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IN SUPPORT OF A MANDATORY PRO BONO RULE FOR NEW YORK STATE

INTRODUCTION

Sparked by a growing concern for the unmet need of the indigent for civil legal services, New York State's judiciary is considering the feasibility of adopting a mandatory pro bono rule for all New York State attorneys.¹ According to several studies across the nation, only fifteen to twenty percent of the civil legal service needs of the poor are met.² As the population of poor people increases, the problem only worsens.³ Cuts in funding for the Legal Services Corporation (LSC) have further exacerbated the situation.⁴

¹ Morocco, *Around the ABA*, 76 A.B.A. J. 92 (July 1990) (In his keynote address at the 1990 ABA Pro Bono Conference, New York State Court of Appeals Chief Judge Sol Wachtler said that New York attorneys will face a mandatory pro bono requirement if the amount of pro bono work they provide does not increase by 1992.).

² Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 Md. L. Rev. 75, 86 n.22 (1990) (citing Civil Legal Services Comm'n, North Dakota Supreme Court, North Dakota Trial Lawyers' Ass'n, A Workable Plan for Civil Legal Services for the Poor: A Practical, Equitable and Political Proposal for Bar Leadership (1988); Committee to Improve the Availability of Legal Services, Preliminary Report to the Chief Judge of the State of New York (1989); Spangenberg Group Report, In Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally (Sept. 1989)).

³ Carroll, *Current Professional Issues: Addressing Obligations and Exploring Opportunities*, 62 N.Y. St. B.J. 8, 9 (Feb. 1990).

⁴ *Id.* See also Vigdor, *Pro Bono Service: Mandatory or Voluntary?*, 62 N.Y. St. B.J. 32, 33 (May 1990) ("Despite efforts of the [ABA] and most state and local bar associations, the Legal Services Corporation has been grossly underfunded for the last 10 years and is annually \$225 million behind where it was 10 years ago—despite the significant increase in the poverty population during that period."); Wechsler, *Attorneys' Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE L. REV. 909, 916-17 (1990) (referring to cuts to the LSC program during the Reagan and Bush Administrations); Miskiewicz, *Mandatory Pro Bono Won't Disappear*, Nat'l L.J., Mar. 23, 1987, at 1, col. 3. The 25% cut in funding for LSC in 1980 has never been fully restored. From 1984-86, federal funding was frozen at \$305.5 million, \$15 million less than before 1980. In 1987, as a result of the Gramm-Rudman-Hollings budget reduction act, an additional reduction of \$14.3 million was made. Although the LSC continues to "close as many cases" as before the funding cuts, it is not known how many cases are being turned away. The Project Advisory Group, which lobbies for more funding for the LSC, advises that there are now 1.6 attorneys for every 10,000 people living below the federal poverty line. Additional funding of \$170-175 million would be needed to restore the pre-1980 level of 2 attorneys

In 1987, the New York State Bar Association (NYSBA) commissioned a study on the legal needs of the poor.⁵ The New York Legal Needs Study (Legal Needs Study) found that in New York State only fourteen percent of the civil legal service needs of the poor are provided.⁶ The Legal Needs Study reported an average of more than two legal problems per household faced without legal assistance.⁷ Based on a poor population of more than 1.2 million, the Legal Needs Study estimated that seven hundred thousand households, or fifty-seven percent of all low-income households, face over three million civil legal problems each year without legal assistance.⁸ The most frequently reported legal problems were in the categories of housing, public benefits, consumer issues and health.⁹

Following the Legal Needs Study, two plans were put forth by the legal community in New York to increase the poor's access to the legal system. The first plan was submitted by a committee appointed by Chief Judge Sol Wachtler in April 1988 (the Marrero Committee) to study the availability of legal services and to make recommendations for improvements.¹⁰ The plan in-

per 10,000 people. *Id.* For a description of LSC, see Note, *Mandatory Pro Bono: The Path to Equal Justice*, 16 PEPPERDINE L. REV. 355, 356 n.10 (1989).

⁵ The study was conducted by the Spangenberg Group, based in West Newton, Massachusetts. The Draft Final Report was submitted to the NYSBA on Oct. 11, 1989.

⁶ Spangenberg Group, New York Legal Needs Study 196 (Oct. 11, 1989) (Draft Final Report) [hereinafter Legal Needs Study] (available from NYSBA and on file at the Brooklyn Law School Library). Attorneys' pro bono contributions made outside of organized bar pro bono programs are not adequately measured for New York, and the Legal Needs Study estimated those contributions using figures from other studies. *Id.* at 194-95, 197.

⁷ *Id.* at 20. The Legal Needs Study reported an average of 2.37 noncriminal legal problems handled without legal assistance per household, including those households that had legal assistance. Of those households that had experienced one or more legal problems without legal assistance, the average was 4.18 legal problems per household. *Id.*

⁸ *Id.* at 24. Population figures were based on the 1980 U.S. Census Bureau statistics.

⁹ *Id.* at 24, 203. The Legal Needs Study categorized the areas where the poor need legal assistance as follows, in descending order of frequency: housing, public benefits, consumer, health, utility, discrimination, employment, school, family, other, and immigration. *Id.* at 25. Immigration problems may have been underreported by interviewees due to fear of disclosure. *Id.* at 26.

¹⁰ Serving on the Committee to Improve the Availability of Legal Services (the Marrero Committee) were: Victor Marrero, Chair; Bradley Backus; Hanna S. Cohn; Sol Neil Corbin; Louis A. Craco; Evan A. Davis; Charles H. Dougherty; Herbert B. Evans; Robert B. Fiske, Jr.; Alexander D. Forger; Ellen V. Futter; Thomas F. Gleason; Raymond W. Hackbarth; Sandra W. Jacobson; Robert M. Kaufman; Joseph T. McLaughlin; Gerald A. Norlander; John K. Powers; Norman Redlich; Hon. Israel Rubin; Cyrus R. Vance; and

cluded a mandatory pro bono requirement for all registered attorneys actively practicing law in New York State.¹¹ This proposal for a mandatory rule generated a strong reaction from the legal community.¹² At best, a mandatory plan was viewed by opponents as an "absolute last resort," on the ground that voluntary pro bono programs were still relatively young, and it was too soon to impose a mandatory rule.¹³ A special committee of the NYSBA, organized in response to the mandatory requirement proposal, put forth an alternate plan, proposing that the pro bono obligation remain a voluntary one and adopting a minimum pro bono standard as an aspirational guideline for all attorneys in New York State.¹⁴

On May 1, 1990, Chief Judge Wachtler announced he would delay promulgating a mandatory pro bono rule for two years to allow time for New York attorneys to increase their pro bono contributions voluntarily.¹⁵ If pro bono contributions do not increase, he will propose that a mandatory rule be adopted.¹⁶ The Chief Judge called for a voluntary program based upon the Mar-

Bryan R. Williams.

¹¹ Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York (Apr. 1990) [hereinafter *Marrero Committee Plan*] (available from Victor Marrero, Esq., Brown & Wood; and on file at the Brooklyn Law School Library).

¹² See Adams, *Wachtler Defers Mandatory Pro Bono*, N.Y.L.J., May 2, 1990, at 1, col. 3 (Chief Judge Wachtler's Remarks) ("It would be difficult to overstate the intensity of the debate that this simple proposal has generated."). See also *Marrero Committee Plan*, *supra* note 11, at 7.

¹³ *Mandatory Pro Bono*, 74 A.B.A. J. 46 (May 1, 1988) (interviews with Esther Lardent, pro bono specialist, Washington D.C.; and Alexander Forger, managing partner at Milbank, Tweed, Hadley & McCloy and a member of the *Marrero Committee*). See also *Marrero Committee Plan*, *supra* note 11, at 140 (statement by Corbin) (voluntary efforts by lawyers were not adequately considered by the *Marrero Committee*).

¹⁴ New York State Bar Ass'n, Report of the Special Committee to Review the Proposed Plan for Mandatory *Pro Bono* Service (Oct. 16, 1989) [hereinafter *State Bar Plan*] (available from NYSBA and on file at the Brooklyn Law School Library). The NYSBA Special Committee was chaired by Justin L. Vigdor. Other members of the Committee were: Peter J. Brevorka; James F. Dwyer; Thomas H. Elwood; Edward V. Esteve; Joseph H. Farrell; John Gaal; Joseph S. Genova; Bruce E. Hansen; Eileen R. Kaufman; Muriel S. Kessler; Thomas Maligno; James E. Reid; Jon N. Santemma; Charles W. Shorter; and L. David Zube. *Id.* at 4 n.1, 42 (app. 3) (Summaries of Credentials of the Chair and Members of the Special Committee to Review the Proposed Plan for Mandatory *Pro Bono* Service). The State Bar Plan was adopted by the NYSBA House of Delegates in October 1989. Vigdor, *supra* note 4, at 33.

¹⁵ Adams, *supra* note 12.

¹⁶ *Id.*

rero Committee Plan without the mandatory element, in effect merging the two proposals.¹⁷ Supporters of the mandatory pro bono proposal called the Chief Judge's response a "fair and statesmanlike resolution," "exhibiting extraordinary leadership and sensitivity on this issue."¹⁸ In September 1990, the Chief Judge appointed a Pro Bono Review Committee to monitor implementation of the Marrero Committee Plan without the mandatory element.¹⁹

¹⁷ *Id.*

¹⁸ *Id.* (quoting S. Oliensis, former president of the Ass'n of the Bar of the City of New York, and V. Marrero, Chairman of the Marrero Committee.)

