and re-launched the Justice Index in 2016 based on data collected in 2015. *Id.*

20. See Keith, *supra* note 18, at 77–78 (“Though there is no constitutional right to counsel in civil proceedings, some state legislatures have enacted statutes and some state courts have judicially decided that state-funded counsel should be provided as a right to some parties, typically concerning civil commitment or family law issues.”).

21. See Latonia Haney Keith, Survey: Incorporating Pro Bono into the Justice Index (June 28, 2018) (electronic survey via Qualtrics) (on file with author) [hereinafter Survey: Incorporating Pro Bono into the Justice Index].

cases to earn credit toward mandatory CLE requirements; (4) reporting requirements for pro bono to maintain one's license to practice; and (5) the waiver of license requirements for law professors, in-house counsel, retired and inactive attorneys, and out-of-state attorneys assisting individuals and families in a state impacted by a disaster. Upon evaluating the strengths and weaknesses of the policies, this article will take a position on which practices or interventions are the most effective and that all jurisdictions should institute as essential elements of a sound pro bono infrastructure; thereby increasing access to justice.

II. EXISTING STATEWIDE RULES, POLICIES, AND INITIATIVES

A. *Model Rule of Professional Conduct 6.1*

In 1969, the American Bar Association's House of Delegates adopted the Model Code of Professional Responsibility, which prescribed the baseline standards of legal ethics and professional responsibility for attorneys in the United States.²² This adoption represented the first time that the American Bar Association articulated an affirmative responsibility of attorneys to engage in pro bono legal services.²³ Under Canon 2 of the Model Code—entitled “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available”—Ethical Consideration 2-25 articulated this responsibility as follows:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation

22. See MODEL CODE OF PROF'L RESPONSIBILITY Preface (AM. BAR ASS'N 1980). Prior to the Model Code, the ABA's standards of professional responsibility for lawyers were governed under the Canons of Professional Ethics. See *id.*

23. *Id.* EC 2-25, nn. 40, 43.

of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.²⁴

Moreover, Canon 8 of the Model Code, entitled “A Lawyer Should Assist in Improving the Legal System,” provided that “[t]hose persons unable to pay for legal services should be provided needed services,”²⁵ and further pronounced that “[t]he advancement of our legal system is of vital importance in maintaining the rule of law and . . . therefore, lawyers should encourage, and should aid in making, needed changes and improvements.”²⁶

Although the ABA characterized all the above statements as “Ethical Considerations” that extolled principles toward which attorneys should aspire, no repercussions actually befell attorneys for their failure to live up to this newly articulated “basic responsibility.”²⁷ The Model Code therefore had very little impact on the behavior of the bar towards assisting disadvantaged communities. A 1972 study on pro bono legal services by the private bar concluded: “We have seen too little evidence of professional as opposed to trade performance by the individual lawyer and no evidence of serious professional self-regulation toward diverting the profession to the pursuit of common good—the public interest.”²⁸ The authors of the study argued “that public interest or pro bono work should be a *duty*

24. *Id.* EC 2-25.

25. *Id.* EC 8-3.

26. *Id.* EC 8-9.

27. *Id.* Preliminary Statement (“The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” (footnotes omitted)).

28. PRIVATE LAWYERS AND THE PUBLIC INTEREST 33 (Robert Granfield & Lynn Mather eds., 2009) [hereinafter PRIVATE LAWYERS AND THE PUBLIC INTEREST] (quoting Dennis Kaufman, *Pro Bono: The Evolution of a Professional Ethos*, 10 PBI EXCHANGE 3, 15 (1992)).

for all lawyers, and linked this duty to the monopoly lawyers hold on legal services.”²⁹

Three years later, the ABA House of Delegates passed a resolution, which the Special Committee on Public Interest Practice originally proposed, aiming to define an attorney’s obligation to engage in pro bono legal services.³⁰ The resolution, referred to as the Montreal Resolution, formally acknowledged that “it is the basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services.”³¹ The resolution further specified the areas in which lawyers should render such services; namely, “poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice.”³² In outlining the resolution’s implementation, the Special Committee on Public Interest Practice recommended “that state and local bar associations adopt guidelines quantifying the pro bono responsibility and assist lawyers in deciding such issues as monetary contribution in lieu of services and the appropriate role of bar association[s] in assisting lawyers to fulfill their responsibility.”³³

In 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct, which overhauled the Model Code.³⁴ Although the House of Delegates incorporated an attorney’s obligation to render pro bono legal services into the black letter of the rules, they refrained from making the pro bono responsibility mandatory.³⁵ In 1980, the ABA Commission on Evaluation of Professional Standards (referred to as the Kutak Commission) published a discussion draft of the proposed Model Rules that included a mandatory pro bono requirement:

A lawyer shall render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal

29. *Id.* (emphasis in original).

30. *See id.*; Ann Juergens & Diane Galatowitsch, *A Call to Cultivate the Public Interest: Beyond Pro Bono*, 51 WASH. U.J.L. & POL’Y 95, 105 (2016).

31. PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 28, at 33 (quoting the resolution).

32. *Id.*

33. *Id.* (quoting Kaufman, *supra* note 28, at 15).

34. MODEL RULES OF PROF’L CONDUCT Preface (AM. BAR ASS’N 2018).

35. *ABA Model Rules of Professional Conduct (pre-2002) History*, LEGAL INFO. INST. (last updated Mar. 2013), <https://www.law.cornell.edu/ethics/aba/2001/history.htm> [<https://perma.cc/3PB8-TJ7Z>] [hereinafter *ABA Rules History*].

profession, or by providing professional services to persons of limited means or to public service groups or organizations. A lawyer shall make an annual report concerning such service to an appropriate regulatory authority.³⁶

The provision, however, faced such strong opposition that “the adoption of the entire set of Model Rules . . . was threatened.”³⁷ The National Organization of Bar Counsel raised several concerns regarding the implementation of the proposed rule including the strain that enforcing the rule would place on a disciplinary body; the lack of a specific amount of pro bono service the provision required attorneys to render; the failure to include an exception for “those attorneys in military, governmental, judicial, or legal services organizations”; and the reflection of an “unwarranted lack of confidence in lawyers.”³⁸ Accordingly, in late 1980, the Kutak Commission announced that it was eliminating the mandatory nature of the proposed rule and removing the reporting requirements.³⁹ The commission’s decision also led to opposition. In an op-ed, Sara-Ann Determan, the then-Chairman of the Special Committee on Public Interest Practice, protested the word change in the proposed rule, stating:

The 1975 Resolution of the A.B.A. House of Delegates on the lawyer’s public service obligation states: “. . . it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services.” Only through mandatory language can the importance of this fundamental obligation be sufficiently underscored. We believe that substituting “should” for “shall” would undesirably weaken the forceful language of the Montreal resolution, reducing what was intended as a statement of obligation to a mere wish, with little or no practical significance.⁴⁰

36. MODEL RULES OF PROF’L CONDUCT r. 8.1 (AM. BAR ASS’N, Discussion Draft 1980).

37. Chesterfield H. Smith, *Mandatory Pro Bono Service Standard—Its Time Has Come*, 35 U. MIAMI L. REV. 727, 727-28 (1981), <https://repository.law.miami.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2349&context=umlr> [http://perma.cc/YC74-CYWZ].

38. *Id.* at 728.

39. *Id.*

40. Sara-Ann Determan, *Protest Word Change*, 67 A.B.A. J. 536 (1981).

Despite this criticism, the ABA withdrew the mandatory nature of the provision and the reporting requirements from the final proposed draft of the Model Rules,⁴¹ rendering the final language purely aspirational:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.⁴²

A decade later, the ABA House of Delegates voted to revise Model Rule 6.1, reiterating the aspirational nature of pro bono in both the text and title of the rule,⁴³ and quantifying the goal—encouraging lawyers to contribute at least fifty hours of pro bono legal services annually.⁴⁴ The new Model Rule 6.1 also incorporated a more refined definition of pro bono, specified the ways in which attorneys may discharge this responsibility, and clarified that “a substantial majority” of an attorney’s commitment to pro bono should be discharged through the provision of legal services to “persons of limited means” or groups “primarily designed to address the needs of persons of limited means.”⁴⁵

In 2002, the ABA House of Delegates once again revised Model Rule 6.1 to add a new sentence at the beginning of the rule emphasizing that “[e]very lawyer has a professional responsibility to

41. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N, Proposed Final Draft 1981) [hereinafter Proposed Final Draft].

42. *ABA Rules History*, *supra* note 35.

43. The title was revised from “Pro Bono Publico Service” (Proposed Final Draft, *supra* note 41, at 84) to “Voluntary Pro Bono Publico Service” (MODEL RULES OF PROF'L CONDUCT r. 6.1)).

44. See *ABA Rules History*, *supra* note 35. The fifty-hour aspirational goal incorporated into the Model Rule aligns with the ABA House of Delegates' adoption in 1988 of the resolution, referred to as the Toronto Resolution, that, among other things: “Urge[d] all attorneys to devote a reasonable amount of time, but in no event less than 50 hours per year, to pro bono and other public service activities that serve those in need or improve the law, the legal system, or the legal profession.” AM. BAR ASS'N, RECOMMENDATION 122A (1988), https://www.americanbar.org/content/dam/aba/directories/policy/1988_am_122a.authcheckdam.pdf [https://perma.cc/WJT8-GJZK].

45. MODEL RULES OF PROF'L CONDUCT r. 6.1.

provide legal services to those unable to pay.”⁴⁶ The revision also added a new Comment 11 stating that “[l]aw firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.”⁴⁷ However, the revised version retained the former Comment 11—now Comment 12—which continues to make clear that “[t]he responsibility set forth in this Rule is not intended to be enforced through disciplinary process.”⁴⁸

With the assistance of the ABA Center for Professional Responsibility’s Policy Implementation Committee, each state, with the exception of California, has adopted rules of professional conduct

46. *Id.* The current text of Model Rule 6.1 is as follows:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

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

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

(b) provide any additional services through:

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate;
- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Id.

47. *Id.* cmt. 11.

48. *Id.* cmt. 12.

that follow the format of or closely align with the Model Rules.⁴⁹ Additionally, most jurisdictions have adopted some version of Model Rule 6.1 in their rules of professional conduct. Six jurisdictions incorporate verbatim the current version of Model Rule 6.1 into their rules;⁵⁰ whereas thirteen jurisdictions mimic the current version with certain revisions.⁵¹ Moreover, eight jurisdictions incorporate a rule

49. *Model Rules of Professional Conduct*, AM. BAR ASS'N (Sept. 27, 2018), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [<https://perma.cc/ST4R-GE96>].

50. ALASKA RULES OF PROF'L CONDUCT r. 6.1 (2018); ARK. RULES OF PROF'L CONDUCT r. 6.1 (2014); IOWA RULES OF PROF'L CONDUCT r. 6.1 (2012); MINN. RULES OF PROF'L CONDUCT r. 6.1 (2015); R.I. RULES OF PROF'L CONDUCT r. 6.1 (2007); WIS. RULES OF PROF'L CONDUCT r. 6.1 (2017).

51. COLO. RULES OF PROF'L CONDUCT r. 6.1 (2016) (including an additional comment encouraging law firms to adopt a pro bono policy); IDAHO RULES OF PROF'L CONDUCT r. 6.1 (2014) (removing a part of the last clause of Model Rule 6.1(b)(1)); LA. LAWYERS' RULES OF PROF'L CONDUCT r. 6.1 (2004) (omitting the final paragraph of the Model Rule and all comments); ME. RULES OF PROF'L CONDUCT r. 6.1 (2014) (removing the "substantial majority" requirement and the suggested amount of hours); MONT. RULES OF PROF'L CONDUCT r. 6.1 (2017) (removing the word "voluntary" from the title of the rule and omitting all comments); NEB. RULES OF PROF'L CONDUCT r. 6.1 (2008) (omitting the language specifying a commitment of at least 50 hours); N.H. RULES OF PROF'L CONDUCT r. 6.1 (2004) (reducing the annual pro bono commitment to at least thirty hours); N.M. RULES OF PROF'L CONDUCT r. 16-601 (2016); N.M. RULES GOVERNING N.M. BAR r. 24-108 (2016) (permitting attorneys to discharge their pro bono commitment by contributing \$500 per year to legal services organizations or some combination of pro bono hours and financial contribution, and incorporating a mandatory pro bono reporting requirement); N.C. RULES OF PROF'L CONDUCT r. 6.1 (2003) (moving Model Rule 6.1(b)(1) under section (a) creating a new sub-section (3)); UTAH RULES OF PROF'L CONDUCT r. 6.1 (2015) (adding a provision that lawyers may "discharge the responsibility to provide pro bono publico legal services by making an annual contribution [to a legal services provider] of at least \$10 per hour for each hour not provided under [the rule]," and a provision instituting a voluntary pro bono reporting requirement); VT. RULES OF PROF'L CONDUCT r. 6.1 (2014) (removing the words "aspire to" from the second sentence); WASH. RULES OF PROF'L CONDUCT r. 6.1 (2015) (reducing the annual pro bono commitment to at least thirty hours, but providing for recognition to attorneys reporting at least fifty hours to the Washington State Bar Association, removing the specification that the majority of pro bono hours be provided without fee or expectation of the fee, and omitting the language relating to voluntary contributions of financial support to legal services organizations); WYO. RULES OF PROF'L CONDUCT r. 6.1 (2014) (revising the final paragraph to permit attorneys to substitute their pro bono commitment by "voluntarily contribut[ing] \$500.00 per year to any existing non-profit organization which provides direct legal assistance to persons of limited means").

more closely aligned with either the 1993 version⁵² or the 1983 version,⁵³ whereas eleven jurisdictions incorporate the original 1983 version verbatim into their rules of professional conduct.⁵⁴ Twelve jurisdictions, however, incorporate an aspirational commitment to pro bono in their rules of professional conduct or in state bar or high court resolutions through language distinct from Model Rule 6.1.⁵⁵

52. GA. RULES OF PROF'L CONDUCT r. 6.1 (2001) (adding a provision that states "[n]o reporting rules or requirements may be imposed without specific permission of the Supreme Court granted through amendments to these Rules"); HAW. RULES OF PROF'L CONDUCT r. 6.1 (2014) (revising section (a) of Model Rule 6.1 to read "provide at least 25 hours of legal services," rather than "provide a substantial majority of the (50) hours of legal services"; adding a provision to permit attorneys to discharge their pro bono commitment by "contributing at least \$500 each year" to a legal services provider; adding the new Comment 11 in the 2002 version; and omitting the word "voluntary" from the title of the rule); MASS. RULES OF PROF'L CONDUCT r. 6.1 (2018) (reducing the annual pro bono commitment to at least twenty-five hours; revising the final paragraph to state that Massachusetts lawyers should "contribute from \$250 to 1 percent of the lawyer's annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means"; and omitting several comments); TENN. RULES OF PROF'L CONDUCT r. 6.1 (2018) (adding the new Comment 11 in the 2002 version).

53. D.C. RULES OF PROF'L CONDUCT r. 6.1 (2007) (adding the new Comment 11 in the 2002 version and a comment that "call[s] on members of the D.C. Bar, at a minimum, each year to (1) accept one court appointment, (2) provide 50 hours of pro bono legal service, or (3) when personal representation is not feasible, contribute the lesser of \$750 or 1 percent of earned income to a legal assistance organization"); KY. RULES OF PROF'L CONDUCT r. 6.1 (1994) (adding the aspirational fifty-hour annual goal in future versions of the Model Rule, incorporating a voluntary pro bono reporting requirement, and providing for recognition to attorneys reporting at least fifty hours to the Kentucky Bar Association); OKLA. RULES OF PROF'L CONDUCT r. 6.1 (2008) (incorporating minor word changes with no substantive effect); S.D. RULES OF PROF'L CONDUCT r. 6.1 (2004) (incorporating minor word changes with no substantive effect).

54. ALA. RULES OF PROF'L CONDUCT r. 6.1 (2007); CONN. RULES OF PROF'L CONDUCT r. 6.1 (2018); DEL. LAWYERS' RULES OF PROF'L CONDUCT r. 6.1 (2010); IND. RULES OF PROF'L CONDUCT r. 6.1 (2018); KAN. RULES OF PROF'L CONDUCT r. 6.1 (2007); MO. RULES OF PROF'L CONDUCT r. 6.1 (2007); N.J. RULES OF PROF'L CONDUCT r. 6.1 (2004); N.D. RULES OF PROF'L CONDUCT r. 6.1 (2006); PA. RULES OF PROF'L CONDUCT r. 6.1 (2018); S.C. RULES OF PROF'L CONDUCT r. 6.1 (2017); W. VA. RULES OF PROF'L CONDUCT r. 6.1 (2015).

55. ARIZ. RULES OF PROF'L CONDUCT r. 6.1 (2004) (permitting attorneys who commit in excess of fifty hours to carryover the excess hours to subsequent years, a pro rate reduction of the fifty-hour goal for part-time attorneys, and a law firm or group of lawyers to satisfy their responsibility collectively); STATE BAR OF CAL., PRO BONO RESOLUTION (2002) (urging law firms and governmental and corporate employers to count at least fifty pro bono hours per year to any billable hour requirements and law schools to both encourage participation in pro bono by law students and require "any

law firm wishing to recruit on campus to provide a written statement of its policy” regarding its pro bono commitment); CAL. BUS. & PROF’L CODE § 6068 (2004) (mandating that “[i]t is the duty of an attorney . . . [n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed”); FLA. RULES OF PROF’L CONDUCT r. 4-6.1 (2018) (reducing the pro bono commitment to twenty hours; allowing attorneys to discharge their pro bono commitment by contributing \$350 to a legal aid organization; permitting attorneys to carry over excess hours; allowing collective satisfaction of the requirement; incorporating a mandatory pro bono reporting requirement; and exempting members of the judiciary and their staff, certain government lawyers, and retired, inactive, or suspended attorneys from complying with this responsibility); MD. LAWYERS’ RULES OF PROF’L CONDUCT r. 6.1 (2016) (permitting a pro rata reduction of the fifty-hour goal for part-time attorneys; moving the language under Model Rule 6.1(b)(1) and (b)(2) to fall under the “substantial majority” language under Model Rule 6.1(a); omitting most comments; and inserting into the black letter of the rule a provision entitled “Effect of Noncompliance,” which states: “This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions”); MICH. RULES OF PROF’L CONDUCT r. 6.1 (2018); STATE BAR OF MICH., VOLUNTARY PRO BONO STANDARD (2012) (encouraging Michigan attorneys to represent pro bono “a minimum of three low income individuals,” commit at least thirty hours to pro bono service, or contribute a minimum of \$300 annually or a minimum of \$500 annually “for those lawyers whose income allows a higher contribution”); MISS. RULES OF PROF’L CONDUCT r. 6.1 (2005) (reducing the pro bono commitment to twenty hours; allowing attorneys to discharge their pro bono commitment by contributing \$200 to the Mississippi Bar; permitting attorneys to carry over excess hours; allowing collective satisfaction of the requirement; incorporating a mandatory pro bono reporting requirement, and exempting members of the judiciary and their staff, certain government lawyers, legal aid lawyers, retired, inactive, or suspended attorneys, and “lawyers who are restricted from practicing law outside their specific employment” from complying with this responsibility); NEV. RULES OF PROF’L CONDUCT r. 6.1 (2018) (reducing the pro bono commitment to twenty hours; allowing attorneys to discharge their pro bono commitment by either providing sixty hours of services annually “at a substantially reduced fee to persons of limited means” or contributing \$500.00 to legal services organizations; establishing the development of district court pro bono committees, an access to justice section, and district foundations; permitting courts to direct sanctions or fines to be paid to legal services organizations or law libraries; and incorporating a mandatory pro bono reporting requirement, including instituting a \$100 fine for failure to timely report); N.Y. RULES OF PROF’L CONDUCT r. 6.1 (2017) (clarifying that “[l]awyers in private practice or employed by a for-profit entity should aspire to contribute annually in an amount at least equivalent to (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time; or (ii) if the lawyer’s work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer’s time; or (iv) if the lawyer is underemployed, an amount not to exceed

Only Illinois has resisted including some equivalent form of Model Rule 6.1 in its rules of professional conduct. The preamble to the Illinois Rules of Professional Conduct explicitly acknowledges the rationale for omitting Model Rule 6.1:

The absence from the Illinois Rules of a counterpart to ABA Model Rule 6.1 regarding *pro bono* and public service should not be interpreted as limiting the responsibility of lawyers to render uncompensated service in the public interest. Rather, the rationale is that this responsibility is not appropriate for disciplinary rules because it is not possible to articulate an appropriate disciplinary standard regarding *pro bono* and public service.⁵⁶

B. Model Rule of Professional Conduct 6.5

Unlike Model Rule 6.1, Model Rule 6.5—titled “Nonprofit & Court-Annexed Limited Legal Services Programs”—does not provide an aspirational standard or suggested behavior for lawyers.⁵⁷ Instead, Model Rule 6.5 dovetails with Model Rule 6.1 in an important way: it provides exceptions to other key provisions in the Model Rules schema. These exceptions are intended to allow lawyers to provide

one-tenth of one percent of the lawyer’s income”); OHIO RULES OF PROF’L CONDUCT pmbL [6], r. 6.1 (2017); SUPREME COURT OF OHIO, STATEMENT REGARDING THE PROVISION OF PRO BONO LEGAL SERVICES BY OHIO LAWYERS (2007) (strongly encouraging “each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities”; allowing attorneys to discharge their pro bono commitment by contributing to legal services organizations; and establishing a voluntary pro bono reporting requirement); OR. STATE BAR BYLAW 13.1 (2017) (urging each Oregon attorney to “annually to perform 80 hours of pro bono services” and “endeavor to devote 20 to 40 hours or to handle two cases involving the direct provision of legal services to the poor, without an expectation of compensation”); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT pmbL [6] (2018); STATE BAR OF TEX. BD. OF DIR., STATE BAR OF TEXAS RESOLUTION (2000) (clarifying that financial contributions include “out-of-pocket, non-reimbursed expenses incurred by a lawyer” handling a pro bono matter); VA. RULES OF PROF’L CONDUCT r. 6.1 (2009) (encouraging Virginia attorneys to “render at least two percent per year of the lawyer’s professional time to pro bono”; allowing attorneys to discharge their pro bono commitment by contributing to legal services organizations; and allowing collective satisfaction of the requirement).

