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MANDATORY PRO BONO: CUI BONO?

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The talk in legal circles increasingly has turned to mandatory pro bono proposals. These proposals would require licensed attorneys to donate annually a set number of hours, a set sum of money, or some combination thereof in furtherance of providing needed legal services to the indigent. Unfortunately, all too many of the proposals seem to have selected a combination, such as twenty hours or one thousand dollars per year,[1] rather arbitrarily. There has been

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1. In 1988, the New York state chief judge appointed a committee to study ways to improve the availability of legal services. In its final report to the chief judge, the committee recommended the implementation of mandatory pro bono. The committee suggested a compliance provision of 40 hours every two years with a $50/hour buy-out option available for attorneys in firms of ten or fewer lawyers. COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, April 1990, *reprinted in* 19 HOFSTRA L. REV. 755, 784, 799–806 (1991) [hereinafter MARRERO REPORT]. The plan was never implemented.

little empirical research done to determine, for example, whether or not attorneys will exercise a buy-out option, if available, how much money will be collected if such an option is exercised, what the impact of such funds will be on the delivery of legal services to the poor, and what causes or persons will benefit from either the money donated or the hours worked. In short, the only verifiable conclusion which seems to have been reached is that mandatory pro bono just seems like a good idea . . . but *cui bono?*[2] That is, for whose good will such a requirement be implemented? Without sufficient empirical research to analyze the effect of a specific mandatory pro bono proposal on the delivery of legal services, it is difficult to see how the perceived problem and perceived solution will be joined to form a reasonably complete and worthwhile cure.

While more empirical research is needed on the ramifications of the implementation of mandatory pro bono proposals, this Article represents a step toward a rational approach for the provision of legal services and away from an intuitive, shotgun approach. In Part I, the Article reviews the issue of mandatory pro bono. Part II discusses the obligation to perform pro bono from an ethical perspective. Part III examines First Amendment issues which will color the implementation of any mandatory pro bono proposals. Finally, Part IV provides economic models of pro bono proposals and buy-out options in an attempt to forecast probable results.

I. MANDATORY PRO BONO: AN OVERVIEW

The delivery of legal services to the poor has been a concern in this country for decades. Beginning in the early 1900s, free legal assistance was provided by private Legal Aid Societies.[3] The federal government became involved in the 1960s when the Legal Services Corporation was established as a part of the Great Society reforms of that era.[4] However, the budget cuts of the 1980s reduced the ser-

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2. The phrase cui bono is defined as "for whose use or benefit," or "for what good, for what useful purpose." BLACK'S LAW DICTIONARY 377 (6th ed. 1990).

3. *See* Daniel H. Lowenstein & Michael J. Waggoner, Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 806 (1967).

4. *See* Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis,* 60 N.C. L. REV. 282, 297–336 (1982) (discussing the Legal Services Corporation and the provision of legal aid prior to its creation); *see also* EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM (1974) (discussing the evolution of the Legal Services Corporation).

vices previously available to the indigent through the Legal Services Corporation.[5] As a result, the focus has shifted again to the private sector, specifically to the organized bar, for the provision of legal services to the poor. In fact, some commentators have concluded that the members of the bar should not just volunteer, but should be *required* to serve because the voluntary provision of legal representation is insufficient[6] and unfairly burdens the small percentage of lawyers who are willing to become involved.[7]

Other observers, however, disagree with any plan to require attorneys to provide free legal representation for the poor, characterizing such plans as attempts to mandate charity.[8] They point to the availability of alternatives to mandatory pro bono[9] and express concern over the ultimate quality of *mandated* service.[10] Ironically,

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5. Lisa G. Lerman, *Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1144 (1991) (stating that the government reduced the Legal Services Corporation funding by 40% in the 1980s).

6. *See* Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 1109 (1991) (concluding that mandatory pro bono is the only reliable way to increase civil legal services for the poor); Chesterfield H. Smith, *A Mandatory Pro Bono Service Standard — Its Time Has Come*, 35 U. MIAMI L. REV. 727, 736–37 (1981) (concluding that a mandatory pro bono standard can and should be achieved); Joseph L. Torres & Mildred R. Stansky, *In Support of a Mandatory Public Service Obligation*, 29 EMORY L.J. 997, 1025 (1980) (stating that the scale of unmet need for legal services is so vast that present system of pro bono work based on personal conscience will not work).

7. *See In re* Amendments to Rules Regulating the Florida Bar, 598 So. 2d 41, 49 (Fla. 1992) (commenting that mandatory pro bono advocates decry the unfairness of a voluntary system in which the burden of representation is unequally borne).

8. *See* State Bar of Texas v. Gomez, 891 S.W.2d 243, 247 (Tex. 1994) (Gonzalez, J., concurring) ("Since the problem of access to legal services faces society as a whole, the burden of resolving it does not solely rest on the legal profession."); *see also* James N. Adler et al., *Pro Bono Legal Services: The Objections and Alternatives to Mandatory Programs*, 53 CAL. ST. B.J. 24, 24–25 (1978); Ben Wildavsky, *Mandatory Volunteerism: Is There Harm in Having to Do Good?*, THE AMERICAN ENTERPRISE, Sept./Oct. 1991, at 71. *See generally* Deborah Graham, *Mandatory Pro Bono: The Shape of Things to Come?*, A.B.A. J., Dec. 1, 1987, at 62, 63–64 (providing an overview of the pro bono debate).

9. For example, instead of mandating pro bono, the bar could sponsor well-organized programs that encourage and facilitate participation in established public aid programs. The bar could also favor expansion of publicly funded services programs, further the competitive marketplace for delivery of legal services by limiting the restrictions on the unauthorized practice of law, and focus on inducements and rewards for providing representation. Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1136–38 (1991); *see also* John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1268 (1991) ("The solution to meeting the unmet legal needs of the poor lies in volunteerism and deregulation — not more government.").

10. Justice Sandra Day O'Connor does not support mandatory pro bono proposals,

it also can be argued that mandating a minimum number of hours or amount of money could result in a cap on voluntary service or donations at a level lower than what otherwise would be given.[11] Further, more legal assistance may not be what the poor need or want most in order to improve their station in life.[12] Mandatory pro bono then could culminate in substantial amounts of aid being misdirected. Finally, some detractors of mandatory pro bono argue that the current efforts of individual attorneys are largely understated,[13] and that many attorneys already provide substantial no-fee or low-fee legal services, particularly in rural communities.[14] Nevertheless, the future implementation of mandatory pro bono proposals seems likely if one considers the current state of volunteerism at law schools as a watermark. Perhaps because studies have shown that the desire of law students to devote their careers to public service and their time to volunteering pro bono dwindles over their course of study,[15] efforts have accelerated to introduce law students to pro

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fearing that they could become a recipe for malpractice. Wildavsky, *supra* note 8, at 70. Indeed, while there is some research on the subject of the quantity of legal services, there is little research on the quality of legal services. Rick J. Carlson, *Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come,* 11 LAW & SOC'Y 287, 287–88 (1976). Thus, it might be difficult to measure from a qualitative standpoint whether or not mandatory pro bono proposals actually succeeded in meeting, and not just providing for, the legal needs of the poor. Further, competency issues are raised when lawyers who specialize in areas other than poverty law are required to practice in a different, yet equally specialized field. *See* John A. Humbach, *Serving the Public Interest: An Overstated Objective,* 65 A.B.A. J. 564, 565–66 (1979); *see also* Bill Winter, *"Buy-Out": Is It a Pro Bono Cop-Out?,* 66 A.B.A. J. 1351, 1352 (1980) (stating the concern of then ABA President Wm. Reece Smith, Jr., that specialization may make mandatory pro bono service counterproductive).

11. Adler et al., *supra* note 8, at 25.

12. Humbach, *supra* note 10, at 565–66; Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?,* 77 CORNELL L. REV. 1115, 1116 (1992).

13. *See* Fred Rhodes, *On the Cuff: Free Legal Service Before It Was "Pro Bono",* 57 TEX. B.J. 1212, 1213–14 (1994).

14. Max E. Roesch, *Pro Bono: In the Trenches*, 57 TEX. B.J. 1220, 1221 (1994). The provision of no-fee or low-fee legal services by individual attorneys is yet another area for which there are few empirical studies available. *See* Phillip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys,* 9 LAW & SOC'Y 431, 432 (1975).

15. Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School,* 45 STAN. L. REV. 1695, 1700–03 (1993). One study of the Class of 1976 at the Law School of the University of Wisconsin-Madison found that after the second year of study the opportunity to do pro bono work decreased as being relevant to the students' choice of employment, as did the percentage of time the students expected to devote to such work. Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public*

bono work in hopes of socializing them into a habit of volunteerism. While most law schools enthusiastically endorse and support voluntary pro bono programs,[16] several schools have implemented mandatory pro bono programs.[17] Moreover, in 1990 the Law Student Division of the American Bar Association ("ABA") passed a resolution requesting that the ABA establish a pro bono requirement for graduation.[18] Thus, the implementation of a mandatory obligation seems possible, maybe even likely; however, what is the origin of such an obligation?

There are several rationales which can be used to justify mandatory pro bono. Some scholars characterize attorneys as being officers of the court who, because of this position, can be compelled to assist in the administration of justice.[19] Another justification suggests that, because attorneys enjoy a monopoly over the practice of law as a result of licensing restrictions, they are impliedly obligated to render service pro bono in order to afford all citizens access to the

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Interest Concerns, 13 LAW & SOC'Y 11, 27 (1978).

16. For example, Pro Bono Students New York ("PBS NY") is a placement service which matches law students to voluntary public interest positions. Chaifetz, *supra* note 15, at 1703–09. PBS NY recently has grown into a national network with regional centers located throughout the country. *Pro Bono — Texas Style!*, 58 TEX. B.J. 6 (1995).

17. Chaifetz, *supra* note 15, at 1709 n.72; Kim Schmimenti, *Pro Choice for Lawyers in a Revised Pro Bono System,* 23 SETON HALL L. REV. 641, 695 (1993).

18. Wildavsky, *supra* note 8, at 68. Some high schools and colleges currently require public service as a graduation requirement, though not without objection. *Id.* at 64–67.

