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# **SPECIAL FEATURE: PRO BONO LEGAL SERVICES: CURRENT PUBLIC LAW AND POLICY ISSUES: The Past, The Present, and The Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law, 26 Hamline J. Pub. L. & Pol'y 331**

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**Reporter**

**26 Hamline J. Pub. L. & Pol'y 331 \***

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## Highlight

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"The need [for legal services for low income individuals] is everywhere. It's urban. It's rural. It's old. It's young. It's every race. It's women. It's kids. It's straights. It's gays. It's people with mental health problems. It's people with development disabilities. Anywhere you look, you find that need." [2 ↓](#)

# Text

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## [\*331]

### I. Introduction

As the old adage goes, "a lawyer's advice is his stock in trade." **3** Abraham Lincoln is accredited with establishing this maxim, an apparent result of a conflict he had with one of his clients regarding a fee for his services. **4** As the story goes, one of Lincoln's clients refused to pay his fee because the only service Lincoln had provided was his advice regarding the client's particular matter, which was not "real" work in the client's opinion. **5** When the client refused to pay, Lincoln responded by advising the client that "a lawyer's advice is his stock in trade." **6** Consequently, some one hundred and fifty years later this maxim **[\*332]** is frequently found hanging next to Lincoln's picture on the walls in law firms across the United States, a means of putting potential clients on notice that an answer to their question will likely result in a fee for such services. **7**

While it is true that a lawyer generally expects to be compensated for his or her services, it is equally true that circumstances may arise in which a lawyer should not expect to be compensated for such services. **8** A recent article in the Fulton County Daily Report revealed a variety of instances in which such work was done free of charge, particularly in rural areas with dormant economies. **9** Though these "country" lawyers undoubtedly heed Lincoln's advice, they also realize that small towns lawyers inevitably will do a lot of work for free since most people simply cannot afford their services. **10** They refer to this type of work as "**pro bono**, country style." **11** As one lawyer explained, "'folks just don't have a lot of money, but they need representation. I know a lot of them. If they don't use me, they won't have anybody.'" **12**

The article in the Fulton County Daily Report calls attention to one of the various instances in which **pro bono** plays a vital role in supplying necessary legal representation to individuals who may not otherwise be able to afford it. Unfortunately, these success stories historically have been few and far between. Though many lawyers contribute significant unpaid hours and financial support to **pro bono** activities, the majority of the legal profession does not. **13** In fact, an average lawyer provides "less **[\*333]** than half an hour a week" and less than "fifty cents a day" engaged in **pro bono** activities. **14** Consequently, recent estimates

indicate that the poor contest more than four-fifths of their legal disputes without legal representation. [15](#) In short, there is much to be desired in terms of equal access to legal representation in the United States today, and **pro bono** inevitably will play a vital role in filling this void as the legal profession moves forward into the twenty-first century.

The ensuing section of this article discusses the evolution of **pro bono** service within the legal profession, as well as the establishment and evolution of Model Rule 6.1. Section three then examines the demographics of **pro bono** service, focusing on two states in assessing the current status of **pro bono** service in each state respectively. [16](#) Additionally, section three will include a discussion of the various motivations and rationales underlying **pro bono** service. Section four focuses on the current incentives for performing and supporting **pro bono** service, including an examination of various reporting policies regarding **pro bono** participation, achievement awards honoring **pro bono** service, and the availability of CLE credits for performing **pro bono** service. Finally, the last section of this article will consider a tax credit proposal designed for lawyers participating in **pro bono** service as a means of enhancing the legal profession's participation in **pro bono** activities.

**[\*334]**

## II. The Evolution of **Pro Bono** as a Professional Responsibility

The availability of free legal assistance for the poor has always been a principal concern in American society. [17](#) It is no secret that a noticeable disparity has always existed between the legal needs of the poor and the legal resources available to meet those needs. [18](#) The more disturbing aspect, however, is that this seemingly insurmountable void has increased over time. [19](#) Before one can determine which option presents the highest probability of correcting this growing disparity, however, one must first understand what exactly the legal profession's commitment to provide legal services "**pro bono publico**" entails. This can be best accomplished by first understanding what is meant by "**pro bono publico**," and then by enhancing that understanding by way of a historical perspective of how **pro bono** responsibilities have evolved over time.

In its broadest form, "**pro bono publico**" is defined as being "for the public good; for the welfare of the whole." [20](#) A stricter interpretation defines "**pro bono publico**" as "providing legal services to indigents without

charge." [21](#) Though these definitions suggest that providing **pro bono** services is analogous to charitable [\[\\*335\]](#) contributions, it is important to note that participating in **pro bono** activities is more than "a philanthropic exercise; it is also a professional responsibility." [22](#) As such, providing uncompensated legal assistance to the poor is generally considered one of the legal profession's most reputable characteristics. [23](#) Using this basic definition of **pro bono**, the article will now examine the historical evolution of **pro bono** responsibilities within the legal profession.

#### A. **Pro Bono** Responsibilities Prior To the Adoption of Model Rule 6.1

The legal profession's obligation to provide free legal services to the poor dates back to the beginning of the nineteenth century. [24](#) The belief that incorporated into the legal profession exists an inherent professional responsibility to provide **pro bono** legal services to the poor was first documented by Baltimore lawyer David Hoffman in 1836. [25](#) In Resolution XVII, included in Hoffman's treatise *A Course of Legal Study, Addressed to Students and the Profession Generally*, Hoffman expressed the profession's ethical obligation in the following manner:

To my clients I will be faithful; and in their causes, zealous and industrious. Those who can afford to compensate me, must do so; but 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 [\[\\*336\]](#) defended; and they shall receive a due portion of my services, cheerfully given. [26](#)

Hoffman's writings also appear to have influenced the ensuing publications of George Sharswood, whose 1854 essay offered a similar perspective on the legal profession's professional responsibility to provide **pro bono** services. [27](#)

The adoption of the Canons of Professional Ethics in 1908 signified the ABA's first attempt at solidifying the legal profession's **pro bono** obligations. [28](#) While not legally binding, the 1908 Canons of Professional Ethics did contain two provisions that recognized an obligation to provide **pro bono** services to the poor. [29](#) First, Canon 4 first suggested that "'a lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts on his behalf.'" [30](#) Similarly, Canon 12 expanded upon Canon 4's

suggestions by further acknowledging that "'a client's poverty' might require a reduced fee or 'even [no fee] at all.'" [31](#)