56. ILL. RULES OF PROF’L CONDUCT pmbL [6B] (2010). *But see* ILL. SUP. CT. R. 756(f) (2018) (incorporating a mandatory pro bono reporting requirement to maintain one’s license to practice law in Illinois).

57. *See* MODEL RULES OF PROF’L CONDUCT r. 6.5 (AM. BAR ASS’N 2016).

pro bono services pro bono in circumstances that would otherwise be foreclosed to them.

Adopted by the ABA House of Delegates in 2002,⁵⁸ Model Rule 6.5 states:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.⁵⁹

Working in conjunction with Model Rule 1.2(c),⁶⁰ Model Rule 6.5 provides the framework within which lawyers can use the articulated exemptions that allow lawyers to engage in only limited scope representation pursuant to programs that the courts or legal services organizations create. Such programs usually take the form of an advice-only clinic, a hotline, or a narrowly-tailored court appearance (such as representing a domestic violence victim in an order of protection hearing).⁶¹ Under such circumstances, the lawyer is exempt from violations of Model Rule 1.7, which governs conflicts of interests between current clients,⁶² and Model Rule 1.9(a), which governs conflicts of interest with former clients,⁶³ if the lawyer has no

58. See CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 691-95 (2006).

59. MODEL RULES OF PROF'L CONDUCT r. 6.5.

60. *Id.* r. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

61. See *id.* r. 6.5 cmt. 1; see also Am. Bar Ass'n Ctr. for Prof'l Dev., Model Rule 6.5: Opening the Door to Pro Bono 22 (2017) (webinar) (explaining the requirements of other Model Rules when considering Model Rule 6.5) (on file with author).

62. MODEL RULES OF PROF'L CONDUCT r. 1.7.

63. *Id.* r. 1.9(a).

knowledge of the conflict.⁶⁴ Moreover, Model Rule 6.5(a)(2) exempts lawyers from violations of Model Rule 1.10—which governs the imputation of conflicts of interest among lawyers within a law firm⁶⁵—if the lawyer once again has no knowledge that one of their colleagues would be disqualified under the conflict of interest rules in connection with the limited scope representation.⁶⁶

At first blush, Model Rule 6.5(b) does not appear to add anything to Rule 6.5(a)(2), given that subparagraph (a)(2) makes clear that the imputed conflicts rule does not disqualify the pro bono lawyer unless the pro bono lawyer knows that a partner or associate or of counsel lawyer has a disqualifying conflict. But in fact, Rule 6.5(b) adds something very important: when the short-term, limited representation ends, the pro bono lawyer does not take any conflicts back to the firm because of the limited services program. In other words, Rule 6.5(b) cuts off imputed conflicts running in both directions—from the firm to the pro bono lawyer and from the pro bono lawyer to the firm. Cutting off imputation from the firm to the pro bono lawyer means that the pro bono lawyer can serve clients at the limited services program without stopping to check thoroughly for conflicts. Cutting off imputation from the pro bono lawyer to the firm means that the firm can keep on representing all of its current clients, and take on new clients, without recording the pro bono lawyer's short-term client on the roster of former clients in its conflicts database.⁶⁷

By reducing the burden on lawyers to engage in extensive conflict checks when representing clients pro bono under limited circumstances, Model Rule 6.5's exemptions maintain the delicate balance of upholding the profession's ethical obligations to clients while permitting lawyers to comply with their professional responsibility under Model Rule 6.1.⁶⁸ Taken together, Model Rules 6.1 and 6.5 provide lawyers with an end and a means to engage in pro

64. *Id.* r. 6.5(a)(1).

65. *Id.* r. 1.10.

66. *Id.* r. 6.5(a)(2).

67. Roy Simon, *Conflicts of Interest & 'Limited Service' ProBono Programs: New DR 5-101-a*, N.Y. LEGAL ETHICS REP., <http://www.newyorklegaethics.com/conflicts-of-interest-limited-service-probono-programs-new-dr-5-101-a> [<https://perma.cc/YBS4-EC84>].

68. Louis S. Rulli, *Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients*, 17 U. PA. J. L. & SOC. CHANGE 347, 368 (2014).

bono legal services. Model Rule 6.1 gives lawyers an aspirational goal to represent those unable to afford legal services,⁶⁹ and Model Rule 6.5 removes some of the significant barriers to providing such services.⁷⁰ The two rules work together to encourage lawyers to use their legal skills and knowledge, not for personal gain, but to further society's interest in an efficient, balanced, and accessible justice system.

As with Model Rule 6.1, most jurisdictions have adopted some version or form of Model Rule 6.5 into their rules of professional conduct. Thirty-four jurisdictions incorporate verbatim the current version of Model Rule 6.5 into their rules;⁷¹ whereas fifteen jurisdictions include the current version with certain revisions.⁷² Two

69. MODEL RULES OF PROF'L CONDUCT r. 6.1.

70. *Id.* r. 6.5.

71. ALA. RULES OF PROF'L CONDUCT r. 6.5 (2007); ALASKA RULES OF PROF'L CONDUCT r. 6.5 (2018); ARK. RULES OF PROF'L CONDUCT r. 6.5 (2014); COLO. RULES OF PROF'L CONDUCT r. 6.5 (2016); DEL. LAWYERS' RULES OF PROF'L CONDUCT r. 6.5 (2010); D.C. RULES OF PROF'L CONDUCT r. 6.5 (2007); HAW. RULES OF PROF'L CONDUCT r. 6.5 (2014); IDAHO RULES OF PROF'L CONDUCT r. 6.5 (2014); ILL. RULES OF PROF'L CONDUCT r. 6.5 (2016); IND. RULES OF PROF'L CONDUCT r. 6.5 (2016); IOWA RULES OF PROF'L CONDUCT r. 6.5 (2012); KY. RULES OF PROF'L CONDUCT r. 6.5 (2009); LA. LAWYERS' RULES OF PROF'L CONDUCT r. 6.5 (2004); MD. LAWYERS' RULES OF PROF'L CONDUCT r. 6.5 (2016); MICH. RULES OF PROF'L CONDUCT r. 6.6 (2015); MO. RULES OF PROF'L CONDUCT r. 6.5 (2012); MONT. RULES OF PROF'L CONDUCT r. 6.5 (2017); NEB. RULES OF PROF'L CONDUCT § 3-506.5 (2008); NEV. RULES OF PROF'L CONDUCT r. 6.5 (2018); N.J. RULES OF PROF'L CONDUCT r. 6.5 (2015); N.M. RULES OF PROF'L CONDUCT r. 16-605 (2016); N.C. RULES OF PROF'L CONDUCT r. 6.5 (2003); OHIO RULES OF PROF'L CONDUCT r. 6.5 (2017); OKLA. RULES OF PROF'L CONDUCT r. 6.5 (1998); OR. RULES OF PROF'L CONDUCT r. 6.5 (2018); PA. RULES OF PROF'L CONDUCT r. 6.5 (2018); R.I. RULES OF PROF'L CONDUCT r. 6.5 (2007); S.C. RULES OF PROF'L CONDUCT r. 6.5 (2017); S.D. RULES OF PROF'L CONDUCT r. 6.5 (2004); TENN. RULES OF PROF'L CONDUCT r. 6.5 (2011); UTAH RULES OF PROF'L CONDUCT r. 6.5 (2015); VA. RULES OF PROF'L CONDUCT r. 6.5 (2009); VT. RULES OF PROF'L CONDUCT r. 6.5 (2014); W. VA. RULES OF PROF'L CONDUCT r. 6.5 (2015).

72. ARIZ. RULES OF PROF'L CONDUCT r. 6.5 (2004) (adding a sub-section (c) noting that Rule 1.5, dealing with fees, "does not apply to a representation governed by this rule and for which the lawyer does not charge a fee"); CAL. RULES OF PROF'L CONDUCT r. 6.5 (2018) (adding a sub-section (c) providing that "[t]he personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program"); CONN. RULES OF PROF'L CONDUCT r. 6.5 (2018) (adding sub-section (b) that requires lawyers who provide limited representation to secure the client's informed consent, and if limited representation is not reasonable under the circumstances, permitting the lawyer to offer advice, but requiring the lawyer to also advise the client of the need for further counsel); FLA. RULES OF PROF'L CONDUCT r. 4-6.6 (2018) (expanding the programs to those sponsored by government agencies, bar associations, and accredited law schools); GA. RULES OF PROF'L CONDUCT r. 6.5 (2001)

jurisdictions, however, have refrained from incorporating such a provision in their rules of professional conduct.⁷³

(clarifying that the “short-term limited legal services” are “normally through a one-time consultation”; adding a new sub-section (c) that provides that clients served under this rule are “for purposes of Rule 1.9, a former client of the lawyer providing the service, but that lawyer’s disqualification is not imputed to lawyers associated with the lawyer for purposes of Rule 1.10”; and making clear that “[t]he maximum penalty for a violation of this Rule is a public reprimand”); ME. RULES OF PROF’L CONDUCT r. 6.5 (2014) (clarifying that lawyers are subject to Rules 1.7, 1.9(a) and 1.10 if the lawyer “is aware” rather than “knows” that the representation involves a conflict of interest); MASS. RULES OF PROF’L CONDUCT r. 6.5 (2015) (adding a sub-section under (a) noting that lawyers who provide short-term services under this rule are not subject to Rule 1.5(b), dealing with fees); MINN. RULES OF PROF’L CONDUCT r. 6.5 (2015) (revising the language “a program sponsored by a nonprofit organization or court” to “a program offering pro bono legal services”); MISS. RULES OF PROF’L CONDUCT r. 6.5 (2011) (limiting Rule 6.5 to lawyers who provide “short-term limited *pro bono* legal services” (emphasis added)); N.H. RULES OF PROF’L CONDUCT r. 6.5 (2004) (revising the language “provides short-term limited legal services to a client” to “provides one-time consultation with a client” and adding a new sub-section (c) providing that “Rule 1.6 [regarding confidentiality of information] and Rule 1.9(c) [regarding duties to former clients] are applicable to a representation governed by this Rule”); N.Y. RULES OF PROF’L CONDUCT r. 6.5 (2017) (providing an exemption from Rule 1.8 (specific conflict of interest rules); clarifying that “short-term limited legal services” are services that do not extend beyond “an initial consultation, representation or court appearance”; requiring the client’s informed consent to short-term services; and confirming that the rule is not applicable if the court determines a conflict exists or the lawyer becomes aware of the existence of a conflict of interest during the course of the representation); N.D. RULES OF PROF’L CONDUCT r. 6.5 (2006) (adding a sub-section (c) providing that clients served under this rule are “for purposes of Rule 1.9, a former client of the lawyer providing the service, but that lawyer’s disqualification is not imputed to lawyers associated with that lawyer for purposes of Rule 1.10”); WASH. RULES OF PROF’L CONDUCT r. 6.5 (2015) (adding a sub-section (3) under (a) providing that lawyers under this rule are not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) if the lawyers are screened from information related to opposing clients, the clients are notified of the conflict, and “the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted” by the disqualified lawyer); WIS. RULES OF PROF’L CONDUCT r. 6.5 (2017) (expanding the programs to those sponsored by bar associations and accredited law schools); WYO. RULES OF PROF’L CONDUCT r. 6.5 (2014) (expanding the programs to those sponsored by state or county bar associations).

73. See KAN. RULES OF PROF’L CONDUCT (2007); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT (2018).

C. *Model Code of Judicial Conduct 3.7(B)*

The ABA House of Delegates adopted the Model Code of Judicial Conduct on August 7, 1990—just seven years after the first adoption of the Model Rules of Professional Conduct.⁷⁴ Although Canon 4 originally governed a judge's extrajudicial activities to minimize the risk of conflict with judicial obligations—with Canon 4C specifically addressing a judge's participation in governmental, civic, or charitable activities—the original Model Code failed to specifically address a judge's participation in, or encouragement of, pro bono legal services.⁷⁵

In 2007, the ABA House of Delegates overhauled the Model Code of Judicial Conduct, creating Rule 3.7, entitled "Participation in Educational, Religious, Charitable, Fraternal, or Civil Organizations and Activities."⁷⁶ Rule 3.7 incorporated a new provision that states quite simply that: "A judge may encourage lawyers to provide pro bono publico legal services."⁷⁷ Rule 3.7 has also been accompanied by a new comment to the code, providing the background and reasoning behind the provision:

In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.⁷⁸

Standing alone, Rule 3.7(B) does little, but as a part of a larger scheme to encourage pro bono participation in the legal field, the provision increases the likelihood that lawyers will actually participate in pro bono work.⁷⁹ Moreover, Rule 3.7(B) works in tandem with Rule 3.7(A), which allows judges to participate in

74. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 1990); see also *ABA Rules History*, *supra* note 35.

75. MODEL CODE OF JUDICIAL CONDUCT Canon 4C.

76. MODEL CODE OF JUDICIAL CONDUCT r. 3.7 (AM. BAR ASS'N 2011).

77. *Id.* r. 3.7(B).

78. *Id.* r. 3.7(B) cmt. 5.

79. See *supra* Parts II.A.–B.

activities “concerned with the law, the legal system, or the administration of justice.”⁸⁰ Both provisions permit judges to act—in ways that might otherwise be prohibited—to further access to justice in the United States. In a report to the ABA House of Delegates, the ABA Joint Commission proposed the new provision to “encourag[e] judges to provide leadership in increasing pro bono publico lawyering in their respective jurisdictions”⁸¹ and to “stress the importance of [participation in organizations that promote pro bono publico lawyering] by including a specific provision on this topic.”⁸² In essence, Rule 3.7(B) acts in much the same way as Model Rule 6.5, by removing barriers that might otherwise dissuade judges from promoting or engaging in pro bono service.⁸³

Currently, twenty-nine jurisdictions have adopted Model Rule 3.7(B)—and its related Comment 5—almost verbatim within their codes of judicial conduct;⁸⁴ whereas six jurisdictions have adopted the concept with certain revisions.⁸⁵ That leaves seventeen states

80. MODEL CODE OF JUDICIAL CONDUCT r. 3.7(A).

81. ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT 109 (2006), https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/report_judicial_conduct.pdf [<http://perma.cc/69P7-K3RB>].

82. *Id.* at 110.

83. *See supra* Part II.B.

84. ARIZ. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2009); ARK. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2016); CAL. CODE OF JUDICIAL ETHICS r. 4(C)(3)(e) (2015); COLO. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2010); CONN. CODE OF JUDICIAL CONDUCT r. 3.7(b) (2011); D.C. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2012); HAW. CODE OF JUDICIAL CONDUCT r. 3.7(b) (2008); IND. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2018); IOWA CODE OF JUDICIAL CONDUCT r. 3.7(B) (2010); KAN. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2007); KY. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2018); ME. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2015); MASS. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2016); MINN. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2016); MO. CODE OF JUDICIAL CONDUCT r. 2-3.7(B) (2012); MONT. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2014); NEB. CODE OF JUDICIAL CONDUCT § 5-303.7 (2009); NEV. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2009); N.M. CODE OF JUDICIAL CONDUCT r. 21-307(B) (2018); N.D. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2012); OHIO CODE OF JUDICIAL CONDUCT r. 3.7(B) (2017); OKLA. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2011); R.I. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2018); TENN. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2015); UTAH CODE OF JUDICIAL CONDUCT r. 3.7(B) (2010); V.I. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2010); VA. CODE OF JUDICIAL CONDUCT r. 4(C) (2015); W. VA. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2015); WYO. CODE OF JUDICIAL CONDUCT r. 3.7(B) (2009).

85. FLA. CODE OF JUDICIAL CONDUCT Canon 4B cmt. (2008) (confirming that support of pro bono legal services is an activity that relates to improvement of the administration of justice and acknowledging that judges may encourage attorneys to engage in pro bono services by recognizing attorneys’ pro bono contributions,

with no specific rule or provision explicitly encouraging or permitting the judiciary to actively promote pro bono representation.⁸⁶

Of the twenty-nine jurisdictions with verbatim language, seven incorporate additional language regarding judicial activities surrounding pro bono legal services in either the black letter or the comments of the relevant rule.⁸⁷ The most common incorporations center around permitting judges to convene, participate, assist in, or provide leadership to advisory committees and community collaborations devoted to the improvement of the administration of justice.⁸⁸ Hawaii's Code of Judicial Conduct, however, incorporates a new subsection in the black letter of its code that permits judges to participate directly in "pro bono activities to improve the law, the legal system or the legal profession or that promote public understanding of and confidence in the justice system."⁸⁹ Hawaii's

establishing accommodations for pro bono attorneys, and acting in an advisory capacity to pro bono programs); IDAHO CODE OF JUDICIAL CONDUCT r. 3.7(B) (2017) (confirming that "a judge may encourage participation by a lawyer or lawyers in pro bono activities as long as the encouragement is not coercive in nature"); MD. CODE OF JUDICIAL CONDUCT r. 3.7(b) (2010) ("A judge may encourage *but not coerce* lawyers to provide pro bono public legal services." (emphasis added)); OR. CODE OF JUDICIAL CONDUCT r. 4.5(E) (2013) (stating "[s]o long as the procedures employed are not coercive, a judge may personally encourage or solicit lawyers to provide publicly available pro bono legal services," but omitting Comment 5); PA. CODE OF JUDICIAL CONDUCT r. 3.7(C) (2014) (mimicking the language in Model Rule 3.7(B) but omitting Comment 5); WASH. CODE OF JUDICIAL CONDUCT r. 3.7 cmt. [5] (2011) (omitting the language in Model Rule 3.7(B) from the black letter of the rule but including the language in Comment 4 to the Model Rules verbatim).

