BRING ON THE PETTIFOGGERS[1]: REVISITING THE ETHICS RULES, CIVIL *GIDEON*, AND THE ROLE OF THE JUDICIARY

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INTRODUCTION

Over one million civil legal needs go unmet every year.[2] There are 1.3 million lawyers in this country.[3] The math is easy, even for lawyers. If every lawyer meets just one need, the justice gap narrows.[4] Lawyers are expected to provide free legal services to persons of limited means–to serve the public interest. In fact, the Latin term *pro bono* means "for the public good."[5] More specifically, *Model Rules of Professional Conduct* rule 6.1, promulgated by the American Bar Association (ABA), declares that lawyers have a professional responsibility to provide fifty hours of pro bono legal services annually to persons of limited means.[6] Lawyers can also fulfill this calling by providing

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1. "A lawyer lacking in education, ability, sound judgment, or common sense." *Pettifogger*, BLACK'S LAW DICTIONARY (10th ed. 2014).

> A lawyer who is employed in a small or mean business, or who carries on a disreputable business by unprincipled or dishonorable means. "We think that the term 'pettifogging shyster' needed no definition by witnesses before the jury. This combination of epithets, every lawyer and citizen knows, belongs to none but unscrupulous practitioners who disgrace their profession by doing mean work, and resort to sharp practice to do it."

What is Pettifogger?, LAW DICTIONARY, https://thelawdictionary.org/pettifogger/ (quoting Bailey v. Kalamazoo Publ'g Co., 40 Mich. 251, 253 (1879)).

2. *See* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6, 14 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

3. *See* AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER POPULATION BY STATE (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2009-2019.pdf.

4. *See* LEGAL SERVS. CORP., *supra* note 2. The Legal Services Corporation defines the justice gap as "the difference between the civil legal needs of low-income Americans and the resources available to meet those needs." *Id.* at 9.

5. *Pro Bono*, BLACK'S LAW DICTIONARY (10th ed. 2014).

6. *See* MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 1983).

legal services to religious, charitable, or nonprofit organizations which address the needs of underserved persons.[7] In addition to the ethics rules, lawyers in some jurisdictions also take an oath to serve the underserved. When new lawyers are sworn in to the profession, they raise their right hand and promise that they will "contribute time and resources to public service, and will never reject . . . the cause of the defenseless or oppressed."[8] Even so, many lawyers leave this work to legal aid agencies that are funded by the Legal Services Corporation (LSC).[9] But, with approximately 12% of the nation's population living in poverty,[10] legal aid organizations are not able to meet even 50% of the need.[11] It is widely understood that most Americans, even those not living below the poverty line, cannot afford a lawyer to address even the most fundamental basic needs. While some lawyers are reliably providing pro bono legal services, the poverty needle does not move and the legal needs of "the 12%" are still going unmet. Many scholars have proposed solutions to incentivize lawyers to do more pro bono, including providing continuing legal education (CLE) credit, reducing annual license fees, and allowing lawyers with out-of-state licenses to do pro bono work.[12] This Article will advocate that states should create a mandatory pro bono appointment system for serious civil matters that threaten family, shelter, or health, such as child custody and support, civil protection orders, housing, and government benefits.

To provide context, this Article will summarize the ABA's Commission on the Future of Legal Services published 2016 report, *Report on the Future of Legal Services in the United States*, referred to in this Article as the "*Future Report*." From 2014 to 2016, the Commission on the Future of Legal Services took a closer look at why affordable legal services are out of reach for so many Americans.[13] The report also addressed the changing needs of the indigent population and examined evolving delivery methods.[14] Finally, the report developed recommendations for the profession and the judiciary to increase access to justice for underserved Americans.[15]

Relatedly, this Article will explore a judge's inherent authority to appoint pro bono legal counsel for civil litigants and the tension between the *Model*

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7. *See id.*

8. IDAHO BAR COMM'N RULES r. 220 (BD. OF COMM'RS OF THE IDAHO STATE BAR 1986).

9. Congress established the Legal Services Corporation in 1974 as an independent nonprofit organization to provide financial support for civil legal aid to low-income Americans. LSC provides funding to 133 legal aid programs. LEGAL SERVS. CORP., https://www.lsc.gov (last visited August 2019).

10. *See* KAYLA FONTENOT, JESSICA SEMEGA & MELISSA KOLLAR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017, at 11 (2018).

11. *See* LEGAL SERVS. CORP., *supra* note 2, at 13.

12. *See* Latonia Haney Keith, *The Structural Underpinnings of Access to Justice: Building a Solid Pro Bono Infrastructure*, 45 MITCHELL HAMLINE L. REV. 116, 121–22 (2019).

13. *See* AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016) [hereinafter FUTURE REPORT].

14. *See id.*

15. *See id*.

Rules of Professional Conduct and the *Model Code of Judicial Conduct*. Specifically, the Article will address a judge's authority under the ABA *Model Rules of Professional Conduct* rule 6.2 to appoint counsel to represent indigent individuals.[16] In contrast, the ABA *Model Code of Judicial Conduct* permits judges to encourage pro bono activities but not explicitly to appoint lawyers in specific indigent cases.[17] This Article will examine the role of the judiciary in addressing the justice gap. More precisely, this Article will propose a rule change to the *Model Code of Judicial Conduct* to permit judges to take a more active role in appointing lawyers to take pro bono cases.

Highlighting a judge's authority to appoint counsel to represent indigent individuals is controversial as many scholars have argued mandatory pro bono (that is, requiring lawyers to contribute pro bono hours as a licensing requirement) is unconstitutional.[18] In fact, even requiring lawyers to pay bar association dues is drawing criticism. Several attorneys have recently filed suit against their state bar associations challenging compulsory membership and annual bar dues, although most of these challenges to date have not been successful.[19] If compulsory membership or annual bar dues are found to be an unconstitutional infringement on a lawyer's First Amendment rights, requiring lawyers to provide pro bono legal services as a licensing requirement will add additional fuel to that fire.

In *Fleck v. Wetch*, the United States Supreme Court remanded an Eighth Circuit Court of Appeals case regarding a First Amendment challenge to the mandatory fees that attorneys pay to the State Bar of North Dakota.[20] The Court requested briefing on the effect of the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, in which the Court overruled contrary precedent and concluded that requiring a monetary contribution to a union violates the member's constitutional guarantees under the First Amendment.[21] Other states have

16. *See* MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR. ASS'N 1983).

17. *See* MODEL CODE OF JUDICIAL CONDUCT r. 3.7 (AM. BAR ASS'N 1990).

18. *See infra* Part IV.

19. *See, e.g.*, Fleck v. Wetch, 868 F.3d 652 (8th Cir. 2017) (a North Dakota lawyer challenged mandatory bar dues as an unconstitutional infringement of his First Amendment rights); Gruber v. Or. State Bar, 3:18-cv-1591-JR, 2019 WL 2251826 (D. Or. Apr. 1, 2019) (two members of the Oregon State Bar challenged the mandatory nature of the membership fee structure); Eugster v. Wash. State Bar Ass'n, 684 F. App'x 618 (9th Cir. 2017) (attorney filed suit against the Washington Bar Association challenging compulsory membership); Schell v. Gurich, 409 F. Supp. 3d 1290 (W.D. Okla. 2019) (attorney brought action against the state bar association and state supreme court and justices alleging the state's compulsory membership in the bar association and accompanying mandatory dues violate the First Amendment); Boudreaux v. La. State Bar Ass'n, No. 19-11962, 2020 WL 137276 (E.D. La. Jan. 13, 2020) (attorney brought action against the state bar association and state supreme court and justices alleging that compulsory bar membership violates First and Fourteenth Amendments).

20. *See* Fleck v. Wetch, 139 S. Ct. 590 (2018) (mem.).

21. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

submitted amicus briefs arguing against mandatory bar dues. This Article will address the constitutional criticism attendant to requiring lawyers to participate in certain pro bono activities, even when the lawyers are provided an "opt-in" or "opt-out" provision, paralleling some of the arguments involved in *Fleck* and *Janus*.

Principally, this Article will argue that judges should use their inherent authority to appoint counsel for indigent civil clients, particularly in the class of cases embodying "poverty law" issues, such as housing, child support, and government assistance. This argument obviously has "Civil *Gideon*" overtones—the doctrine delineating when, if ever, indigent civil litigants are legally entitled to counsel appointed and paid for by the State.[22] At the risk of revisiting the notion of "Civil *Gideon*," this Article will also explore State-funded systems for compensating court-appointed lawyers.

Finally, this Article will propose solutions for an automated legal service delivery model for bar associations to enforce mandatory pro bono in discrete areas of service. Like jury service, every member of a bar association could be randomly drawn and selected for certain cases. The lawyer would have the opportunity to decline based on the provisions of ABA *Model Rules of Professional Conduct* rule 6.2.[23] The delivery model would require a lawyer who declines a case to provide a certain time that he or she will be available for the next case on the docket. The Article will also discuss the historical use of a "pettifogger," a professional who is trained and licensed to handle small, routine claims in magistrate courts. A pettifogger may be likened to limited license legal technicians (LLLTs) in Washington State. This Article will provide an overview of the requirements for LLLTs and how other states could license non-lawyers for certain legal matters. This Article will also analyze other profession's use of paraprofessionals such as the use of "physician assistants" and "nurse practitioners" in the medical profession who provide limited patient treatment under the supervision of a physician.

I. THE SERVICES GAP

According to the United States Census Bureau (Census Bureau) Current Population Survey Annual Social and Economic Supplement, 12.3% of the population was living in poverty in 2017.[24] The Census Bureau uses a set of money income thresholds that vary by family size and composition to determine who is living in poverty.[25] If a family's total income is less than the family's threshold, then every individual in that family is considered in poverty.[26] According to the 2018 poverty estimates, a family of four with an annual income

22. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

23. *See infra* Part II.

24. *See* FONTENOT, SEMEGA & KOLLAR, U.S. CENSUS BUREAU, *supra* note 10, at 11.

25. *See id.* at 47.

26. *See id.*

under $26,000 meets the description of living in poverty.[27] In 2017, approximately forty million people were living in a state of deprivation without socially acceptable amounts of money or possessions.[28] When individuals living in poverty suffer legal problems, they must often face these issues on their own. They cannot afford a lawyer and legal aid organizations can only help about 50%of them.[29] According to the Justice Index,[30] there is less than one lawyer who can provide free civil legal aid for every 10,000 Americans living in poverty.[31]

Court dockets are overburdened with cases over mortgages or rent, credit card payments, child support obligations, and domestic relations. In many of these cases, the pro se litigant is at a disadvantage.[32] While courts can provide training and resources, pro se litigants still lose in the end.[33] If the dearth of legal-aid lawyers still leaves about 12% of the population without lawyers, the only way to close the gap is to engage the nation's roughly 1.3 million lawyers in pro bono service.[34]

II. CHALLENGES WITH THE CURRENT "ASPIRATIONAL" MODEL

A voluntary pro bono system is not bridging the gap in services. The ethical rule regarding the provision of pro bono services is purely aspirational. While the rule imposes a professional responsibility on lawyers to provide pro

27. U.S. CENSUS BUREAU, POVERTY THRESHOLDS FOR 2018 BY SIZE OF FAMILY AND NUMBER OF RELATED CHILDREN UNDER 18 YEARS (2018), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html.

28. FONTENOT, SEMEGA & KOLLAR, U.S. CENSUS BUREAU, *supra* note 10, at 11.

29. *See* LEGAL SERVS. CORP., *supra* note 2, at 8.

30. The Justice Index is a project of Fordham Law School. It is an online resource that collects information from all fifty states, the District of Columbia, and Puerto Rico and studies access to justice.

31. *Measuring Access to Justice*, JUST. INDEX, https://justiceindex.org (last visited Aug. 2019).

32. In 2010, an ABA survey of state trial judges found that the number of pro se litigants had increased especially in the areas of foreclosure, domestic issues, consumer disputes, and housing litigation and that this lack of representation adversely affected the pro se litigant. AM. BAR ASS'N COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 13–14 (2010).

33. *See* Sonja Ebron, *Why Do Pro Se Litigants Lose So Often*, COURTROOM5 (Sept. 15, 2016), https://courtroom5.com/why-do-pro-se-litigants-lose-so-often (showing statistics on some types of cases and the success rates of pro bono versus pro se in those cases); *see also* U.S. BANKR. COURT CENT. DIST. OF CAL., SELF-REPRESENTED PARTIES AND THE COURT 2015-2016 (2016), https://www.cacb.uscourts.gov/sites/cacb/files/documents/publications/Pro%20Se%202015-2016.pdf (discussing how to alleviate the burden from pro se applicants and assist them in being more successful).