**[\*337]** Sixty-one years later, in 1969, the ABA explicitly addressed the legal profession's obligation to provide free legal services to the poor when it adopted the Model Code of Professional Responsibility. [32](#) One of the Code's aspirational considerations, Ethical Consideration 2-25 (EC 2-25), explained that "every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." [33](#) In so stating, EC 2-25 reinforced the **[\*338]** premise that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer." [34](#) Unfortunately, EC 2-25 proved unsuccessful in its efforts to make a lasting impression on **pro bono** participation within the legal profession. [35](#) In addition, the little impact EC 2-25 did have on **pro bono** participation did not result in increased **pro bono** benefits for the poor. [36](#)

In 1975 the ABA adopted the "Montreal Resolution," which recognized "'the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services.'" [37](#) By the end of the 1970s, however, the ABA's Commission on Professional Standards set out to establish a new set of ethical principles. [38](#) In drafting the Model Rules of Professional Conduct as a revision to the Model Code, the Commission initially proposed a rule that would have required the legal profession to provide free legal services to the poor. [39](#) Model **[\*339]** Rule 6.1 as adopted, however, rejected the Commission's initial proposal, instead phrasing the rule with aspirational undertones. [40](#)

### [III](#). "Voluntary **Pro Bono Publico** Service" [41](#) - **Pro Bono**

#### Responsibilities Following the Adoption of Model Rule 6.1

Prior to the adoption of Model Rule 6.1, the legal profession's historical self-characterization of valuing "service to the public" remained primarily aspirational. [42](#) Beginning in the early 1980s, however, a variety of societal forces converged to bring about significant change. [43](#) First, funding for government-subsidized legal services was greatly reduced, thus reducing the availability of free legal services to the poor. [44](#) As a result, many publicly funded legal services offices began soliciting the assistance of private lawyers to aid in satisfying the legal needs of the poor. [45](#) Next, the legal profession began taking notice of the level of discontent within the profession itself, and became even more acute to the general

public's tepid perception of the profession. [46](#) Moreover, underlying these issues was the intensifying dilemma the legal profession had been struggling with for decades: a large number of the population had legal needs that were not being fulfilled. [47](#)

**[\*340]** In an effort to appease these demands, the ABA responded by adopting Model Rule 6.1 in 1983. [48](#) The original language of the rule declared that "a lawyer "should render public interest legal service." [49](#) Much like the Canons and Ethical Considerations before it, however, Model Rule 6.1 remained purely an aspirational mandate calling for an unspecified amount of "public interest legal service." [50](#)

Following the adoption of Model Rule 6.1 in 1983, the ABA continually made efforts to fortify the rule's **pro bono** commitment but was largely unsuccessful. [51](#) The ABA first amended Model Rule 6.1 in 1988 when it adopted the "Toronto Resolution." [52](#) The underlying purpose of the amendment was to urge lawyers ""to devote a reasonable amount of time, but in no event less than [fifty] hours per year to **pro bono** and other public service activities that serve those in need or improve the law, the legal system or the legal profession." [53](#) Shortly thereafter, in 1993, the ABA again amended Model Rule 6.1 to incorporate "a quantified aspirational goal [of] at least [fifty] hours" of **pro bono** service per year, "a more refined definition of **pro bono**," and detailed instructions explaining how lawyers could satisfy their **pro bono** obligations. [54](#) Currently, Model Rule 6.1 provides:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of **[\*341] pro bono publico** legal services per year (emphasis added). In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means. [55](#)

**[\*342]** In 2002 the ABA again amended the rule "to give greater prominence to the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay." [56](#) Though these amendments have been a positive step in solidifying lawyers' **pro bono** obligations, the legal profession's obligation to provide **pro bono** services remains voluntary. [57](#)

The Comments to Model Rule 6.1 indicate that "the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning" of the rule. [58](#) Consequently, "services rendered cannot be considered **pro bono** if an anticipated fee is uncollected." [59](#) The Comments also provide that "the provision of **pro bono** services [as] a professional responsibility... is the individual ethical commitment of each lawyer." [60](#) The rule does recognize, however, that "there may be times when it is not feasible for a lawyer to engage in **pro bono** services." [61](#) When circumstances prohibit a lawyer from fulfilling his or her ethical obligation, the lawyer "may discharge [his or her] **pro bono** responsibility by providing financial support to organizations **[\*343]** providing free legal services to persons of limited means." [62](#) It also is worth noting that even though the **pro bono** responsibility articulated in the rule addresses the obligations of individual lawyers, it is the legal profession as a whole that has the obligation to provide **pro bono** legal services to the poor. [63](#)

In sum, society's call on the legal profession to provide **pro bono** services to the poor has intensified over time, but the ABA has yet to require such service. [64](#) Nonetheless, the belief that the legal profession has an obligation to provide uncompensated legal services to the poor has evolved since the Model Code's adoption in 1969. What began as an invitation for lawyers "to perform some kind of community service" has progressed into "a professional responsibility for lawyers to spend at least fifty hours" per year rendering **pro bono** services. [65](#) Despite the aforementioned attempts to bolster **pro bono** as a professional and ethical obligation, the ABA has persistently strayed away from requiring the legal profession to provide **pro bono** legal services. [66](#)

### [III](#). The Demographics of **Pro Bono** Service: The Number of Lawyers Fulfilling Their Model Rule 6.1 Responsibilities and Their Rationale for Doing so

#### A. Who is Participating in **Pro Bono** Services?

Despite the ABA's continued efforts to enhance **pro bono** participation, the disparity between "**pro bono** aspirations and **[\*344]** practices" persists. [67](#) Unfortunately, a variety of factors have seemingly foreclosed the ABA's ability to accumulate comprehensive data regarding **pro bono** participation. [68](#) The most significant factor is that only three states currently require their lawyers to report on their **pro bono** activities. [69](#) Moreover, liberal interpretations of **pro bono** services have resulted in the collection of distorted data regarding the extent of genuine **pro bono** efforts. [70](#) Finally, the inclusion of uncompensated legal services within the ambit of **pro bono** services, when compensation for such services was initially expected, has also limited efforts aimed at collecting comprehensive, accurate data. [71](#) Without this information, both the ABA and individual state bars have difficulty assessing the status of **pro bono** participation. As mentioned in the Introduction, however, the little information that is available indicates that an average lawyer provides "less than half an hour a week" and less than "fifty cents a day" engaged in **pro bono** activities. [72](#) Furthermore, less than twenty percent of the lawyers who do provide **pro bono** legal services are providing these services to indigents. [73](#)