86. ALA. CANONS OF JUDICIAL ETHICS (1999); ALASKA CODE OF JUDICIAL CONDUCT (1998); DEL. JUDGES' CODE OF JUDICIAL CONDUCT (2008); GA. CODE OF JUDICIAL CONDUCT (2004); ILL. CODE OF JUDICIAL CONDUCT (2008); LA. CODE OF JUDICIAL CONDUCT (2016); MICH. CODE OF JUDICIAL CONDUCT (2018); MISS. CODE OF JUDICIAL CONDUCT (2002); N.H. CODE OF JUDICIAL CONDUCT (2018); N.J. CODE OF JUDICIAL CONDUCT (2016); N.Y. RULES OF THE CHIEF ADMIN. JUDGE, P. 100 (2010); N.C. CODE OF JUDICIAL CONDUCT (2015); S.C. CODE OF JUDICIAL CONDUCT (2018); S.D. CODE OF JUDICIAL CONDUCT (2006); TEX. CODE OF JUDICIAL CONDUCT (2002); VT. CODE OF JUDICIAL CONDUCT (2012); WIS. CODE OF JUDICIAL CONDUCT (1979).

87. ARIZ. CODE OF JUDICIAL CONDUCT r. 3.7(C) (2009); HAW. CODE OF JUDICIAL CONDUCT r. 3.7(a)(8) (2008); MONT. CODE OF JUDICIAL CONDUCT r. 3.7 cmt. [6] (2014); NEB. CODE OF JUDICIAL CONDUCT § 5-303.7(C) (2011); NEV. CODE OF JUDICIAL CONDUCT r. 3.7 cmt. [6] (2009); OKLA. CODE OF JUDICIAL CONDUCT r. 3.7(C) (2011); VA. CODE OF JUDICIAL CONDUCT r. 4(C) (2015).

88. ARIZ. CODE OF JUDICIAL CONDUCT r. 3.7(C) (2009); MONT. CODE OF JUDICIAL CONDUCT r. 3.7 cmt. [6] (2014); NEB. CODE OF JUDICIAL CONDUCT § 5-303.7(C) (2011); OKLA. CODE OF JUDICIAL CONDUCT r. 3.7(C) (2011); VA. CODE OF JUDICIAL CONDUCT r. 4(C) (2015).

89. HAW. CODE OF JUDICIAL CONDUCT r. 3.7(a)(8) (2008).

subsection clarifies that such activities may be “related to judicial activity, but not required to fulfill the duties of judicial office” and incorporates a new comment that provides examples of permitted activity.⁹⁰ Nevada’s Code of Judicial Conduct also adds a new comment clarifying permissible behavior by judges when recruiting lawyers to engage in pro bono legal services:

Recruitment of lawyers or law firms to provide pro bono legal services pursuant to Supreme Court Rule 191 is not membership solicitation. A judge may assist an organization in recruiting attorneys so long as the recruitment effort cannot reasonably be perceived as coercive. A judge may provide an organization with general endorsement or solicitation material for use in the organization’s recruitment materials. Similarly, this Rule does not preclude a judge from requesting an attorney to accept pro bono representation of a party in a proceeding pending before the judge.⁹¹

Interestingly, despite adopting Model Rule 3.7(B) verbatim, Colorado’s annotated version of its Code of Judicial Conduct refers to an advisory opinion issued by the Alaska Commission on Judicial Conduct, qualifying Colorado’s rule:

A judge may make monetary contributions to further pro bono activities, but it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs. Acknowledging the pro bono activity of particular attorneys would be permissible if it were done in a manner that is public, but letters of congratulation sent directly to the attorney could be interpreted as evidence that the attorneys

90. *Id.* r. 3.7(a)(8) cmt. [6] (“Examples of ‘pro bono activity . . . related to judicial activity, but not required to fulfill the duties of judicial office’ include: (i) judging moot court for law school classes, high school mock trials or We the People competitions; (ii) giving speeches or presentations on law-related topics, such as (a) at the Judiciary’s Lunch and Learn the Law events, (b) to a bar association or section, or (c) to other groups, like high school civics classes or Rotary Club groups; (iii) serving on Judiciary committees, such as the rules committees; (iv) serving on the board of a law-related organization, such as the American Judicature Society, or delivering presentations on behalf of such organizations; or (v) serving on continuing legal education committees, Bar Association committees, and committees of the Access to Justice Commission.”).

91. NEV. CODE OF JUDICIAL CONDUCT r. 3.7 cmt. [6] (2009); *see also* VA. CODE OF JUDICIAL CONDUCT r. 4(C) (2015) (granting judges the power to encourage lawyers to participate in pro bono publico or legal services).

are in a special position of influence or that the judge's ability to act impartially has been compromised.⁹²

This opinion is emblematic of the ongoing debate as to “whether (and to what extent) judges can be involved in efforts to expand pro bono representation without violating their states’ codes of judicial conduct.”⁹³ The debate predominately centers on whether such judicial action is “coercive.” In 2015, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion, finding that it is permissible for a judge to sign a general appeal letter on the judge’s stationary encouraging lawyers to comply with their professional responsibility under Model Rule 6.1 and providing lawyers with information on how to locate pro bono opportunities.⁹⁴ The Standing Committee recommended evaluating the totality of the facts to determine whether a judge’s actions appear “coercive” to a reasonable person under Model Rule 3.1(D); namely, whether “the person solicited would feel obligated to respond favorably.”⁹⁵ In concluding that the proposed letter was not coercive, the Standing Committee noted that the tone of the letter was encouraging rather than dictatorial and that its broad distribution, generic plea, and lack of post-sending monitoring would not lead a reasonable person to “feel obligated to perform pro bono services” or

92. COLO. CODE OF JUDICIAL CONDUCT r. 3.7 (2010) (citing Alaska Comm’n on Judicial Conduct, Advisory Op. 2004-01 (2004)).

93. Alaska Comm’n on Judicial Conduct, Advisory Op. 2004-01 (2004) (judges may not refer lawyers to a particular pro bono program); Fla. Supreme Court, Judicial Ethics Advisory Comm., Op. 2012-26 (2012) (judges may convene meetings in order to solicit attorneys to volunteer as attorneys ad litem for children in dependency cases); Ethics Comm. of the Ky. Judiciary, Op. JE-107 (2005) (judges may issue generic letters to the bar but a judge may not urge lawyers to volunteer with a specific pro bono organization); Md. Judicial Ethics Comm., Op. 2013-29 (judges may solicit volunteers for pro bono service to indigent parties by writing to such attorneys individually); Mich. Standing Comm. on Prof’l and Judicial Ethics, Op. J-7 (1998) (a judge may not solicit individual lawyers to perform pro bono); Jodi Nafzger, *Bridging the Justice Gap: Judicial Promotion of Pro Bono*, ADVOCATE, Aug. 2016, at 26, 28, <https://commons.cu-portland.edu/cgi/viewcontent.cgi?article=1116&context=lawfaculty> [<https://perma.cc/MU3J-X2RQ>] (citing Ala. Judicial Inquiry Comm’n, Advisory Op. 04-847 (2004)) (“[J]udges may send letters asking lawyers to participate in state bar operated pro bono programs.”).

94. ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 470, at 10 (2015).

95. *Id.* at 7 (quoting MODEL CODE OF JUDICIAL CONDUCT r. 3.1(D) cmt. [4] (AM. BAR ASS’N 2011)).

to “believe that the lawyer who performs pro bono services is currying favor with the justice.”⁹⁶

D. Pro Bono Service as a Condition to Becoming a Licensed Attorney

As a means of addressing the large unmet need for lawyers to represent the poor, former New York Chief Judge Jonathan Lippman announced in May 2012 that a minimum number of hours of pro bono service will be required of all individuals seeking admission to the bar in New York.⁹⁷ In his address at the New York Court of Appeals’ annual Law Day in 2012, Chief Judge Lippman stated:

If pro bono is a core value of our profession, and it is—and if we aspire for all practicing attorneys to devote a meaningful portion of their time to public service, and they should—these ideals ought to be instilled from the start, when one first aspires to be a member of the profession.⁹⁸

As a result, pursuant to Section 520.16 of the New York Rules of the Court of Appeals:

Every applicant admitted to the New York State bar on or after January 1, 2015, other than applicants for admission without examination pursuant to section 520.10 of this Part, shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.⁹⁹

For purposes of this rule, “pro bono service” is “pre-admission law-related work” that assists in the provision of pro bono legal services to persons of limited means, non-profit organizations or groups seeking to promote access to justice, or in the provision of public service for a governmental entity, but does not include any work connected with partisan political activities.¹⁰⁰ Law school faculty members, attorneys admitted to practice and in good standing in the relevant jurisdiction, judges, or court-employed attorneys may

96. *Id.* at 7–8.

97. Honorable Jonathan Lippman, Chief Judge of the State of N.Y., Address at the New York Court of Appeal’s Annual Law Day 4 (May 1, 2012), <https://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf> [<https://perma.cc/T87M-JK9B>].

98. *Id.* at 3–4.

99. N.Y. R. Ct. App. § 520.16(a) (2018).

100. *Id.* § 520.16(b), (g).

supervise an applicant's pro bono work.¹⁰¹ Although an applicant may complete the pro bono work in any jurisdiction, the applicant must complete the work after commencing their legal studies but before applying for admission to the New York State bar.¹⁰² Upon applying, individuals must submit affidavits of compliance that include a certification by the supervising faculty, attorney, or judge.¹⁰³

As Chief Judge Lippman articulated, the rule was instituted primarily to "provid[e] additional legal resources to expand access to justice for low-income New Yorkers."¹⁰⁴ However, the rule was structured to ensure additional beneficial outcomes, including "provid[ing] instructive and meaningful experiences to law students that will expose them to the pressing needs of the less fortunate," "encourag[ing] law students to continue with volunteer pro bono services after they are admitted," and "help[ing] prospective lawyers acquire hands-on skills under the supervision of committed members of the legal profession."¹⁰⁵

Although a handful of states quickly followed suit by considering similar proposals,¹⁰⁶ to date none have adopted such a requirement and no other states have undertaken serious efforts to implement such a rule.¹⁰⁷ California, Connecticut, and New Jersey all considered adding such a rule, but each eventually declined to do so. Of the three, Connecticut's consideration of a potential rule appeared the most cursory.¹⁰⁸ In 2012, the Connecticut Access to Justice Commission requested the creation of a report to evaluate the current state of—

101. *Id.* § 520.16(c).

102. *Id.* § 520.16(d)–(e).

103. *Id.* § 520.16(f).

104. N.Y. STATE UNIFIED COURT SYS., NEW YORK STATE BAR ADMISSION: PRO BONO REQUIREMENT FAQs 3 (2018), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/FAQsBarAdmission_0.pdf. [<https://perma.cc/48EZ-U2PL>].

105. *Id.* at 4.

106. See STANDING COMMITTEE ON PRO BONO & PUB. SERV., AM. BAR ASS'N NEW YORK'S 50-HOUR PREADMISSION PRO BONO RULE: WEIGHING THE POTENTIAL PROS AND CONS 1 (Oct. 2013) [hereinafter NEW YORK'S 50-HOUR PREADMISSION PRO BONO RULE], https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf [<https://perma.cc/KUL9-A59F>].

107. *Bar Pre-Admission Pro Bono*, AM. BAR ASS'N, https://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono.html [<https://perma.cc/S64E-ZPXX>].

108. *Id.*

and provide solutions for curing—the justice gap in Connecticut.¹⁰⁹ As part of a long list of recommendations, the report proposed that the Connecticut Judicial Branch convene a task force to consider whether to recommend a pre-admission pro bono requirement.¹¹⁰ However, the Connecticut Access to Justice Commission declined to pursue that recommendation.¹¹¹

Similarly, in October 2012, Chief Justice Stuart Rabner of the Supreme Court of New Jersey formed a working group to evaluate whether New Jersey should adopt a pre-admission pro bono requirement.¹¹² In April 2013, the Working Group on the Proposed Preadmission *Pro Bono* Requirement submitted a report to the Supreme Court of New Jersey recommending that New Jersey adopt a fifty-hour pre-admission requirement.¹¹³ However, two months before the issuance of the report, the New Jersey State Bar Association (NJSBA) approved a resolution opposing a pre-admission pro bono requirement:

[NJSBA] finds the proposal for mandatory pro bono service by individuals who have not yet been admitted to the Bar to be unnecessary, unworkable and an affront to consumers who expect experienced practitioners to provide legal services. The New Jersey State Bar Association, therefore, urges the New Jersey Supreme Court that the Court reject the proposal and recognize and appreciate the extraordinary pro bono service provided by the Bar and to work in conjunction with the New Jersey State Bar

109. MELANIE B. ABBOTT, LESLIE C. LEVIN & STEPHEN WIZNER, REPORT TO THE CONNECTICUT JUDICIAL BRANCH ACCESS TO JUSTICE COMMISSION 1 (2013).

110. *Id.* at 19–20.

111. See Karen Sloan, *Pro Bono Mandate Gains Steam*, NAT'L L. J. (Apr. 22, 2013), <https://www.law.com/nationallawjournal/almID/1202596770850> [archived at <https://advance.lexis.com/search?crd=b5b738ad-e53a-4ce2-8fc48c9046211d76&pdsearchterms=LNSDUID-ALM-NTLAWJ-1202596770850&pdbyasscitorords=False&pdmfid=1000516&pdisurlapi=true>] (“[J]udicial leaders were inclined against the idea,” said Superior Court Judge William Bright Jr., chairman of the judicial branch’s pro bono committee. “We’re probably not going to pursue that right now,” Bright said. “I think we want to take a more measured approach and work with the individual law schools to look for ways to get students involved in pro bono.”).

112. NEW YORK’S 50-HOUR PREADMISSION PRO BONO RULE, *supra* note 106, at 11.

113. N.J. COURTS, REPORT OF THE WORKING GROUP ON THE PROPOSED PREADMISSION PRO BONO REQUIREMENT 6–7 (2013) (modeling the proposal on New York’s rule with the exception of limiting the performance of pro bono to services performed in the United States and its territories).

Association to identify any need for additional programs or services to assure the prompt and effective delivery of legal services to all citizens of the State.¹¹⁴

In the face of opposition from the NJSBA, the initiative within New Jersey has stalled, making no advances since early 2013.¹¹⁵

Conversely, California's proposal made it all the way through the California Legislature. At the State Bar of California's request, the Task Force on Admissions Regulation Reform evaluated whether to adopt a pre-admission pro bono rule and ultimately recommended the adoption of a requirement that mirrored New York's rule, with a few exceptions.¹¹⁶ The Task Force's proposed requirement permitted individuals to satisfy the pro bono requirement up to one year after the attorney was licensed to practice and expanded the rule to apply to those hours spent serving individuals of modest means (performing low bono services).¹¹⁷ Subsequently, Senator Marty Block sponsored a bill in the California Legislature that required California's newly admitted lawyers to complete fifty hours of pro bono work.¹¹⁸ Although Senate Bill 1257 incorporated the "modest means" recommendation from the Task Force, the bill followed suit with New York by requiring that applicants must complete all pro bono work *before* gaining admittance to the State Bar.¹¹⁹ California Governor Jerry Brown vetoed the bill, citing the high cost of legal education:

Law students in California are now contending with skyrocketing costs—often more than \$200,000 for tuition and room and board—and many struggle to find employment once they are admitted to the Bar. In this context, I believe it

114. NEW YORK'S 50-HOUR PREADMISSION PRO BONO RULE, *supra* note 106, at 11 (quoting NEW JERSEY STATE BAR ASSOCIATION, RESOLUTION OPPOSING THE PROPOSAL FOR MANDATORY *PRO BONO* SERVICE BY INDIVIDUALS WHO HAVE NOT YET BEEN ADMITTED TO THE BAR 2 (2013)).

115. *Bar Pre-Admission Pro Bono*, *supra* note 107.

116. *Compare* STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 15-17 (2013), http://www.calbar.ca.gov/Portals/0/documents/publicComment/2013/2013_StateBarTaskForceBios_FINAL6-11-13.pdf [<https://perma.cc/FV77-DADJ>], *with* N.Y. STATE UNIFIED COURT SYS., *supra* note 104, at 5.

117. STATE BAR OF CAL., *supra* note 116, at 16–17.

118. CAL. SENATE RULES COMM., OFFICE OF SENATE FLOOR ANALYSES, S.B. 1257, 2d Sess. 2–5 (Aug. 8, 2016).

119. *Id.* at 3–4.

would be unfair to burden students with the requirements set forth in this bill.

Instead, we should focus on lowering the cost of legal education and devising alternative and less expensive ways to qualify for the Bar Exam. By doing so, we could actually expand the opportunity to serve the public interest.¹²⁰

Montana is the only state to implement a rule that reflects the sentiment underlying the New York rule. In December 2014, the Supreme Court of Montana ordered the following:

[T]his Court's Statewide Pro Bono Coordinator and the State Bar of Montana shall develop a process to give all applicants for the bar examination the opportunity to submit voluntarily a statement of any pro bono law-related activities they have performed as of the date of their application. Neither the information provided in the statement nor an applicant's choice not to submit a statement will be allowed to affect the applicant's candidacy for admission to the Montana bar in any way.¹²¹

However, submission of the statement is merely voluntary.¹²² Despite this limitation, the court noted that instituting a voluntary statement option would still inform bar applicants of the high importance Montana places on admitted attorneys to comply with Rule 6.1 of its rules of professional conduct, as well as provide the court with information to evaluate pro bono opportunities generally and admitted attorneys' willingness to engage in pro bono work and to develop resources for pro bono attorneys.¹²³

120. *Id.* at 7–8. See also David Siders, *Pro Bono Rule for New California Lawyers? Not So Fast, Jerry Brown Says*, SACRAMENTO BEE (Aug. 29, 2016), <https://www.sacbee.com/news/politics-government/capitol-alert/article98734647.html> [<https://perma.cc/8WQ7-8UME>].

121. *Montana Pro Bono Requirements*, PSJD, https://www.psjd.org/Montana_Pro_Bono_Requirements [<https://perma.cc/JXT6-2JUK>] (quoting the Supreme Court of Montana's December 2014 order).

122. *Id.*

123. *Id.* (stating three purposes for the voluntary statement, including “[t]o provide bar applicants with an opportunity to indicate their interest in receiving information about training and their willingness to be contacted about pro bono opportunities upon admission to the bar”).

E. Pro Bono Service Satisfying State Mandatory CLE Requirements

To promote pro bono service throughout the bar, fourteen states have implemented rules that permit attorneys who take on pro bono matters to earn credit toward Continuing Legal Education (CLE) requirements to maintain their licenses to practice law.¹²⁴ This approach provides a direct incentive to for attorneys to take on pro bono assignments in lieu of attending a traditional CLE seminar.¹²⁵

Most jurisdictions require lawyers to dedicate at least five or six hours of pro bono legal services over the relevant reporting period to earn one CLE credit.¹²⁶ New York, Oregon, and Wyoming, however, grant one CLE credit for every two hours of pro bono service;¹²⁷ whereas Washington grants credits on a one-to-one ratio.¹²⁸ Similarly, most states permit lawyers to earn up to three CLE credits

124. States with rules granting CLE credits for undertaking pro bono matters include: Alabama, Arizona, Colorado, Delaware, Louisiana, Minnesota, New York, North Dakota, Ohio, Oregon, Tennessee, Washington, Wisconsin and Wyoming. See *CLE Rules*, A.B.A.,

https://www.americanbar.org/groups/probono_public_service/policy/cle_rules.html [<https://perma.cc/8DH2-S2L8>]. Beginning in 2019, Pennsylvania launched a pilot program allowing lawyers to receive one CLE credit for every five hours of pro bono work for up to a maximum of three CLE credits per year towards the annual CLE requirement. *Id.*; see also Press Release, Admin. Office of Pa. Courts, Pennsylvania Supreme Court Approves Pilot Program Allowing CLE Credit for Pro Bono Service (May 2, 2018), <http://www.pacourts.us/assets/files/newsrelease-1/file-7033.pdf?cb=b4480c> [<https://perma.cc/P36N-WAJK>] (stressing the importance of pro bono service and announcing this three-year pilot program).