¹⁹ Spencer, *Chief Judge Names Panel to Monitor Pro Bono Effort*, N.Y.L.J., Sept. 11, 1990, at 1, col. 3 (Co-chairpersons of the Pro Bono Review Committee are Victor Marrero and Justin Vigdor. The other members are Joseph Genova and Robert Ostertag, who head the NYSBA Committee on Access to Justice, which was formed by NYSBA president to implement the State Bar Plan.). The Pro Bono Review Committee's first assignment is to "accurately gauge" the amount of pro bono work currently provided. *Id.*

A debate has begun regarding how this information is to be collected and whether all attorneys or a representative sample should be surveyed. See Spencer, *Pro Bono Reporting by Individuals Opposed*, N.Y.L.J., Sept. 26, 1990, at 1, col. 3. Opposition to the survey is based on a perception that a survey is the first step toward promulgation of a mandatory rule and will facilitate enforcement of a future mandatory rule. Spencer, *Bar Disagrees Over Measures on Pro Bono*, N.Y.L.J., May 18, 1990, at 1, col. 3. Opposition to the survey based on this perception was expressed to the special committee by Arthur Norman Field, President of the New York County Lawyers Association, which has 10,500 members. *Id.* Leaders of six bar associations—the Bronx County Bar Association; Brooklyn Bar Association; Nassau County Bar Association; New York County Lawyers' Association; Queens County Bar Association; and Westchester Bar Association—have endorsed a proposal that the state bar reconsider its recommendation in the State Bar Plan for a survey of all attorneys and instead use figures provided by local bar associations on participation in the pro bono programs they administer. Spencer, Sept. 26, 1990, *supra*. The survey was retained, however, because it was "needed to assess how well the voluntary program worked [and] eliminating [it] . . . would 'eviscerate' the plan." Spencer, May 18, 1990, *supra* (quoting bar officials). Chief Judge Wachtler doubts that the objections to a survey are widespread because his correspondence, he said, "indicates a desire on the part of lawyers to tell how much they do to perform the pro bono service which they are ethically obliged to perform . . ." *Id.*

In January 1991, the Pro Bono Review Committee announced it would send surveys to 6,000 randomly selected attorneys across New York to be completed and returned anonymously. Fox, *6,000 Lawyers to be Sent Pro Bono Poll*, N.Y.L.J., Jan. 23, 1991, at 1, col. 6. The survey will ask for information on each attorney's area of practice, geographic location, pro bono work performed in 1991, and on why pro bono work may not have been performed. The survey will be used to measure pro bono contributions for 1990 and to ascertain the effectiveness of the state's efforts to increase pro bono work voluntarily. *Id.* In late September 1991, the survey results were reported. See Spencer, *Half of State's Lawyers Handle Pro Bono Work*, N.Y.L.J., Sept. 25, 1991, at 1, col. 3. Over 48% of attorneys had done some pro bono work during the previous year. Forty-three percent had done no pro bono work; of these, 24% indicated that they had no interest in performing pro bono work. *Id.*

The pro bono debate in New York has encouraged the bar to discuss the legal needs of the poor and the professional obligation of lawyers to help meet these needs.²⁰ At the least, the Marrero Committee Plan has served as a catalyst for new proposals to improve the availability of legal services for the poor.²¹

This Note recommends that the Marrero Committee Plan be adopted in New York State with certain minor changes. Part I discusses the need for pro bono work, traces the development of pro bono guidelines for attorneys, and then describes the mandatory and voluntary plans proposed in New York State. Part II of this Note demonstrates that a mandatory pro bono rule will more effectively meet the demand for legal services than a voluntary program. Part II then discusses how the Marrero Committee Plan satisfies the major criticisms of a mandatory pro bono rule and concludes with a brief analysis of the nature of the pro bono obligation as a duty, rather than an act of personal charity, which is owed by lawyers to the public and to the courts.

I. BACKGROUND

A. *The Need to Increase Pro Bono Contributions*

Most of the legal community agree that the problem of lack of access to the legal system for the poor is of concern to all lawyers, but disagree on the extent to which pro bono work is an appropriate response to solve the problem.²² There is a general

²⁰ Marrero Committee Plan, *supra* note 11, at 8.

²¹ Adams, *supra* note 12.

Suddenly, everyone in the legal profession is willing to talk about ways to deliver legal services to the poor, and alternatives to mandatory pro bono are forthcoming from every corner

For this contribution alone, the committee's work must be considered a great success Their proposal has served as a much needed catalyst for public discourse—nothing clarifies the mind like the sight of the gallows.

Id. (quoting Chief Judge Wachtler).

In addition to the State Bar Plan that was formulated in response to the Marrero Committee proposal, the Interest on Lawyer Account (IOLA) Fund has given \$1 million to the New York Bar Foundation to be awarded to proposals across the state which will "increas[e] the availability and effectiveness of pro bono legal services to poor people." Dean, *Voluntary or Mandatory Service?*, N.Y.L.J., May 21, 1990, at 3, col. 3 (Pro Bono Digest). In 1991, the IOLA Fund awarded \$13.5 million to 116 organizations across New York State that provide civil legal services to the poor. IOLA Fund Press Release (Feb. 21, 1991).

²² Marrero Committee Plan, *supra* note 11, at 6-7. There is agreement that a signifi-

consensus that the best solution to meeting the legal needs of the poor is increased funding for legal services programs.²³ The legal problems of the poor are best handled by professionals experienced in the field and available full-time to handle cases that may require protracted appearances in court and which may last for years. The Legal Needs Study reported that in interviews with private attorneys it was often stated that pro bono contributions cannot be considered a substitute for fully staffed legal services offices.²⁴ More funding would increase the availability of legal services by making it possible to provide more full-time attorneys with expertise in poverty law and poverty issues. Increased funding would provide resources to increase salary levels, or to provide other financial incentives to attract attorneys to legal services offices.

Increases in funding are not likely to occur soon, however. Federal funding for legal services has not increased beyond the level established in 1980.²⁵ New York State and local government funding for legal services increased over the last decade, but these funds are almost entirely allocated to specific legal services programs or for targeted populations rather than for general civil legal services offices.²⁶ Funding for general civil legal

cant gap exists between the need for legal services and availability, but there is disagreement on the extent of lawyers' responsibility to alleviate the situation. Almost all of the New York bar associations are against a mandatory pro bono plan. *Id.* See also Enright, *Pro Bono Conference*, 74 A.B.A. J. 122 (July 1, 1988) (in an informal survey, 95 of 129 attorneys attending a 1988 pro bono conference were against any mandatory pro bono plan); Miskiewicz, *supra* note 4 (mandatory pro bono rule proposed in 1980 by the Commission on Evaluation of Professional Standards (the Kutak Commission) was rejected by the ABA); Emmanuel, *Pro Bono Publico*, 59 FLA. B.J. 4 (Dec. 1985) (President's Page) (majority of lawyers are against a mandatory pro bono program according to bar polls).

²³ See Marrero Committee Plan, *supra* note 11, at 26-27 ("[A]n arguably better solution would be a quick, large infusion of federal, state and municipal funds to provide civil legal services equal to the demand."); State Bar Plan, *supra* note 14, at 14-15 ("[T]he complex problems of the poor, including their unmet legal needs, are fundamentally societal problems, meriting broad governmental, publicly supported solutions. . . . [S]taff programs should be provided with sufficient resources because they are best equipped to effectively and efficiently deliver legal assistance to the poor."); Adams, *supra* note 12 (Chief Judge Wachtler stated, "[V]irtually everyone who has joined the debate about mandatory pro bono agrees that the best way to provide legal services to the poor is to increase funding for legal services and other social programs.").

²⁴ Legal Needs Study, *supra* note 6, at 193.

²⁵ *Id.* at 146-48, 203. See also note 4 *supra*.

²⁶ Legal Needs Study, *supra* note 6, at 156-58. New York State funding for legal services increased 418% between 1980 and 1987, from \$2.6 million in 1980 to \$10 million in 1987. "While this infusion of state money is extremely important in meeting a variety

services is minimal.²⁷ Although private funding for legal services in New York State has also increased over the last decade, it is also mostly targeted to specific legal aid programs.²⁸

Contributions by the private bar to increase the availability of legal services for the poor are extensive and admirable; although they also have not succeeded in closing the gap between the need for civil legal services and the supply of those services.²⁹ These efforts include the American Bar Association Private Bar Involvement Project,³⁰ pro bono policies at private firms,³¹ bar association programs to increase voluntarism,³² In-

of legal needs, it does not provide the kind of general purpose resources necessary to fill the funding gap caused by LSC cutbacks, or to meet the increased need for full service representation." *Id.* at 157. In 1987, 58% of state funding was restricted to the Disability Advocacy Program (DAP), providing legal assistance to obtain, or reinstate, federal public assistance benefits. Other major portions of state funding are earmarked for Prisoner Legal Services Program funding and law school clinic programs, which do provide general legal services. *Id.*

Local funding increased 267% between 1980 and 1987, from \$1.26 million in 1980 to \$3.37 million in 1987. In 1987, about 88% of the funds were restricted to special programs. *Id.* at 158.

²⁷ Legal Needs Study, *supra* note 6, at 203. Federal legal services funds, IOLA funds and United Way funds are the only unrestricted funds the legal services programs receive. Legal Services offices handled 138,000 cases, but this represented only about 4% of the total number of noncriminal legal problems experienced by the poor. *Id.* For figures on contributions by the IOLA Fund, see note 21 *supra*.

²⁸ Legal Needs Study, *supra* note 6, at 162. Private funding increased almost 100% between 1980 and 1987, from \$3.9 million in 1980 to \$7.67 million in 1987.

²⁹ Marrero Committee Plan, *supra* note 11, at 100-01, 105. See also State Bar Plan, *supra* note 14, at 9-13.

³⁰ For description of the ABA Private Bar Involvement Project, see Note, *supra* note 4, at 363 n.64.

³¹ There are many examples of private law firm contributions. In the summer of 1990, a nationwide survey of 130 firms, with 86 responding, revealed an average contribution of 40 hours of pro bono work per year per attorney (double the Marrero Committee's proposed requirement of 40 hours per attorney every two years). Barr, *Doers & Talkers*, AM. LAW., July-Aug. 1990, at 51. However, this average incorporated a wide range between firms contributing far less and firms contributing far more. *Id.* at 56. See also Dean, *Projects Outside of New York*, N.Y.L.J., July 16, 1990, at 3, col. 3 (Pro Bono Digest) (survey of several private firms' pro bono programs). In 1988, Skadden, Arps, Slate, Meagher & Flom set up a \$10 million fellowship program to provide salaries over a five-year period to 125 attorneys, each to work for two years in the public interest. Labaton, *Big Law Firm to Help Poor in Civil Cases*, N.Y. Times, June 8, 1988, at B1, col. 5. But see Wechsler, *supra* note 4, at 913 nn.17-20 and accompanying text (conflicting data on the levels of pro bono work contributed by attorneys); Wise, *Only 1 in 4 Firms Report Keeping Pro Bono Pledges*, N.Y.L.J., June 20, 1988, at 1, col. 1 (Volunteers of Legal Services, founded in 1984, obtained promises from 99 law firms and corporate law departments to contribute an average of 30 hours of pro bono work each year, per attorney, but only 25% of the pledges were met.).