19. *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 453 (1990) (Blackmun, J., concurring in part, dissenting in part) ("Attorneys are not merely participants in a competitive market for legal services; they are officers of the court."); *In re* Snyder, 734 F.2d 334, 343 (8th Cir. 1984) ("disrespectful remarks by an officer of the court [attorney] do not fall within the ambit of protected speech"), *rev'd*, 472 U.S. 634 (1985); United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) ("[R]epresentation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court . . . ."), *cert. denied*, 382 U.S. 978 (1966). Other scholars, however, do not believe that the English tradition, in which attorneys were considered to be officers of the court, is applicable to American lawyers. *See, e.g.,* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 76 (1989); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 740–53 (1980); Beth M. Coleman, Note, *The Constitutionality of Compulsory Attorney Service: The Void Left by* Mallard, 68 N.C. L. REV. 575, 586 (1990); Bruce A. Green, Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 373–76 (1981); 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. 545, 567–68 (1991).

courts.[20] A third explanation ties pro bono obligations to the professional responsibility of the organized bar to perform public service.[21] Finally, it can be argued that pro bono can be mandated because of the inherent power of the judiciary to compel service.[22] While the power of courts to appoint counsel for indigent defendants is settled, the inherent power to appoint counsel without compensation for civil defendants is less clear,[23] although statutes may grant such authority to courts.[24] Nevertheless, most proposals for mandatory pro bono

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20. *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, 989 (1987) (stating that lawyers have a duty to serve the public interest because they have a state sanctioned monopoly in the public justice system); Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 279 (1981) (commenting that the obligation to serve uncompensated can be rationalized as an implied condition of the attorney's license to practice law). *But see* Adler et al., *supra* note 8, at 25 (stating that the "monopolistic" position does not justify imposing on lawyers the entire burden of remedying a social problem which should be borne equitably by all citizens); Macey, *supra* note 12, at 1122 (concluding that entry restrictions do not justify imposition of mandatory pro bono).

21. *See, e.g.*, Thomas Ehrlich, *Charles H. Miller Lecture — Lawyers and Their Public Responsibilities*, 46 TENN. L. REV. 713, 725 (1979) (stating that society has an interest in the sound performance of the legal system and thus the profession has an obligation to ensure that legal services are available to the poor); Zino I. Macaluso, *That's O.K., This One's On Me: A Discussion of the Responsibilities and Duties Owed by the Profession to Do Pro Bono Publico Work*, 26 B.C. L. REV. 65, 86 (1992) (concluding that the profession should provide services to indigents whether or not a historically entrenched duty to serve exists); Dean S. Spencer, *Mandatory Public Service for Attorneys: A Proposal for the Future*, 12 SW. U. L. REV. 493, 502–04 (1981) (stating that public service is not a charity but is an obligation to the public just as much as competent lawyering is). For a discussion of such professional and ethical considerations see also *infra* notes 40–65.

22. *See* Matalon, *supra* note 19, at 576–69; Rosenfeld, *supra* note 20, at 274–76; *see also In re* Amendments to Rules Regulating the Florida Bar, 573 So. 2d 800, 804–05 (Fla. 1990).

23. *See generally* Judy E. Zelin, Annotation, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action*, 52 A.L.R. 4TH 1063 (1987); Green, *supra* note 19; Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1334–49 (1966).

24. For example, the federal In Forma Pauperis Act allows courts to appoint attorneys for indigent plaintiffs. 28 U.S.C. § 1915 (a)-(e) (1988 & Supp. V 1993). However, as the statute has been construed, Congress did not grant courts the authority to compel appointment of attorneys. Mallard v. United States Dist. Ct., 490 U.S. 296 (1989) (Kennedy, J., concurring). In *Mallard*, the Court did not rule on whether or not federal courts inherently possessed the power to compel service. *Id*. at 310. For a discussion of the *Mallard* case, see Lisa M. Windfeldt, Note, *Pro Bono Representation — A Lawyer's Statutory Right to "Just Say No": The End of Compelled Indigent Representation* — Mallard v. United States District Court, 25 WAKE FOREST L. REV. 647 (1990); *see also* Coleman, *supra* note 19, at 575.

rely on the judiciary's inherent authority to regulate and supervise the legal profession as the means by which mandatory pro bono can be ordered.[25]

Assuming *arguendo* both the existence of the obligation and the right to compel its performance, is mandatory pro bono the best tool for delivering needed legal services to the indigent? Most of the legal problems of the indigent involve matrimonial issues, debtor-creditor disputes, landlord-tenant questions and criminal actions.[26] Such problems require an immediate, although not necessarily a sophisticated response,[27] notwithstanding the argument that poverty law itself is a specialized field. As a result, a preferred alternative to attorney involvement in these problems might be paraprofessional specialist involvement.[28] After all, the true issue should be charac-

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25. *See* MARRERO REPORT, *supra* note 1, at 814–19. *But see* Scully, *supra* note 9, at 1239–44 (stating that the chief judge lacks power to implement the Marrero Report's mandatory pro bono plan in New York). Courts have the inherent power to order the integration of the bar. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 452 (1990) (Brennan, J., concurring in part, dissenting in part) (noting that a legislative body could terminate boycott by private practice lawyers who regularly acted as court appointed counsel for indigent defendants by ordering them to perform such services pro bono); *see also* Hollar v. Government of the Virgin Islands, 857 F.2d 163, 166 (3d Cir. 1988). Therefore, courts probably possess the power to mandate pro bono, given their authority over the professional conduct of attorneys, providing that such a requirement is constitutionally sound. The legislative branch should also possess such power, providing the requirement is constitutional. In an interesting recent case, State Bar of Texas v. Gomez, 891 S.W.2d 243, 244 (Tex. 1994), plaintiffs sued the state bar alleging that its failure to provide volunteer free legal services violated their rights under the Texas Constitution. The state supreme court held that the district court had no jurisdiction to hear the dispute since the Texas Supreme Court, and not a district court, had the exclusive authority to regulate the practice of law, and that the bar was powerless, acting alone, to implement a mandatory pro bono program for Texas lawyers. *Id.* at 245–46. The court observed in *dicta*, however, that the district court could hear a case against the state supreme court which challenged its implementation of such a program. *Id.* at 246–47. On the other hand, the dissenters argued that the case did present a justiciable controversy, reasoning that the district court could determine both the constitutionality of rules promulgated by the court, as well as the constitutionality of the court's failure to propose regulations creating a mandatory pro bono program. *Id.* at 250 (Hightower, J., dissenting). Justice Gonzalez, in a concurring opinion, concluded that while both the Texas Supreme Court and the legislature had jurisdiction to address the problems of providing legal services to indigents, "[t]he Legislature is better suited to tackle this social problem." *Id.* at 248 (Gonzalez, J., concurring). The entire opinion of the court is reprinted in 58 TEX. B.J. 114, 114–17, 136 (1995).

26. *See* Lochner, *supra* note 14, at 455.

27. Jack Katz, *Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Program*, 12 LAW & SOC'Y 275, 279–83 (1978).

28. F. Raymond Marks, *Some Research Perspectives for Looking at Legal Need and*

terized as one involving access to social justice and not lawyer justice.[29] The right to counsel and involvement of attorneys in disputes increased in the United States as societal changes in the eighteenth century resulted in more technical and complicated legal principles.[30] It seems obvious, then, that the necessary role that attorneys play in the present justice system could be diminished by simplifying the rules governing the legal system[31] and allowing for more informal dispute resolution.

Justice, as a goal in dispute resolution, in fact can be achieved through alternative dispute mechanisms, such as arbitration, mediation, and conciliation services offered by neighborhood justice centers.[32] Such alternatives to litigation are becoming increasingly popular[33] and are encouraged under federal law.[34] The United States is

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Legal Services Delivery Systems: Old Forms or New, 11 LAW & SOC'Y 191, 204–05 (1976). The Bar, however, probably would not be receptive to the idea of a more prominent role for paraprofessionals since attorneys are required by their ethical codes to prevent the unauthorized practice of law. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) (1994). Such ethical commands are probably legally enforceable as well. In Lawline v. American Bar Ass'n, 956 F.2d 1378, 1381 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 551 (1993), the appellate court upheld the trial court's dismissal of a complaint brought by Lawline, an unincorporated association of lawyers, paralegals and laypersons. Lawline challenged the disciplinary rules prohibiting the unauthorized practice of law and association with nonlawyers under antitrust law, civil rights legislation, and the Constitution. *Id*. at 1381–83. Further, aside from competency concerns and from a more egocentric perspective, the bar probably would not want the competition from legal paraprofessionals. Arguably, such fears motivated the governing board of the State Bar of Nevada to ask the Nevada Supreme Court to require pro bono as a condition of maintaining a license to practice. The proposal is the first one in the country to be considered by the highest state court. Richard B. Schmitt, *Nevada Bar Offers Pro Bono Plan to Stem Nonlawyer Competition*, WALL ST. J., Jan. 9, 1995, at B-3.

29. Humbach, *supra* note 10, at 564.

30. *See* Note, *supra* note 23, at 1328–29. Indeed, in colonial America some legal codes forbade the practice of law; some colonies used lay persons to resolve disputes and encouraged the litigants to represent themselves in court as well. *In re* Amendments to Rules Regulating the Florida Bar, 598 So. 2d 41, 56 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part).

31. *See* Breger, *supra* note 4, at 290–91 (noting that "the right to counsel is necessitated by the complexity of the legal system and will expand or contract depending on the roles attorneys play in the social justice system").

32. *Id.* at 362–63; *see also* Donald T. Weckstein, *The Purpose of Dispute Resolution: Comparative Concepts of Justice*, 26 AM. BUS. L.J. 605, 617–23 (1988).

33. *See* Kenneth R. Feinberg, *Mediation — A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. SUPP. 55, 56–57 (1989) (stating that mediation has many advantages over litigation). *But see* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (stating that ADR should not be encouraged because it cannot provide public

arguably the most litigious country in the world with probably the most adversarial system of justice.[35] Why not spare indigents from a complex and beleaguered system, and solve the access to justice problem by shifting resources to informal alternate dispute resolution ("ADR") centers?[36]

Alternatively, or in conjunction with the increased use of ADR, legislative bodies could respond to the needs of indigent civil plaintiffs by increasing the number of fee-shifting statutes,[37] in order to encourage rather than to mandate the services of attorneys.[38] Of

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benefits obtainable only through litigation).

34. For example, the Federal Arbitration Act encourages arbitration. 9 U.S.C. §§ 1–16 (1994); *see also* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (holding that claims brought under the Securities Act of 1933 are arbitrable); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding that claims brought under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act can be arbitrated pursuant to an agreement); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that claims arising under federal antitrust laws are arbitrable). For a discussion of the *McMahon* case and private dispute resolution, see G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397 (1988). Arguably, the increased popularity of alternatives to litigation should weaken the monopoly argument which is used to justify, in part, mandatory pro bono. *See supra* note 20 and accompanying text. However, the compelled enforcement of valid, privately obtained judgments still is dependent upon access to the public justice system. Breger, *supra* note 4, at 286–88.

35. *See generally* Debra D. Burke, *Alternative Dispute Resolution, in* READINGS IN BUSINESS LAW AND THE LEGAL ENVIRONMENT 31–42 (Douglas Whitman, ed., 2d ed. 1994).

36. A dispute process that emphasizes reconciliation rather than conflict reflects the methods used by social workers. *See* Lowenstein & Waggoner, *supra* note 3, at 812. Indigent clients, then, may feel more comfortable and less intimidated by ADR, and may be more likely to seek the assistance of such centers. *Id*.

37. There are currently many statutes, both state and federal, that allow the prevailing plaintiff, and in some cases the prevailing defendant, to recover reasonable attorneys' fees. Silverman, *supra* note 6, at 1095–97. For example, at the federal level, the Civil Rights Attorney's Fees Awards Act of 1976 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1988 & Supp. V 1993). At the state level, for example, the consumer protection acts of most states allow prevailing plaintiffs to recover attorneys' fees for suits successfully brought alleging the commission of either deceptive or unfair trade practices. *See generally* Debra E. Wax, Annotation, *Award of Attorneys' Fees in Actions Under State Deceptive Trace Practice and Consumer Protection Acts*, 35 A.L.R. 4th 12 (1985).