125. See *CLE Rules*, *supra* note 124; *Offering Free CLE to Encourage Pro Bono Participation*, LEGAL SERVS. CORP., <https://www.lsc.gov/grants-grantee-resources/resources-topic-type/offering-free-cle-encourage-pro-bono-participation> [<https://perma.cc/R4YF-62AA>].

126. ARIZ. SUP. CT. R. 45(a)(5); COLO. R. CIV. P. 250.9(3); LA. SUP. CT. R. XXX R. 3, REG. 3.21; OHIO SUP. CT. R. 10 § 5(H)(2); TENN. SUP. CT. R. 21 § 4.07(c); WIS. SUP. CT. R. 31.05(7); ALA. STATE BAR, RULES FOR MANDATORY CONTINUING LEGAL EDUCATION 3.9 (2017); COMM'N ON CONTINUING LEGAL EDUC. OF THE SUP. CT. OF DEL., DELAWARE RULES FOR CONTINUING LEGAL EDUC. 9(D) (2016); MINN. STATE BD. OF CLE, RULES OF THE BOARD OF CONTINUING EDUCATION 6C (2016); STATE BAR ASS'N OF N.D., CLE POLICY § 1.19 (2018); WYO. STATE BAR, RULES OF THE WYOMING STATE BOARD OF CLE 5(d) (2017).

127. N.Y. CLE BOARD REG. § 3D(11)(d) (2018); OR. STATE BAR, MINIMUM CLE RULES AND REGULATIONS 5, 5.300(b) (2018); WYO. STATE BAR, RULES OF THE WYOMING STATE BOARD OF CONTINUING LEGAL EDUC. 5(d).

128. WASH. ST. CT. R. 11(c)(2), (e)(7).

annually by completing pro bono work.¹²⁹ Washington, however, permits up to eight CLE credits annually;¹³⁰ Arizona, New York, and Wyoming permit up to five;¹³¹ and Minnesota and Oregon only permit up to two annually.¹³² Relatedly, because each jurisdiction requires lawyers to complete roughly twelve hours¹³³ or fifteen hours¹³⁴ of CLE credit annually, most jurisdictions permit the number of credits earned through pro bono service to comprise 20% to 25% of the overall annual CLE requirement. However, Minnesota and Oregon only permit up to 13%;¹³⁵ whereas Arizona and Wyoming permit up to 33%,¹³⁶ New York permits up to 42%,¹³⁷ and Washington permits up to 53%.¹³⁸ Moreover, while only three states do not include specific language requiring that attorneys complete pro bono work through

129. *E.g.*, COLO. R. CIV. P. 260.8(1); LA. SUP. CT. R. XXX R. 3, REG. 3.21; OHIO SUP. CT. R. 10 § 5(H)(2); TENN. SUP. CT. R. 21 § 4.07(c); WIS. SUP. CT. R. 31.05(7); ALA. ST. BAR, RULES FOR MANDATORY CONTINUING LEGAL EDUCATION 3.9 (2017); COMM'N ON CONTINUING LEGAL EDUC., THE DELAWARE RULES FOR CONTINUING LEGAL EDUCATION 8(D) (2016); STATE BAR ASS'N OF N.D., CLE POLICY § 1.19 (2018).

130. WASH. ST. CT. R. 11(b)(6), (c)(1)(i)–(ii), (c)(2), (e)(7) (requiring forty-five credits over a three-year reporting period, reduced by a required fifteen credits of law and legal procedure courses and six credits of ethics and professional responsibility courses).

131. ARIZ. SUP. CT. R. 45(a)(5); N.Y. CLE Bd. REGULATIONS § 3(D)(11)(d) (2018); WYO. STATE BAR, RULES OF THE WYOMING STATE BOARD OF CONTINUING LEGAL EDUCATION 5(d); *see also* 22 N.Y. CODES RULES AND REGULATIONS § 1500.22(a)–(b) (2018) (setting forth New York's biennial reporting cycle).

132. MINN. STATE Bd. OF CLE, RULES OF THE BOARD OF CONTINUING EDUCATION 6C (2016); OR. STATE BAR, MINIMUM CLE RULES AND REGULATIONS R. 6, 6.1(c) (2018).

133. *E.g.*, LA. SUP. CT. R. XXX R. 3(a) REG. 3.1 (requiring 12.5 CLE hours per year); SUP. CT. R. FOR THE GOVERNMENT OF THE BAR OF OHIO 10 § 2 (2006); ALA. ST. B. RULES FOR MANDATORY CONTINUING LEGAL EDUC. R. 3; COMM'N ON CONTINUING LEGAL EDUC., DELAWARE RULES FOR CONTINUING LEGAL EDUCATION 4(A) (2017); N.Y. STATE CLE Bd. REGULATIONS AND GUIDELINES REVISED § 3(D)(11) (2018).

134. *E.g.*, ARIZ. SUP. CT. R. 45(a)(1); COLO. R. CIV. P. 260.8(1); TENN. SUP. CT. RULES R. 21(4); WIS. SUP. CT. R. 31.02(1); MINN. STATE Bd. OF CLE, RULES OF THE BOARD OF CONTINUING EDUCATION 9(A) (2018); STATE BAR ASS'N OF N.D., CLE POLICY § 1.19 (2018); OR. STATE BAR, MINIMUM CLE RULES AND REGULATIONS R. 3.2(a) (2018); REG. OF THE WASH. STATE Bd. OF CLE 103 (2017); WYO. STATE BAR, RULES OF THE WYOMING STATE BOARD OF CONTINUING LEGAL EDUCATION 4(a)(1).

135. *See* MINN. STATE Bd. OF CLE, RULES OF THE BOARD OF CONTINUING EDUCATION 6(C), 9(A) (2016); OR. ST. B. MINIMUM CLE RULES AND REGULATIONS R. 3.2(a), 5, 5.300(b) (2018).

136. *See* ARIZ. SUP. CT. R. 45(a)(1), (5); WYO. STATE BAR, RULES OF THE WYOMING STATE BOARD OF CLE 4(a)(1), 5(d).

137. N.Y. STATE CLE Bd. REGULATIONS AND GUIDELINES REVISED § 3(D)(11) (2018).

138. WASH. ST. CT. R. 11(b)(6), (c)(1), (e)(7).

an approved legal aid or a pro bono organization or by virtue of an appointment by a court,¹³⁹ all states require attorneys to report their completed pro bono hours and receive certification by a legal services provider or approval from the relevant MCLE board.¹⁴⁰

F. Mandatory and Voluntary Pro Bono Requirements

To track and promote pro bono services, several jurisdictions have instituted a mandatory¹⁴¹ or voluntary¹⁴² requirement for lawyers to report the number of pro bono hours a lawyer personally dedicated—as well as any financial contributions to legal aid or public interest organizations—as part of the filing requirement to maintain a legal license. Such reporting requirements have the potential to encourage (or guilt) lawyers into dedicating some form of pro bono service. These requirements also provide a mechanism for jurisdictions to obtain statistical information about the amount of pro bono services attorneys are performing within the jurisdiction.¹⁴³ Any negative consequences, however, are tied simply to the failure to

139. COLO. R. CIV. P. 260.8; OR. STATE BAR, MINIMUM CLE RULES AND REGULATIONS R. 5, 5.300(b) (2018); WYO. ST. B., RULES OF THE WYOMING STATE BOARD OF CLE R. 5(d) (2015).

140. ARIZ. SUP. CT. R. 45(a)(5); COLO. R. CIV. P. 260.8; LA. SUP. CT. R. XXXR. 3, REG. 3.21; OHIO SUP. CT. R. 10 § 5(H)(2); TENN. SUP. CT. R. 21 § 4.07(c); WASH. ST. CT. R. 11(e)(7), (g)(2), (i)(1); WIS. SUP. CT. R. ch. 31.05(7); ALA. ST. B. RULES FOR MANDATORY CONTINUING LEGAL EDUC. 3.9 (2017); COMM'N ON CONTINUING LEGAL EDUC., DELAWARE RULES FOR CONTINUING LEGAL EDUCATION 8(D) (2017); MINN. STATE BD. OF CLE, RULES OF THE BOARD OF CONTINUING EDUCATION 6C (2016); N.Y. CLE BOARD REG. § 3D(11)(e) (2018); STATE BAR ASS'N OF N.D., CLE POLICY § 1.19 (2018); OR. STATE BAR, MINIMUM CLE RULES AND REGULATIONS R. 5, 5.300(b); WYO. STATE BAR, RULES OF THE WYOMING STATE BOARD OF CLE 5(d).

141. States with mandatory pro bono reporting requirements include: Florida, Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, and New York. See *State Reporting Policies*, A. B.A., https://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html [<https://perma.cc/UX2K-SWSL>].

142. States with voluntary pro bono reporting requirements include: Arizona, Connecticut, Georgia, Kentucky, Louisiana, Montana, Ohio, Oregon, Tennessee, Texas, Virginia and Washington. See *State Reporting Policies*, *supra* note 141.

143. See *Reporting of Pro Bono Service*, A.B.A., https://www.americanbar.org/groups/probono_public_service/policy/reporting_of_pro_bono_service.html [<https://perma.cc/FDP3-5KS3>].

report, rather than the failure to contribute to legal aid organizations or perform any pro bono.¹⁴⁴

G. *Waiver of License Requirements or Special Admission to the Bar*

As multijurisdictional practice and unauthorized practice of law rules inhibit attorney availability to engage in pro bono legal services, the public interest community has advocated for the development of rules waiving certain license requirements for certain categories of attorneys or under certain circumstances.¹⁴⁵ Such rules include reducing or eliminating the annual license fee, eliminating the requirement of admission to the local bar, and eliminating the need to register or obtain certification to practice from the bar or court.¹⁴⁶ The unifying feature of these rules is a lightening of the licensing burden for attorneys who limit their practice to the provision of pro bono legal services.

1. *Emeritus Attorney Pro Bono Practice Rules*

In 1979, the ABA Commission on Law and Aging began evaluating the potential for an emeritus attorney pro bono practice rule.¹⁴⁷ In a bold move, Florida became the first state to launch a one-year pilot of the concept in 1981, eventually approving a formal rule that went into

144. See *id.*

145. See CORPORATE PRO BONO, MULTIJURISDICTIONAL PRACTICE IN THE U.S.: IN-HOUSE COUNSEL PRO BONO 1 (2017); LEGAL SERVICES CORPORATION, REPORT OF THE PRO BONO TASK FORCE 26 (2012).

146. See generally CORPORATE PRO BONO, *supra* note 145, at 1; *Emeritus Attorney Rules*, A.B.A., https://www.americanbar.org/groups/probono_public_service/policy/emeritus_attorney_rules.html [<https://perma.cc/4WJP-LDVS>]; *Pro Bono and Disasters*, A.B.A., https://www.americanbar.org/groups/probono_public_service/policy/disasters.html [<https://perma.cc/KG9D-9GTY>]. In December 2018, the Supreme Court of Missouri issued an order requiring the Missouri Bar to launch a pilot program in 2019 taking a new approach to encouraging pro bono within the state of Missouri. Order Regarding Rule 6.01(o) Pro Bono Waiver of Annual Enrollment Fee and Pilot Project (Sup. Ct. Mo. 2018). The order adopts a new rule that grants a lawyer in good standing in Missouri the option of obtaining a waiver of the Missouri annual enrollment fee if the lawyer provides pro bono legal services in Missouri to an approved legal assistance organization and meets other requirements. *Id.*

147. DAVID GODFREY, EMERITUS ATTORNEY PRO BONO PRACTICE RULES 3 (2015), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_emeritus2016.pdf [<https://perma.cc/K4E7-3L8K>] [hereinafter GODFREY, EMERITUS RULES].

effect in 1985.¹⁴⁸ According to ABA Commission on Law and Aging, “[t]he original vision of emeritus attorney rules was to encourage retired attorneys to [engage in pro bono legal services] by reducing or eliminating the annual license fee and other burdens.”¹⁴⁹ Today, such rules—adopted by forty-four jurisdictions—encompass both retired and inactive attorneys and waive some of the regular licensing requirements prevalent in the relevant jurisdiction.¹⁵⁰ In order to be eligible under an emeritus attorney rule, six jurisdictions impose an age restriction;¹⁵¹ fifteen jurisdictions require a specific number of years of practice, or a combination of years of practice and years licensed in good standing;¹⁵² and eleven jurisdictions limit the applicability of the relevant emeritus attorney rule to attorneys of a certain status.¹⁵³ To lift licensing burdens, twenty-eight jurisdictions

148. AM. BAR ASS'N, NO LONGER ON THEIR OWN: USING EMERITUS ATTORNEY PRO BONO PROGRAMS TO MEET UNMET CIVIL LEGAL NEEDS 3 (2008), https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/V2_pro_bono_emeritus_brochure_3_5.pdf [<https://perma.cc/N4YA-757F>].

149. GODFREY, EMERITUS RULES, *supra* note 147, at 3.

150. Jurisdictions that have adopted emeritus pro bono rules include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. DAVID GODFREY, STATE EMERITUS PRO BONO PRACTICE RULES (2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/Emeritus%20Rules%20Chart.pdf [<https://perma.cc/A7DJ-UAVS>].

151. *See id.* (noting an age restriction of fifty-five or older in New York; sixty-five or older in Delaware; seventy and older in Georgia, Kentucky and Wisconsin; and seventy-five or older or in practice for fifty years or more in Utah).

152. *See id.* (noting a practice requirement of at least three years in California (with three of last five in state); at least five years in Arizona, Idaho, North Dakota (out of the last ten years), Tennessee (out of the last ten years or twenty-five years of practice) and Washington (out of the last ten years for in-state lawyers); at least ten years in Florida (out of the last fifteen years), Montana (out of the last fifteen years), New York, Washington (out of the last fifteen years for out-of-state attorneys) and West Virginia; at least fifteen years in Ohio, Oregon (for out-of-state attorneys); at least twenty years in Virginia (with at least five active out of seven years before status); at least twenty-five years in Georgia (with at least five in good standing); and fifty years of practice or seventy-five years of age or older in Utah).

153. *See id.* (applying the rules to only retired attorneys in Georgia, Minnesota, South Dakota, Virginia, Washington, and Wisconsin; only inactive attorneys in Alabama, the District of Columbia, Hawaii, and Ohio; only retired or inactive attorneys

waive the annual dues or fees,¹⁵⁴ whereas fourteen jurisdictions reduce the annual dues or fees.¹⁵⁵ Eighteen jurisdictions waive the MCLE requirements,¹⁵⁶ whereas seven jurisdictions reduce the MCLE requirements.¹⁵⁷ Forty-one jurisdictions, however, impose the requirement of working under the auspices of a certified legal services

in Alaska, California, Florida (provided inactive status is voluntary), Idaho, Kansas, Maine, Maryland, Massachusetts, Montana, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Texas; only inactive attorneys in state, active or inactive attorneys out of state, or clinical law professors in Nevada; only inactive attorneys in state or active or inactive attorneys out of state in New Mexico; only attorneys retired, inactive, or otherwise unable to practice in Arizona; active or retired attorneys in Connecticut; only inactive, retired, or emeritus attorneys in Delaware; only retired, inactive, or out-of-state attorneys in Illinois; only inactive attorneys at least seventy years old in Kentucky; only inactive or out-of-state attorneys in Mississippi; only volunteer attorneys in North Dakota and Oregon; only inactive attorneys or active attorneys at least seventy-five years old in Utah; only attorneys retired, inactive, or active, but not practicing in West Virginia; and only out-of-state attorneys in Arkansas and New Jersey).

154. *See id.* (noting the following states with waived fees: Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Illinois (for retired attorneys), Iowa, Kansas (for retired attorneys), Kentucky, Maine, Massachusetts (for retired attorneys), Minnesota, Montana, Nevada (for inactive attorneys), New York (for retired attorneys), North Carolina, North Dakota, South Dakota (for inactive attorneys), Tennessee, Texas, Utah (for emeritus attorneys), Vermont, Virginia, West Virginia, Wisconsin and Wyoming).

155. *See id.* (noting the following states with reduced fees: Alabama, Colorado, Hawaii, Idaho, Illinois (for inactive attorneys), Massachusetts (for inactive attorneys), New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Utah (for inactive attorneys) and Washington).

156. *See id.* (noting the following states with waived MCLE requirements: Arizona, Delaware, Georgia (at age seventy), Illinois, Kansas, Kentucky, Maine (for certain attorneys), Nevada (for inactive and retired attorneys), New York (for retired attorneys), North Carolina, North Dakota (for out-of-state attorneys), Oregon, South Carolina, Texas, Utah, Washington, West Virginia, and Wisconsin).

157. *See id.* (noting the following states with reduced MCLE requirements: California, Iowa, Maine, Minnesota, Montana, Pennsylvania, and Wyoming).

program;¹⁵⁸ whereas twenty jurisdictions require direct supervision by an attorney licensed within the relevant state.¹⁵⁹

2. *In-House Counsel Rules*

Although they are admitted and in good standing in one or more jurisdictions in the United States, many in-house attorneys are not licensed to practice law in the states in which they currently work.¹⁶⁰ In 2012, the ABA House of Delegates addressed this issue by adopting recommendations from the Commission on Multijurisdictional Practice and by amending Model Rule 5.5.¹⁶¹ The rule, entitled “Unauthorized Practice of Law; Multijurisdictional Practice of Law,” authorizes in-house counsel to practice for their employers without being admitted to the local bar and without registering or obtaining certification from the bar or court, as long as they are licensed and in good standing in at least one U.S. jurisdiction or foreign jurisdiction and are providing services that do not require pro hac vice admission.¹⁶² Although several jurisdictions have adopted the amended Model Rule,¹⁶³ most jurisdictions have implemented rules that allow non-locally licensed in-house counsel to work for their employer only after registering or obtaining a certification to do so.¹⁶⁴

158. *See id.* (noting the following states requiring pro bono work to be completed through a certified legal services provider: Alabama, Alaska, Arizona, Arkansas (for court appearances), California, Connecticut, Delaware (for retired and inactive attorneys), Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming).

159. *See id.* (noting the following states requiring pro bono work to be completed under the supervision of a licensed attorney: Arizona, Arkansas, California, Florida, Idaho, Iowa, Mississippi, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia).

160. CORPORATE PRO BONO, *supra* note 145, at 1.

161. COMM’N ON ETHICS, AM. BAR ASS’N, DRAFT FOR COMMENT MODEL RULE 5.5 (2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120904_ethics_20_20_revised_draft_proposal_model_rule_5_5_foreign_lawyers.authcheckdam.pdf [<https://perma.cc/LPL5-274Q>].

