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## An Ethical Evaluation of Mandatory Pro Bono

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**AN ETHICAL EVALUATION OF MANDATORY PRO BONO**

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## I. INTRODUCTION

In November 1994, Nevada attorneys learned that the State Bar of Nevada (SBN) Board of Governors was preparing to petition the state supreme court to institute an additional condition of licensure: twenty hours of *pro bono publico* service per year.<sup>1</sup> This petition would make Nevada the first state to propose a mandatory pro bono program.<sup>2</sup> But few of the SBN's approximately 3500 active members had been consulted about the mandatory pro bono petition.<sup>3</sup> The backlash was swift.

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1. Margo Piscevich, *A View from the Top*, NEV. LAW., Nov. 1994, at 2, 4 [hereinafter Piscevich, Nov. 1994]. The requirement would apply to all active resident SBN members. Petition at 4, *In re* Amendment to the Supreme Court Rules Mandating that Attorneys Licensed to Practice in the State of Nevada Shall Perform Certain Hours of *Pro Bono Publico* (Nev. 1994) (ADKT 200) [hereinafter *Nevada Petition*].

*Pro bono publico* is defined as service provided for the public good. BLACK'S LAW DICTIONARY 1203 (6th ed. 1990). The phrase has been interpreted to convey the "larger good and meaning of providing one-to-one legal services to persons in need, including the needy working poor, who constitute such a large and permanent part of society." Joseph W. Bellacosa, *Obligatory Pro Bono Publico Legal Services: Mandatory or Voluntary? Distinction Without a Difference?*, 19 HOFSTRA L. REV. 745, 747 (1991). However, other legal work also has been labeled as pro bono, including unpaid legal work for local charity organizations or for attorneys' friends and family. Chesterfield H. Smith, *A Mandatory Pro Bono Service Standard—Its Time Has Come*, 35 U. MIAMI L. REV. 727, 730 (1981). Pro bono services are especially necessary in civil cases because the constitutionally guaranteed right to assignment of counsel only extends to criminal cases. U.S. CONST. amend. VI. In addition, low- and moderate-income communities need pro bono legal-related assistance in matters outside the courtroom, including administrative actions, alternative dispute resolution, and tax preparation. See Jennifer Gerarda Brown, *Rethinking "The Practice of Law"*, 41 EMORY L.J. 451, 460 (1992); Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1125 (1991).

2. Piscevich, Nov. 1994, *supra* note 1, at 4; Richard B. Schmitt, *Nevada Bar Offers Pro Bono Plan to Stem Nonlawyer Competition*, WALL ST. J., Jan. 9, 1995, at B3. Other states considering the issue have rejected the creation of a pro bono requirement. See generally A.B.A. CTR. FOR PRO BONO, *THE LAW OF PRO BONO: MANDATORY, ASSIGNED COUNSEL AND OTHER LEGAL ISSUES* (1994) (providing examples of the current pro bono law in several states). From the mid-1970s to the mid-1980s, several national and local bar associations considered and proposed mandatory pro bono. Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 889 (1991). State-level reform efforts were largely unsuccessful, particularly in Oregon, Maryland, North Dakota, and Washington, where mandatory pro bono was resisted or rejected. *Id.* at 894-95. Most recently, the Texas Supreme Court threw out a lawsuit asking the state bar association to mandate pro bono, affirming the lower court's ruling that the lower court had no jurisdiction in the case. Ben Wear, *Court Decision Puts Mandatory Pro Bono in Legal Limbo*, AUSTIN AM.-STATESMAN, Dec. 23, 1994, at B6.

3. See Margo Piscevich, *A View from the Top*, NEV. LAW., Feb. 1995, at 2, 2 [hereinafter Piscevich, Feb. 1995] (stating that most members of the bar felt that the Board of Governors had received insufficient input before the petition was filed).

Within days SBN members voiced their opposition to the plan. A “‘vocal minority’”<sup>4</sup> called the program “‘immoral’” and “‘socialistic.’”<sup>5</sup> Some even accused the state bar of contributing to a “‘welfare state.’”<sup>6</sup> With such vehement opposition, the Board of Governors felt it had no choice but to withdraw the petition and instead voted to develop new proposals for increasing voluntary pro bono.<sup>7</sup>

Mandatory pro bono supporters cannot shrug off what happened in Nevada as the aberrant behavior of a bunch of “‘cowboys.’”<sup>8</sup> The arguments Nevada attorneys raised have been part of the mandatory pro bono debate all along.<sup>9</sup> While a twenty-hour annual requirement averages out to only five minutes a day, five days a week, attorneys inevitably balk when a state bar attempts to designate how that time—however small—is spent. Those are *their* five minutes.

The purpose of this Comment is not to argue the merits of pro bono service. With the recent cut in funding for the Legal Services Corporation,<sup>10</sup> there is little doubt that the legal needs of low- and moderate-income people are huge.<sup>11</sup> The issue this Comment will focus on is whether mandatory pro bono opponents correctly assert that mandatory pro bono will paradoxically lead to a *violation* of attorneys’ ethical obligations.

This Comment will first use the recent history of pro bono in Nevada as a case study to identify the obstacles to implementing mandatory service programs. Next, it will briefly outline the most common objections to mandatory pro bono. Finally, this Comment

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4. *Nevada’s Pro Bono Mandate Triggers Anger Among Lawyers*, LAWYER, May 2, 1995, at 5 [hereinafter *Mandate Triggers Anger*].

5. Franny Forsman, “. . . With Liberty and Justice for All?”, NEV. LAW., June 1995, at 12, 12.

6. *Id.*

7. Ed Vogel, *Nevada Bar Abandons Pro Bono Requirement*, LAS VEGAS REV.-J., Jan. 14, 1995, at 3B.

8. *Mandate Triggers Anger*, *supra* note 4, at 5 (quoting a statement by Rosie Small, Nevada State Bar director).

9. Forsman, *supra* note 5, at 12 (referring to some of the “routine arguments” raised against mandatory pro bono).

10. On April 10, 1995, President Clinton signed a bill which cut \$15 million from the Legal Services Corporation’s 1995 budget. *Id.*

11. Indigent people often have greater legal needs than those in the middle class. Wear, *supra* note 2, at B6 (citing LeRoy Cordova, executive director of the Texas Equal Access to Justice Foundation). However, some people still maintain that the poor and middle class regard legal services as an expendable luxury. Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1116 (1992) (stating that mandatory pro bono will not help the poor since legal services are “very, very low on a poor person’s shopping list”).

will discuss these objections in light of the purpose and policy behind the American Bar Association's (ABA) *Model Rules of Professional Conduct*, concluding that the ethical rules do not bar mandatory pro bono.

## II. THE STATE BAR OF NEVADA PETITION

In 1994 sixty percent of low- and moderate-income Nevada households with legal problems had no legal services available to them.<sup>12</sup> An estimated 26.4% of these households attempted to handle legal problems on their own.<sup>13</sup> Others neglected legal problems entirely or received less assistance than they needed.<sup>14</sup> Even where voluntary pro bono programs were in place, such as in Clark and Washoe counties, needs of residents far outpaced hours volunteer attorneys could provide.<sup>15</sup>

Into Nevada's legal vacuum slipped nonlawyer practitioners who gladly serviced the working poor.<sup>16</sup> These practitioners, also called scriveners, promised lower fees and equivalent services.<sup>17</sup> Indigent clients were easy targets for scriveners since an estimated 25.8% of households without legal representation believed either that lawyers and legal remedies were too expensive or that a lawyer could not help their situation.<sup>18</sup> But scriveners worked without attorney supervision, without having their work reviewed by an attorney, and without regulation.<sup>19</sup> Unsurprisingly, clients using scriveners often received substandard advice<sup>20</sup> while ultimately paying as much or more for nonlawyer services as they would have spent to hire an attorney in the first place.<sup>21</sup>

12. THE STUDY COMM. ON AVAILABILITY OF LEGAL SERVS. IN NEV., STATE BAR OF NEV., THE NEVADA LEGAL NEEDS STUDY 3 (1994) [hereinafter NEVADA LEGAL NEEDS STUDY].

13. *Id.*

14. *Nevada Petition*, *supra* note 1, at 2. Factors in some people's decision to forego seeking legal services included fear of retaliation, fear of being turned down for legal aid, and lack of knowledge of legal help sources. NEVADA LEGAL NEEDS STUDY, *supra* note 12, at 4.

15. Forsman, *supra* note 5, at 12.

16. *Id.* Scriveners were charging consumers for help with filling out forms covering simple bankruptcies, divorces, and wills. Schmitt, *supra* note 2, at B3.

17. Forsman, *supra* note 5, at 12; see Cramton, *supra* note 1, at 1117.

18. NEVADA LEGAL NEEDS STUDY, *supra* note 12, at 3. An estimated 23.1% of households with no legal help sought third-party nonlegal advice. *Id.* at 23.