**[\*345]** In spite of widespread lack of information on **pro bono** participation, the general rule appears to be "the bigger the firm, the greater the level of **pro bono** activity." [74](#) Though small firms and solo-

practitioners have played an important role in providing **pro bono** services, it is the bigger firms that shoulder the burden of endorsing **pro bono** as a professional obligation. [75](#) Big firms possess many of the resources needed for **pro bono** activities that smaller firms simply cannot match, including the ability to furnish an abundance of lawyers, more easily absorb the cost, and organize and manage broader comprehensive efforts. [76](#) Despite the numerous advantages big firms enjoy, it is the legal profession as a whole which has the obligation to provide **pro bono** legal services to the poor, and small firm participation remains an important piece in providing these legal service needs. [77](#)

Though the ABA is without nationwide data regarding the level of **pro bono** participation, two states have recently put forth extensive efforts to assess the current and future status of **pro bono** in their respective states, and have provided these reports to the ABA. [78](#) The first state providing the data, Maryland, is not all that surprising considering Maryland recently mandated **pro bono** reporting. [79](#) The second state, New York, has also provided [\[\\*346\]](#) extensive data concerning **pro bono** activities among licensed lawyers in the state, despite rejecting a mandatory **pro bono** reporting policy. [80](#) The data collected from each of these states is discussed in the following sections.

#### 1. The Status of **Pro Bono** Service in Maryland

In 2002, Maryland became the second state in the nation to mandate **pro bono** reporting when it adopted Rule 16-903. [81](#) Under Rule 16-903, lawyers licensed in the state of Maryland are required to submit an annual report regarding their **pro bono** contributions for the given year. [82](#) Though the rule requires lawyers to report the extent of their **pro bono** participation, lawyers are not penalized for failing to satisfy the rule's aspirational time commitment. [83](#) At the same time, however, not filing the required report could result in lawyers losing their license to practice law in the state of Maryland. [84](#)

Information collected from the 2002 report indicates that among the 30,024 licensed lawyers in the state of Maryland, approximately 48% engaged in varying degrees of **pro bono** activities. [85](#) As a result, Maryland lawyers collectively rendered 995,615 hours of **pro bono** services in 2002, for an average of slightly more than thirty-three **pro bono** hours per lawyer. [86](#) [\[\\*347\]](#) Among those who reported rendering some amount of **pro bono** service in 2002, more than 51% provided their

services to "people of limited means," with an additional 13% contributing to "organizations helping people of limited means." **87** Moreover, an additional 406,477 hours were spent on various measures aimed at "improving the law, the legal system, or the legal profession." **88**

Using this information, several factors were identified as correlating with the provision of **pro bono** services. **89** For example, lawyers who had been practicing for an extended period of time tended to have higher **pro bono** participation rates than younger, less experienced lawyers. **90** Similarly, lawyers practicing in rural regions of the state were more inclined to render **pro bono** services than lawyers practicing in the state's metropolitan locales. **91** Additionally, lawyers practicing in the areas of "family, general, and employment law" were more likely to participate in **pro bono** than lawyers practicing "criminal and governmental law." **92** Similarly, several factors were also identified as corresponding **[\*348]** with non-participation, the majority of which are simply inversely related with those previously mentioned. **93**

Similar to Model Rule 6.1, Rule 16-903 established an aspirational goal of "[fifty] hours of **pro bono** service for lawyers in the full time practice of law." **94** Though approximately 48% of the licensed lawyers in Maryland reported engaging in some degree of **pro bono** activity, less than 18% satisfied the rule's aspirational goal of at least fifty hours. **95** Accordingly, these figures indicate that Maryland still has some obstacles to overcome in achieving their ultimate bar-wide goal of at least fifty hours of **pro bono** services rendered. **96**

Overall, despite the small percentage of licensed Maryland lawyers fulfilling their ethical obligations regarding **pro bono** public service, the Maryland Bar is optimistic that Rule 16-903 is a positive step in promoting **pro bono** participation within its ranks. The Bar is confident that the information collected from this report, coupled with the information collected in ensuing reports, will be extremely valuable in determining how close Maryland licensed lawyers are in satisfying the fifty-hour target set forth in Rule 16-903. **97** Moreover, it is also the Bar's hope that this information can be used in both structuring initiatives that promote **pro bono** service in the state of Maryland, and in establishing a standard by which the Bar can assess the "efficiency and effectiveness" of their **pro bono** efforts. **98**

**[\*349]**

## 2. The Status of **Pro Bono** Service in New York

In 1994, New York briefly considered requiring their lawyers to report on their **pro bono** activities, but declined to adopt a mandatory reporting system in light of the strong opposition the requirement generated. [99](#) A few years later, in May 1997, New York adopted a "**Pro Bono** Resolution" calling on all members of the New York Bar to render "at least [twenty] hours of **pro bono** legal services to poor persons each year and to support financially the work of organizations that provide such services." [100](#) That same year, in an effort to appraise the level of **pro bono** activity within its ranks, the New York Bar authorized a survey of its **pro bono** activities. [101](#) The results of the survey indicated that approximately 47% of the New York Bar participated in "qualifying **pro bono** services" in 1997, with approximately 27% satisfying the aspirational twenty-hour target set forth in the Resolution. [102](#)

**[\*350]** Since the 1997 survey, however, certain monumental events in the state of New York have influenced the legal profession's philosophy regarding **pro bono** participation. [103](#) Among the most significant, not only in New York but throughout the entire United States, were the events that transpired in New York City on September 11th, 2001. In the aftermath of these events, New York experienced an unimaginable outpouring of voluntary efforts from a wide range of individuals, including from many members of the legal profession. [104](#) In addition to the impact September 11th had on **pro bono** participation, New York had also recently amended its rules on Continuing Legal Education (CLE) to permit lawyers to receive CLE credit for providing **pro bono** services. [105](#) In light of these developments, the New York Bar implemented a second survey in 2002 to reassess the level of **pro bono** participation within the profession. [106](#)