162. MODEL RULES OF PROF’L CONDUCT r. 5.5(d)(1) (AM. BAR ASS’N 2016).

163. CORPORATE PRO BONO, *supra* note 145, at 1 n.1.

164. *Id.* at 6–10 (highlighting that the following thirty-six jurisdictions require non-locally licensed in-house counsel to register or obtain a certification in order to

Only four jurisdictions refrain from providing an exemption for non-locally licensed in-house counsel.¹⁶⁵

Although “practice rules in all but a few states permit in-house counsel licensed in other U.S. jurisdictions to represent their in-state employer, often through a registration or similar certification process ... [the vast majority] of these rules limit representation to the employer-client.”¹⁶⁶ In other words, very few jurisdictions expressly permit non-locally licensed in-house counsel to engage in pro bono representation. The failure to permit such attorneys to engage in pro bono legal services prevents the public interest community from tapping into a large pool of attorneys living in their state.¹⁶⁷

In July 2012, the Conference of Chief Justices and the Conference of State Court Administrators adopted Resolution 11:

BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators encourage their members to consider promoting the expansion of pro bono legal services, including by amending the practice rules to allow non-locally licensed in-house counsel who are permitted to work for their employer to also provide pro bono legal services subject to the local rules of professional conduct.¹⁶⁸

practice law on behalf of their employer: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin).

165. *Id.* (noting that Hawaii, Mississippi, Montana and West Virginia fail to make any exceptions or allowances for non-locally licensed in-house counsel).

166. *Id.* at 1.

167. *Id.* at 2 (highlighting that registered in-house counsel authorized to work in-state for their employer number more than 250 in Colorado, Massachusetts, and Ohio, more than 300 in Pennsylvania, more than 350 in Delaware, more than 500 in Illinois, more than 550 in New York, more than 900 in Florida and Virginia, and more than 950 in Connecticut).

168. CONFERENCE OF CHIEF JUSTICES & THE CONFERENCE OF STATE COURT ADM’R., RESOLUTION 11: IN SUPPORT OF PRACTICE RULES ENABLING IN-HOUSE COUNSEL TO PROVIDE PRO BONO LEGAL SERVICES (2012).

Moreover, in August 2014, the ABA House of Delegates also adopted a resolution requesting that in-house lawyers be allowed to do pro bono in the remaining jurisdictions.¹⁶⁹

To date, four jurisdictions—Illinois, New York, Virginia, and Wisconsin—have adopted practice rules that permit non-locally licensed in-house counsel to engage in pro bono legal services broadly without restrictions—for example, mandating that the pro bono legal services be provided only in association with an approved organization or under the supervision of a locally licensed lawyer.¹⁷⁰ Four other jurisdictions allow non-locally licensed in-house counsel to provide pro bono legal services but only if such services are associated or affiliated with an approved legal services organization and provided under the supervision of a locally licensed attorney; twelve jurisdictions require that such services must only be associated or affiliated with an approved organization; while four jurisdictions require that such services must only be provided under the supervision of a locally licensed attorney.¹⁷¹ Nine jurisdictions are silent with respect to whether non-locally licensed in-house counsel can engage in pro bono legal services; however, these same jurisdictions allow out-of-state attorneys, which include in-house counsel, to provide pro bono legal services subject to numerous restrictions.¹⁷² Finally, eighteen jurisdictions are completely silent as to whether non-locally licensed in-house counsel and out-of-state attorneys may engage in pro bono representation.¹⁷³ In other words, forty-six jurisdictions have practice rules that limit or severely restrict pro bono legal services by in-house counsel.

3. *Disaster Relief*

In the wake of the devastation caused by Hurricanes Katrina and Rita in the summer of 2005, the ABA Task Force on Hurricane Katrina mobilized immediately to advocate for the suspension of unlicensed practice of law rules by various states impacted by the hurricanes to permit lawyers from other jurisdictions to provide pro bono legal services to the thousands of citizens affected by this natural

169. See Terry Carter, *Let More In-House Counsel Do Pro Bono Service, ABA House Resolution Says*, A.B.A.J. (Aug. 11, 2014).

170. See CORPORATE PRO BONO, *supra* note 145, at 1.

171. See *id.*

172. See *id.*

173. See *id.*

disaster.¹⁷⁴ Shortly thereafter, the Task Force recognized the need for a model rule that “would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction.”¹⁷⁵

At its February 2007 annual meeting, in an effort led by the Standing Committee on Client Protection, the ABA House of Delegates voted to approve the Standing Committee’s recommendation to adopt the Model Court Rule on Provision of Legal Services Following Determination of a Major Disaster and amend Comment 14 to Model Rule 5.5 to add the following language:

Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.¹⁷⁶

Despite the ABA’s adoption of the new Model Court Rules and revisions to Model Rule 5.5’s commentary—and endorsement from other constituencies¹⁷⁷—only eighteen jurisdictions have currently adopted the Model Court Rule.¹⁷⁸ Interestingly, these jurisdictions do not include those most palpably impacted by major disaster—whether hurricanes, tornadoes, floods, or fires—since the creation of the Model Court Rule, including Alabama, Arkansas, California,

174. STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 9 (2007).

175. *Id.* at 9.

176. AM. BAR ASS’N, RESOLUTION 104 12 (2007) (adopted in Model Rule 5.5).

177. See CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3: ENCOURING CONSIDERATION OF THE ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF A MAJOR DISASTER (2007).

178. STANDING COMM. ON CLIENT PROT., AM. BAR ASS’N, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf [<https://perma.cc/6WKY-HEPE>] (highlighting the following eighteen jurisdictions: Arizona, Colorado, Delaware, Georgia, Iowa, Illinois, Louisiana, Minnesota, Missouri, North Dakota, New Jersey, New York, South Carolina, Tennessee, Virginia, Washington, and Wisconsin).

Florida, Kentucky, Mississippi, Nebraska, North Carolina, Oklahoma, Texas, and West Virginia.¹⁷⁹

4. Law Professors

Similar to in-house counsel attorneys, law professors are often not licensed to practice law in the states in which they currently work and represent an untapped pool of attorneys who could engage in pro bono service.¹⁸⁰ However, unlike the rules governing emeritus attorneys, in-house counsel attorneys, or attorneys keen to lend a hand during a disaster, the rules governing law professors lack consistency.¹⁸¹ For most jurisdictions, non-locally licensed law professors can engage in pro bono service only by pursuing admission pro hac vice for a specific pro bono case or pursuing admission to the bar either by: (1) porting their bar exam score if they are licensed and the jurisdiction in which they work are Uniform Bar Examination (“UBE”) states; (2) securing reciprocal admission; or (3) successfully passing the relevant jurisdiction’s bar exam.¹⁸² For a handful of jurisdictions, law professors may gain admission to the bar if they

179. See Sahil Chinoy, *The Places in the U.S. Where Disaster Strikes Again and Again*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/interactive/2018/05/24/us/disasters-hurricanes-wildfires-storms.html> [http://perma.cc/T3QB-2L2R].

180. See Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 LA. L. REV. 547, 593 (2017) (noting that a practical objection to mandatory pro bono for law faculties is “some professors are not admitted to the state bar where the school is situated or, indeed, any bar at all”).

181. See ELIZABETH MERTZ ET AL., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 14 (2011) (noting that in the 2007–08 academic year, 8142 full-time law professors were employed at the then-197 accredited law schools).

182. See, e.g., COLO. R. CIV. P. 203.2–3; R. GOVERNING ADMISSION TO THE ALA. STATE BAR 3; ALASKA BAR R. 2 § 2; AM. SAM. HIGH CT. R. 138; DEL. SUP. CT. R. 55; R. REGULATING THE FLA. BAR 1-3.10; GA. R. GOVERNING ADMISSION TO THE PRACTICE OF LAW PT. C § 1–4; GUAM R. GOVERNING ADMISSION TO THE PRACTICE OF LAW 4; IDAHO BAR COMM’N R. 206; ILL. SUP. CT. R. 704A, 705; IOWA CT. R. 31.12; KAN. SUP. CT. R. 708; ME. BAR ADMISSION R. 11A–11B; MASS. SUP. JUD. CT. R. 3:01 § 6; N.H. SUP. CT. R. 42(6); N.Y. R. CT. APP. FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW 520.10; N.C. ADMISSION R. .0502; N.D. ADMISSION TO PRACTICE R. 7; N. MAR. I. SUP. CT. R. 73-3(C); P.R. R. FOR THE ADMISSION OF APPLICANTS TO THE PRACTICE OF LAW AND THE NOTARIAL OF PROFESSION 4.1.1(d); S.C. APP. CT. R. 402(j); UTAH JUDICIAL COUNCIL CODE OF JUDICIAL ADMIN. R. 14-705; V.I. SUP. CT. R. 201–202; VA. SUP. CT. R. 1A:1; WASH. ADMISSION AND PRACTICE R. 3(c)–(d); WYO. RULES AND PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF LAW R. 304–305. CONN. BAR EXAMINING COMM., RULES OF THE SUPERIOR COURT REGULATING ADMISSION TO THE BAR § 2-13 (2018); MISS. BD. OF BAR ADMISSIONS, RULES GOVERNING ADMISSION TO THE MISSISSIPPI BAR R. 6 § 1 (2011).

have been admitted and in good standing in another jurisdiction for at least five years.¹⁸³

Arkansas, Kentucky, and Maryland, however, appear to offer a clear path to pro bono practice for law professors, by permitting attorneys licensed to practice in other jurisdictions admittance to the bar or permission to practice if they engage solely in pro bono practice.¹⁸⁴ Similarly, Arizona, Connecticut, Hawaii, New Jersey, Nevada, Oregon, South Dakota, and West Virginia permit law professors admission to the bar in the respective jurisdictions with certain restrictions.¹⁸⁵ Law professors satisfy the qualifications for admission in Connecticut if the law professor is a full-time faculty member or clinical fellow at an accredited Connecticut law school and admitted as a member of the bar in another jurisdiction.¹⁸⁶ In Nevada, professors at the William S. Boyd School of Law may be admitted to the bar if they are barred in another jurisdiction and have passed the MPRE with a score of eighty-five or higher.¹⁸⁷ Professors at approved law schools in South Dakota and Arizona may be admitted to the bar upon recommendation of the dean and continued employment at their law school.¹⁸⁸ Likewise, professors at West Virginia University College of Law may be admitted to the bar upon recommendation by the dean and if the professor is barred in another jurisdiction;

183. See, e.g., D.C. CT. APP. R. 46; RULES FOR ADMISSION TO THE BAR OF MONT. R. 4-5; RULES OF THE SUP. CT. GOVERNING ADMISSION TO THE BAR OF TEX. R. 13 § 1(a) (requiring engagement in the practice of law for five of the last seven years); VT. RULES OF ADMISSION TO THE BAR R. 14-15 (allowing attorneys barred in Maine and New Hampshire to only have engaged in practice for three years); WIS. SUP. CT. R. 40.05.

184. KY. SUP. CT. R. 2.112 (limiting the license to practice to eighteen months); ARK. ADMIN. ORDERS ORD. 15 (2016); STATE BD. OF LAW EXAMINERS STATE OF MD., RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND R. 19-215 (2016) (requiring attorneys to be affiliated with a legal services or pro bono publico program).

185. ARIZ. REV. STAT. SUP. CT. R. 38(c); HAW. SUP. CT. R. 1.8(a); NEV. SUP. CT. RULES REGULATING ADMISSION TO THE PRACTICE OF LAW R. 49.1; RULES GOVERNING THE CTS. OF THE STATE OF N.J. R. 1:27-3; W. VA. SUP. CT. RULES FOR ADMISSION TO THE PRACTICE OF LAW R. 4.6; CONN. BAR EXAMINING COMM., RULES OF THE SUPERIOR COURT REGULATING ADMISSION TO THE BAR R. 2-13(a) (ii); OR. STATE BD. OF BAR EXAMINERS, SUPREME COURT OF THE STATE OF OREGON RULES FOR ADMISSION OF ATTORNEYS R. 11.05 (2018); S.D. BD. OF BAR EXAMINERS, RULES AND REGULATIONS FOR ADMISSION TO PRACTICE LAW IN SOUTH DAKOTA R. 16-16-7.1 (2018).

186. CONN. BAR EXAMINING COMM., RULES OF THE SUPERIOR COURT REGULATING ADMISSION TO THE BAR § 2-13(a) (ii).

187. NEV. SUP. CT. RULES REGULATING ADMISSION TO THE PRACTICE OF LAW R. 49.1.

188. ARIZ. REV. STAT. SUP. CT. R. 38(c)(1), (5); S.D. BD. OF BAR EXAMINERS, RULES AND REGULATIONS FOR ADMISSION TO PRACTICE LAW IN SOUTH DAKOTA R. 16-16-7.6.

however, there is an initial five-year limitation on the license.¹⁸⁹ After one year of teaching, professors at Oregon law schools may secure a limited license to practice that expires upon termination of employment with the law school; however, the professor must be barred in a jurisdiction with a bar exam “substantially equivalent” to the bar exam in Oregon.¹⁹⁰ Similarly, after five years of full-time teaching at an approved law school in New Jersey, law professors may be admitted to the bar if they have been admitted to another jurisdiction with “educational qualifications for admission to the bar [] equal to those” in New Jersey.¹⁹¹ In Hawaii, law professors may be admitted pro tem to the bar for three years.¹⁹² Upon expiration of the three-year period, the dean of the law school may submit an affidavit or motion declaring that the professor has remained in good standing during the three-year period, which may then permit the law professor to be admitted as a full member of the bar if the professor is barred in another jurisdiction.¹⁹³

Although Arizona provides a path for admission for full-time professors, the state also limits the number of hours for which professors are eligible to receive compensation for their legal services. Specifically, Arizona restricts its faculty members from receiving compensation for legal work that exceeds an average of eight hours per week during a calendar year.¹⁹⁴ Moreover, Arizona also requires an annual certification by the dean verifying faculty member compliance with this requirement.¹⁹⁵ Additionally, to encourage law schools to promote clinical education and pro bono opportunities for law students, Arizona has provided a less restrictive path to admission for clinical law professors.¹⁹⁶ Similarly, Ohio ties a law professor’s admission to the bar to the professor’s affiliation with a law school’s clinical education program.¹⁹⁷ In both jurisdictions, if the law professor is barred in another jurisdiction, they may practice

189. W. VA. SUP. CT. RULES FOR ADMISSION TO THE PRACTICE OF LAW R. 4.6.

190. OR. STATE BD. OF BAR EXAMINERS, SUPREME COURT OF THE STATE OF OREGON RULES FOR ADMISSION OF ATTORNEYS R. 11.05(1), (6).

191. RULES GOVERNING THE CTS. OF THE STATE OF N.J. R. 1:27-3.

192. HAW. SUP. CT. R. 1.8(a).

193. *Id.* at R. 1.8(b).

194. ARIZ. REV. STAT. SUP. CT. R. 38(c)(5).

195. *Id.*

196. *Id.* R. 38(d)(1).

197. SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO R. 9(1)(E).

law, but only if such practice is connected directly with the fieldwork associated with the clinic.¹⁹⁸

Meanwhile, California permits its bar to characterize law schools as “legal services providers” and allows any attorneys, including law professors, who are working for the legal services provider to engage in pro bono practice so long as the non-locally licensed lawyers are supervised by a California-barred attorney.¹⁹⁹ Relatedly, Pennsylvania will admit a licensed attorney from another jurisdiction to its bar if the attorney is “employed by or associated with a public defender’s office, an organized defender association, or an organized legal services program which is sponsored, approved or recognized by the local county bar association.”²⁰⁰ Arguably, if a law professor engages in pro bono practice through the auspices of a legal services program or if, the law school itself can be deemed a legal services program by the local bar association, then it is possible a law professor may be admitted to practice. Such arguments may also apply to the rules governing the admittance of attorneys in Minnesota and New Mexico, both of which will grant a limited license to attorneys employed by a qualified legal services organization; however, under those rules, the law school or its clinical education program would need to be deemed a qualified legal services provider.²⁰¹

H. Unbundling Rules

Because the cost of legal services is prohibitive for low-income and often modest-means Americans, the legal industry has followed other industries—such as the airline industry, the financial service industry, and the music industry—by unbundling legal services.²⁰²

198. ARIZ. REV. STAT. SUP. CT. R. 39(1), (5) (2018); SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO R. 9(1)(E) (limiting the work to “criminal or poverty law clinics,” which may exclude work associated with clinics focused on environmental law, civil rights, animal rights, community and economic development, etc.).

199. CAL. RULES OF CT. R. 9.45(a) (1) (B).

200. PA. BD. OF LAW EXAM’RS, PA. BAR ADMISSION RULES R.311(b) (2015).

201. N.M.R. 15-301.2 (2018); MINN. STATE BD. OF LAW EXAMINERS, RULES FOR ADMISSION TO THE BAR 8 (2017) (granting a temporary license not to exceed fifteen months).

202. Stephanie L. Kimbro, *Law a la Carte: The Case for Unbundling Legal Services*, 29 GPSOLO 30, 30 (2012), https://www.americanbar.org/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services.html [<https://perma.cc/9J4J-QZJZ>].

Model Rule 1.2(c) formally permits limited scope representation (“unbundling”): “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”²⁰³ Unbundling is a delivery method for legal services in which a “lawyer breaks down the tasks associated with a client’s legal matter and provides representation only pertaining to a clearly defined portion of the client’s legal need” and in which the “client accepts responsibility for doing the footwork for the remainder of the legal matter until reaching the desired resolution.”²⁰⁴ Such services include advising clients on court procedures and courtroom behavior, coaching on strategy, conducting document review, drafting agreements or pleadings, ghostwriting, dispute resolution, negotiating, organizing discovery material or preparing exhibits, and making limited appearances in court or providing legal guidance.²⁰⁵ To date, Rule 1.2(c) has been adopted either verbatim or with some modification (typically limiting unbundling only to noncriminal matters) in all fifty states and the District of Columbia.²⁰⁶

I. Access to Justice Commissions

Although the first Access to Justice (ATJ) Commission was launched in 1994 in the State of Washington, the expansion of this concept has only occurred within the last few years.²⁰⁷ Now, ATJ Commissions exist in forty-four jurisdictions—a growth spurred by a series of one-time grants in 2012 and 2013 to spread the ATJ Commission movement across the United States.²⁰⁸ Created typically

203. MODEL RULES OF PROF’L CONDUCT r. 1.2(c) (AM. BAR ASS’N 2016).

204. Kimbro, *supra* note 202, at 32.

205. *See id.* at 33–34.

206. *See Unbundling Resources by State*, A.B.A.,

https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state.html [https://perma.cc/SL6V-CEKZ]; *Rules*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html [https://perma.cc/4X58-SPBD].

207. *See Access to Justice Commissions*, A.B.A.,

http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html [https://perma.cc/W5WT-DKJW].

208. *See Directory and Structure*, A.B.A.,

http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions/commission-directory.html

by order of the jurisdiction's highest court, ATJ Commissions focus not on providing direct pro bono assistance, but rather on improving existing systems or creating new opportunities for expanding access to justice within the jurisdiction.²⁰⁹ ATJ Commissions are typically comprised of state citizens representing the legal profession, the business sector, the academic community, the religious community, and the public interest and advocacy community.²¹⁰

III. SURVEY SAYS!: MOTIVATIONS FOR PRO BONO ENGAGEMENT

Absent a complete system overhaul²¹¹ or significant funding to support legal services organizations,²¹² pro bono legal services will

[<https://perma.cc/AJK8-LEC5>] (noting the establishment of ATJ Commissions in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Vermont, Virgin Islands, Virginia, Washington, Wisconsin, and Wyoming; and other ATJ entities in Georgia, Michigan, Minnesota, Ohio, and Oregon); *see also* RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, AM. BAR ASS'N, ACCESS TO JUSTICE UPDATES 2017-2018 122 (2018),

<https://www.americanbar.org/content>

/dam/aba/events/legal_aid_indigent_defendants/ls_sclaid_atj_18_meeting_material_s_booklet.authcheckdam.pdf [<https://perma.cc/97MS-N4H4>] [hereinafter ACCESS UPDATES]. Although the West Virginia Access to Justice Commission lost its funding at the end of 2017, it appears that it secured a grant of almost \$75,000 to revive the commission. *See* Steve Canterbury, *Cuts at Supreme Court Might Look Good at First, But Will Harm People*, CHARLESTON GAZETTE-MAIL (Dec. 28, 2017), https://www.wvgazette.com/opinion/gazette_opinion/op_ed_commentaries/steve-canterbury-cuts-at-supreme-court-might-look-good-at/article_82df3090-f36b-5a7e-8199-b6b2ac2d36b8.html [<https://perma.cc/U37V-WP6Y>]; Press Release, W.V. State Bar, Access to Justice Foundation Awarded Grant From West Virginia State Bar, (Feb. 19, 2018), <https://wvbar.org/access-to-justice-foundation-awarded-grant-from-west-virginia-state-bar> [<https://perma.cc/5X3V-NYLX>].