34. *See* AM. BAR ASS'N, *supra* note 3. According to the American Bar Association, there are approximately 1.3 million lawyers in the United States, including American Samoa, North Mariana Islands, Virgin Islands, and Puerto Rico. *Id.*

bono service, it does not require lawyers to provide service as a condition or privilege of licensing. The ABA *Model Rules of Professional Conduct* encourage attorneys to provide fifty hours of pro bono service to persons of limited means each year.[35] Model rule 6.1 declares that every lawyer has a professional responsibility to provide legal services to those unable to pay.[36] Comment 12 makes clear, however, that this responsibility "is not intended to be enforced through disciplinary process."[37] The previous version of this ethical rule, EC 2-25, defines the lawyer's responsibility as follows: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."[38] EC 8-3 stated that "persons unable to pay for legal services should be provided needed services."[39] In 1983, the ABA House of Delegates adopted the *Model Rules of Professional Conduct*.[40] Model rule 6.1, which was adopted by most states, provided as follows:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[41]

In 1993, the ABA added the word "voluntary" to the title of the rule and rewrote the rule to include an aspirational goal of at least fifty hours of pro bono service.[42] Since that time, some states have explored making pro bono service mandatory.[43] Lawyers at the state and national level have weighed the advantages and disadvantages of requiring lawyers to perform pro bono service.[44] So far, New York is the only state that requires pro bono service as a

35. *See* MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR. ASS'N 1983).

36. *See id.*

37. *Id.* r. 6.1 cmt. 12.

38. MODEL CODE OF PROF'L RESPONSIBILTY EC 2-25 (AM. BAR ASS'N 1969). The earliest version of the lawyer's code of ethics was numbered by "Ethical Considerations." The first Model Code of Professional Responsibility became effective January 1, 1970. *See id.* preface.

39. *Id.* EC 8-3.

40. *Model Rules of Professional Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct (last visited June 11, 2019).

41. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 1983).

42. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N amended 1993).

43. *See generally* Leslie Boyle, Note, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415 (2007); David J. Dreyer, *Culture, Structure, and Pro Bono Practice*, 33 J. LEGAL PROF. 185 (2009).

44. *See* AM. BAR ASS'N STANDING COMM. ON PRO BONO & PUB. SERV., NEW YORK'S 50-HOUR PREADMISSION PRO BONO RULE: WEIGHING THE POTENTIAL PROS AND CONS (2013),

condition of admission.[45] California, Connecticut, Montana, and New Jersey explored similar initiatives but ultimately did not adopt a mandatory pro bono system.[46]

A. Conflict Exists Between the Model Rules of Professional Conduct and the Model Code of Judicial Conduct

Model rule 6.1 is aspirational, but model rule 6.2 *requires* attorneys to accept appointments except in certain articulated situations. Model rule 6.2 provides:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
>
> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
>
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.[47]

Further, the comment provides, "[t]he lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service," citing model rule 6.1.[48]

The *Model Code of Judicial Conduct* also considers the judge's role in the pro bono context. ABA *Model Code of Judicial Conduct* rule 3.7 provides that "judge[s] may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice," with certain restrictions, and judges may encourage lawyers to provide pro bono legal services.[49] Comment 5 reinforces a judge's inherent authority to appoint lawyers to serve as counsel for indigent parties in individual cases.[50] In spite of this judicial power, judicial ethics opinions from

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http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf.

45. *The Legal Profession - Pro Bono: Bar Admission Requirements*, N.Y. COURTS, http://ww2.nycourts.gov/attorneys/probono/baradmissionreqs.shtml.

46. *See generally* Justin Hansford, *Lippman's Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 FORDHAM URB. L.J. 1141, 1144–45 (2014).

47. MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR ASS'N 1983).

48. *Id.* r. 6.2 cmt. 1.

49. MODEL CODE OF JUDICIAL CONDUCT r. 3.7 (AM. BAR. ASS'N 1990).

50. *See id.* r. 3.7 cmt. 5.

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

a number of jurisdictions suggest strongly that it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs or to take on specific cases.[51] As a result, in most jurisdictions, judges are reluctant to appoint counsel as doing so may be a violation of the ABA's *Model Code of Judicial Conduct*.

B. Judges Do Not Exercise Their Inherent Authority to Appoint Pro Bono Lawyers

The *Model Code of Judicial Conduct* ("the Code") gives judges the inherent authority to appoint pro bono lawyers. The Code was adopted by the House of Delegates of the American Bar Association in 1990 and provides guidance to judges in their judicial and personal conduct and provides a basis for regulating that conduct.[52] The Code consists of four canons, numbered rules, and comments explaining each rule. Though the canons provide an overall framework of judicial ethics and the comments explain the rules, a judge may be disciplined only for violating a rule, and the rules do not provide for any criminal or civil liability.

Rule 3.7 of the *Model Code of Judicial Conduct*, the text of which is provided in full below, lays out specific ways judges may participate in educational, religious, charitable, fraternal, or civic organizations and activities. In February of 2007, the ABA House of Delegates amended Rule 3.7 adding subsection B allowing judges to "encourage lawyers to provide pro bono publico legal services."[53] Rule 3.7 is found under Canon 3, which provides: "A judge shall conduct the judge's personal and extrajudicial activities to minimize

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> publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

Id. (emphasis added).

51. *See* Jodi Nafzger, *Bridging the Justice Gap: Judicial Promotion of Pro Bono*, ADVOCATE, Aug. 2016, at 26, 28, 30 n.8 (citing Ala. Judicial Inquiry Comm'n, Advisory Op. 04-847 (2004), https://www.alabar.org/assets/JIC/2004-847.pdf (stating judges may send letters asking lawyers to participate in state bar operated pro bono programs)); *see also* Alaska Comm'n on Judicial Conduct, Advisory Op. 2004-01 (2004), http://www.acjc.alaska.gov/advopinions.html#2004-01 (stating judges may not refer lawyers to a particular pro bono program); Fla. Judicial Ethics Advisory Comm., Op. 2012-26 (2012), http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2012/2012-26.html (stating judges may convene meetings in order to solicit attorneys to volunteer as attorneys *ad litem* for children in dependency cases); Ky. Ethics Comm. of the Judiciary State Capitol Op. JE-107 (2005), https://kycourts.gov/commissionscommittees/JEC/JEC_Opinions/JE_107.pdf (stating judges may issue generic letters to the bar but a judge may not urge lawyers to volunteer with a specific pro bono organization); Md. Judicial Ethics Comm., Published Op. 2013-29 (2014), https://www.courts.state.md.us/sites/default/files/import/ethics/pdfs/2013-29.pdf (stating judges may solicit volunteers for pro bono service to indigent parties by writing to such attorneys individually); Mich. State Bar Judicial Ethics Standing Comm., Op. J-7 (1998), https://www.michbar.org/opinions/ethics/numbered_opinions/OpinionID=708 (stating a judge may not solicit individual lawyers to perform pro bono).

52. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. [3] (AM. BAR ASS'N 1990).

53. *Id.* r. 3.7.

the risk of conflict with the obligations of judicial office."[54] Specifically, rule 3.7 provides:

> Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities
>
> (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
>
> (1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
>
> (2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;
>
> (3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
>
> (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;
>
> (5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
>
> (6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
>
> (a) will be engaged in proceedings that would ordinarily come before the judge; or
>
> (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.
>
> (B) A judge may encourage lawyers to provide pro bono publico legal services.[55]

54. *Id.* Canon 3.

55. *Id.* r. 3.7.

The House of Delegates added subsection B "encouraging judges to provide leadership in increasing *pro bono publico* lawyering in their respective jurisdictions," and as a response to the increasing frequency of pro se representation in the courts.[56] A new comment provides:

> In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.[57]

This new comment was designed to clarify that "judges may encourage lawyers to engage in *pro bono publico* service generally, quite apart from situations in which judges may appoint counsel for indigent parties in individual cases."[58]

i. The ABA Guidance for Judges on What Constitutes Encouragement Is Elusive

Despite the ABA's guidance on what constitutes "encouraging lawyers to provide pro bono publico legal services," ambiguity exists, and application is varied from state to state. The ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion in May of 2015 considering whether it is permissible for a justice to sign a letter encouraging lawyers to seek out pro bono opportunities by contacting the bar association. In finding such general appeal letters permissible, the formal opinion interprets rule 3.7(B) to require a judge to consider whether participating in certain activities are permitted under model rule 3.1, which provides guidance for extrajudicial activities.[59] Under this rule, a judge may participate in extrajudicial activities, but a judge shall not:

> (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
>
> (B) participate in activities that will lead to frequent disqualification of the judge;
>
> (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;
>
> (D) engage in conduct that would appear to a reasonable person to be coercive; or

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56. AM. BAR ASS'N, ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT REPORT 109 (2006).

57. MODEL CODE OF JUDICIAL CONDUCT r. 3.7 cmt. 5 (AM. BAR. ASS'N 1990).

58. AM. BAR ASS'N, *supra* note 56, at 110.

59. *See* ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 470 (2015).

> (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.[60]

The formal opinion provides some helpful guidance to determine what kind of conduct might be considered "coercive" under rule 3.1(D). This cautionary language was added to the 2007 *Model Code of Judicial Conduct* because the ABA Joint Commission determined that some judges were coercing others into supporting certain activities, noting that this can be a significant problem in small communities with fewer judges and lawyers.[61] The *Model Code of Judicial Conduct* does not define what constitutes coercion.[62] The language of rule 3.1(D) uses the term "reasonable person," which suggests whether the judge's conduct is coercive depends on whether a reasonable lawyer in that situation would find the judge's request coercive. Rule 3.1 Comment 4 explains that a judge should avoid actions that risk that "the person solicited would feel obligated to respond favorably."[63] The formal opinion suggests that "[t]he totality of the facts should be reviewed to determine whether a judge's actions appear coercive to a reasonable person."[64] The opinion concludes that a general appeal letter does not lead a person to feel obligated to perform pro bono services or that the lawyer who performs such pro bono services is "currying favor with the justice," and therefore it is not coercive.[65]

The opinion goes on to provide a number of factors that a judge should weigh before sending a letter encouraging lawyers to perform pro bono service, including "[t]he number of lawyers [receiving] the letter," "[t]he number of judges serving the jurisdiction," "[w]hether the letter is [] personalized . . . or a general plea," whether there is any monitoring of lawyer response, and "[t]he tone of the letter."[66] The ABA's opinion did not specifically address the situation in which a judge asks a specific lawyer to accept appointment for a specific case.[67]

ii. States Are Not in Agreement About What Constitutes Coercion

A review of other states' judicial codes indicates that states do not have a consistent approach to the limits of judges' encouragement of pro bono.[68] In

60. MODEL CODE OF JUDICIAL CONDUCT r. 3.1 (AM. BAR ASS'N 1990).

61. *See* AM. BAR ASS'N, *supra* note 56, at 90.

62. *See* MODEL CODE OF JUDICIAL CONDUCT r. 3.1 (AM. BAR ASS'N 1990).

63. *Id.* r. 3.1 cmt. 4.

64. ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 470, at 7 (2015).

65. *See id.* at 8.

66. *Id.*

67. For that situation, see MODEL CODE OF JUDICIAL CONDUCT r. 1.3, 2.4, 2.13, 3.1(D) (AM. BAR. ASS'N 1990); MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR ASS'N 1983).

68. *See* AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL CODE OF JUDICIAL CONDUCT AND STATE VARIATIONS

most states, acceptable forms of judicial encouragement may include letters to bar members, resolutions celebrating pro bono service, recognition for lawyers who have contributed significant time to pro bono work, and educational tools such as speeches, manuals, or videos.

Twenty-eight states have adopted ABA *Model Code of Judicial Conduct* rule 3.7(B) or substantively similar language.[69] Many states have adopted the precise language of the model rule and some include examples of pro bono activities a judge can engage in.[70] Other states have placed the rule 3.7 language in the comments without substantively altering existing rules.[71] States also place provisions dealing with pro bono service under different canons, including canons dealing with extrajudicial activities, fundraising, or solicitations.[72] There is still debate, however, among even those states who have adopted rule 3.7 about what kind of "encouragement" a judge may provide. Judicial ethics opinions from a number of jurisdictions suggest strongly that it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs or to take on specific cases.[73] In those states, like Alaska, the ethics opinions have suggested that a judge's solicitation on behalf of specific organizations may lead to "the impression that [the attorneys] are in a special position to influence the judge" in violation of the states' judicial code provisions analogous to the ABA *Model Code of Judicial Conduct* Canon 2.4(C).[74]

At the ABA midyear meeting in 2004, Debbie Segal, then Chair of the ABA Standing Committee on Pro Bono and Public Service, asked the commission to make clear that judges are allowed to promote, inspire, and encourage pro bono legal work.[75] Segal gave a list of concrete examples of

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(2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/3_7.pdf.