19. Piscevich, Nov. 1994, *supra* note 1, at 2.

20. Mike Yuille, *Vegas to See Pro Bono Gamble*, *LAWYER*, Dec. 20, 1994, at 5.

21. See *Nevada Petition*, *supra* note 1, at 3; Forsman, *supra* note 5, at 12.

Problems with scriveners became so intense that in 1992 the Nevada Supreme Court affirmed an injunction against the unauthorized practice of law by a group of legal technicians.<sup>22</sup> Because nothing in the record evidenced the need for legal services to low-income Nevadans, the court ordered that the SBN assemble a committee to investigate the extent of the alleged unavailability of legal services for low- and middle-income people<sup>23</sup> that seemed to be fueling the growth of the scrivener industry.

The SBN assembled the Study Committee on Availability of Legal Services in Nevada (Study Committee), comprised of practitioners, judges, paralegals, educators, and others involved with providing legal services to indigent people.<sup>24</sup> The Study Committee undertook telephone surveys and in-person interviews covering the northern urban, southern urban, and rural sections of the state.<sup>25</sup> During the study period scriveners introduced legislation that would have created a class of nonlawyers able to perform most legal functions—including drafting pleadings, settling cases, and giving legal advice—with no professional accountability.<sup>26</sup> The SBN was able to convince the state legislature to table the scriveners' legislation pending the results of the Study Committee's findings.<sup>27</sup>

The Study Committee found that the number of Nevadans living below the poverty line between 1980 and 1990 had grown to 240,000 citizens—an increase of seventy-four percent.<sup>28</sup> About 108,000 low- and moderate-income Nevada households had experienced at least one significant legal problem during the prior five years, primarily in the areas of housing, employment, bankruptcy, and health care.<sup>29</sup>

The SBN used the Study Committee's findings to determine that the best way to address the growing legal needs of the underserved indigent population was to adopt a mandatory twenty-hour annual pro

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22. *Greenwell v. State Bar of Nev.*, 836 P.2d 70 (Nev. 1992).

23. *Id.* at 71.

24. *Nevada Petition*, *supra* note 1, at 1. The members of the Study Committee were Franny Forsman, Gary Booker, Thomas Davis, Frances Doherty, Carolyn J. Embry, Doug Emerick, Leonard Gang, Geoffrey Giles, Nancy Hart, Ishi Kunin, Jack Lehman, Sonny C. Lyerly, Ernie Nielsen, Wayne Pressel, Kathleen Price, Rosie Small, and Julie Smith. NEVADA LEGAL NEEDS STUDY, *supra* note 12, at 1.

25. NEVADA LEGAL NEEDS STUDY, *supra* note 12, at 49.

26. Piscevich, Nov. 1994, *supra* note 1, at 2.

27. *Id.*

28. *Nevada Petition*, *supra* note 1, at 2.

29. NEVADA LEGAL NEEDS STUDY, *supra* note 12, at 3.

bono requirement for every SBN member practicing in Nevada.<sup>30</sup> The increase in pro bono service to the community would simultaneously mitigate the growing problems the scriveners caused by removing some of the perceived obstacles to service.<sup>31</sup> In addition, the SBN drafted legislation to clarify Nevada's unauthorized practice of law statute to help police scriveners.<sup>32</sup>

On September 16, 1994, the SBN Board of Governors voted unanimously to petition the Nevada Supreme Court to implement the Study Committee's mandatory pro bono plan.<sup>33</sup> The SBN announced the petition in the November issue of *Nevada Lawyer*,<sup>34</sup> and the petition was filed on November 10, 1994.<sup>35</sup>

#### A. *The Specifics of the Petition*

To be truly mandatory, a compulsory pro bono program must contain a quantifiable, enforceable, and enforced obligation that is a condition of continuing licensure.<sup>36</sup> The SBN plan contained all of these elements. In addition, the petition had several options for performing service.<sup>37</sup>

SBN members could receive prescreened clients through a bar-sponsored referral service, obviating the need for attorneys to spend their own time seeking out pro bono clients.<sup>38</sup> Members could also arbitrate or mediate in court-referred cases involving parties of low or moderate means.<sup>39</sup> Alternatively, those wishing to forego ongoing casework could fulfill their pro bono commitment by answering legal questions at libraries, clinics, and courthouses; assisting specialty bar associations in developing simple legal forms for *in propria persona*

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30. Piscevich, Nov. 1994, *supra* note 1, at 4; Schmitt, *supra* note 2, at B3.

31. Schmitt, *supra* note 2, at B3.

32. Piscevich, Nov. 1994, *supra* note 1, at 4.

33. *Nevada Petition*, *supra* note 1, at 5. One member not present when the vote was taken was quick to criticize the program and to point out that he was absent. Schmitt, *supra* note 2, at B3 (quoting Coe Swobe).

34. Piscevich, Nov. 1994, *supra* note 1, at 4.

35. *Nevada Petition*, *supra* note 1, at 1.

36. Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 81 (1990).

37. *Nevada Petition*, *supra* note 1, at 6-7. For details on other states' mandatory pro bono proposals, see A.B.A. CTR. FOR PRO BONO, *supra* note 2.

38. *Nevada Petition*, *supra* note 1, at 6.

39. *Id.* at 6-7.

litigants of low and moderate incomes; or providing service in any other way approved by the SBN.<sup>40</sup>

Another pro bono option available to SBN members was to pay \$500 annually to an SBN fund.<sup>41</sup> The SBN's Pro Bono Board, to be established by the petition, would collect the fund of "buyout" money and allocate grants to organizations whose sole purpose was to provide legal service to low-income Nevada residents.<sup>42</sup>

Additionally, SBN members could accept referral cases from the SBN's Lawyer Referral and Information Service on a reduced-fee basis.<sup>43</sup> Under this option, attorneys could charge up to \$50 per hour<sup>44</sup>—instead of the average fee of \$150 per hour<sup>45</sup>—and receive two-thirds-hour credit toward their pro bono requirement for each hour worked at the reduced fee.<sup>46</sup> The reduced fee option would give the SBN a way to serve clients with modest incomes who would ordinarily fall above the income restrictions for free legal aid.<sup>47</sup>

Members would report reduced fee hours, conventional pro bono hours, and buyout payments to the SBN.<sup>48</sup> The SBN would be responsible for enforcing the requirements against members who

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40. *Id.* The SBN plan's service options were designed to fill the needs of low- and moderate-income Nevadans and excluded clients such as nonprofit organizations and others who have also traditionally benefited from free legal service. *See id.* at 6-8; *supra* note 1. Other proposals that have restricted mandatory service to indigent people have reduced the number of hours from the ABA's aspirational goal of 50 hours per year to only 20 hours per year. *See, e.g.,* Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215, 215 (1993) (stating that the reduction in mandated hours was to offset the exclusion of nonindigent clients from receiving service).

41. *Nevada Petition, supra* note 1, at 7.

42. *Id.*

43. William Kerry Skaggs, *State Bar Expands Lawyer Referral Service to Meet Needs of Working Poor*, NEV. LAW., Dec. 1994, at 4, 4.

44. *Nevada Petition, supra* note 1, at 7.

45. Yuille, *supra* note 20, at 5.

46. *Nevada Petition, supra* note 1, at 7. Allowing attorneys to receive mandatory pro bono credit for services rendered at a reduced fee comports with the public interest legal service ethical obligation set forth in the *Model Rules of Professional Conduct* (Model Rules). MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1994) [hereinafter MODEL RULES] (stating that participating in programs "in which the fee is substantially below a lawyer's usual rate [is] encouraged").

47. Wm. Kerry Skaggs, *The Reduced Fee Panel . . . Bridging the Gap of Unmet Legal Needs*, NEV. LAW., June 1995, at 18.

48. *Nevada Petition, supra* note 1, at 8.



failed to meet their obligations.<sup>49</sup> Members who did not comply with the pro bono requirements could have their licenses revoked.<sup>50</sup>

### B. *SBN Members' Reaction*

Although the press reported broad-based popular support,<sup>51</sup> members complained that they were not consulted about the plan before it was announced in *Nevada Lawyer*.<sup>52</sup> Mandatory pro bono turned out to be a highly emotional issue that oddly united attorneys and scriveners.<sup>53</sup> Nevada Supreme Court justice Charles Springer denounced the SBN plan as "undemocratic."<sup>54</sup> SBN Board of Governors member Coe Swobe, who was absent for the vote on the petition, called it unfair to solo practitioners and criticized the "maternalistic attitude" implicit in mandatory pro bono.<sup>55</sup> Nonlawyer Glen Greenwell of Greenwell Paralegal Center in Reno claimed the plan was "self-serving."<sup>56</sup> Nevertheless, Greenwell dismissed the notion that the SBN petition was a potential threat to his business, saying that even mandatory pro bono could not realistically meet all the legal needs of the low-income community.<sup>57</sup>

Some of the most vigorous opponents of the program were attorneys who donate many pro bono hours each year—often more hours than the proposal required.<sup>58</sup> The underlying theme from

49. *Id.* at 7.