209. *See Access to Justice Commissions*, *supra* note 207.

210. RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, AM. BAR ASS'N, HALLMARKS OF EFFECTIVE ACCESS TO JUSTICE COMMISSIONS, 2 (2014), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_effective_atj_commissions_hallmarks.authcheckdam.pdf [<https://perma.cc/8FHF-HSD4>].

211. Keith, *supra* note 18, at 65–96 (describing the complexity of the civil legal aid delivery system).

212. In the current political climate, it is unrealistic to think that federal funding for the civil legal aid system will increase any time soon. *See* Katie Benner, *Justice Dept. Office to Make Legal Aid More Accessible is Quietly Closed*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice->

continue to be a key component of the access to justice equation. As such, attempting to provide an understanding of the best state-wide practices to further expand pro bono resources throughout the country is an important next step. Unfortunately, though, there is a lack of empirical evidence evaluating whether and to what extent any of the above discussed approaches promote pro bono and are effective in expanding access to justice.²¹³ Despite this reality, the following section attempts to provide some understanding of the rules, policies, and initiatives that are most worthwhile to pursue.

A. *Supporting Justice Survey*

Recently, the ABA Standing Committee on Pro Bono and Public Service aimed to provide some guidance on this score. In 2017, the Standing Committee embarked on its fourth empirical investigation since 2004 into how the culture of volunteering has manifested in the legal profession (the “Supporting Justice Survey”).²¹⁴ Although prior studies by the Standing Committee yielded low response rates, the most recent study incorporated a new data collection methodology that yielded a significantly larger sample.²¹⁵ Rather than distributing the survey through nationally-available lists of attorneys (e.g. ABA

department-closed.html [https://perma.cc/P9AQ-8GG2]; Jenna Greene, *Trump Budget Puts Legal Services Back on the Chopping Block*, AM. LAW LITIG. DAILY (Feb. 13, 2018), <https://www.law.com/sites/litigationdaily/2018/02/13/trump-budget-puts-legal-services-back-on-the-chopping-block> [archived at <https://advance.lexis.com/search?crd=a6161661-3cb6-4cf-d79722e692c9&pdsearchterms=LNSDUID-ALM-DLYRPT-hdk45efdj&pdbyasscitatordocs=False&pdmfid=1000516&pdisurlapi=true>]; Jenavieve Hatch, *The Trump Administration Quietly Defunded Legal Services for Trafficking Victims*, HUFFINGTON POST (July 6, 2018), https://www.huffingtonpost.com/entry/trump-defunded-legal-services-trafficking_us_5b3fbeade4b07b827cc0517c [https://perma.cc/4XAN-9RKJ]; Debra Cassens Weiss, *ABA President Says Trump’s Plan to Defund the Legal Services Corp. ‘Should Be Dead on Arrival,’* ABA J. (Feb. 13, 2018), http://www.abajournal.com/news/article/trumps_budget_plan_would_once_again_eliminate_funding_for_the_legal_service [https://perma.cc/48UY-Q9UH].

213. See Keith, *supra* note 18.

214. STANDING COMM’N ON PRO BONO & PUB. SERV., AM. BAR ASS’N, SUPPORTING JUSTICE: REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.authcheckdam.pdf [https://perma.cc/4565-DT7M] [hereinafter SUPPORTING JUSTICE SURVEY].

215. *Id.* at 3–4.

members), the Standing Committee worked directly through state entities to distribute the survey to all attorneys licensed within the twenty-four participating states.²¹⁶ The Supporting Justice Survey quantified the amount of pro bono legal services contributed by attorneys in the United States in 2016, describes characteristics of recent pro bono service, and identifies factors that encourage and discourage pro bono service.²¹⁷ The participating jurisdictions yielded a “representative sample of states nationally in terms of attorney demographics, urban/rural breakdown, political leaning, and pro bono policies.”²¹⁸ With a response rate of 7.3% and responses from over 47,000 attorneys, the study provides an interesting data set to examine the effectiveness of various state-wide rules, policies, and practices.²¹⁹

The Supporting Justice Survey found that, when undertaking pro bono legal services, attorneys most commonly pursue limited scope representation in matters referred by legal services providers and within their area of expertise.²²⁰ Through a series of questions examining the motivations underlying pro bono engagement, attorneys overwhelming responded that “empathetic or ethical motivations, such as helping people, reducing social inequalities, being a good person, and ethical or professional obligations” were the driving forces behind their willingness to participate in pro bono legal services.²²¹ Using pro bono as a professional development tool only moderately motivates attorneys, and “[a]ttorneys reported being least motivated by recognition.”²²² Relatedly, the Supporting Justice Survey asked attorneys about how helpful or motivating certain actions by states generally or the public interest community specifically would be to promoting pro bono engagement.²²³ Attorneys responded that they are most influenced by (1) a judge soliciting participation; (2) opportunities for limited scope

216. *Id.* Alabama, Arizona, Arkansas, California, Illinois, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, New Mexico, New York, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming participated in the 2017 study. *Id.*

217. *Id.* at 3–6.

218. *Id.* at 4.

219. *Id.* at 4.

220. *Id.* at 6.

221. *Id.* at 19.

222. *Id.*

223. *Id.* at 21.

representation; and (3) CLE credit for undertaking pro bono.²²⁴ Attorneys are moderately influenced by opportunities to engage in pro bono remotely and least motivated by policies encouraging or requiring self-reporting and state bar tracking of pro bono and by formal recognition of pro bono efforts.²²⁵

Of the 57% of respondents who provided pro bono legal services as a law student, just shy of 60% responded that pro bono engagement in law school made them “more likely” or “far more likely” to provide pro bono legal services after graduation.²²⁶ Roughly 38% indicated that pro bono engagement in law school had no impact on their likelihood of undertaking pro bono post-graduation, and only 3.4% reported that it made them “less likely” to engage in pro bono.²²⁷

As part of the Supporting Justice Survey, the Standing Committee aimed to obtain information about attorney engagement in what it called “public service activities”—activities that fall outside the traditional definition of pro bono but nevertheless compete with the limited time and resources attorneys have to volunteer.²²⁸ The most common public service activity is “legal services for a reduced fee,” which is more commonly known as “low bono.”²²⁹ Over 20% of respondents reported that they provide low bono services, averaging seventy-three hours per year.²³⁰ Of the attorneys assisting low-bono clients in 2016, one out of four reduced their fees by roughly 50%; whereas one out of five reduced their fees by approximately 71% to 75%.²³¹ Such reductions led to fees that were predominately under \$150 per hour, with a quarter of respondents charging between \$101 and \$150 per hour, a third charging between \$51 and \$100 per hour, and another quarter charging \$50 or less.²³²

In addition, the Supporting Justice Survey asked private practice attorneys a series of questions regarding their use of limited scope

224. *Id.* at 21, 35–36 (“[P]rivate practice attorneys were most motivated by a judge soliciting their participation in a pro bono case. Corporate, government, non-profit and academic attorneys tended to rate malpractice insurance in their top three.”).

225. *Id.*

226. *Id.* at 23.

227. *Id.*

228. *Id.* at 25.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 26.

representation and unbundling for a fee.²³³ Although most respondents indicated that none of their cases involved unbundled legal services for a fee, almost 25% of attorneys responded that up to 20% of their caseload involves unbundling for a fee.²³⁴ When asked the primary reasons for not providing limited scope representation, 75% of respondents agreed with the statement: “I don’t think unbundling would work for much of my practice”; 67% agreed with the statement: “I worry that unbundling would expose me to malpractice claims”; 63% agreed with the statement: “It is difficult to get enough clients to make unbundling worthwhile”; and 58% agreed with the statement: “Prospective clients are not interested in unbundled legal services.”²³⁵ For those who provide limited scope representation, 78% agreed with the statement: “Unbundling lowers the cost of cases so that more people can afford my services”; and 70% agreed with the statement: “Unbundling allows me to offer legal services at a more competitive price.”²³⁶ When asked to rank a list of actions that might encourage attorneys to provide unbundled services, respondents requested more clarity concerning ethical obligations, malpractice exposure, and court procedure.²³⁷

Through the Supporting Justice Survey, respondents offered important insight into actions that states and the public interest community could undertake that would encourage attorneys to engage in pro bono. Based on an analysis of the responses, the Standing Committee recommended “[e]ngaging judges in supporting pro bono work by encouraging them to write support letters, ask[ing] attorneys to take pro bono cases, recogniz[ing] attorneys who do pro bono work, and cultivat[ing] court-based pro bono programs.”²³⁸ It further recommended developing rules and policies to permit limited scope representation, allow attorneys to earn CLE credit by undertaking pro bono, and grant corporate and government lawyers the opportunity to engage in pro bono.²³⁹ Additionally, the Standing Committee encouraged the continual development of law school pro bono programs and technical and other innovations to increase

233. *Id.* at 26–28.

234. *Id.* at 26.

235. *Id.* at 27, n. 5.

236. *Id.* at 28.

237. *Id.*

238. *Id.*

239. *Id.* at 42.

attorney involvement in pro bono.²⁴⁰ Importantly, the Standing Committee acknowledged the need to “[c]ontinu[e] to collect information on attorney behaviors and attitudes with regard to pro bono to better understand the attorney population and to develop evidence-based program and policy changes.”²⁴¹

B. Taking the Pulse of Public Interest Leaders

In 2018, this author sought to expand on the work of the Standing Committee by holding a focus group and circulating another survey. At the 2018 Equal Justice Conference, approximately forty leaders in the public interest community came together to discuss the laws, rules, and policies adopted or implemented by certain states to improve pro bono culture and expand pro bono services within their jurisdictions.²⁴² The consensus among the leaders was that the best practice is to implement rules or policies that create a larger population from which to recruit attorneys for pro bono work, rather than rules or policies that simply encourage pro bono work from the sub-set of attorneys already at the public interest community’s disposal.

Following this conversation and after consulting with the NCAJ, the author decided to “take the pulse” of other leaders in the public interest community to gauge whether a strong consensus exists on best practice for promoting pro bono. Although empirical analysis over time will help determine the effectiveness of the various rules and policies for promoting pro bono, a survey offers a starting place to identify policies that experts on the ground consider to be effective. A narrowly-tailored and brief survey format was purposefully selected to reduce the risk of overcomplicating the process or reducing the response rate, for example, by requiring ranking or

240. *Id.* at 43.

241. *Id.* at 42–43.

242. Jamie Gamble, Latonia Haney Keith, & Cheryl Zalenski, Pro Bono Infrastructure: The Top Ten State Laws & Policies for Promoting Pro Bono, Presentation at the 2018 Equal Justice Conference (May 11, 2018), https://www.americanbar.org/groups/probono_public_service/ejc/agenda_at_a_glance.html [<https://perma.cc/5A3F-Z56U>] (occurring at a session entitled “Pro Bono Infrastructure: The Top Ten State Laws & Policies for Promoting Pro Bono” representing the interests of legal services and pro bono organizations, law firms, corporations, law schools, Access to Justice Commissions, and funders of civil legal aid).

ranges of feeling.²⁴³ The survey asked respondents to identify which of the following state-wide laws, rules, policies, or initiatives was, in their opinion, “so valuable as to make its adoption worthwhile in every state,” by simply indicating “agree” or “disagree” next to each option or leaving it blank if their feelings were neutral:

- 1) State-wide rule expressly adopting ABA Model Rule 6.1 (encouraging lawyers to aspire to dedicate at least fifty hours of pro bono service)
- 2) State-wide rule expressly adopting ABA Model Rule 6.5 (relaxing obligations under conflict rules for nonprofit and court-annexed limited legal services programs)
- 3) State-wide rule expressly adopting ABA Model Code of Judicial Conduct Rule 3.7(B) (permitting judges to encourage lawyers to provide pro bono services)
- 4) Waiver of license requirements for retired or inactive attorneys (aka Emeritus Rule)
- 5) Waiver of license requirements for in-house/corporate counsel
- 6) Waiver of license requirements for law professors
- 7) Waiver of license requirements for out-of-state attorneys assisting in disaster relief
- 8) Permitting attorneys who take pro bono cases to earn free or reduced CLE credits
- 9) State-wide rule requiring a designated number of hours of pro bono service as a condition to becoming a licensed attorney (a.k.a. the New York Rule)
- 10) Mandatory pro bono reporting requirements to maintain one’s license to practice
- 11) Voluntary pro bono reporting requirements to maintain one’s license to practice
- 12) Financial contribution to legal service organizations (in lieu of actual pro bono work) to maintain one’s license to practice
- 13) State-wide adoption of unbundling rules (e.g. authorizing “lawyer for a day” programs for pro bono attorneys)
- 14) Access to Justice Commissions
- 15) State-wide pro bono initiative (e.g. ABA Free Legal Answers)

243. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

16) State-wide pro bono awards or recognition program.²⁴⁴

The Taking the Pulse Survey also invited respondents to:

- 17) identify state-wide pro bono initiatives and state-wide pro bono awards or recognition programs as well as to add up to two other laws, rules, policies, or initiatives that the respondent believes should or should not be adopted on a wide scale;
- 18) include a brief explanation of their reasoning for identifying policies they agreed or disagreed with as well as share any other views on any and all state-wide practices for promoting pro bono;
- 19) self-identify as to the type of organization or constituency the respondent represents with the following choices as well as an option for “Other” with a text box: Legal Aid—LSC-Funded; Legal Aid—Non-LSC Funded; Pro Bono/Public Interest Organization; National Advocacy Organization/Think Tank; Law Firm; Law School; Corporation; Bar Association; Judiciary; and Government (other than judiciary) (hereinafter the “constituencies”);
- 20) and identify the jurisdiction in which the respondent or their organization is located, or if they manage pro bono practices in more than one jurisdiction, select the state in which the respondent is most involved in state policies regarding pro bono, and identify in a text field the other locations over which the respondent has purview.²⁴⁵

The survey was distributed in July 2018 to roughly 750 public interest leaders in states across the country and in the U.S. territories, and garnered 333 responses—a response rate of approximately 44%.²⁴⁶ The respondents represented all constituencies and jurisdictions, with the exception of South Dakota, West Virginia, American Samoa, and the U.S. Virgin Islands.²⁴⁷

244. *Id.*

245. *Id.*

246. The “Taking the Pulse” Survey was distributed to representatives of the ABA Standing Committee on Pro Bono & Public Service, the ABA Standing Committee on Legal Aid & Indigent Defendants, the Association of Pro Bono Counsel (APBCo), the Clinical Legal Education Association (CLEA), Corporate Pro Bono (CPBO), the Legal Services Corporation (LSC), the National Association of Pro Bono Professionals (NAPBPro), the National Legal Aid & Defender Association (NLADA), the Pro Bono Institute (PBI), and Pro Bono Net.

247. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

Interestingly, the responses fell within clear buckets, with no significant difference of opinion along constituency or geographic lines.²⁴⁸ Adoption of Model Rule 6.1 and unbundling rules were outliers as the top best practices for promotion of pro bono with roughly 88% of respondents identifying these two rules as critical to the pro bono infrastructure.²⁴⁹ The next tranche, which still indicated strong support, includes adoption of Model Rule 6.5 and Model Code of Judicial Conduct Rule 3.7(B), waiver of license requirements for out-of-state attorneys assisting in disaster relief, and granting of CLE credit for pro bono representation.²⁵⁰ In the following tranche, although the Emeritus Rules and the creation of Access to Justice Commissions received fairly strong support, voluntary pro bono reporting requirements and award and recognition programs garnered less support.²⁵¹ Waiving the licensing requirements for in-house counsel and law professors, as well as launching a state-wide pro bono initiative (such as ABA Free Legal Answers), however, received only lukewarm support.²⁵² Finally, the least favored rules and policies for encouraging pro bono included mandatory pro bono reporting requirements, the requirement to contribute financially to legal-services organizations to maintain one's license to practice, and the New York Rule.²⁵³

IV. TAKE-AWAYS: BEST PRACTICES FOR PROMOTING PRO BONO

A. *Mandating Pro Bono*

It is clear that the long-standing and intense debate surrounding “mandatory volunteerism” is still in play within the public interest arena.²⁵⁴ As former Judge Colin Campbell noted back in 1990,

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. Interestingly, this debate recently played out once again in connection with the Assembly Bill 3204 proposed by Assembly Member Adam Gray in the California Legislature earlier this year. Assemb. B. 3204, 2017–18 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB3204 [<https://perma.cc/LCD4-HG84>]. The bill would require California attorneys to complete a minimum of twenty-five hours of pro bono legal service. *Id.* Alternatively, attorneys could opt out of this requirement by contributing a minimum of \$500 to the

“[n]othing has aroused the ire of so many lawyers as much as the current debate on whether [Rule 6.1], the *pro bono publico* rule, should be made mandatory.”²⁵⁵

1. *The Debate*

Opponents to mandating pro bono argue that doing so appears incongruous with the underlying purpose of pro bono, which is to make a personal contribution to the profession.²⁵⁶ Making such a contribution mandatory discourages the aspirational nature of the rules, and in the words of one respondent to the Taking the Pulse Survey, “is a form of servitude in the name of justice; repugnant and ineffective all at once.”²⁵⁷ Supreme Court Justice Sonia Sotomayor’s comment during the American Law Institute’s 2016 annual meeting advocating “forced labor” for lawyers to improve access to justice

California Bar to support legal aid and maintain their license to practice. *Id.* The bill would exempt acting judges, inactive members of the bar, attorneys employed by legal aid organizations, attorneys who earned less than \$50,000 the previous year, and any newly-admitted members to the bar for the first five years of practice, unless they earn \$100,000 or more from the requirement. *Id.*; see also Cheryl Miller, *This New Bill Would Make Pro Bono Mandatory—Or Else Pay Up*, RECORDER (Feb. 26, 2018, 6:56 PM), <https://www.law.com/therecorder/2018/02/26/this-new-bill-would-make-pro-bono-mandatory-or-else-pay-up/?slreturn=20180904022710> [<https://perma.cc/FNR3-LUDZ>]. After OneJustice—a California innovation lab focused on applying creative problem-solving and design approaches to increasing access to justice—formally opposed the bill, it convinced Assembly Member Gray to drop AB 3204 and instead become a co-author of AB 3249, the annual licensing and state bar oversight bill. OneJustice also wanted to add a provision to that bill allowing attorneys to count a certain amount of pro bono hours toward California’s mandatory CLE requirements. E-mail from Harlene Katzman, Pro Bono Counsel & Director, Simpson Thacher & Bartlett LLP, to author (May 8, 2018) (on file with author). However, the additional provision was not approved by the Committee on Judiciary. Assemb. B. 3249, 2017-18 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB3249 [<https://perma.cc/Q72Q-3PMT>].

255. Colin Campbell, *Why is There a Debate Over Mandatory Pro Bono Work?*, ARIZ. ATT’Y, May 1990, at 14.

256. See, e.g., Sirota, *supra* note 180, at 573; Dan Grunfeld et al., *Mandatory Pro Bono is not the Answer for Practitioners*, LAW360 (Apr. 22, 2014, 6:30 PM), <https://www.law360.com/articles/530036/mandatory-pro-bono-is-not-the-answer-for-practitioners> [<https://perma.cc/Y4EL-JZNM>].

257. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

similarly garnered stark criticism.²⁵⁸ Opponents to Justice Sotomayor's claim argued that mandatory pro bono is a violation of the Thirteenth Amendment, which prohibits "involuntary servitude" and slavery—even if it does not rise to a violation of the Constitution, any type of "forced labor is a deeply unjust violation of individual liberty."²⁵⁹ Similarly, some opponents claim that mandatory pro bono violates constitutional rights including "the First Amendment's prohibition on forced association, the Fifth Amendment's prohibition on uncompensated takings, and the Fourteenth Amendment's equal protection guarantee."²⁶⁰

Moreover, a mandatory pro bono requirement may have unintended consequences, which may negatively impact the ability of the public interest community to provide legal services to the indigent.²⁶¹ Such a system would put pressure on a currently underfunded legal aid system, as well as on the disproportionate burden on solo practitioners and young lawyers who lack the physical and financial resources to meet such a requirement.²⁶² As one Taking the Pulse Survey respondent noted:

258. See Tony Mauro, Opinion, *Sotomayor Urges Mandatory Pro Bono for All Lawyers*, NAT'L L.J. (May 17, 2016, 8:24 AM), <https://www.law.com/nationallawjournal/almID/1202757812765/Sotomayor-Urges-Mandatory-Pro-Bono-for-All-Lawyers> [<https://perma.cc/Q6N9-22XE>].

259. Ilya Somin, Opinion, *Justice Sotomayor's Misguided Advocacy of "Forced Labor" for Lawyers [Updated with a Response to Steve Lubet]*, WASH. POST (May 20, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/20/justice-sotomayors-misguided-advocacy-of-forced-labor-for-lawyers/?utm_term=.c72e4e21eca5 [<https://perma.cc/LWD5-4RR4>]; see also George Leef, *Justice Sotomayor's Very Bad, No Good Idea for Lawyers*, FORBES (May 24, 2016, 10:00 AM), <https://www.forbes.com/sites/georgeleef/2016/05/24/justice-sotomayors-very-bad-no-good-idea-for-lawyers/#64c4536f6580> [<https://perma.cc/HA48-A4QD>]; Ronald D. Rotunda, *Forcing Lawyers to Perform Pro Bono Services*, VERDICT (July 18, 2016), <https://verdict.justia.com/2016/07/18/forcing-lawyers-perform-pro-bono-services> [<https://perma.cc/73SJ-J9A2>].

260. Sirota, *supra* note 180, at 574 (citing Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 464–65 (2001)).

261. Grunfeld et al., *supra* note 256.

262. Sirota, *supra* note 180, at 580–81. *But see* Joseph A. Sullivan, *A Response to "Forcing Lawyers to Perform Pro Bono Services,"* VERDICT (Aug. 26, 2016), <https://verdict.justia.com/2016/08/26/response-forcing-lawyers-perform-pro-bono-services> [<https://perma.cc/5U97-ZZLR>] ("The suggestion that mandatory pro bono would simply be too onerous may also be overstated. Practicing law already includes many requirements. Future lawyers must go to law school, must take and

Mandatory pro bono to maintain a law license sounds good but disregards the many times that attorneys, often in rural areas or impoverished areas, already provided dramatically reduced-fee representation or take a case they suspect will result in “involuntary pro bono.” I can do pro bono now, because of my supportive firm, but in the past as a solo, I was already hand to mouth too many times. Piling pro bono on top when I had no legal assistant would have been disaster.²⁶³

In addition, opponents point to Meyer Goldman—widely regarded as the originator of the public defender movement—who once said, “Too frequently, the services [of lawyers appointed by the court with minimal or no compensation] are half-hearted or openly negligible The client pays the penalty, perhaps not for the crime charged, but often for his poverty.” Following this logic, opponents argue that mandatory pro bono will produce the same result.²⁶⁴ As another Taking the Pulse Survey respondent argued:

[A]ccess to justice should be a matter of concern to ALL society, and thus society should fund sufficient civil legal services programs to provide competent and professional legal services to those who cannot afford an attorney and not rely on pro bono that is grudgingly and possibly negligently provided because it is mandatory.²⁶⁵

Proponents of mandatory pro bono, however, argue that “pro bono publico”—for the public good—harkens to the highest ideals of the legal profession, a sentiment firmly rooted in American legal history.²⁶⁶ As Judge Campbell eloquently argued:

It is somewhat ironic to have a Code of Professional Responsibility that states it is a matter of professional responsibility for a lawyer to do *pro bono publico* service,

pass a bar exam, and must meet character and fitness requirements. Lawyers must pay annual registration fees and must take a certain number of continuing legal education (CLE) credits each year. Lawyers who don't pay the fees or take the CLE courses cannot practice law. Is requiring, say, 50 hours of pro bono a year qualitatively different?”).

263. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

264. Grunfeld et al., *supra* note 256.

265. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21 (emphasis in original).

266. Steven Schulman, Breanna DeVaney, and Kevin Curnin, *Any Pro Bono Brawl Should Be For More Access to Justice*, LAW360 (Jan. 17, 2014, 1:59 PM), <https://www.stroock.com/siteFiles/Pub1443.pdf> [<https://perma.cc/33FQ-W8ZE>].

and yet have a third of the bar membership not adhere to it If the rule is to remain purely aspirational, and a substantial segment of the State Bar in practice views it purely as lip service, then [Rule 6.1] should be shifted to the Code of Professionalism. Let that code be the “elephant graveyard” of professional aspirations. If the rule is truly to be a matter of ethics and responsibility, then lawyers should be expected to live up to it.²⁶⁷

Moreover, proponents note that “Rule 6.1 is not a ‘personal’ commitment: it is unambiguously a professional one,” and further argue that “[a] bar association that advertises that its members have ‘a duty ... to promote access to the legal system’ cannot simultaneously take the position that an individual lawyer’s efforts to fulfill that duty are merely ‘personal.’”²⁶⁸ Taking the Pulse Survey respondents agreed, arguing, “[p]ro bono work should be REQUIRED and documented by the bar to maintain [one’s] license.”²⁶⁹ One respondent noted that “[i]f pro bono isn’t mandatory, a lot of people will never do it” and that “if we really want to chip away at the access to justice issue, a LOT more attorneys need to be spending some time on pro bono”²⁷⁰; while another said simply that nothing “short of mandatory pro bono (or mandatory financial contribution in lieu of it) will address the access to justice disaster.”²⁷¹

2. Reporting Requirements

Regarding the adoption of mandatory or voluntary reporting requirements, significant arguments for and against both approaches exist.²⁷² A mandatory pro bono reporting requirement may more effectively raise awareness of the need for pro bono legal services and a lawyer’s professional responsibility to fill that need.²⁷³ It may also create an environment characterized by positive peer pressure, leading to an increase in the delivery of legal services to the poor as well as increased monetary contributions to organizations serving the

267. Campbell, *supra* note 255, at 18 (emphasis in original).

268. Schulman, DeVaney, & Curnin, *supra* note 266.

269. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21 (emphasis in original).

270. *Id.* (emphasis in original).

271. *Id.*

272. See *Reporting of Pro Bono Service*, *supra* note 143.

273. *Id.*

poor.²⁷⁴ Such an approach also guarantees a high rate of reporting, which in turn permits jurisdictions to collect reliable and consistent data.²⁷⁵ Jurisdictions may use such data to recognize contributing lawyers, enhance the image of lawyers in the community, and evaluate the jurisdiction's delivery of legal services to low-income communities.²⁷⁶ As one Taking the Pulse Survey respondent noted: "Mandatory [pro bono] is attractive because good data helps with legislative advocacy and you're much more likely to improve what you monitor. If we don't monitor pro bono, it is much harder to evaluate effective strategies"²⁷⁷

Conversely, shaming lawyers into engaging in pro bono may backfire, causing members of the bar to resent the concept of pro bono and express hostility, inviting political opposition, or opening the door for the public and the press to use the data collected to criticize the bar.²⁷⁸ Relatedly, such a requirement may violate an attorney's constitutional right to privacy by publicizing private acts of charity and may violate an attorney's right to be free from involuntary servitude.²⁷⁹ Moreover, the creation of an infrastructure to facilitate a mandatory pro bono requirement may place a financial burden on jurisdictions and an onerous responsibility on attorneys²⁸⁰ who are already overworked—and in the case of some solo practitioners—struggling to make ends meet.²⁸¹

A voluntary pro bono reporting requirement, however, counters most of the arguments against a mandatory system by raising awareness of the need for pro bono services and lawyers' obligation to fill that need through a more positive, low-burden approach.²⁸² Still, the drawbacks of such a system are significant. Response rates, for example, are typically quite low, making any data collected insufficient to draw statistically valid conclusions.²⁸³ Relatedly, without the effects of peer pressure or any sense of accountability, such a reporting requirement is unlikely to effectively increase

274. *Id.*

275. *Id.*

276. *Id.*

277. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

278. *Reporting of Pro Bono Service*, *supra* note 143.

279. *Id.*

280. *Id.*

281. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

282. *Id.*

283. *Id.*

participation in pro bono.²⁸⁴ As one Taking the Pulse Survey respondent frankly commented: “Voluntary reporting of pro bono is a joke. There’s no good data from voluntary reporting—you don’t know what the non-reporters did in any given year, so you can’t even talk about trends with any confidence.”²⁸⁵

Nevertheless, it has yet to be shown that reporting requirements—whether mandatory or voluntary—influence lawyers to undertake pro bono service. Because there is no real “stick” under either approach—whether you do pro bono or not, there is no impact on your license to practice²⁸⁶—a reporting requirement may be an ineffectual mechanism for promoting pro bono and closing the justice gap.

3. Law School Accreditation Standards

In light of ABA accreditation standards for law schools, it is somewhat surprising that states have resisted substantively considering adopting a rule akin the New York Rule.²⁸⁷ Pursuant to ABA Standard 303(b)(2) entitled “Curriculum,” all law schools are required to “provide substantial opportunities to students for . . . student participation in pro bono legal services, including law-related public service activities.”²⁸⁸ Of the 204 institutions accredited by the Council of the ABA Section of Legal Education and Admissions to the Bar,²⁸⁹ over forty law schools include the completion of a specific number of pro bono hours—typically ranging from twenty to seventy hours—as a graduation requirement.²⁹⁰ Further, approximately 125 law schools have formal voluntary pro bono programs that match students through a referral system to pro bono opportunities in the

284. *Id.*

285. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

286. See *generally Reporting of Pro Bono Service*, *supra* note 143 (outlining the pros and cons of mandatory versus voluntary pro bono reporting requirements).

287. *Supra* Part I(D).

288. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018 16 (2017).

289. *ABA-Approved Law Schools*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/aba_approved_la_w_schools.html [<https://perma.cc/HS9V-XSP5>].

290. *Pro Bono Programs Chart*, AM. BAR ASS’N (Aug. 15, 2017), https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/pb_programs_chart.html [<https://perma.cc/73PN-6FQH>].

community; whereas approximately sixteen law schools have no formal, school-wide program, but pro bono opportunities exist, typically through student-led efforts.²⁹¹

The fifty-hour pro bono requirement under the New York Rule has the potential to provide aspiring lawyers with hands-on practice experience as well as instill a service ethic among tomorrow's lawyers—leading to more lawyers electing to serve the underserved as their primary career or incorporate pro bono within their practice.²⁹² However, as previously noted, the mandatory pro bono requirement places an additional burden on the legal aid community—an already overburdened system—to provide the supervision and training necessary to permit unlicensed individuals to fulfill the pro bono requirement.²⁹³ Such organizations are already experiencing resource constraints in directly serving their low-income clients; the pro bono requirement adds another layer of responsibility on the organizations without the financial support to hire dedicated staff.

B. Incentives and Barriers

Aside from the debate over mandatory pro bono, the surveys and focus group discussed in this article yielded notable results concerning award and recognition programs, CLE rules, unbundling rules, and waiver or special admission rules. Although pro bono award and recognition programs did not come out on top in the Taking the Pulse Survey, such programs still received fairly strong support as a best practice for pro bono engagement.²⁹⁴ In fact, in the commentary section, multiple respondents highlighted such programs as a critical component of encouraging pro bono with comments such as “awards and accolades are particularly helpful”; “[c]ourts should be encouraged to recognize and support pro bono work by lawyers locally in every way that makes sense”; “state and local bar associations . . . need to play a larger role in . . . supporting and recognizing volunteers”; and “cannot thank people enough.”²⁹⁵

291. *Id.*

292. N.Y.'s 50-HOUR PREADMISSION PRO BONO RULE, *supra* note 106, at 5–6.

293. *Id.* at 7–8.

294. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

295. *Id.*

However, when comparing this response by leaders in the public interest community to the response by lawyers in the Supporting Justice Survey, there appears to be a disconnect. In responding to the Supporting Justice Survey, attorneys were *least motivated* by formal recognition and awards.²⁹⁶ Although the respondents were perhaps being modest, the response provides food for thought as to whether formal recognition and awards actually promote pro bono work or whether the effort and funding geared toward such events should be channeled to more effective mechanisms.

Interestingly, permitting attorneys who take pro bono cases to earn free or reduced CLE credits garnered significant support from respondents in both surveys.²⁹⁷ As with formal recognition programs, however, it has yet to be shown that such a mechanism influences lawyers to undertake pro bono service.²⁹⁸ Tennessee, for example, has been experiencing a declining trend in the number of CLE hours awarded for pro bono work.²⁹⁹ In 2016, Tennessee's Commission on Continuing Legal Education awarded 1,928.57 hours of CLE credit to 1,928 attorneys, representing a nearly 900-hour decline in the number of CLE hours awarded in 2015.³⁰⁰ Since 2010, Tennessee has seen an overall decline in the number of awarded CLE hours by 1,706.72 hours.³⁰¹

Because lawyers can now take traditional CLE courses at their desks, (usually while multitasking—allowing lawyers to handle

296. SUPPORTING JUSTICE SURVEY, *supra* note 214, at 21, 35–36.

297. *Id.*; Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

298. As Rima Sirota argued: “The impact of this seemingly win-win arrangement on pro bono service has yet to be determined. As a large-scale solution, however, it presents problems both in practice and in theory. As a practical matter, state rules protect the profitable mandatory CLE industry. Although the rules vary somewhat among the 11 states, most allow three or fewer yearly mandatory CLE credit hours to be fulfilled by pro bono work, and most require 15 hours of pro bono work to earn those three hours of CLE credit. Although the nod to pro bono work is undoubtedly a welcome gesture, the math undermines its value as a pro bono incentive.” Sirota, *supra* note 180, at 579; *see also* Latonia Haney Keith, *Above & Beyond: CLE or Not CLE – That’s the Question*, CHICAGO LAWYER (June 1, 2012).

299. JUSTICE FOR ALL, PRO BONO REPORT 2016 11 (2016), http://www.tncourts.gov/sites/default/files/docs/atj_2016_pro_bono_report.pdf [<https://perma.cc/8HNI-5HX6>].

300. *Id.*

301. *Id.*

personal or professional matters while listening to a CLE seminar),³⁰² CLE credit may not be enough of an incentive to encourage lawyers who would not otherwise engage in pro bono to take on such a matter in lieu of a traditional CLE course.

Likewise, unbundling legal services came out on top of the Taking the Pulse Survey and the Supporting Justice Survey as a key alternative form of legal service delivery that provides limited representation and increases access to justice.³⁰³ Unbundling potentially helps better prepare pro se litigants for court hearings and related procedures, and may allow lawyers to make limited appearances in court to more effectively assist pro se litigants with navigating the complexity of court proceedings.³⁰⁴ Unbundling also provides an opportunity for alternative fee arrangements, such as fixed-fee or value arrangements and payment plan options.³⁰⁵

Nonetheless, even unbundled services may present financial hardships for the impoverished. The unbundling model also rests on the assumption that the client has the wherewithal (either financially or personally) to handle the other aspects of the matter. For underprivileged communities, this assumption may prove false if the disadvantaged have a limited ability to self-advocate, perhaps due to insufficient or unavailable self-help and legal aid sources, which could potentially diminish the value of the unbundled assistance.³⁰⁶ Relatedly, the unbundling model by its nature provides limited scope representation—in other words, assistance with only a component of the relevant legal problem. As such, for clients who need full representation, unbundling may not be appropriate. As one respondent summed it up, “[u]nbundling can be problematic . . . if follow up is in fact needed and the client then has nowhere to turn.”³⁰⁷

Conversely, the distinction in support between waiving the license requirements for out-of-state attorneys assisting in disaster

302. See, e.g., *ABACLE*, A.B.A., <https://www.americanbar.org/cle.html> [<https://perma.cc/9XAC-QDXW>].

303. SUPPORTING JUSTICE SURVEY, *supra* note 214, at 21, 35–36; Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

304. Kimbro, *supra* note 202, at 32.

305. *Id.*

306. See, e.g., CHI. BAR FOUND., LIMITED SCOPE REPRESENTATION TOOLKIT 6 (2018), <http://chicagobarfoundation.org/pdf/resources/limited-scope-representation/toolkit.pdf> [<https://perma.cc/W935-6P7Z>] (listing the client's capabilities as a consideration in providing unbundled assistance).

307. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

relief or retired or inactive attorneys, and waiving those same requirements for in-house or corporate attorneys and law professors was surprising.³⁰⁸ Based on the commentary, it appears concerns stem from (1) the possibility of in-house attorneys and law professors using the loosened requirements as a loophole to non-pro bono practice; (2) the idea that retired attorneys have more expertise relevant to the pro bono arena than in-house attorneys and law professors; and (3) uncertainty as to the effectiveness of those policies for in-house attorneys and law professors as compared to retired or inactive attorneys or attorneys keen to assist in disaster relief.³⁰⁹ One respondent noted:

The two options that gave me pause to disagree with were the waivers of license requirements for in-house/corp[orate] counsel and law professors. I think those enticements would be effective only if they were coupled with statewide efforts to train, recruit, and recognize those particular groups of attorneys. In my experience neither corporate counsel nor law professors have taken advantage of pro bono opportunities without significant support.³¹⁰

C. *Statewide Pro Bono Initiatives*

Similarly, the Taking the Pulse Survey results with respect to state-wide pro bono initiatives were illuminating.³¹¹ The creation of Access to Justice Commissions received fairly strong support from public interest leaders.³¹² Bringing together key stakeholders both within and outside the legal profession to focus on generating ideas to close the justice gap has great potential to lead to innovation and transformation.³¹³ As one respondent commented:

308. *Supra* Part II.G.

309. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

310. *Id.*

311. *Id.*

312. *See id.*

313. *See* April Faith-Slaker, *Access to Justice Commissions—Accomplishments, Challenges, and Opportunities*, MGMT. INFO. EXCHANGE J., Fall 2015 at 13–18, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/2015_atjcommissions_mie.authcheckdam.pdf [<https://perma.cc/65C7-KJDJ>]; *see generally* *Access to Justice Commissions*, *supra* note 206 (discussing collaborative efforts among various groups in an effort to remove barriers to justice for underprivileged populations).

I think ATJ Commissions are important, but I don't think they should be focused on pro bono. At this point pro bono is not controversial or shouldn't be and bar associations are the perfect vehicle to promote pro bono. I would like to see the Commissions working on bigger, more impactful, and potentially more controversial or thornier questions and initiatives to advance [access to justice].³¹⁴

But, often the process can be painfully slow, leading to more talk and less action.³¹⁵ Most jurisdictions require their commissions to make recommendations to various bodies.³¹⁶ For example, in the Supreme Court of Kentucky's order that created the Kentucky Access to Justice Commission, the commission is "directly responsible to the [Kentucky] Supreme Court for reporting and making recommendations concerning access to justice in the court system by persons in the Commonwealth of Kentucky."³¹⁷ Such a requirement reflects that commissions may not have the requisite power to effectuate real change. Moreover, the lack of funding to develop, launch, and replicate even the most innovative ideas may also be a significant roadblock.³¹⁸ Although great ideas have developed within the purview of the existing legal delivery structure, those ideas

314. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

315. See ACCESS UPDATES, *supra* note 208, at 1–112, 152–58.

316. See *generally* Access to Justice Commissions, *supra* note 207 (discussing activities and responsibilities of Access to Justice Commissions).