³² For example, The American Bar Association Torts and Insurance Practice Section

terest on Lawyer Account (IOLA) Fund rules,³³ fundraising activities among groups of lawyers and law students,³⁴ clinic programs administered through law schools,³⁵ and, in some jurisdictions, expansion of the permissible role of legal paraprofessionals.³⁶ These efforts represent a significant contribution and show a commitment by the legal profession to increase access to the legal system for the poor.

Despite the public and private efforts, the needs of the poor for legal services are still, to a large extent, unmet.³⁷ The Legal Needs Study identified only 432 full-time legal services attorneys to handle the needs of the poor of the entire state.³⁸ Legal services offices are operating at a "triage" level, turning away serious cases in order to handle even more urgent ones.³⁹

Council has instituted a policy for its members to provide 50 hours of pro bono work per year. *Around the ABA*, 76 A.B.A. J. 109 (Aug. 1990). The Suffolk County Bar has begun a program to provide pro bono bankruptcy legal services in cooperation with Nassau Suffolk Law Services. N.Y.L.J., Sept. 4, 1990, at 1 (Today's News). The Queens County Bar Association has begun a pilot pro bono program to provide civil legal services. *Judge Urges Bar Meet Pro Bono Challenge*, N.Y.L.J., May 16, 1990, at 2, col. 6 (letter to the editor from Queens County Civil Court Judge John A. Milano).

³³ The IOLA program funds legal services for the poor from interest earned on clients' funds held in escrow accounts. N.Y.L.J., Oct. 3, 1990, at 1, col. 1 (Today's News). See also IOLA Fund Press Release, *supra* note 21.

³⁴ *Legal Aid Drive Nets \$600,200*, N.Y.L.J., Sept. 25, 1990, at 1, col. 5.

³⁵ Clinic programs are offered by all fifteen of the law schools in New York State. Marrero Committee Plan, *supra* note 11, at 116. The Marrero Committee encourages law school clinic programs recognizing that they provide a significant contribution, but the Committee rejected a mandatory rule requiring law students to enroll in clinic programs. *Id.* at 116-17. The State Bar Plan also endorsed law school clinic programs, recommending that law schools expand these programs. State Bar Plan, *supra* note 14, at 36. Some law schools have imposed or are considering imposing a public interest requirement in their curriculum. See Note, *supra* note 4, at 360 n.41 (Tulane, for example, requires 20 hours service for indigent); Canellos, *Harvard Law Students Endorse Free Legal Work*, Boston Globe, April 16, 1990, at 15 (students voted to include a public interest requirement in the curriculum).

³⁶ California is considering licensing paralegals to perform certain legal services in order to increase availability of these services. See *California Is Poised to Let Paralegals Go It Alone*, N.Y. Times, Oct. 12, 1990, at B5, col. 1; *Non-Lawyer Legal Help*, 76 A.B.A. J. 40 (Oct. 1990).

³⁷ Legal Needs Study, *supra* note 6. See also notes 4, 25-28 and accompanying text *supra*.

³⁸ Legal Needs Study, *supra* note 6, at 204-05.

³⁹ Adams, *supra* note 12 (Chief Judge Wachtler stated, quoting the Ass'n of the Bar of the City of New York, "[e]very legal service agency is compelled to conduct a daily, continuing and agonizing triage: turning away the poor with desperate legal problems in order to serve those with even more urgent problems.").

By engaging in pro bono work, the private bar can make a significant contribution to the problem by handling some of the overflow, taking on new cases, and by working with nonprofit and community organizations to alleviate conditions that give rise to a need for legal services.⁴⁰ For example, nonprofit community development organizations need legal assistance to purchase buildings from absentee landlords, obtain loans, set up cooperative housing associations, and handle general real estate and tax problems. These activities generate more affordable housing for the poor and thereby reduce the number of eviction proceedings caused by nonpayment of rent.⁴¹

Proponents of both the mandatory and the voluntary pro bono plans agree that society at large has the responsibility to work to alleviate harsh conditions suffered by the poor, and that increased funding for legal services offices would be the best solution to the problem of access for the poor.⁴² Both proposals acknowledge, however, that current levels of funding for legal services programs are not sufficient and are not likely to increase soon.⁴³ The two plans represent efforts to increase pro bono contributions to help close the gap between available legal services for the poor and the actual need for those services.

B. *Brief Chronology of the Development of the Lawyer's Pro Bono Obligation*

Professional acceptance of a pro bono obligation as an ethical responsibility has evolved over the past century.⁴⁴ The 1908

⁴⁰ See Legal Needs Study, *supra* note 6, at 51.

⁴¹ *Id.* See also Dean, *Legal Needs in New York*, N.Y.L.J., Nov. 20, 1989, at 3, col. 1.

⁴² See Marrero Committee Plan, *supra* note 11, at 26-27; State Bar Plan, *supra* note 14, at 14-17.

⁴³ Marrero Committee Plan, *supra* note 11, at 27; State Bar Plan, *supra* note 14, at 24.

⁴⁴ The roots of the pro bono obligation are ancient. See Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 19-24 (1990); Wechsler, *supra* note 4, at 911-12. The exact nature of the historical obligation is debated. See Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 738 (1980) ("[T]he 'duty to serve' in fact has a history shrouded in obscurity, ambiguity, and qualification . . ."); Note, *Court Appointment of Attorneys in Civil Cases*, 81 COLUM. L. REV. 366, 374 (1981) (Solicitors, as officers of the court, had a duty to aid in the administration of justice, including an obligation to assist the poor. Barristers, as citizens responding to the King's commands, had a duty to accept court appointment and provide free representation to the poor. American litigation attorneys' functions resemble more closely the English barristers' functions, and therefore the officer of the

Canons of Professional Ethics included a pro bono duty to represent indigent criminal defendants and to aid in the administration of justice.⁴⁵ The 1969 ABA Code of Professional Responsibility expanded this duty, stating that "a lawyer should assist in improving the legal system,"⁴⁶ and that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."⁴⁷ In 1975, the ABA resolved that "it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services."⁴⁸

In 1977, the ABA recommended that state and local bar associations adopt their own pro bono guidelines for their members.⁴⁹ Guidelines were to include quantifying the amount of pro bono work expected, advising whether the obligation could be met collectively, and whether "buyout" provisions were appropriate.⁵⁰ Following the ABA recommendation, many bar associations adopted voluntary guidelines for their members.⁵¹

court justification for a pro bono obligation arguably does not apply to them.).

⁴⁵ Torres & Stansky, *In Support of a Mandatory Public Service Obligation*, 29 EMORY L.J. 997, 997-98 (1980) (citing ABA Canons of Professional Ethics, Canons 2 and 4, (1937)). See also Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 258 (1981).

⁴⁶ Rosenfeld, *supra* note 45, at 259 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1969)).

⁴⁷ *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969)).

⁴⁸ *Id.* at 260 (emphasis omitted) (citing ABA House of Delegates Res. on Public Interest Legal Services (Aug. 1975), reprinted in ABA Special Comm'n on Public Interest Practice, *Implementing the Lawyer's Public Interest Practice Obligation* 19-20 app. (June 1977)). The full text of the resolution is printed in Rosenfeld, *supra* note 45, at 260 n.29.

⁴⁹ Rosenfeld, *supra* note 45, at 261. The recommendation was made by the ABA Special Committee on Public Interest Practice.

⁵⁰ *Id.* Guidelines were also to include whether government attorneys and in-house corporate counsel would be covered, how they could meet the obligation and the role the bar association would play in aiding the lawyer to fulfill the obligation. *Id.*

⁵¹ Miskiewicz, *supra* note 4. See also Webster, *Setting Pro Bono Standards*, 69 MICH. B.J. 232 (Mar. 1990) (President's Page) (In Michigan, a voluntary pro bono standard of three cases per year, or 30 hours of service to an individual or an organization, has been considered. The plan permits a buy out alternative by allowing a \$300 contribution to any nonprofit organization that provides civil legal services to individuals or organizations.); Campbell, *Why Is There a Debate Over Mandatory Pro Bono Work?*, 26 ARIZ. ATT'Y 14 (May 1990) (There is a debate because although the Code of Professional Responsibility suggests pro bono work, only one third of attorneys do it.) After discussion of a mandatory rule in Arizona, a voluntary standard of 50 hours of pro bono work per year was recently adopted. The state is conducting a survey of current pro bono services and will conduct a survey in two years to measure the impact of its voluntary program. *Id.*

The Association of the Bar of the City of New York proposed a mandatory pro bono standard in 1978, which was rejected by its members.⁵² In 1980, the ABA Commission on Evaluation of Professional Standards (the Kutak Commission) proposed a mandatory pro bono rule in their First Discussion Draft of revisions to the ABA Model Rules.⁵³ The proposed rule, which did not include specific time requirements or enforcement provisions, was rejected.⁵⁴ A few bar associations have successfully adopted mandatory pro bono requirements as conditions of membership.⁵⁵ In addition, mandatory pro bono programs have been adopted by a few courts where the need was severe. These programs are restricted to specific areas of law, such as matrimony cases, and together the bar and court programs reach only about 7,750 attorneys.⁵⁶

C. *The Marrero Committee's Mandatory Pro Bono Plan*

The Marrero Committee issued its preliminary plan in June 1989.⁵⁷ After holding four public hearings to receive "a full airing within the legal community," the final plan was issued, in-

⁵² See Wechsler, *supra* note 4, at 918-19.

⁵³ Torres & Stansky, *supra* note 45, at 999-1000.

⁵⁴ See Lardent, *supra* note 2, at 92-98; Wechsler, *supra* note 4, at 919-20.

⁵⁵ Bainbridge, *Pro Bono Service: What's a Lawyer to Do?*, 22 Md. B.J. 13 (Sept.-Oct. 1989). One of the oldest mandatory pro bono programs was adopted in 1967 by the Orange County Bar Association. Marin-Rosa & Stepter, *Orange County—Mandatory Pro Bono in a Voluntary Bar Association*, 59 FLA. B.J. 21 (Dec. 1985). The Orange County Bar Association program requires each member to take two cases per year, or to pay \$250 to the association. *Id.* Of 1500 members, about one-half choose the buyout provision, providing about \$100,000 each year to the Orange County Legal Aid Office. Miskiewicz, *supra* note 4 (citing 1986 figures). For further description of the Orange County plan, see Wechsler, *supra* note 4, at 935-37.

