Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations

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Few issues of professional regulation arouse such passionate debate as lawyers’ ethical duty to provide pro bono legal services. In the last twenty years, prominent academic commentators have both advocated and opposed a mandatory service rule. This Article examines the changing conceptions of lawyers’ pro bono responsibilities. Part II briefly considers the noblesse oblige tradition of ancient Rome, reflected in the medieval European oaths of office, and in colonial America. Part III examines in detail the history of American lawyers’ professional regulation relating to pro bono expectations. In light of the historical developments, Part IV reconsiders the changing professional paradigm using the concept of law as a vocational calling. Building on the concept of vocation, and the historical progression in legal regulation, I suggest a shift in focus to external, measurable standards. Specifically, I propose that states consider two additional changes to their statements of pro bono responsibilities. First, I propose a requirement of annual reporting as a formalized mechanism for individual lawyers to evaluate the current extent of their service. As a subset to this requirement, states should provide lawyers with an easy and efficient method to volunteer future services, participate in lawyer referral systems, or alternatively satisfy their responsibility. Second, states should consider financial support and pooling arrangements as coequal alternatives to direct service. Because not all lawyers are inclined or competent to provide direct services for the poor, the ethics rules should fully respect alternative means of satisfaction, rather than dismissing them as morally repugnant.

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I. INTRODUCTION

Few issues of professional regulation arouse such passionate debate as lawyers' ethical duty to provide pro bono legal services. In the last twenty years, prominent academic commentators have both advocated and opposed a mandatory service rule. Mandatory pro
bo no debate will now shift back to local jurisdictions. State supreme courts and bar leaders will determine the particulars of local rules.

America has no shortage of lawyers. Currently, there is one lawyer for every 275 persons in the country. At the top of the food chain, lawyers aggressively compete for the opportunity to represent paying clients. At the bottom, there is no such competition. Legal aid programs provide limited access to lawyers for low-income people. During its peak funding in the early 1980s, legal aid programs served less than twenty percent of the serious legal needs encountered by the eligible population. The ratio of legal aid lawyers to their client base is about one to ten thousand. Emergency triage is the only practical option to manage the overwhelming demand. As a condition of funding, legal aid programs must establish pro bono relationships with the practicing bar. Firm data does not exist, but it is estimated that nationally only about seventeen percent of lawyers engage in an array of pro bono activities, including work for bar associations, educational institutions, and charitable institutions.

The legal profession has long prided itself on a tradition of pro bono publico: acting for the common good of society. First arising from a patrician sense of noblesse oblige, an individual lawyer's current responsibility for pro bono service to poor people is largely fortuitous. If, by chance, a poor person realizes she has a legal problem and asks a lawyer for help despite her inability to pay, we hope the lawyer will respond generously. Happenstance pro bono service does not work in a highly technical, legally nuanced society. Meaningful access to justice for all with serious legal problems must become a higher priority of the profession. The newest revisions to the ABA Model Rules are a distinct move towards clearly articulating


standards for all lawyers and firms to satisfy their voluntary pro bono responsibilities.

This Article examines the changing conceptions of lawyers’ pro bono responsibilities. Part II briefly considers the noblesse oblige tradition of ancient Rome, reflected in the medieval European oaths of office, and in colonial America. The American tradition apparently arose from antilawyer regulations and Puritan teachings about each person’s affirmative responsibility to serve the public good. Part III examines in detail the history of lawyers’ professional regulation relating to pro bono expectations. Over time, codifications have progressed from stating moral principles for introspective guidance to articulating standards of conduct susceptible of external measurement and objective evaluation. Beginning with the early writings of David Hoffman and George Sharswood, through early codification in Alabama and the ABA 1908 Canons, American legal ethics embraced a passive and reactive model of lawyering. The traditional professionalism paradigm did not actively seek out clients (any advertising or solicitation was prohibited as crass commercialism), but rather waited until prospective clients realized they had a legal problem and sought help from a specific lawyer. From 1836 until adoption of the ABA Code of Professional Responsibility in 1969, this reactive model in practice left most lawyers with limited responsibility to serve the poor for little or no fee. An individual lawyer was “privileged” to serve for free or a reduced fee only when a needy client presented herself with a just cause, or a court appointed a specific lawyer.

The 1969 Code signaled a major shift towards a proactive responsibility, with the largely symbolic statement encouraging the bar and individual lawyers to make legal services available to those in need. Each subsequent formulation has moved forward, recognizing lawyers’ ethical responsibility to volunteer legal services to those who are unable to pay. The ABA’s new revisions to the Model Rules give the legal profession a fresh opportunity to consider its responsibility for the quality of justice in America.

In light of the historical developments, Part IV reconsiders the changing professional paradigm using the concept of law as a vocational calling. The move towards recognizing lawyers’ proactive volunteer responsibilities is consistent with suggestions of a paradigmatic shift embracing (and not repudiating) business aspects of law. Building on the concept of vocation, and the historical progression in legal regulation, I suggest a shift in focus to external, measurable standards. Specifically, I propose that states consider two
additional changes to their statements of pro bono responsibilities. First, I propose a requirement of annual reporting as a formalized mechanism for individual lawyers to evaluate for themselves the current extent of their service. As a subset to this requirement, states should provide lawyers with an easy and efficient method to volunteer future services, participate in lawyer referral systems, or alternatively satisfy their responsibility. Second, states should consider financial support and pooling arrangements as coequal alternatives to direct service. Because not all lawyers are inclined or competent to provide direct services for the poor, the ethics rules should fully respect alternative means of satisfaction, rather than dismissing them as morally repugnant.

II. HISTORY OF PRO BONO PUBLICO ETHICAL TRADITION

A. Ancient Foundations

[The term “profession”] refers to a group . . . pursuing 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. Pursuit of the learned art in the spirit of a public service is the primary purpose.13

Roscoe Pound’s classic definition of a profession has ancient foundations.14 Practitioners undergo rigorous training in order to master an esoteric but systematic body of useful knowledge.15 Because their services are complex and technical, and hence beyond lay understanding, professionals operate in relative autonomy, with few external controls. Professionals embrace an ethic of service, which places the interests of others ahead of their own.16 The esoteric knowledge and expected altruism were claimed to justify self-regulation over the professional monopoly, which limited who could perform designated professional tasks.

The legal profession expansively defines the practice of law to include both legal advice and litigation advocacy. With its claimed monopoly over access to the legal system, lawyers are joined in a

13. ABA Professionalism Report, supra note 9, at 10 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)).
16. Id.
common calling in the spirit of public service. The term pro bono publico is Latin: for the public good; for the welfare of the whole. ¹⁷

In ancient Rome, jurisconsults were patricians—men of rank, wealth, and distinction—who gave legal advice without charge. They did so as a "gentlemen’s hobby" related to their aristocratic leadership, and as part of their training for higher political position. ¹⁸ As patrons, they undertook the role of orators for clients, who were often dependent members of the household. ¹⁹ At various points in time, the advocates were legally forbidden to accept money or gifts in return for their services, although such proscriptions were often circumvented. ²⁰ These early advocates were to serve the public good by representing individuals in the developing legal system.

Throughout the development of the legal profession in early England and Scotland, a sense of noblesse oblige prevailed among those who made up its elite ranks. ²¹ While lawyers received fees for their services, they viewed compensation as incidental to the public service component. In what may be the first oath of office, the 1275 First Statute of Westminster obligated serjeants, the most respected advocates of the time, to serve the poor for free, vowing not to covet profit over faithful service to the king’s people. ²² In some common law courts around the third century, if a serjeant refused to plead for a poor

¹⁸. Hans Julius Wolff, Roman Law: An Historical Introduction 96–97 (1951) (discussing development of early legal profession, circa 253 B.C.-39 B.C.). The Greek tradition differs somewhat. According to classical Greek tradition (circa fourth and fifth centuries B.C.) there was no concept of representation at trial. Telephone Conversation with Hugh Benson, Samuel Roberts Noble Presidential Professor, University of Oklahoma Department of Philosophy (May 25, 2001). While one could pay someone to write a speech on his or her behalf, it had to be personally delivered by the litigant. Id.; see also Douglas M. MacDowell, The Law in Classical Athens 203-19 (1978) (describing arbitration and legal actions circa 400 B.C. Athens).
¹⁹. Millemann, supra note 2, at 33.
²⁰. Id. at 35 n.99 (citing 5 R. Pound, Jurisprudence 704 (1959)); Pound, supra note 13, at 33-46.
²¹. Millemann, supra note 2, at 39. As a practical reality, the entry costs of training and tutelage were such that only individuals from wealthier families could become lawyers.
²². Id. at 40-41. The oath required:
Ye shall swear that well and truly ye shall serve the king’s people as one of the serjeants at the law. . . . And ye shall not defer, tract or delay their causes willingly for covetise of money or other thing that may turn you to profit. And ye shall give attendance accordingly. As God you help, and his saints.
Id. at 41; Kaufman, supra note 14, at 4; see also I.H. Baker, The Legal Profession and the Common Law: Historical Essays 106 n.47 (1986) ("[S]peeches to new serjeants: ‘Be as glad to tel the poure man the truth of the law for God’s sake as the riche man for his monye’ (16th century) Bnt. Mus. Ms. Harl. 160 f. 192v"); id. ("[S]o should you also have another tongue as ready without reward to defend the poor and oppressed’ (1594). . . ").
man when appointed by the court, he could be removed from the bar.23
The oaths taken by lawyers in other European countries were more
explicit, pledging "[n]ot to reject ... the cause of the weak ... or the
oppressed."24 From the outset, the responsibility was essentially
reactive; not to turn away a prospective client with a worthy cause
because of the lawyer's self-interest in receiving payment.

B. The Pro Bono Tradition in America: Law as a Vocation

Hostility to lawyers is nothing new. Lawyers were despised for
much of the seventeenth century, although there were significant
differences among the early colonies.25 Multiple factors contributed to
the widespread opposition and distrust.26 Restrictive controls
discouraged the practice of law and minimized the number of licensed
lawyers.27 Such legislation persisted until midway through the
eighteenth century.28 Reminiscent of ancient Roman law, a 1645
Virginia statute prohibited lawyers from charging a fee for their
services, arguably a mandatory pro bono rule enacted to ban the legal
profession.29

Religious teaching profoundly influenced the developing national
self-consciousness, its institutions, and habits.30 Puritan clergy,
religious elements in the community, and Quaker opposition to activity
involving litigation and strife were powerful forces behind the hostile

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23. Millellman, supra note 2, at 41.
24. The lawyer oath in the Swiss Canton of Geneva promised "[n]ot to reject, for any
consideration personal to myself, the cause of the weak, the stranger, or the oppressed.
Kaufman, supra note 14, at 4. Since 1424, Scottish lawyers took a similar oath. See
Millellman, supra note 2, at 22-23. Contrast the oath adopted by the Parliament of Paris in
1344 (requiring lawyers to lower fees based on the importance of the case and parties'
circumstances) and the Danish and Norwegian 1683 Code of Christian V (requiring a pledge
to "exact no exorbitant fee from the poor or others") and the early German oath (requiring
lawyers to "aid everybody, the poor man quite as willingly as the rich man"). Kaufman,
supra note 14, at 4.
25. POUND, supra note 13, at 132; 1 ANTON-HERMANN CHROUST, THE RISE OF THE
LEGAL PROFESSION IN AMERICA 27-28 (1965).
26. 1 CHROUST, supra note 25, at 27-29. One reason for the hostility is that Puritan
and Quaker colonists associated lawyers with the religious persecution they suffered under
the English legal system. Id.
27. Id. at 28-29.
28. POUND, supra note 13, at 136.
30. EDWIN SCOTT GAUSTAD, THE GREAT AWAKENING IN NEW ENGLAND 102 (1957)
(citing H. RICHARD NIEBUHR, THE KINGDOM OF GOD IN AMERICA 126 (Chicago 1937)).
regulations. The Puritan concept of vocation or calling remains an important part of contemporary religious thought on professionalism.3

Although Puritans were a relative minority religion in terms of population, their belief system "was overwhelmingly dominant" in influence. Puritan settlers came to the New World armed with "an elaborately articulated[,]... highly coherent, theologically ordered sense of themselves, their role in history, and the meaning of their settlement." They sought to "show the world... how a holy commonwealth ought to be ordered" as a "biblical, God-ordained church and state." In 1630, while in transit to America, John Winthrop, a Puritan lawyer and first governor of Massachusetts Bay Colony, wrote a sermon defining characteristic features of the Puritan mind. All of God's chosen were called to worthy service, that "the care of the public must oversway all private respects... We must love one another with a pure heart fervently; we must bear another's burdens; we must not look only on our own things, but also on the things of our brethren." The concentric orientation of Puritan thought organized all aspects of life—cultural, social, economic, and political—around their religious beliefs. Its conservative political philosophy advocated group betterment as opposed to individual success and urged members to do good for society, with the promise of personal rewards in return.

A central tenet provided that each man was summoned by God to live as he was called, to serve in a particular vocation or office, and to furnish services for the benefit and good of all mankind. This

34. JAMES G. MOSELEY, A CULTURAL HISTORY OF RELIGION IN AMERICA 3 (1981).
35. Id. at 7.
37. MOSELEY, supra note 34, at 4-5, 13-14. This early formulation of the "Protestant work ethic" created a welcoming environment for development of capitalism. See MAX WEBER ON CAPITALISM, BUREAUCRACY AND RELIGION, A SELECTION OF TEXTS 111-25 (Stanislav Andreski ed., 1983).
38. William Perkins, On Callings, in 2 THE WORKERS OF THAT FAMOUS AND WORTHY MINISTER OF CHRIST IN THE UNIVERSITIE OF CAMBRIDGE, MR. WILLIAM PERKINS 750-59 (1603), reprinted in PURITAN POLITICAL IDEAS, 1558-1794, at 35-39 (Edmund S. Morgan ed., 1965). Its conservative political philosophy encouraged proponents to do "good" for society, with the promise of personal rewards in return. Id. The writings of Englishman and Cambridge fellow William Perkins were highly influential in Puritan thought. He directed people to "live and go on in their callings, so as they may please God... [A calling was] a certain kind of life, ordained and imposed on man by God, for the common good... it is a
particular calling requires the faithful practice of the vocation as part of the general calling to all Christians—that they become servants to their brothers, for the common good of all. Thus, if called to serve as a Magistrate, one must serve as a Christian Magistrate, acting as an instrument of God in all trades of life.\textsuperscript{39}.

In 1710, Cotton Mather, the influential Harvard-educated religious leader of the Massachusetts Bay Colony, delivered \textit{Bonifacius}, which is believed to be the first North American address on lawyers’ professional duties.\textsuperscript{40} In it, Mather adapted the Puritan ideals to attorneys:

Your Opportunities to Do Good are such[:]...the main intention is that you may be wise to do Good. ... There has been an old Complaint, That a Good Lawyer seldom is a Good Neighbor. ... Confute it, Gentlemen, by making your Skill in the Law a Blessing to your Neighborhood. You may, Gentleman, if you please, be a vast Accession to the Felicity of your Countreys.\textsuperscript{41}

Mather again addressed attorneys in \textit{Essays to Do Good}, urging the “gentlemen of the law” to do good by being skillful, knowledgeable, scholarly, and wise.\textsuperscript{42} One should engage in daily self-examination as to whether one had “done good to others” as well as “to his own soul.”\textsuperscript{43} Lawyers should use their talents for the greater good to protect the poor or oppressed and to promote charity and law reform.

What a noble thing would it be for you to find out oppressed widows and orphans; and as such can appear only “in forma pauperis;” and are objects, in whose oppression “might overcomes right,” generously plead their cause! “Deliver the poor and needy, and rid them out of the hand of the wicked”—It will be a glorious and Godlike action!

Affluent persons, about to make their wills, may frequently ask your advice. You may embrace the opportunity of advising them to such liberality in behalf of pious purposes, as may greatly advance the kingdom of God in the world. ... Is there nothing to be amended in the laws? ... The reformation of the laws ... are loudly called for. ... If some lawyers, “men of an

certaine condition or kind of life ... a manner of leading our lives.” \textit{Id.} at 35. The Puritans strongly believed that these callings should be for the common good in society, “that is, for the benefite and good estate of mankinde ... for the good of the whole bodie.” \textit{Id.} at 37-38.

\textsuperscript{39} Perkins, \textit{supra} note 38, at 55-56.
\textsuperscript{40} 1 \textit{CHROST}, \textit{supra} note 25, at xii n.4.
\textsuperscript{41} \textit{Id.} at xi-xii.
\textsuperscript{42} COTTON MATHER, \textit{ESSAYS TO DO GOOD} 145-46 (George Burder ed., 1815) (\textit{Bonifacius} 1710).
\textsuperscript{43} \textit{Id.} at 151.
excellent spirit,” would direct their attention this way, and call the attention of the legislature to them, all the world might feel the benefit of it. 44

These early writings suggest that the early American pro bono tradition was rooted in puritanical thought, that God’s chosen were called to serve in all walks of life. Lawyers were called to serve, and to help those who could not afford to pay for needed legal services. While concepts of vocational calling and public service were not limited to the Puritan tradition, religious principles undoubtedly influenced the cultural climate. 45

Reinhold Neibuhr noted irony in elements of the Calvinist creed, changing from a faith that took “prosperity and adversity in its stride to a religion which became preoccupied with the prosperity of the new community.” 46 They became enamored with prosperity, embracing a theory of providence that cast “every favor or catastrophe ... in immediate moral terms.” 47 Gratitude for “unmerited’ mercies” soon dissipated into self-congratulation, in which virtue was the basis of prosperity. 48

Colonial poor laws inherited from the English legal background served as a backdrop for the Puritan theology. Local towns where poor persons “settled” were required to provide for their relief and maintenance. 49 To avoid such responsibilities, towns regularly warned off newcomers, shifting the burden of support back to their former place of settlement. 50 Transient paupers were discouraged from staying long enough to be received and entertained, and thus deemed settled in a town. “Whatever kindness warmed the heart of the poor laws was expended on old friends and neighbors in town, who happened to fall upon evil days. There the sympathy stopped.” 51 Poor laws bestowed meager sustenance only on those considered worthy: “the helpless

44. Id. at 152.
45. Robert N. Bellah, Civil Religion in America, in RELIGION IN AMERICA 3, 7 (William G. McLoughlin & Robert N. Bellah eds., 1968) (citing Benjamin Franklin’s autobiographical reference “that the most acceptable service of God was the doing of good to men”) Bellah asserted that the reward of virtue and similar ideas were part of the late eighteenth-century cultural climate. Id.
47. Id. at 49-50 (citing early Puritan Michael Wigglesworth who depicted the New England Drought of 1662 as God’s intervention to punish vice).
48. Id. at 52-53.
50. Id.
51. Id.
For others, poverty resulted in adjustment of status to avoid burdening the public purse: orphans became apprentices; poor adults became indentured servants. After the revolutionary war, poor laws continued much as before, with local townships obligated to support the poor settled in their community. Paupers were stigmatized as idle, weak, and reckless. Public resentment of the financial burden shaped poor laws into punitive, unpalatable safety nets that deterred all but the truly desperate from accepting relief. Institutionalized response to poverty began in the early nineteenth century, with development of the almshouse or poor house as an economical way to provide centralized sustenance and moral education in exchange for low paid labor.