69. *See id.*

70. *See, e.g.*, CONN. CODE OF JUDICIAL CONDUCT r. 3.7 (2010); N.M. CODE OF JUDICIAL CONDUCT r. 21-307 (2012).

71. *See, e.g.*, ALASKA CODE OF JUDICIAL CONDUCT Canon 4 cmts. (1998); FLA. CODE OF JUDICIAL CONDUCT Canon 4 cmt. (1994).

72. *See, e.g.*, OR. CODE OF JUDICIAL CONDUCT r. 4.5 (2013); S.D. CODE OF JUDICIAL CONDUCT Canon 4 cmt. (2006).

73. *See, e.g.*, Ky. Ethics Comm. of the Judiciary State Capitol, Op. JE-107 (2005), https://kycourts.gov/commissionscommittees/JEC/JEC_Opinions/JE_107.pdf (stating judges may issue generic letters to the bar but a judge may not urge lawyers to volunteer with a specific pro bono organization); Mich. State Bar Judicial Ethics Standing Comm., Op. J-7 (1998), https://www.michbar.org/opinions/ethics/numbered_opinions/OpinionID=708 (stating a judge may not solicit individual lawyers to perform pro bono).

74. Alaska Comm'n on Judicial Conduct, Advisory Op. 2004-01 (2004) (quoting ALASKA CODE OF JUDICIAL CONDUCT Canon 2B (1998)), http://www.acjc.alaska.gov/advopinions.html#2004-01 (stating a judge shall not convey the impression that any person is in a "special position to influence the judge" by soliciting individual attorneys to work pro bono on behalf of specific organizations).

75. *See* Memorandum from Debbie Segal, Chair, Am. Bar Ass'n Standing Comm. on Pro Bono & Pub. Serv., to Joint Comm'n to Evaluate the ABA Model Code of Judicial Conduct (Feb. 3, 2004) [hereinafter Debbie Segal, Feb. 3 Memo]; Memorandum from Debbie Segal, Chair, Am.

what judges can do, including: sending recruitment letters and thank you notes, publicly expressing appreciation to volunteer lawyers, writing articles encouraging pro bono work, teaching continuing legal education seminars addressing poverty laws, presenting awards at bar functions, and giving preference on calendar calls to pro bono lawyers.[76] Segal advocated that the commentary to Canon 4 already allows such activities by acknowledging that judges are in a "unique position" to promote activities that will improve the administration of justice.[77] But judges are reluctant to take a very active role because they do not know where the line is drawn between acceptable and unacceptable encouragement.

Courts and individual judges in many states have been very instrumental in the development of programs to benefit indigent individuals. Some states have adopted standards or rules to underscore the importance of judicial participation and leadership in activities to identify and resolve issues of access to justice. Examples include forming local committees to increase access to justice, creating on-site court assistance offices to help pro se litigants access forms and understand procedural rules, and developing court-based pro bono initiatives.[78] Some courts and judges have created their own programs to provide information to litigants in discrete substantive areas, such as housing, foreclosures, consumer protection, and family law.[79] But as Mary Triggiano and John Ebbott noted, these programs do not provide direct legal services in the courtroom. Instead, these programs, in large part, serve as a clearinghouse or referral to another agency who may not have the capacity to timely handle the matter.

> Referral by the courts to legal services providers has not solved the problem, because of the providers' limited resources. Referral to private, pro bono attorneys has been only sporadically successful. . . .
>
> Other remedies, though imaginative and earnest, have not effectively eliminated the problem. Past and current efforts to remedy the pro se problem have fallen short. Self-help centers,

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Bar Ass'n Standing Comm. on Pro Bono & Pub. Serv., to Joint Comm'n to Evaluate the ABA Model Code of Judicial Conduct (Dec. 3, 2003) [hereinafter Debbie Segal, Dec. 3 Memo].

76. *See* Debbie Segal, Feb. 3 Memo, *supra* note 75; Debbie Segal, Dec. 3 Memo, *supra* note 75.

77. *See* Debbie Segal, Feb. 3 Memo, *supra* note 75; Debbie Segal, Dec. 3 Memo, *supra* note 75.

78. *See e.g., Pro Se Centers Help Even the Odds for Litigants Without Lawyers*, U.S. COURTS (Aug. 20, 2015), https://www.uscourts.gov/news/2015/08/20/pro-se-centers-help-even-odds-litigants-without-lawyers; *see also Access to Justice Committee*, TENN. BAR ASS'N, https://www.tba.org/index.cfm?pg=Access-to-Justice-Committee (providing programs for lawyers, the Bar, law schools, and other legal service organizations to help provide justice to those who need it).

79. *See, e.g., Family Law Programs*, COLO. JUDICIAL BRANCH, *https://www.courts.state.co.us/Administration/Unit.cfm?Unit=polprogpra*; *Foreclosure Mediation Program*, STATE OF CONN. JUDICIAL BRANCH, https://www.jud.ct.gov/foreclosure.

> family law facilitators, pro se clinics, and enhanced technology have helped, but not enough. At the conclusion of these services, the pro se litigant is still pro se.[80]

Following are some examples of the incongruence among states in the interpretation of a judge's ability to "encourage pro bono" pursuant to rule 3.7. In Alabama, judges may send letters asking lawyers to participate in State Bar operated pro bono programs.[81] Maryland courts permit judges to solicit volunteers for pro bono service to indigent parties by writing to such attorneys individually.[82] Citing rule 1.3 of its judicial code of conduct, the Maryland Judicial Ethics Committee concluded that solicitation of volunteer pro bono assistance for indigent parties does not constitute use of the prestige of the judge's office for that purpose.[83] In Alaska, judges are permitted to undertake efforts to improve the law, the legal system, and the administration of justice (such as writing general appeals letters, teaching CLEs, writing articles encouraging pro bono, and acknowledging pro bono activities), but judges may not refer lawyers to a particular pro bono program.[84] Similarly, Kentucky allows a generic letter to the Bar, but a judge may not urge lawyers to volunteer with a specific pro bono organization.[85] And in Michigan, a judge may not solicit individual lawyers to perform pro bono.[86]

Florida courts allow a judge to ask a local bar association to host an event at which the judge will ask lawyers to provide pro bono legal services. Florida courts also provide some guidance on what conduct may be interpreted as "coercive."[87] The Florida Judicial Ethics Advisory Committee expressly permits judges to convene meetings in order to solicit attorneys to volunteer as attorneys ad litem for children in dependency cases as long as it "does not appear to a reasonable person to be coercive or cast reasonable doubt on the judge's capacity to act impartially."[88]

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80. Mary E. Triggiano & John F. Ebbott, Gideon*'s New Trumpet,* WIS. LAW., June 2009, at 5, 52.

81. *See* Ala. Judicial Inquiry Comm'n, Advisory Op. 04-847 (2004), https://www.alabar.org/assets/JIC/2004-847.pdf.

82. *See* Md. Judicial Ethics Comm., Published Op. 2013-29 (2014), https://www.courts.state.md.us/sites/default/files/import/ethics/pdfs/2013-29.pdf.

83. *See id.*; MD. CODE OF JUDICIAL CONDUCT r. 1.3 (2010) ("A judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.").

84. *See* Alaska Comm'n on Judicial Conduct, Advisory Op. 2004-01 (2004), http://www.acjc.alaska.gov/advopinions.html#2004-01.

85. *See* Ky. Ethics Comm. of the Judiciary State Capitol Op. JE-107 (2005), https://kycourts.gov/commissionscommittees/JEC/JEC_Opinions/JE_107.pdf.

86. *See* Mich. State Bar Judicial Ethics Standing Comm., Op. J-7 (1998), https://www.michbar.org/opinions/ethics/numbered_opinions/OpinionID=708.

87. *See* Fla. Judicial Ethics Advisory Comm., Op. 2012-26 (2012), http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2012/2012-26.html.

88. *Id.*

> [C]oercive conduct may exist if the judge's conduct causes, or is likely to cause, an attorney to volunteer for appointment when:
>
> (a) the attorney's representation . . . is likely to result in violation of the Rules of Professional Conduct or of the law;
>
> (b) the attorney's representation . . . is likely to result in an unreasonable financial burden on the attorney; or
>
> (c) the cause is so repugnant to the attorney as to be likely to impair the attorney-client relationship or the attorney's ability to represent the child.[89]

These noted exceptions track the language of the ABA *Model Rules of Professional Conduct* rule 6.2 for lawyers as it relates to accepting appointments. The Florida courts recognize the deeply rooted requirement that lawyers accept appointments unless the appointment compromises the attorney's ethical responsibilities or the attorney-client relationship.

Some state judges have tested the rules by participating in campaigns to solicit bar members to contribute pro bono service. A Nebraska Ethics Advisory Opinion, however, concluded that a judge's participation in such a campaign violated Nebraska's judicial canons, namely Canon 2 (impartiality) and Canon 4 (fundraising).[90] Texas courts have also forbidden a judge's referral of criminal defendants to a private law firm when the defendant does not qualify for a court-appointed attorney. The Texas Judicial Ethics Committee opined that this type of referral would constitute a recommendation of private counsel which is prohibited under its judicial canon relating to a judge "lend[ing] the prestige of judicial office to advance the private interests of the judge or others" or that it may "convey the impression that [the selected attorneys] are in a special position to influence the judge."[91]

C. Indigent Pro Se Litigants Do Not Have a Constitutional Right to Counsel in Civil Cases

Civil litigants are not afforded Sixth Amendment protections. The Sixth Amendment is interpreted to require the federal government to provide counsel to indigent defendants charged with federal crimes.[92] That requirement was extended to state governments in *Gideon v. Wainwright* but is limited to criminal litigants.[93] Courts generally acknowledge no duty to appoint counsel in civil cases.[94] Some state statutes do provide the right to appointed counsel in

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89. *Id.*

90. *See* Neb. Judicial Ethics Comm., Advisory Op. 02-3 (2002), https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/02-3_1.pdf.

91. Tex. Comm. On Judicial Ethics, Op. 289 (2004) (quoting TEX. CODE OF JUDICIAL CONDUCT Canon 2B (2019)), https://www.txcourts.gov/media/678096/JudicialEthicsOpinions.pdf.

92. *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

93. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

94. *See generally* Bruce Andrew Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981); *see, e.g.*, *In re* Waite, 389 P.2d 407 (Mont. 1964); Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971); Powell v.

civil proceedings involving children, such as guardian ad litem attorneys in termination of parental rights cases.[95]

In *Lassiter v. Department of Social Services*, the Court mandated a case-by-case evaluation of a litigant's right to counsel.[96] In *Lassiter*, a North Carolina district court terminated an unrepresented mother's parental rights. She appealed based on deprivation of due process.[97] The United States Supreme Court held that there was no absolute right to appointed counsel in parental termination cases but that due process might require counsel.[98] The Court applied the due process test from *Mathews v. Eldridge*, in which the Court weighed the State interest against the private interest.[99] In *Mathews*, the Court was confronted with deciding to what extent due process requires an evidentiary hearing prior to the termination of disability benefits.[100] The Court concluded that "an evidentiary hearing [was] not required" and the administrative procedures prescribed under the Child Protection Act "fully comport with due process."[101] The *Lassiter* Court concluded that failure to appoint counsel for indigent parents in a proceeding for termination of parental status did not deprive the mother of due process.[102]

In his article, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, Professor Russell Engler argues that a case-by-case analysis of the right to counsel is unworkable.[103] Engler states: "A system that requires a litigant, appearing without counsel, to prove that he or she will suffer a substantial hardship due to the absence of counsel necessarily requires a vulnerable and often powerless litigant to prevail under the very circumstances in which defeat is likely."[104] In short, it is overly burdensome to ask a pro se litigant to advocate for their own right to counsel. An appointment system that

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State, 507 P.2d 989 (Ariz. Ct. App. 1973); Carter v. Kaufman (*In re* Robinson), 87 Cal. Rptr. 678 (Ct. App. 1970); SEC v. Alan F. Hughes, Inc., 481 F.2d 401 (2d Cir. 1973). But in civil cases of particular exigency, courts have elevated the importance of counsel to constitutional dimension. *See, e.g.*, *In re* Welfare of Luscier, 524 P.2d 906, 908 (Wash. 1974) (en banc) (involuntary termination of parental rights); Payne v. Superior Court, 553 P.2d 565 (Cal. 1976) (indigent prisoner defendant in suit for civil damages); State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109 (W. Va. 1974) (involuntary commitment proceeding); State *ex rel.* Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974) (involuntary termination of parental rights).