Other states, in addition to New York, are considering adopting a mandatory rule. In Maryland, an Action Plan created by the Maryland Legal Services Corporation Advisory Council called for a mandatory minimum of one pro bono case per attorney per year, as well as other steps to increase the poor's access to the legal system. The mandatory plan was temporarily rejected, and an ambitious voluntary program was undertaken by the state government and judiciary branch. If the efforts are not successful, Maryland's high court may impose a mandatory pro bono rule. See Cardin & Rhudy, *Expanding Pro Bono Legal Assistance in Civil Cases to Maryland's Poor*, 49 Md. L. Rev. 1 (1990).

⁵⁶ Miskiewicz, *supra* note 4. See also Wechsler, *supra* note 4, at 920-21, 935-38.

⁵⁷ Committee to Improve the Availability of Legal Services, Preliminary Report to the Chief Judge of the State of New York (June 30, 1989) (available from Victor Marrero, Esq., Brown & Wood and on file at the Brooklyn Law School Library).

corporating the public response.⁵⁸ The Marrero Committee Plan recognized that the best solution to the problem of access to the legal system for the poor would be a large infusion of public money to provide the needed legal services. However, given the large amount needed and the immediate urgency of the problem, the Committee found that it was unrealistic to expect that enough money would be forthcoming soon.⁵⁹

The Marrero Committee found the problem to be urgent. It found that the legitimacy of the legal system itself is threatened where, due to a lack of resources, a large number of people are not receiving needed legal assistance. The Committee also noted that laws established by the courts and the legislature to protect the poor are not enforced because of a lack of legal representation.⁶⁰ The Marrero Committee found that lawyers have a duty to ensure access to the legal system based on their obligation as professionals and as officers of the court, and on their possession of "unique training and skills" and their "exclusive" possession of the license to practice law.⁶¹ The proposal rejected reliance on

⁵⁸ Marrero Committee Plan, *supra* note 11, at 5, 7 (Almost all professional bar associations were against a mandatory rule except for the Association of the Bar of the City of New York, which expressed reservations about some details of the plan; legal services agencies and public interest organizations generally supported the plan; newspaper commentaries were also generally in support of the plan.). *See also* Wise, *Bar Groups Split on Mandatory Pro Bono Plan*, N.Y.L.J., Oct. 20, 1989, at 1, col. 3 (While city bar supported the proposal, "numerous" county bar associations were against it. The National Lawyers Guild was opposed to the plan on the ground that it would weaken efforts to get government funding for legal services offices.).

⁵⁹ Marrero Committee Plan, *supra* note 11, at 25-27.

⁶⁰ *Id.* at 14-15, 18-19. Without legal representation, the poor are unable to enforce existing "remedial legislation" established to help them obtain basic essentials such as "shelter, minimum levels of income and entitlements, unemployment compensation, disability allowances, child support, education, matrimonial relief and health care." *Id.* at 14-15 (citing Legal Needs Study, *supra* note 6). *See also* Labaton, *supra* note 31 (quoting Chief Judge Sol Wachtler) ("[T]here is no way we can say we've met our obligations in the justice business, when access has become limited to only those who can afford counsel."); Millemann, *supra* note 44, at 26-27 (surveying the legal needs of the poor and the inadequacy of pro se representation to successfully assert rights that are "buried in the complex language of lawyers"). *But see* Marrero Committee Plan, *supra* note 11, at 140 (statement by Corbin) (crisis is not of such proportion as to justify a mandatory pro bono requirement). The State Bar Plan chose not to debate "whether the vast need documented by the Study was or was not a 'crisis'." State Bar Plan, *supra* note 14, at 8 n.6.

⁶¹ Marrero Committee Plan, *supra* note 11, at 9, 15, 19, 27.

We believe that lawyers, independent of their ordinary duty as citizens, have a professional responsibility to mobilize their own resources in order to meet these needs. This duty flows from the lawyer's role as a professional and an officer of the court and arises particularly from the lawyer's possession of

voluntarism as unlikely to produce enough of an increase in the amount of pro bono work contributed.⁶² It also rejected a voluntary pro bono standard as condoning attorney nonparticipation and found that insistence on a voluntary standard was "a rallying cry for the status quo."⁶³

The proposal suggested a mandatory pro bono requirement for every registered attorney admitted to practice to provide forty hours of pro bono services every two years.⁶⁴ The proposal set forth three categories of "qualifying" pro bono services: (1) direct legal representation of the poor in civil matters, or in criminal matters where there is no government obligation to provide an attorney; (2) indirect representation of the poor through activities designed to benefit the poor by improving the administration of the justice system or workings of the legal process that affect the poor; and (3) activities on behalf of "charitable, religious, civic and educational" organizations that assist the poor, thereby preventing the need for legal services in the future.⁶⁵

The proposed plan also provided "two notable exceptions": a monetary contribution option whereby attorneys in firms of ten or fewer attorneys, or groups of ten or fewer attorneys organized for purposes of the pro bono rule, could donate money in lieu of their time (the "buy out" option);⁶⁶ and a group services

unique training and skills and of the exclusive, publicly granted franchise to practice law

Moreover, the obligation stems, too, from the lawyer's responsibility to promote the legitimacy, efficacy and equity of the legal system itself, all of which are fundamentally undermined by permitting a vast gap to continue between the legal services required to procure basic human requirements and the availability of those services.

Id. at 27-28.

⁶² *Id.* at 105 (despite "Herculean efforts" by bar associations to promote pro bono contributions, only 10 to 15% of their members participate in volunteer programs).

⁶³ *Id.* at 106 (The majority of attorneys who currently rely on a minority of the profession to fulfill the pro bono obligation are permitted to continue to do so since there is no means by which to require nonparticipating attorneys to contribute their share under a voluntary standard.).

⁶⁴ Marrero Committee Plan, *supra* note 11, at 9-10, 34. If an attorney exceeded the 40 hour requirement, the surplus time could be carried forward and credited to the next four years. *Id.* at 9-10, 72-73.

⁶⁵ *Id.* at 47-56.

⁶⁶ *Id.* at 59, 62. The monetary contribution option is designed to provide attorneys with an alternate method of satisfying the obligation and is particularly suited to "specialists and other lawyers who truly could not render effective direct legal services to the poor . . . as well as for government, legal services and corporate attorneys." *Id.* at 59-60. The option could also be exercised where, because of other demands, contribution of

option whereby attorneys in firms, or groups, of more than ten attorneys could aggregate their pro bono activities (the "delegation" option).⁶⁷ To prevent assigning all pro bono work to the newest attorneys in a firm, yet to encourage new attorneys to experience pro bono work personally, attorneys admitted to the bar for less than two years would not be included in aggregating the firms', or groups', pro bono time units, and these new attorneys could not be assigned to fulfill the collective requirement.⁶⁸

Three Marrero Committee members recommended deferring consideration of a mandatory rule to allow time for efforts to increase voluntarism to succeed.⁶⁹ Two members dissented from the plan, finding that the duty owed to the poor is societal and should not be imposed only upon lawyers, and objecting to the buy out and delegation options on the ground that the pro bono obligation is a personal one.⁷⁰ They also dissented on the ground that the crisis is not so severe as to justify conscription, and they questioned the court's authority to promulgate a rule that would affect activities outside the court.⁷¹

D. *The NYSBA's Voluntary Plan*

The New York State Bar Association Special Committee plan (State Bar Plan) was proposed in October 1989, in response to the Marrero Committee's Preliminary Plan.⁷² The State Bar Plan found that legal services offices are best suited to serving the poor because of their expertise, commitment, and full-time availability,⁷³ and it proposed to promote increased public and private funding for legal services for the poor. Recognizing that increased funding for legal services will not come quickly enough

personal time would present "financial hardship or practical difficulties." *Id.* at 60.

⁶⁷ *Id.* at 57. Solo practitioners could informally group together for the purpose of aggregating their pro bono time requirement. *Id.* This provision permits firms to assign their attorneys' pro bono time requirements to one or more attorneys most interested or suited to pro bono assignment, and it permits the benefits that flow from the resources and general support a firm can offer. *Id.* at 58.

⁶⁸ *Id.* at 58-59.

⁶⁹ Marrero Committee Plan, *supra* note 11, at 133-36, 137, 145-47 (statements by Davis, Gleason, and Fiske).

⁷⁰ *Id.* at 138-43 (statement by Corbin, joined by Dougherty).

⁷¹ *Id.*

⁷² State Bar Plan, *supra* note 14, at 1, 40 (app. 1) (Charge of the Special Committee to Consider the Proposed Plan for Mandatory Pro Bono Service).

⁷³ *Id.* at 15-16.

and that there is a pressing need, the State Bar Plan outlined steps to encourage voluntarism by attorneys to help fill the demand for legal services.⁷⁴

The State Bar Plan proposed to increase voluntarism by: (1) setting specific aspirational guidelines on the amount of pro bono work each attorney should contribute; (2) proposing ways to remove barriers such as the need for training, malpractice insurance and assistance with costs; (3) facilitating voluntarism by a series of twenty steps designed to help the NYSBA coordinate with local bar groups to create locally based proposals;⁷⁵ (4) recommending an annual or biannual survey of attorneys' pro bono work;⁷⁶ and (5) encouraging participation by judges in providing

⁷⁴ *Id.* at 13-14.

⁷⁵ The twenty steps proposed in the State Bar Plan are: (1) adopt a resolution that "assuring the provision of adequate legal services for the poor, including *pro bono* services" is a primary purpose of a bar association; (2) assign the president-elect of the NYSBA, each year, as head of the bar's pro bono campaign; (3) charge all sections of the bar to report to the bar's executive committee, by June 1, 1990, on how their sections can contribute or facilitate pro bono activities; (4) hire a pro bono coordinator who would work to link the private bar with the needs of the community; (5) design, distribute within 6 months, and collate results of a survey of all registered attorneys in New York State to be distributed to local bar associations to determine their local needs and to design "action plans"; (6) request "local needs assessment" and specific "action plans" from local bar associations within 9 months; (7) consider ways to coordinate the activities of NYSBA's Volunteer Lawyer Committee, the Committee on Legal Aid, and the Committee on Public Interest; (8) assure a pro bono presence at NYSBA annual and mid-year meetings; (9) expand Pro Bono Service Awards, establish additional awards for legal service professionals and for students; (10) appoint a committee to pursue ways to develop a malpractice insurance fund to cover attorneys performing pro bono independently of a legal services organization; (11) expand and simplify fee shifting or fee waiver procedures such as the Equal Access to Justice Act and *in forma pauperis* procedures that lower legal costs for the poor; (12) establish a pro bono program for state bar employees as a model for other employers; (13) consider how State Bar Continuing Legal Education programs can be used as incentive or reward for pro bono efforts and as training for pro bono work; (14) develop a statewide campaign and theme; (15) request that the governor designate a pro bono week; (16) feature articles on pro bono work regularly in the *New York State Bar Journal*; (17) develop, print and distribute a brochure for attorneys on pro bono work; (18) coordinate with the court system on ways to use pro bono services efficiently; (19) coordinate with other statewide bar associations; and (20) coordinate with, and encourage, pro bono activities of other statewide professional organizations. *Id.* at 29-31.