317. Order Establishing of Kentucky Access to Justice Commission ¶ (D)(9) (Sup. Ct. Ky. 2010).

318. See, e.g., ACCESS UPDATES, *supra* note 208, at 123–26 (outlining the results of a year-long study of the staffing and funding of Access to Justice Commissions across the country); STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., BOS. BAR ASS'N, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 1–2 (2014), <http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma-investing-in-justice.pdf> [<https://perma.cc/K89N-V9QU>] ("Others, like our Access to Justice Commission, have developed many creative ideas and initiatives for dealing with unrepresented litigants. Despite these private efforts, lack of funds is at the root of the problem."); Jennifer Lechner, *Legislature Slashes Aid to People in Need by Eliminating the Access to Civil Justice Act*, NC POLICY WATCH (Feb. 28, 2018), <http://www.ncpolicywatch.com/2018/02/28/legislature-slashes-aid-people-need-eliminating-access-civil-justice-act> [<https://perma.cc/TG8Q-AK5L>] (noting that after being in place for twenty-seven years, the North Carolina General Assembly repealed the Access to Civil Justice Act, which "[a]t the height of state support, . . . directly appropriated or dedicated fees and fines totaling over \$6.1 million to support access to justice").

requiring significant attorney resources face issues of scalability and longevity.³¹⁹

Conversely, other statewide initiatives received only lukewarm support,³²⁰ with some participants responding very vocally against ABA Free Legal Answers, which is a model based on the Online Tennessee Justice platform.³²¹ To address connectivity problems and the limited supply of lawyers, Tennessee launched the Online Tennessee Justice platform, a website where qualifying low-income individuals can post civil legal questions to an anonymous lawyer.³²² The online platform states, “[q]uestions are posted to the queue

319. See Robert Echols, *Twelve Lessons from Successful State Access to Justice Efforts*, MGMT. INFO. EXCHANGE J. at 46–48 (Spring 2008),

<https://www.americanbar.org/>

[content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_Article_2008_MIE.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_Article_2008_MIE.authcheckdam.pdf) [<https://perma.cc/HH9M-NTCQ>]; see also Faith-Slaker, *supra* note 313, at 14 (“Major challenges facing commissions generally include low visibility of the commission; insufficient attention to planning and assessment; engaging commission members, and insufficient staff capacity. In a few states, institutional relationships with the Supreme Court or the state bar are problematic.”).

320. See, e.g., MASS. ACCESS TO JUSTICE COMM’N, ADDITION OF “ACCESS TO JUSTICE” TOPIC TO THE MASSACHUSETTS BAR EXAMINATION 1 (2013), <https://studylib.net/doc/7210479/a-proposal---mass-access-to-justice-commission> [<https://perma.cc/CR8L-6PRS>] (discussing the Massachusetts Supreme Judicial Court’s approval to add “access to justice” to the Massachusetts bar exam, making Massachusetts the first state to add this concept to the exam for new lawyers); MASS. ACCESS TO JUSTICE COMM’N, FINAL REPORT OF THE SECOND MASSACHUSETTS ACCESS TO JUSTICE COMMISSION (2015) (reporting the Commission pursued an “aggressive agenda . . . [of] more than forty pending projects” and addressing the challenges that remain moving forward as many projects were not accomplished); *The Ideas Page*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/roadmap_to_access/ideas_page.html [<https://perma.cc/AXF6-YNP9>] (Recommending that “the Court require an ‘access to justice impact statement’ be filed” with any amendments or newly proposed laws, rules, or policies that indicates “the number of people impacted by the rule change, whether the change will increase or decrease access to the courts by those of low incomes and the impact on minorities and those with limited English proficiency”).

321. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21. (“State-wide pro bono initiatives such as [ABA] Free [L]egal [A]nswers are, in our opinion, not very effective in directly meeting the needs of a particular locality. I would rather see state funds go to individual organizations that work together in a collaborative way to get clients to the right place without a state wide [*sic*]umbrella that makes everyone use the same tool.”).

322. See *ABA Free Legal Answers*, TENN. ALLANCE FOR LEGAL SERVICES, <https://www.tals.org/abafreelegalanswers> [<https://perma.cc/H799-T3D5>].

where registered attorneys can review them.”³²³ Furthermore, “[u]sers have the opportunity to ask three different questions per year.”³²⁴ This online service platform has been recognized across the country and has won several awards from the ABA as well as the National Legal Aid and Defender’s Association.³²⁵ In 2015, the ABA Board of Governors unanimously approved the creation of a national interactive pro bono website with a planned site launch in July 2016.³²⁶

Implementing this technology has great potential to serve thousands of Americans.³²⁷ Currently, the ABA Center for Pro Bono has fully rolled out the website—ABAFreeLegalAnswers.org—in thirty-eight jurisdictions with four more committed to participate.³²⁸ To date, individuals of limited means nationwide have submitted over 25,000 questions, with many of those questions being submitted on the Florida, Illinois, Tennessee and Texas versions of the website.³²⁹ Nearly half of all questions submitted to the website concern family law issues, whereas just over a quarter of all questions involve issues pertaining to consumer rights and housing and homelessness.³³⁰ This model increases the convenience for lawyers to provide legal services to the underserved on their own time. As one Taking the Pulse Survey

323. *Id.*

324. *Id.*

325. *Id.*

326. Mary Ryan, *The Standing Committee on Pro Bono and Public Service Year-in-Review*, A.B.A. CTR. FOR PRO BONO EXCHANGE, <https://centerforprobono.wordpress.com/2015/12/21/the-standing-committee-on-pro-bono-and-public-service-year-in-review> [https://perma.cc/NYV9-FZNQ].

327. See *Online Tennessee Justice Service Report*, TENN. ALLIANCE FOR LEGAL SERVICES, <https://www.tals.org/sites/tals.org/files/4%2030%2016%20TJ%20Service%20Report.pdf> [https://perma.cc/27KK-AGB2] (showing that over 12,000 client accounts have been created).

328. See Marissa LaVette, *GIVING BACK: ABA Free Legal Answers*, 35 GPSOLO 81, 82 (2018); see also *ABA Free Legal Answers*, A.B.A., https://www.americanbar.org/groups/probono_public_service/projects_awards/free_legal_answers.html [https://perma.cc/YFB2-FYBY] (showing a map of states that participate in the platform, with states still in discussion, including California, Colorado, Delaware, Maryland, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, and Rhode Island).

329. See GEORGE T. LEWIS, *ABA FREE LEGAL ANSWERS* (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/abafree/afla_presentation.authcheckdam.pdf [https://perma.cc/N9T4-PCL5]; see also LaVette, *supra* note 328.

330. LEWIS, *supra* note 329.

respondent noted, “I think the Free Legal Answer program is great, I have been involved in a couple of ‘parties’ where lawyers get together and have pizza and answer questions. It has gotten some folks involved in pro bono who never really have donated time to ‘regular’ people legal problems.”³³¹ More than 4,600 attorneys are registered on the website, reflecting their willingness to engage in pro bono advice to low-income communities.³³² Florida, Tennessee and Texas each boast over 600 registered attorneys; while Illinois, Indiana, Massachusetts, New York and Virginia each boast close to or between 200 to 300 registered attorneys.³³³

All legal advice, however, is limited in nature, and therefore this model is ineffectual for low-income individuals who need more robust service. Relatedly, it is unclear as to whether such a model leads to high quality representation, raising potential ethical considerations. As one respondent articulated: “The [ABA] Free Legal Answers program poses a real possibility of unsupervised legal advice, a situation that if not carefully controlled can be quite problematic.”³³⁴ Limitations on the number of questions an indigent person may ask in a year may also be problematic given that studies show that many low-income individuals and families face more than three different legal problems in any given year.³³⁵ But most importantly, this model

331. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

332. LEWIS, *supra* note 329.

333. LaVette, *supra* note 328, at 82.

334. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21. *But see* RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, AM. BAR. ASS’N, NATIONAL MEETING OF STATE ACCESS TO JUSTICE CHAIRS 240 (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_atj_meeting2017materials.pdf [<http://perma.cc/Z58V-S6Y5>] (responding to ethical concerns by noting that because the model does not require “on the spot” advice as with in-person, advice-only clinics or hotlines, volunteers can leverage each other’s expertise through collaboration, undertake more robust research before crafting a response, and use the provided resources tab to find approved advice or responses to commonly asked questions).

335. See, e.g., TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 7, 11 (2010) (detailing the results of a civil legal needs study that surveyed a statistically valid sample of the 6.3 million New York State residents living at or below 200 percent of the federal poverty guidelines and finding that nearly half of respondents—almost three million low-income New Yorkers—experienced at least one specified legal problem (for example, domestic and family issues, employment, finances, health insurance or medical bills, housing,

requires low-income populations to self-identify their legal problem and understand it well enough to ask a relevant question, and then have the wherewithal to understand and effectively act upon any advice provided.³³⁶

D. So, Where Does That Leave Us?

Reflecting on the data obtained through the surveys and the discussion with leaders who are re-thinking and re-conceiving civil legal practice, jurisdictions should institute rules or policies centered around providing foundational encouragement of pro bono and removing barriers to pro bono practice.³³⁷ As the Taking the Pulse

public benefits, and school issues), and 1.2 million low-income residents experienced three or more legal problems).

336. See REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 16 (2014), <https://richardzorza.files.wordpress.com/2014/08/sandefur-accessing-justice-in-the-contemporary-usa-final.pdf> [http://perma.cc/Z9KR-AADM] (“When facing civil justice situations, people often do not consider law at all. They frequently do not think of these situations as legal, nor do they think of courts or of attorneys as always appropriate providers of remedy.”); REBECCA L. SANDEFUR, CIVIL LEGAL NEEDS AND PUBLIC LEGAL UNDERSTANDING 2 (2012), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf [http://perma.cc/7Z94-DS9G] (“Research reveals that when Americans are asked about their experiences with problems or situations that happen to be justiciable, ‘they often do not think of their justice problems in legal terms.’”); see also Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 869, 876 n.34 (2004) (“Notwithstanding the popularity of reforms dependent on improving self-help, few lawyers or judges seriously believe that, when working with the same facts and law, a litigant with one hour of preparation can fare as well in his or her first courtroom appearance as someone with at least three years of training and, in most cases, extensive courtroom experience in similar cases.”); JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 2 (2002), <http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf> [http://perma.cc/LMY8-HG32] (“We have little evidence on whether self-represented litigants who receive assistance are more than likely to obtain a favorable court outcome.”); Haddon, *supra* note 18, at 13:27–13:37 (“[D]oes access to justice mean access to legal services or access to a just resolution of legal disputes?”).

337. As part of the “Taking the Pulse” survey, respondents were encouraged to share other potential state-wide rules, policies, or initiatives that they believed would be effective in encouraging pro bono work. The author was intrigued by three ideas, which can all be characterized as incentives to undertake pro bono: rewarding attorneys who provide pro bono legal services with (1) a reduction in their annual bar dues; (2) a reduction in the cost of their malpractice insurance coverage; and (3)

Survey results evidence, many respondents appear to have a visceral reaction against mandating pro bono; therefore, there is no desire to institutionalize any rules, policies, or initiatives to make engagement in pro bono work mandatory, whether for newly admitted attorneys or for attorneys retaining their practice license.³³⁸ Similarly, there is a lack of appetite for requiring financial contributions to legal aid or public interest organizations in lieu of pro bono.³³⁹ Although one respondent noted with respect to the voluntary ATJ contribution on the State Bar of Texas Dues Statement that “[i]t was incredibly controversial at the time [it was implemented,] but you don’t hear too much about it now,”³⁴⁰ another respondent opposed the concept strongly:

Mandating attorneys to make financial contributions seems draconian. Legal services is [*sic*] for those who are in poverty, and there should be some general recognition that young attorneys who are new in their careers, or even mid-level attorneys who have families, may not have the ability to make a financial contribution to any non-profit. I’m a little offended that this was included here, actually—people should want to give, not give grudgingly, or because they have no alternative.³⁴¹

Despite the opposition towards mandatory pro bono hours, it is clear that the adoption of Model Rule 6.1 and Model Rule 6.5—coupled with the unbundling rules and the adoption of the Model Code of Judicial Conduct Rule 3.7(B)—are viewed as a critical foundation for the promotion of pro bono legal services.³⁴² This is evidenced by both the Taking the Pulse Survey and the Supporting Justice Survey, which noted the limited scope representation and judicial solicitation

tying student loan forgiveness to pro bono hours. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

338. *Supra* Part III.A.

339. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

340. See *The Access to Justice Contribution*, STATE BAR TEX.,

https://www.texasbar.com/AM/Template.cfm?Section=Contribute_to_the_ATJ_Fund&Template=/CM/HTMLDisplay.cfm&ContentID=30215 [<https://perma.cc/MPK9-GFQ3>]; see also TEX. DISCIPLINARY R. OF PROF’L CONDUCT pmb1, § 6 (2018); BD. DIRS., STATE BAR OF TEX. STATE BAR OF TEXAS RESOLUTION (2000),

<https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoResolution.pdf> [<https://perma.cc/D79S-6AZW>].

341. Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

342. *Supra* Part II.

and encouragement as primary motivators for undertaking pro bono work.³⁴³ Thus, as a starting point to promoting pro bono work, all jurisdictions should adopt Model Rule 6.1 and Model Code of Judicial Conduct Rule 3.7(B) as the key rules grounding and inculcating pro bono culture within the jurisdiction. If the rules are already adopted, jurisdictions should revise their rules to mirror the most recent language of those provisions.

Furthermore, each jurisdiction should implement rules to remove institutional barriers to pro bono practice to effectively expand the pool of attorneys available to undertake pro bono work within the jurisdiction in which they live or practice. Adopting Model Rule 6.5, Model Rule 1.2(c) and other rules permitting limited scope representation and unbundling is a great start. But it is also critical to institute rules waiving license requirements or permitting special admission to the bar for retired and inactive attorneys, in-house or corporate counsel, and law professors, and for out-of-state attorneys in times when the jurisdiction is facing a disaster.³⁴⁴ Rather than distinguishing between these categories of equally capable and qualified attorneys, all of whom must be currently (or formerly) licensed to practice in the relevant jurisdiction, states should follow Arkansas's model rules authorizing attorneys to provide pro bono services. Pursuant to Arkansas Supreme Court Rule 15.2 entitled "Pro Bono Legal Services by Non-admitted Licensed Attorneys:"

(a) *Authorization to Provide Pro Bono Services.* Notwithstanding the limitations on practice for attorneys who are not licensed by the State of Arkansas, non-admitted attorneys are authorized to provide pro bono legal services in this state as set out in this order. This order constitutes legal authorization for purposes of Ark. R. Prof'l Conduct 5.5(d)(2).

(1) The attorney must be licensed in another state or the District of Columbia and be in good standing in that jurisdiction.

(2) The attorney shall provide his or her services without charge or an expectation of a fee to persons of limited means who have been referred to the attorney

343. SUPPORTING JUSTICE SURVEY, *supra* note 214, at 21, 35-36; Survey: Incorporating Pro Bono into the Justice Index, *supra* note 21.

344. *Supra* Part II.B., H., G.

by an authorized sponsoring entity as set out in subsection (b) and only through such referrals.

(3) The volunteering attorney shall complete any appropriate training required by the sponsoring entity and shall additionally comply with the Continuing Legal Education requirements of any state in which the attorney holds a current license to practice law.

(4) If the volunteer attorney's services for a client require a court appearance, the attorney shall comply with the appearance requirements of Rule XIV of the Rules Governing Admission to the Bar and/or the procedure of the applicable forum, even if the attorney resides inside the State of Arkansas.

(5) The volunteer attorney agrees to be bound and subject to all applicable Arkansas Rules of Professional Conduct.

(b) *Sponsoring Entity.* When providing pro bono services pursuant to this provision, attorney's representation shall be under the auspices of a sponsoring entity. The sponsoring entity shall be a legal aid services provider that represents Arkansas clients, namely Legal Aid of Arkansas, Inc., Center for Arkansas Legal Services, Inc., Lone Star Legal Aid, Inc., or such other entity as may be approved by the Arkansas Supreme Court, and shall:

(1) make the volunteer attorney aware of the sponsoring entity's resources that may be of assistance to the attorney;

(2) maintain a log on an annual basis of all volunteer attorneys providing legal services through that sponsoring entity; and

(3) provide professional malpractice insurance covering the volunteer attorney's services if the volunteer attorney is not otherwise covered by professional malpractice insurance.³⁴⁵

Lessening the licensing burden for attorneys who limit their practice to the provision of pro bono legal services does not run afoul of the underlying purpose of those rules. Nor does it remove the protections that already exist within the rules of professional conduct

345. ARK. ADMIN. ORDER 15.2 (2011), <https://www.arcourts.gov/rules-and-administrative-orders/court-rules/order-15-attorneys-152-pro-bono-legal-services-non> [<https://perma.cc/Z294-ARSL>].

requiring all attorneys to be, among other things, competent and diligent.

That said, it is insufficient to just institute rules and remove licensing barriers. To effectively promote pro bono, such steps must be coupled with a strong infrastructure of well-funded legal service providers and public interest organizations that can offer the training, support, and oversight necessary for an effective pro bono practice.

V. CONCLUSION

In the face of a civil legal system in which access to justice is not a reality for most low-income and modest-means Americans, and in which funding to substantially increase the number of legal aid attorneys is unfortunately unlikely, pro bono legal services will continue to play a critical role in bridging the justice gap. As such, identifying the statewide rules, policies, and initiatives that are effective in encouraging pro bono is more important now than ever. Although it is a vital step, the adoption of an aspirational rule alone is insufficient to dramatically increase the engagement in pro bono by the private bar.³⁴⁶

A commitment to meaningful access to justice requires all jurisdictions in the United States to adopt, not only the current version of Model Rule 6.1, but also the Model Code of Judicial Conduct Rule 3.7(B). Working together, these rules lay the foundation necessary to promote pro bono legal services. Such a foundation coupled with the implementation of rules that remove institutional barriers to pro bono practice—such as unbundling rules and rules waiving licensing requirements or permitting special admission to the bar—will expand the number of attorneys available to assist the public interest sector with meeting the needs of the underserved and disadvantaged.

346. See, e.g., SUPPORTING JUSTICE SURVEY, *supra* note 214, at 7 (“The number of attorneys who provide regular and significant pro bono work is not ubiquitous, suggesting that there is room for expanding such services. Overall, attorneys provided an average of 36.9 hours of pro bono service in 2016, suggesting that many of the attorneys are providing well below the aspirational goal of 50 hours per year set forth in ABA Model Rule 6.1 and followed by many states. As shown in Figure 1, only 20% of the attorneys had provided 50 hours or more of pro bono service in 2016. Meanwhile, there is a significant segment of the attorney population—approximately one out of five attorneys—that has *never* undertaken pro bono of any kind.”) (emphasis in original).

As Reginald Heber Smith pronounced in his groundbreaking book, entitled *Justice and the Poor*, “[n]othing rankles more in the human heart than the feeling of injustice.”³⁴⁷ It is therefore hoped that incorporating the above recommendations into the third rendition of the Justice Index will ignite advocacy and a change in policy throughout jurisdictions in the United States; thereby moving the country one step closer to making access to justice a reality for all.

347. REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 10 (1919), https://books.google.com/books?id=j1wXAAAAYAAJ&pg=PA10&source=gbs_toc_r&cad=3#v=onepage&q&f=false [<https://perma.cc/6ZKF-FKK7>].

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