95. *See* ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013, at 16, 19 (2013).

96. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

97. *See id.* at 24.

98. *See id.*at 31–32.

99. *See id.* at 31; Mathews v. Eldridge, 424 U.S. 319 (1976).

100. *See Mathews*, 424 U.S. at 319.

101. *Id.* at 349.

102. *See Lassiter*, 452 U.S. at 33–34.

103. *See* Russell Engler, *Shaping a Context-Based Civil* Gideon *from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006).

104. *Id.* at 716.

automatically assigns pro bono attorneys in certain cases would relieve this burden.

In the absence of a constitutional right to counsel in civil cases, there are ample reasons to engage pro bono lawyers in these types of cases. Additionally, courts have the inherent power to appoint counsel for indigent civil litigants.[105] It would be appropriate for a pro bono appointment system to excuse lawyers from appointments for certain enumerated reasons if the appointment would compromise the attorney's ethical responsibilities or the attorney-client relationship, or for other good cause.[106] The duty to provide competent representation is often raised in the context of an appointment under *Model Rules of Professional Conduct* rule 6.2. *Model Rules of Professional Conduct* rule 1.1, provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[107] Lawyers have raised their lack of competence in a specific practice area as a reason to be excused from a pro bono appointment. Notably, comment 4 to rule 1.1 provides: "A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2."[108]

In *Mallard v. United States District Court*, the Court held that 28 U.S.C. § 1915(d) did not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a civil case.[109] Section 1915(d) provided that federal courts may request an attorney to represent any person claiming *in forma pauperis* status.[110] The United States District Court for the Southern District of Iowa engaged in a pro bono program with the Iowa Bar Association and the Volunteer Lawyers Project (VLP) whereby, if a party qualified for representation under § 1915(d), the Clerk of the Court would forward a copy of the court file to the VLP, which keeps a list of all attorneys in good standing.[111] An attorney is selected alphabetically from the list and requested to represent the unrepresented litigant pro bono.[112]

In *Mallard*, the district court required the selected attorney to represent indigent inmates in their suit against prison officers.[113] Mallard, a bankruptcy and securities lawyer, requested leave to withdraw after reviewing the case file

105. *See* Powell v. Alabama, 287 U.S. 45 (1932).

106. *See* MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR ASS'N 1983).

107. *Id.* r. 1.1.

108. *Id*. r. 1.1 cmt. 4.

109. *See* Mallard v. U.S. Dist. Court, 490 U.S. 296, 310 (1989).

110. *See* 28 U.S.C. § 1915(d) (amended & renumbered 1996). The provision was renumbered and the language was amended in 1996, but the substantively same provision can now be found at 28 U.S.C. § 1915(e) (2018).

111. *See Mallard*, 490 U.S. at 298.

112. *See id.* at 298–99.

113. *See id.* at 299.

because he was unfamiliar with this area of practice and he was not a litigator.[114] The VLP opposed the motion and the magistrate court denied it.[115] The district court affirmed the magistrate court and deemed Mallard competent to represent the prisoners.[116] The court also held that " § 1915(d) empower[ed] federal courts to make compulsory appointments in civil actions."[117] "Mallard sought a writ of mandamus from the Court of Appeals for the Eighth Circuit to compel the district court to allow his withdrawal."[118] The court of appeals denied the petition without opinion, and the Supreme Court granted certiorari to resolve the "conflict among the Courts of Appeals over whether § 1915(d) authorize[d] compulsory assignments of attorneys in civil cases."[119]

The Supreme Court relied on the plain meaning of the word "request" and concluded that the statute "permitt[ed] attorneys to decline representation of indigent litigants" due to "personal, professional, or ethical concerns."[120] The Court expressly declined to consider the constitutional issue, however, of "whether the federal courts possess inherent authority to require lawyers to serve."[121] In Justice Stevens's dissent, with whom Justice Marshall, Justice Blackmun, and Justice O'Connor joined, he sees the issue as one of professional responsibility:

> The program adopted by the District Court for the Southern District of Iowa to provide representation for indigent litigants was in operation when petitioner became a member of that court's bar. In my opinion his admission to practice implicitly included an obligation to participate in that program. When a court has established a fair and detailed procedure for the assignment of counsel to indigent litigants, a formal request to a lawyer by the court pursuant to that procedure is tantamount to a command.[122]

D. Lawyers Have a Professional and Moral Responsibility to Provide Pro Bono Service

Lawyers are in a unique position to help the less fortunate. In her article, *Lawyers as Citizens*, Professor Deborah Rhode reminds lawyers of the language from the preamble of the *Model Rules of Professional Conduct*: "A lawyer as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality

114. *See id.* at 299–300.
115. *See id.* at 299.
116. *See id.* at 300.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 303.
121. *Id.* at 310.
122. *Id.* at 317 (Stevens, J., dissenting) (footnote omitted).

of justice."[123] She describes three fundamental responsibilities of the lawyer's duty as a public citizen.[124] The third fundamental responsibility Rhode describes is the bar's responsibility to engage in pro bono service and to increase access to justice.[125] Borrowing concepts from *The Federalist Papers*,[126] Rhode depicts the earliest portrait of lawyers as "lawyer statesmen who helped shape American governance structures"[127] and "leaders throughout the twentieth century [who] gave generously of their time and talents to social causes and indigent clients."[128] Ultimately, Rhode argues for more structural reform to achieve the historic idealism of the profession.[129]

The Bible also speaks to the individual's role to serve our neighbors. The story of the Good Samaritan is emblematic of this role. This parable from the Gospel of Luke is preceded by a conversation between Jesus and a lawyer as follows:

> On one occasion an expert in the law stood up to test Jesus. "Teacher," he asked, "what must I do to inherit eternal life?"
>
> "What is written in the Law?" [Jesus] replied. "How do you read it?"
>
> [The expert in the law] answered, "'Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbor as yourself.'"
>
> "You have answered correctly," Jesus replied. "Do this and you will live."[130]

The Scripture goes on to describe how the lawyer wanted to further justify himself by asking, "And who is my neighbor?"[131] Jesus responded to this question with the parable of the Good Samaritan:

> "A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan,[132] as he traveled, came

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123. Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1323 (2009) (quoting MODEL RULES OF PROF'L CONDUCT pmbl. para. 1 (AM. BAR. ASS'N 1983)).

124. *See id.* at 1324.

125. *See id.*

126. *See* THE FEDERALIST NO. 35 (Alexander Hamilton).

127. Rhode, *supra* note 123, at 1324.

128. *Id.* at 1326.

129. *Id.* at 1331–34.

130. *Luke* 10:25–28 (New International Version) (footnotes omitted).

131. *Id.* 10:29.

132. A Samaritan was an inhabitant of Samaria, and, at the time of the New Testament, Jewish people had a longstanding and profound hatred for the Samaritans to the north of Judea. *See* Jürgen K. Zangenberg, *The Samaritans*, BIBLE ODYSSEY, https://www.bibleodyssey.org/en/people/related-articles/samaritans. Samaritan is also understood

> where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two denarii and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'"[133]

After telling him this story, Jesus asked the lawyer, "'Which of these three do you think was a neighbor to the man who fell into the hands of robbers?' The expert in the law replied, 'The one who had mercy on him.' Jesus told him, 'Go and do likewise.'"[134] The parable of the Good Samaritan is understood by some theologians symbolically, with the Samaritan representing Jesus.[135] Others believe the parable more generally represents the ethics of Jesus.[136] Overall, the parable teaches about service, empathy, and mercy as interpreted by an expert in the law.

Research shows that serving underserved populations also makes people happy.[137] Medical studies show that volunteering improves both mental and physical health.[138] One study shows volunteering actually makes people live longer.[139] For a profession that suffers remarkably from high incidences of substance abuse, depression, anxiety, and stress,[140] pro bono service may provide a reprieve from the high-stakes, emotionally taxing work of law practice. There are many examples of lawyer satisfaction derived from pro bono

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as "one who is compassionate and helpful to a person in distress." *Samaritan*, DICTIONARY.COM, https://www.dictionary.com/browse/samaritan#.

133. *Luke* 10:30–35 (New International Version) (footnote omitted).

134. *Id.* 10:36–37.

135. *See* John W. Welch, *The Good Samaritan: A Type and Shadow of the Plan of Salvation*, 38 BYU STUD. Q., no. 2, 1999, at 51, 73.

136. *See, e.g.*, *What Is the Meaning of the Parable of the Good Samaritan?*, GOTQUESTIONS.ORG, https://www.gotquestions.org/parable-Good-Samaritan.html; Jack Wellman, *Parable of the Good Samaritan: Meaning, Summary and Commentary*, CHRISTIAN CRIER (Apr. 21, 2014), https://www.patheos.com/blogs/christiancrier/2014/04/21/parable-of-the-good-samaritan-meaning-summary-and-commentary.

137. *See, e.g.*, Jenny Santi, *The Secret to Happiness Is Helping Others*, TIME, https://time.com/collection/guide-to-happiness/4070299/secret-to-happiness; Valerie Soleil, *Why Helping Others Makes You Happy, According to Science*, LIFE ADVANCER (May 26, 2018), https://www.lifeadvancer.com/helping-others-happy.

138. *See* Stephanie Watson, *Volunteering May Be Good for Body and Mind*, HARV. HEALTH PUB.: HARV. HEALTH BLOG (June 26, 2013, 11:35 AM), https://www.health.harvard.edu/blog/volunteering-may-be-good-for-body-and-mind-201306266428.

139. *See* Sara Konrath et al., *Motives for Volunteering Are Associated with Mortality Risk in Older Adults*, 31 *HEALTH PSYCHOL.* 87 (2012).

140. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874 (1999) ("Lawyers seem to be among the most depressed people in America.").

service.[141] After all, the law is a helping profession, and much of a lawyer's job satisfaction is derived from serving clients and the public good.

III. A NEW MODEL IN LINE WITH THE *FUTURE REPORT*

The ABA's Commission on the Future of Legal Services *Future Report* is a product of a study from 2014 to 2016 by the Commission on the Future of Legal Services.[142] The Commission's full membership includes commissioners, special advisors, liaisons, reporters, and ABA staff members.[143] The Commission explored access to justice, service delivery models, technology, and the lawyer's responsibility to advance access for underserved individuals and communities.[144] The report is also informed by written comments by the public, testimony at public meetings, and discussions during summits, webinars, and other presentations.[145] At the conclusion, the Commission made recommendations about how the profession can better serve persons of limited means and improve how legal services are delivered and accessed.[146]

A. The Future Report Recommends Reform in Order to Increase Access to Justice

> The following are the Commission's findings:
>
> A. Despite sustained efforts to expand the public's access to legal services, significant unmet needs persist.
>
> . . . .
>
> B. Advancements in technology and other innovations continue to change how legal services can be accessed and delivered.
>
> . . . .
>
> C. Public trust and confidence in obtaining justice and in accessing legal services is compromised by bias, discrimination, complexity, and lack of resources.[147]

In response, the Commission made the following twelve ambitious recommendations:

> Recommendation 1. The legal profession should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer.

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141. *See Why I Love Being a Lawyer*, A.B.A. J. (Feb. 1, 2011, 11:00 AM), http://www.abajournal.com/magazine/article/why_i_love_being_a_lawyer (describing the article itself as a "valentine to the profession").

142. *See* FUTURE REPORT, *supra* note 13.

143. *See id.* at 2–3.

144. *See id.* at 4.

145. *See id.*

146. *See id.* at 6–7.

147. *Id*. at 5–6.