⁷⁶ *Id.* at 31-33. Step 5 of the State Bar Plan calls for an annual or biannual survey of attorneys' pro bono activities. If a "respected third party foundation, university or other organization" is not found within one year to undertake this survey, the State Bar Plan suggests that the NYSBA fund the surveys; and if this is not feasible, the State Bar Plan recommends as a last resort that Rule 118.1 of the Rules of the Chief Administrator be amended to include a section wherein attorneys would report their pro bono work of the prior two years. *Id.* at 33-34. See N.Y. COMP. CODES R. & REGS. tit. 22, § 118 (1986)

training and public support. The State Bar Plan adopted a voluntary standard for every New York attorney to provide twenty hours per year of pro bono services to the poor, or to donate an equivalent amount in earnings to an organization that provides legal services to the poor.⁷⁷

The State Bar Plan rejected mandatory pro bono as ineffective because "effort expended voluntarily will normally produce far more quality results than will conscripted effort."⁷⁸ The New York State Bar Association Special Committee recommended deferring the consideration of any mandatory pro bono plan for at least three years in order to allow sufficient time for the State Bar Plan to succeed.⁷⁹

The New York State Bar Association organized a committee to implement the State Bar Plan.⁸⁰ Thus, the effort to increase voluntary pro bono contributions in New York State includes

(Registration of Attorneys).

Similarly, the mandatory plan suggested amending Rule 118.1 for attorneys to report their compliance with the rule. Marrero Committee Plan, *supra* note 11, at 90. The State Bar Plan provides a suggested form to collect the information on pro bono contributions. State Bar Plan, *supra* note 14, at 61 app. 7 (Draft of a Statewide Survey of Attorneys with Respect to Their *Pro Bono* Activities). The form separates pro bono work into nine categories: (1) direct representation in civil matters where there is a right to an appointed lawyer but none was appointed; (2) direct representation in civil matters where there is no right to an appointed lawyer; (3) direct representation in criminal matters where there is no right to an appointed lawyer; (4) indirect representation through activities simplifying access to the legal system for the poor; (5) legal work for a charitable organization dedicated to aiding the poor; (6) service on 18B panels; (7) legal services for charitable organizations that are not dedicated to aiding the poor; (8) work for bar associations or other organizations to improve the legal system; and (9) any other activities the attorney considers "pro bono publico" and for which the attorney did not receive pay. The attorney would fill in the number of hours contributed in the past two years in any category. In addition, financial contributions to organizations that provide legal services to the poor would be reported. *Id.* For objections to the survey in the legal community, see note 19 *supra*.

⁷⁷ *Id.* at 24-25. "Any attorney who does not [provide pro bono services], for whatever reason, should recognize and honor a moral obligation to make a financial contribution, commensurate with his or her resources and the actual or imputed opportunity cost of the time not so spent, to an organization dedicated to providing legal services to the poor." *Id.* at 25.

⁷⁸ *Id.* at 37.

⁷⁹ *Id.* at 1.

⁸⁰ The state bar's Committee on Access to Justice was appointed by the NYSBA president and consisted of twenty-two members from across New York State. Spencer, *Bar Disagrees Over Measures on Pro Bono; County Lawyers Object to Reporting of Hours*, N.Y.L.J., May 18, 1990, at 1, col. 3. The Committee's purpose was to work with local bar associations to identify local legal services needs and organize local training programs for volunteers to meet those needs. *Id.*

two forces implementing a voluntary standard. There is the State Bar Plan being implemented by the New York State Bar Association Committee on Access to Justice, and the Marrero Committee Plan, without its mandatory element, being implemented by the Pro Bono Review Committee appointed by Chief Judge Wachtler.⁸¹ Because a voluntary standard was kept, New York State's attorneys have had an opportunity to choose to participate in pro bono programs and avoid the need for a mandatory rule.⁸²

II. COMPARING THE POTENTIAL EFFECTIVENESS OF THE MANDATORY AND VOLUNTARY PRO BONO PLANS

This Note argues that a mandatory pro bono plan should be adopted in New York State because it will more effectively raise the level of pro bono contributions than will reliance on a voluntary pro bono standard. This increase can significantly ease the problem of access to the legal system by providing an essential supplement to current efforts by federal, state and local government, and by the legal profession, to address the legal needs of New York's poor.

Reliance on a voluntary plan will not produce a significant change from the current level of pro bono contributions because the plan is unlikely to motivate individual lawyers to contribute. By definition, the voluntary plan relies for its success on a personal commitment by most attorneys to fulfill the professional obligation. The plan does not contain enough incentives to increase voluntarism.⁸³

The State Bar Plan seeks to achieve increased pro bono services through a range of promotional efforts. It relies on peer pressure and the threat of a future mandatory rule to increase the level of pro bono contributions. The state bar is limited to providing incentives, such as awards, in the voluntary plan.⁸⁴ Another incentive is the prospect of publicity by publishing an

⁸¹ See note 19 and accompanying text *supra*.

⁸² If pro bono contributions increase from current levels, a mandatory rule will not be imposed. See Adams, *supra* note 12.

⁸³ See Lardent, *supra* note 2, at 102; Wechsler, *supra* note 4, at 922 n.84.

⁸⁴ The state bar recognizes and encourages pro bono efforts through the New York State Bar Association President's *Pro Bono Service Award*. The State Bar Plan proposed to expand these awards. State Bar Plan, *supra* note 14, at 30.

article in the bar journal. Continuing education "certificates" or "vouchers" in return for pro bono hours are also considered incentives that will increase pro bono contributions.

The most important element of the State Bar Plan to reinforce personal motivation is the imposition of an annual, or bi-annual, survey. In addition to providing the state with information on pro bono efforts and a mechanism for measuring and comparing voluntarism levels over time, the survey can act as a regular official "reminder" to attorneys, each time they complete it, of their obligation to perform pro bono work. As envisioned by the voluntary plan, the survey is to include all registered attorneys in New York State.⁸⁵ To provide additional incentives, the plan should also encourage firms to count pro bono work, or a portion thereof, as "billable hours," and to consider pro bono activities in their decisions regarding promotions, bonuses and partnership.

Indirectly, the plan relies on the threat of a mandatory rule as an incentive for local bar associations to cooperate. Even with this threatened implementation of a mandatory pro bono program, it is not clear that enough attorneys in New York State will respond to the call for increased voluntarism. The threat of a mandatory pro bono rule may not be enough of a motivator. Although, according to most polls, the majority of attorneys do not want a mandatory program, the majority of attorneys currently involved in mandatory programs have not expressed difficulty complying with the rule.⁸⁶

Even if volunteer efforts do initially increase, there is a problem of maintaining the increased level of commitment over time. To have effect, a significant commitment and financial expense will be needed.⁸⁷ Cooperation between the NYSBA, local bar associations, the court system, and the political branch are necessary for the plan to succeed.⁸⁸ In addition, there are a sig-

⁸⁵ State Bar Plan, *supra* note 14, at 26.

⁸⁶ Marrero Committee Plan, *supra* note 11, at 23 (citing Dean, *Two Model Programs*, N.Y.L.J., Dec. 21, 1987, at 1, col. 1 (Pro Bono Digest); Marin-Rosa & Stepter, *Orange County—Mandatory Pro Bono in a Voluntary Bar Association*, *supra* note 55; Miskiewicz, *Mandatory Pro Bono Won't Disappear*, *supra* note 4. See also Marrero Committee Plan, *supra* note 11, at 110-11. But see Wechsler, *supra* note 4, at 944 *passim* (survey of attorneys participating in two mandatory pro bono programs indicates that most of these attorneys are opposed to a mandatory pro bono rule).

⁸⁷ See notes 74-75 and accompanying text *supra*.

⁸⁸ *Id.*

nificant number of attorneys in New York State who are not members of a bar association and who will not be reached by the plan.⁸⁹

A mandatory program is a simple and direct route to achieving the goal of increased access to the legal system for the poor.⁹⁰ A mandatory pro bono rule would increase significantly the amount of legal services available because it would reach all of New York State's registered attorneys. Currently, only about ten to fifteen percent of New York's eighty-eight thousand licensed attorneys participate in pro bono activities.⁹¹ A mandatory rule would increase the availability of legal services by providing a large cadre of attorneys on a regular basis. The mandatory rule would also provide a significant increase in funding for legal services because of the fees that would be generated by those attorneys electing the buyout option in lieu of contributing time.⁹²

The Marrero Committee Plan limits the buyout option to solo practitioners and groups of ten or fewer attorneys. To maximize the fundraising potential of a mandatory plan, this limitation should be eliminated, and the buyout option should be available to all attorneys, as it is in the State Bar Plan.⁹³ If one-half of all New York attorneys elected the buyout option, about

⁸⁹ Marrero Committee Plan, *supra* note 11, at 105 (approximately one-half of New York attorneys do not belong to a professional bar association).

⁹⁰ *Mandatory Pro Bono*, 74 A.B.A. J. 46 (May 1, 1988) (At Issue) ("[Mandatory pro bono is] just a good, straight-forward, simple way of approaching the problem. As attractive as sheer voluntarism is, it simply isn't working.") (quoting Alexander Forger, managing partner, Milbank, Tweed, Hadley & McCloy and a member of the Marrero Committee).

⁹¹ Marrero Committee Plan, *supra* note 11, at 22, 99. *See also* Legal Needs Study, *supra* note 6, at 191-93, 206-07 (estimates are based on reports from local and state bar associations; pro bono participation outside of organized bar programs has not yet been reliably measured). However, results of the statewide survey conducted in 1991 by the Pro Bono Review Committee indicate a higher percentage participation rate among individual attorneys registered in New York responding to the survey, as well as a significant percentage who do not participate. *See* note 19 *supra*.