Results from the 2002 survey revealed that less than half of the New York Bar rendered "qualifying" **pro bono** services in 2002, with nearly 27% providing at least twenty hours as called for **[\*351]** in the Resolution. [107](#) The Bar collectively averaged approximately forty-one hours of "qualifying" **pro bono** service per lawyer, with an additional 56% of the Bar providing "financial support to one or more organizations that provide legal services to the poor." [108](#) Not surprisingly, members of the New York Bar were more inclined to provide **pro bono** services to "poor persons in a civil

matter," as opposed to the provision of such services "for poor persons in a criminal matter." [109](#)

Using this information, the New York Bar was able to identify a variety of factors associated with the provision of **pro bono** services to the poor. [110](#)

[110](#) For instance, lawyers engaged in private practice provided a majority of the "qualified" **pro bono** services rendered in 2002. [111](#) Moreover, lawyers practicing in "small firms" and "very large firms" were considerably more likely to undertake their **pro bono** obligations than lawyers practicing in "mid-size firms." [112](#) Not surprising, law school faculty were the most actively participants in all forms of **pro bono** service, including "qualifying" and "non-qualifying" **pro bono** [\*352] efforts. [113](#) Additionally, lawyers practicing in New York's metropolitan regions provided substantially more time to **pro bono** efforts than lawyers practicing in less populated regions of the state. [114](#)

The New York Bar was also able to identify a variety of factors that prevented some lawyers from participating in **pro bono** efforts. [115](#) The most common justifications were "concern over the time and resources **pro bono** work might demand, lack of expertise in legal areas involving poor persons, lack of office staff to support qualifying **pro bono** work, [and] lack of malpractice insurance... that [would] cover **pro bono** representation." [116](#) Additional factors correlating with non-participation included a lack of financial resources to provide such services, participation in "non-qualifying" **pro bono** activities, and simply a lack of interest in providing uncompensated legal assistance to the poor. [117](#)

Ultimately, the results from the 2002 survey indicate that the New York Bar has unfortunately made little progress in its attempts to enhance statewide **pro bono** participation. [118](#) Nonetheless, the Bar remains optimistic that these figures can be improved, especially since a majority of the Bar reported that they "would be willing voluntarily to report their **pro bono** work as a means of helping the Bar assess the unmet legal needs of the poor." [119](#) Minimally viewed, the 2002 survey provided the Bar [\*353] with an assortment of possible techniques for encouraging and enhancing participation in **pro bono** services, which is a positive first step. [120](#) Despite the Bar's optimism, however, issues regarding the enhancement of **pro bono** participation remain in the forefront in the state of New York. [121](#)

As the Maryland and New York reports indicate, less than half of each respective state's lawyers are participating in **pro bono**, with an even smaller percentage fulfilling their bar's aspirational **pro bono** goals. [122](#) However, both state reports identified and emphasized the positive aspects of **pro bono** reporting. These include assessing the current status of **pro bono** participation in each respective state, providing the bar with various policies and strategies designed to promote greater **pro bono** participation, and utilizing the collected information in structuring future initiatives aimed at reducing the gap between the legal needs of the poor and the resources available to meet those needs.

### C. Lawyers' Rationale for Participating in **Pro Bono** Services

The belief that lawyers have an obligation to provide free legal services to the poor is derived from two main premises. [123](#) [\*354] The first premise is that society as a whole is better off when their legal needs are adequately attended to. [124](#) Naturally, it is the legal profession's responsibility to ensure that the necessary legal services are available to meet these needs. [125](#) The second premise, which is really just a corollary of the first, is that the legal profession as a whole benefits by ensuring that legal services are available to satisfy society's legal needs. [126](#)

The primary justification for the first premise is that "access to legal services is a fundamental need," and that it is the legal profession's responsibility to ensure that legal services are available to meet these needs. [127](#) The notion that "access to legal services is a fundamental need" is not seriously disputed, especially considering that many in society depend on this accessibility in order to satisfy their basic needs. [128](#) Furthermore, research indicates that "public confidence in legal processes depends heavily on opportunities for direct participation." [129](#) By design, however, opportunities for direct participation possess little value without legal representation. [130](#) Therefore, the legal profession is placed with the burden of making legal services available to those who need them, with due regard given to the likely scenario that these services will go uncompensated. [131](#)

[\*355] The second premise for lawyers participating in **pro bono** services is the residual benefits that both lawyers individually and the legal profession as a whole accrue as a result of undertaking their **pro bono** obligations in the first instance. [132](#) Beyond the variety of personal

rewards associated with **pro bono** participation, engaging in **pro bono** activities can "provide valuable training, contacts, trial experience, and leadership opportunities" that the individual lawyer may not have otherwise had the opportunity to experience. [133](#) At the same time, **pro bono** participation also benefits the legal profession as a whole, with arguably the most notable benefit being the enhancement of the legal profession's image amongst the general public. [134](#)

Ultimately, most lawyers believe that uncompensated legal services should be provided for those otherwise unable to access such services. [135](#) At the same time, most lawyers are opposed to any requirements designed to implement this ideal. [136](#) Though contradictory in nature, it appears that most lawyers are willing to provide **pro bono** services, but they believe that mandating **pro bono** service is the not the desired means to achieving this end. [137](#) Notwithstanding various noteworthy arguments in favor of mandatory **pro bono**, lawyers must recognize their special role in the legal system and the distinctive obligations such a role necessitates:

#### **[\*356]**

Much of what lawyers do is about providing justice, [which is]... nearer to the heart of our way of life... than services provided by other professionals. The legal profession serves as indispensable guardians of our lives, liberties and governing principles... like no other professionals, lawyers are charged with the responsibility for systematic improvement of not only their own profession, but of the law and society itself. [138](#)

The purpose of this section is to gain a better understanding of what motivates lawyers to provide **pro bono** services. It is among these rationales that lawyers derive their justification for participating in **pro bono** services. Though some may argue that encouraging lawyers to participate in **pro bono** services for "intrinsic reasons rather than extrinsic rewards" bolsters the lawyer's **pro bono** efforts, the overall objective is to get the legal profession to collectively increase its participation in **pro bono** services, regardless of the underlying motivation. [139](#) In order to

**[\*357]** implement effective initiatives aimed at enhancing lawyers' participation in **pro bono** services, one must first have a basic understanding of what currently motivates lawyers to participate in **pro bono** activities. With this understanding in place, one can then advocate for new initiatives to enhance **pro bono** participation.

This section set forth the basic rationales for lawyers' involvement in **pro bono** services. The ensuing section examines the current incentives available, in addition to the basic rationales set forth here, for lawyers' participation in **pro bono** activities. Finally, the concluding section endeavors to build upon these rationales and incentives in order to propose an additional incentive for participation in **pro bono** services - the adoption of a **pro bono** tax credit.