The following Part traces the development of pro bono publico expectations in American legal ethics. The writings of David Hoffman and Judge George Sharswood are considered the precursors to formal regulation. Their ethical views, in Susan Carle’s view, reflect a “religious jurisprudence,” in which their personal religious convictions held that lawyers had responsibility “to steer the legal system toward just results.” Nevertheless, both men avoided positing an affirmative, individualized responsibility to volunteer legal services for the poor. As secular professional bodies moved toward formalized regulation, the religious moralistic tones faded, but continued to reflect a deep ambivalence about whether collective pro bono responsibilities should come to rest with the individual practitioner. This uncomfortable tension still persists.

52. Id. at 78.
53. Id. at 77-78.
54. Id. at 187.
55. Id. at 188-89.
56. Id. at 190-91; see also id. at 428-31 (suggesting that ideological motivations prompted a trend in the latter half of the nineteenth century to centralized administration and cheap warehousing of paupers in degrading conditions).
III. LEGISLATIVE HISTORY: PRO BONO RESPONSIBILITIES IN PROFESSIONAL REGULATIONS

A. Precursors to Regulation: Teachings of Hoffman and Sharswood

1. David Hoffman: *Fifty Resolutions in Regard to Professional Deportment* (1836)

   Profound changes in the American legal profession occurred throughout the nineteenth century, eventually prompting a formal system of self-regulation that limited entrance to the profession and disciplined those deviating from accepted norms. In postrevolutionary America, most lawyers were college-educated and came from professional and wealthier families. The overwhelming majority received tutelage from a private law office or an independent course of study. Although there were loose controls over admission, and legal education was not especially stringent, the number of lawyers was relatively small. Because of the small numbers, and lawyers’ homogeneous backgrounds, training, and values, informal sanctions sufficed to maintain control over occasional deviant behavior.

   In 1836, David Hoffman published *Fifty Resolutions in Regard to Professional Deportment*, the first serious effort to formulate principles of legal ethics for American lawyers. Written in response to what he perceived as corruption of professional standards during the Jacksonian era, Hoffman recommended their recitation twice yearly,

58. Friedman, supra note 49, at 266-67 (discussing social background and some stratification within the bar); id. at 550 (discussing the composition of the Philadelphia bar in 1800).

59. Id. at 525. Indeed, the established bar jealously guarded its prerogative of training and controlling admission. Id. During the 1830s, the Philadelphia bar effectively blocked creation of a law department at the University of Pennsylvania. Id. at 526.

60. Id. at 266.

61. See Lawrence Friedman, A History of American Law 94-98, 633-35, 638-39 (2d ed. 1985), reprinted in Geoffrey C. Hazard, Jr. & Deborah L. Rhode, The Legal Profession: Responsibility and Regulation 22, 24 (3d ed. 1994) (describing apprenticeship training around 1750 as a control device commanded by senior lawyers); see also Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1279 (1991) (observing that the “bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance”). For more detailed treatment of historical shifts in efforts to organize and supervise professional deportment, see 1 Chroust, supra note 25, at 125, 144-45, 151, which describes local and historical differences between organizational controls over legal profession of the American frontier.

to remind lawyers of appropriate standards of professional behavior.\footnote{\text{63}\text{.}\text{L. Ray Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 Emory L.J. 909, 913-14, 925 (1980).}} Susan Carle relates that Hoffman, a successful Baltimore lawyer, was born into a wealthy mercantile family [and pursued law as ] . . . a more “noble” calling[. He] undertook a prodigious self-guided course of study of . . . [classical] religious, philosophical, and legal thought. . . . [His] approach to legal ethics . . . was steeped in religious conviction . . . envision[ing] human law, human morality, and the laws of nature and the physical world as part of one integrated, divinely inspired system.\footnote{\text{64\text{.}\text{Carle, supra note 57, at 10-11 (reporting from Hoffman's biographers) (citations and footnotes omitted).}}}

Hoffman’s \textit{Resolutions} probably had little immediate practical effect.\footnote{\text{65\text{.}\text{Id. at 11-12 (describing Hoffman's view that proper operation of legal process required “lawyers’ active moral involvement to ensure just results” and Resolutions as “argumentative, defensive, and more than a little bombastic”).}}} Because he wrote as an individual, without official imprimatur, the \textit{Resolutions} had no force of law or enforcement capability. Nevertheless, over time, they gained acceptance as an influential, early contribution to the subject of legal ethics.

Consistent with Hoffman’s often preachy tone, Resolution 18 described an essentially passive pro bono obligation. In both tone and substance, it has a patrician air reminiscent of the noblesse oblige from earlier times:

\begin{quote}
XVIII. To my clients . . . I shall never close my ear or heart because my client’s means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.\footnote{\text{66\text{.}\text{Hoffman, supra note 62, app. E, at 342.}}}
\end{quote}

In contrast with Mather’s view that lawyers should volunteer their efforts to protect the poor and oppressed and to work for law reform, Hoffman’s concept of pro bono was reactive. A “due portion” of legal services shall be “cheerfully given” to those whom the lawyer accepted as clients and whose cause was deemed just. Despite the view that Hoffman’s religious jurisprudence required “active moral involvement to ensure just results . . . to protect the legal system,”\footnote{\text{67\text{.}\text{Carle, supra note 57, at 11-12 (describing active moral duty to do justice, or the accountability debate, as a gatekeeping function).}}}

Resolution 18 asked only that the lawyer listen and evaluate the worthiness of a
prospective client’s cause, and not to volunteer. Although silent on what portion was due, it implied that each lawyer should participate in serving the poor, and do so joyously, not begrudging the fact that work was done for free.

2. Pennsylvania Lectures of Judge George Sharswood (1854—1884)

In 1850, responding to “vociferous . . . demands” of prospective law students who were “‘restive in the confinement of law offices,’ eager for a ‘less inbred program of legal studies,’” retired Pennsylvania Supreme Court Judge George Sharswood reopened the law department at the University of Pennsylvania. It was one of fifteen law schools then in operation. A more formalized system of professional acculturation was needed to deal with the larger number of students. Judge Sharswood soon began a series of annual lectures on legal ethics. Some topics received more attention than others. His lectures were discursive and lofty in tone. They painted an idealistic view of practice. Sharswood’s contributions endure as a cornerstone in the progressive movement towards articulating generalized norms and values for the legal profession.

Like Hoffman, Sharswood suggested “no enforcement mechanisms beyond moral compulsion and the threat of professional dishonor.” While also tending to be moralistic, Sharswood’s lectures reflected greater professional ambivalence on whether lawyers had a “duty-to-do-justice.” Perhaps in part because of their comparative length, Sharswood’s lectures were less didactic than Hoffman’s Resolutions. Sharswood depicted American lawyers in a more populist image than the noble professionals of Hoffman, but recognized that larger policy questions distinguished lawyers from

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71. Friedman, supra note 49, at 526.
73. Carle, supra note 57, at 12-13. After a lengthy discussion of the counterarguments, Sharswood concluded that lawyers should exercise discretion in accordance with their own “sense of justice.” Id. (citation omitted).
other trades and businesses. He frankly acknowledged that lawyers were engaged in business to earn a living. Reflective of his religious jurisprudence, high moral principles served as the foundation of professional integrity. "The question really is, what is best for the people at large,—what will be most likely to secure them a high-minded, honorable Bar. It is all-important that the profession should have and deserve that character."\textsuperscript{74}

Sharswood’s limited comments about pro bono work shift slightly towards a proactive but generalized ethical responsibility for lawyers to serve the poor. Regarding fees, he compared ancient Roman advocates and English barristers to American lawyers.\textsuperscript{75} The Roman rules purportedly limited payment for advocacy services to nominal compensation, "a gratuity . . . [that] was a mere honorary recompense, the client was under no legal obligation to pay it."\textsuperscript{76} Likewise, English law limited permissible fees for barristers, and forbade suits to recover fees.\textsuperscript{77} That contrasted sharply with the American legal system, which made no technical distinction between different categories of lawyers.\textsuperscript{78} Application of those restrictions to American lawyers would be artificial and unjust. To suppose that the business or profession by which anyone earns the daily bread of himself or of his family is so much more honorable than the business of other members of the community as to prevent him from receiving a fair compensation for his services would be wholly inconsistent with our ideas of equality.\textsuperscript{79}

It would be a “monstrous legal fiction” to regard “hard-working lawyers of our day, toiling till midnight in their offices [as equivalent to the] patrician jurisconsults of ancient Rome.”\textsuperscript{80}

Sharswood believed that litigated fee disputes with clients lowered the public’s perception of the legal profession.\textsuperscript{81} Where the client can afford to pay, the lawyer’s "services should be recompensed . . . according to a liberal standard."\textsuperscript{82} If, however, a client cannot pay for needed legal services, counsel should work for free.\textsuperscript{83}

\textsuperscript{74} GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 147 (4th ed. 1876).
\textsuperscript{75} Id. at 137-53.
\textsuperscript{76} Id. at 139; see also id. at 136-44 (detailing changes in permissible fees to ancient advocates in Rome and English barristers).
\textsuperscript{77} Id. at 142-44.
\textsuperscript{78} Id. at 144.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 147.
\textsuperscript{81} Id. at 150.
\textsuperscript{82} Id. at 151.
\textsuperscript{83} Id.
There are many cases, in which it will be his duty, perhaps more properly his privilege, to work for nothing. It is to be hoped, that the time will never come, at this or any other Bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights.\textsuperscript{84}

Notice the subtle change in voice between the two quoted sentences. The first sentence addresses the individual lawyer's responsibility in a reactive manner similar to Hoffman's. If a prospective client needing appropriate legal services asks a lawyer for help, that lawyer is either obliged or privileged to work for free. The second sentence expresses the more general exhortation that the bar give needed representation to the poor despite the lack of a fee. This duality set the course for the next 150 years of pro bono debates.

\textbf{B. First Regulatory Efforts}

1. Alabama Code (1887)

Nationwide, entry to the bar became open-ended. Professional entrance barriers relaxed, opening the field to sharp and ambitious men from middle-class backgrounds. The number of lawyers rose dramatically.\textsuperscript{85} It no longer sufficed to rely on class-based assumptions of shared values. Stratification within the bar differentiated elite segments from those of lower status. Around 1870, when other collective organizations were forming throughout the nation, the bar association movement began. It sought to raise standards for bar admissions, promote social relations, and resist conversion to a mere trade or business.\textsuperscript{86}

The first formal Code of Ethics was adopted by the Alabama State Bar in 1887, representing an important move to articulate clear standards of professional conduct, to reinforce traditional professional ethos, and to deter behavior that bar leaders deemed unacceptable.\textsuperscript{87} Judge Thomas Goode Jones, the primary author, relied heavily on the Sharswood lectures.\textsuperscript{88} Proponents contended it would help address the

\begin{itemize}
\item \textsuperscript{84} \textit{Id.} (emphasis added).
\item \textsuperscript{85} \textit{Friedman, supra note 49, at 549} (estimating growth in the legal profession, from almost 22,000 in 1850, to 60,000 in 1880, to 114,000 in 1900).
\item \textsuperscript{86} \textit{Id.} at 550, 561-66 (recounting the formation of the first bar associations, in New York City and Iowa, and the American Bar Assoc., 1870-78).
\item \textsuperscript{87} \textit{See Kaufman, supra note 14, at 6.}
\item \textsuperscript{88} \textit{1887 Code of Ethics AL. State Bar Ass'n, reprinted in Drinker, supra note 62, app. F, at 352.} Besides his principal role in drafting the 1887 Alabama Code, Jones served two terms as state governor, as president of the state bar, and was appointed to the federal
regional demoralization and social upheaval left following the Civil War, which harmed the legal profession and other social institutions. The Alabama Code reflected the rural state's practical realities. Guiding principles of professional honor, dignity, and usefulness underlie duties owed fellow attorneys, clients, and the state. Fifty-six provisions identify core concepts, including several that persist in modern ethics regulations.

The concept of pro bono work was addressed only as it related to permissible attorneys' fees:

**Value of Attorney's Services Not to Be Overestimated**

48. Men, as a rule, overestimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty

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district bench by Teddy Roosevelt after a distinguished career in private practice in Montgomery. Marston, supra note 72, at 478-81. Susan Carle reports that he also served on the ABA Committee on Code of Professional Ethics, which drafted the ABA's Canons of Professional Responsibility (1908). Carle, supra note 57, at 23. Jones received an undergraduate education at the Virginia Military Institute, served in the Confederate army, and apparently read for the bar. Id. at 28-30. Born in 1844, Jones was Episcopalian. Id. at 36, 38. Carle, tracking the drafting history of the 1908 Canons on the issue of lawyers' accountability for the justness of a cause, suggests that Jones' views as a practitioner reflected a "skeptical pragmatism perhaps borne of . . . formative life experiences . . . doub[ing] that the correct outcomes of legal disputes could be determined by ex ante analysis." Id. at 28.

89. Marston, supra note 72, at 488-90.

90. Kaufman, supra note 14, at 6. For example, ex parte communications between lawyers and judges were a perceived problem meriting attention. By contrast, the Alabama Code's "gentlemanly views on the initiation and funding of lawsuits" poorly suited a "competitive urban practice." Marston, supra note 72, at 491-92, 503.

91. See 1887 CODE OF ETHICS AL. STATE BAR ASS'N, supra note 88, app. F, at 355. The Code presents the "Duty of Attorneys to Each Other, to Clients and the Public" as follows:

**Uphold Honor of Profession**

8. An attorney should strive, at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow man.

Id.

92. Id. Consider, for example, provisions limiting a lawyer's conduct within legal limits, protecting client secrets, exposing other lawyers' professional misconduct, forbidding ex parte communications, restricting advertising, and extrajudicial comments about pending litigation. Id. Allison Marston attributes the origins of confidentiality and professional courtesy to the Alabama Code. Marston, supra note 72, at 500, 502.
may require a less charge in many instances, and sometimes none at all.93

Given the historical ethos of lawyers’ pro bono responsibilities, this weak addendum states a minimal expectation of serving the poor. It does, however, suggest a normative basis for downward fee adjustments by acknowledging the connection between attorneys’ fees and access to justice.94

This provision signals tension between a professional tradition of honorable conduct and the potential significance of stating such a principle in a written code expected to have some force of law. Dennis Kaufman suggests that, historically, professional regulation of pro bono expectations has been both passive and negative.95 That aptly describes its treatment in this first official codification of American legal ethics. The Alabama Code is negative in that it provides no stated expectation that all lawyers would engage in some work for the public good. Furthermore, it is passive in suggesting that any requirement of providing services for free or a reduced fee depends on the happenstance event of accepting a poor client. It does, however, link the issue of representing the poor with candid recognition that lawyers are engaged in the business of providing fees for services. In that respect, No. 48 of the Alabama Code marks the first step in a coherent progression, from religiously based, moralistic exhortations, towards formalized (albeit uncertain and ambivalent) guidance on external standards of conduct.96

2. ABA Canons (1908)

A select group of gentlemen formed the American Bar Association in 1878, with the avowed purpose “to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation[,] ... uphold the honor of the profession[,] ... and encourage cordial intercourse among” its members.97 Its membership

94. Cf. Kaufman, supra note 14, at 6, 17 (discussing the Alabama Code, which did not exhort lawyers to serve, and was only passive acknowledgment of a pro bono responsibility).
95. Id. at 5, 17 (stating that ethics codes reinforced traditional professional ethos, and deterred behavior perceived by some as unacceptable).
96. Carle, supra note 57, at 33 (referring to coherent progression).
97. Friedman, supra note 49, at 563 (citation omitted).
grew slowly; in 1902, only about 1700 of America’s 114,000 lawyers were members.98

Several other states adopted codes modeled after Alabama’s effort, although most dropped any suggestion of reduced fees in specific circumstances.99 Prompted by the movement to codify professional ethics in other fields, the spirit of the Progressive era, and a perceived negative public opinion of lawyers, the young American Bar Association sought to create a national legal ethics code.100 Starting in 1905, a small committee undertook the task of drafting rules that could be enforced when necessary.101 The fourteen man ABA Ethics Committee included Thomas Goode Jones of Alabama, Harvard Dean Ezra Thayer and other prominent lawyers and academics.102 An initial draft was circulated to the ABA membership and limited others, prompting more than one thousand comments.103

Hardly a democratic extravaganza, the drafting process took into account the views of the ABA’s relatively elite membership. Several commentators addressed marketing issues, with contingent fees justified as “[t]he poor man’s fee.”104 Except for a few comments on court appointments for indigent prisoners, nothing was said suggesting that lawyers provide free representation to those unable to pay a fee.105 Herbert Fordham of New York urged drafters to limit codification to essentials, focus on conduct, and “avoid all high sounding phrases about the great and glorious profession to which we belong.”106 Roscoe

98. Id. at 563-64; see also DEP’T OF COMMERCE & LABOR, STATISTICAL ABSTRACT OF THE UNITED STATES 169 (1907) (reporting a total lawyer population of 114,460 in 1900).
99. Marston, supra note 72, at 504-05.
100. Carle, supra note 57, at 1, 7 n.12 (detailing the confluence of these three factors, and asserting that until this time, the ABA functioned largely as a social club).
101. Id. at 8-9.
102. Id. at 16 n.29 (describing the committee’s composition as Anglo-Saxon Protestants, and noting that with the members’ average age of 61, and almost three-quarters of them college educated, they were from the social and economic elite of the profession); id. app. A (detailing members’ biographical sketches).
103. Id. at 17; see also Memorandum for Use of American Bar Association’s Committee to Draft Canons of Professional Ethics (Mar. 23, 1908) (copy on file with author) [hereinafter Canons Comments] (reporting comments).
104. See, e.g., Canons Comments, supra note 103, at 32 (referring to University of Nebraska College of Law Dean George P. Costigan’s acknowledgment of a “legitimate solicitation of business,” doubting that the conservative bar would allow it); id. at 43-44 (listing various comments disapproving solicitation on fee-generating matters); id. at 73-74 (discussing the New York State Bar Association position on the importance and risks of contingent fees).
105. Id. at 85; see also id. at 125-26 (quoting comments of distinguished but anonymous lawyer “X.Y.Z.” advising “short and pungent” canons “omitting [sic] all moral platitudes”).
106. Id. at 122.
Pound stressed that to be effective, the code must represent widely held convictions by which lawyers are willing to judge their own and others’ professional conduct.  