38. Arguably, inducements and rewards are more likely to produce the desired results than are threats. Cramton, *supra* note 9, at 1138. The contingency fee arrangement is another reward-type option which is designed to inspire attorneys to litigate meritorious claims. *Id.* at 1117; *see also* Humbach, *supra* note 10, at 565. Unfortunately, many of the legal problems of indigents, such as those involving child support and custody issues, cannot be taken on a contingency basis. Another incentive idea which en-

course, legislatures ideally reflect the will of those persons represented,[39] and the enactment of such statutes may not enjoy sufficient public support. If such is the case with respect to either the funding of ADR centers or the passing of fee-shifting statutes, it is still unclear whether the bar is the appropriate vehicle for the delivery of justice to the poor, particularly if the efficacy of alternative means of delivery have been neither explored adequately nor compared empirically to the projected beneficial results of the implementation of mandatory pro bono.

II. AN ETHICAL PERSPECTIVE ON MANDATORY PRO BONO PROPOSALS

Even if mandatory pro bono is not the best solution for the legal needs of the poor, it is undisputed that attorneys, *as members of the legal profession,* owe a duty of public service which embraces the provision of equal access to justice. In short, "[l]awyers, as members of an ancient and honorable profession, have a duty to utilize their training and experience in rendering service to the public."[40] The practice of law, which is one of the learned professions, is characterized by the pursuit of "a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of livelihood."[41] Thus, practitioners, *as part of their common professional calling*, should serve in the public in-

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joyed a degree of popularity in the 1980s was the allowance of a charitable tax deduction for attorneys who rendered legal services pro bono. Breger, *supra* note 4, at 284 n.6.

39. Inequalities in the election process, however, may skew democratic choice. *See* Marlene A. Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 819–21 (1974).

40. *In re* Florida Bar Bd. of Governors' Action, 217 So. 2d 323, 324 (Fla. 1969).

41. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). The ABA Commission on Professionalism adopted this definition as well. Chaifetz, *supra* note 15, at 1696–97. Historically, students of the learned professions, which are divinity, medicine and law, were bound to serve society because of the higher learning to which they were exposed. Bonnie Wheeler, *Professionals, Culture and the Law*, 57 TEX. B.J. 549, 549–50 (1994). Other traits emerging from this coupling of a learned art with service include certification or licensing, fiduciary relationships with clients, and an ethical code. *See* Jack Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients,* 11 LAW & SOC'Y 207, 210 (1976). Another definition of the characteristics of a profession include: 1) skills that are intellectual in nature, resulting from extensive training; 2) services that are beyond assessment by non-professionals; and 3) concerns that exceed those of a particular individual. Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704–05 (1977).

terest. Ideally, it should be this spirit of public service which drives attorneys to perform pro bono work, although reality sometimes suggests the existence of less altruistic motivating factors.[42] While professional responsibilities differ from ethical responsibilities,[43] the ethical code and rules of the legal profession unequivocally endorse the realization of the ideal of public service through pro bono activities as well.

The original canons of ethics adopted by the ABA in 1908 provided in part that every lawyer had a duty to accept assignment as counsel for indigent prisoners, and that each attorney should strive to improve the administration of justice.[44] This duty was augmented by the more recent Model Code of Professional Responsibility, ("the Code") which was adopted in 1969 and is still recognized in a few states.[45] The Code provides that "a lawyer should assist in improving the legal system,"[46] and that "a lawyer should assist *the legal profession* in fulfilling *its* duty to make legal counsel available."[47] More specifically, an ethical consideration of the Code provides that

> [h]istorically, the need for legal services of those unable to pay rea-

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42. A study of the no-fee/low-fee practice of both individual practitioners and firm attorneys revealed that their involvement in such service "was not entirely an exercise in civic virtue." Lochner, *supra* note 14, at 464. Business and intra-firm reputation motives primarily inspired firm attorneys, while the need to get and keep paying clients motivated attorneys in solo practice. *Id.* at 443–48. While secondary objectives exist, such motivational factors are ethically suspect. Carolyn Elefant, *Can Law Firms Do Pro Bono? A Skeptical View of Law Firms' Pro Bono Programs,* 16 J. LEGAL PROF. 95, 104–08 (1991).

43. The professional behavior of lawyers requires three attributes beyond ethical behavioral requirements: "an absolute fidelity to law as a disciplined branch of knowledge and wisdom, an abiding sense of the service and obligation each lawyer owes society, and a commitment to the civilized and thoughtful courtesies each lawyer owes all other members of the legal guild." Wheeler, *supra* note 41, at 551.

44. Rosenfeld, *supra* note 20, at 258.

45. Lerman, *supra* note 5, at 1151 n.37. Most states have adopted the Model Rules, proposed by the ABA in the early 1980s. *Id.*; *see infra* Appendix 1. For a discussion of the Model Rules, see *infra* notes 53–63 and accompanying text.

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980). An ethical consideration further provides that

> The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services . . . .

Id. at EC 8-3.

47. *Id.* at Canon 2 (emphasis added).

> sonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.[48]

"The Code, however, does not contain a corresponding disciplinary rule requiring pro bono,"[49] nor does it set standards for how lawyers should meet their responsibility.[50]

The idea of *enforceable* ethical pro bono requirements, however, began to be debated in the late 1970s and early 1980s. A 1979 Report by the Special Committee on the Lawyers Pro Bono Obligation, which was appointed by the Association of the Bar of the City of New York, proposed that a mandatory obligation be imposed on every lawyer to devote uncompensated time to public service.[51] This proposal, however, was rejected by the City Bar.[52] Further, in discussing the adoption of the most recent ethical commands of the ABA, the Model Rules of Professional Conduct, (the "Model Rules") the issue of mandatory pro bono also was debated. The Kutak Commission, which drafted the Model Rules as a revision to the Code, proposed a rule which provided that

> [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 an appropriate regulatory authority.[53]

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48. *Id*. at EC 2-25.

49. Smith, *supra* note 6, at 729 n.13.

50. Ehrlich, *supra* note 21, at 725.

51. Torres & Stansky, *supra* note 6, at 998–99; Rosenfeld, *supra* note 20, 269–70.

52. Graham, *supra* note 8, at 62.

53. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 8.1 (1st Discussion Draft, Jan. 30, 1980), *reprinted in* Rosenfeld, *supra* note 20, at 261; Torres & Stansky, *supra* note 6, at 999–1003. Proposed Rule 8.1 was modified and adopted as Rule 6.1. Rule 6.1 does not mandate pro bono work. *See infra* note 54 and accompanying text.

The Rule as adopted, however, eliminated the mandatory command in favor of an aspirational goal,[54] primarily because of inherent enforcement problems, including the magnitude of corresponding reporting requirements, the failure of the rule to specify the amount of service required for disciplinary oversight, and the failure of the rule to exempt certain governmental attorneys.[55]

The current version of the Rule,[56] as amended in 1993, provides that

> [a] lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
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> (a) provide a substantial majority of the fifty (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means;[57] and (b) provide any additional services through:

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54. For a comparison of the Code and the Rules, see Gaetke *supra* note 19, at 63–71. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (Proposed Final Draft, May 30, 1981), *reprinted in* Spencer, *supra* note 21, at app. B.

55. Smith, *supra* note 6, at 728. Historically, ethical considerations, such as conflicts of interest, precluded governmental attorneys from performing pro bono work, although that prohibition is being reviewed in some states. *See* Stewart A. Estes, *The Government Lawyer and Pro Bono*, WASH. ST. B. NEWS, Nov. 1990, at 19; John Katzman, *Government Attorneys and Pro Bono — Overcoming the Obstacles,* 55 TEX. B.J. 862 (1992); Lerman, *supra* note 5, at 1141; Rick Strange, *Pro Bono: A Legislative Update*, 57 TEX. B.J. 1227 (1994); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. 5 (1994).

56. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1994). The 1983 version of the Model Rules was less specific in its recommendation, providing that

> [a] lawyer should render public interest service" defined as "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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

57. The comments to the rules suggest that such legal services may consist of activities such as "individual and class representation, the provisions of legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring to those who represent persons of limited means." MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. 2 (1994). Examples of persons of limited means include those who qualify for participation in programs funded by the Legal Services Corporation, and examples of qualifying legal services include services rendered to homeless shelters, battered women's centers and food pantries that serve those of limited means.

> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;[58] (2) delivery of legal services at a substantially reduced fee to persons of limited means; or[59] (3) participation in activities for improving the law, the legal system or the legal profession.[60] In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.[61]

As such, the Rule, by definition, is aspirational in nature, and no corresponding disciplinary rules provide for enforcement through the imposition of sanctions for noncompliance,[62] notwithstanding that compliance should not be a problem given the broadness of the definition of qualifying services.[63] In addition to the ABA stan

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Id. at cmt. 3.

58. The comments suggest that this paragraph allows the provision of certain types of legal services to those persons whose resources place them above those of limited means, and permits reduced-fee pro bono work. Suggested issues which can be addressed under this paragraph include First Amendment claims, Title VII claims, and environmental protection claims, while suggested organizations include social service, medical research, cultural and religious groups. *Id.* at cmt. 6.

59. The comments, by way of example, encourage participation in judicial programs and acceptance of court appointments at a substantially reduced fee. *Id.* at cmt. 7.

60. A few examples suggested by the comments include "[s]erving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession . . . ." *Id.* at cmt. 8.

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1994).

62. *Id*. at cmt. 11. At any rate, the ABA Model Rules of Professional Conduct are advisory only; the law of each individual jurisdiction is controlling. Letter from Peter Geraghty, Director, ETHIC Search, to authors ABA Center for Professional Responsibility (July 14, 1994) (on file with authors).

63. *See supra* notes 57–60 and accompanying text. While the ABA definition encompasses a wide variety of public service work, the substantial majority of the aspirational 50 hours, nevertheless, must be devoted to the legal needs of the poor. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 & cmt. 1 (1994). The Texas State Bar also has an aspirational goal of 50 hours per year and broadly defines pro bono services as including

> (a) The direct provision of legal services to the poor, without an ex-

dard, many state bar associations have set aspirational goals,[64] although Florida is the only state which has imposed a mandatory *reporting* requirement.[65]

While the comments to the Model Rules approve of a buy-out option for pro bono obligations based on a reasonable monetary equivalent of the hours owed,[66] many state aspirational goals provide for an express trade-off of dollars for hours.[67] These buy-out provisions have proven to be controversial.[68] Some observers argue that the obligation to serve is a personal one that should not be capable of being satisfied by a personal check.[69] On the other hand,

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> pectation of compensation, whether civil or criminal;
> (b) Uncompensated services related to simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons;
> (c) Uncompensated legal services rendered to charitable, public interest organizations with respect to matters or projects designed predominantly to address the needs of poor persons;
> (d) Uncompensated legislative, administrative or systems advocacy services provided on behalf of poor persons; or
> (e) Unsolicited, involuntary appointed representation of indigents in criminal and civil matters.