⁹² Marrero Committee Plan, *supra* note 11, at 60 (the funds should be expended on full-time legal services attorneys with expertise in areas such as housing law and government entitlement programs where volunteer attorneys are less effective). *See* note 66 and accompanying text *supra* (explanation of Marrero Committee Plan's buyout option).

⁹³ The Marrero Committee gave three reasons for choosing to limit the availability of the buyout option: first, to give solo practitioners and smaller firms' attorneys an advantage; second, to encourage personal participation by attorneys; and third, to prevent larger firms from crediting their financial contributions towards fulfilling their attorneys' pro bono obligations. Marrero Committee Plan, *supra* note 11, at 70.

\$8.8 million would be raised every two years.⁹⁴ This would represent an amount equivalent to almost the entire annual funding for legal services provided by New York State alone.⁹⁵ The combined annual funding for legal services in New York State provided by state, local and private sources would be increased by almost half.⁹⁶ In addition, assuming that the number of attorneys in the state continues to grow each year, this source of funding would increase each year.

A. Major Criticisms of a Mandatory Pro Bono Rule

The route to a mandatory rule is fraught with contention.⁹⁷ This Note recognizes that even if a mandatory rule would increase significantly the amount of legal services available to the poor, this increase would not be sufficient reason to impose such a rule if the burden on attorneys were too onerous, or if administration of the plan were too costly. However, the Marrero Committee Plan has successfully incorporated most of the criticisms of a mandatory rule by providing a flexible choice of services, and by proposing a simple self-enforced administration that dovetails with preexisting, biannual registration and disciplinary procedures.

The major criticisms of a mandatory pro bono rule discussed in this section are grouped in two parts: (1) objections to any mandatory pro bono rule; and (2) objections to specific elements of the Marrero Committee Plan. The general arguments

⁹⁴ This calculation is based on the Marrero Committee proposal of \$50.00 per hour, which was selected by the Committee based on the rate paid in federal courts to lawyers appointed to represent the indigent in criminal cases. Marrero Committee Plan, *supra* note 11, at 64. The mandatory pro bono rule in effect in Orange County includes a buyout provision, and administrators report that about one-half of all attorneys elect the buyout option. See Marin-Rosa & Stepter, *supra* note 55, at 21; Wechsler, *supra* note 4, at 936.

⁹⁵ New York State funding in 1987 amounted to \$10 million. See note 26 and accompanying text *supra*.

⁹⁶ State, local and private contributions for 1987 amounted to \$21.04 million. See notes 26, 28 and accompanying text *supra*.

⁹⁷ Adams, *supra* note 12, at 2, col. 3 ("I am not unmindful of the arguments that there would be an inevitable legal and philosophical confrontation were we to mandate pro bono service.") (quoting Chief Judge Wachtler). See also Graham, *Mandatory Pro Bono: The Shape of Things to Come?*, 73 A.B.A. J. 62 (Dec. 1, 1987) (There is a "litany of philosophical, legal and practical reasons" given in opposition to a mandatory pro bono program.); Wechsler, *supra* note 4, at 921 n.78 *passim* (polls show majority of attorneys are against a mandatory pro bono rule).

addressed are: the constitutionality of a mandatory pro bono rule; the "reluctant advocate" problem; the "chilling effect" on voluntarism possibly caused by such a rule; the unpopularity of the rule among lawyers; and finally, the "matching skills" problem. The specific arguments then addressed are: the buyout and delegation features of the proposed plan; the expense of administration, oversight and enforcement of such a rule; and finally, the need for malpractice insurance for attorneys providing pro bono services.

1. Arguments Against Imposition of Any Mandatory Pro Bono Rule

Opponents of a mandatory pro bono rule protest that it may be unconstitutional under the Fifth, Thirteenth and Fourteenth Amendments.⁹⁸ The Marrero Committee Plan considered the constitutional issues raised by a mandatory pro bono rule in a separate appendix to the report.⁹⁹ Reviewing relevant cases and standards, the Committee rejected the "involuntary servitude," "taking without compensation," "due process" and "equal protection" arguments.¹⁰⁰ Commentators support the Marrero Committee conclusion.¹⁰¹ The Supreme Court has never ruled on the question of whether a mandatory requirement would be constitutional. Courts have been reluctant to rule that a mandatory

⁹⁸ See Adams, *supra* note 12, at 2, col. 3 ("The arguments have already been raised that [a mandatory pro bono plan] would be taking property without just compensation, that it would be involuntary servitude, that it would affect the equal protection of the law.") (quoting Chief Judge Wachtler). See also notes 101-02 and accompanying text *infra* (cases and commentary on the constitutionality of a mandatory pro bono rule for attorneys).

⁹⁹ Marrero Committee Plan, *supra* note 11, at 153 app. C (Constitutional and Statutory Issues).

¹⁰⁰ *Id.*

¹⁰¹ See, Rosenfeld, *supra* note 45, at 288-95 (not a taking where government is enforcing a preexisting obligation owed to the public; not involuntary servitude where government calling for service to meet a public need and where one is free to choose another calling; not an equal protection violation where there is a rational relationship with the government's interest and the requirement reaches all lawyers); Millemann, *supra* note 44, at 65-68 (constitutional arguments are "strained at best"; for a taking there must be showing of irreparable and permanent injury or that property value was entirely destroyed). For a survey of scholars' opinions and cases, see Cardin & Rhudy, *supra* note 55, at 11 n.58; Rofes, *Ducking the Question: Some Observations on Mallard v. United States District Court and the Case of the Unwilling Lawyer*, 55 BROOKLYN L. REV. 1129, 1136 n.35 (1990). For a helpful review of the constitutional arguments, see also Note, *supra* note 4, at 366-69.

appointment of an attorney is constitutional,¹⁰² but the mandatory pro bono plan, which permits an attorney to choose when and how to fulfill the obligation, allows an attorney far more choice than an attorney asked to accept a specific case.¹⁰³ Where the need is great enough, and the burden placed on attorneys is flexible, a mandatory pro bono rule should withstand constitutional scrutiny.

It is asserted that a mandatory pro bono requirement is impracticable and counterproductive because of doubts about the effectiveness of any representation where the attorney has been forced to accept the case. It is feared that a mandatory pro bono rule would generate a "reluctant advocate" situation whereby an attorney, taking on a case simply to satisfy his or her obligation under the rule, would not represent the client as zealously as he or she would handle private clients.¹⁰⁴ The poor are best served by attorneys "who stand at their side willingly."¹⁰⁵ This fear seems unfounded in practical terms because by providing numerous and flexible categories of acceptable service, an attorney under the mandatory plan would not be put in the position of accepting a case against her will.¹⁰⁶

It is also feared that a mandatory pro bono rule will have a

¹⁰² See Cardin & Rhudy, *supra* note 55, at 11 n.58. In *Mallard v. United States District Court*, 490 U.S. 296 (1989), the Court avoided deciding whether federal courts have the power to compel an attorney to accept a case by restricting the decision to interpretation of 28 U.S.C. § 1915(d) (1982). The statute provides that a federal court may "request" an attorney to represent an indigent civil litigant. Justice Brennan who authored the 5 to 4 decision, held that "request" was not intended to mean "require" and that an attorney could refuse to serve. For commentary on *Mallard*, see Rofes, *supra* note 101; Note, *The Constitutionality of Compulsory Attorney Service: The Void Left by Mallard*, 68 N.C.L. REV. 575 (1990). Unlike the situation in *Mallard*, the Marrero Committee Plan contains a wide scope of qualifying services that an attorney could perform to satisfy the requirement, see note 65 and accompanying text *supra*, as well as containing buyout and delegation options, see notes 66-67 and accompanying text *supra*. Thus no attorney would be in *Mallard's* position of being asked to take a case in which he had no expertise.

¹⁰³ Cardin & Rhudy, *supra* note 55, at 11 n.58. See also Rofes, *supra* note 101, at 1136 n.35 (survey and discussion of court decisions on constitutionality of compulsory uncompensated appointment of attorneys).

¹⁰⁴ See Cardin & Rhudy, *supra* note 55, at 12; Millemann, *supra* note 44, at 60-61.

¹⁰⁵ Adams, *supra* note 12, at 2, col. 4 ("Voluntary service is obviously preferable to compulsory service in any endeavor.") (quoting Chief Judge Wachtler). See also State Bar Plan, *supra* note 14, at 37.

¹⁰⁶ Marrero Committee Plan, *supra* note 11, at 109-10. The Marrero Committee Plan also rejects this criticism as an injustice to the majority of attorneys. *Id.*

chilling effect on voluntarism;¹⁰⁷ on contributions to legal aid programs;¹⁰⁸ or that it would relieve government of its obligation to provide legal services for the poor. The Marrero Committee rejected these arguments, finding that they would apply equally to voluntary or mandatory plans to increase pro bono services.¹⁰⁹

A mandatory plan is disliked in principle by the majority of attorneys.¹¹⁰ More information on attorneys' objections to a mandatory rule will be gained from the survey of six thousand attorneys being conducted by the Pro Bono Review Committee.¹¹¹ The Marrero Committee heard objections from government lawyers concerned that they already are fulfilling their obligation by working at lower salaries and under poorer conditions than most private attorneys, and concerned that their public positions prevent them from taking on volunteer cases. Private business corporation lawyers expressed concerns that

¹⁰⁷ Graham, *supra* note 97. See also Metz, *Lawyers Pondering Pro Bono Legal Aid*, N.Y. Times, May 7, 1989, § 12 (Long Island), at 12, col. 5 (Nassau and Suffolk Bar Associations say a mandatory pro bono rule would cut into volunteer efforts); Wise, *Bar Groups Split on Mandatory Pro Bono Plan*, N.Y.L.J., Oct. 20, 1989, at 1, col. 3 (Sullivan & Cromwell partner states that a mandatory pro bono rule would cut into the "burgeoning" voluntarism movement). But see Labaton, *Big Law Firm to Help Poor in Civil Cases*, N.Y. Times, June 8, 1988, at B1, col. 5 (a mandatory rule would have no effect on Skadden, Arps public interest fellowship fund); Millemann, *supra* note 44, at 64 (mandatory pro bono rule unlikely to have an effect on current levels of voluntarism); Marrero Committee Plan, *supra* note 11, at 109-10 ("inconceivable" that attorneys would reduce their levels of pro bono work under a mandatory pro bono plan).