> Recommendation 2. Courts should consider regulatory innovations in the area of legal services delivery.
>
> Recommendation 3. All members of the legal profession should keep abreast of relevant technologies.
>
> Recommendation 4. Individuals should have regular legal checkups, and the ABA should create guidelines for lawyers, bar associations, and others who develop and administer such checkups.
>
> Recommendation 5. Courts should be accessible, user-centric, and welcoming to all litigants, while ensuring fairness, impartiality, and due process.
>
> Recommendation 6. The ABA should establish a Center for Innovation.
>
> Recommendation 7. The legal profession should partner with other disciplines and the public for insights about innovating the delivery of legal services.
>
> Recommendation 8. The legal profession should adopt methods, policies, standards, and practices to best advance diversity and inclusion.
>
> Recommendation 9. The criminal justice system should be reformed.
>
> Recommendation 10. Resources should be vastly expanded to support long-standing efforts that have proven successful in addressing the public's unmet needs for legal services.
>
> Recommendation 11. Outcomes derived from any established or new models for the delivery of legal services must be measured to evaluate effectiveness in fulfilling regulatory objectives.
>
> Recommendation 12. The ABA and other bar associations should make the examination of the future of legal services part of their ongoing strategic long-range planning.[148]

The proposals in this Article align with three of these recommendations. First, this Article explores Recommendation 1: "The legal profession should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer."[149] Advocating for the right to counsel in certain civil cases will provide assistance for essential civil legal needs and serve the Commission's recommendation to provide effective assistance for civil legal needs. This Article also explores Recommendation 2: "Courts should consider regulatory innovations in the area of legal services delivery."[150] On this issue, the Commission explicitly addressed a regulatory model which includes licensing nonlawyer professionals to provide legal services in discrete practice areas.[151] Finally, this Article

148. *Id.* at 6–7.

149. *Id.* at 6, 37.

150. *Id.* at 6, 39.

151. *See id.*

examines Recommendation 10: "Resources should be vastly expanded to support long-standing efforts that have proven successful in addressing the public's unmet needs for legal services."[152] This Article argues for an effective pro bono appointment system to address the public's unmet need for legal services.

i. States Should License Paraprofessionals to Increase Access to Justice

States could explore licensing nonlawyers, with proper training, to provide legal services in discrete practice areas to relieve the over-capacity of pro se litigants in the court system. Other professions license assistants to relieve the burden and increase access to certain services.[153] For example, the medical profession licenses physician assistants (PAs) who work under the supervision of physicians.[154] PAs serve a critical purpose to increase access to medical care for rural areas and underserved patients.[155] Sometimes PAs are the only health care provider in more remote areas.[156] According to the American Academy of Physician Assistants, PAs are medically trained and state-licensed to practice medicine in all fifty states.[157] PAs are required to graduate from a program that is accredited by the Accreditation Review Commission on Education for the Physician Assistant (the accrediting body since 2001), pass a national certification exam, and obtain a license from the State.[158] In most states, the scope of a PA's authority includes taking medical histories, performing medical exams, ordering and interpreting laboratory tests, diagnosing and treating illnesses, counseling patients, assisting in surgeries, setting fractures, and prescribing medication.[159] The medical profession also licenses medical assistants in other subspecialties including occupational therapy.[160]

Some states are already leveraging qualified paraprofessionals to help fill the gap in legal services. Washington State has a fairly progressive licensing system for nonlawyer assistance in providing access to civil legal aid. The Washington Supreme Court has approved limited license legal technicians (LLLTs) "to advise and assist people going through divorce, child custody, and

152. *Id.* at 7, 54.

153. Some of such licenses include: occupational therapists, guidance counsellors, dental hygienists, certified interpreters, and nursing assistants.

154. *See Physician Assistant*, EXPLOREHEALTHCAREERS.ORG, https://explorehealthcareers.org/career/medicine/physician-assistant.

155. *See id.*

156. *See id.*

157. *See Become a PA*, AM. ACAD. PHYSICIAN ASSISTANTS, https://www.aapa.org/career-central/become-a-pa/.

158. *See id.*

159. *Physician Assistant*, *supra* note 154.

160. *See id.*

other family law matters."[161] The purpose statement for *Washington Admission and Practice Rules* (APR) 28 includes the following language:

> The Civil Legal Needs Study (2003), commissioned by the Supreme Court, clearly established that the legal needs of the consuming public are not currently being met. The public is entitled to be assured that legal services are rendered only by qualified trained legal practitioners. Only the legal profession is authorized to provide such services. The purpose of this rule is to authorize certain persons to render limited legal assistance or advice in approved practice areas of law.[162]

Although LLLTs were initially limited to domestic relations, Washington is exploring other practice areas.[163] In fact, in May of 2019, the Washington Supreme Court adopted amendments to this practice rule which expanded the scope of practice to include retirement assets, restraining orders, and real property division effective June 4, 2019.[164] Washington also licenses law students and certain individuals performing real estate transactions, but the LLLT program licenses individuals who have completed forty-five core credits at an ABA-approved law school or paralegal program, or at an educational institution with an LLLT program approved by the LLLT Board.[165] An LLLT may communicate with clients, conduct research, assist clients in filling out forms, and draft letters and contracts, but an LLLT may not represent a client in court.[166] LLLTs are also required to pay an annual licensing fee, complete continuing legal education, maintain trust accounts, and operate under their own rules of professional conduct.[167] Notably, Washington also has a limited practice rule allowing lawyers licensed in other jurisdictions to provide civil legal aid in Washington in the face of a natural or other major disaster.[168] In May 2019, the New Mexico Supreme Court also announced the formation of a work group to study whether to create a similar licensed legal technician program to address civil legal needs.[169] New Mexico created this task force as a response to the dearth of lawyers in rural counties. The work group released a report in January of 2020 recommending that New Mexico continue to

161. *Limited License Legal Technicians*, WASH. ST. BAR ASS'N, https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (last updated Sept. 6, 2019).

162. WASH. SUPREME COURT APR 28 (2019); *see also id.* APR 1–5, 13.

163. *See id.* APR 28; *Limited License Legal Technicians*, *supra* note 161.

164. *See* WASH. SUPREME COURT APR 28 (2019); *Limited License Legal Technicians*, *supra* note 161.

165. *See* WASH. SUPREME COURT APR 28 regulation 3(A) (2019).

166. *See id.* APR 28(F), (H).

167. *See id.* APR (I).

168. *See id.* APR 27.

169. *See* Debra Cassens Weiss, *Facing Shortage of Lawyers in Some Areas, This State Is Considering Licensing Legal Technicians*, A.B.A. J. (May 28, 2019, 7:00 AM), http://www.abajournal.com/news/article/facing-a-shortage-of-lawyers-in-some-areas-this-state-considers-licensing-legal-technicians.

monitor other states that license non-lawyers and conduct market research about, among other topics, whether litigants would hire a limited license technician.[170]

These limited practice programs serve the regulatory innovation goals of the Commission on the Future of Legal Services which encourages states to adopt regulatory objectives as well as judicially authorized and regulated legal services providers.[171] In February of 2016, the ABA House of Delegates adopted a resolution which proposed model regulatory objectives to guide states in their regulation of nontraditional legal services.[172] The objectives encourage the use of nontraditional legal services including nonlawyer providers, and the House of Delegates specifically pointed to Washington's innovative LLLT program.[173]

With a movement afoot to license other professionals in the legal industry, bar associations and legislatures have an opportunity to expand the areas of service. For example, housing matters involving disputes between landlords and renters could be one area of service. Lower income individuals are often renters, and the housing industry and statutory framework in many states favor landlords over tenants. Individuals are provided with little time to move out and little recourse to pursue legal remedies. Often, property management companies are represented in court and tenants are not. This creates inequity and congestion in the court system.[174]

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170. *See* Jayne Reardon, *New Mexico Supreme Court Endorses Proposals to Expand Civil Legal Services*, 2CIVILITY (Jan. 30, 2020), https://www.2civility.org/new-mexico-supreme-court-endorses-proposals-to-expand-civil-legal-services/.

171. *See* Lorelei Laird, *ABA House Approves Model Regulatory Objectives for Nontraditional Legal Services*, A.B.A. J. (Feb. 8, 2016, 5:55 PM), http://www.abajournal.com/news/article/house_approves_proposed_model_regulatory_objectives_for_nontraditional_lega.

172. *See id.*

173. *See id.*

174. Consider this familiar example of a landlord-tenant case where the landlord is represented but the tenant is not: A refugee family relocated to the United States after they were evicted from their country, Bhutan, a landlocked country in South Asia at the eastern end of the Himalayas. Bhutanese refugees have been forced to flee their native country due to ethnic persecution. The couple worked through a resettlement agency and rented an apartment in an affordable complex. The father works at the airport and the mother worked at the local International Market until it burned to the ground a few months ago. The couple has two young children who attend the elementary school just behind their apartment complex. One child suffers from a physical disability and the school provides special services. Last week, the couple received a thirty-day notice to evict their apartment. Unfortunately, the rental market isn't keeping up with the demand. The couple, evicted again, has nowhere to go. Details around the management surface including stories of pest infestations, mold, and holes in the roof. The couple cannot afford an attorney and the local legal aid organizations cannot take any more cases. The couple obtained some paperwork for a demand letter from a legal advice clinic and filed the letter. Now the couple is in court but, even with an interpreter, they cannot fully understand the proceedings to defend the eviction notice. They just need more time to relocate, again.

Legal technicians could be licensed to provide legal assistance in housing court, for example. As in Washington, technicians could be required to attend forty-five credits at an ABA-approved law school (basically the first-year curriculum) including specific training in the subject matter, court procedures, and applicable rules of evidence. Since public defenders are provided to indigent criminal defendants, technicians would not be required to take criminal law courses. Other practice areas could include guardianship, probate, and government benefits. According to the *Future Report*, millions of Americans are living with civil justice problems involving "basic human needs," which may include evictions, government benefits, protection orders, healthcare, and child custody.[175] Legal aid agencies, which are chronically under-resourced, can't handle all of the requests for legal assistance.

ii. States Should Incentivize Lawyers to Practice in Rural Areas

Limited practice rules may also serve to increase access to justice in rural America. Some states are innovating to fill this gap. In fact, in 2012 the American Bar Association called on federal, state, and local governments to address the decline and shortage of lawyers in rural areas.[176] For example, in Nebraska, there are eleven counties without a lawyer.[177] In response, Nebraska launched a program to recruit high school-age children to attend college, law school, and eventually practice in underserved, rural areas.[178] The Kearney Law Opportunities program at the University of Nebraska is a collaborative program between the undergraduate campus in Kearney and the College of Law.[179] It is designed to recruit students from rural areas and train them to return to their communities after law school to practice law. Another example of increasing access in rural areas is South Dakota's Recruitment Assistance Pilot Program

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This fact pattern is based on a real event, but the people and the circumstances are fictional. *See* Adam Cotterell, *Boise International Market Vendor Wants to Rebuild After Fire*, BOISE ST. PUB. RADIO (Sept. 9, 2015), https://www.boisestatepublicradio.org/post/boise-international-market-vendor-wants-rebuild-after-fire.

175. FUTURE REPORT, *supra* note 13, at 12. The Legal Services Corporation defines "basic human needs" as matters related to shelter, sustenance, safety, health, and family. *Id.*; *see also* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), https://mlac.org/wp-content/uploads/2015/08/Documenting-the-Justice-Gap.pdf.

176. *See* Editorial, *Nebraska and Iowa Work to Reduce Attorney Scarcity in Rural Communities*, OMAHA WORLD-HERALD (Jul. 22, 2019), https://www.omaha.com/opinion/editorial-nebraska-and-iowa-work-to-reduce-attorney-scarcity-in/article_4f9847e4-3cb0-52af-91ba-d9c7c39b8c7f.html.

177. *See Lawyer Shortage in Some Rural Areas Reaches Epic Proportions*, NPR (Dec. 26, 2016, 5:00 AM), https://www.npr.org/2016/12/26/506971630/nebraska-and-other-states-combat-rural-lawyer-shortage.

178. *See id.*

179. *See id.*; *Kearney Law Opportunities Program*, U. NEB. KEARNEY, https://www.unk.edu/admissions/kearney-law-opportunities-program/index.php (last visited May 11, 2020).

which offers cash incentives to attorneys who will agree to live and work in rural areas.[180] Twenty-four states provide loan repayment assistance to students who will work in public interest law after graduation.[181] In addition to these innovations, states may be able to leverage limited license practitioners to serve clients in rural areas.

Bars and law schools could also work together to intentionally prepare lawyers for practice in magistrate court. While pettifogger is a term that was historically used to describe a "shyster" or someone who behaves unethically,[182] it has also come to be understood as a lawyer who represents people in the Justice of the Peace (or magistrate) courts. The term has been used more broadly to describe a lawyer who handles minor matters. In his article *Mandatory Pro Bono*, Justice Menis E. Ketchum II from the West Virginia Supreme Court of Appeals argues that "[a] trained and licensed pettifogger could proficiently handle small, routine claims in our magistrate courts."[183] For example, lawyers could be specifically trained to handle matters in misdemeanor court, probate court, housing court, and other like matters.