Julie Oliver, *What Counts as Pro Bono in Texas?*, 57 TEX. B.J. 1224, 1225–26 (1994); *see also In re* Amendments to Rules Regulating the Florida Bar, 598 So. 2d 41, 59 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part) (characterizing an aspirational goal for Florida attorneys as including services benefitting either the poor, charitable organizations, civic endeavors, or other activities that benefit the public).

64. *See infra* Appendix 1. The comments to the Model Rules allow for such deviations. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. 1 (1994).

65. Mark Hanson, *Reporting Pro Bono,* A.B.A. J., Oct. 1993, at 16. The 1994 reporting results of the Florida Bar revealed that approximately 96% of licensed attorneys complied with the reporting requirement, and that the average of the hours reported was 13.66, with 40% of the members reporting that they performed pro bono. *Annual Pro Bono Reporting: A Look at Texas and Florida*, 57 TEX. B.J. 1230 (1994). For a history of the Florida experience, see Maher, *supra* note 20.

66. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1994). The comments to the rule provide that since

> there may be times when it is not feasible for a lawyer to engage in pro bono services . . . a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.

Id. at cmt. 9.

67. *See infra* Appendix 1.

68. For an overview of the debate, see generally Michael S. Greco & Cleaveland D. Miller, *Time and/or Money: Should Lawyers Be Allowed to "Buy-Out" of Their Pro Bono Obligation?*, 22 CLEARINGHOUSE REV. 950 (1989); Smith, *supra* note 6, at 731–32.

69. Mark E. Allen, *Pro Bono Attorneys Do It for Free,* WASH. ST. B. NEWS, Nov.

other commentators argue that cash contributions may be the most efficient means of delivering needed legal services.[70] If available, solo practitioners, as well as attorneys practicing in firms, might well elect to donate the cash.[71] Therefore, if the goal of mandatory pro bono is to require individual service, perhaps a buy-out option should not be included in the plan.[72]

Another controversial issue surrounding mandatory pro bono proposals centers on the idea of collective satisfaction; that is, whether or not an individual's obligation can be extinguished through the services rendered by an associate in the same firm. The comments to the Model Rules note that "at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities."[73] Again, proponents of the idea of collective satisfaction argue that it is efficient,[74] while opponents urge that the responsibility remains an individual professional debt.[75] To take the concept of collective satisfaction a step fur

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1991, at 22.

70. *See, e.g.*, Adler et al., *supra* note 8, at 26–27; Elefant, *supra* note 42, at 110; Spencer, *supra* note 21, at 510. Even the executive director of the National Legal Aid and Defender Association urged the Kutak Commission, during its consideration of a mandatory pro bono rule, to allow a buy-out option. Winter, *supra* note 10, at 1351. The mandatory pro bono provision which was considered seriously by New York State allowed such a buy-out option. *See supra* note 1 and accompanying text. Nevertheless, it can be argued that, even though cash contributions may be preferable to service by lawyers practicing in an area outside their field of expertise, it will be legal aid societies and charities that benefit most directly from the donations, and not the poor. Scully, *supra* note 9, at 1266.

71. *See* Silverman, *supra* note 6, at 913–28 (analyzing proposed New York buy-out option). Of course, whether or not attorneys exercise the option will depend on how the exchange is structured. *See infra* notes 123–53 and accompanying text.

72. A mandatory service requirement without a buy-out option, however, may raise constitutional concerns. Silverman, *supra* note 6, at 949. For a discussion of constitutional issues, see *infra* notes 82–122 and accompanying text.

73. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 6.1 cmt. 9 (1994).

74. *See* Elefant *supra* note 42, at 113; Silverman, *supra* note 6, at 914–15. One analysis of the way in which firms provide pro bono services concluded that a functional integration model, whereby projects are assigned to attorneys with the directly applicable substantive expertise, was the most effective delivery system. Note, *Structuring the Public Service Efforts of Private Law Firms,* 84 HARV. L. REV. 410, 420–23 (1970).

75. For an overview of the debate see Melinda Smith, *Collective Satisfaction: A Viable Alternative?*, 57 TEX. B.J. 1228 (1994). Some critics argue as well that the members of large firms with lucrative practices will benefit from collective satisfaction at the expense of smaller firms or solo practitioners. Humbach, *supra* note 10, at 566; Silverman, *supra* note 6, at 1006–11. In implementing its voluntary pro bono plan with mandatory pro bono reporting requirements, the Florida Supreme Court, while rejecting

ther, should attorneys be allowed to contract their pro bono obligation to attorneys not practicing in their own firm? An affirmative response to this question could result in specialized *pro bono firms* satisfying the obligation of the bar.[76]

Nevertheless, neither collective satisfaction nor buy-out options should be prohibited unless the only goal is to require attorneys to serve individually for their own edification. While the ethical obligations of attorneys as expressed in both the Model Code and the Model Rules address the duty as one owed by each attorney individually,[77] it is the profession which owes the duty of public service. Attorneys should serve as part of *a common professional calling*, and only because they are members of the profession.[78] It is the profession which owes the obligation; but for membership in the bar the duty would not be owed. Therefore, analytically, collective satisfaction as applied to the entire bar should be permitted since the aggregate members owe a collective duty to the administration of justice by reason of their professional calling.[79] Likewise, professional ethical standards are not wholly based upon individual judgment, but on the role and functioning of a profession as an association of individual members.[80] The profession owes a duty to assist in the administration of justice. Therefore, since the public interest is in seeing justice done, both expeditiously and efficiently,[81] if buy-out options, collective satisfaction, even the formation of pro bono firms render the administration of justice more expeditious and efficient, then they should be endorsed. Unfortunately, however, too few studies have evaluated which, if any, of these options is best suited for the

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generally the collective satisfaction of pro bono obligations, allowed limited collective satisfaction for cases involving substantial resources, such as death penalty cases and class action suits. *In re* Amendments to Rules Regulating the Florida Bar, 598 So. 2d 41, 44 (Fla. 1992).

76. *See* Silverman, *supra* note 6, at 940–41; Smith, *supra* note 75, at 1228–29.

77. *See supra* notes 44–61 and accompanying text; *see also* Arthur T. Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A. J., 31, 31–32 (1954) (describing one function of a "lawyer as doing his part individually and as a member of the organized Bar to improve the profession, the court and the law").

78. *See supra* notes 40–43 and accompanying text.

79. Uncompensated service can be imposed because of "the ancient tradition of his [the lawyer's] profession and as an officer assisting the courts in the administration of justice." United States v. Dillon, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

80. Morgan, *supra* note 41, at 704.

81. *Id.* at 705.

delivery of legal services to the poor, assuming, of course, that is the goal of mandatory pro bono.

III. THE FIRST AMENDMENT AND MANDATORY PRO BONO

Several constitutional concerns have been raised regarding mandatory pro bono, including, for example, that such mandatory service violates the Thirteenth Amendment's prohibition against involuntary servitude, or that it violates the Fifth Amendment's prohibition against a governmental taking without just compensation.[82] The constitutional objection most likely to be considered meritorious, however, concerns First Amendment freedom of speech and association guarantees.[83] The First Amendment affirmatively protects as fundamental the right to associate,[84] as well as the corre-

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82. Some legal scholars would argue, however, that such concerns are groundless. *See, e.g.*, MARRERO REPORT, *supra* note 1, at 857–61; Maher, *supra* note 20, at 988; Rosenfeld, *supra* note 20, at 286–96; Torres & Stansky, *supra* note 6, at 1015–22; *see also* Green, *supra* note 19, at 378–90 (noting that compelled appointment does not violate Fifth or Thirteenth Amendments). Aside from a strict constitutional "takings" analysis, as a practical matter, requiring pro bono may be economically confiscatory. A previous study which examined data from the 100 largest law firms in the country found a negative correlation between firm performance and profitability, on the one hand, and the amount of pro bono service performed, on the other. Debra Burke et al., *Pro Bono Publico: Issues and Implications,* 26 LOY. U. CHI. L.J. 61, 82–83 (1994).

83. The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The free speech protection of the First Amendment is applicable to the states by the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 652 (1925).

84. Over 100 years ago, Alexis de Tocqueville observed the importance of this right in American political and civil life. "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 174 (J. P. Mayer & Max Lerner eds., George Lawrence trans., 1966). This right, of course, is of constitutional magnitude. *See generally* M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION (2d ed. 1981); Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964). Moreover, the right to associate includes the right to undertake collective action to seek access to the courts. *See, e.g., In re* Primus, 436 U.S. 412 (1978); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963). Ironically, the question presented in *Button* was whether or not a statute, which characterized the underwriting of racial discrimination test cases as being unlawful solicitation activities, abrogated the constitutional guarantees of free access to the courts. The current controversy now centers on achieving equal access to the courts for indigents by requiring lawyers to associate, or alternatively, by rejecting the argument that lawyers can refuse to associate.

sponding right *not* to associate,[85] or to be compelled to speak.[86] Requiring attorneys to associate with clients or causes through the performance of mandatory pro bono, or to speak through forced monetary donations arguably violates the First Amendment.[87] Since "the practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character,"[88] requiring association or speech as a condition upon the practice of law could violate the Constitution.[89]

In a series of cases the Supreme Court has examined First Amendment issues with respect to the compelled association with and financial support of unions and bar associations. In *Railway Employees' Department v. Hanson*[90] the Court upheld the union shop provision of the Railway Labor Act against a claim that compelled membership and payment of dues infringed upon First Amendment rights. The Court concluded that Congress' desire to promote collective bargaining was a sufficiently compelling governmental interest and that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . .

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85. One author, nevertheless, has argued that the Supreme Court does "not weigh the right *not* to associate quite as heavily as the converse right to associate." ABERNATHY, *supra* note 84, at 292–99.

86. Scully, *supra* note 9, at 1245; *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that requiring the phrase "live free or die" on license plate is unconstitutional); Miami Herald v. Tornillo, 418 U.S. 241 (1974) (holding that a statute requiring newspaper to print a political candidate's reply to an attack is unconstitutional); Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that public school children cannot be compelled to participate in a flag salute exercise).

87. The Supreme Court has equated money with speech to some degree on a constitutional level. *See* Buckley v. Valeo, 424 U.S. 1, 39–59 (1976) (per curiam) (holding that expenditure limitations of federal election act impose unconstitutional restraints on quantity of political speech). For a discussion of the case, see Harold Leventhal, *Courts and Political Thickets,* 77 COLUM. L. REV. 345, 356–67 (1977).

88. Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971); *see also* Barnard v. Thorstenn, 489 U.S. 546, 553 (1989) (stating that the practice of law is a privilege that is subject to constitutional protection).

89. Scully, *supra* note 9, at 1248–49. The doctrine of unconstitutional conditions provides that the government may not grant a benefit contingent upon the relinquishment of a constitutional right. *See generally* Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989); Green, *supra* note 19, at 376–77; Kenneth J. Levit, Note, *Campaign Finance Reform and the Return of* Buckley v. Valeo, 103 YALE L.J. 469, 478–86 (1993).