Adopted in 1908, the original ABA Canons of Ethics stated (presumably) shared professional values in thirty-two general statements. The early Canons, including those added to the 1908 provisions in 1928, generally call upon lawyers to “pursue the high road in every endeavor mentioned.” Several provisions, those primarily intended for enforcement, regulated lawyers’ conduct in attracting or soliciting clients and other issues relating to money and business matters. In both tone and substance, they restricted commercial activity thought unseemly for a noble profession. Critical historian Jerold Auerbach observed that “[t]he Canons reflected and reinforced an increasingly stratified profession.” They were, therefore, equally adaptable to small town lawyers and similarly “homogeneous upper-class metropolitan constituency . . . [and] served as a club against lawyers whose clients” were urban poor, immigrants and working class.

Legal services were provided to fee-paying clients; contingent fees for personal injuries were reluctantly allowed only when the client could not pay a traditional fee. The primary fee provision, Canon 12, echoed the Alabama Code’s passive endorsement of pro bono expectations and also introduced the concept of professional courtesy, that lawyers give “special and kindly consideration” to “reasonable requests of brother lawyers, and of their widows and orphans without ample means.” Beginning the trend to codify objective standards of

107. *Id.* at 129.
108. DRINKER, supra note 62, at 309 n.1.
109. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53-54 (1986). The ABA was formed in 1878. *Id.*
110. See, e.g., CANONS OF PROF’L ETHICS Canon 27, reprinted in DRINKER, supra note 62, app. C (advertising and solicitation); *id.* Canon 28 (stirring up litigation); *id.* Canon 34 (fee-splitting); *id.* Canon 38 (commissions); *id.* Canon 42 (litigation expenses); *id.* Canon 44 (approved law lists).
112. *Id.* at 51.
113. *Id.* at 42-50.
114. CANONS OF PROF’L ETHICS Canon 12 (1908). Canon 12, in relevant part, provided:

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client’s ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother
conduct, especially on economic matters, Canon 12 listed the criteria for determining a permissible fee. Its closing admonished that “the profession is a branch of the administration of justice and not a mere money-getting trade.” 15 Other Canons provide that lawyers, as ministers of the law, are responsible for their conduct under the “strictest principles of moral law,” which is not escaped by the excuse that one acts pursuant to client instructions. 16 Lawyers ought not lightly seek to avoid court appointments for indigent prisoners and should exercise best efforts on their behalf. 17

At the time of their adoption, the United States was achieving new heights of commercial and economic success. The gilded era of the late nineteenth century increased the wealth disparities between successful industrialists and aristocrats and those in working classes who produced items of commerce. The transition from an agricultural to an industrial economy produced new social problems in urban areas. Social commentators, religious leaders and bar leaders began seeking organized responses to alleviate problems of poverty. 18 Legal aid societies had just begun in a few major cities, in part to protect poor immigrants from exploitation. 19 Regardless of their jurisprudential ideology, lawyers responded to industrialization by “replacing religion with law as the controlling element of society.” 20

The ABA Canons reflected the values and interests of its “gentleman-lawyers” membership and sought to restrict the conduct of those lawyers who were, often for reasons of their own social status, more likely to represent poor persons with claims against those with
substantial economic resources. Given that backdrop, the paradigm of the gentleman lawyer passively waiting for new clients makes perfect sense. Active volunteering, by offering to provide free or reduced rate legal services, was out of the question. Lawyers engaged in solicitation of clients, barratry (stirring up litigation), or maintenance (financial investment in litigation) ran afoul of the genteel (and typically gentile) notions that the client must first locate counsel and proffer employment. The individual lawyer was expected to serve for little or no fee only when confronted with a needy prospective client whose cause was just.

With increased stratification and specialization of the urban bar, relatively few prominent lawyers had occasion for such encounters, and hence no meaningful pro bono obligation in serving the poor. Rather, for many prominent lawyers, the ethos of pro bono publico served as a general gloss to their practice, that in whatever they do for clients, they should take into account the impact on the public interest. Lawyers who actually practiced in poor communities, themselves likely to need compensation for work done, more probably were approached by those in need of free legal services. And so, the first national codification of legal ethics symbolically touted a pro bono obligation that had little practical impact on most lawyers and the low-income population.

Although the term "pro bono publico" is derived from ancient Rome, American courts used it expansively, until the 1950s, referring to the broad concept of what was within the public interest, and not to charitable legal representation. As relating to legal representation

121. See, e.g., LOUIS D. BRANDEIS, BUSINESS—A PROFESSION, at ix, x, 321, 327 (1933) (describing his personal commitment to spend substantial time working on public interest matters for no fee).


123. See, e.g., Dew v. Judges of the Sweet Springs Dist. Court, 13 Va. 1, 11 (1 Hen. & M. 1808) (considering mandamus action to force appointment as clerk of court where plaintiff failed to file sufficient bond within the statutory deadline and stating that "[a] statute, pro bono publico, ought to be construed, so that it may, as far as possible, attain the end proposed"); Brandon v. Planters, 1 Stew. 320, 331 (Ala. 1828) (discussing a treasure trove case where a slave found money, a slave owner successfully claimed a right to the money as against the bank, which had lost the money on the grounds that the possession of a slave is the possession of owner, and citing the English law of treasure trove, in which the finder "was required to divide with the king pro bono publico"); Jackson v. Bulloch, 12 Conn. 38, 46 (1837) (granting writ of habeas corpus to a woman slave imported into the state from Georgia, based on interpretation of a state statute declaring slavery as an evil to be suppressed "to add force and life to the cure and remedy according to the true intent of the makers of the act, pro bono publico"); Ex'rs of Joseph Burr v. Smith, 7 Vt. 241, 251 (citation omitted) (1835) (using "pro bono publico" in context of a bequest to charity).
given in the public interest, the term apparently was first used in 1944. In *Root Refining Co. v. Universal Oil Products Co.*, the United States Court of Appeals for the Third Circuit awarded $100,000 in fees to experienced patent attorneys who worked 9000 hours as court-appointed amici curiae to invalidate corruptly obtained patents.\(^{124}\) Judge Jones dissented on the amount of compensation, noting that amici “volunteered to bring the subject matter officially to our attention” and should be considered “as having primarily acted pro bono publico of their own volition.”\(^{125}\) His implicit concern appeared to be that rewarding volunteers might encourage lawyers to interject themselves in hopes of obtaining remunerative employment, running afoul of the anti-solicitation rules. Ten years later, the United States Court of Appeals for the Fifth Circuit affirmed the Tax Court’s finding that payment to a lawyer of the Louisiana State Law Institute was taxable income, rejecting the lawyer’s contention that the services were performed pro bono.\(^{126}\)

In criminal matters, before the United States Supreme Court upheld a defendant’s constitutional right to counsel, federal and state courts typically relied on court-appointed counsel, without payment of any fee when representation was deemed necessary.\(^{127}\) Beginning in 1931 with *Powell v. Alabama*, in limited circumstances involving felony charges, indigent defendants were entitled to court-appointed counsel.\(^{128}\) Court appointments were not uniformly allowed, and the lawyers who served without pay were treated with some solicitude by the courts. The first reported case that I found that used the term “pro bono publico” and upheld an indigent criminal defendant’s right to appointed counsel was *Surratt v. United States*, decided in 1958.\(^{129}\) Once again, the dissent used the phrase to object that the defendant’s blanket allegation of incompetence sufficed to advance the appeal, raising doubt as to “the professional competence of a . . . [lawyer] who acceded to the call of the court pro bono publico; and . . . to call upon another . . . [lawyer] to contribute . . . his time, skill and money . . . in

\(^{124}\) 147 F.2d 259, 240-61 (3d Cir. 1944).
\(^{125}\) Id. at 262 (Jones, J., dissenting).
\(^{126}\) Hubert v. Comm’r, 212 F.2d 516, 517 (5th Cir. 1954).
\(^{127}\) WOLFRAM, supra note 109, at 799.
\(^{128}\) Id. at 791 (citing Powell v. Alabama, 287 U.S. 45 (1932)). The Scottsboro defendants were charged with capital offenses. Id.
\(^{129}\) See generally *Surratt v. United States*, 262 F.2d 691 (D.C. Cir. 1958) (allowing the appointment of new counsel on appeal and filing of appeal without prepayment of costs, where indigent defendant claimed incompetent assistance at trial).
reexamination of the work of another lawyer." Some reluctant, court-appointed counsel, conscripted to serve without fee, gave only nominal defense to their indigent clients. Others served valiantly, pushing the courts to ensure a fair trial and appeal. Lawyers' limited passive and negative pro bono expectations came vividly into play. Only those selected for court appointment were called to serve without fee. The resulting involuntary client-lawyer relationships were often of marginal quality, with little scrutiny given to claims of ineffective representation. These representations typically evolved beneath the radar screen of reported cases. The happenstance pairing of client with appointed counsel yielded inconsistent quality of representation, unrelated to the justness of the cause, the defense, or the severity of charges. Congress instituted a national system of compensating court-appointed defense counsel in 1964.

Opinions of the ABA Legal Ethics Committee first embraced the term "pro bono" to mean representation of low-income persons for free or reduced rates in the 1930s. These opinions demonstrated the continuing tension between the professional ideal of the common good and aversion to any semblance of seeking or volunteering to represent prospective clients. The ethics opinions implicitly distrust the commercial motives of lawyers who would actively seek representations, even at reduced rates.

The Canons survived sixty years, at least on paper. States were slow to embrace them as official codifications. Washington state, it
appears, was the first to adopt them in 1921, with Ohio following suit in 1929. Fourteen more states signed on before 1940. In all, only thirty-six states and territories officially adopted the Canons before their demise became certain. Because they were so vague and nonspecific, they mostly created “an ethical mood,” leaving bar committees to set standards of conduct through the interpretive process. They lacked a cohesive underlying philosophy, seeming instead to be a list of “random, disjointed, and sometimes conflicting thoughts.” In 1934, Supreme Court Justice Harlan Stone characterized them as “generalizations designed for an earlier era” that condemned undesirable practices that “do not profoundly affect the social order outside our own group.”

Some thirty years later, Anthony Amsterdam called the Canons “vaporous platitudes . . . which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room.” Meanwhile, the American Bar Association began a transformation “from a convention-oriented social club to a working organization” that invited widespread participation “reflecting the makeup of the American bar.”


136. Id. (identifying formal adoption before 1940 by Arizona (1933), Arkansas (1939), Mississippi (1932), Missouri (1934), Nebraska (1937), New Mexico (1936), North Carolina (1933), Oklahoma (1939), Oregon (1935), Puerto Rico (1935), South Dakota (1931), Utah (1937), and Virginia (1921)). Kentucky did not formally adopt, but in 1934 recognized Canons as persuasive authority in disciplinary proceedings. Id. at 5.

137. Id. at 1-13.


139. Sutton, supra note 138, at 257.

140. WOLFRAM, supra note 109, at 55 (quoting Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1, 10 (1934)).

141. Id. at 50 n.29 (quoting Professional Ethics: Charity & Perjury, Time, May 13, 1966, at 81).


Given the widespread criticism of the Canons, ABA President Lewis F. Powell, Jr. committed to modernize them during his 1964 term in office. This was just one of his three initiatives during his term in office. He also focused on improved access to legal services, specifically targeting the poor and middle income populations. Powell appointed Little Rock attorney Edward L. Wright to chair the Special Committee on Evaluation of Ethical Standards.

Reportedly, Wright accepted the assignment subject to the condition that he could choose the other members of the committee. Twelve prominent men, mostly trial lawyers, were appointed. University of Texas Professor John F. Sutton, Jr. was retained to serve as Reporter, and Sarah C. Ragle (later Weddington) served two years as Assistant Reporter.
Limited archival documents chronicle the Code's drafting process. Multiple drafts were considered, three of which were distributed outside the Committee. The Reporters, working with a small editorial committee, did the primary drafting work. The Wright Committee met seventy-four days over five years, confidentially exchanging ideas and debating points for further revisions by the drafters. Interest groups had limited and controlled opportunities to express their concerns. Footnotes prepared by Sutton and Weddington referenced the Canons, ethics opinions, and other authorities; they were included in the Final Draft to perpetuate the research but not officially considered a part of the Code.

Perhaps law had replaced religion as the primary control on behavior, but religious considerations certainly influenced Code drafting decisions. At the Committee's first meeting, members were asked to submit written comments suggesting possible direction. Harvard Professor A. James Casner expressed concern with the "Thou Shall Not' Character of Present Canons," and suggested the need for "a more positive responsibility to reach out and act in an affirmative manner with respect to matters of general public interest."

151. Sherman Welpton prepared an initial draft synthesizing the American College of Trial Lawyers' Code of Trial Conduct and the 1908 Canons. Letter from Sherman Welpton, Partner, Gibson, Dunn & Crutcher to Edward L. Wright, Chairman, Committee on Evaluation of Ethical Standards Nov. 24, 1964) (on file with author). John Sutton prepared subsequent drafts distributed only to committee members. Partial Drafts of Code of Professional Responsibility (Oct. 1965) (on file with author). Prior revision efforts failed because of uncontrolled dissemination of early drafts, hence, the Wright Committee agreed to an in camera process, with tight restrictions on initial drafts. See Welpton Interview, supra note 147, at 13-18. A tentative draft (Oct. 15, 1968) was distributed to 550 lawyers, judges and professors; Preliminary Draft (Jan. 15, 1969) was distributed to 15,000, and a final draft (July 1, 1969) was distributed to 25,000. See 94 ABA ANN. REP. 728 (1969). Archival records of comments received could not be located, either at the ABA or Northwestern University Law Library, which serves as a repository for the ABA, or in the papers of A. James Casner, at Harvard Law Library.

152. See 94 ABA ANN. REP. 731 (1969). At various times, Edward Wright, Walter Armstrong, John Ritchie, and John Weinmann, served on the three-man editorial subcommittee that conferred with John Sutton an additional twenty-eight days. Wright, supra note 146, at 2, 7.

153. Wright, supra note 152, at 2.

154. Welpton Interview, supra note 147, at 12-13 (detailing input from the General Practee Section, in-house counsel, insurance defense, and plaintiffs' litigation bar).

155. 94 ABA ANN. REP. 734-36 (1969); see also MODEL CODE OF PROF'L RESPONSIBILITY pmbl., n.1 (1969) (explaining that footnotes are not intended to reflect official views of the drafting committee); Welpton Interview, supra note 147, at 14.

156. See A. James Casner, General Comments to the Special Committee on Evaluation of Ethical Standards 3 (Nov. 16, 1964) (unpublished commentary) (copy on file with author).
While the Committee initially began with ten proposed Canons as organizing principles, the number was reduced to nine to avoid “sound[ing] too much like the Bible with ten commandments.”

While debating the tiered structure, E. Smythe Gambrell likened the authoritative statement to “the text of the preacher’s sermon,” which the guiding principles then elaborate.

Casner’s desire for affirmative principles gave voice to what eventually became Canon 2. Initial language, that one “must” help satisfy the collective obligation “to supply” competent assistance, became “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.” Geoffrey Hazard raised, and answered in the negative, the fundamental question of whether each lawyer was obligated to accept an unlimited number of clients who needed legal services but could not afford to pay. Although the individual lawyer was not a public utility, there was a collective obligation to assure access and that no rules serve as obstacles to access. Casner agreed, expanding on individual responsibility.

Under current thinking, one could passively sit back and do nothing unless specifically asked. Casner maintained that each lawyer had to ensure the existence of a local organization capable of calling upon individual lawyers to provide services; if not, “then you have not fulfilled your responsibilities to your profession.”