Specialty courts may fit in to this model as well. Specialty or "problem-solving" courts are increasing in number. These specially designed court calendars are aimed at a particular population or "problem." Specialty courts are generally more therapeutic and rehabilitative in nature. Attorneys, probation officers, and social service organizations collaborate on treatment and the judge acts as a supervisor. According to the National Institute of Justice, there were more than 1,300 specialty courts including drug courts, domestic violence courts, reentry courts, and veteran's treatment courts in 2013.[184] There are also housing courts, community courts, homeless courts, and others developing around the country.[185] Attorneys or LLLTs could be trained in these limited practice areas to represent clients in specialty courts.[186]

iii. States Should Make Pro Bono Reporting a Condition of Licensing

It is well-known that not all attorneys do pro bono and those who do may not report their pro bono contributions through their state bar associations or volunteer lawyer programs. The *2017 Annual Report Justice Gap* reported that sixty million Americans earn incomes at or below 125% of the federal poverty

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180. *See Rural Attorney Recruitment Program*, S.D. UNIFIED JUD. SYS., https://ujs.sd.gov/uploads/RuralAttorneyRecruitmentProgram.pdf.

181. *See State Loan Repayment Assistance Programs*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/loan_repayment_assistance_programs/state_loan_repayment_assistance_programs/ (last visited May 11, 2020).

182. *See supra* note 1 and accompanying text.

183. Menis E. Ketchum II, *Mandatory Pro Bono*, W.V. LAW., Jan.–Mar. 2013, at 30, 32.

184. *See Specialized Courts*, NAT'L INST. JUST. (Mar. 13, 2013), https://www.nij.gov/topics/courts/pages/specialized-courts.aspx.

185. *See id.*

186. Specific educational requirements or different bar exam or licensing requirements are beyond the scope of this Article.

level.[187] In that reporting year, 71% of these low-income households experienced at least one civil legal problem in areas such as housing, health care, disability, veterans' benefits, and domestic violence, and 86% of those legal problems were not met by an LSC-funded legal aid organization.[188] Though *Model Rules of Professional Conduct* rule 6.1 encourages lawyers to perform fifty hours of pro bono service every year, a 2018 ABA survey found that just over half of the 50,000 attorneys in twenty-four states who were surveyed had provided some pro bono legal services.[189]

However, in a recent ABA study entitled *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers* (fourth in a series of such reports), approximately half of the 50,000 attorneys surveyed reported doing some pro bono service as defined by rule 6.1 in 2016.[190] Attorneys reported lack of time, competing personal commitments, and lack of skills or experience as frustrations to doing more pro bono service.[191] Only nine states currently require their attorneys to report pro bono work: Florida, Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, and New York.[192] Voluntary pro bono reporting systems are in place in Arizona, Connecticut, Georgia, Kentucky, Louisiana, Montana, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington.[193]

Reporting pro bono work is just one factor. In May 2016, United States Supreme Court Justice Sonia Sotomayor spoke in favor of mandatory pro bono at an American Law Institute annual meeting in Washington, saying she believes in "forced labor" when it comes to providing access to justice for the poor.[194] But this is not a popular view. State judicial and political leaders have been debating for several decades whether to require attorneys to perform a

187. *See 2017 Annual Report Justice Gap*, LEGAL SERVS. CORP., https://www.lsc.gov/media-center/publications/2017-annual-report-justice-gap (defining federal poverty level as $15,075 for an individual and $30,750 for a family of four).

188. *See id.*; *see supra* Introduction.

189. *See New Comprehensive ABA Report Details Lawyer Involvement in Providing Pro Bono Services*, A.B.A. (Apr. 26, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/04/new_comprehensiveab/.

190. *See* AM. BAR ASS'N STANDING COMM. ON PRO BONO & PUB. SERV. & THE CTR. FOR PRO BONO, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 4, 6 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf.

191. *See id.* at 6.

192. *See Pro Bono Reporting*, A.B.A., https://www.americanbar.org/groups/probono_public_service/policy/arguments (last updated Mar. 19, 2020).

193. *See id.*

194. *See* Tony Mauro, *Sotomayor Urges Mandatory Pro Bono for All Lawyers*, NAT'L L.J. (May 17, 2016, 8:24 AM), https://www.law.com/nationallawjournal/almID/1202757812765/Sotomayor-Urges-Mandatory-Pro-Bono-for-All-Lawyers.

certain number of pro bono hours annually.[195] To date, only New York has required attorneys to do pro bono work. In 2012, "the *New York State* Court of Appeals adopted a *new rule* requiring applicants for admission to the *New York State* bar to perform 50 hours of *pro bono* services."[196] Section 520.16(a) of New York's Rules of Court states, in relevant part:

> Fifty-hour pro bono requirement. Every applicant admitted to the New York State bar on or after January 1, 2015 . . . shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.[197]

Since then, several states have considered a similar proposal but have not yet passed a requirement. The ABA maintains a chart summarizing the status of such proposals in other states.[198] In sum, California adopted an implementation plan in 2014 but never passed a requirement.[199] A bill was introduced to the California Legislature in 2018 to require attorneys to do twenty-five hours of pro bono service or donate $500 to the State Bar to support legal aid but it was not successful.[200] Connecticut created a working group but did not pursue a proposal.[201] Montana developed a voluntary declaration of pro bono activities as part of the application for licensure.[202] New Jersey formed a working group who developed an initiative, the New Jersey Bar Association issued a dissenting opinion, and the initiative ultimately failed.[203] Still, moral and constitutional arguments dominate the discussion around mandatory pro bono.

iv. Other Learned Professions Value Service to the Underserved

The importance of pro bono work finds its roots in the preamble of the *Model Rules of Professional Conduct*.

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> . . . .

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195. *See, e.g.*, *Pro Bono Reporting*, *supra* note 192.

196. *The Legal Profession – Pro Bono: Bar Admission Requirements*, *supra* note 45.

197. New York Rules of Court § 520.16(a) (2019).

198. *See An Overview of Pro Bono Requirements*, PSJD, https://www.psjd.org/An_Overview_of_Pro_Bono_Requirments (last visited Aug. 13, 2019).

199. *See id.*; *Bar Pre-Admission Pro Bono*, A.B.A., https://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono/.

200. *See* Cheryl Miller, *This New Bill Would Make Pro Bono Mandatory—Or Else Pay Up*, RECORDER (Feb. 26, 2018, 6:56 PM), https://www.law.com/therecorder/2018/02/26/this-new-bill-would-make-pro-bono-mandatory-or-else-pay-up.

201. *See An Overview of Pro Bono Requirements*, *supra* note 198.

202. *See id.*

203. *See id.*

> [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.[204]

Traditionally understood as one of the learned professions, lawyers share characteristics with doctors and pastors.[205] Lawyers represent the possibility of social change.[206] They lead political discourse and represent individuals in the most intimate affairs of their lives. Lawyers, doctors, and pastors are generally regarded as educated, industrious, and noble. With that nobility comes a social and professional responsibility to serve their communities. Just as a doctor does not refuse treatment to an indigent patient, a lawyer does not turn away "the cause of the defenseless or the oppressed."[207]

Physicians are seen as elite. They are educated at universities and study under other physicians. They prescribe medicine and cure diseases. The modern Hippocratic Oath clearly states that doctors will "remember that [they] remain a member of society, with special obligations to all [their] fellow human beings, those sound of mind and body as well as the infirm."[208] This oath has been the basis for the American Medical Association's Code of Medical Ethics as late as 1996 with up to almost 100% of medical schools in the United States administering it in some form today.[209] Of additional note is the language from

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204. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 1983).

205. *See Learned Profession*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/learned%20profession (defining "learned profession" as **"**one of the three professions, theology, law, and medicine, traditionally associated with extensive learning or erudition").

206. Karen L. Loewy, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869 (2000) (arguing that lawyers' access to the legal system uniquely empower them to work for social change).

207. IDAHO BAR COMM'N RULES r. 220 (BD. OF COMM'RS OF THE IDAHO STATE BAR 1986).

208. Peter Tyson, *The Hippocratic Oath Today*, PBS: NOVA (Mar. 27, 2001), https://www.pbs.org/wgbh/nova/article/hippocratic-oath-today/.

209. *See id.*

the American Medical Association's Principles of Medical Ethics from 2001 which provides standards of conduct for physicians to follow:

> I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.
>
> II. A physician shall uphold standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.
>
> III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
>
> IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.
>
> V. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
>
> VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.
>
> VII. A physician shall, recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.
>
> VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount.
>
> IX. A physician shall support access to medical care for all people.[210]

These principles acknowledge the professional requirements of the medical field and the responsibility to improve access to medical care.

Pastors are also considered part of a learned profession. Although educational requirements vary by denomination, pastors are traditionally ordained into their positions through an official appointment process.[211] Pastors lead congregations and perform baptisms, weddings, and funerals. Members of the clergy also take a rite of ordination which specifies certain duties to their flock including "faithfully instruct[ing] both young and old in the chief articles

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210. Frank A. Riddick, Jr., *The Code of Medical Ethics of the American Medical Association*, OCHSNER J., Mar. 2003, at 6, 9–10 app. C(quoting AM. MED. ASS'N, AMA CODE OF MEDICAL ETHICS (2001)).

211. *See Church Pastor: Job Description & Career Requirements*, STUDY.COM (Mar. 11, 2019), https://study.com/articles/Church_Pastor_Job_Information_and_Requirements_for_Students_Considering_a_Career_as_a_Church_Pastor.html.

of Christian doctrine,"[212] "minister[ing] faithfully to the sick and dying,"[213] and "admonish[ing] and encourag[ing] the people to a lively confidence in Christ and in holy living."[214]

Clergy members are also encouraged to participate in their local community. "Although committed to ministry among the flock of his parish, the pastor is not an island to himself. He has relationships to others in his community and in the wider church."[215] These relationships require a duty of confidentiality as anything that is "spoken to him in confidence, even if not specifically stated as confidential, must remain so."[216] Furthermore, the pastor must not lose his temper and speak angry words.[217] The pastor must also be truthful and avoid substance abuse.[218] He must also remain autonomous while contributing to the rest of his professional community.[219] A pastor's duty to his or her community can also be found in scripture. The pastor is called to be a shepherd.[220]

Lawyers also take an oath which includes a promise to serve the underserved. While oaths vary by bar, the following example is illustrative of the spirit behind these oaths. The oath or affirmation upon admission in Idaho is as follows:

> I DO SOLEMNLY SWEAR THAT: . . . I will support the Constitution of the United States and the Constitution of the State of Idaho.
>
> I will abide by the rules of professional conduct adopted by the Idaho Supreme Court.
>
> I will respect courts and judicial officers in keeping with my role as an officer of the court.
>
> I will represent my clients with vigor and zeal, and will preserve inviolate their confidences and secrets.

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212. THE COMM'N ON WORSHIP OF THE LUTHERAN CHURCH—MO. SYNOD, LUTHERAN SERVICE BOOK: AGENDA 165 (Concordia Publ'g House 2006).

213. *Id.*

214. *Id.*

215. COUNCIL OF PRESIDENTS OF THE LUTHERAN CHURCH—MO. SYNOD, COMMITMENTS OF THE SHEPHERD: PRINCIPLES OF CONDUCT FOR ORDAINED MINISTERS OF THE GOSPEL 9 (1990).

216. *Id.* at 13.

217. *See id.*

218. *See id.* at 14, 15.

219. *See id.* at 9.

220. *See id.* at 1, 8; *see also* 1 *Peter* 5:1–4; 1 *Timothy* 3:1–7, 4:16; 2 *Timothy* 2:24–25a, 4:2, 4:5; *Titus* 1:7–9, 2:1, 2:7–8. If there is anything that is clear about the office of the ministry, it is that the pastor is called to be a shepherd under the Good Shepherd, Jesus Christ. The very fact that Holy Scripture singles out the pastor for special treatment with regard to the conduct of his ministry apart from what is normally expected of any Christian underscores this special relationship with, and unique responsibility toward, the Good Shepherd.