90. 351 U.S. 225 (1956).

does not violate either the First or the Fifth Amendments."[91] The Court addressed a similar issue raised by compelled dues paid to an integrated bar[92] in *Lathrop v. Donohue*.[93] In a plurality opinion, the Court in *Lathrop* upheld the mandatory membership requirement of the Wisconsin Bar against a claim that such a requirement violated the plaintiff's right of free association.[94] The Court, however, reserved the issue of whether or not the use of compelled dues to support political causes to which the plaintiff objected violated his free speech rights.[95] This issue was first resolved in the union context. In *Abood v. Detroit Board of Education*,[96] the Court held that while an agency shop agreement between a governmental employer and the union did not violate First Amendment rights, the use of fees collected to advance political or ideological causes unrelated to collective bargaining activities and to which the employee objected did violate the First Amendment.[97] This conclusion, however, was not reached by the Court with respect to bar dues for another twelve years, although state and lower federal courts did address the issue in the interim.[98]

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91. *Id.* at 238. Subsequently, the Court narrowed the permissible use of such dues by holding that the Railway Labor Act prohibited the use of dues for political purposes in International Ass'n of Machinists v. Street, 367 U.S. 740, 768–69 (1961).

92. An integrated bar is "an association of attorneys in which membership and dues are required as a condition of practicing law . . . ." Keller v. State Bar of California, 496 U.S. 1, 5 (1989).

93. 367 U.S. 820 (1961) (plurality opinion).

94. *Id.* at 843 (Brennan, J.) The Court used the state's interest in regulating the legal profession and in improving the quality of legal services as justification for the infringement. *Id.; see also* Kaimowitz v. Florida Bar, 835 F. Supp. 619 (M.D. Fla. 1992) (affirming the constitutionality of compelled membership settled in *Lathrop*).

95. In a concurring opinion, Justice Harlan concluded that such a claim lacked merit. Lathrop v. Donohue, 367 U.S. 820, 848–65 (1961) (Harlan, J., concurring).

96. 431 U.S. 209 (1977).

97. *Id.* at 235–36; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (holding that chargeable activities must be germane to collective bargaining agreement, must be justified by the government's interest in labor peace and avoiding free riders who unjustly benefit from union efforts, and must not significantly add to the burdening of free speech).

98. *See, e.g.*, Hollar v. Government of the Virgin Islands, 857 F.2d 163 (3d Cir. 1988) (holding that the integrated bar association can constitutionally spend funds and express opinions to advance causes germane to the furtherance of the administration of justice even over dissent); Arrow v. Dow, 544 F. Supp. 458 (D. N.M. 1982) (mem.) (holding that the bar may exact dues to support only those duties and functions of the Bar which serves important or compelling governmental interests); Reynolds v. State Bar of Montana, 660 P.2d 581 (Mont. 1983) (holding that the state bar association may not use funds received from compulsory dues for lobbying purposes unless an adequate provision

In 1990, the Court in *Keller v. State Bar of California*[99] held that the principles announced in *Abood* applied to an integrated bar as well,[100] and that an integrated bar could constitutionally fund through compulsory dues those activities germane to the state's interest in regulating the legal profession and improving the quality of legal service, but not those of an ideological nature which fall outside of those areas of activity.[101] In other words, presumably while the bar could support ideological or political causes, it could not do so financially with the compulsory dues of members who objected to such causes.[102] The Court acknowledged that delineating those activities which involve the regulation of the profession and those which involve political or ideological activities unrelated to the advancement of the profession or the administration of justice would not be an easy task.[103] The *Keller* court left open, how

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is made for refunding an aliquot portion to dissenting members). *See generally* Jay M. Zitter, Annotation, *Use of Compulsory Bar Association Dues or Fees for Activities from Which Particular Members Dissent,* 40 A.L.R. 4th 669 (1985).

99. 496 U.S. 1 (1990) (unanimous opinion).

100. *Id.* at 11–17.

101. *Id.* at 13–14.

102. Abood v. Detroit Board of Education, 431 U.S. 209, 235–36 (1977).

103. *Keller*, 496 U.S. at 16. The Court did identify the extreme ends of the spectrum:

> Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Id. at 16.

> The activities challenged by the petitioners in *Keller* included:
> (1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor-piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries;
> (2) Filing *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline

ever, the question as to what procedures could be employed to assure that the rights of dissenters are protected, and that their dues are not used to finance non-germane political or ideological activities.[104] The Court also reserved the issue of whether or not members of an integrated bar could be compelled "to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*."[105]

Assuming that association itself with an organization which spends the compulsory dues of consenting members on ideological purposes is not impermissible constitutionally, what specific activities might be appropriate for funding through the compulsory dues of all members? In a post-*Keller* case, *Schneider v. Colegio de Abogados de Puerto Rico*,[106] plaintiffs complained that compulsory dues and fees were used to espouse views and support causes with which they disagreed on controversial issues far removed from the concerns of lawyers.[107] The federal appeals court adopted the district court's five areas of permissible purposes for which financial support could be compelled: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services, improving court operations, and funding those activities without expressive

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> attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm; and
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> (3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing.

Id. at 5-6 n.2.

104. *Id*. at 17. The landmark case which outlined a minimum set of constitutionally required protection was Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986). *See also* Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 634–37 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992); Gibson v. Florida Bar, 906 F.2d 624, 628–29, 633 (11th Cir. 1990); Crosetto v. Heffernan, 810 F. Supp. 966 (N.D. Ill. 1992), *aff'd in part, vacated in part, & remanded sub nom.*, Crosetto v. State Bar of Wisconsin, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2138 (1994).

105. *Keller*, 496 U.S. at 17. The same issue was reserved in Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 634 n.19 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992). For a discussion of *Schneider*, see *infra* notes 106–12, and accompanying text.

106. 917 F.2d 620 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992).

107. *Id*. at 623–24. Such alleged issues included "supporting the Sandinista Front for National Liberation in Nicaragua, forcing the United States Navy to leave the island of Vieques, stopping the draft, and amending the electoral law in Puerto Rico." *Id.* at 624.

content which benefit all members equally, such as providing insurance and underwriting social events.[108] The appeals court concluded that political activities designed to create a pluralistic society, including political lobbying, were inappropriate activities to fund[109] unless the lobbying activities were "narrowly limited to regulating the legal profession or improving the quality of legal service available to the residents of Puerto Rico."[110] The court also concluded that where permissible and impermissible goals were intertwined beyond separation, dissenters had a right to opt out of the entire cost of the function.[111] Finally, the court upheld another challenged program, a stamp program , whereby attorneys were required to purchase stamps to attach to official documents and the funds so collected were used to fund certain bar activities, with the caveat that no revenues from the sale of the stamps be used to fund activities outside the Bar's proper *core* functions.[112]

Thus, it appears that non-ideological goals designed to improve the administration of justice and the availability of legal services constitutionally can be funded through compelled payment of not only bar dues, but perhaps through funds generated by mandatory pro bono buy-out options, as well.[113] The appropriateness of the bar's

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108. *Id.* at 626–32.

109. *Id.* at 632–33.

110. *Id.* at 632. By way of example the court noted that it would be appropriate to fund lobbying efforts designed to create new judgeships, to increase salaries for governmental attorneys, or to amend the technical, non-ideological aspects of substantive law, and that it would not be appropriate to fund efforts to advocate restrictions on advertising for legal services in aid of abortion clinics, to promote a system of no-fault automobile insurance, or to generate support for a death penalty. *Id.* at 632–33.

111. *Schneider*, 917 F.2d at 633–34. For example, if a magazine sponsored by the bar espoused an unbalanced ideological perspective, along with articles of general interest, it should not be funded through the compulsory dues of dissenters. *Id.* at 634.

112. *Id.* at 637–39. The court reasoned that it was rational to impose a larger share of the burden of funding upon lawyers who use the judiciary more frequently. *Id.*

113. Two pre-*Keller* cases also speculated on the permissible use of compulsory bar dues. In Falk v. State Bar of Michigan, 305 N.W.2d 201 (Mich. 1981), *cert. denied*, 469 U.S. 925 (1984), the state supreme court determined that funds spent for regulatory activities, continuing legal education, publication of the bar journal, preservation of a client security fund, the education of the public on the legal system, and activities designed to make the legal system more accessible would be constitutionally permitted. In Gibson v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986), the court defined activities designed to improve the administration of justice as those relating to the role of the lawyer in the judicial system and society. Therefore, the court approved lobbying for "(1) questions concerning regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client

support for such purposes has been endorsed with respect to the use of interest money generated from client trust accounts, or IOLTA programs.[114] The First Circuit, in *Washington Legal Foundation v. Massachusetts Bar Foundation*,[115] upheld the district court's dismissal of a complaint which challenged an IOLTA program on First Amendment grounds, holding that since the interest earned on the account belonged to no one, using it to fund legal assistance programs for the poor, by definition, could not constitute compelled financial support.[116] In contrast, of course, the exercise of a mandatory pro bono buy-out option would be more akin to a forced contribution of personal funds.

Nevertheless, is the spending of funds generated through the buy-out option of a mandatory pro bono proposal, which is designed to enhance the delivery of legal services to the poor, a permissible use aimed at "improving the quality of legal services"?[117] The district court, in *Washington Legal Foundation v. Massachusetts Bar Foundation*,[118] reasoned that the use of IOLTA funds did not concern the ideological or political substance of any litigation, but only the process; hence, it concluded that the rule requiring funding dealt "with opportunity, not ideology."[119] It can be argued, however, that either forcing a lawyer to associate with indigent clients or causes which relate to their needs, or to donate money to support such litigation, inherently contains ideological and political overtures, and that the endorsement of that goal itself reflects a partisan position.[120] Certainly if the money collected from any buy-out option is used in furtherance of activities comparable to what the Model Rules of Profes-

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trust accounts; and (5) law school and Bar admission standards." *Id.* at 1569 n.4.

114. IOLTA stands for "Interest on Lawyers' Trust Accounts." For a discussion of how IOLTA funds came about in response to federal banking reform, see Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987).

115. 993 F.2d 962 (1st Cir. 1993).

116. *Id.* at 979–80.

117. Keller v. State Bar of California, 496 U.S. 1, 13–14 (1990).

118. 795 F. Supp. 50 (D. Mass. 1992), *aff'd*, 993 F.2d 962 (1st Cir. 1993).

119. *Id.* at 55–56.

120. Scully, *supra* note 9, at 1245–54. Mr. Scully, an attorney with the Washington Legal Foundation, also argues that the decision in *Keller* itself could represent the death knell for mandatory pro bono schemes. *Id.* at 1250. It is undisputed that whether or not the provision of legal services to indigents is the type of proper cause envisioned by the *Keller* Court, many attorneys increasingly are objecting to political causes being advanced by bar associations at the perceived cost of their First Amendment rights. Junda Woo, *Lawyers Challenge Bar Groups' Authority*, WALL ST. J., March 31, 1994, at B-2.

sional Conduct define as being appropriate service activities,[121] ideological causes will be advanced. Furthermore, even if improving the delivery of legal services to the poor is constitutionally a proper purpose, it has not been established that mandatory pro bono will accomplish this objective, nor that it is the least restrictive means constitutionally of providing access to justice for the poor.[122] At any rate, even though First Amendment issues regarding mandatory pro bono are far from being resolved, if such a plan is to be implemented, what are some sound economic suggestions for the parameters of a proposal?