The Wright Committee succeeded in forging a consensus for revisions where three earlier efforts had failed. Added impetus, it appears, came from two Supreme Court decisions that struck down ethical restrictions on the delivery of legal services. In NAACP v. Button, the Court recognized that activities of the NAACP in bringing test litigation were constitutionally protected “modes of ... association” that Virginia could “not prohibit, under its power to

157. Id. at 4-5.
158. Welpton Interview, supra note 147, at 13.
161. Meeting Transcript, supra note 159, at 148-49.
162. Id. at 150.
163. Id. at 150-51.
164. Id.
165. 94 ABA ANN. REP. 720 (1969) (recalling special committees to recommend changes to ethical rules created in 1928, 1933, and 1937).
regulate the legal profession, as improper solicitation of legal business.\footnote{166} The next term, the Court dispelled efforts to limit Button's application to public interest cases of political association. \textit{Brotherhood of Railroad Trainmen v. Virginia} extended the principle to protect the channeling of workers' injury claims to lawyers selected by the union.\footnote{167} Application of ethical rules prohibiting solicitation and unauthorized practice violated protected rights of "freedom of speech, petition and assembly."\footnote{168} This raised the prospect of group legal services, with the involvement of lay intermediaries in the selection and supervision of lawyers. If broadly interpreted, the two cases destroyed the underpinnings of ethics rules preserving the economic and competitive preeminence by those in control of the legal profession.\footnote{169} While the Wright Committee worked, the Supreme Court dealt another blow to traditional ethical restrictions on practice.\footnote{170} Many lawyers were surprised, even apoplectic, in response to these cases.\footnote{171}

Meanwhile, other ABA groups also studied delivery questions.\footnote{172} Powell's leadership was instrumental in creation of the Legal Services Program, "integrat[ing] the concept of government subsidy of legal services with the legal profession itself so that instead of this being a competitive effort by the federal government it became an effort . . . of the organized bar itself."\footnote{173} He realized that voluntary legal services could not possibly satisfy the demand, and that the bar's intransigence to governmental subsidy would be disastrous.\footnote{174} Powell believed the legal profession had an affirmative responsibility to see that legal

\begin{footnotes}
\item[167] 377 U.S. 1, 8 (1964).
\item[168] Id. at 2, 5.
\item[169] Cf. \textit{Comment, Legal Ethics and Professionalism}, 79 \textit{Yale L.J.} 1179, 1187 (1970) (discussing temptation by those in control of the profession to use the ethics code as weapon "to perpetuate their position of control, or to prevent even small shifts in the balance of power").
\item[170] United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 217 (1967) (extending constitutional protection to a union plan in which a private lawyer employed by the union handled members' compensation claims).
\item[172] See, e.g., 94 ABA ANN. REP. 390-92 (1969). (Remarks of William F. McCalpin, Chair, Special Committee of Availability of Legal Services); \textit{id.} at 389-94 (Remarks of William J. Fuchs, Chair, Section of General Practice).
\item[174] \textit{Id.}
\end{footnotes}
services "were made available on a far broader basis to people who needed them and couldn't afford to pay for them." Viewed from this larger social and political perspective, the monumental shift in Canon 2, recognizing a lawyer's duty to make legal services available, may have been an effort to stave off government intervention and socialized legal aid programs.

Since 1965, William McCalpin and his Special Committee of Availability of Legal Services focused on the thorny subject of group legal services. McCalpin appeared before the Wright Committee twice, vehemently urging it to abandon traditional ethical restraints against advertising and solicitation as applied to group legal services. The General Practice Section strongly opposed that view. It contended that general practitioners should have the opportunity to satisfy any great unfulfilled need for legal services. The Wright Committee understood that these conflicting forces within the ABA could block passage of the proposed Code revisions; marketability served as a prime consideration that forged compromise on key substantive provisions. Canon 2's broad statement of each lawyer's duty deftly bridged the competing views about government subsidized services, group legal services, and the desire to keep the market open for general practitioners.

When the proposed Code of Professional Responsibility was presented to the ABA House of Delegates in August 1969, the issue of group legal services remained the most divisive. Chairman Wright introduced the Code as "a product of conciliation and compromise . . . not that it is a flawless document, . . . but because the bar generally believes it [to] be a better document than the present Canons." Rejecting a proposed amendment that would regulate permissible

175. Id.
176. See, e.g., Meeting Transcript, supra note 159, at 141-57.
177. Welpton Interview, supra note 147, at 19; see also Judith L. Maute, Pre-Paid and Group Legal Services: Thirty Years After the Storm, 70 FORDHAM L. REV. 915, 917-25 (2001) (discussing the tortured history of bar efforts to regulate group legal services).
178. Id. at 21.
180. See, e.g., id. at 389, 392 (recounting the remarks of Henry L. Pitts, Illinois State Bar Ass'n, on adverse consequences that compromise professional independence and subject lawyers to lay control); id. at 392 (recounting the remarks of Arthur Leibold, for Chicago Council of Lawyers, criticizing DR 2-103(D)(5) as unrealistic and backward-looking); see also R.W. Nahstoll, Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2-103(D)(5): Stale Wine in New Bottles, 48 TEX. L. REV. 334, 334 (1970) (castigating acerbically the Wright Committee and House of Delegates).
group legal services, the House opted for the Committee draft that permitted nonprofit group legal services "only ... to the extent that controlling constitutional interpretation at the time of the rendition of the services requires."\textsuperscript{182}

The drafters envisioned the Code as "a giant step forward," but not the final word.\textsuperscript{183} Rather, in the words of Reporter John Sutton, the Code was only the start "of a new effort ... to state a valid philosophy of the lawyer's place in society, together with a set of enforceable rules for the government of the profession. Constant review and reappraisal of the Code is necessary ... to carry forward the work ... in refining our professional ethical standards."\textsuperscript{184}

From the outset, the Code tried to differentiate between general normative statements, ethical considerations, and mandatory disciplinary rules subject to penal sanctions.\textsuperscript{185} This structural

\footnotesize{182. \textit{Model Code of Prof'1 Responsibility} DR 2-103(D)(5) (with amendments to Feb. 24, 1970), \textit{reprinted in} L. RAY PATTERSON \& ELLIOTT E. CHEATHAM, \textit{The Profession of Law} 425 (1971); \textit{see also} 94 ABA ANN. REP. 391 (1969) (citing the remarks of Chesterfield Smith reading excerpts from the UM\textit{W} opinion, labeling as "heifer dust" any opposition to the proposed McCalpin Committee amendment regulating group legal services and suggesting that proposed DR 2-103(D)(5) is an effort to gain support from those hoping for a reversal of constitutional holdings). William J. Fuchs, Chair of Section of General Practice, opposing any McAlpin Committee amendment, stated: "If there is some great unfulfilled need of the middle or lower income public for more legal services, the general practitioner says 'Let us try to provide for this need, not by choking our traditional system and concepts but by improving them.' \textit{Id.} Mr. Pitts, of the Illinois State Bar Association, also opposed the amendment, "which would enrich lawyers who are well-connected with trade associations or are aggressive enough ... [but unlikely] to provide better services to the modest income group which they purport to serve." \textit{Id.} at 392. After rejecting the McAlpin amendment, the House of Delegates approved the adoption of the Wright Committee's Final Draft. \textit{Id.}

183. Sutton, supra note 138, at 266.

184. \textit{Id.}

185. \textit{Model Code of Prof'1 Responsibility} preliminary statement. According to the preliminary statement:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

\textit{Id.} (footnote omitted).

The tripartite structure first appeared in the second code draft in October 1965, with different labels, but the same underlying concepts. Canons were used as organizing
bifurcation attempted to state specific, authoritative standards of conduct that gave "fair and complete notice of forbidden conduct." It caused some debate then, implying that some highminded lawyers would like guidance on reaching beyond minimum standards, while others needed to be controlled through penal rules. Rejecting the Canon's hortatory admonition that the lawyer "should obey his own conscience," the Code confronted the open question of whose conscience and standards controlled, providing binding standards in the disciplinary rules. Beginning the trend towards a restatement format, extensive footnotes annotated the Code, citing to related Canons, ethics committee and judicial opinions, and secondary authorities. To the extent that generalities in the former Canons were "embryonic explanations" of lawyers' roles in the legal process, they were "restated as ethical considerations" to state professional aspirations and guide lawyers in making ethical decisions on matters not addressed by binding law.

In Canon 2, drafters strove for the normative principle "that every layman should be afforded access to the independent professional services of a lawyer of integrity and competence." Of course, the disciplinary rules imposed no duty to accept a client, with or without a fee. Aspirational and largely symbolic references to the pro bono tradition honored the professional ideal and skirted the issue of individual obligation with words of encouragement, that "[e]very lawyer ... should find time to participate in serving the disadvantaged." In ironic contrast to Canon 2's titular focus on access to counsel, most of its disciplinary rules restricted permissible

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principles for "indicative principles" and "peremptory rules." Some members of the drafting committee regarded canons merely as topic headings while other members placed greater importance on canonical language, explaining the origins of "axiomatic norms." See Meeting Transcript, supra note 159, at 146-47, 154 (providing comments of Justice Charles Whitaker, Geoffrey Hazard, E. Smythe Gambrell, and others).

186. Sutton, supra note 138, at 264; see also id. at 260.

187. See Meeting Transcript, supra note 159, at 32-38 (providing comments of Justice Charles Whitaker, Geoffrey Hazard, E. Smythe Gambrell, and others). Some members expressed concern that the indicative or guidance principles (later known as Ethical Considerations), and the penal provisions in the peremptory rules (later known as Disciplinary Rules) made "odious comparisons" that would divide the bar into two tiers: "one for the very the highminded fellow and the other for the fellow [who was just] getting by." Id. The decision was made to retain the tiered format. Id.

188. Sutton, supra note 138, at 260.

189. Id. at 264 (describing more specific standards in disciplinary rules as "winnowed from" ABA ethics opinions).

190. Id.

191. Id. at 259.

communications between lawyers and their prospective clients and group legal services. This hypocrisy did not escape some members of the drafting committee, which retained the marketing restrictions in pragmatic recognition of the politics surrounding adoption.

Several ethical considerations address lawyers' individual and collective responsibilities for access to representation. Except for a reference to group legal services, they were adopted virtually unchanged from the Tentative Draft, reinforcing the view that this was a compromise approach with possibly greater symbolic than practical importance. Ethical Consideration 2-25 most explicitly urges individual involvement.

EC 2-25 states:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has become necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the


194. Sutton, supra note 138, at 260-65 (recognizing the new Code's deficiencies on marketing issues, specialization and group legal services). Because most in the bar despised group legal services allowed in the preliminary draft, final draft regulations were "more in the nature of a lateral pass of the problem to the . . . Supreme Court." Id. The drafters took a politically pragmatic course. See also John F. Sutton, Jr., How Vulnerable is the Code of Professional Responsibility?, 57 N.C. L. Rev. 497, 497-98 (1979) (describing Code provisions on advertising, solicitation, specialization, group legal services, and other marketing issues as "at best inadequate and at worst obstreperous and obstructionistic" and a consequence of political adoption process).

195. As adopted, MODEL CODE OF PROF’L RESPONSIBILITY EC 2-4 (1969) omits a sentence from the tentative draft: "Likewise, it is proper for a lawyer to volunteer such advice and render resulting legal services in connection with permissible group services." MODEL CODE OF PROF’L RESPONSIBILITY ¶ 4, ll. 12-16 (Draft 1968) (copy on file with author). The deleted language raises politically volatile issues of solicitation, whether or not for remuneration, group legal services, and economic competition.
profession. Every lawyer should support all proper efforts to meet this need for legal services.¹⁹⁶

Numerous footnotes reinforce the aspirational language, with lengthy quotes extolling the profession's weighty responsibilities to ensure equal justice for the poor.¹⁹⁷

¹⁹⁶. CODE OF PROF’L RESPONSIBILITY EC 2-26 (1969) (emphasis added) (footnotes omitted). Three additional Ethical Considerations generally note the profession's collective responsibilities. See id. EC 2-1 (identifying as an important function, “to assist in making legal services fully available”) (footnote omitted); CODE OF PROF’L RESPONSIBILITY EC 2-16 (1969) (addressing the general need for adequate compensation). “Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.” Id. See also MODEL CODE OF PROF’L RESPONSIBILITY EC 2-24 (1916) (“A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services . . . [without an appropriate contingent fee] unless the services are provided for him.”).

¹⁹⁷. See MODEL CODE OF PROF’L RESPONSIBILITY EC 2-1 n.3 (1969) (quoting former ABA President Lewis F. Powell on the inability of many unrepresented persons to obtain equal justice because of poverty or ignorance and quoting Cheatham on the unmet need for legal services because of the inability to pay fees); MODEL CODE OF PROF’L RESPONSIBILITY EC 2-1 n.4 (1969) (quoting Cheatham for maxim that “privilege brings responsibilities’ . . . to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it” (citation omitted)); CODE OF PROF’L RESPONSIBILITY EC 2-16 n.41 (1969) (quoting 1958 ABA Joint Conference Report, that ideal of “equality before the law . . . remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees.” (citation omitted)). According to the Report of the Attorney General's Commission on Poverty and the Administration of Criminal Justice,

[l]awyers have peculiar responsibilities for the just administration of the law, . . . [which] include providing advice and representation for needy persons. To a degree not always appreciated by the public . . . the bar has performed these obligations with zeal and devotion. . . . However . . . a system of justice that attempts . . . to meet the needs of . . . [indigent defendants] through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate.

CODE OF PROF’L RESPONSIBILITY EC 2-25 n.56 (1969). The 1958 ABA Joint Conference Report states that

representation [of those unable to pay usual fees] is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and—increasingly—through the organized efforts of the Bar. . . . If . . . [the] need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance.

An early commentator on the Code, Eugene Smith, called Canon 2 a "near-radical departure from familiar ethical principles."\(^{198}\) Previously, lawyers' obligations focused on a reactive role in cases where a solvent client recognized a need for legal services and rationally selected a competent lawyer: "the legal profession was to be passive in its relations with the public, which was to be active in learning of legal rights."\(^{199}\) Despite this "big step forward," the drafters recognized that the reactive model could not meet existing legal needs and undertook the precarious venture of easing restrictions on group-based delivery of legal services.\(^{200}\)

External factors pressed to change the traditional model. The civil rights movement and War on Poverty abandoned passivity, actively seeking opportunities to challenge discriminatory laws.\(^{201}\) Some in the emerging legal service programs worked for broad-based law reform, as opposed to the traditional reactive model of delivering legal services.\(^{202}\) Recent Supreme Court decisions shook "the profession to its roots ... forcing bar associations and grievance committees" to reevaluate the traditional constraints.\(^{203}\)

Canon 2 and its public service Ethical Considerations should be viewed against this complex historic, constitutional, and political backdrop. If the renewed focus on ethical rules was to have any legitimacy, apart from guildlike economic protectionism, it had to say something about making legal services available while concurrently restricting the permissible means of affording access.\(^{204}\) Thus, this language could be considered a defensive move averting pressure to permit group legal services, which were seen both as an encroachment

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199. Id. at 286-87.
200. Id. at 288-89, 301-02, 307-10.
201. See generally Susan D. Carle, From Buchanan to Button: Legal Ethics and the NAACP (Part II), 8 U. CHI. ROUNDTABLE 281 (2001) (describing the NAACP's proactive legal strategy and the tension therein with traditional legal ethics).
202. See, e.g., Smith, supra note 198, at 302; WOLFRAM, supra note 109, at 936.
204. See Comment, supra note 169, at 1191 (describing the organized bar's resistance to mass production techniques and lay competition as a means to ensure quality and the bar's inattention to quantity considerations as reminiscent of tactics used by vocational guilds).
on traditional delivery of legal services and as an economic threat to the status quo in the legal marketplace.\textsuperscript{205}

Viewed from this critical perspective, the new Code language casts a somewhat different light. Besides encouraging lawyers’ volunteer efforts to serve the poor, it could also be a rallying cry for the troops of practitioners nervous about future encroachments. Indeed, several noted sources specifically focused on improving delivery of services to prospective middle income clients able to pay some fee.\textsuperscript{206} Nevertheless, it can be argued that these multiple factors combined to work a paradigmatic shift in normative standards, explicitly recognizing a proactive and affirmative expectation that each lawyer would help make legal services available to those in need.

After the Code’s formal adoption by the House of Delegates, the ABA launched a campaign to encourage enactment by local jurisdictions. Contrasted with the Canons’ delayed and spotty adoption, the Code met with initial, sweeping success. Within two years, by 1972, all but three states adopted the Code.\textsuperscript{207} Most jurisdictions adopted it verbatim, as recommended by the ABA, after cursory independent consideration.\textsuperscript{208} A few states formally adopted only the disciplinary rules but not the ethical considerations.\textsuperscript{209} The Canons served primarily as chapter headings.\textsuperscript{210}

Little reliable data exists to show the extent of the bar’s involvement in rendering pro bono legal services.\textsuperscript{211} Some larger firms created pro bono committees and other institutionalized mechanisms to encourage public service. Much of what lawyers began to consider

\textsuperscript{205} See generally id. at 1187 (stating that despite the attempted aura, the Code “is undeniably of political and economic rather than spiritual derivation”). The organized bar’s response to external pressures for change “may be less concerned with extending legal services than with preserving its monopolistic control over the provision of such services.” Id. (quoting JEROME E. CARLIN, LAWYERS’ ETHICS 180 (1966)).

\textsuperscript{206} See, e.g., Cheatham, supra note 171, at 440, 443-44 (noting an increased need for legal services by expanding middle class, and urging response by individual leaders and bar leaders); Cyril A. Fox, Jr., Comment, Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution, 26 U. PITT. L. REV. 811, 826-28 (1965); Elliott E. Cheatham, A Lawyer When Needed: Legal Services for the Middle Class, 63 COLUM. L. REV. 973, 976-83 (1963).

\textsuperscript{207} WOLFRAM, supra note 109, at 57.


\textsuperscript{209} Id.

\textsuperscript{210} Id.