¹⁰⁸ See The Legal Aid Society, *Legal Aid Society Pro Bono Plan Report*, N.Y.L.J., Dec. 8, 1989, at 2, col. 3 ("[The buyout provision] should not be set so high as to become a substitute for the contributions of both people and money that [are now made] to The Legal Aid Society and elsewhere.").

¹⁰⁹ Marrero Committee Plan, *supra* note 11, at 109-12.

¹¹⁰ Marrero Committee Plan, *supra* note 11, at 7. See also Margolick, *New York Panel Urges Lawyers to Aid the Poor*, N.Y. Times, July 11, 1989, at A1, col. 1 (Chief Judge Wachtler has received "an 'enormous' amount of mail from lawyers against compulsory public service.").

¹¹¹ See Fox, *supra* note 19. See also Wechsler, *supra* note 4. Professor Wechsler conducted a survey of 700 attorneys from four geographic areas to gain insight into attorneys' attitudes regarding mandatory pro bono. Most of the surveys were sent out in 1988. *Id.* at 933. Following analysis of the results of the survey, Professor Wechsler suggests guidelines for designing a mandatory pro bono rule that will not be onerous on attorneys. *Id.* at 951-58. The Marrero Committee Plan incorporates all of these recommendations, except: (1) Professor Wechsler recommends that the buyout option be made available to all attorneys. *Id.* at 953; and (2) Professor Wechsler suggests pro bono clients should pay a small fee, as low as \$10.00, if they are able to, as a symbolic recognition of the value of the services received. *Id.* at 958. This Note also recommends that the buyout option be available to all attorneys. See note 130 and accompanying text *supra*.

their employers would bear some of the cost of their contributed time.¹¹²

The Marrero Committee Plan rejected exempting any attorneys from the rule, preferring a "universal" standard to support the credibility and effectiveness of the rule.¹¹³ Where government attorneys are prohibited from legal work outside of their positions, the Marrero Committee urged that the rules be amended.¹¹⁴ The Marrero Committee noted that some public agencies have already begun to ease regulations of this type.¹¹⁵ Further, the Marrero Committee urged that business corporations should accept any additional costs resulting from a mandatory pro bono rule, "within reasonable limits," as a cost of doing business.¹¹⁶ Government lawyers and public interest organization lawyers with expertise in poverty law and poverty issues could conduct training programs as a method of fulfilling their pro bono time requirement.¹¹⁷ In any case, the proposed mandatory rule would allow for exceptions to be made on a case-by-case showing of special circumstances.¹¹⁸

Another frequent objection to a mandatory rule is the perceived difficulty of matching the skills of the private bar to the needs of the poor.¹¹⁹ The mandatory rule would permit a range of qualifying services in addition to direct legal representation of

¹¹² Marrero Committee Plan, *supra* note 11, at 41.

¹¹³ *Id.* at 38.

¹¹⁴ *Id.* at 39.

¹¹⁵ *Id.* at 39-40. Federal agencies including the Justice Department have established policies encouraging pro bono work by their attorneys following an executive order in 1979. *Id.* The Marrero Committee noted that New York State Department of Civil Service rules that currently permit paid leaves of absence for professional activities "directly related to the employee's profession or professional duties" could be slightly adjusted to permit state government lawyers to fulfill a professional pro bono requirement. *Id.* at 40 (citing Rules & Regs. of the Dept. of Civil Service, N.Y. CIV. SERV. LAW §§ 28-1.9, 28-1.12-1.15 (McKinney Supp. 1989)).

¹¹⁶ Marrero Committee Plan, *supra* note 11, at 41. The Marrero Committee found it "unlikely that private corporations would discourage or impede their law department attorneys from fulfilling a pro bono legal services obligation." *Id.*

¹¹⁷ *Id.* at 42.

¹¹⁸ *Id.* at 36. Exemptions would be made for "incapacity by reason of illness . . . unusual financial constraint or personal hardship . . . or long personal or business absence from the jurisdiction." *Id.* at 37.

¹¹⁹ See Marrero Committee Plan, *supra* note 11, at 146 (statement by Fiske) ("[S]pecialized knowledge and experience [are needed in] . . . areas in which the vast majority of lawyers who would be subject to the [rule] . . . have little or no experience.").

the poor.¹²⁰ Mechanisms already exist that coordinate pro bono work and notify attorneys of clients needing legal help in specific areas.¹²¹ In addition, "private attorneys are educable."¹²² In private practice, attorneys are often required to research new causes of action, or learn about unfamiliar types of business transactions, for their paying clients. The legal needs of the poor are varied and do not all require expertise in poverty law.¹²³ Finally, to assist private attorneys to serve the poor, there are already many training programs offered by bar associations and legal services organizations.¹²⁴

2. Arguments Against Specific Elements of the Proposed Mandatory Pro Bono Rule

a. *The Buyout and Delegation Options*

Those who view the pro bono obligation as a purely ethical duty consider the buyout and delegation elements of the plan to be loopholes for the elite, enabling larger firms and wealthier attorneys to shirk their obligation.¹²⁵ Opposition to these provisions is based on a perception that the pro bono obligation is a personal one.¹²⁶ One of the benefits of providing pro bono work

¹²⁰ *Id.* at 47-56. See text accompanying note 65 *supra* for a description of the qualifying services.

¹²¹ See Dean, *The Year Ahead*, N.Y.L.J., Sept. 17, 1990, at 1, col. 1 (Pro Bono Digest) ("There are many organizations in the city that run excellent pro bono programs Volunteers of Legal Service [can put lawyers in touch with these organizations].").

¹²² Millemann, *supra* note 44, at 61.

¹²³ See note 8 and accompanying text *supra*.

¹²⁴ For some examples of training programs, see Curtin, *Hope for the Homeless*, 76 A.B.A. J. 8 (Dec. 1990) (ABA Representation of the Homeless Project provides assistance to individual attorneys, law firms, bar associations and law schools to set up programs to aid the homeless with their legal needs); N.Y.L.J., Sept. 25, 1990 at 1, col. 1 (Today's News) (announcing all-day training program sponsored by the City Bar to assist refugees); N.Y.L.J., Oct. 22, 1990, at 1, col. 2 (Today's News) (evening training program given by city bar and The Council of New York Law Associates on areas of pro bono services).

¹²⁵ See Chambers, *Lawyers Find Loopholes In Pro Bono*, Nat'l L.J., Oct. 1, 1990, at 13, col. 4 (Sua Sponte Column).

¹²⁶ The proposed mandatory plan put forth by the Ass'n of the Bar of the City of New York did not permit attorneys to buyout or delegate their duty. Torres & Stansky, *supra* note 45, at 1010. See also Marrero Committee Plan, *supra* note 11, at 141-42 (statement by Corbin) (pro bono is a personal obligation and should not be delegable or sellable by a large number of lawyers).

Both the mandatory and voluntary plans proposed in New York State include buyout provisions. See notes 66, 77 and accompanying text *supra*. These "exceptions"

is the personal satisfaction that it brings, and the increased awareness of "the problems at the bottom."¹²⁷

The buyout and delegation exceptions in the plan were included in order to neutralize several common objections to a mandatory rule.¹²⁸ Attorneys whose areas of expertise are not easily transferrable to the legal needs of the poor, or who for any reason prefer not to contribute time, may select one of these options to satisfy their obligation.¹²⁹

The Marrero Committee Plan restricts the buyout option to attorneys in groups of ten or fewer and restricts the delegation option to groups of more than ten attorneys. These alternative options should be made available to all attorneys regardless of whether they work alone or in groups because these alternatives increase the flexibility of the plan and increase access of the poor to the legal system.¹³⁰

In recognition of the "personal satisfaction" benefits of pro bono, the Marrero Committee Plan excludes new attorneys from the buyout or delegation options.¹³¹ This exception for new attorneys might seem inconsistent because the specific goal of the Marrero Committee Plan is to increase the availability of legal services for the poor by enforcing a preexisting obligation to the court system. However, in addition to providing new attorneys with the opportunity to experience pro bono work, the exception also prevents new attorneys from being relied upon exclusively to fulfill the aggregate time requirements of other attorneys. Because of this practical purpose, the exception for new attorneys should be retained.

The mandatory plan proposed by the Marrero Committee set a contribution rate of fifty dollars per hour which could be donated, in lieu of time, to any organization or fund the individual attorney selects, as long as the purpose of the organization or fund meets the eligibility criteria of the plan by being specifi-

can be viewed as alternatives; an attorney is still fulfilling his or her obligation but has elected to do it in a way other than by providing time. Marrero Committee Plan, *supra* note 11, at 59-60.

¹²⁷ See Chambers, *supra* note 125, at 13; Cardin & Rhudy, *supra* note 55, at 13.

¹²⁸ Marrero Committee Plan, *supra* note 11, at 59-60.

¹²⁹ *Id.*

¹³⁰ See note 92 and accompanying text *supra* (alternate argument for eliminating the limitation on the buyout option). See also notes 66-67 and accompanying text *supra* (description of the buyout and delegation options).

¹³¹ Marrero Committee Plan, *supra* note 11, at 58-59.

cally aimed at addressing needs of the poor.¹³² The voluntary plan recommended that attorneys contribute an amount equivalent to the value of their time, although this amount could be determined by the individual attorney.¹³³ The voluntary plan's proposed standard for setting an alternative contribution amount takes into account the disparate economic circumstances of attorneys across New York State. The Marrero Committee Plan's standard sets a uniform amount which is based on the current compensation rate for court-appointed attorneys in federal criminal cases.¹³⁴ The Marrero Committee's standard is preferable because it is simpler to administer and, where it would cause economic hardship, an attorney could apply for a special circumstances exception.¹³⁵

b. *Administrative Burden*

It is feared that a mandatory rule would be expensive to administer, requiring staff and oversight, and that many attorneys would need a malpractice insurance fund for their representation of the poor. Although a mandatory plan may cost more to administer than the State Bar Plan, the plan is designed to cost as little as possible. The rule would be promulgated by the Chief Judge of the Court of Appeals.¹³⁶ The rule would be

¹³² See Marrero Committee Plan, *supra* note 11, at 62-63. See also note 66 and accompanying text *supra*.

The contributed money could also go into a fund to pay for court fees incurred in providing pro bono services, to recoup legal services organizations for the costs of training and supervising volunteer attorneys, and to hire full-time legal services attorneys. See Marrero Committee Plan, *supra* note 11, at 60-61.