IV. ECONOMIC ANALYSIS

A. An Economic Model of a Bar Association

A model, such as a doll or a model airplane, is a simplified representation or abstraction of reality. In models reality is usually simplified because the reality is too complex to copy, or because much of the complexity is actually irrelevant. Models permit the user to play, demonstrate what can be built, or even simulate an event. In model building, the challenge is to balance simplification and representation.[123] Models can represent different levels of abstraction: iconic models, such as model airplanes, which are the least abstract; analog models, such as maps, which do not look like the real system, but behave or mimic the system; and mathematical models, such as computer simulation models, which are the most abstract and require large amounts of time and resources to construct.[124]

An economic model is a type of mathematical model which allows the modeling or simulation of an economic event. By manipulating various endogenous and exogenous variables,[125] it is pos

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121. *See supra* notes 56–63 and accompanying text.

122. Because First Amendment rights arguably are affected by mandatory pro bono proposals, the government must establish that the requirement serves a compelling state interest and that the least restrictive means has been selected for implementing the state's objective. *See* Gibson v. Florida Bar, 798 F.2d 1564, 1599 (11th Cir. 1986); *see also* Scully, *supra* note 9, at 1245–49.

123. EFRAIM TURBAN & JACK R. MEREDITH, FUNDAMENTALS OF MANAGEMENT SCIENCE 30–48 (1991).

124. *Id.* at 30.

125. An endogenous variable is a variable which is inside the system under consideration. An exogenous variable is a variable which is outside the system under consid-

sible to consider what effect an event or multiple events may have on the outcomes under consideration, without requiring that the events actually occur. Most economic models are designed to see what happens if something changes. This ability to analyze change is particularly valuable in economic models, where the occurrence of the actual event or object under consideration may be quite expensive or even dangerous. When the chance of a bad outcome can be very costly, economic modeling allows the user to consider the effects of manipulating certain variables within the system, without the possibility of an undesirable and irreversible economic impact.

A number of state bar associations are considering various pro bono proposals which would allow lawyers to satisfy their pro bono obligation by contributing their time or by contributing money in lieu of professional time.[126] Because of the large number of lawyers involved, the possible economic impact on both the bar and the public could be quite substantial. Consequently, the motivation to forecast the economic and social impacts of the various proposals is strong. Using economic modeling techniques, it is possible to model a typical bar association and, by manipulating a variety of decision variables, to capture some of the economic and social impacts of various pro bono proposals. The bar association described in this model allows the ethical obligation to be satisfied collectively through the exercise of a buy-out option, and then uses the pool of money generated by attorneys who exercise that buy-out option to contract with other attorneys to provide the legal services.

The process of building a model begins with identifying the basic components of the model and describing the relationships between and among the variables which impact and comprise it. Economic or mathematical models are comprised of three basic components: result variables, decision variables, and uncontrollable variables.[127] The variables are connected by mathematical or logical relationships. *Result variables* reflect the level of system effectiveness and capture the overall success of the system being modeled. Result variables are also sometimes called outcome or dependent

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eration. Thus, it is important to precisely define the boundaries of the system. For a more complete description of how to establish system boundaries in a modeling environment, see *id*. at 740–68.

126. *See supra* notes 56–76 and accompanying text; *see also* Appendix 1.

127. For a discussion of these variables, see TURBAN & MEREDITH, *supra* note 123, at 30–48.

variables, since the outcome of the model is dependent upon the manner in which the model variables are manipulated. *Decision variables* describe elements in the problem for which a choice must be made. Such variables are manipulable and controllable by the decisionmaker and usually have a significant impact on the outcome or dependent variables. *Uncontrollable variables* are variables or factors that affect the result or outcome, but are not under the control of the decisionmaker. Such variables are the most difficult to model, since the outcome may be significantly affected by uncontrollable variables or factors beyond the control of the modeler.

In this model, the result or dependent variable is the total number of pro bono hours to be provided by the bar (*total pro bono hours*). Total Pro Bono Hours are composed of (a) the number of hours voluntarily provided by lawyers (total pro bono *volunteered* hours), and (b) the number of hours delivered by lawyers who are paid by the bar association to work (total pro bono *contract* hours). The buy-out rate and the compensation rate are examples of decision variables. For example, the bar association is able to *decide* the hourly rate at which lawyers contribute to the bar in lieu of personally performing pro bono services (*the buy-out rate*), as well as the hourly rate at which the bar association compensates lawyers who contract to perform pro bono work (*the compensation rate*).[128] Another decision variable in this model is the number of pro bono legal service hours each lawyer is obliged to provide, either through volunteer legal services delivered or through financial contributions to the bar.[129] Finally, the average hourly rate at which lawyers charge their regular clients is an uncontrollable variable known as the *billing rate*. Other examples of uncontrollable variables include the aggregate demand for all legal services, legal restrictions on pro

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128. Multiplying the buy-out rate by the number of service hours each buy-out lawyer would otherwise be obliged to contribute creates a fund to compensate lawyers who contract for pro bono work. Dividing this fund by the compensation rate generates the total pro bono contract hours. Again, combining total pro bono contract hours and total pro bono volunteered hours yields total pro bono hours, the result variable.

129. The minimum aggregate number of total pro bono hours to which the entire Bar aspires is equal to the number of lawyers in the bar association multiplied by the pro bono legal service hours that each of those lawyers is obliged to provide. This minimum level of total pro bono hours may or may not equal the actual total pro bono hours potentially available. That figure will depend upon the compensation rate and buy-out rate the bar association establishes and their relationship to each other. *See infra* notes 140–58 and accompanying text.

bono imposed by the legislature, or similar requirements over which the bar has no control.

Because economic models can be quite complex, simplifying assumptions are often made about the environment in which the model operates, as well as about the model itself. Unfortunately, the overall performance of the model depends quite heavily on the correctness of the assumptions made. To simplify the illustration, this model will be based on a mythical bar association of 10,000 lawyers with an aspirational goal of twenty hours per lawyer annually.[130] Other assumptions included are: (1) lawyers are rational and the traditional economic man assumptions[131] prevail; (2) the twenty-hour goal can be satisfied either by personally providing the pro bono legal services or by contributing money to the bar association, which then hires lawyers to perform needed legal services; (3) if their billing rate equals or exceeds the buy-out rate, lawyers will buy out their pro bono service, rather than voluntarily performing it;[132] (4) if their billing rate is less than the buy-out rate, lawyers will contribute their time in the performance of pro bono service; (5)

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130. There are approximately 780,000 lawyers in the United States. Thus, the average size of a state bar association is approximately 15,000 lawyers. Because several states, such as California, New York, and Florida, represent disproportionately large bar associations, the median bar association actually has approximately 11,000 lawyers. MARTINDALE-HUBBELL LAW DIRECTORY (1993). For ease in computation, 10,000 was chosen as the number of lawyers in the mythical bar association modeled here. By manipulating the size of a bar association, as well as the aspirational goal, different results can be achieved. Thus, this model is not intended to model any particular existing bar association. Rather, the model is proposed to capture a mythical, or typical, bar association. Because the model assumes linear relationships between the variables, the relative outcomes will remain the same, even though the *absolute* outcomes will differ. That is, only the magnitude of the outcomes in other models will change (i.e. total pro bono hours), not the *relative* outcomes within a particular group of models (i.e. which type of model is preferable).

131. There are three economic man assumptions: (1) man is an economic being whose objective is to maximize personal goals; that is, the decisionmaker is rational; (2) in a given situation, all alternative courses of action and their possible consequences are known; and (3) the decisionmaker has an order of preference that enables him to rank the desirability of all consequences of the analysis. TURBAN & MEREDITH, *supra* note 123, at 39.

132. For example, if a lawyer's billing rate is $75/hour and the buy-out rate is the same, at this point of indifference, the rational lawyer will choose to work for paying clients, since those clients represent a continuing source of income. In contrast, a pro bono client represents a single occurrence of legal work and may or may not come back to the lawyer for additional income-producing work. Although this is a strong assumption, unless altruistic motives are injected, it is likely a sound one. *See* Silverman, *supra* note 6, at 913–28 (concluding that attorneys will not render service in kind).

if the bar association's compensation rate exceeds their billing rate, lawyers will contract with the bar to perform pro bono work; (6) lawyers *either* contribute their time in performing pro bono service *or* buy out their obligation;[133] (7) the total number of pro bono hours contracted is equally distributed among the pro bono lawyers who perform them;[134] (8) billing rates are uniformly distributed over a range of $50 to $150/hour; and (9) the model does not operate in a self-regulating market[135] so lawyers, therefore, may not barter, trade, or sell time credits between or among themselves.

B. Modeling the Florida/Nevada Plans

The Florida Bar Association proposes that its lawyers perform twenty hours of pro bono service or contribute $350 annually; the Nevada Bar Association proposes that its lawyers perform twenty hours of pro bono service or contribute $500 annually.[136] These plans result in buy-out rates of $17.50/hour (FL) and $25/hour (NV) which is well below the billing rate of the least-compensated lawyer ($50/hour) in this model.[137] Therefore, it is reasonable to assume that all the lawyers associated with either bar will opt to buy out their obligation rather than to volunteer the required twenty hours. It will cost a $50/hour Nevada attorney $1000 to volunteer his services, yet only $500 if he buys out his obligation.[138] This cost difference becomes more dramatic the higher the attorney's billing rate. It

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133. That is, under the model's assumptions there is no option for a combination of money and service. Michigan, however, has a voluntary standard of 30 hours or $300 annually, or some combination thereof. Paul R. Abrahamsen, *Pro Bono Involvement*, 70 MICH. B.J. 896 (1991).

134. This assumption merely simplifies the calculations which illustrate how the model works. It has no substantive impact on those outputs in terms of the implications one can derive from them or upon the behaviors various bar associations will exhibit.

135. That is, lawyers opting to buy out their obligation do so by monetarily contributing directly to the bar an amount in accordance with its recommendation; the bar association then contracts pro bono services from lawyers at rates which it sets.

136. Florida and Nevada were chosen to model because Florida is the first state to mandate reporting requirements and Nevada is the first bar to petition the state supreme court for an order mandating that annual pro bono hours be performed as a condition for maintaining a license. *See supra* notes 28 & 65 and accompanying text.

137. *See infra* Appendix 2. Further, one is probably safe in assuming such buy-out rates as those for which Florida and Nevada provide, are well below most any lawyer's billing rate.

138. Twenty volunteered hours represent 20 hours not worked at the $50/hour lawyer's billing rate. Thus, volunteering those 20 hours amounts to lost income of $1000.

will cost a $125/hour Nevada lawyer $2500 to volunteer her services, but only $500 if she buys out her obligation. Thus, the $50/hour Nevada lawyer avoids $500 in unnecessary cost by buying out his obligation and the $125/hour Nevada lawyer avoids $2000 by doing the same.