50. See Piscevich, Nov. 1994, *supra* note 1, at 4. For a discussion of administrative and enforcement management issues, see Silverman, *supra* note 2, at 906-08.

51. Yuille, *supra* note 20, at 5 (estimating that Nevada's judges, 75% of SBN leaders, and the 1.5 million people living in the state supported the mandatory pro bono scheme).

52. In his opposition to the SBN petition, Nevada Supreme Court justice Charles E. Springer asked the SBN Board of Governors to consult the membership about the plan. Opposition to Petition for Amendment of Supreme Court Rule Relating to Mandatory Contribution of Services or Money and Counter-Petition at 9, *In re* Amendment to the Supreme Court Rules Mandating that Attorneys Licensed to Practice in the State of Nevada Shall Perform Certain Hours of *Pro Bono Publico* (Nev. 1994) (ADKT 200) [hereinafter *Counter-Petition*].

53. See Philip P. Houle, *Is Mandatory Uncompensated Pro Bono in Civil Cases Constitutional?*, *NEV. LAW.*, June 1995, at 20, 20.

54. *Counter-Petition*, *supra* note 52, at 8.

55. Schmitt, *supra* note 2, at B3 (quoting SBN Board of Governors member Coe Swobe).

56. *Id.* (quoting Glen Greenwell). Glen Greenwell was a defendant in the Nevada case involving the unauthorized practice of law that provided the impetus to form the Study Committee. See *Greenwell v. State Bar of Nev.*, 836 P.2d 70 (Nev. 1992).

57. Schmitt, *supra* note 2, at B3 (citing Glen Greenwell).

58. See *Mandate Triggers Anger*, *supra* note 4, at 5 (citing Rosie Small, Nevada State Bar director).

these attorneys was an unwillingness to participate in the program simply because it was "‘mandatory.’"<sup>59</sup> Also among these opponents were those who felt that a mandatory pro bono requirement cheapened the significance of their service.<sup>60</sup>

### C. *Abandoning the Petition*

In January 1995, when the Board of Governors realized that Nevada attorneys did not fully support the proposal, it decided to withdraw the petition.<sup>61</sup> Just as a New York State Bar Association committee concluded that mandatory pro bono would be ineffective because "effort expended voluntarily will normally produce far more quality results than will conscripted effort,"<sup>62</sup> the SBN determined that it would be more beneficial to the working poor to extend members the carrot of bar-supported voluntary pro bono programs rather than the stick of mandatory service.<sup>63</sup> Its decision came only days after *The Wall Street Journal* hailed the imminent adoption of mandatory pro bono in Nevada.<sup>64</sup>

Despite the SBN's withdrawal of the petition, the Nevada Supreme Court asked that the Board of Governors continue with its pro bono efforts.<sup>65</sup> To satisfy the request of the court as well as the needs of low-income Nevadans, the Board of Governors voted to make providing legal services to the poor a "number one priority."<sup>66</sup> A new SBN committee devised an alternate program to address both the unmet legal needs of the working poor and the problem of scriveners.<sup>67</sup>

The recommendations from the new committee included aspirational goals for the number of pro bono hours Nevada attorneys should render annually, a call for further examination of legal needs in the state, the creation of local committees to determine how best to meet regional legal needs, increased funding for the SBN's lawyer referral service, and an offer of free programming in exchange for pro

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59. *Id.* (quoting Rosie Small, Nevada State Bar director).

60. *See infra* part III.B.1.

61. Vogel, *supra* note 7, at 3B.

62. NEW YORK STATE BAR ASS'N, REPORT OF THE SPECIAL COMM. TO REVIEW THE PROPOSED PLAN FOR MANDATORY *PRO BONO* SERVICE 37 (1989).

63. *See* Forsman, *supra* note 5, at 13.

64. Schmitt, *supra* note 2, at B3.

65. Piscevich, Feb. 1995, *supra* note 3, at 2.

66. *Id.*

67. Forsman, *supra* note 5, at 13.

bono service—including free continuing legal education in areas of poverty law.<sup>68</sup> The revised plan also included a two-year examination period to determine the plan's success.<sup>69</sup>

The new committee's intent was to increase volunteerism in those areas that the Study Committee found the most critically underserved: family law, consumer protection, landlord-tenant, and employment.<sup>70</sup> If what members said was true—that they would provide pro bono service so long as they were not forced to provide it—creating opportunities for pro bono would increase significantly the satisfaction of legal needs in the community.

### III. THE ARGUMENTS AGAINST MANDATORY PRO BONO

The arguments raised by the vocal minority opposing mandatory pro bono in Nevada are not new.<sup>71</sup> The ABA Commission on Evaluation of Professional Standards' (the Kutak Commission)<sup>72</sup> original draft of the Model Rules that called for mandatory pro bono<sup>73</sup> met with opposition for political and philosophical reasons—including a feeling that mandatory service implied an unwarranted lack of confidence in attorneys' commitment to the community.<sup>74</sup> Opposition was so strong that the adoption of the Model Rules

68. *Id.* at 13-14.

69. *Id.* at 14.

70. Piscevich, Feb. 1995, *supra* note 3, at 2.

71. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 & legal background (1992).

72. Smith, *supra* note 1, at 727-28.

73. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (Discussion Draft 1980).

The proposed language read:

A lawyer *shall* render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations. A lawyer shall make an annual report concerning such service to appropriate regulatory authority.

*Id.* (emphasis added).

74. Smith, *supra* note 1, at 728. In contrast to the SBN petition, the vague language of the Kutak Commission's proposal did not include a specified number of hours, a system of reporting, or a way of punishing those who did not comply. *Id.* Neither did it include any provisions for attorneys serving in military, government, judicial, or public interest organizations. *Id.* In short, it was neither quantifiable nor practically enforceable. *See supra* notes 36-50 and accompanying text.

as a whole was jeopardized.<sup>75</sup> In the end opposition rendered the language of Model Rule 6.1 nonenforceable.<sup>76</sup>

Regulatory bodies before and including the SBN have been reluctant to combat the political difficulties of member participation in mandatory pro bono programs and have repeatedly allowed the arguments that follow to come between legal services and the poor.<sup>77</sup> This Comment will first present general arguments to mandatory pro bono, then arguments specifically relating to attorneys' ethical obligations.

### A. General Arguments

#### 1. Argument one: "mandatory pro bono is unconstitutional"

Opponents of mandatory pro bono raise a constitutional shield against required service, invoking the guarantees of freedom of association and belief; freedom from uncompensated takings; and freedom from involuntary servitude.<sup>78</sup>

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75. Smith, *supra* note 1, at 728.

76. MODEL RULES, *supra* note 46, Rule 6.1. Nevada Supreme Court Rule 191 strongly encourages members to perform pro bono work, although the SBN has found that many objectors appeared unaware of this rule. NEV. SUP. CT. R. 191 (Michie 1995) ("A lawyer should render public interest legal service."); Forsman, *supra* note 5, at 14 n.3. Although Rule 191 does not specify the number of hours members should serve each year, Model Rule 6.1 set 50 hours per year as the aspirational goal for every lawyer—150% more hours than the SBN petition required. MODEL RULES, *supra* note 46, Rule 6.1.

77. See Lardent, *supra* note 36, at 99-100; cf. Sol Wachtler, *Introduction*, 19 HOFSTRA L. REV. 739, 743 (1991) (announcing that New York would defer adopting mandatory pro bono).