\textsuperscript{211} WOLFRAM, supra note 109, at 932 & n.13 (citing conflicting authorities dated in the 1970s for the proposition that the level of pro bono work by private practitioners is “quite low,” yet more than forty-five percent of another survey’s respondents indicated participation in pro bono services).
pro bono work advanced the interests of their paying clients or aided new client development. Volunteer work for civic arts groups and bar committees, while also important, did not address the unmet legal needs of the poor. Sole practitioners and small firms likely handled a disproportionate share of individual pro bono representations because their offices—especially in smaller communities—were physically more accessible to the low income population as walk-ins from the street.

Bar leaders tried to encourage greater involvement with reminders that each lawyer has a responsibility to serve the public interest. Discussion of legal ethics reached an unprecedented level in the wake of the civil rights and consumer movements, antipoverty programs, and Watergate. Eight short years after its adoption, the Code was doomed. The Supreme Court struck its broad restrictions on advertising and group legal services. Courts and ethics committees revealed interpretive difficulties with vague, inconsistent provisions, or gaps in the disciplinary rules and had to rely on Canons and Ethical Considerations. Scholarship criticized the Code's misplaced priorities. The Justice Department threatened antitrust enforcement.

212. Id. at 949-50.
213. Id. at 950.
214. Id. at 948, 951 (regarding 1975 ABA House of Delegates resolution that stated it is “the basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services” and defining public interest to include poverty, civil rights and public rights law, representation of charitable organizations, and the administration of justice). One prominent critic argued that the Code’s unenforceable aspiration of pro bono work was “an indefensible bow to self-interest.” Marna Tucker, Pro Bono ABA?, in VERDICTS ON LAWYERS 20, 27-28 (Ralph Nader & Mark Green eds., 1976), cited in Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 685 (1989).
4. ABA Model Rules of Professional Conduct

a. 1977 to 1983

It was time to return to the drawing board. In 1977, ABA President William B. Spann, Jr. named the Special Commission on Professional Standards to review "all facets of legal ethics." Omaha attorney Robert J. Kutak chaired the Commission until his untimely death in 1983. The group’s composition was more diverse than its predecessors, for the first time including several women and designated public representatives. Prominent bar leaders, jurists, and academics participated in the intense deliberative process. Yale Professor Geoffrey Hazard, who was Executive Director of the American Bar Foundation during the Code drafting, was named Reporter.

Like its predecessor, the Kutak Commission agreed that early discussion and drafts would be held in confidence among the participants. The initial period of private deliberations allowed the luxury of visionary rethinking of grand policy issues, unconstrained by

219. WOLFRAM, supra note 109, at 60-61; cf. Maute, supra note 216, at 490-93.
220. Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 Law & Soc. Inquiry 677, 677 (1989) (footnote omitted). The impetus in appointing the Kutak Commission was partly to shore up the profession's public image, and partly to shore up the ABA's image as "lawgiver for the practice of law" among lawyers and disciplinary enforcement staff. Id. at 688.
223. See Letter from Robert J. Kutak to the ABA Commission on Evaluation of Professional Standards (Apr. 13, 1979). The Commission included two ABA Presidents, Robert W. Meserve & William B. Spann, Jr.; Missouri Bar President Robert O. Hetledge; Robert B. McKay, New York City bar leader and former Dean of New York University Law School; Chief Justice Arno H. Denecke of the Oregon Supreme Court; Marvin E. Frankel, former federal judge from the Southern District of New York; and Professor Samuel D. Thurman, of University of Utah School of Law. Robert J. Kutak was founding partner of Kutak Rock & Huie, a large Omaha-based law firm. See id. Geoffrey C. Hazard, then of Yale Law School, served as Reporter. See id. Additional consultants were L. Ray Patterson (Dean, Emory Law School) and John F. Sutton (University of Texas Law School). See id. Liaisons maintained communications with important bar counterparts (Michael Franck, Standing Committee on Professional Discipline, John C. Deacon, Board of Governors, and Thomas Z. Hayward, Jr., Standing Committee on Ethics and Professional Responsibility). See id.
224. Schneyer, supra note 220, at 698.
political pressures from within the bar.\textsuperscript{225} For example, it considered the behavioral effects of a professional code of conduct:

A code is seen as a necessary consequence of the officially sanctioned monopoly enjoyed by those who have endured the prescribed rites of passage and been admitted to the company of licensed attorneys . . . . [I]t actively operates to forestall such external control.

But . . . [it] is much more than a collection of internally generated rules . . . . Taken seriously, it becomes a provocation to a continuing discourse within the profession; becomes, in fact, a constitution of first principles . . . codifying the mores of an identifiable society, . . . actively serving as a tool in the complex process of “socializing” the members of that society.\textsuperscript{226}

It is, in the best of words, a teaching text. This heady discussion appears to have played a pivotal role in the evolutionary process of defining ethical standards based upon external conduct and not personal moral considerations. Early on, the Kutak Commission sought input from the ABA's harshest critics, while remaining aloof to its own membership.\textsuperscript{227}

At the fall 1977 organizational meeting held in Aspen, Commissioner Thomas Ehrlich (also President of the Legal Services Corporation) suggested the need to address whether the bar should have a duty to ensure availability of legal services.\textsuperscript{228} Meetings for the next year and a half discussed fundamental questions about the functions of an ethics code and created multiple “working drafts.”\textsuperscript{229} Its earliest discussion of pro bono, at the April 1979 meeting, reflected a preference for a broad definition of qualifying activities and

\textsuperscript{225} Id. at 699-70.


\textsuperscript{227} Schneyer, supra note 220, at 698. Groups who were asked to read early drafts included the Society of American Law Teachers (SALT), an organization of politically progressive law professors, the American Trial Lawyers Association (ATLA), which eventually produced a competing set of proposed ethics rules, and the National Humanities Center. Triangle Park Journal, supra note 226, at 17-18.


\textsuperscript{229} See, e.g., Triangle Park Journal, supra note 226 (describing ninth meeting of which most of the discussion was on theoretical matters and anticipated circulation draft in early 1980).
appreciation that a mandatory rule would present "enormous enforcement problems."

The very first, "truly tentative" pro bono draft rule proposed forty hours per year of mandatory service, or its dollar equivalent, to improving the legal system or providing legal services to the poor. Shortly before the draft rule was to be discussed at the June meeting, Kutak sent Commissioners a memorandum from prominent bar leader Marna S. Tucker, which recommended a mandatory, enforceable duty to provide pro bono legal services for the poor. Also included in the mailing was a renumbered, though substantially identical, draft provision that was previously circulated, but not explicitly considered. The pro bono draft was first scheduled for discussion on June 29, 1979, about a month before the infamous "Showcase" session at the August 1979 ABA Annual Meeting.

Robert Kutak's personal copy of the draft provision contains handwritten notations, to "completely rethink" portions because of "serious compliance mechanisms" and the need for "allocation mechanisms." Although this meeting's journal was not found, Kutak's notes clearly indicate the provision would undergo major change. Also on that meeting agenda was discussion of a "Showcase" Program sharing preliminary ideas from the Model Rules project at the August 1979 ABA meeting.

230. Id. at 24.
231. Letter from Robert J. Kutak, Chair of American Bar Association Committee on Ethics and Professional Responsibility, to American Bar Association Committee on Ethics and Professional Responsibility (May 23, 1979). The Commission had not yet discussed Draft Rule 13.1. Id. A substantially similar version appeared a few months earlier, as R. 13.1 (May 1979 draft), and R. 9.1-1 (June 1979 draft). See also Schneyer, supra note 220, at 701 (citing to MODEL RULES OF PROF'L CONDUCT R. 9.1 (Draft Aug. 1979)).
232. Letter from Robert J. Kutak, Chair of American Bar Association Committee on Ethics and Professional Responsibility, American Bar Association on Evaluation of Professional Standards to Commissioners (June 22, 1979); and accompanying memorandum from Marna S. Tucker, Partner, Boasberg, Heures, Finkelstein & Kutak, Chair of American Bar Association Committee on Ethics and Professional Responsibility, at 5 (June 5, 1979) (on file with author).
236. Id.
237. Schneyer, supra note 214, at 701. Other controversial proposals would have required written fee agreements and would have more carefully defined the limits of confidentiality when a client used a lawyer's services for wrongdoing. Id.
The Dallas Showcase was a signal event in the history of the Model Rules. Hofstra Professor Monroe Freedman had been invited to speak and was provided with a copy of the initial draft provisions. As he recalls, the precirculation draft was not provided to him on condition of confidentiality. Within hours before the program was to start, Freedman claims he was summoned to Kutak's hotel suite and told that the draft language was confidential and was not to be read from or distributed at the program. Freedman says he protested to this late notice, insisting he would not have agreed to participate on that condition. He understood that the Showcase program was designed to introduce the proposals, gather comments and invite feedback, and that keeping the language private was completely inconsistent with that purpose.

At the public event, Freedman harshly criticized certain provisions and distributed copies of the heretofore private tentative draft. Proposed exceptions to confidentiality drew his strongest comments. He recalls objecting to the mandatory pro bono language, which could result in shabby services by reluctant attorneys, and the broad definition of qualifying service, which would dilute the focus on serving the unrepresented poor.

After the trade press published the leaked document, some segments of the practicing bar protested loudly about the draft provisions. The fiasco jeopardized the Model Rules project, which, after a period of recoupment, actively sought and considered comments on its later drafts. The September draft of Rule 9.1,
purportedly incorporating revisions made at a prior meeting, retained
the concept of mandatory service, deleted the quantification of hours
and buyout, and inserted a reporting requirement. Notably, the
September draft conspicuously included strong confidentiality
language limiting distribution, quotation, or public disclosure of any
contents.

Fallout from the Showcase debacle forced pragmatic
reexamination of how best to proceed. Thereafter, the Commission’s
proceedings were decidedly more open, with subsequent “unofficial
pre-circulation draft[s]” distributed which invited commentary, subject
to the caveat that the text was under continual revision. It received
voluminous comments on many topics, reflecting the ethical pluralism
within the American bar. Ted Schneyer considered the resulting
process “an extravaganza” that “amounted to the most sustained and
democratic debate about professional ethics in the history of the
American bar.” This contrasted sharply with the closed process used
in drafting both the ABA 1908 Canons and 1969 Code.

The Commission widely distributed the 1980 Discussion Draft.
Proposed Rule 8.1 still required an unspecified amount of unpaid pro
bono legal service, generically identified means by which it could be
satisfied, and called for an annual service report. More than 150
organizations and individuals submitted written comments. Several
individuals expressed vehement opposition to mandatory service and
reporting. A special committee of the New York City Bar submitted

243. Letter from Robert J. Kutak, Chair of American Bar Association Committee on
Ethics and Professional Responsibility, to American Bar Association Commission on
Evaluation of Professional Standards Commission (Sept. 13, 1979) (copy on file with author)
(transmitting “second pre-circulation draft”).
244. American Bar Association Commission on Evaluation of Professional Standards,
245. American Bar Association Commission on Evaluation of Professional Standards,
Unofficial Pre-Circulation Draft Rules of Professional Conduct (Tentative Draft Oct. 12,
1979) (copy on file with author).
246. Schneyer, supra note 214, at 703.
247. Id. at 678.
248. MODEL RULES OF PROF’L CONDUCT R. 8.1 (Discussion Draft 1980) (on file with
author).
249. 1-3 Geoffrey C. Hazard, Compilation of Comments on the Model Rules of
Professional Conduct (1980) (copy on file with author) (compiling comments from law
organizations and individuals).
250. For example, in June 1980, Commissioner Denecke submitted a collection of
letters from Oregon lawyers responding to the published R. 8.1 proposal. Letters from
Oregon lawyers to Oregon Bar Association Commission Denecke (June, 1980) (on file with
the American Bar Association); see also 1-3 Hazard, supra note 249 (suggesting that most,
but not all comments opposed mandatory service; some thoughtful comments supported the
its report recommending mandatory service, based on a quantitative standard, and also recognized that the responsibility could be discharged by financial support of organizations providing legal services to the poor.251 Different New York bar committees submitted opposing views.252 Other powerhouse organizations weighed in their pro bono concerns.253 Despite differing views as to the proper approach, resounding support was given to the importance of making legal services available to those in need.

The next published draft was purely aspirational and dropped the reporting requirement.254 It remained in the same form when submitted to the ABA House of Delegates in February 1983.255 A consensus was reached among the New York City committees to avoid the issue of mandatory service and emphasize the importance of improved access. The Association of the Bar of the City of New York presented an amendment recognizing that the responsibility could be discharged by financial support of organizations providing legal services to the poor.256 The ABA House of Delegates, showing pragmatic responsiveness to the democratic process, adopted the rule as amended. The 1983 version of ABA Model Rule 6.1 provided:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.257

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252. 1 Hazard, supra note 249 (reprinting a report by the Committee on Professional and Judicial Ethics); 3 Hazard, supra note 249 (reprinting testimony of the Legal Aid Society of New York City).

253. 3 Hazard, supra note 249 (quoting comments of Jerome Shestak, for ABA Standing Committee on Legal Aid and Indigent Defendants, Joseph Mandel, for Los Angeles County Bar Ass’n, and Howard Eisenberg, for National Legal Aid and Defender Ass’n).


255. MODEL RULES OF PROF’L CONDUCT R. 6.1 (Proposed Final Draft 1981); see also MODEL RULES LEGISLATIVE HISTORY, supra note 5, at 278.

256. MODEL RULES LEGISLATIVE HISTORY, supra note 5, at 274.

257. Id. at 273-74.
The Preamble identified three roles in which each lawyer serves: as representative of clients, as officer of the legal system, and as "public citizen having special responsibility for the quality of justice." In the civic role,

[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. 258

The Kutak Commission replaced the Code’s tripartite structure with the restatement approach, in which authoritative blackletter rules are followed by comments that serve as guidance for practicing in compliance with the rules and as guides to interpretation. 259 It generally dropped the pretense of stating higher, nonbinding, aspirational principles. Model Rule 6.1 was one of two exceptions to this drafting convention. The pro bono service responsibility was cast in nonmandatory, aspirational terms. 260

Deviation from the drafting convention reflects the heightened normative importance of pro bono service. More than a century after the first legal ethics code, public service was stated as an affirmative ethical responsibility for each practicing lawyer. Qualifying service was broadly defined and gave no quantitative standard to guide the amount of service. Almost any unpaid or reduced fee legal service for civic or professional groups arguably would suffice. 261 Given the impassioned debate over the earlier proposals, the compromise struck in this language is still significant. Unlike Canon 2 and its Ethical Considerations, Model Rule 6.1 squarely placed responsibility upon

260. Contrast MODEL RULES OF PROF’L CONDUCT R. 2.1 (1999) (mandating that a lawyer shall exercise independent professional judgment); Id. at R. 3.3(a)(1) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal. . . .”). The only other exception to this drafting convention is Model R. 1.2(b), asserting that “[a] lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Id. at R.1.2(b).
261. See Cranton, supra note 2, at 1124 n.67 (citing 1982 ABA survey showing that sixty-eight percent of respondents provided unpaid public service, with the greatest amount of time given to charitable organizations and bar association activities); OKLA. BAR ASS’N, RESULTS OF THE 1992 MEMBERSHIP SURVEY OF THE OKLA. BAR ASS’N, 63 OKLA. B.J. 3544 (1992) (reporting survey results of an Oklahoma Bar Association poll in which fifty-two percent of respondents spend less than three hours a week on “civic/community/pro bono/charitable work” and sixty-six percent of respondents spend less than three hours a week on “professional legal work/volunteer work”).
the individual. In the coherent progression towards articulating meaningful standards of conduct, Rule 6.1 inched away from the negative and reactive standards, moving towards a positive expectation that each lawyer would affirmatively volunteer to serve the public interest.

Official pronouncements by the ABA House of Delegates repeatedly exhorted lawyers to participate in pro bono activities. Consistent with its social history of identifying significant actions by meeting location, its 1975 “Montreal Resolution” reaffirmed that every practicing lawyer has a responsibility “to provide public interest legal services,” and defined the kinds of work that would meet this responsibility. In 1983. Exhortations were elevated to the status of an ethical rule in 1983. In 1988, the “Toronto Resolution” urged that all lawyers devote “a reasonable amount of time” (at least fifty hours a year) “to pro bono and other public service activities, to persons in need or to organizations serving individuals of limited means, or on activities which improve the law, the legal system, or the legal profession.”

In 1991, the ABA House of Delegates again stated the goal of “promoting meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.” Despite these frequent reminders of lawyers’ pro bono responsibilities, studies reported that most legal needs of the poor went unmet. The organized bar gave increased political support to government-provided legal service programs, but did not fill the gap with voluntary legal services. Although largely symbolic pronouncements recognized the responsibility, perhaps only twenty percent of American lawyers regularly provided pro bono legal services to those who could not afford to pay. Actual performance fell far short of the symbolic public service ideal.

b. 1993 Amendment to ABA Rule 6.1

In 1993, following spirited debate, a closely divided House of Delegates amended ABA Rule 6.1. The strengthened rule
incorporated the annual fifty-hour goal of the Toronto Resolution and definition of qualifying service.\(^{267}\) Emphasizing the continued aspirational responsibility, "voluntary" was added to the title, and commentary explicitly stated it was "not intended to be enforced through disciplinary process."\(^{268}\) A "substantial majority" of the fifty hours should be rendered, without expectation of fee, to "persons of limited means" and organizations designed primarily to meet their needs. It encouraged financial support of "organizations that provide legal services to persons of limited means."\(^{269}\)

Nationwide, many state and local bar associations have tried to encourage greater pro bono involvement by the practicing bar. Since 1988, twenty-two jurisdictions have amended their pro bono rules or adopted policy statements to recommend a specific annual goal for pro bono services.\(^{270}\) Other states are considering similar changes.\(^{271}\) The ABA devotes considerable resources and leadership to the issue.\(^{272}\)

\(^{267}\) MODEL RULES LEGISLATIVE HISTORY, supra note 5, at 277-78 (summarizing reasons for proposed revisions and reporting to 228 to 215 standing vote in favor of amendment).