¹³³ State Bar Plan, *supra* note 14, at 25. "Since our goal is aspirational, and since it may be met either by rendering service or contributing money, we believe that there are decidedly few attorneys who should exempt themselves from doing one or the other." *Id.* at 26 n.13.

¹³⁴ Marrero Committee Plan, *supra* note 11, at 64.

¹³⁵ See note 118 and accompanying text *supra*.

¹³⁶ Marrero Committee Plan, *supra* note 11, at 88. The Marrero Committee Plan argues that promulgating such a rule would be within the court's authority because the focus of the scope of qualifying services would be on improving the poor's access to the court system. Qualifying services would include activities outside of the court, but these activities would affect the court by avoiding legal action (such as avoiding eviction proceedings by developing lowercost housing). This would ease the need of the poor for legal services and relieve the administrative strain on the court system. *But see id.* at 143 (Statement by Corbin) (A mandatory pro bono rule would exceed the court's authority because the rule would cover many activities outside the court.).

mainly self-enforced.¹³⁷ Attorneys would report their compliance on their biennial licensing registration forms.¹³⁸ Discipline for noncompliance, review of applications for exemptions to the rule, and decisions on whether a certain service was within the rule's scope of qualifying services would all require administration, which would be handled by the various departments of the Appellate Division,¹³⁹ acting under the Chief Judge and the Chief Administrator of the Court of Appeals.¹⁴⁰ The legal profession is for the most part self-regulated, and a mandatory pro bono rule need not vary from this norm.

The NYSBA asserts that by adopting a voluntary plan, New York will avoid the litigation and debate that would be produced by a mandatory rule over such issues as the constitutionality of mandatory service and the court's authority to implement a mandatory rule.¹⁴¹ Indeed, this is one of the reasons that Chief Judge Wachtler elected to wait two years before judging the effectiveness of the voluntary plan.¹⁴² If the voluntary plan is not successful, these costs will have to be borne in order to establish the new rule. However, it is this Note's contention that a flexible but effective mandatory pro bono rule would prevail in litigation, and the costs of litigation would be outweighed by the increase in services produced under a mandatory pro bono rule.

B. *The Extent of the Pro Bono Obligation: Charity or Professional Duty?*

Both the State Bar Plan and the Marrero Committee Plan were premised on a commitment to the principle of equal access to justice.¹⁴³ The underlying goal of each plan was to increase

¹³⁷ *Id.* at 92-93.

¹³⁸ *Id.* at 90.

¹³⁹ *Id.* at 90-91. The Appellate Division already has responsibility, under the supervision of the Chief Judge and the Chief Administrator, for disciplining attorneys for professional misconduct. *Id.*

¹⁴⁰ *Id.* at 91.

¹⁴¹ State Bar Plan, *supra* note 14, at 38. See also Vigdor, *supra* note 4, at 35.

¹⁴² Adams, *supra* note 12, at 2, col. 3 ("Whatever the merits of [arguments against mandatory pro bono], I would prefer to avoid the wasteful and divisive confrontation that would seem inevitably to be precipitated by implementation of a mandatory plan.").

¹⁴³ See Marrero Committee Plan, *supra* note 11, at 19 ("The absence of legal assistance to the poor goes to the essence of some fundamental principles ingrained in our jurisprudence: simple equity, due process, equal protection, equal elementary access to the judicial system to redress wrongs."); State Bar Plan, *supra* note 14, at 2 ("We believe

the availability of legal services for the poor.¹⁴⁴ Both the mandatory and voluntary plans relied in part on the existence of a professional obligation for attorneys to serve the poor as set forth in the Code of Professional Responsibility,¹⁴⁵ and on the lawyer's duty to aid in the administration of justice as an officer of the court.¹⁴⁶ The plans diverged on the extent of the obligation and duty.¹⁴⁷

Changing the obligation from voluntary to mandatory involves a shift in interpretation, from viewing the pro bono obligation as an act of charity inspired by a sense of professionalism, to viewing it as a professional duty owed to the public and the courts to aid in the administration of justice.¹⁴⁸

[W]e believe that the voluntary/mandatory debate reflects a fundamental difference in professional outlook towards the lawyer's pro bono obligation. Some proponents of voluntarism seem to regard lawyers' public interest service as individual *charity*. In the context of the legal services crisis, we see it as a professional *duty*. . . . This distinction is not merely philosophical, but has a practical effect in public policy. . . . [I]ts recognition as such is likely to result in the contribution of more legal services than a program understood and carried out as charity, under which every contribution is a purely discretionary act of kindness.¹⁴⁹

The duty owed to the public to provide pro bono contributions emanates from the role lawyers have in our society as "guardians of our lives, liberties and governing principles."¹⁵⁰

that lawyers accept the bar's fundamental role in assuring equal access to justice for all people, regardless of their means.").

¹⁴⁴ Marrero Committee Plan, *supra* note 11, at 65 ("[T]he primary aim of [the Marrero Committee Plan] was to improve the availability of legal services to the poor and thereby also enhance the administration of justice."); State Bar Plan, *supra* note 14, at 3 ("Our Committee chose, primarily, to focus on the challenge of addressing the unmet legal needs of the poor . . .").

¹⁴⁵ New York Lawyer's Code of Professional Responsibility EC 2-25, (1970, as amended 1990).

¹⁴⁶ Marrero Committee Plan, *supra* note 11, at 27; State Bar Plan, *supra* note 14, at 2-3, 5-6.

¹⁴⁷ Marrero Committee Plan, *supra* note 11, at 6-7. There is disagreement on the extent of a lawyer's responsibility to help alleviate the problem. *Id.*

¹⁴⁸ Marrero Committee Plan, *supra* note 11, at 27-28, 32-33, 65, and 97.

¹⁴⁹ *Id.* at 97 (emphasis in original).

¹⁵⁰ *Id.* at 31. "[W]hat lawyers do is about providing justice Lawyers have a special obligation to insure a legal system that protects the rights of individuals, and their political, civil and religious freedoms Like no other professionals, lawyers are charged with the responsibility for systemic improvement of not only their profes-

With this duty comes responsibilities and privileges, including the privilege of more self-regulation than most professions.¹⁵¹ In return, the public can demand that lawyers assume more of the burden, within reason, of improving the legal system.¹⁵² The duty to provide pro bono services which is expressed in our Code of Professional Responsibility should be made an "enforceable norm," in view of the desperate need for increased civil legal services for the poor.¹⁵³ The Marrero Committee Plan also relied on the lawyer's duty to the court.¹⁵⁴ A mandatory pro bono rule for attorneys is part of a judicial solution to the crisis of the unmet legal services needs of the poor.¹⁵⁵ As a coequal branch of government, the judiciary has an obligation to maintain access to the court system. In addition, courts have the power to regulate the practice of law by all attorneys admitted to the bar.¹⁵⁶ A mandatory rule is justifiable as a condition imposed by the court on the license to practice law.¹⁵⁷

Some proponents of a mandatory rule view lawyers as partners with government.¹⁵⁸ Government has delegated to lawyers

sion, but of the law and society itself." *Id.* at 31-32. See also Cardin & Rhudy, *supra* note 55, at 12 n.63 (citing *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring) ("[A]ll the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers.")).

¹⁵¹ Marrero Committee Plan, *supra* note 11, at 32.

¹⁵² *Id.*

¹⁵³ *Id.* at 33.

¹⁵⁴ Marrero Committee Plan, *supra* note 11, at 65-66:

We did not regard it to be the starting point of our task to effectuate the lawyers' ethical obligation under the Code of Professional Responsibility to provide public interest service. As we view it, the legal profession's contribution to the legal services shortage would be one component of a judicial solution to relieve a crisis in our legal system and improve the administration of justice Accordingly, the means by which the primary objective of improving the availability of legal services is carried out should not be constrained by the personal service standard that would pertain if the sole task at hand were effectuating the ethical principles set forth in the Code of Professional Responsibility. Instead, the means by which the problem could be remedied could be formulated within the bounds of what the court could reasonably require lawyers to contribute pertinent to the need.

¹⁵⁵ *Id.* at 65.

¹⁵⁶ *Id.* at 153, 158-59 app. C (Constitutional and Statutory Issues). "(L)awyers admitted to practice in New York can be compelled to assist in the overall administration of justice in the courts pursuant to standards set by the Court of Appeals under Judiciary Law section 53." *Id.* at 159.

¹⁵⁷ Rosenfeld, *supra* note 45, at 279.

¹⁵⁸ Millemann, *supra* note 44, at 32.

the power and responsibility to enforce the law. Along with the power, lawyers share with the government an obligation to ensure that laws are enforced equally. In exchange for the duty and responsibility, lawyers receive a monopoly on access to the legal system and the privilege of being in a largely self-regulated profession.¹⁵⁹ A duty to aid the poor to receive equal access to the legal system is imposed fairly when society has not been able to meet this need.

The Marrero Committee Plan treated the responsibility to provide assistance to the poor as resting on each individual attorney as well as on the legal profession as a whole.¹⁶⁰ However, the Plan's stated goal was to improve access to the legal system rather than to enforce an ethical obligation, or make better people of attorneys.¹⁶¹

CONCLUSION

To a large extent, poor people in New York State are forced to cope with most of their civil legal problems without the benefit of legal guidance or assistance. Increased government funding for civil legal services is needed but has not been forthcoming. To increase the availability of civil legal services for the poor, a mandatory pro bono plan requiring forty hours of pro bono service every two years by every attorney has been proposed by a committee appointed by the Chief Judge of the Court of Appeals. An alternate plan proposing a voluntary standard of the same amount has been proposed by the NYSBA. The Chief Judge has postponed adoption of a mandatory plan for two years to allow time for the voluntary plan to succeed. If the voluntary plan does not result in an increase in pro bono contributions, a mandatory plan may still be promulgated. Both mandatory and voluntary plans are premised on an obligation of attorneys to aid the poor in obtaining legal services. For a voluntary plan to succeed, this sense of obligation must be reinforced in all attorneys. A mandatory plan is the straighter route to the same goal. The Marrero Committee Plan contains enough flexi-

¹⁵⁹ *Id.*

¹⁶⁰ Marrero Committee Plan, *supra* note 11, at 28.

¹⁶¹ *Id.* But see Marrero Committee Plan, *supra* note 11, at 138-39 (statement by Corbin) (duty to the poor is owed by society overall and the lawyer's obligation is a purely personal one as a member of society).

bility and choice to overcome the major arguments against a mandatory pro bono plan. At the same time, the plan can achieve a significant increase in legal representation for the poor.

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