78. See Forsman, *supra* note 5, at 12-13. Opponents have also raised the doctrine of unconstitutional conditions in conjunction with the constitutional arguments outlined in Part III.A as a way of rebutting mandated service. *E.g.*, State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 769 (Mo. 1985) (en banc). The doctrine of unconstitutional conditions applied in the context of mandatory pro bono says that the "right to practice law, or to engage in any occupation requiring a state license, must not be predicated upon the relinquishment of constitutional rights." *Cunningham v. Superior Ct.*, 177 Cal. App. 3d 336, 347, 222 Cal. Rptr. 854, 861 (1986) (citations omitted). The unconstitutional conditions argument depends on finding a constitutional right. *See id.* Even assuming that mandatory pro bono does implicate a constitutional right, however, the doctrine of unconstitutional conditions is inapplicable when there is a compelling state interest for instituting the requirement. *See Madarang v. Bermudes*, 889 F.2d 251, 252 (9th Cir. 1989) (citations omitted), *cert. denied*, 498 U.S. 814 (1990). Since such a large percentage of legal needs was unmet it is likely that Nevada's interest in ensuring universal access to justice would be compelling enough to outweigh the alleged relinquishment of constitutional rights.

a. *First Amendment*

Opponents argue that mandatory pro bono which designates the agencies that could receive service under pro bono requirements, violates the First Amendment right to be free from coerced association with ideas, causes, and conduct held by others.<sup>79</sup> Others argue that mandatory pro bono creates and supports a value system that implicates these First Amendment rights of freedom of speech and association.<sup>80</sup> However, a First Amendment analysis would not have applied to the SBN's petition. The petition's service options would have been so flexible that SBN members would not be forced to espouse any particular belief, thus no rights of association or belief would have been implicated.<sup>81</sup>

The First Amendment argument would have been similarly weak against the SBN's buyout option. There would be no First Amendment right to determine what organizations would be funded with money from the buyout.<sup>82</sup> As a mandatory bar the SBN's rules are codified as statutes.<sup>83</sup> Just as taxpayers have no constitutional right to have their payments directed toward specific causes or prevent funding of specific causes,<sup>84</sup> attorneys would have had no First Amendment recourse to dispute what organization received money paid to the SBN buyout fund.<sup>85</sup>

b. *Fifth Amendment*

Opponents rely on two components of a Fifth Amendment "takings" argument to rebut mandatory pro bono. First, opponents assert that attorneys' services are property within the meaning of the

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79. See Houle, *supra* note 53, at 24-25.

80. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 5-6 (1990).

81. This statement assumes that providing service to a particular group of poor people is not the same as espousing a political belief. See Coombs, *supra* note 40, at 223 n.20.

82. *But see Keller*, 496 U.S. at 14 (holding that there are limits to the types of activities that a bar association can support using funds raised through member dues). The difference between the financial obligation disputed in *Keller*—bar association membership dues—and the financial obligation in the SBN plan—the buyout election—is that the SBN buyout was not the sole way of fulfilling the mandatory pro bono condition of membership. SBN members had several other nonfinancial service options to support the activity of their choice wherein no First Amendment right would be implicated.

83. *E.g.*, NEV. SUP. CT. R. 191 (Michie 1995) (Nevada's voluntary pro bono rule).

84. For a discussion of general tax considerations with regard to mandatory pro bono, see Silverman, *supra* note 2, at 941-48.

85. Coombs, *supra* note 40, at 223-24.

Fifth Amendment.<sup>86</sup> Opponents assert attorney services are indeed property because requiring attorneys to provide free use of their stock and trade is akin to taking "a grocer's stock, an electrician's tools, or an individual's home."<sup>87</sup>

Once opponents conclude that attorney services are property, they claim that mandatory pro bono would still withstand any further Fifth Amendment challenge because government-mandated takings may not be used for ideological purposes unrelated to the business of the bar, including, presumably, pro bono service to the poor.<sup>88</sup> As with the other constitutional objections, however, courts have not been able to reach a consensus on the Fifth Amendment issue.<sup>89</sup>

### c. Thirteenth Amendment

Opponents, like the SBN's vocal minority, claim that the mandatory pro bono requirement is a form of involuntary servitude in violation of the Thirteenth Amendment.<sup>90</sup> Numerous courts have rejected this Thirteenth Amendment argument<sup>91</sup> primarily because mandatory pro bono does not impair attorneys' physical liberty.<sup>92</sup> Possible disbarment or revocation of license for refusing to perform pro bono services has not been enough to induce courts to invalidate mandatory service.<sup>93</sup> The SBN petition's flexibility would have given

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86. See *Colbert v. Rickmon*, 747 F. Supp. 518, 520 (W.D. Ark. 1990). Some courts have held that attorneys' services can be interpreted as property. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (holding that a state could not exclude an applicant to the bar without reason); *Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Utah 1968) (holding that compulsory attorney service without compensation is a taking).

87. *Roper*, 688 S.W.2d at 764. For a discussion of comparisons of attorneys to other professionals, see *infra* part III.B.3.

88. See *Keller*, 496 U.S. at 14 (holding that bar dues may not be used for ideological purposes); cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (holding that union dues may only be used for ideological purposes where employees do not object to advancing those ideas and are not coerced into financing those ideological purposes).

89. Compare *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) ("[T]he lawyer has consented to, and assumed, this [pro bono] obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.'"), *cert. denied*, 382 U.S. 978 (1966) with *Roper*, 688 S.W.2d at 769 ("We will not permit the State to deprive a citizen of this constitutional right [to the enjoyment of the gains of their own industry] as a condition to granting a license or privilege.").

90. Vogel, *supra* note 7, at 3B.

91. See *In re Amendments to Rules Regulating the Fla. Bar*, 573 So. 2d 800, 805 (Fla. 1990). *Contra Bedford*, 447 P.2d at 195.

92. Houle, *supra* note 53, at 25.

93. *Id.* But see John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*,

attorneys the opportunity to fulfill their requirements in virtually any location and for virtually any organization<sup>94</sup> thus eliminating the constraints opponents predicted.

2. Argument two: "the community doesn't need legal services"

Some opponents argue that mandatory pro bono is unnecessary because there are no unmet legal needs in the community.<sup>95</sup> Nevada's statistics, however, had demonstrated the contrary. Moreover, as the number of Nevadans with unmet legal needs increased,<sup>96</sup> the number of public interest attorneys available had decreased.<sup>97</sup> In Nevada attorneys had tried to satisfy those needs through voluntary pro bono programs.<sup>98</sup> However, the pro bono programs could only help a narrow group of low-income clients because of lack of government funding and low attorney participation.<sup>99</sup> Nevada attorneys had also tried to increase legal access for underserved populations by encouraging alternative methods of dispute resolution, such as mediation or arbitration.<sup>100</sup> Again, due to a shortage of government funding and attorney volunteers, even alternative methods failed to broaden significantly the base of legal help for the needy.<sup>101</sup>

Even if Nevada had been without unmet legal needs, opponents cannot assert this argument against mandatory pro bono nationwide. In 1981 the national ratio of legal services attorneys to eligible indigents was 1 to 9585.<sup>102</sup> By 1989 the New York State Bar

19 HOFSTRA L. REV. 1229, 1261 (1991) (arguing that law school indebtedness may constrain attorneys' choice between compliance or revocation of license).

94. *Nevada Petition*, *supra* note 1, at 6-7.

95. Coombs, *supra* note 40, at 216.

96. *See supra* notes 24-29 and accompanying text.

97. *E.g.*, Vogel, *supra* note 7, at 3B (citing Nevada Legal Services executive director Wayne Pressel as saying that Nevada Legal Services' 18-attorney staff has been cut nearly in half as a result of reduction of federal grants).

98. *See, e.g.*, Nancy E. Hart, *Volunteer Lawyers of Washoe County*, NEV. LAW., June 1995, at 15 (describing the pro bono efforts of local lawyers working with poor clients for the past five years); Dennis M. Hetherington, *Clark County Pro Bono Project*, NEV. LAW., June 1995, at 17 (describing Clark County's volunteer program working with low- and moderate-income clients for the past 10 years); *Rural County Pro Bono Program*, NEV. LAW., June 1995, at 16 (describing new efforts for poor clients coordinated by Nevada Legal Services).

99. *Nevada Petition*, *supra* note 1, at 4.

100. *Id.*

101. *Id.*

102. Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV.

Association Legal Needs Study reported that New York low-income households were facing an average of more than two noncriminal legal problems without legal assistance during the study year.<sup>103</sup> In 1991 the Texas State Bar determined that available sources met only sixteen percent of the legal needs of Texas's 3.5 million poor people.<sup>104</sup> In 1993 the ABA reported that legal resources were addressing only about fifteen to twenty percent of legal needs among the indigent population.<sup>105</sup>

Yet attorney participation in voluntary pro bono programs has not increased significantly despite greatly intensified and highly creative recruiting efforts.<sup>106</sup> In 1990 only an average of 16.9% of attorneys participated in organized pro bono programs for the poor.<sup>107</sup> Today at most only twenty to thirty percent of attorneys participate in any type of pro bono.<sup>108</sup> Clearly the need for legal services does exist, and it is staggering.<sup>109</sup>

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545, 547 n.12 (1991).

103. NEW YORK STATE BAR ASS'N, THE NEW YORK LEGAL NEEDS STUDY 159 (1993). For a general discussion of the way New York was striving to meet legal needs, see Silverman, *supra* note 2, at 928-41.

104. Wear, *supra* note 2, at B6.

105. AMERICAN BAR ASS'N STANDING COMM. ON LAWYERS' PUB. SERV. RESPONSIBILITY ET AL., REPORT ACCOMPANYING PROPOSED REVISIONS TO MODEL RULE OF PROFESSIONAL CONDUCT 6.1, at 6-7 (1993).