\(^{270}\) Maute, supra note 208, at 549 & nn.119-120, 597 tbl. 1 (comparing different jurisdictional approaches).

\(^{271}\) Id.

\(^{272}\) See, e.g., ABA Leaders Endorse Affirmative Action But Spin Wheels on Internal Governance, 64 U.S.L.W. 2096, 2098 (Aug. 15, 1995) (summarizing resolutions in support of funding for legal service organizations and seeking "to make the expansion of pro bono legal services by practicing lawyers a critical priority." (citation omitted)); AM. STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (Feb. 1996) (adopted by House of Delegates) (stating comprehensive standards for development of civil pro bono programs by entities of private bar); ABA Rejects Multidisciplinary Practice, Stands Firm Against Sharing Legal Fees, 69 U.S.L.W. 2042, 2042 (July 18, 2000) (stating access to justice and pro bono services as core values of legal profession). The ABA Center for Pro Bono provides policy and technical support for jurisdictions exploring innovative ways to encourage voluntary pro bono involvement. The ABA Standing Committee on Lawyer’s Public Service Responsibility and Center for Pro Bono consults with local bar associations, helps educate lawyers, and assists with program planning and administration. See AM. BAR ASS’N CENTER FOR PRO BONO, MAKING PRO BONO A PRIORITY: A BAR LEADER’S HANDBOOK (2d ed. 1996) (describing possible strategies for bar associations to consider, including self-assessment, membership input and support commitment of staff resources, overall approach to delivery of services, bar resolutions and ethics rules, and recruitment and training of volunteer attorneys).
c. ABA Ethics 2000: Staring at the Elephant in the Room

Starting early in 1998, the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 a/k/a “e2k” or Commission) undertook a comprehensive revision of the Model Rules in light of developments in the law and ethics of lawyering. The ABA House of Delegates overwhelmingly approved the revisions at the midyear meeting in February 2002. States are now encouraged to adopt the changes. Some jurisdictions have already begun the process.

The Commission, like its predecessors, was composed of prominent members of the bar, judiciary, and academy. Many in the group were richly experienced in the law of lawyering and legal ethics. The ABA Center for Professional Responsibility provided expert staffing. More than ever before, this Commission, consisting of thirteen members, reflected the growing gender and ethnic diversity in the profession. Three women and an African-American man sat on the

273. Susan R. Martyn, Justice and Lawyers: Revising the Model Rules of Professional Conduct, 12 PROF. LAW., Fall 2000, at 20, 22 (assessing whether proposals promote justice and noting that because of the bar’s hostility to deregulation of the professional monopoly, the Commission was left staring at pro bono legal services as the “elephant in the room”).


275. See id.

276. Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct Appendix A-Biographies, at http://www.abanet.org/cpr/e2k-commission_bios.html (last visited Oct. 17, 2002). See id. Chair is the Honorable E. Norman Veasey, Chief Justice of the Delaware Supreme Court. Id. Other present or past members of the judiciary are the Honorable Patrick E. Higgenbotham, of the Fifth Circuit Court of Appeals, the Honorable Henry Ramsey, who previously served on the California trial and Superior Courts, and the Honorable Laurie D. Zelon, of the California Superior Court. Id. Private practitioners include Lawrence J. Fox, Albert C. Harvey, W. Loeber Landau, Margaret Colgate Love, and Lucian T. Pera. Richard E. Mulroy came from corporate practice. Id. David T. McLaughlin is the public representative. Commissioners from the academy are University of Pennsylvania Professor Geoffrey C. Hazard, Jr. and University of Toledo Professor Susan R. Martyn. Id. The Commission’s three Reporters come from the academy: Boston University Professor, Nancy J. Moore (Chief Reporter), George Washington University Professor, Thomas D. Morgan, University of Tennessee Professor, Carl A. Pierce. Id. James B. Lee, and Seth Rosner serve as liaisons.

277. Jeanne P. Gray served as Director, and Charlotte “Becky” Stretch was Associate Director, as well as Special Counsel. Id. Sue Campbell, of the ABA Center for Professional Responsibility also staffs the project. See Ethics 2000 Commission, at http://www.abanet.org/cpr/ethics2k.html (last visited Nov. 4, 2002).
Commission. A large advisory council provided for ongoing input from a wide array of interested groups.\footnote{278}

Each time the ABA has undertaken a revision of the ethics rules, it has improved the process of circulating for comment, listening to divergent views, and evaluating how to proceed. The internet revolution made access possible to anyone who cared to look and comment. The Commission regularly posted drafts to solicit comments, posted the comments, and posted meeting minutes. This practice allowed many opportunities for those interested to testify at public hearings around the country. The Commissioners listened carefully, deliberated thoughtfully, and circulated revisions in response to the comments. If the Model Rules process was a political "extravaganza," then Ethics 2000 has been an "orgy," not in the sense of debauchery, but in the sense of "unrestrained indulgence in any activity."\footnote{279} Acting out the visionary role of professional codification as a teaching text, the Ethics 2000 project was "a provocation to continuing discourse."\footnote{280} The Commission extensively debated pro bono and remained closely divided until the very end.\footnote{281} Opening discussion with an alternative to the current rule, the Reporters' first draft proposed fifty hours of mandatory service, which could also be satisfied by paying $100 for each hour not served, or collectively, by others within a firm. Further, it proposed carryover of excess hours for two years, and an annual reporting requirement.\footnote{282} Preliminary discussion kept alive the possibility of considering a recommendation for mandatory service, with ideas presented for the Reporter to incorporate in another draft.\footnote{283} The second draft's blackletter text used the imperative "shall" to describe the fifty hour annual "pro bono legal

\footnote{278. See Charlotte "Becky" Stretch, Overview of Ethics 2000 Commission and Report, at http://www.abanet.org/cpr/e2k-ov_mar02.doc (last visited Oct. 29, 2002) (stating that the Advisory Council is comprised of over 250 members of diverse experience).}
\footnote{279. WEBSTER'S NEW WORLD DICTIONARY (2d ed. 1982).}
\footnote{280. See Triangle Park Journal, \textit{supra} note 226, at 9-10 (recounting discussions from the preliminary meeting of the Kutak Commission).}
\footnote{281. Written Testimony of Richard Zitrin, University of San Francisco Professor and Director of Center for Applied Ethics, \textit{available at \url{http://www.abanet.org/cpr/zitrin.html}} (last visited Oct. 17, 2002) (urging the Commission on the Evaluation of the Rules of Conduct to consider mandatory pro bono); \textit{see also} Martyn, \textit{supra} note 273, at 22 (relating eleventh hour consensus to add precatory language to R. 6.1).}
\footnote{282. \textit{MODEL RULES OF PROF'L CONDUCT R. 6.1} (Proposed Draft No. 1 1999); Ethics 2000 Commission Memorandum of Reporter's Observations (Sept. 27, 1999).}
service" obligation and annual reporting. It relegated to the nonbinding commentary all other treatment: types of activities, carryover (now extended to three years), and buyout (reduced to $25 for each hour of unperformed service, or a maximum of $1250).284

Before the next Commission meeting, the legal services community voiced "considerable opposition" to the possibility of mandatory pro bono.285 In the next three meetings, the Commission discussed at length whether to circulate for comments a proposal for mandatory service. In lawyers' inimitable way of using Roberts' Rules of Order to decide divisive issues, after voting on motions at each of the meetings, the Commission finally voted five to four to "circulate a memorandum inviting comment."286 The close division was not, I emphasize, on whether to recommend a mandatory service rule, but whether it was prudent to even reopen discussion of that issue.287 The decision to invite comment was likely made because of a perceived "need to raise the level of dialogue about pro bono service" and not because the commission was inclined to recommend mandatory service.288

A May 2000 memorandum sought input on "whether a lawyer's pro bono obligation should be voluntary or mandatory and whether, in the event the obligation [was] to remain voluntary, the rule should incorporate a reporting requirement . . . [and] how a mandatory rule might be implemented."289 It summarized some of the opposing views and identified subsidiary questions.

By the February 2000 ABA midyear meeting, the Commission heard much opposition to mandatory pro bono from groups deeply committed to serving the poor. Robert Weiner, Chair of the ABA

288. Id.
Standing Committee on Pro Bono and Public Service, predicted a "firestorm of resentment, protest, and resistance," that would divert attention from the crisis in unmet legal needs to the controversial and ultimately doomed issue of compulsory service. "Forced involvement of reluctant attorneys" would present numerous practical difficulties, and "could undercut the quality of legal services to the poor."

Others responded to the invitation for comments. I testified at the Commission's June 2000 hearings in New Orleans, opposing mandatory service as inconsistent with the concept that law is a public calling and politically unfeasible; predictable backlash by the bar risked a public relations debacle. Instead, any revisions should begin with the consensus reflected in the 1993 amendments, produced after extensive negotiations and compromise. Rather than revisiting the divisive issue of mandatory service, the "organized bar should focus . . . upon raising lawyers' awareness of and willingness to satisfy this moral responsibility that comes with being in the profession." I recommended cooperative pooling arrangements and comparable financial contributions as alternatives to direct service. I suggested that an annual reporting requirement could achieve a sound balance between aspirational guidance and regulatory compulsion. A simple annual form, as part of the other usual compliance statements, could

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291. Ethics 2000 Hearing Testimony, supra note 262. Also registering their opposition were Doreen Dodson, chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (concerned with diluting the definition of pro bono and the predictable acrimonious debate of a mandatory proposal), Esther Largent, the committee's Ethics 2000 liaison, and Jonathan Vickery, President and CEO of Legal Services of Northern Texas. Moore, supra note 290, at 257.

292. In addition to testimony summarized in text, comments were received from the District of Columbia Bar Association, the United States Department of Justice, the National Legal Aid and Public Defender Association, the Center for Law and Public Policy, and the Los Angeles County Bar Association. ABA Ethics 2000 Commission, R. 6.1 Comments in Response to Public Discussion Darft [sic] (June 29, 2000); Mandatory Pro Bono Idea Loses Steam at Ethics 2000 Commission's Final Hearing, 69 U.S.L.W. 2062, 2062 (Aug. 1, 2000).


294. Maute, supra note 293.

295. Id.

296. Id.

297. Id.
be designed to prompt lawyers’ regular reflection on their own involvement, to obtain reliable information on volunteer services provided, to encourage increased service activity or financial support, and to create a statewide infrastructure for distribution of services for those in need.\textsuperscript{298} It need not seek confidential client information, or otherwise infringe on protected rights.\textsuperscript{299}

Thereafter, prominent members of ABA leadership weighed in, urging no change to the current rule and opposing either a service or reporting requirement.\textsuperscript{300} Robert Hirshon, who chaired the pro bono committee during the 1993 amendment, recalled the “countless hours of research, discussion and debate” and negotiation among constituent groups within the ABA policymaking structure.\textsuperscript{301} The amendment “significantly strengthening” the rule passed by “the slimmest of margins in the House of Delegates.”\textsuperscript{302} Hirshon saw “no reason to believe that the careful consensus we obtained from a wide array of interested groups and individuals has evolved, and will support a shift to a mandatory rule for either service or reporting.”\textsuperscript{303} In his upcoming term as ABA President (2001-02), Hirshon planned an initiative to “call for a new voluntary commitment to pro bono service... hop[ing] to inspire and motivate our colleagues to fulfill their... obligation.”\textsuperscript{304}

John Pickering, founding partner of the Wilmer, Cutler & Pickering firm and recipient of numerous pro bono awards, strongly opposed any mandatory rule.\textsuperscript{305} He believed that “the carrot is far more effective than the stick; a mandatory approach to... service or reporting would be ineffective in broadening access to justice, counterproductive to efforts to better serve the poor and unworkable in practice.”\textsuperscript{306}

\begin{itemize}
  \item \textsuperscript{298} \textit{Id.}
  \item \textsuperscript{299} \textit{Id.}
  \item \textsuperscript{300} It is possible that my testimony, which was reported in professional journals and posted to the Ethics 2000 Consultative Council, provoked additional comments. Four additional comments discussed in text were dated June 19-June 21, 2000. Any inferences to be drawn to this timing are left to the reader.
  \item \textsuperscript{301} Written Testimony of Robert E. Hirshon, American Bar Association President-Elect Nominee Regarding Proposed Model Rule of Professional Conduct 6.1 (June 19, 2000) (unpublished comments) (copy on file with author).
  \item \textsuperscript{302} \textit{Id.}
  \item \textsuperscript{303} \textit{Id.}
  \item \textsuperscript{304} \textit{Id.}
  \item \textsuperscript{306} Pickering Testimony, \textit{supra} note 305.
\end{itemize}
Doreen Dodson testified as chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID).\textsuperscript{307} She believed the Commission and SCLAID both sought to increase availability of legal services for the poor, and considered what practical strategies would better yield positive results.\textsuperscript{308} Her comments focused separately on the issues of mandatory service and reporting. SCLAID "fervently hope[d] that each lawyer . . . will have an internal moral compass call[ing] . . . to give something back to society."\textsuperscript{309} Because it had seen evidence of ineffective assistance by appointed counsel in death penalty cases, SCLAID knew "that conscripts make poor lawyers . . . [P]oor clients in civil matters deserve lawyers who want to represent them and who will do it with vigor."\textsuperscript{310} Dodson predicted that "[a]n unintended byproduct" of making service mandatory would be to define broadly qualifying service, and dilute focus on serving the poor.\textsuperscript{311} Further, the Commission's recommendation of a service requirement that "has no realistic prospect of being adopted would weaken the stature and credibility of the entire Model Rules construct."\textsuperscript{312}

Dodson's comments on mandatory reporting were somewhat qualified. At present, it was "neither an appropriate nor a desirable strategy to increase provision of pro bono service."\textsuperscript{313} It was "not a panacea."\textsuperscript{314} Dodson, who had served as president of the Missouri State Bar, well understood local subtleties. She warned the Commission not to "assume that 'one size fits all'" and that a national model for reporting was inappropriate.\textsuperscript{315} Only Florida has such a rule, "implemented as part of a complete overhaul" of the state's approach, which included "the persuasive authority . . . by the local judiciary . . . [as] the more significant incentive for lawyers."\textsuperscript{316} Dodson added:

[T]he manner in which each state chooses to provide incentives for pro bono service should be left to those states, not dictated by a national model. Legal and bar association cultures are simply too divergent.


\textsuperscript{308} Id.

\textsuperscript{309} Id.

\textsuperscript{310} Id.

\textsuperscript{311} Id.

\textsuperscript{312} Id.

\textsuperscript{313} Id.

\textsuperscript{314} Id.

\textsuperscript{315} Id.

\textsuperscript{316} Id.
across the states for the ABA to try to promulgate a model rule on something like reporting of pro bono service .... In [Florida] the involvement of the judiciary was critical to improvement in pro bono statistics. In other states, there may be other adjustments that will produce similar improvement, either by themselves or in conjunction with a reporting rule.\footnote{317}

Robert Weiner again testified, reiterating the standing pro bono committee's opposition to mandatory service and also addressing the reporting issue.\footnote{318} Mandatory pro bono was analogous to a tax, which people pay reluctantly and "seek loopholes to avoid."\footnote{319} After closely studying mandatory and voluntary reporting, the committee decided it was

not an appropriate strategy for every state.... Moreover, the ethical rules are not the place to impose this type of duty to report. The Rules of Professional Conduct govern just that: the professional conduct of individual lawyers. Pro bono reporting rules are procedural. They relate to record keeping. The relationship to ethical obligations, including the ethical obligation to do pro bono work, is indirect at best. Even states that impose mandatory continuing legal education do so in court rules, not in the Rules of Professional Conduct.\footnote{320}

The committee primarily sought to avoid negative fallout from reopening the debate, which was likely to be destructive, counterproductive, and hostile to pro bono initiatives. It preferred the rule "remain in its current form" than take "the wrong approach at the wrong time."\footnote{321}

Because commentators almost unanimously opposed mandatory service as "inconsistent with the needs of the indigent clientele intended to be benefitted," at its July 2000 meeting, the Commission decided to drop the idea, and propose no substantive changes to Rule 6.1.\footnote{322} Still, the internal debate continued. At the September meeting,
the Commission first voted in favor of mandatory service, then agreed to reconsider. Members debated on the Commission listserv. Two weeks later they voted again, by teleconference; Chairman Veasey broke a tie, defeating a motion in support of the mandatory concept.

The Commission then unanimously agreed (with one abstention) to add a new sentence to the rule text: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.”

Another motion to clarify the aspirational language also failed after a tie-breaking vote by the chair. Revisions to the Preamble were also unanimously approved. Paragraph 6 stressed the importance of “access to the legal system,” stating: “Therefore, all lawyers should devote professional time, resources and civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”

By the time of the Final Report, the Commission agreed to add a new comment, that “law firms [should] act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by [this]
Rule.” The Reporter explained the importance of the ethical obligation, and because the current system of delivering such services was not working, the Commission sought to encourage increased participation. At the February 2002 midyear meeting, the Commission agreed to further amend the comment, calling upon law firms to “encourage” pro bono, as well as “enable” it. With all that took place during the Commission’s deliberations, these amendments passed muster in the House of Delegates without controversy.

One might consider these superficial, minor changes of largely symbolic importance. That would be wrong. Commissioner Susan Martyn considered:

It [is] absolutely remarkable that the commission is split nearly evenly on [whether to adopt a mandatory rule] when lawyers across the country so uniformly oppose it. What explains our flirtation with such a radical idea? Two simple facts: nothing else works and lawyers can do something about it.