**[\*358]**

#### IV. Current Incentives for Lawyers Participating in **Pro Bono** Services

Despite the fact that a majority of lawyers do not undertake their ethical obligations to render **pro bono** services to the poor, there are incentives currently in place to promote **pro bono** participation. [140](#) Some notable incentives, including both mandatory and voluntary reporting policies concerning **pro bono** participation, achievement awards honoring **pro bono** service, and the availability of CLE credits for performing **pro bono** services, are discussed in the following sections. [141](#)

**[\*359]**

##### A. Reporting **Pro Bono** Activity

**Pro bono** reporting systems have recently captured national interest for their ability to enhance **pro bono** participation. [142](#) The primary purpose of **pro bono** reporting systems is to draw lawyers' attention to their professional responsibilities concerning the provision of **pro bono** services. [143](#) The information compiled through **pro bono** reporting enables state bars to determine the current status of **pro bono** within its borders. [144](#) Specifically, such information discloses the number of lawyers rendering **pro bono** services and the extent of their participation, as well as the amount of financial contributions made in support of **pro bono** efforts. [145](#) This information, once properly assessed, can then be used to increase the availability of free legal services to the poor. [146](#) Moreover, the availability of this information enables lawyers participating in **pro bono** activities to receive accreditation for their efforts, thereby bolstering the legal profession's reputation amongst the general public. [147](#)

Beginning with Florida in 1993, two contrasting **pro bono** reporting systems emerged. [148](#) The more stringent **pro bono** reporting system requires lawyers to divulge the extent of their **pro bono** contributions,

while its less restrictive counterpart simply encourages lawyers to disclose information regarding **pro bono** [\*360] contributions "voluntarily." 149  
Currently, sixteen states have implemented **pro bono** reporting systems in varying degrees: three states have mandatory **pro bono** reporting, while thirteen others have implemented voluntary systems for reporting **pro bono** activities within their respective states. 150 Unfortunately, thirty-four states do not require their lawyers to report on the number of hours they spend engaged in **pro bono** services, effectively leaving these lawyers unaccountable for their professional responsibility to provide **pro bono** services to the poor. 151

## [\*361]

### 1. A Mandatory **Pro Bono** Reporting Model

In 1993, Florida became the first state to adopt a **pro bono** reporting system when its Supreme Court amended its Rules of Professional Conduct to require all Florida-licensed lawyers to report on their **pro bono** contributions. 152 In support of this amendment, the Court indicated that the "rules [were]... implemented in the hopes that they will act as a motivating force for the provision of legal services to the poor by the members of this state's legal profession." 153 To date, Florida's mandatory reporting system has consistently yielded response rates from its bar nearing 90%. 154 More importantly, Florida has experienced considerable increases in both direct participation in and financial support for **pro bono** services since the mandatory **pro bono** reporting system was adopted in 1993. 155

Despite Florida's success with its mandatory **pro bono** reporting system, only two other states have chosen to implement [\*362] similar systems, both of which only recently adopted mandatory **pro bono** reporting systems. 156 While those in favor view mandatory **pro bono** reporting as an effective strategy to increase the availability of legal services to the poor, the majority interprets mandatory reporting systems as a threat to a lawyer's autonomy and a step toward mandating **pro bono** service. 157 Consequently, [\*363] over the past ten years, eight states have considered and rejected initiatives designed at implementing a mandatory **pro bono** reporting requirement. 158

Notwithstanding the foregoing arguments, Florida's recent success by way of mandatory **pro bono** reporting cannot be ignored. The Florida model

demonstrates that mandatory reporting systems can increase **pro bono** participation levels, since lawyers' action, or more likely their inaction, becomes "answerable to the public" under a mandatory reporting system. **159** Moreover, the compiled information can be used to both identify nonparticipating members of the bar, and to formulate more effective initiatives designed to increase participation where **pro bono** participation is lacking. **160** For all of these reasons, a mandatory **pro bono** reporting system can be an invaluable device in enticing lawyers to fulfill their ethical obligations with respect to **pro bono** service. The negative aspect overshadowing mandatory **pro bono** reporting systems, however, is that only three states have elected to adopt **[\*364]** such a system thus far. **161** Accordingly, relying on mandatory **pro bono** reporting systems to collectively enhance **pro bono** participation will not suffice. Ultimately, additional incentives are inevitable if the ABA hopes to increase participation in **pro bono** activities. An additional incentive proposed here is the adoption of a **pro bono** tax credit.

## 2. A Voluntary **Pro Bono** Reporting Model

The alternative to mandatory **pro bono** reporting systems are voluntary **pro bono** reporting systems, which are naturally preferred over mandatory reporting systems because of their less restrictive, optional nature. **162** By design, inherent in a voluntary **pro bono** reporting system is the individual lawyer's decision to report the number of **pro bono** hours rendered during a given period. **163** Accordingly, lack of any formal reporting requirements renders voluntary **pro bono** reporting systems far less controversial than its mandatory counterpart. **164**

Unfortunately, the most appealing aspect of a voluntary **pro bono** reporting system also serves as its biggest drawback. As a result of its optional nature, voluntary **pro bono** reporting systems have historically prompted fairly low response rates. **165** Collectively, the response rates experienced in states that have implemented voluntary reporting systems are mediocre at best, especially when compared to the response rates Florida has **[\*365]** experienced since implementing its mandatory **pro bono** reporting system. **166** Though these response rates are not necessarily indicative of actual **pro bono** participation in these states, these figures certainly do not compel the conclusion that participation in **pro bono** activities is indeed higher than the response rates would indicate. **167**

As a result, many view voluntary **pro bono** reporting systems as an ineffective method of raising lawyers' consciousness regarding their **pro bono** obligations, thus failing to ultimately enhance participation in **pro bono** activities. [168](#) Nonetheless, the positive aspects of a voluntary **pro bono** reporting system seemingly outweigh the model's limitations, at least from the legal profession's perspective. [169](#) Consequently, voluntary **pro bono** reporting systems prompt greater support than its mandatory counterpart. [170](#)

Ultimately, although voluntary **pro bono** reporting systems are an attractive implementation strategy, such systems have yet to **[\*366]** significantly impact lawyers' participation in **pro bono** activities. [171](#) Despite the drawbacks associated with a voluntary **pro bono** reporting system, these reporting systems remain a viable option for states because of their ease, inexpensiveness, and voluntary nature. [172](#) Similar to other incentives currently available, the ability of voluntary **pro bono** reporting systems to meet the legal profession's ultimate goal of increased **pro bono** participation appears dubious. Consequently, more has to be done in order to meet the legal profession's ultimate goal. One such option is the adoption of a **pro bono** tax credit.