106. Lardent, *supra* note 36, at 90.

107. *Id.* This figure had been reported by the ABA as 17.7% in 1988. Richard Lacayo, *The Sad Fate of Legal Aid*, TIME, June 20, 1988, at 59, 59 [hereinafter Lacayo, *Legal Aid*].

108. Houle, *supra* note 53, at 20.

109. Some mandatory pro bono opponents concede the apparent deficiency in the number of pro bono attorneys for indigent clients but argue that the indigent population does not actually *desire* legal help. Scully, *supra* note 93, at 1235. These opponents argue that "there is no necessary connection between an increase in poverty and the need for increased legal services." *Id.* at 1234. These opponents presume that the legal system has no practical application in the everyday lives of the indigent population. *Id.* at 1235 ("If given the option, the poor might very well prefer a cash payment in lieu of legal services. It is not at all certain that the poor place as a high a value on legal service as does [New York's Committee to Improve the Availability of Legal Services]."). Accordingly, despite the relatively small ranks of public interest attorneys as compared to the number of legal problems to solve, opponents conclude that the indigent population will not in any case utilize legal services. See generally Macey, *supra* note 11, at 1117 (asserting that "poor people do not hire lawyers because they use their limited resources to buy things that they value more than legal services").

But can state bar associations dismiss mandatory pro bono based on opponents' presumption that low-income people have better ways to spend their money? See Wachtler, *supra* note 77, at 742 ("I have yet to hear of a lawyer who, despite a conscientious effort, has been unable to find someone in need of pro bono legal services. And no one in the legal services community has come forward to say 'Thanks, but no thanks—we



3. Argument three: "mandating service for the indigent population is not the duty of the state bar"

Some mandatory pro bono opponents claim that shortage of legal services is a matter for the legislative and judicial branches of government who have failed to ensure universally affordable justice.<sup>110</sup> Others believe that it is the legislature alone, not the courts, who should be responsible for providing legal services.<sup>111</sup> In the concurring opinion of a recent Texas Supreme Court case that threw out a lawsuit asking the State Bar of Texas to mandate pro bono, one justice wrote, "This Court lacks the resources and/or the political will to attempt further resolution of the profound problem of providing legal services for indigent citizens. . . . The Legislature is better suited to tackle this social problem."<sup>112</sup>

Opponents of mandatory pro bono also argue that the regulatory bodies of doctors and other licensed professionals impose no public service obligation, therefore bar associations should not be able to mandate pro bono.<sup>113</sup> These opponents believe that requiring attorneys to undertake litigation that society would not otherwise support will confirm suspicions that attorneys take themselves "way, way too seriously."<sup>114</sup>

However, comparisons to other professions are inappropriate.<sup>115</sup> Hospital doctors are barred by federal and some state statutes from denying an indigent patient urgent care treatment;<sup>116</sup> however, no

don't need the help.'"). From a practical standpoint, it is in attorneys' own interests to fill society's legal needs—real or perceived—or risk having their professional freedom curtailed. Smith, *supra* note 1, at 734 ("If the legal profession does not address society's needs, society will satisfy those needs through other means, thus reducing the autonomy that the profession currently enjoys.").

110. See Matalon, *supra* note 102, at 546.

111. *Roper*, 688 S.W.2d at 769 ("The courts of this state have no inherent power to appoint or compel attorneys to serve in civil actions without compensation. Providing for such representation and the funding thereof is a matter for legislative action.").

112. *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 248 (Tex. 1994) (Gonzalez, J., concurring).

113. *Colbert*, 747 F. Supp. at 525; Forsman, *supra* note 5, at 12; Silverman, *supra* note 2, at 1011-12.

114. Macey, *supra* note 11, at 1123.

115. However, if lawyers' duty to the poor *were* compared to the duty of, for example, doctors, it is arguable that the medical profession has many more burdens than lawyers would have, even under an annual 20-hour requirement. Silverman, *supra* note 2, at 1012-13.

116. *Id.* at 1013.

parallel laws or comparable “emergency room” services exist for indigent litigants.<sup>117</sup> In addition, other professions have no “ancient and established tradition” of pro bono as does the legal profession.<sup>118</sup>

Moreover, unmet legal needs *are* a burden best shouldered by the regulatory bodies of the legal profession rather than by society as a whole,<sup>119</sup> in part because attorneys have helped to cause some of the problems of the indigent population.<sup>120</sup> The legal profession has traditionally discouraged cost-reducing innovations such as mediation, arbitration, and other alternative dispute resolution strategies, relegating indigent citizens to a cycle of ever-growing legal problems.<sup>121</sup> Nevada’s battle against scriveners—notwithstanding the abuse of the legal process by some nonlawyer practitioners—is an example of such resistance.<sup>122</sup> While other professional licensing bodies may not require pro bono service for their members, the argument that state bar associations are unjustified in doing so is erroneous.<sup>123</sup>

### B. Ethical Arguments

#### 1. Argument one: “attorney expertise won’t satisfy client need”

Opponents assert that mandatory pro bono is impractical because attorneys may be forced to accept cases in areas where they have no expertise just to fulfill their required hours.<sup>124</sup> Other opponents claim that because the interests and skills of the available attorneys

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117. Telephone Interview with Franny Forsman, President-Elect, State Bar of Nevada (July 18, 1995).

118. *Dillon*, 346 F.2d at 635.

119. Barlow F. Christensen, *The Lawyer’s Pro Bono Publico Responsibility*, 1981 AM. B. FOUND. RES. J. 1, 16-17.

120. Silverman, *supra* note 2, at 1016-18 (describing ways indigent people are harmed, directly and indirectly, by attorneys).

121. *Id.* at 1018. The SBN petition did provide for several ways to serve indigent Nevadans, including alternative dispute resolution and other methods to minimize the number of instances where indigent people would need to go to court. See *Nevada Petition*, *supra* note 1, at 6-7.

122. Piscevich, Nov. 1994, *supra* note 1, at 4.

123. See Silverman, *supra* note 2, at 1015 (“[E]ven assuming that the lawyers are truly singled out by mandatory pro bono programs, they deserve to be.”).

124. See Forsman, *supra* note 5, at 12 (citing claims that mandatory pro bono would cause malpractice).

would be unlikely to match the needs of indigent clients, they should not be mandated to perform service at all.<sup>125</sup>

In Nevada the SBN plan's flexibility would have mooted the argument that available skills would not match client need. Although it could be challenging to find ways for corporate counsel, government employees, or criminal lawyers to assist in areas of greatest need, the SBN plan encompassed a broad spectrum of pro bono activities.<sup>126</sup> Moreover, the buyout would have funded gaps where legal needs and available skills didn't match.<sup>127</sup>

In part to alleviate concerns about effectiveness of service, the SBN had also planned to implement a mentoring component as part of its mandatory pro bono plan.<sup>128</sup> Mentoring would have drawn in some of the SBN's emeritus and inactive members and given the large population of young solo practitioners a chance to benefit from the experience and wisdom of these older members through working alongside attorneys with expertise in the field.<sup>129</sup> In general, mentoring provides a way for older members to stay involved in the legal community without having to maintain full-time practices.

Opponents' underlying argument is that mandatory pro bono will force attorneys to violate their ethical duty to represent clients competently because their knowledge of the areas where indigent people would need help most would be insufficient to comply with the ethical rules.<sup>130</sup> This argument will be discussed further in Part IV; however, the possibility that some people might remain underserved

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125. Coombs, *supra* note 40, at 224; e.g., *Mallard v. United States Dist. Court*, 490 U.S. 296, 300 (1989) (outlining an attorney's claim that a statute compelling him "to represent indigent inmates in a complex action requiring depositions and discovery, cross-examination of witnesses, and other trial skills . . . would compel him to violate his ethical obligation to take on only those cases he could handle competently"). This argument attacks public service in general rather than mandatory service specifically. Wachtler, *supra* note 77, at 741.

126. STATE BAR OF NEV., WHAT IS PRO BONO? (1995) [hereinafter WHAT IS PRO BONO?].

127. Coombs, *supra* note 40, at 224 (stating that financial contributions can be used to fund forms of legal service most desired by potential pro bono clients).

128. Telephone Interview with Franny Forsman, *supra* note 117.

129. *Contra* Richard Lacayo, *You Don't Always Get Perry Mason*, TIME, June 1, 1992, at 38, 39 (quoting Reno public defender Shelly O'Neill as saying that no amount of mentoring could be effective for certain types of cases, comparing it to "calling a dentist to do a brain surgeon's work").