These changes, while small, represent a distinct step forward. Building on the general principle set forth in Canon 2, they underscore the expectation that “every” lawyer should act to provide legal services for those unable to pay and the role of law firms in creating an ethical culture that actively “encourages” pro bono services. If the lawyer does nothing to provide direct service or financial support to others who serve, the lawyer presumably has violated her professional responsibility. While the expectation remains aspirational, and is not the basis for discipline, revised Rule 6.1 clearly rejects the passive professional paradigm. Lawyers are affirmatively expected to volunteer their services and otherwise support those who render unpaid legal services, and not merely to react to fortuitous requests for help by those in need. It heightens focus on the role of law firms, not merely to allow lawyers’ pro bono service on top of their usual work obligations, but to actively enable and encourage every lawyer to satisfy the ethical responsibility. The new comment reflects the reality that little pro bono service will be done unless the workplace

331. Id.
332. E-mails from Nancy Moore, Professor, Boston University, Art Garwin, Professionalism Counsel, ABA Center for Professional Responsibility, and William Barker, Partner, Sonnenschein Nath & Rosenthal, to Judith Maute, Professor, University of Oklahoma College of Law (Feb. 5, 2002) (on file with author).
334. Martyn, supra note 273, at 22.
335. Id.
environment affirmatively values it—and not just the bottom line. Taken as a whole, the revisions represent a distinct movement towards a clearly stated, universal expectation that every American lawyer and legal employer has an affirmative responsibility to do her fair share of pro bono work, ensuring access to justice for those unable to pay.

IV. CHANGING PARADIGM: VOLUNTARY AND PROACTIVE SERVICE EXPECTATION

A. Law as a Vocation in Twenty-First Century America

The contemporary “religion lawyering movement” has renewed interest in the concept of vocation as a faith-based command to serve the common good.336 Being “called” to serve in a vocation is rooted in Judeo-Christian, Islam, and Baha’i traditions.337 God calls upon persons of faith to share their skills and resources with those in need, as is expected of a good neighbor.338 The calling to serve the public

336. Russell G. Pearce, Learning from the Unpleasant Truths of Interfaith Conversation: William Stringfellow’s Lessons for the Jewish Lawyer, 38 CATH. L. 255, 260-62 (1998). Christian theologian Stringfellow “boldly asserts that faith demands that a lawyer make his or her life a sacrament and that doing so requires representation of poor people, women, people of color and homosexuals.” Id. at 256. Pearce identifies several Jewish theologians with analogous views on vocation, including Rabbi Moshe of Kobryn: “there is no rung of human life on which we cannot find the holiness of God everywhere and at all times”; Martin Buber, on God’s presence in all facets of existence; Abraham Joshua Heschel’s command “to realize the sacred potential of every moment.” Id. at 260 (citations omitted).

337. Timothy W. Floyd, The Practice of Law as a Vocation or Calling, 66 FORDHAM L. REV. 1405, 1410 n.30 (1998); Pearce, supra note 336, at 259.

338. Scriptural sources can be found in the Old Testament. See Deuteronomy 15:7 (Oxford Ann. 1994) (“If there is among you anyone in need, a member of your community in any of your towns within the land that the Lord your God is giving you, do not be hard-hearted or tight-fisted toward your needy neighbor.”); Proverbs 31:8-9 (Oxford Ann. 1994) (“Speak out for those who cannot speak, for the rights of all the destitute. Speak out, judge righteously, defend the rights of the poor and needy.”). A familiar New Testament passage provides: “From everyone to whom much has been given, much will be required; and from the one to whom much has been entrusted, even more will be demanded.” Luke 12:48 (Oxford Ann. 1994). In Islam, Charity has been institutionalized as the third of the five pillars (In Arabic, Arkan ad-din). See QUR’AN 2:177 (Yusuf Ali trans.) (“To spend of your substance, Out of love for Him, For your kin, For orphans, For the needy, For the wayfarer, For those who ask, And for the ransom of slaves; To be steadfast in prayer, And practice regular charity.”). Charity is also central to the Baha’i faith. See SHOGHI EFFENDI WRITINGS, reprinted in BAHAI EDUCATION: A COMPILATION 297 (1997) (“In philanthropic enterprises and acts of charity, in promotion of the general welfare and furtherance of the public good including that of every group without any exceptions whatever, let the beloved of God attract the favourable attention of all, and lead all the rest.”); see also BAH’U’Llah, TABLETS OF BAH’U’Llah 71 (1978) (“Charity is pleasing and praiseworthy in the sight of God and is regarded as a prince among goodly deeds.”). The author gratefully acknowledges research
good extends to all types of work, and is not limited to the learned professions.  

Like other moral principles founded on religious teachings, the communitarian command to serve the public good has been incorporated into secular discussions of professionalism. Dean Anthony Kronman identified features of legal practice that make it a profession: as a public calling, it is a generalist craft that engages the whole person and is linked to a tradition “of historical proportions.” By contrast to other trades, the lawyer is charged “with a conscious trusteeship of the public good” in that it is “part of the lawyer’s job to be directly concerned with the public good—with the integrity of the legal system, with the fairness of its rules and their administration, with the health and well-being of the community which the laws in part establish and in part aspire to create.”

Professionalism discourse sometimes implies a moral superiority that is absent from faith-based teachings of vocational calling. The ABA’s 1986 Professionalism Commission asserted that a profession’s transcendent commitment to the public good is an underlying assumption that justifies its special privileges. Often criticized by

assistance for this note from Dann J. May, Adjunct Professor of Philosophy and Religion, Oklahoma City University.

339. William F. May, The Beleaguered Rulers: The Public Obligation of the Professional, 2 KENNEDY INST. OF ETHICS J. 25, 30 (1992) (quoting William Perkins’ treatment of calling as a communal tradition, in which God’s servants are called to perform tasks for the community and stating that the calling is “a certain kind of life, ordained and imposed on man by God for the common good”). Historical treatment of vocation and commitment to public good is not limited to the “learned professions” of law and medicine. See Daniel A. Wren, Medieval or Modern? A Scholastic’s View of Business Ethics, circa 1430, 28 J. BUS. ETHICS 109, 109 (2000) (demonstrating five-hundred-year history of interdisciplinary study of business ethics).


341. Id. at 91.

342. Business ethics literature regularly attaches public duties to businesspeople, most of whom accept “that duty to the public is part of what they do.” E-mail from Dan Ostas, Professor and James G. Harlow, Jr. Chair in Business Ethics and Community Service, University of Oklahoma, Price College of Business, to author (Sept. 19, 2000) (on file with author). The rhetorical structure of the business-profession dichotomy in legal ethics literature suggests “that a businessman is a self-interested bloodthirsty seeker of profit—whereas a profession is a nobler calling; business was also a ‘calling’ imbued with a public purpose. . . . Few businesspeople think of themselves as self-interested bloodthirsty seekers of profit. Hence, lawyers owe public duties and so too do businesspeople.” Id.

343. AM. BAR ASS’N COMM. ON PROFESSIONALISM, supra note 13, at 10. Sociology professor Elliot Freidson’s definition of professional attributes is used to justify the privileges of self-regulation and the monopoly power to grant licenses and prohibit nonmembers from engaging in unauthorized practice. Id. The Report states the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgments.
academic commentators, the report might be viewed as a desperate effort to turn back the clock on the commercial realities of twentieth-century legal practice.\textsuperscript{344} Tom Shaffer, noted for his work on issues of faith in lawyering, called the ABA’s professionalism campaign “a nostalgic appeal to a particular kind of moral leadership, a particular kind of prominence and power, to the memory . . . of the lawyer titans who ruled America, and whose hold on power began, a generation ago, to slip away.”\textsuperscript{345} The Commission, by using virtue words like honor, selflessness, and integrity, and by its claims “that to be professional is to be a good person,” made the “American gentleman-lawyer” its “unidentified ideal.”\textsuperscript{346} Gentleman-lawyers are a ruling class, America’s only aristocrats.\textsuperscript{347} Despite its elitist tendencies, Shaffer saw a beautiful melancholy in the older ethic: the gentleman-lawyer “is able to function in a moral universe because he admits his complicity in the evil that is around him, the evil that supports his power and the power of his clients.”\textsuperscript{348} Recognition of the profession’s moral complicity in injustice translated into acceptance of responsibility for justice.\textsuperscript{349} By contrasting professionalism with its critical views of

\begin{enumerate}
\item That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.
\item That the client’s trust presupposes that the practitioner’s self-interest is overbalanced by devotion to serving both the client’s interest and the public good, and
\item That the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client’s trust, and transcend their own self-interest.
\end{enumerate}

\textit{Id.}


\textsuperscript{346} \textit{Id.} at 396-97.

\textsuperscript{347} \textit{Id.} at 399 (citing \textit{ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA} (1835)).

\textsuperscript{348} \textit{Id.} at 401.

\textsuperscript{349} \textit{Id.} at 403; cf. Louis D. Brandeis, \textit{The Living Law}, 10 ILL. L. REV. 461, 468 (1916) (discussing democratic longing for social justice and urging that courts become
commercialism, the ABA campaign hypocritically ignored that history, which acknowledged the possibility that one could simultaneously be an entrepreneur, competitor, and gentleman-lawyer.\textsuperscript{350}

Russell Pearce argued in 1995 that the legal profession was on the brink of a change in paradigm, abandoning the hypocrisy of the traditional Business-Profession dichotomy.\textsuperscript{351} The Business Paradigm, or a hybrid “Middle Range” approach, was replacing the professionalism paradigm. The new model he posited would candidly recognize that business and economic concerns can coexist with moral character and conduct, and with promotion of the common good.\textsuperscript{352} Business persons are not morally inferior to lawyers.\textsuperscript{353} Rather, all people and all occupations share responsibility for the public good.\textsuperscript{354} This “Middle Range” approach envisions that the practice of law is a business, and hence would ease restrictions on competition from nonlawyers, alter the regulatory regime of lawyers, and promote a “shared moral commitment to the public good.”\textsuperscript{355} The paradigm shift of which I speak is related, but with a different focus, changing the model for delivering pro bono legal services from passive and reactive, to voluntary and proactive. As applied to remunerative employment, bar leadership continues to resist change.

Some of today’s most heated controversies within the profession relate to the Business-Profession dichotomy, including advertising, unauthorized practice, multidisciplinary, and multijurisdictional issues. They all concern the business of getting and keeping clients, turf protection, and limiting competition from others. Opponents of efforts to relax these business barriers invoke the profession’s altruistic “core values” of loyalty, independent judgment, and commitment to the common good.\textsuperscript{356} To some critical observers within and outside the legal profession, the professionalism paradigm rings hollow, as “empty...
rhetoric.\textsuperscript{357} To others, reference to “core values” envisions the best of the gentleman-lawyer ideal.\textsuperscript{358} As the legal profession collectively struggles with the practical difficulties of trying to contain law practice within narrow geographical or disciplinary boundaries, it must shed self-serving illusions of moral superiority and disingenuous claims of protectionism purportedly justified because law is not a business.

Lawyers are not isolated from what takes place in society. The extravagant American affluence of late benefitted many. In the words of Russell Pearce, that affluence brought a widespread shift throughout society away from a sense of obligation to the community and toward the individualistic pursuit of self-interested goals. Lawyers were unable to insulate themselves from this trend. They moved from a vision of themselves as guardians of society who also represented clients to the belief that they were hired guns concerned with promoting their clients’ self-interest.\textsuperscript{359}

As we know well, gilded eras do not last. The high profits that enabled lavish living by some did not trickle down to all segments of society, eliminating poverty, homelessness, and hunger. Historically low levels of unemployment at least temporarily reduced the ranks of the super poor.\textsuperscript{360} Expanded job opportunities at the lower end of the service sector helped some people move up the ladder, if only to minimum wage jobs without benefits. Even when there is a booming economy, its benefits are not uniformly distributed. At the same time that dotcom entrepreneurs bid up the price of housing in Silicon Valley, some technical workers in the area, earning $50,000 a year, were homeless and rode commuter buses to catch a few hours sleep.\textsuperscript{361} The extraordinarily high earnings of some workers priced other diligent workers out of the market for needed goods and services. For many,

\textsuperscript{357} Pearce, \textit{Paradigm Shift}, supra note 344, at 1275.

\textsuperscript{358} See, e.g., Lawrence J. Fox, \textit{Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs}, 84 \textit{Minn. L. Rev.} 1097, 1102-04 (2000) (discussing legal profession’s values of loyalty, confidentiality, and professional independence and claiming that as officers of the court with responsibility to improve the law and justice system, lawyers are a priesthood).

\textsuperscript{359} Pearce, \textit{Post-Professionalism}, supra note 344, at 20 (footnotes omitted) (discussing a hypothetical situation concerning changes in the legal profession after 2050).

\textsuperscript{360} See, e.g., Silver & Cross, supra note 2, at 1480 (citing newspaper reports for the proposition that economic growth in 1998 “lifted 1.1 million Americans out of poverty” and that “[t]he percentage of people below the official poverty line fell to its lowest level since 1989” (citations omitted)).

\textsuperscript{361} Evelyn Nieves, \textit{Many in Silicon Valley Cannot Afford Housing, Even at $50,000 a Year}, \textit{N.Y. Times}, Feb. 20, 2000, at 20; James Fallows, \textit{The Invisible Poor}, \textit{N.Y. Times}, Mar. 19, 2000, at 68 (discussing the social and imaginative separation between wealthy and poor Americans).
2001 and 2002 were very bad years—recession, September 11, the collapse of Enron and other big companies, and other like events cut back drastically on employment, tax revenue, and general charitable giving. Existing safety nets that have traditionally cushioned the low income population are badly strained. New entrants to the labor market are most vulnerable to layoffs and reductions in the work force. Longtime employees are a layoff away from financial disaster when their companies fail. Although the economic downturn has certainly also affected the legal community, on relative terms, lawyers are in better financial condition than most.

It is inadequate to respond with economic theory that Adam Smith's invisible hand is at work, nudging the working poor to retool their skills towards more lucrative ventures. A functioning community will always need the labor provided by service workers, garbage collectors, restaurant staff, teachers, and other public servants. There will always be persons who cannot adequately support themselves because of severe physical or mental disabilities. The sobering recent events provide the American public with an opportunity to reexamine what it means to be part of an interdependent community and lawyers' responsibilities to it. If those who are blessed with wealth, health, and power cannot spare the time or resources to aid the common good, who can?  

The nation must reexamine what it means to be in a community. President George W. Bush called on the nation to respond, urging every American to provide two years of volunteer service during her lifetime. Responsibility for the public good does not belong with any one segment—the government, the rich, or the learned professions. All persons share responsibility for the common good, which includes caring for those who are less fortunate. Ironically, those with fewer resources may act on this principle with greater generosity than those who are blessed with great wealth.

362. Reference to Marie-Antoinette's infamous gaff is appropriate: when told the poor were starving, she reputedly said, "Let them eat cake." Oxford English Dictionary of Quotations 446 (Angela Patterson ed., 4th ed. 1992) (referencing Jean Jacques Rousseau). When the extremely rich show, through their words and deeds, a complete lack of empathy for those less fortunate, tragic consequences may result. Dare I say, "heads will roll"?


364. See Independent Sector, 1999 National Survey, The Demographics of Household Contributors and Volunteers, available at http://www.independentsector.org/GndV/s_demo.htm (last visited Oct. 17, 2002) (reporting that, while a lower percentage of low-income households reported charitable contributions than more affluent households, they gave a higher percentage of household income, and that contributing households with incomes
President John F. Kennedy challenged Americans to a higher communitarian vision, saying “[f]or those to whom much is given, much is required.” Religious and social ethics teachings are in accord.

The legal profession, because it is a privileged and powerful group, should take leadership in redirecting social consciousness from an “individualistic pursuit of self-interested goals” to a greater moral vision embracing the common good. Many professional privileges are conferred on us as public assets, much like public utilities; these public benefits create a correlative responsibility to serve the public good. As public citizens, lawyers have “special responsibility for the quality of justice.” “Equal justice under law” is a foundational but unrealized ideal of the American legal system. Too often, the outcome of legal problems is influenced more by wealth and access to effective representation than by application of the relevant legal principles. Improved access to justice requires at least four areas of reform: (1) simplified methods of handling common legal problems to reduce the need for professional representation, (2) relaxed anticompetitive and illegitimate unauthorized practice restrictions, (3) increased public funding of legal services for the poor, and (4) expanded access to affordable legal services for the poor and ordinary Americans. Because it understands the consequences of

under $10,000 contributed an average of 5.25% of their household income, compared to households with income exceeding $100,000, which contributed an average of 2.2%). Approximately seventy percent of American households made charitable contributions in 1998; the expanded giving was attributed to a strong economy and declines in unemployment and money worries. Independent Sector, 1999 National Survey, Household Giving, available at http://www.independentsector.org/GandV/s_hous.htm (last visited Oct. 17, 2002). In the aftermath of September 11, Americans responded generously to the devastating losses, diverting support usually given to other charitable organizations.

365. BARTLETT'S FAMILIAR QUOTATIONS 741 (John Bartlett & Justin Kaplin eds., 1992) (quoting from Speech to Massachusetts State Legislature, Jan. 9, 1961); see also WILLIAM K. FRANKENA, ETHICS 50-51 (2d ed. 1973) (arguing that ethical principle of justice calls upon people to make the “same relative sacrifice[,] in accordance with ability”).