#### B. Achievement Awards Honoring **Pro Bono** Service

Achievement awards honoring **pro bono** service is a standard incentive for lawyers to fulfill their **pro bono** obligations by participating in **pro bono** activities. The ABA has established a variety of **pro bono** and public service awards, which recognize lawyers' participation in, and dedication to, **pro bono** and public service activities. [173](#) The ABA **Pro Bono Publico** Awards Program is the primary administrative vehicle facilitating these awards, which establishes the criteria for the awards and ultimately determines whom the award recipients will be. [174](#)

In accordance with standards set forth in the program, the Standing Committee on **Pro Bono** and Public Service presents awards annually to members of the legal profession whom have **[\*367]** demonstrated an exemplary commitment to the provision of **pro bono** services to the poor. [175](#) The awards seek to honor those lawyers whose **pro bono** contributions have significantly impacted many of society's less fortunate members, and whose commitment and approach to **pro bono** efforts have raised the standard in **pro bono** participation. [176](#) As an additional

incentive, the lawyers selected as award recipients are presented with the awards at the ABA's annual meeting. [177](#)

The significance of these awards lies in the number of lawyers they are able to entice and motivate to provide uncompensated legal services to the poor. Undoubtedly, the impact of these awards on the legal profession collectively is likely a de minimis benefit toward the profession's ultimate goal of increased participation in **pro bono** activities. Nonetheless, achievement awards honoring exceptional **pro bono** participation can produce the same residual effects as other incentives currently available. [178](#)

Unfortunately, despite the incentive created by **[\*368]** achievement awards, **pro bono** participation across the bar has remained disappointingly low. Therefore, achievement awards alone have proved unsatisfactory in meeting the legal profession's ultimate goal of increased **pro bono** participation. Again, additional incentives must be made available in order to increase **pro bono** participation. The adoption of a **pro bono** tax credit is one such incentive.

#### C. CLE Credit for **Pro Bono** Performance

A recently new incentive for **pro bono** participation has been the adoption and implementation of rules that permit lawyers participating in **pro bono** cases to earn credit toward mandatory CLE requirements. [179](#) A number of states have experimented with this strategy over the last couple of years, with a majority of those states eventually adopting rules granting CLE credit for **pro bono** services rendered. [180](#) Currently, five states have systems in place that allow lawyers to earn CLE credit while providing legal services to the poor. [181](#) While the "CLE credit/**pro bono** hours rendered" equivalency varies among the states, the main objective of providing legal services to the poor remains the primary consideration under each initiative. [182](#)

**[\*369]** The methodology for allowing lawyers to earn CLE credit while providing **pro bono** services is based on two premises. The first premise is that lawyers already have a mandatory obligation to complete a certain amount of CLE credits annually in order to maintain their legal license. [183](#)  
[183](#) The second premise, which is a central issue for the legal profession as a whole, is that a large majority of the poor have legal needs that remain unaddressed. [184](#) Ultimately, allowing lawyers to fulfill their mandatory CLE obligations while simultaneously fulfilling their ethical responsibility of providing uncompensated legal services to the poor results in the proverbial

maxim "killing two birds with one stone." [185](#) Thus, permitting lawyers to fulfill their mandatory CLE obligations while providing **pro bono** services to the poor is a simplistic approach that enables both sides to win. [186](#)

In the end, allowing lawyers to earn CLE credit for accepting **pro bono** cases appears to be the most attractive incentive available for lawyers to participate in **pro bono** services. [187](#) While some argue that the most effective way to enhance **pro bono** participation is by encouraging lawyers to undertake their **pro bono** obligations altruistically, allowing lawyers to earn CLE credit for providing **pro bono** services nonetheless satisfies the ABA's primary objective of providing **[\*370]** free legal services to the poor. [188](#) Thus, permitting lawyers to earn CLE credit for participating in **pro bono** activities appears to be appealing for all interested parties, at least in theory. Unfortunately, the impact this incentive will have on **pro bono** participation remains to be seen. [189](#)

Ultimately, the incentives currently in place to promote **pro bono** participation are insufficient to meet the ABA's ultimate goal of increased **pro bono** participation, as evidenced by recent estimates indicating that the poor contest more than four-fifths of their legal disputes without legal representation. [190](#) The incentives previously discussed - mandatory and voluntary **pro bono** reporting, **pro bono** achievement awards, and CLE credit for **pro bono** services rendered - are simply not enough to fill the growing void. Further incentives must be offered to achieve increased bar-wide participation in **pro bono** activities. The adoption of a **pro bono** tax credit is one additional incentive that could achieve this end.

#### V. **Pro Bono** as a Tax Incentive

Many in the legal profession argue that providing free legal services to the poor corresponds to imposing a special tax on lawyers since the government has historically declined to adequately fund legal aid services to the poor. [191](#) Their argument is bolstered by the justification that "if access to legal services is a societal value, society as a whole should bear its costs." [192](#) After all, the poor have fundamental needs for other of life's necessities, but society does not require those who provide such necessities to provide their resources free of charge in satisfying those **[\*371]** fundamental needs. [193](#) Why should the legal profession be held to a higher standard?

Numerous arguments have been set forth justifying the heightened burden society places upon the legal profession. [194](#) Notwithstanding the validity of these justifications, this article endeavors to achieve the same ultimate goal - increased **pro bono** participation within the legal profession - by way of a different methodology. Rather than debating whether **pro bono** places a special tax on the legal profession and, if so, whether society is justified in placing this burden on the profession, this article seeks to transform **pro bono** participation from a tax burden on the legal profession into a tax incentive for the legal profession. To accomplish this end, primary consideration will be given to the adoption of a tax credit designed for lawyers' participating in **pro bono** services.