130. *Id.*; Coombs, *supra* note 40, at 217, 224.

even with mandatory pro bono is ultimately irrelevant to whether required service is effective.<sup>131</sup>

2. Argument two: "mandatory pro bono produces lower quality service than voluntary pro bono"

The Nevada proposal was broad enough to allow attorneys to have retained wide latitude in choosing their pro bono clients,<sup>132</sup> however, even the most flexible mandatory pro bono program still requires attorneys to serve whether or not it is convenient.<sup>133</sup> However, opponents who assert that mandatory pro bono would produce lower quality service ultimately contend that mandated service would affect their attitude toward the service—and to the client.<sup>134</sup>

The word "mandatory" is defined as "authoritatively ordered; obligatory,"<sup>135</sup> and some opponents take offense at the implications of being authoritatively ordered to do anything.<sup>136</sup> The rationale seems to be that the reluctance to provide pro bono service will impact the ability to provide service concomitant with the commitment attorneys vowed to undertake. Attorneys raising this argument seem to equate serving with a bad attitude with poor service. This Comment will discuss in Part IV whether in light of the ethical rules it is valid to reject mandatory service because service may be rendered resentfully.

Opponents also contend that mandatory pro bono would cheapen pro bono service as a whole, eliminating psychic value to attorneys.<sup>137</sup> They claim that pro bono is a charitable act with a peculiar

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131. Coombs, *supra* note 40, at 224; *see also* Silverman, *supra* note 2, at 1024 n.281 ("The critical metaphor of choice holds that mandatory pro bono programs are unlikely to make much of 'a dent' in an extremely serious problem, described in terms of a very large unmet need for civil legal services.").

132. *See Nevada Petition, supra* note 1, at 6-7.

133. While the El Paso Bar Association (EPBA) allows members to be excused from its annual mandatory pro bono requirements for "hardship," the standard for a successful claim of hardship is quite stringent and would almost certainly exclude mere inconvenience. Telephone Interview with Nancy Gallego, El Paso Bar Association (Sept. 29, 1995).

134. Lacayo, *Legal Aid, supra* note 107, at 59 (stating that mandatory pro bono could lead to "inadequate representation by advocates who lack the conviction or specific legal skills to defend the poor").

135. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 824 (1991).

136. *Mandate Triggers Anger, supra* note 4, at 5.

137. *See* Coombs, *supra* note 40, at 217.

benefit to attorneys rendering the service;<sup>138</sup> to ensure receipt of this benefit, charity should never be mandated.<sup>139</sup> As one court stated: "Compelled legal service is totally inconsistent with the giving of pro bono service as a matter of professional responsibility or professional pride. The latter two involve a matter of professional choice. It is the choice that makes the rendering of the service self-fulfilling, pleasant, interesting, and successful."<sup>140</sup> The argument is that free legal service would become qualitatively different to attorneys if no longer voluntary—and threatens to become something less significant to the client as well.<sup>141</sup>

But the foundation of pro bono is obligation,<sup>142</sup> thus the primary purpose of mandatory pro bono is "to increase legal services for the poor. . . . not to make lawyers better people."<sup>143</sup> Pro bono is professional tithing—a requirement inherent in being part of the legal community<sup>144</sup> because law is a monopoly and only those with the exclusive license to practice law are authorized to perform services.<sup>145</sup> Even if there were an essential difference in the service rendered, such difference would be immaterial to those who benefit from pro bono. There is no qualitative difference between the way mandated service and voluntary service are *received*. Performing pro bono service *can* be personally rewarding, but statistics in Nevada and across the nation show that reliance on attorneys to make this "self-

138. *Id.* at 216.

139. Forsman, *supra* note 5, at 12.

140. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) (en banc).

141. *E.g.*, Scully, *supra* note 93, at 1264.

142. *See generally* Sandra Day O'Connor, *Legal Education and Social Responsibility*, 53 FORDHAM L. REV. 659, 661 (1985) (stating that lawyers have moral and social responsibilities that need to be "discharged by the Bar, willingly, and some would say, even unwillingly").

143. Coombs, *supra* note 40, at 216, 220-21 n.14.

144. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 362 (1990). Opponents characterize mandatory pro bono as less of a "tithe" than a "regulatory tax," claiming that it is a "compulsory levy or exaction, regularly imposed by government without conditioning taxpayer liability on any specific benefit received." Silverman, *supra* note 2, at 942. For a more detailed discussion of mandatory pro bono as a regulatory tax in the context of the report of New York's Committee to Improve the Availability of Legal Services, see *id.* at 942-48.

145. Wachtler, *supra* note 77, at 740. The "monopoly" argument in favor of mandatory pro bono is particularly applicable in Nevada, where members wanted to strengthen statutes prohibiting the unauthorized practice of law. *See* Piscevich, Nov. 1994, *supra* note 1, at 1; *infra* notes 119-22 and accompanying text.

fulfilling” professional choice is not meeting the needs of the poor.<sup>146</sup>

3. Argument three: “buying out of the pro bono requirement is unethical”

The SBN’s \$500 buyout would have given members an additional service option that would also increase legal services funding.<sup>147</sup> The vocal minority in Nevada, however, disliked the buyout option,<sup>148</sup> claiming that it was unfair to solo practitioners and small firms because mandatory pro bono requirements could significantly impact their working hours or available income.<sup>149</sup>

Other mandatory pro bono opponents argue that the relatively modest amount of the buyout would make it more likely that attorneys in large firms would never render hands-on service.<sup>150</sup> At \$500 the buyout would represent only two or three billable hours at large firms’ typical hourly rates of \$150 to \$200, making it likely that large firms would find it more cost-effective to use the buyout.<sup>151</sup> Opponents claim the buyout is thus another example of how mandatory pro bono programs are the most lenient on those who can best afford to be charitable—large firms.<sup>152</sup>

But the buyout is not significantly disproportionate. The \$500 buyout only represents four to seven billable hours at a typical small firm or solo practitioner rate of \$75 to \$150 per hour.<sup>153</sup> In addition, the buyout actually helps resolve equity problems by providing

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146. See *supra* part III.A.3. Mandatory pro bono is not likely to receive the same degree of peer recognition as voluntary pro bono. E.g., Joseph Wharton, *Applause, Please*, A.B.A. J., Sept. 1995, at 101 (recognizing attorneys for public service).

147. *Nevada Petition*, *supra* note 1, at 7.

148. Vogel, *supra* note 7, at 3B.

149. See also Cramton, *supra* note 1, at 1128-29 (explaining that mandatory pro bono will be more “onerous” to solo practitioners and attorneys in small firms).

150. Ironically, the buyout was conceived by New York’s Committee to Improve the Availability of Legal Services as a means of helping solo practitioners meet the mandatory pro bono requirement. Silverman, *supra* note 2, at 905.

151. See also Cramton, *supra* note 1, at 1133 (describing how senior attorneys could shift the burden of pro bono work to newer attorneys).

152. See also Coombs, *supra* note 40, at 217 (presenting the argument that mandatory pro bono obligations are inequitable). For further discussion of equity issues, see Silverman, *supra* note 2, at 1006-11.

153. Other proposals that included a buyout option have attempted to link the buyout amount to the amount the attorney charges per hour. For example, an attorney who charges a basic per hour rate of \$100 would pay \$2000 to buy out of the 20-hour pro bono requirement. Coombs, *supra* note 40, at 233. Other mandatory pro bono proposals have required as little as \$50 per hour. Silverman, *supra* note 2, at 916.

ways to include attorneys often exempted from other mandatory service proposals, typically government attorneys and judges.<sup>154</sup>

Opponents also claim that the buyout is inherently unethical.<sup>155</sup> A Florida supreme court justice called Florida's buyout provision "an easy incentive to avoid the more significant, necessary, and direct help that is essential if the impact is to be real."<sup>156</sup> In the same decision another justice took an even stronger stance:

I find it ethically repugnant to suggest that an obligation inhering in each attorney personally can be discharged merely by a contribution of money. Under this provision, financially able attorneys can buy their way clear of the aspirational duty to help the poor, while less financially able attorneys who take their ethical obligations seriously will be constrained to donate services. Both [types of attorneys] should be treated equally.<sup>157</sup>

Although these judges mention no specific ethical rule that the buyout violates, it is difficult to dispute that these "mere" financial contributions can be the most significant, necessary, and direct ways to provide experienced legal services to the poor.<sup>158</sup> Buyout funds can support full-time attorneys who specialize in legal problems of the poor, especially those working on cases with the potential to last for years.<sup>159</sup> In 1986 about half of Florida's Orange County Bar Association members chose to buy out of their mandatory pro bono requirements, bringing in about \$100,000 for the nongovernment-funded Legal Aid Society of the Orange County Bar Association.<sup>160</sup> If 3000 Nevada attorneys chose the buyout option, they could raise \$1.5 million annually for new and existing pro bono services.<sup>161</sup> The

154. Coombs, *supra* note 40, at 224-25. For a discussion of the issues related to government attorneys and mandatory pro bono, see Committee on Ethics, *Report of the Committee on Ethics*, 15 ENERGY L.J. 193, 197-99 (1994); Lisa G. Lerman, *Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1150-57 (1991).