366. See supra notes 336-338 and accompanying text.

367. Pearce, Post-Professionalism, supra note 344, at 20.

368. See Lubet & Stewart, supra note 2, at 1246.


371. These ideas are not my own; I merely echo those who have come before me. See, e.g., Denise R. Johnson, The Legal Needs of the Poor as a Starting Point for Systemic Reform, 17 YALE L. & POL'Y REV. 479, 484 (1998) (suggesting unmet legal needs of the poor
underrepresentation, the organized bar might persuasively lobby for increased funding of public legal services. The public is rightly cynical about self-interested posturing by the bar. A healthy dose of introspection could start the process. On both a collective and individual basis, lawyers should consider whether they have marginalized the public interest and representation of the poor in pursuit of unbridled profits.\footnote{372}

Ongoing debates about MDPs (multidisciplinary practices) and MJP\footnote{373} s (multijurisdictional practices) reflect the paradigm shift towards a business model and anticipate a larger shift acknowledging the professional obligation to make legal services available, with or without a fee. The legal profession has undergone immense changes in the last century. The metaphor of "gentleman-lawyer" is demographically outmoded. Lawyers are now a more diverse, heterogeneous occupation than at any time in past.\footnote{373} The sheer number of American lawyers ensures a wide range of social and political views. Such diversity within the ranks lessens the appeal of shared normative values, which may say more about hierarchical social standing than commitment to the public good. Competition for paying are the canary in a mineshaft, and that the poor are affected first because of their vulnerability, but their difficulties are symptomatic of larger problems; \textit{id.} (recommending the demystification of law, altering the lawyer monopoly, and alternatives to court adjudication); Pearce, \textit{Paradigm Shift}, supra note 362, at 1270-71 (arguing that the Business Paradigm removes presumed altruism as a buffer, forcing the public and lawyers to confront access problems, and that the public must either limit the goal of equal justice or implement reforms); Gillian K. Hadfield, \textit{The Price of Law: How the Market for Lawyers Distorts the Justice System}, 98 Mich. L. Rev. 953, 1001-06 (2000) (using economic analysis as a starting point for thinking about problems of access); \textit{id.} (stating that complexity, monopoly, and the unified legal profession support lawyers' market powers and give wealth a defining role in resource allocation). See generally Talbot "Sandy" D'Alemberte, \textit{Tributaries of Full Justice: The Search for Full Access}, 25 Fla. St. U. L. Rev. 631, 631-34 (1998) (identifying eight tributaries, or resources to improve access, including: (1) increased federally funded legal services, (2) interest on lawyers' trust accounts, (3) increased funding through filing fee surcharge, (4) service tax on for-profit legal services, (5) allocation of punitive damage and leftover class action awards to a "civil Gideon Fund," (6) fee awards for poor claimants forced to establish their entitlement to government benefits, (7) comprehensive lawyer pro bono plan, and (8) local experiments to enhance access).
clients is a daily reality, both between lawyers and from other service providers. Entrepreneurial skills are essential to getting and staying in the business of practicing law. MDPs and MJPs are global phenomena. Lawyers, like other entrepreneurs, have the potential for significant annual earnings, whether through traditional hourly billing, contingent fees, or investing in client businesses.

Generalized calls to “rekindle professionalism” and “to serve the common good” risk rejection as meaningless platitudes. As the bar confronts the complex ethical questions surrounding multi-jurisdictional and multidisciplinary practices, it might also take the opportunity to reconsider the larger concept of law as a vocation and professional calling and what it means “to serve the common good.” Beyond definition, which must respect divergent views about delicate social issues, the bar should strive to more clearly articulate what is expected of all lawyers as their fair contributions to the common good. Because these issues are deeply controversial and reflect local practice conditions, I recommend they be considered by local jurisdictions, as revisions to the ABA Rule 6.1.

B. Proposed Local Revisions of ABA Rule 6.1

Most jurisdictions will, at some point, consider amending their local rules of professional conduct, giving consideration to the newly revised ABA Model Rules. This creates a natural opportunity to consider pro bono as part of an overall revision. Many states have

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As further evidence that the paradigm has changed, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-418 (2000) (permitting lawyers to acquire ownership interest in client business in connection with performing legal services).
already revised their local pro bono rule based on the 1993 amendments to ABA Model Rule 6.1 to state a quantitative standard as an annual goal to guide lawyers’ pro bono efforts.\textsuperscript{376} Other jurisdictions should follow suit. Further definition is needed to clarify the expectation that each lawyer contribute to the public good. I recommend a shift from the hortatory urging that all lawyers should serve in some pro bono capacity, to an externalized and measurable standard to guide the individual lawyer on how to satisfy the aspirational duty. While the underlying concept of law as a vocation remains relevant, the claim of shared normative values is no longer realistic. With increased numbers and heterogeneity within the bar, the ethical precepts have necessarily moved from focus on internal virtues towards external conduct.\textsuperscript{377} This task is especially difficult when dealing with pro bono expectations because the service expectation is aspirational and not obligatory. Nevertheless, there can be an effective shift in focus towards external conduct.

The operative language in amended ABA Rule 6.1, encouraging fifty hours of annual service and suggesting allocation between types of service, reflects a delicate compromise between competing views.\textsuperscript{378} I propose that jurisdictions consider two additional changes: (1) a requirement of annual reporting and (2) explicit recognition of alternative means to satisfy the aspirational expectation.

\textsuperscript{376} Maute, supra note 271, at 597 tbl. 1.

\textsuperscript{377} CANONS OF PROF’L ETHICS Canon 6 (1908) (providing a general duty to avoid adverse influences and conflicting interests); MODEL CODE OF PROF’L RESPONSIBILITY EC 5-3 (1969) (“A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.”); MODEL RULES OF PROF’L CONDUCT R. 1.8(a) (1983) (prohibiting business transactions with clients unless it is fair and reasonable to the client, the terms are fully disclosed in writing, client has a reasonable opportunity to seek independent counsel, and the client consents in writing); MODEL RULE OF PROF’L CONDUCT R. 1.8 (rev. 2002), available at www.abanet.org/cpr/mrpc/rule_1-8.html (last visited Nov. 3, 2002) (refining prophylactic measures to require written advice to a client on desirability of seeking independent legal counsel, and the client’s written informed consent to essential terms of the transaction and the lawyer’s role in it); see also Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1249 (1991) (observing that the Canons represented “fraternal norms issuing from an autonomous professional society [that] have now been transformed into a body of judicially enforced regulations”).

\textsuperscript{378} MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002).
1. Annual Reporting: Required Periodic Self-Assessment on Voluntary Pro Bono Activities

The proposed reporting requirement brings to an external level the vocational expectation of periodic introspection. Cotton Mather urged the faithful to ask daily "what have you done for the common good?" I suggest that lawyers be required to ask themselves that question each year. The reporting form would ask the lawyer to evaluate whether one's individual contributions measure up to the aspirational standard adopted by the local jurisdiction. If, upon reflection, the lawyer realizes that she has given little time to the areas of service specified by the rule, she is encouraged to use the reporting vehicle as an opportunity to make alternative contributions to the public good. It has been shown that personal invitation is "the most effective way to recruit donors and volunteers." A requirement of self-reflection and reporting, adopted by the state supreme court and bar leaders, turns inward the asking function, provides a gauge for self-assessment, and is a convenient means to channel response. Admittedly controversial, reporting is required in only one jurisdiction, Florida, and has been explicitly rejected in several states.

Although it will meet with predictable resistance, the concept is worth considering because of the value of self-reflection and its potential utility as a means of channeling lawyers' availability to volunteer or provide financial support.

2. Buyouts and Cooperative Pooling: Coequal Alternative Means of Satisfaction

The second key component would explicitly acknowledge financial contributions and collective pooling as legitimate alternative pro bono contributions. Contrary to the outmoded professionalism paradigm, which rejects buyout alternatives as "morally repugnant," I would recognize and respect monetary contributions to indigent legal service providers in lieu of direct service. Continued, generalized pleas for direct service to the poor does not further the goal of

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380. Maute, supra note 271, at 549 & nn.119-120, 597 tbl. 1. The supreme courts in Colorado, Massachusetts, Minnesota, Nevada, New York, and Utah rejected proposals to require reporting. Id.
enhanced access to legal service. Lawyers who, for whatever reason, are not inclined to serve will not be persuaded by exhortations.\(^{381}\) Suggestions for mandatory service are politically unwise, likely to backfire, and unfair to the clients.\(^{382}\) In recognition of the changing paradigm, lawyers should be encouraged to participate in satisfying the need for indigent services in any way they are willing and able. Perhaps lawyers will contribute more direct services at the beginning and end of their practice careers, and while in mid-career, give more money to fund legal aid programs.\(^{383}\) Disdain for monetary contributions accomplishes nothing in terms of providing legal services for the poor and likely deters some lawyers from making any contribution. If “equal justice for all” is the ultimate goal (as I think it is), then lawyers’ contributions should not be graded by extent of personal involvement. To achieve parity between lawyers who serve and the monetary alternatives, I recommend that any buyout or collective satisfaction be based on a dollar formula that is equivalent to the contributing lawyer’s effective hourly rate, or a percentage of the lawyer’s adjusted gross income. The annual reporting form could also be used to solicit lawyers’ participation in a local referral system or other means of collective satisfaction.

Cogent arguments can be made for the moral superiority of direct services. Deborah Rhode identifies several potential benefits to those who provide voluntary legal assistance.\(^{384}\) Steven Lubet contends “[t]he presence of a prominent lawyer can have a transformative effect on a courtroom,” which badly needs reform in its manner of dispensing justice to the poor.\(^{385}\) Without deprecating the importance

\(^{381}\) See, e.g., Silver & Cross, supra note 2, at 1477-94 (raising efficiency, competence, and libertarian arguments to support conclusion that pro bono legal work should not be preferred over other forms of charity).

\(^{382}\) See Ethics 2000 Hearing Testimony, supra note 262; see also supra notes 290-292 and accompanying text.

\(^{383}\) See generally Marc Galanter, “Old and in the Way”: The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services, 1999 Wis. L. Rev. 1081, 1094-1107 (1999). Galanter notes: “Increasingly, large-firm practice has become a young person’s game.” Id. at 1097. He further suggests that as such firms devalue and force out lawyers over fifty years old, these senior lawyers could supplement existing legal services offices. Id. at 1102-03.

\(^{384}\) Rhode, Cultures of Commitment, supra note 2, at 2420, 2427-31 (citing the exposure to governance structure and the lawyers’ special role in the system); id. at 2428 (stating that intrinsic factors in prosocial or altruistic behavior include the capacity for empathy and a sense of civic obligation); id. at 2430 (stating that extrinsic factors include learning opportunities, personal contacts, and enhanced reputation).

\(^{385}\) Steven Lubet, Professionalism Revisited, 42 EMORY L.J. 197, 206 (1993). For another vivid example of this point, see Andrew Cockburn, The Radicalization of James Woolsey, N.Y. TIMES, July 23, 2000, at 26, describing the impact when a prominent corporate
of indigent and public interest legal matters, it must be recognized that a significant number of lawyers will be unmoved by such claims. Successful bar leadership must find common ground in its appeals for lawyers to serve the common good beyond the interests of their clients. While most lawyers could, with study, become competent in areas of poverty practice, some lawyers (who are perhaps concentrated at the upper rates of pay) will object that their time is better spent on the matters of paying clients.\footnote{Rhode, Cultures of Commitment, supra note 2, at 2424 (stating pragmatic arguments against a mandatory service requirement and advocating hiring additional poverty law specialists as a more efficient than reliance upon "reluctant dilettantes").} Under the outmoded professionalism paradigm, this economic efficiency argument was likely snubbed with admonitions of professional altruism and reminders that law practice is not a business. Such arguments are not so easily rebuffed—especially in the current practice environment. Bar leaders could admonish lawyers until they are blue in the face and still meet with resistance from "reluctant dilettantes."\footnote{See, e.g., Silver & Cross, supra note 2, at 1484-85 (arguing that it is odd to suggest that lawyers with established expertise in other areas should retool in poverty areas of law); see also Macey, supra note 2, at 1117.} Contemporary professional standards should offer viable alternatives for these lawyers to satisfy their fair share of responsibility for pro bono legal services. Their financial contributions, based on an earnings formula, could become an important funding source to hire poverty law specialists, and to fund pro bono lawyer referral programs or other activities that aid equal justice under the law. Money equivalents from lawyers who choose not to serve can accomplish as much, or more, than their reluctant and coerced labor on behalf of the poor.

Implicit in the above analysis is that lawyers contribute legal services, or money used toward that end. Charles Silver and Frank Cross reject this assumption.

[We] see no reason to encourage lawyers to make donations of legal services their preferred form of charity. . . . Lawyers should provide the forms of charity that poor people need most, especially gifts of cash.

. . . .

[T]he question we are posing is not whether lawyers should help the poor but how they should do so. All persons of means should be charitable, [h]owever, not all forms of charity are equally efficacious,
and we see no reason to encourage lawyers to do pro bono work when other forms of charity do more to help the poor.\footnote{388} Poor people, they argue, would often rather receive the cash value of a donor’s time, to use for food, housing, health care, or other preferences, than the donor’s personal assistance on a legal matter.\footnote{389} It is paternalistic self-delusion for the legal profession to impose its assessment of the value of goods and services on those it wants to help.\footnote{390}

Silver and Cross seem to believe that money will cure whatever ails the poor. This assumes a mechanism exists for direct transfers to needy individuals. It assumes that the poor would have buying power to obtain fair value on their chosen exchanges. This may not be so.\footnote{391} True, cash in hand can buy food for the next meal, temporary housing, and other short-term palliatives. Small gifts of cash cannot, however, resolve complex and far-reaching problems of poverty.

Legal representation, by contrast, can bring about long-term solutions. Government benefit programs offer social safety nets for the poor, enabling them to obtain assistance in job training, medical care, child care, housing, and other essential needs. Skilled intervention is often needed to establish eligibility for these programs. Poor persons risk eviction from housing, although deplorable conditions may provide a good defense to an ejectment action. Domestic violence victims, often stuck because of economic dependence, may need protective orders and other legal assistance to move out of dangerous relationships. Involvement in the criminal justice system without adequate representation can result in lost liberty, employment, housing, and a host of other problems. In each of these situations, small investments of a trained lawyer’s time can produce nonquantifiable benefits of far greater value than the lawyer’s cost of that time. While cash can ameliorate some poverty-related

\footnote{388} Silver & Cross, supra note 2, at 1478-79 (footnotes omitted); see also Macey, supra note 2, at 1116 (arguing that lump sum transfers of money to the poor would help more than pro bono legal services).
\footnote{389} Silver & Cross, supra note 2, at 1483.
\footnote{390} Id. at 1487.
problems, skilled legal assistance may be crucial to address the web of difficulties common to the poor.

Neither direct transfers of money nor band-aid legal services can solve the problems of poverty. All in the community share responsibility to help those in need, and to work for the common good. That is what it means to be in a community. Atomistic behavior, in which each actor pursues only individual ends, benefits those who win, but leaves behind those who were handicapped from the start and those who are trampled in the process.

Lawyers who earn their living by their legal skills can rightly be expected to contribute some labor to aid the common good, and particularly those who are poor. This does not ask more of lawyers than other occupations. Doctors, veterinarians, electricians, plumbers, grocers, and merchants contribute in their own ways, according to their specialized skills and resources. Each vocation, by contributing a small portion of their unique skills to the common good, improves the social welfare more than inefficient and haphazard cash transfers to the poor.

Silver and Cross use Bill Gates as an "extravagant" example, arguing that he could help the poor more by managing Microsoft and giving away the wealth than by doing minimum wage work cutting vegetables in a soup kitchen. Regardless of what one might think of Gates' business practices, he has led by example in giving both time and resources to alleviate problems of poverty. It is said he was moved to direct his charitable giving after visiting poor villages in Africa. Empathy for another's plight and understanding how one can help arises from first-hand exposure to their situation. Many of the newly rich technology entrepreneurs

are applying to philanthropy the lessons they have learned as entrepreneurs. . . . This new breed of philanthropist scrutinizes each charitable cause like a potential business investment . . . . [They] not only give money but business skills and expertise in marketing, public relations, technology, financial and business management.

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392. Silver & Cross, supra note 2, at 1483-84.  
393. Karl Taro Greenfeld, Giving Billions Isn't Easy, TIME, July 24, 2000, at 52 (describing charitable activities of the Gates Foundation, which spends annually $1 billion of its $22 billion in assets on global health issues, wiring American libraries for computer technology, and other areas of concern).  
394. Id.  
395. Id. at 53 ("The more people know about . . . the millions of lives that can be saved . . . how can you not do something about it?").  
396. Karl Taro Greenfeld, A New Way of Giving, TIME, July 24, 2000, at 49.
V. CONCLUSION

Specialized labor is not all that one should give towards the public good. Those who are richly blessed should share generously what they have, according to their abilities. "Our generosity may be the best measure of our humanity." Lawyers' pro bono publico responsibilities are narrowly limited to their vocational calling as lawyers and not the general expectation that all citizens contribute as they can to the public good.

America has no shortage of lawyers; the problem is one of distribution. Nationally, the lawyer-population ratio is 1:275. Lawyers tend to congregate in metropolitan areas, while poor people may be more disbursed, located both in urban and rural areas. As evidenced by the proliferation of advertisements, beauty contests, and other legal marketing techniques, there is ample competition to serve the needs of paying clients. Especially in rural areas, the few lawyers may bear a grossly disproportionate burden in pro bono representation of the low income population, or the poor persons' legal needs may remain unmet. Relative to the general population, lawyers are clearly a privileged class in terms of income and opportunity. At the dawn of the twenty-first century, it is time for the American legal profession to again embrace its responsibilities to serve the public good in ways that encourage each lawyer's voluntary pro bono activities on behalf of our nation's poor.

397. Id. at 49-51. Americans are reportedly now more generous than any other nation, with forty-nine percent volunteering their time in civic activities, and seventy-three percent donating money to charity; Americans gave $190 billion to charities in 1999, or two percent of national income, the highest giving level in twenty-eight years. Id.

398. Supra note 9 and accompanying text.

399. See Maute, supra note 271, at 564 (finding the ratio of Oklahoma lawyers in poor rural counties to legal aid eligible low income population an astonishing 1 to 271 persons, compared to a ratio of 1 to 36 in some metropolitan areas).