#### A. What is a Tax Credit?

A tax credit is a "dollar for dollar" direct reduction in an individual's total tax liability. [195](#) In essence, a tax credit is "treated as a payment already made" against the individual taxpayer's tax liability. [196](#) By its definition, a tax credit is distinguishable from a tax reduction, which reduces the amount of income subject to taxation but does not affect the individual's overall tax liability. [197](#) While both tax credits and tax deductions create incentives for taxpayers, the incentive created by a tax credit is considerably more significant "because it is subtracted after tax is computed rather than before." [198](#)

**[\*372]** Generally speaking, tax credits fall into one of two categories: refundable tax credits and non-refundable tax credits. [199](#) In the event the tax credit is in excess of the taxpayer's total tax liability for the given year, refundable tax credits permit individual taxpayers to receive a tax refund representing the difference. [200](#) In contrast, non-refundable tax credits do not permit individual taxpayers to receive a tax refund when the applicable tax credit is in excess of the taxpayer's total tax liability. [201](#) Thus, the maximum effect a non-refundable tax credit can have for an individual taxpayer is to relieve them of their tax obligation for the given year. [202](#) For our purposes, the **pro bono** tax credit proposed here will be based on a refundable tax credit. [203](#) With this basic information in mind, the ensuing section will consider various tax credits currently available, as well as other forms of tax relief, in an attempt to ultimately formulate a suitable **pro bono** tax credit for lawyers.

#### B. Income Tax Relief Measures

Generally speaking, there are a number of tax credits currently available in the Internal Revenue Code. [204](#) These credits typically fall into four general classifications: "credits for certain taxes, credits for activities that benefit disadvantaged or low-income people, credits for activities that benefit the environment," and "credits for certain [\[\\*373\]](#) other investments." [205](#) Historically, the government has permitted the use of tax credits, as well as other tax incentives, as a means of achieving specific societal ends that would otherwise go unsatisfied without some form of governmental enticement. [206](#) Accordingly, tax credits by in large are designed for the benefit of either disadvantaged groups within society or the betterment of society as a whole.

One of the more exemplary tax credits currently available is the Earned Income Credit (EIC), which is a tax credit designed for the benefit of low-income wage earners. [207](#) The basic function of EIC is to reward low-income working individuals by permitting these workers to recoup a portion of their income taxes withheld [\[\\*374\]](#) during the taxable year. [208](#) By allowing this type of legislative grace, EIC recipients are better equipped to provide for their families, improve their living conditions, invest in education, and even establish family savings plans. [209](#) In sum, the EIC promotes and encourages individuals to work, even though they may be earning meager incomes; it makes work worthwhile for low-income wage earners. [210](#) More importantly, by enticing individuals to actively participate in the workforce, the EIC "lifts nearly five million people out of poverty every year." [211](#) Accordingly, the EIC is widely recognized as a time-honored instrument that controls welfare by rewarding working individuals, thereby strengthening impoverished economies. [212](#)

In addition to tax credits, various other tax incentives are available that promote and encourage participation in targeted activities. [213](#) One such noteworthy tax incentive, arguably more akin to a tax credit aimed at enhancing lawyers' participation in **pro bono** activities than those previously mentioned, is the recently enacted Teacher Tax Relief Act of 2002. [214](#) Analogous to a **pro** [\[\\*375\]](#) **bono** tax credit, the Teacher Tax Relief Act was implemented with the principal intent of serving the interests of a particular group, namely school children, rather than for the benefit of the individual actually receiving the tax benefit. In compliance with this Act, teachers are allowed to deduct the expenses for classroom supplies they personally purchase out-of-pocket for their classes. [215](#) The basis for allowing the deduction lies in improving educational standards by providing

some relief for teachers who expend significant amounts of money to equip classrooms and enhance school programs, not on the individual teacher's financial wherewithal. [216](#) Like all forms of tax relief, however, certain **[\*376]** requirements must be satisfied before the deduction will be allowed, and there are limitations on the expenditure amounts that can be deducted. [217](#) Though the Teacher Tax Relief Act is not a tax credit per se, similar policy considerations and rationales are implicated in the Act as those implicated in a **pro bono** tax credit. Therefore, the Teacher Tax Relief Act should be utilized as an ideal model for the establishment of a **pro bono** tax credit.

The significance of the federal tax relief measures currently available, particularly in reference to the Teacher Tax Relief Act, is the underlying motivation for allowing such tax relief. Undoubtedly, allowing teachers to deduct personal expenditures made for educational purposes was a direct response to the government's inability to adequately fund our nation's educational institutions. The Teacher Tax Relief Act, as well as other previous legislative enactments, has made it very clear that education is an enduring societal value. [218](#) As such, necessary measures have been taken in order to ensure that this particular societal value will continue to be satisfied. Is equal access to the justice system not also a societal value? If so, should necessary measures not also be taken in order to ensure a continuing realization of this societal value? In short, access to the justice system is a societal value. Thus, additional measures should be taken in order to increase the availability of legal services to the poor, and a strategy that warrants consideration is the adoption of a **pro bono** tax credit.

### **[\*377]**

#### C. A Tax Credit for **Pro Bono** Services Rendered

Thus far, this article has addressed the issue of substandard **pro bono** participation by discussing both the evolution of **pro bono** service and the various motivations and rationales underlying **pro bono** service, as well as considering the current incentives available for performing and supporting **pro bono** service. Though the need for free legal assistance to the poor is abundantly clear, the strategies currently in place to achieve that end are unmistakably ineffective. To date, anything short of a mandatory **pro bono** requirement has, at best, produced a diminutive impact on lawyers' involvement in **pro bono** activities. [219](#) Consequently, additional

incentives need to be instituted to ensure the availability of equal access to the legal system, which in practice means increasing lawyers' **pro bono** participation rates.

## 1. Considerations of a **Pro Bono** Tax Credit

The rationale for proposing a tax credit, as opposed to other forms of tax relief, is the preferential treatment tax credits receive under the Internal Revenue Code. [220](#) The underlying purpose of creating a tax incentive for lawyers to participate in **pro bono** activities is in creating a compelling incentive to promote **pro bono** participation. History has shown that less-than-favorable incentives correlate to less-than-favorable results. Instituting a **pro bono** tax credit, therefore, should afford lawyers a significant tax incentive to engage in **pro bono** services. It follows, theoretically at least, that a favorable **pro bono** tax credit would effectuate increased results in **pro bono** participation, which is precisely the result the ABA historically has sought to attain.

In an ideal world, a **pro bono** tax credit would provide a compelling incentive for lawyers to engage in **pro bono** services, while at the same time not affording lawyers too great a latitude in **[\*378]** avoiding taxation. As with all countervailing policy considerations, the most effective **pro bono** tax credit requires a delicate balancing of these considerations. For instance, an initial consideration involves determining the optimal limitation for the tax credit. [221](#) In addition, the proper formula for computing the tax credit needs to be considered. Notwithstanding the onerous task of balancing these considerations, the ensuing discussion seeks to construct a basic model for a **pro bono** tax credit.