> I will never seek to mislead a court or opposing party by false statement of fact or law, and will scrupulously honor promises and commitments made.
>
> I will attempt to resolve matters expeditiously and without unnecessary expense.
>
> I will contribute time and resources to public service, and will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed.
>
> I will conduct myself personally and professionally in conformity with the high standards of my profession.
>
> SO HELP ME GOD. (I hereby affirm.)[221]

The oath acknowledges the esteem of the legal profession and prepares the incoming practitioner to provide time and money to those who are in need. The oath's language promotes advocacy for the defenseless. The attorney's oath is perhaps the most demanding of all three of the learned professions.

As can be seen in all these examples, professionalism is a key part of being a lawyer as well as of being a doctor and pastor. All three professions possess three common elements: "[I]naccessible expertise, altruistic commitment to the public good, and autonomy."[222] Professionalism requires a "formal education, mastery and exercise of intellectual ability."[223] It includes "involvement in interpersonal relationships with clients, and adherence to a role-morality."[224] Furthermore, professionalism embodies a group of professionals that pursues "a learned art as a common calling in the spirit of public service."[225] These qualities are all part of being a lawyer and of being in a profession set apart for service.

Lawyers, doctors, and pastors could all be described as servant leaders as defined by Robert K. Greenleaf in his essay *The Servant as Leader*.[226] Greenleaf describes a servant leader as one who serves first. "The natural servant, the person who is *servant first*, is more likely to persevere . . . on what serves another's highest priority needs than is the person who is *leader first* . . . ."[227] Greenleaf does not discount the mark of a leader. "[T]he leader gives certainty and purpose to others who may have difficulty in achieving it for themselves."[228]

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221. IDAHO BAR COMM'N RULES r. 220 (BD. OF COMM'RS OF THE IDAHO STATE BAR 1986).

222. Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 408 (2011).

223. *Id. See also* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 n.1 (1975).

224. Wald & Pearce, *supra* note 222, at 408.

225. *Id.* (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)).

226. ROBERT K. GREENLEAF, THE SERVANT AS LEADER, http://www.ediguys.net/Robert_K_Greenleaf_The_Servant_as_Leader.pdf.

227. *Id.* at 6.

228. *Id.* at 7.

As some lawyers may not be motivated to serve purely by altruism, scholars have proposed other best practices for incentivizing lawyers to provide pro bono service, thereby improving access to justice.[229] Some examples include requiring pro bono service as a condition of licensing (either in the form of mandatory service or mandatory reporting), allowing lawyers to count pro bono service hours toward their continuing legal education requirement, reducing license fees for retired lawyers who participate in pro bono programs, and waiving license requirements for in-house counsel and other attorneys licensed outside the jurisdiction.[230]

New York has taken an especially ambitious approach to bridging the justice gap. In July of 2015, Chief Judge of the New York Court of Appeals Jonathan Lippman announced the creation of the Permanent Commission on Access to Justice. The task force is recognized as a national model to help ensure low-income individuals have access to legal representation in civil matters involving housing, personal safety, and other basic necessities.[231] States can follow New York (and other states trending in this direction) in their determination to meaningfully effect change and provide civil legal services to those within the ever-increasing gap.

B. The Ethics Rules Should Make Way for Mandatory Pro Bono Appointment Systems

There is a need to normalize the ways in which judges may encourage pro bono. In fact, the rules should not just permit judges to encourage lawyers to provide pro bono, but rather the rules should permit judges to use their inherent authority to appoint attorneys to represent indigent clients without promise of compensation. The current landscape shows some states allowing only general appeals letters and other avocational activities, while other states permit judges to directly recruit volunteer attorneys. In light of the ever-increasing need for civil legal assistance for low-income individuals and the unavailability of resources and capacity, judges should be permitted to take a more active role in bridging the justice gap.

In her article, *Pro Bono: A Case for Judicial Intervention, or How the Judiciary Can Help Bridge the Justice Gap in America*, Judge Anne Lazarus concludes that court involvement is essential to the delivery of pro bono legal services.[232] Judge Lazarus suggests judges take a more active role in recruiting efforts including sending recruitment letters, utilizing public speaking opportunities, and supporting practicing lawyers, emeritus lawyers, and even non-attorneys, in providing unbundled, or limited scope, legal services. She

229. *See generally* Keith, *supra* note 12.

230. *See id.* at 121–22.

231. *See* Press Release, N.Y. State Unified Court Sys., Chief Judge Announces Creation of Permanent Commission on Access to Justice, (July 22, 2015), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR15_07.pdf.

232. *See* Anne Lazarus, *Pro Bono: A Case for Judicial Intervention, or How the Judiciary Can Help Bridge the Justice Gap in America*, PA. B. ASS'N Q. Apr. 2009, at 47, 58.

also suggests providing incentives for pro bono attorneys, such as reduced bar dues, CLE credit, and even tax credits to lawyers who provide pro bono service, as well as public recognition.[233] Judge Lazarus provides a self-test for judges to identify ways to encourage pro bono in their courtrooms.[234] She asks judges to consider whether they are participating in the following ways, all of which she concludes are approved by the code of judicial conduct in Pennsylvania:

> 1) Maintain[ing] a list of attorneys (panel) for *pro bono* appointment . . . [;]
>
> 2) Mak[ing] announcements in [their] courtroom[s] about the importance of *pro bono* service, ask[ing] if there are any counsel representing clients *pro bono* that day . . . and/or ask[ing] for volunteers to sign up[;]
>
> 3) Giv[ing] priority/early listings to *pro bono* counsel when calling or scheduling cases, to reduce the amount of lost time[;]
>
> 4) Giv[ing] *pro bono* counsel . . . the chance to schedule their matters in "groups" to reduce the number of court appearances[;]
>
> 5) Acknowledg[ing] . . . *pro bono* attorneys after a hearing . . . [;]
>
> 6) Writ[ing] letters to senior/managing partners in the law firms of those attorneys who have completed a matter . . . thanking [the firm] for its commitment to equal justice[;]
>
> 7) Nominat[ing] *pro bono* attorneys for awards . . . [;]
>
> 8) Participat[ing] in training *pro bono* attorneys about [courtroom] procedures . . . [;]
>
> 9) Encourag[ing] . . . law clerks to take *pro bono* cases[; and]
>
> 10) Serv[ing] on [boards] of *pro bono* or public interest legal organization (but [not] . . . participating in fundraising activities).[235]

If *Lassiter*'s case-by-case approach lacks uniformity and compassion,[236] bar associations could explore a pro bono appointment system in certain discrete practice areas. Courts would use their inherent authority to appoint counsel in these cases. Appointments can be made by drawing from a list of active attorneys in that jurisdiction, like the federal court examples above. As a licensed member of the state's bar association, attorneys would agree to pro bono representation in these discrete practice areas unless they are excused under *Model Rules of Professional Conduct* rule 6.2 or allowed to withdraw under rule 1.16.[237] Legal services would be provided without compensation by

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233. *See id.* at 51–52.

234. *See id.* at 59–60.

235. *Id*.

236. *See generally* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

237. Model rule 1.16 may permit an attorney to withdraw from representation in certain enumerated circumstances. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 1983) ("(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or

the individual but perhaps by the state or county. A number of scholars have addressed the constitutional limits of uncompensated appointments, which should be considered in any efficient pro bono appointment model.[238]

C. A Solution May Include Amending the Model Code of Judicial Conduct

The profession needs to arm itself with tools to increase access, whether in the form of pro bono incentives, pro bono appointment models, limited practice rules, or more influence by the judiciary. Judges will need to take the lead in developing this legislative and systematic change as the courts have done with the challenges to indigent defense systems. This change may require state statutes providing the right to appointed pro bono counsel in certain types of cases, such as housing and personal safety. The ABA *Model Code of Judicial Conduct* will need to evolve to accommodate judges taking on a more active role in these types of appointments. A proposed rule change would add a subsection C under model rule 3.7. It may read as follows:

> Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities
>
> (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
>
> . . .

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mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged. (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists. (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.").

238. *See, e.g.*, Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981); Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscription*, 3 GEO. J. LEGAL ETHICS 503 (1990); John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229 (1991).

> (B) A judge may encourage lawyers to provide pro bono publico legal services.[239]
>
> (C) A judge may appoint lawyers to represent indigent individuals pursuant to a state's pro bono appointment system.

This rule change will provide much-needed clarity around a judge's role in appointing pro bono lawyers. Courts have the power to compel attorneys to accept appointments. This rule change will empower judges to use this inherent power to help bridge the justice gap.

IV. CONSTITUTIONAL CHALLENGES WITH THE NEW MODEL

Constitutional challenges present a hurdle to adequate representation for civil litigants. A number of cases challenging pro bono appointments come up in the context of criminal law practice. In *Jewell v. Maynard*, a West Virginia lawyer brought an eminent domain action against a judge who appointed him to represent indigent criminal defendants, arguing that such an appointment was an unconstitutional taking.[240] The lawyer argued that the compensation for the appointment was so low that it failed to meet constitutional standards. The Supreme Court of Appeals of West Virginia agreed and concluded,

> "The requirement that an attorney provide gratuitous service to the court for little or no compensation does not, *per se*, constitute a violation of the due process clause of the Fourteenth Amendment. However, where the caseload attributable to court appointments is so large as to occupy a substantial amount of an attorney's time and thus substantially impairs his ability to engage in the remunerative practice of law, or where the attorney's costs and out-of-pocket expenses attributable to representing indigent persons charged with crime reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirement of court appointed service will be considered confiscatory and unconstitutional."[241]

In deciding that the minimal compensation for court-appointments implicated the Sixth Amendment right to effective assistance of counsel, the court ultimately ruled that a lawyer may not be required to devote more than 10% of the lawyer's work year to court-appointed cases.[242] The West Virginia Supreme Court of Appeals had addressed compensation for court appointments thirteen years prior with a similar result which prompted the Legislature to change the compensation structure.[243]

Similarly, the Missouri Supreme Court in *State ex rel. Wolff v. Ruddy*, considered an action by attorney Donald Wolff. Judge James Ruddy had

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239. MODEL CODE OF JUDICIAL CONDUCT r. 3.7 (AM. BAR. ASS'N 1990).

240. *See* Jewell v. Maynard, 383 S.E.2d 536 (W. Va. 1989).

241. *Id.* at 537 (quoting State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 315 (1976)).

242. *See id.* at 547.

243. *See id.* at 538–39.

appointed Wolff to defend Joann Williams in circuit court.[244] The appointed counsel fund had been depleted, so Wolff was appointed without compensation.[245] He argued that he was being subjected to involuntary servitude. The court unapologetically focused its attention on the lawyer's professional responsibility to provide pro bono legal services. The court also concluded, however, that attorneys cannot be required to serve without an evidentiary hearing on the propriety of their appointment.[246] The court reminded attorneys that refusal after an opportunity to be heard could result in discipline.[247] The court stated:

> [T]he members of the legal profession are advised that in its discretion this Court will decline to hear other than the most extraordinary of applications for writs or extraordinary relief. We expect that each member of the legal profession, as he or she has throughout history, to continue to honor the oath "That I will never reject, from any consideration personal to myself, the cause of the defenseless or the oppressed . . .", with complete confidence that this Court will do all within its power to protect the rights of indigent accused and to implement the public policy . . . that those ordered to defend the indigent accused shall be fairly compensated for their expenses and services.[248]

The Alabama Supreme Court in *Sparks v. Parker*, found that an order establishing an indigent defense system did not infringe on constitutional rights of criminal defendants to adequate representation.[249] The attorneys argued that they could not provide effective assistance of counsel if they are underpaid.[250] Pursuant to the indigent defense system, fifty-two attorneys were appointed to four teams of thirteen attorneys, with each team being eligible for appointment during three months of each year.[251] Attorneys were appointed alphabetically in misdemeanor and juvenile cases.[252] The court upheld the indigent defense system, analyzing the history of the lawyer's responsibility to take appointments for indigent clients, dating back to the fifteenth century in England and pre-Revolutionary America.[253] Notably, the court concluded: "A Fifth Amendment 'taking' of property does not occur when the state simply requires an individual

244. *See* State *ex rel*. Wolff v. Ruddy, 617 S.W.2d 64, 64 (Mo. 1981) (en banc).

245. *See id.*

246. *See id.* at 67.

247. *See id.*

248. *Id.* at 67–68 (quoting Mo. Rules Governing the Bar & Judiciary r. 8.11 (amended & renumbered 2003)).

249. *See* Sparks v. Parker (*Ex parte* Sparks), 368 So. 2d 528, 530 (Ala. 1979).

250. *See id.*

251. *See id.* at 529.

252. *See id.* at 529.