155. *Counter-Petition*, *supra* note 52, at 4 n.3 (expressing "concerns about the propriety of involuntary assessments").

156. Amendments to Rules Regulating the Fla. Bar, 630 So. 2d 501, 506 (Fla. 1993) (Barkett, C.J., concurring).

157. *Id.* at 507 (Kogan, J., concurring in part and dissenting in part).

158. See Cramton, *supra* note 1, at 1128.

159. Cynthia R. Watkins, Note, *In Support of a Mandatory Pro Bono Rule for New York State*, 57 BROOK. L. REV. 177, 182 (1991); see Coombs, *supra* note 40, at 220.

160. Jim Miskiewicz, *Mandatory Pro Bono Won't Disappear*, NAT'L L.J., Mar. 23, 1987, at 1, 8.

161. Yuille, *supra* note 20, at 5 (citing Wayne Pressel, chief executive of Nevada Legal Services, a nonprofit pro bono law firm).

argument that the buyout is unethical will be discussed in more detail with regard to the ethical rules in Part IV.

#### IV. MANDATORY PRO BONO AND ETHICAL OBLIGATIONS

The vocal minority in Nevada and opponents through the years have successfully argued not only that mandatory pro bono *will* not work,<sup>162</sup> but also that it *cannot* work if attorneys are to be ethical. The specter of ethical violations has, in part, kept licensing bodies from implementing mandatory public service and the judiciary from sanctioning it.

Opponents argue, as outlined above in Part III, that mandatory representation would trap attorneys into violating their ethical obligations by creating situations where attorneys would represent clients without zeal or competence. In addition, they argue that the possibility of buying out of the pro bono requirement is unethical because attorneys could avoid hands-on service. Each of these arguments is addressed below to clarify how mandatory representation comports with ethical obligations.

##### A. *Ethical Evaluation*

To my clients I will be faithful; and in their causes, zealous and industrious. . . . I shall never close my ear or heart, because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.<sup>163</sup>

Attorneys' basic ethical obligations in representing clients originated in David Hoffman's *A Course of Legal Study*. This section of Hoffman's oath outlines the first two areas in which opponents claim they will be forced to commit ethical violations under mandatory pro bono. The third area, the buyout, will be discussed as well.

##### 1. Zeal and diligence

Modern attorneys find Hoffman's pledge in the comment to Model Rule 1.3 that states that a lawyer should act "with zeal in

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162. Forsman, *supra* note 5, at 13.

163. DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 758 (Philadelphia, Thomas, Cowperthwait & Co., 2d ed. 1846).



advocacy upon the client's behalf."<sup>164</sup> Opponents claim that mandatory pro bono would lead to violations of the zealous representation obligation because attorneys would inevitably render service resentfully.<sup>165</sup> Opponents would be reluctant to serve clients because that obligation had been forced on them and because they no longer received the psychic value of voluntarily doing a good deed.<sup>166</sup> Opponents also claim that they will naturally be inclined to spend more time on paying clients' cases than on pro bono cases and that this will also lead to ethical violations.

However, performing mandatory service with a bad attitude would not in itself violate attorneys' ethical obligation of zealous representation. The germane measure of ethical compliance is the objective manifestation of the zealous representation, not the subjective mental state of those rendering it. Moreover, spending less time on pro bono cases does not automatically violate the zealous representation obligation.<sup>167</sup> Attorneys are not required to "press for every advantage that might be realized" for *any* client.<sup>168</sup> For needy clients, merely competent—rather than fervent—representation under mandatory pro bono would still give access to legal services not otherwise available.

Opponents also raise Model Rule 1.3, the rule obligating attorneys to serve clients diligently, as an area where they believe mandatory pro bono will cause ethical violations. Hoffman's oath to "never close my ear or heart, because my client's means are low;" state statutes that prohibit attorneys from turning away the indigent;<sup>169</sup> and the comment to Model Rule 1.3 make it clear that clients should be represented "despite opposition, obstruction or personal inconvenience" to the attorney.<sup>170</sup> Attorneys who fail to

164. MODEL RULES, *supra* note 46, Rule 1.3 cmt. The *Model Code of Professional Responsibility*, the ethical rules that preceded the Model Rules, also codified the zealous representation requirement. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981).

165. See *supra* notes 132-41 and accompanying text.

166. See *supra* notes 132-46 and accompanying text.

167. The ethical rules only obligate a lawyer to act with "reasonable diligence" in representing a client. MODEL RULES, *supra* note 46, Rule 1.3.

168. *Id.* Rule 1.3 cmt.

169. See, e.g., CAL. BUS. & PROF. CODE § 6068(h) (West 1990) (codifying the duty of California lawyers "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed").

170. MODEL RULES, *supra* note 46, Rule 1.3 cmt.

participate in a mandatory plan or who represent clients half-heartedly do ultimately violate their ethical requirement of diligence.

## 2. Competence

When mandatory pro bono opponents argue that attorneys' expertise wouldn't match clients' needs, they essentially invoke the competence requirement, Model Rule 1.1.<sup>171</sup> Opponents claim that mandatory service would force representation to fall below the threshold of competence because attorneys could be placed on cases where they were unsophisticated in the nuances of the law.<sup>172</sup> Model Rule 6.2 also implicates the competence rule, stating that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause"<sup>173</sup> where good cause for avoiding an appointment includes not being competent to handle the case.<sup>174</sup>

The comment to Model Rule 1.1, however, indicates that attorneys can still provide adequate representation through necessary study even without prior expertise in the area of the law in which the client requires assistance.<sup>175</sup> In general, attorneys' fundamental lawyering skills necessarily transcend particular specialized legal knowledge, so it would not cause ethical violations to undertake pro bono cases in areas where attorneys have little prior experience.<sup>176</sup> The comment to Model Rule 1.1 also encourages attorneys to consult specialists in unfamiliar areas of the law, indicating that, for example, attorneys specializing in bankruptcy would not automatically be disqualified from handling simple divorces.<sup>177</sup>

## 3. Financial contribution versus hands-on service

Contrary to what opponents assert outlined in Part III.B.3, a buyout is not unethical. Nowhere do the ethical rules make a distinction that financial contributions to organizations that provide legal services to the indigent population are improper as compared to hands-on service to the indigent population. Indeed, Model Rule 6.1 and its comment affirmatively suggest that giving money to organiza-

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171. *Id.* Rule 1.1.

172. *See supra* notes 124-30 and accompanying text.

173. *Id.* Rule 6.2.

174. *Id.* Rule 6.2 cmt.

175. *Id.* Rule 1.1 cmt.

176. *See Brown, supra* note 1, at 460.

177. MODEL RULES, *supra* note 46, Rule 1.1 cmt.

tions that fund legal services for the poor can complete attorneys' ethical obligation to the underserved population.<sup>178</sup> The comment states that to the extent that attorneys do not fulfill pro bono service hours through hands-on service, they can complete the remaining commitment by paying money to legal services organizations.<sup>179</sup> The comment also states that it is proper to give to legal services organizations when it is not feasible for attorneys to engage in pro bono services.<sup>180</sup>

Buyout funds are invariably used to give money to legal services organizations as stated in Model Rule 6.1, thus a buyout would not violate the letter or the spirit of the rule. In addition, although the comment does seem to validate social awareness through hands-on service as a goal of pro bono,<sup>181</sup> there is nothing inherent in a buyout scheme that would cause attorneys to violate the ethical rules.

### *B. Appointed Counsel in Existing Programs*

Private bar associations with mandatory pro bono programs have not experienced the ethical violations opponents predicted. In 1992 the El Paso Bar Association (EPBA) approved a resolution requiring all members residing in El Paso County to participate in defending indigent clients in criminal cases.<sup>182</sup> EPBA members can file for an exemption from hands-on service under certain conditions, including payment of a \$600 buyout.<sup>183</sup> The EPBA has 200 to 225 attorneys who do not choose the exemption and who participate in a court-appointment program each year.<sup>184</sup> The Council of Judges Administration Office, which administrates the appointments, receives fewer than ten complaints annually from clients who are dissatisfied with their representation and wish to be reassigned.<sup>185</sup>

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178. *Id.* Rule 6.1 & cmt.

179. *Id.* Rule 6.1 cmt.

180. *Id.* (stating that "there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support").

181. *Id.* (stating that "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer").

182. El Paso Bar Association, Resolution, at 1 (Sept. 2, 1992).

183. *Id.* Other exemptions include members who: are over 55 years old; are exempt by law; are not required to pay the Texas Occupational Tax; or who establish that such mandatory pro bono would be a hardship. *Id.*

184. Telephone Interview with Martha Banales, Court Administrator, Council of Judges Administration Office, El Paso (Sept. 29, 1995).