The buy-out behavior one would expect lawyers to exhibit would generate a fund of $5,000,000 for the bar ($25/hour x 20 hours/lawyer x 10,000 lawyers).[139] Under the model's assumptions, the bar can then use the $5,000,000 to hire lawyers to perform what otherwise would have been pro bono service. The number of hours which can be funded depends, of course, on the rate at which the bar is willing to compensate the lawyers it hires. A compensation rate anything less than a lawyer's billing rate will be ineffective as an inducement because it will only add cost in the form of an opportunity loss to the initial cost of buying the service obligation.[140] For example, a $50/hour Nevada lawyer who contracts for twenty hours of pro bono service at, for example, $25/hour, the rate at which he bought out his obligation, might as well have volunteered his time.[141] The $50/hour lawyer doubles his cost by contracting with the bar at $25/hour and the $125/hour lawyer quintuples hers by doing the same. If instead, a reasonable compensation rate of $100/hour is set, the fund would only be able to provide 50,000 hours of pro bono work annually ($5,000,000 divided by $100/hr) which is 150,000 hours less than what the Bar would generate if all lawyers performed their pro bono obligation instead of buying out of it (20

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139. The fund generated by Florida would be $3,500,000 ($17.50/hour x 20 hours/lawyer x 10,000 lawyers).

140. Faced with alternative courses of action ranked according to their value to the decisionmaker, the decisionmaker's opportunity cost is the value of the second best alternative, that is, the value of the next best alternative he forgoes in deciding for the most highly valued alternative. The term *opportunity loss* then, as used in this study, is the loss that occurs as the result of opting for a less than best alternative — the difference in value between the best alternative and the one selected.

141. In other words, ($50/hour billing rate - $25/hour compensation rate) x 20 hours = $500 opportunity loss as a result of not working those 20 hours at the billing rate. Adding this opportunity loss to the buy-out cost of $500 yields a final cost of $1000 which is exactly what it would have cost the lawyer if instead he had worked the hours. A higher compensation rate of, for example, $40/hour would only reduce the opportunity loss added to his initial buy-out cost — ($50/hour billing rate - $40/hour compensation rate) x 20 hours = $200 opportunity loss as a result of not working those 20 hours at the billing rate. Adding this opportunity loss to the buy-out cost of $500 yields a cost of $700. Thus, the $50/hour lawyer would serve his interests best by not contracting with his bar association under such conditions.

hours/lawyer x 10,000 lawyers). Thus, plans such as those of Florida and Nevada are either ill-conceived or disingenuous because they fail to inspire lawyers to fulfill their obligation individually, *and* fail to provide for total fulfillment collectively.

C. The Florida/Nevada Plans Revised

The following model varies the Florida/Nevada plans by setting a fixed buy-out rate substantially higher than the billing rates of a significant proportion of the lawyers associated with the model bar. The analysis assumes a fixed buy-out rate of $100/hour. This buy-out rate neatly divides the lawyer population into two equal groups of lawyers based on their billing rates.[142] Lawyers whose billing rates are below the fixed buy-out rate will opt to volunteer their time (20 hours/lawyer x 5000 lawyers) which will generate 100,000 pro bono hours.[143] Lawyers whose billing rates are greater than or equal to the buy-out rate will opt to buy out their obligation.[144] This group of lawyers will generate a $10,000,000 fund as the result of buying out their obligation (20 hours/lawyer x $100/hour x 5000 lawyers) which can then be used to contract with lawyers to perform pro bono services. The number of additional hours of pro bono service the bar generates, then, depends on the rate at which it chooses to compensate the lawyers who perform the services. If, for example, the bar compensates lawyers at the buy-out rate of $100/hour, the

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142. *See infra* Appendix 3. Inasmuch as the billing rates for this mythical bar are uniformly distributed over a range of $50–$100 hour, a buy-out rate equal to a $100/hour billing rate is the median for that billing rate range. Since this mythical bar consists of 10,000 lawyers to whom these billing rates apply, one-half of the lawyers (5000) have billing rates less than $100/hour and the other half (5000) have billing rates which exceed $100/hour.

143. They will do this because the opportunity cost of volunteering their time is less than the cost of buying out of it. Volunteering time will cost $1500 in foregone income for the average lawyer in this group, where if that lawyer chose to buy out his obligation, it would cost him $2000 — a 33.3% increase in cost. Lawyers whose billing rates approach the lower end of the billing rate scale incur a lower cost as the result of volunteering their time (i.e. $1000 for a $50/hour lawyer). On the other hand, a $50/hour lawyer buying out his obligation doubles his costs (20 hours x $50/hour or $2000) — a 100% increase.

144. They buy out because the cost of donating their time is greater than the cost of buying out of it. It will cost any lawyer in this billing rate range $2000 to buy out his obligation. In contrast, volunteering time will cost $2500 for the average lawyer in this group — a 25% increase in cost. Lawyers, whose billing rates approach the upper end of the billing rate scale would incur an even higher cost as the result of volunteering their time — $3000 for a $150/hour lawyer — a 50% increase ($1000 divided by $2000).

lawyers who volunteered their time because the buy-out rate exceeded their billing rate also will contract with the bar as pro bono lawyers for the same reason. By contracting with the bar, these lawyers can reduce the cost they incurred when they volunteered their time. For example, consider a lawyer whose billing rate is $75/hour. The cost he incurs by volunteering his time is $1500 (20 hours x $75/hour). By contracting with the Bar at $100/hour, he substitutes hours at that rate for hours at his lower billing rate. This reduces his cost by a third to $1000 ($1500 - ($100/hour - $75/hour) x 20 hours).[145] The Bar will then generate an additional 100,000 hours ($10,000,000 ÷ $100/hour) and provide the public 200,000 hours of pro bono service by contracting with lawyers to perform individually an annual average of twenty hours of pro bono service in addition to the twenty hours of pro bono service each volunteered.[146]

However, such a plan has limitations. First, as long as the buy-out and compensation rate are the same, this plan can never generate more than 200,000 hours. For example, consider a buy-out and compensation rate of $75/hour. This divides the bar into a group of 2500 lawyers who will volunteer 50,000 hours of service and a group of 7500 lawyers who will buy out their obligation, generating a fund of $11,250,000 (20 hours x 7500 lawyers x $75/hour). Contracting the 2500 volunteer lawyers at $75/hour to perform the pro bono work will generate an additional 150,000 hours for a total of 200,000 hours, representing an annual average of eighty hours of pro bono work for the lawyer who both volunteers and contracts her time. The 2500 volunteer lawyers will contract to do this work because in doing so, they will, on average, reduce their cost of volunteering more

145. Instead of substituting hours at $100/hour for hours at $75/hour, the lawyer could work at the lower rate. Thus, the advantage he gains by working hours at the higher rate is the difference between the two rates (opportunity loss) multiplied by the hours he works at that higher rate, which takes into account his opportunity cost of not working those hours at his billing rate. Lawyers with billing rates near the low end of the billing rate scale ($50/hour) will achieve, percentage-wise, a greater reduction in the cost they initially incurred by volunteering their time. Consider the lawyer billing at $50/hour. By contracting with the bar he achieves a 100% reduction in his cost ($1000 - ($100/hour - $50/hour) x 20 hours). Lawyers whose billing rates approach $100/hour will achieve, percentage-wise, a diminishing reduction in the cost they initially incurred by volunteering their time. This percentage reduction will shrink to 0% for the lawyer whose billing rate equals the compensation rate.

146. *See infra* Appendix 4.

so than with a buy-out and compensation rate set at $100/hour.[147] The same number of hours (200,000) would be generated if the buy-out and compensation rates were, for example, $125/hour. Only the costs of those who volunteered their time would change.[148]

This plan, however, could generate more than 200,000 total pro bono hours if the bar chose to contract lawyers at a compensation rate *lower* than the buy-out rate. Consider a buy-out rate of $100/hour and a compensation rate of $75/hour. As before, this buy-out rate neatly divides the lawyer population into two equal groups of lawyers based on their billing rates. Lawyers whose billing rates are below the fixed buy-out rate will opt to perform pro bono services. This will generate 100,000 pro bono hours (20 hours/lawyer x 5000 lawyers). The lawyers whose billing rates are equal to or above the buy-out rate will opt to buy out their obligation. This group of lawyers will generate a $10,000,000 fund for the bar as the result of buying out of their obligation (20 hours/lawyer x $100/hour x 5000 lawyers). This fund can then be used by the bar to contract with lawyers to perform pro bono services. Lawyers who bill between $75/hour and $100/hour, however, will only volunteer their time. They will not contract with the bar to perform pro bono work because that would only add an opportunity loss to the costs they had

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147. Consider a lawyer whose billing rate is $62.50/hour. His initial cost is $1250. Contracting with the bar, his cost reduces to $500 ($1250 - ($75/hour - $62.50/hour) x 60 hours). Dividing a fund of $11,250,000 by $75/hour by 2500 contract lawyers yields an average of 60 hours of contract work at $75/hour for which they can substitute 60 hours at their respective billing rates. Thus, this plan provides a great incentive for volunteer lawyers to contract their time as well. Consider, for example, the $50/hour lawyer who incurs an initial cost of $1000 by volunteering his time. Contracting with the bar reduces that cost to $500 ($1000 - ($75/hour - $50/hour) x 60 hours). That is, the $50/hour lawyer will more than offset his costs and increase his income as a result of this plan.

148. If a bar association equates its buy-out and compensation rates, there is probably little advantage to administratively interposing itself between the lawyers who buy-out their obligation and those who volunteer their time and are willing to contract for those buy-out hours. Lawyers could haggle among each other for the pro bono hours which the bar expects and thus more efficiently achieve their collective aspirational goal. Such haggling would constitute a market in which lawyers who wished to buy out of their obligation would demand services from other lawyers willing to supply those services. To the extent such a market was efficient, it would generate the 200,000 hours to which the bar's membership collectively aspired. Such a plan would reduce the Bar's administrative burden since it would only have to (1) stipulate the number of hours of pro bono service for which each lawyer is responsible either through contracting for another lawyer's services or volunteering his own time, and (2) keep an accounting to ensure that each lawyer properly discharged his pro bono responsibility.

already incurred.[149] Lawyers who bill below $75/hour will not only volunteer their time but contract with the bar as well, because in so doing they can, on the average, substantially reduce their cost.[150] Such a plan will generate 133,333 contract hours ($10,000,000 ÷ $75/hour) in addition to the 100,000 hours the lawyers whose billing rate is under $100/hour have already volunteered. Thus, the bar is able to generate 233,333 total pro bono hours with this variation on a fixed-rate plan.[151]

D. Modeling the American Bar Association Plan

The American Bar Association proposes that lawyers donate fifty hours annually or buy out their obligation at the equivalent rate at which they bill their clients. Under the model's assumptions, the buy-out rate must equal or exceed a lawyer's billing rate before he finds it economically advantageous to volunteer his time rather than to buy it out; therefore, the ABA plan as applied to the model will generate a substantial fund of $20,000,000 (10,000 lawyers x 20 hours x $100/hour - the average billing rate of the model bar's members). If the compensation rate is $100/hour, lawyers whose billing rates exceed $100/hour will buy out their obligation and not contract with the bar to perform pro bono work.[152] Lawyers whose billing rates are less than $100/hour *first* will also opt to buy out their obligation *but then* will contract with the bar to do pro bono work.[153] The

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149. Consider a lawyer whose billing rate is $82.50/hour. Her cost is $1650 (20 hours x $82.50/hour). To contract with the bar for 20 hours of pro bono work would only add an opportunity loss of $150 to the initial cost of volunteering her hours ($1650 - ($75/hour - $82.50/hour) x 20 hours).