253. *See id.* at 532.

to fulfill a commitment he has made."[254] The court pointed to the lawyer's professional obligation to represent indigent clients on appointment and without compensation.[255] The dissent based its argument on an 1861 opinion from the Supreme Court of Washington which stated:

> We do not believe that the legislature have the power generally to say to the physician, the surgeon, the lawyer, the farmer, or any one else, that he shall render this or that service, or perform this or that act in the line of his profession or business without remuneration.[256]

The Ninth Circuit Court of Appeals also considered a "takings" argument in *United States v. Dillon*, and held that a court order appointing counsel to represent an indigent defendant did not constitute a taking which would require compensation under the Fifth Amendment.[257] The court reiterated that lawyers should be aware of the "traditions" of the profession.[258] *Dillon*, however, was called into doubt by *Simmons v. State Public Defender*.[259] Simmons was appointed to represent criminal defendants in appeals of their convictions. The State Public Defender rejected payment of fees in excess of $1,500. The Iowa Supreme Court found that this fee cap could deny a criminal defendant effective assistance.[260] The district court cited *Dillon* for the proposition that attorneys can be required to serve without compensation.[261]

Additionally, in *Simmons*, the Iowa Supreme Court cited to David Shapiro's argument in *The Enigma of the Lawyer's Duty to Serve* that discredits the *Dillon* decision for its reliance on a historical duty.[262] Shapiro argued that this duty applied to a very small group of English officers, not ordinary attorneys.[263] The court also questioned prior decisions that suggested that all attorneys are equipped to handle criminal cases. Instead the court underscored the growing complexity of the criminal justice system and suggested that appointed counsel may not be competent to handle cases, especially without adequate compensation to offset the time it takes to prepare.[264]

Most of the published cases raising constitutional issues are in the criminal "right to counsel" category. Presently, in the wake of the national litigation

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254. *Id.* (citing Kunhardt & Co. v. United States, 266 U.S. 537 (1925); Hurtado v. United States, 410 U.S. 578 (1973)).

255. *See id.* at 533. "Attorneys are officers of the court, and are bound to render service when required by such appointment." *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 73 (1932)).

256. Cty. of Dane v. Smith, 13 Wis. 585, 588–89 (1861); *see also Sparks*, 368 So. 2d at 535 (Maddox, J., dissenting).

257. *See* United States v. Dillon, 346 F.2d 633, 635–36 (9th Cir. 1965).

258. *See id.*at 635.

259. *See* Simmons v. State Pub. Def., 791 N.W.2d 69, 86 (Iowa 2010).

260. *See id.* at 87.

261. *See id.* at 86.

262. *See id.*

263. *See generally* David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 740–49 (1980).

264. *See Simmons*, 791 N.W.2d. at 88.

around public defense systems, the constitutional arguments are receiving more attention. The ACLU has sued in at least eight states over what it characterizes as inadequate public defender programs.[265] States are looking at increasing budgets and oversight of their public defender systems. It is likely that a mandatory pro bono system would draw the same Fifth and Sixth Amendment challenges.

Lawyers have also raised First Amendment challenges in a broad range of activities that a bar association may require especially in the case of integrated bars. In this context, integration is defined as "[t]he process of organizing the attorneys of a state into an association, membership in which is a condition precedent to the right to practice law."[266] In *Fleck v. Wetch*, a North Dakota lawyer challenged mandatory bar dues as an unconstitutional infringement of his First Amendment rights because the State Bar Association of North Dakota (SBAND) participated in advocacy that was in direct conflict with the lawyer's own efforts.[267] Specifically, Arnold Fleck supported a State ballot measure that was designed to establish a presumption that each parent is entitled to equal parental rights.[268] SBAND opposed the measure. Fleck challenged the fact that his mandatory bar dues were being used to oppose the measure.[269] He sought declaratory and injunctive relief based on the First Amendment.[270]

His argument was based, in part, on *Keller v. State Bar of California*. *Keller* was also an integrated bar compulsory fees case. The United States Supreme Court concluded that an integrated bar can use compulsory bar dues to fund limited activities germane to the legal profession.[271] Germane activities include activities or fees designed to improve delivery of legal services and to enforce ethics rules. Pursuant to settlement negotiations, SBAND revised its license form to comply with *Keller*. Fleck also argued that an integrated bar violates his freedom to associate (or not associate) with a member-based organization that advocates for certain activities, which he called "subsidizing speech."[272] The district court dismissed this claim as barred by *Keller*.[273]

Fleck's final argument alleged that SBAND's "opt-out" procedure violates his right to "affirmatively consent before subsidizing non-germane expenditures," because it requires him to acquiesce to nonchargeable fees or

265. *See* Dale Chappell, *Inadequate Public Defender Offices Prompt ACLU Suit*, CRIMINAL LEGAL NEWS (Mar. 16, 2018), https://www.criminallegalnews.org/news/2018/mar/16/inadequate-public-defender-offices-prompt-aclu-suit.

266. *Integrated Bar*, WEST'S ENCYCLOPEDIA OF AM. L. 420 (2d. ed. 2005).

267. *See* Fleck v. Wetch, 868 F.3d 652, 652–53 (8th Cir. 2017).

268. *See id.*at 653.

269. *See id.*

270. *See id.*

271. *See* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990).

272. *Fleck*, 868 F.3d at 653.

273. *See id.*

waive a constitutional right.[274] Each year, SBAND sends a license renewal form to all attorneys. A member must pay $380, $350, or $325 annually depending on their years of practice.[275] The form also allows a reduction of dues to opt out of fees for non-germane expenditures, otherwise referred to as the *Keller* deduction.[276] Fleck argued that Supreme Court precedent requires opt-in instead of opt-out procedures. The district court dismissed this claim on summary judgment and Fleck appealed.

The Eighth Circuit Court of Appeals affirmed the district court on this allegation relying on *Knox v. Service Employees International Union, Local 1000*. In *Knox*, a public-sector union provided an annual notice calculating non-germane expenditures and allowing members to object within thirty days.[277] The majority in *Knox* was seemingly critical of opt-out requirements although two Justices disagreed with this broad condemnation of opt-out procedures generally.[278] The Eighth Circuit Court of Appeals agreed with the district court that *Knox* allows opt-out, annual procedures if those procedures are "carefully tailored to minimize the infringement" of a non-member's First Amendment rights.[279] The *Knox* Court described this as a "fact-intensive standard."[280] However, the Eighth Circuit Court of Appeals ultimately concluded that the opt-out issue debated in *Knox* was not implicated by SBAND's revised license fee statement.[281] The court explained that an SBAND member can either select the *Keller* deduction and pay the lesser amount excluding non-germane expenditures or the member can "opt-in" and include the expenditures for non-germane expenditures, which requires an affirmative act of writing the check for the greater amount.[282]

On Fleck's petition for writ of certiorari, the Supreme Court remanded the case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[283] Mark Janus, a State employee, refused to join a public-sector union and filed suit challenging the constitutionality of a state law authorizing "agency fees" for nonmembers.[284] The union required nonmembers to pay a percentage of the full union dues which covered

274. *Id.*; *see also* Oral Argument, Fleck v. Wetch, 868 F.3d 652 (8th Cir. 2017) (No. 16-1564), http://media-oa.ca8.uscourts.gov/OAaudio/2017/4/161564.MP3.

275. *Fleck*, 868 F.3d at 654.

276. *Id.* at 655.

277. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012).

278. *See id.*

279. *Fleck*, 868 F.3d. at 656 (quoting Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986)).

280. *Id.*

281. *See id.*

282. *See id.*

283. *See* Fleck v. Wetch, 139 S. Ct. 590 (2018) (mem.).

284. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2456 (2018).

expenditures germane to the union's collective bargaining activities.[285] Janus argued these agency fees violated his First Amendment right. The Supreme Court concluded that Illinois's practice of charging agency fees from nonconsenting public-sector employees, in the name of "labor peace" or prohibiting "free riders" violates the First Amendment, and in so doing, it overruled *Abood v. Detroit Board of Education*.[286] The *Janus* Court said, "[e]xclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked."[287] The Court said labor peace can be achieved by less restrictive measures than agency fees.[288] Applying that sentiment, Fleck argued, on June 13, 2019 on remand to the Eighth Circuit, that under *Janus*, freedom of association under the First Amendment requires an exacting standard and that consent from attorneys on an annual bar dues form must be clear and affirmative.[289] Otherwise, the government is asking the attorney to waive a constitutional right. In contrast, Wetch argued that *Janus* has no effect on this case because the dues notice was *Keller*-compliant and that the opt-in procedures protect First Amendment rights.[290] On remand, the Eighth Circuit Court of Appeals found in favor of the bar association, holding that the association's procedures for collecting dues provided adequate notice of the right to claim a deduction relating to nonchargeable activities.[291] Fleck filed a petition for writ of certiorari to the United States Supreme Court asking the Court to re-examine mandatory bar association membership, but certiorari was denied.[292]

Notably, the Supreme Court in *Keller* included within the definition of germane activities those activities which regulate the profession and improve the quality of legal services.[293] The Court explicitly stated, "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members."[294] With that authority, it is possible that First Amendment arguments involving integrated bar associations will not prevail as they relate to the imposition of pro bono appointment programs since pro bono appointments are directly related to improving the quality of legal services.

Pro bono appointment systems must be carefully tailored to mitigate First Amendment challenges. A system may consider safeguards such as recommending a lawyer expend no more than 10% of her work each year to pro

285. *See id.*

286. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

287. *Janus* at 2456.

288. *See id.*

289. *See* Oral argument, Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019) (No. 16-1564), http://media-oa.ca8.uscourts.gov/OAaudio/2019/6/161564.MP3.

290. *See id.*

291. *See* Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019).

292. *See* Fleck v. Wetch, No. 19-670, 2020 WL 1124433 (U.S. Mar. 9, 2020) (mem.). Fleck's petition for rehearing was denied May 4th, 2020. *See* Fleck v. Wetch, No. 19-670, 2020 WL 2105677 (U.S. May 4, 2020) (mem.).

293. *See* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990).

294. *Id.*

bono service as in *Jewell v. Maynard*,[295] or afford lawyers an evidentiary hearing as in *State ex rel. Wolff v. Ruddy*.[296] Additionally, a bar association may provide a lawyer with opt-out options modeled after *Model Rules of Professional Conduct* rule 6.2 which may mitigate constitutional questions.

CONCLUSION

The constitutional and ethical challenges aside, it is unambiguous that lawyers have a professional obligation to serve persons of limited means and to increase access to justice. The current system to bridge the justice gap is flawed. Lawyers' professional responsibility to provide pro bono legal services is merely aspirational. Judges are reluctant to appoint counsel to represent indigent litigants. The ABA *Model Code of Judicial Conduct* and states' formal opinions interpreting the judicial canons do not expressly permit judges to take an active role in appointing lawyers to provide pro bono legal services to civil litigants. Pro se civil litigants represent a weight on the court system, but more importantly, some pro se litigants, like the Bhutanese refugee family, are not prepared to navigate the complexities of the judicial system, and they do not have a constitutional right to counsel. With some articulated changes to state laws and the judicial canons, judges can improve access to justice for some of our most vulnerable populations by appointing lawyers in civil cases pursuant to a pro bono appointment system.

In 1995, the ABA passed a resolution encouraging bar associations to prioritize expanding pro bono legal services.[297] Twenty-five years later, the profession is still lagging behind and the number of low-income Americans is increasing. Aspirational rules, reluctant judges, and tightfisted legislatures will not serve the underserved or bridge the gap. The legal profession must mobilize its members to serve the public interest and judges should take the lead. In the words of the Honorable Candy Dale, United States Magistrate Judge for the District of Idaho, judges "are not 'holding out tin cups and asking for coins' from lawyers. . . . but . . . we have the opportunity—and an obligation—to use our positions to promote and provide access to justice."[298]

295. *See* Jewell v. Maynard, 383 S.E.2d. 536 (W. Va. 1989).

296. *See* State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981) (en banc).

297. *See* AM. BAR ASS'N STANDING COMM. ON LAWYER'S PUB. SERV. RESPONSIBILITY SECTION OF LITIG., ANNUAL MEETING RESOLUTION 114, at 1 (1995) (urging national, state, and local bar associations "to develop effective and innovative strategies to promote pro bono service and to allocate sufficient bar resources to ensure that these strategies can be effectively implemented").

298. Candy W. Dale, *The What and Whys of the Pro Bono Survey*, ADVOCATE, Aug. 2010, at 57, 58 (quoting an Idaho Pro Bono Commission member's statement in a meeting).