185. *Id.*

The Orange County Bar Association (OCBA) in Florida requires its members to pay a buyout of \$350 or take two pro bono cases per year<sup>186</sup> referred by the Legal Aid Society of the Orange County Bar Association.<sup>187</sup> In 1986 the board of trustees of the Legal Aid Society passed a unanimous motion that outlined their policy on requests for exemption from accepting Legal Aid Society referral cases under the mandatory pro bono requirement: "No one is exempt from service."<sup>188</sup> The motion allowed for excusing members for age, illness, or special circumstances, and also provided ways for full-time government employees to receive pro bono credit in ways other than accepting cases.<sup>189</sup> The motion also stated that those members who did not fulfill their pro bono obligation should be subject to further enforcement action.<sup>190</sup> Such action, according to the OCBA bylaws, includes the possible termination of members' OCBA membership if they are unjustified in their refusal to participate.<sup>191</sup>

### C. *Mandatory Pro Bono Is Not Unethical*

The Model Rules will not support a finding that mandatory pro bono is unethical. Opponents to mandatory pro bono have no basis in codified ethics for their position. The vague accusation "unethical" cannot be traced to any violated rule, any canon, any consideration.

This is not to say that there may not be ethical violations that arise collaterally from mandatory pro bono. If attorneys deliberately disregard deadlines or fail to prepare adequately for their pro bono cases they *will* violate the zealous representation ethical obligation. There may be attorneys whose dislike of mandatory pro bono makes them unwilling to undertake reasonable preparation and research

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186. Legal Aid Society of the Orange County Bar Association, Preference Form, at 1 (1995).

187. LEGAL AID SOC'Y OF THE ORANGE COUNTY BAR ASS'N, INC., ANNUAL REPORT 1 (1994-1995) [hereinafter ANNUAL REPORT].

188. Minutes of the Meeting of the Board of Trustees of the Legal Aid Society of the Orange County Bar Association, at 1 (Aug. 27, 1986) [hereinafter Minutes].

189. *Id.* Government attorneys and corporate counsel participate in the Legal Aid Society's projects which range from assisting clients in obtaining guardianship for seniors to advising juveniles accused of misdemeanors to speaking at community programs. ANNUAL REPORT, *supra* note 187, at 11-12.

190. Minutes, *supra* note 188, at 1.

191. Bylaws of the Orange County Bar Association, Inc., art. II, § 4(B) (1985) ("The Executive Council, by majority vote of all members, may terminate the membership of any member of this Association for the following reasons: . . . Unjustified failure to accept Legal Aid Referral cases.").

necessary to provide a basic level of competence for their pro bono clients. But this argument does not belong in the debate about whether mandatory pro bono programs are unethical. Mandatory service cannot be blamed for attorneys' choice to let the character of the work impact the character of their service.

It's time for attorneys and licensing bodies to examine mandatory pro bono in light of community needs. Certainly any mandatory pro bono proposal should be carefully inspected for violations of the ethical rules. However, "why me" arguments ostensibly based in ethical considerations cannot be given credence in the analysis of whether the proposed program is ethically sound. As Judge Bellacosa stated, "The need for legal services is at hand. The duty inures within the words, spirit and fabric of the [ethical rules], along with copious other obligations. The quibbling, nibbling and quarreling about volunteerism versus involuntary servitude and like rhetorical rantings are silly, embarrassing and counterproductive, and should cease."<sup>192</sup>

## V. CONCLUSION

The SBN's attempt to institute mandatory pro bono acknowledged the indigent population's legal service needs. Even if those claiming that mandatory pro bono cannot supply enough legal services are correct,<sup>193</sup> the SBN petition still could have made thousands of hours available to those with the greatest legal needs. Member opposition was thus startling and disappointing.

The SBN's withdrawal of its petition showed that it was willing to rely on members' professed willingness to shoulder voluntarily the burden of servicing the poor. In 1997 the SBN will evaluate whether Nevada attorneys have made good on their promise to provide voluntary service.<sup>194</sup> If, despite the resources available to them, Nevada attorneys have not made significant inroads toward serving the indigent population, the SBN will decide whether to revisit the issue of mandatory pro bono.<sup>195</sup> Until then, the SBN's revised approach is pragmatic: it will provide service opportunities to encourage attorneys not currently involved in pro bono service to join;<sup>196</sup> it will provide opportunities and support for members

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192. Bellacosa, *supra* note 1, at 753 (footnote omitted).

193. Schmitt, *supra* note 2, at B3.

194. See Forsman, *supra* note 5, at 14.

195. Telephone Interview with Franny Forsman, *supra* note 117.

196. WHAT IS PRO BONO?, *supra* note 126.

participating in pro bono programs, including the SBN's Lawyer Referral and Information Service; and it will provide other opportunities to acquaint members with the issues encountered in pro bono work.<sup>197</sup>

In the future mandatory pro bono programs may not be as controversial. In 1993 the ABA strongly recommended that law schools begin instituting public service requirements.<sup>198</sup> At that time only a dozen law schools had implemented public service requirements.<sup>199</sup> However, as more schools adopt public service requirements, new attorneys may find mandatory pro bono less offensive and foreign, and twenty hours of annual service may seem less onerous.<sup>200</sup>

Attorneys may also be increasingly ready to accept mandatory service if they have participated in a private bar association with a mandatory pro bono requirement. The experience of the Orange County Bar Association shows how members come to embrace the tradition of serving the community as their own.<sup>201</sup> These programs pave the way for making attorneys more willing to perform service for the poor.<sup>202</sup>

Attorneys may also be more receptive to mandatory programs if they have participated in reporting systems such as the ones currently in place in Florida and Texas.<sup>203</sup> While still in their earliest stages,

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197. See *supra* notes 61-70 and accompanying text.

198. Laura Duncan, *ABA Retreats on Mandatory Pro Bono Service Requirement for Graduation*, CHI. DAILY L. BULL., Aug. 13, 1993, at 3.

199. *Id.* The law student pro bono graduation requirement at the University of Pennsylvania is 70 hours. *Id.*

200. See, e.g., Silverman, *supra* note 2, at 991 (discussing the reasons that the tax burden of pro bono requirements may be regarded as onerous).

201. Miskiewicz, *supra* note 160, at 8 (quoting referral coordinator for the Orange County Legal Aid Society Catherine A. Tucker as saying that mandatory pro bono had become "status quo").

202. See Stephen T. Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973, 990 (1987).

203. Julie Oliver, *Annual Pro Bono Reporting in Texas and Florida*, A.B.A. CENTER FOR PRO BONO EXCHANGE, Apr. 1995, at 1. Texas's voluntary reporting plan began in 1992 and Florida's mandatory reporting program began in 1994. *Id.* Texas continues to reject mandatory reporting because "[m]andatory reporting is just a step away from mandatory pro bono." Amy Boardman, *Board's Pro Bono Filing Drops Again*, TEX. LAW., May 29, 1995, at 4 (quoting Jim Branton, outgoing Texas bar president). When the SBN abandoned the mandatory pro bono petition, it did not implement a system of pro bono reporting similar to Florida or Texas. Vogel, *supra* note 7, at 3B (citing SBN governing board members Cal Dunlap and James Crockett). Members of the governing board felt that even voluntary reporting would be unproductive, since it was unlikely that

these programs have helped state bar associations determine trends in pro bono service and track changes in the amount of service available to the indigent population.<sup>204</sup> Reporting systems also help bar associations hone the definition of "pro bono" by learning what their members believe fits the definition. In addition, reporting helps educate members about the purpose and nature of public service.<sup>205</sup>

Future mandatory pro bono programs may also tailor their provisions in ways the Nevada petition and other proposals have not. Pro bono requirements may only apply during a certain number of years of practice or only to those practicing in certain areas of the law. Alternatively, bar associations may give incentives like continuing legal education vouchers in return for pro bono hours.<sup>206</sup> Attorneys may be more willing to accept mandatory pro bono under these conditions.

Nevada attorneys will spend the next year demonstrating their commitment to the state's indigent population. The SBN expects member pro bono donations to increase at least moderately. A successful voluntary program is clearly preferable over a mandatory plan,<sup>207</sup> however, when an even moderate level of volunteerism cannot meet the need, it translates into a plague of unequal justice<sup>208</sup>—curable by just five minutes of pro bono a day, five days a week.

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attorneys would admit they had not participated in any pro bono activity. *Id.*

204. See Oliver, *supra* note 203, at 12.

205. See Boardman, *supra* note 203, at 4.

206. See Watkins, *supra* note 159, at 194.

207. Wachtler, *supra* note 77, at 743.

208. Wear, *supra* note 2, at B6.

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