150. Dividing a fund of $10,000,000 by $75/hour by 2500 contract lawyers yields an average of 53.333 hours of contract work at $75/hour for which they can substitute 53.333 hours at their respective billing rates. Consider a lawyer whose billing rate is $62.50/hour. Her initial cost is $1250. Contracting with the bar reduces that cost to $583.33 ($1250 - (($75/hour - $62.50/hour) x 53.333)). Consider another example. A $50/hour lawyer incurs an initial cost of $1000 by volunteering his time. Contracting with the bar reduces that cost to -$333.33 ($1000 - (($75/hour - $50/hour) x 53.33 hours)). That is, the $50/hour lawyer will more than offset his costs and increase his income as a result of this plan. Thus, this plan provides a strong incentive to volunteer lawyers to contract their time as well.

151. *See infra* Appendix 4.

152. Consider a lawyer whose billing rate is $125/hour. Her cost of volunteering time or buying out of her obligation is $2500 (20 hours x $125/hour). Every hour she works by contracting with the bar adds an opportunity loss of $25 to the cost she already incurred.

153. Relaxing Assumption Three shows the disadvantage a contracting lawyer suf-

$20,000,000 fund will permit pro bono lawyers to substitute pro bono hours at a higher rate for regular practice hours, billed at a lower rate. Thus, contract lawyers who buy out their obligation will be able to substantially lower the initial cost of meeting the aspirational goal. For example, it initially will cost a $50/hour attorney $1000 to buy out the obligation. However, if he later contracts with the bar for forty hours[154] of pro bono work he will earn $1000 more in revenue as the result of this plan than if he had no pro bono obligation to discharge in the first place (20 hours x $50/hour - 40 hours x ($100/hour - $50/hour) = -$1000 — a negative cost of $1000 or a cost reduction of 200%).[155] A $75/hour lawyer would reduce her cost to $500, a cost reduction of 67% by buying out her obligation and then contracting with the bar for forty hours (20 hours x $75/hour - 40 hours x ($100/hour - $75/hour)). Lawyers who contract with the bar to perform pro bono work at a $100/hour compensation rate will collectively generate a total of 200,000 hours of pro bono

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fers in performing his obligation rather buying out of it. At a compensation rate of $100/hour, working the obligation will generate 100,000 hours (5000 lawyers x 20 hours/lawyer). This option will cost a $50/hour lawyer $1000 in foregone revenue and 20 hours of time. It will also cost a $75/hour and $100/hour lawyer $1500 and $2000, respectively, in foregone revenue. These lawyers may then opt to contract with the bar to work their higher paid colleagues' buy-out hours which has generated a $12,500,000 fund (5000 lawyers x 20 hours x $125/hour - the average buy-out rate of the buy-out lawyers). If they choose to do this, they will enjoy a substantial reduction in their costs because they can substitute the hours they contract with the bar at $100/hour for their regular practice hours at a lower rate. The $50/hour lawyer makes $250 more revenue as the result of this plan than if he had no pro bono obligation to discharge in the first place (20 hours x $50/hour - 25 hours x ($100/hour -$50/hour) = -$250 — a negative cost of $250). A $75/hour lawyer would reduce her cost to $875 by contracting with the bar, while a $100/hour lawyer would be indifferent. Given that the contract lawyers work their obligation, the bar can deliver a total of 225,000 hours of pro bono service. Comparing these costs to those subsequently calculated for contracting lawyers who buy out their obligation reveals that buying out the obligation is by far more attractive to the contracting lawyer than working it. Thus, Assumption Three is not a factor in anticipating how lawyers will behave under an ABA-type plan.

154. $20,000,000 fund ÷ $100/hour (the compensation rate) ÷ 5000 lawyers = 40 hours/lawyer.

155. Unlike the revised Florida/Nevada plans, no hours are volunteered, only a fee equal to 20 hours x each lawyer's respective billing rate is paid to the bar. Thus, a fund is generated which allows each lawyer who buys out his obligation and then contracts with the bar to substitute 40 hours of contract work at $100/hour for regular practice hours billed at a lower rate. If, on the other hand, contracting lawyers first work their obligation, the fund will only equal $12,500,000 instead of $20,000,000 (20 hours x 5000 lawyers x $125/hour — the average billing rate of the lawyers whose billing rates exceed the bar's compensation rate). Thus, lawyers contracting with the bar would only be able to substitute 25 contract hours for regular practice hours.

service ($20,000,000 ÷ $100/hour) since they will also opt to buy out their obligation.

More collectively generated pro bono service hours are possible, however, if the compensation rate is reduced. At a $90/hour compensation rate 222,222.22 hours of pro bono service would be forthcoming ($20,000,000 ÷ $90/hour). At a compensation rate of $80/hour, 250,000 hours of pro bono service would be forthcoming ($20,000,000 ÷ $80/hour).[156] Reductions in the compensation rate will be attractive to the bar from the standpoint of generating more hours for which those lawyers who find it economically advantageous can contract. Alternatively, compensation rates exceeding $100/hour are not desirable because the collective aspirational goal of at least twenty hours of pro bono work could not be achieved.[157] However, lawyers who bill at different rates will minimize their cost depending upon the compensation rate.[158]

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156. *See infra* Appendix 5.

157. The fund of $20,000,000 is fixed since all lawyers will buy out under the model's assumptions. Thus, a compensation rate of $118.31/hour (the rate at which a $75/hour lawyer minimizes her cost of obligatory participation in the plan — $428) would permit the bar to fund only 169,047 hours of pro bono work ($20,000,000 ÷ $118.31/hour).

158. For example, at compensation rates of $100, $85, and $80/hour, the ABA plan will cost a $75/hour lawyer $500, $828, and $1083, respectively (still an improvement over the $1500 buy-out fee). At compensation rates of $100, $85, and $80/hour, the ABA plan will cost a $60/hour lawyer -$400, -$481, and -$467, respectively (a decided improvement over the $1200 buy-out fee). These results can be easily shown. First consider the basic formulation for determining the cost of participating in the ABA's plan, 20 x BR - (available PB hours/lawyer) x (CR - BR). CR and BR are the compensation and billing rates, respectively. The available PB hours/lawyer are the pro bono hours available to each lawyer as determined by the fund size divided by the CR and number of contracting lawyers combined. The number of contracting lawyers is in turn determined by ((CR - $50 per hour)/$100 per hour) x 10,000 lawyers. Partially differentiating the cost formula with respect to CR and setting its numerator (the relevant portion of the derivative) equal to zero, yields ∂Cost/∂CR = -CR2 4CR x BR - 10,000Br = 0 which is at a global minimum. Solving for BR yields BR = CR2/(4CR - 100) which means that for any value of CR in the billing range, a value for BR is determined for which cost is at a minimum. Thus, at a compensation rate of $100/hour, the lawyer who bills at $66.67/hour minimizes her cost of having to participate in the program. At a compensation rate of $90/hour, the lawyer who bills at $62.31/hour minimizes his cost of having to participate in the program. And, at a compensation rate of $75/hour, the lawyer who bills at $56.25/hour minimizes his cost of having to participate in the program. Assuming a uniform distribution of billing rates across the billing range for the 10,000 lawyers in this model's bar lead to these specific relationships. However, even with a real-world bar with a vastly different (non-uniform) distribution of billing rates for its members, any value of CR in the billing range of its members will determine a value for BR for which cost is at a minimum when following the ABA plan.

Initially the ABA plan is attractive because it appears to be neither regressive nor progressive. The analysis, nevertheless, suggests that the plan is not nearly so even-handed as it seems. The reality of introducing a compensation mechanism into the plan in order to generate pro bono hours performed by contracting lawyers creates something analogous to a progressive tax system. The bar should set a compensation rate for its members which will make it attractive for them to achieve their collective aspirational goal. In so doing, however, the bar unavoidably divides its membership into one group whose billing rates is less than the compensation rate; therefore, the share of the plan's cost for those lawyers is not as confiscatory as for those whose billing rates exceed the compensation rate. Whatever the compensation rate some members will be discontent. Those whose billing rates exceed the compensation rate will be discontent because they have no opportunity whatsoever to recover some of the cost they incur as a result of their obligatory participation in the plan. Those whose billing rate is less than the compensation rate will also be discontent because for each specific billing rate all but one compensation rate will deny the lawyer billing at that specific rate the opportunity to maximize recovery of the cost incurred as a result of participation in the plan.

V. CONCLUSION

This paper has addressed both ethically and empirically the concept of pro bono as a collective obligation of the profession, whereby lawyers are allowed to buy out their individual obligation by contributing funds to their respective state bar associations in order to achieve an aggregate goal. Under many of the current plans, *individual satisfaction* of the annual aspirational watermark, if that is the goal, will not be achieved. Assuming non-altruistic motivation, it does not take an economist to predict whether or not, when faced with the issue, a Florida attorney will choose to donate twenty hours of professional time or write a tax deductible check for $350. If individual satisfaction is the goal, the means of achieving that goal must be re-examined. Alternatively, if as this paper suggests, *collective satisfaction* is ethically sufficient, the bar has yet to critically analyze a successful approach. A critical link, the rate at which attorneys will be compensated from the aggregate fund, is still missing. Moreover, since the relationship between the variables

may not be linear, it will be imperative to determine the manner in which the billing rates of a bar's members are distributed in order then to determine reasonable buy-out and compensation rates. Furthermore, no doubt some lawyers will elect to volunteer time regardless of the point at which the various rates are set. Some effort to approximate the number of those attorneys should be made before the relationship among the independent variables are analyzed.

Assuming that the hours volunteered and money donated can then be estimated in a reasonable fashion, nevertheless, no plan has been produced for what will be done with the money donated. Perhaps the money is destined to pay attorneys to perform the needed services, but no plan seems evident at this juncture. Clearly, without empirical data to establish the extent of the need, to predict the options likely to be exercised by attorneys, or to forecast the amount of money which will be generated, mandatory pro bono, despite its ethical grounding, seems undirected. This failure to identify a tangible goal and to formulate a carefully tailored plan to achieve it adds fuel to constitutional challenges likely to be faced by any attempt to legally mandate the ethical directive. As a result, state bar associations should attempt to model empirically the relationships among the key variables of a mandatory proposal, as well as to examine alternatives, in an effort to arrive at a constitutionally sound and rational solution, justified by economic principles as well as by ethical concerns.