## 2. The Basic Structure of a **Pro Bono** Tax Credit

A **pro bono** tax credit is premised upon the number of **pro bono** hours rendered and the corresponding hourly rate for such services. The sole purpose of establishing an hourly rate lies in computing the tax credit a lawyer would be allowed to claim against his or her tax liability, keeping in mind that the recipient of the **pro bono** work would not be charged this amount for the legal services rendered. [222](#) For purposes of establishing this model, the proposed tax credit will utilize a predetermined hourly rate of \$ 100. [223](#) The underlying reason for applying \$ 100 as the predetermined amount coincides with establishing an optimal limitation on the **pro bono** tax credit, which is discussed in greater detail below. Moreover, in establishing an equivalency between lawyers' "normal" hourly

rate and their hourly rate for the purposes of this tax credit, applying an amount less than most [\*379] lawyers' "normal rate" has precedence in analogous **pro bono** incentives that grant CLE credit for **pro bono** services rendered. 224

A **pro bono** tax credit, like any other tax credit, would also necessitate a limitation on the amount of credit an individual lawyer could claim annually. As previously mentioned, the effectiveness of the **pro bono** tax credit will be dependent on the limitation that is allowed for lawyers' to claim against their tax liability. 225 Therefore, referring back to the predetermined hourly rate of \$ 100, and taking into consideration the ABA's aspirational goal for all lawyers to render at least fifty hours of **pro bono** service per year, an annual limitation of \$ 5,000 for **pro bono** services rendered appears satisfactory. 226 Though the \$ 5,000 limitation in practice may prove to be less than optimal, the proposed limitation is adequate for the purpose of establishing this model for a **pro bono** tax credit. 227 Additionally, because the purpose of a **pro bono** tax credit is to entice all lawyers to engage in at least fifty hours of **pro bono** services each year, placing an income restriction on lawyers' eligibility for the **pro bono** tax credit is undesirable as it would undermine the primary purpose of [\*380] the tax credit. 228 With this basic model in place, an examination of the impact such an initiative could engender is in order.

### 3. The Impact of a **Pro Bono** Tax Credit on **Pro Bono** Participation

Like every initiative put forth endeavoring to enhance **pro bono** participation within the legal profession, certain advantages and disadvantages will be inevitable. Naturally, for a particular initiative to effectively impact the provision of **pro bono** services to the poor, the initiative's advantages need to noticeably outweigh its disadvantages. The expectation in structuring a **pro bono** tax credit is no different. The primary goal in proposing this **pro bono** tax credit, therefore, is that the advantages accompanying the tax credit will compensate for its disadvantages, and it will ultimately emerge as a practicable incentive for enhancing lawyers' participation in **pro bono** services.

There are many advantages associated with a **pro bono** tax credit, especially in light of the ABA's and other state bars' inability to significantly enhance **pro bono** participation. Most importantly, a **pro bono** tax credit would alleviate the tension between the public's overwhelming need for free legal services and its general perception that the legal profession has

proved incapable of meeting these fundamental needs. [229](#) The adoption of a **pro bono** tax credit would allow the poor to receive the free legal services they so desperately need, while simultaneously enabling [\[\\*381\]](#) lawyers to accrue tax benefits for providing such services. [230](#) The fact that lawyers would essentially be compensated for their services would not undermine the primary purpose of their Model Rule 6.1 ethical obligations. [231](#) In fact, allowing for compensation by means of a tax credit would not only positively impact lawyers' participation in **pro bono** activities, but it would diminish the legal profession's historical claim that **pro bono** is a tax on the practice of law. [232](#) In addition, structuring the incentive as a tax credit implies that all lawyers will be able to take advantage of the credit, regardless of their income. [233](#) All things considered, it is somewhat taxing (no pun intended) to contemplate a sequence of events in which offering a **pro bono** tax credit would not in some way enhance lawyers' participation in **pro bono** activities. Undeniably, increasing lawyers' participation in **pro bono** activities would benefit society as a whole. At the same time, a **pro bono** tax credit would offer the legal profession some needed relief in its efforts to provide legal services to all those in need, including those otherwise unable to financially obtain such services. Thus, the adoption of a **pro bono** tax credit would result in a rarely experienced "win-win" situation for society and the legal profession.

Unfortunately, a **pro bono** tax credit has its drawbacks as well. A primary concern regarding a **pro bono** tax credit is its inability to collectively reach all lawyers engaged in the practice of law. Inevitably, a portion of the legal profession would be unable or unwilling to garner the tax benefit available with this tax [\[\\*382\]](#) credit. [234](#) Moreover, under the proposed model, there would be little incentive for lawyers to render more than fifty hours of **pro bono** service, regardless of the need, since the \$ 5,000 limitation would limit the tax benefit they could realize at fifty hours. On a broader spectrum, an additional concern involves the impact a **pro bono** tax credit would engender on tax revenues throughout the nation. Arguably, if every lawyer took advantage of the \$ 5,000 tax credit, the resulting impact on tax revenues could be quite substantial. [235](#) Moreover, there also remains our society's enduring propensity to denounce tax proposals designed for the benefit of society's more affluent members. [236](#) Finally, the ultimate effect a **pro bono** tax credit would have on closing the gap between **pro bono** services rendered and the remaining unmet legal needs of the poor is also a concern. If a large portion of the population continued

to have legal needs that go unmet, then has the implementation of a **pro bono** tax credit positively enhanced **pro bono** participation or has it simply established a ceiling on the amount of **pro bono** service that the legal profession will render?

In determining the effectiveness of a **pro bono** tax credit, the ultimate question should concern the impact the **pro bono** tax credit engendered on lawyers' participation in **pro bono** activities; has the **pro bono** tax credit enhanced **pro bono** participation? A **pro bono** tax credit is by no means an end all to the enhancement [\*383] of **pro bono** participation, but it could provide a positive first step towards achieving the ABA's aspirational goals. It seems inconceivable that a **pro bono** tax credit would fail to enhance **pro bono** participation in some respect, although the degree of such enhancement remains debatable. Nonetheless, any measure that could shift the legal profession closer to collectively achieving the ABA's aspirational goal of at least fifty hours of **pro bono** service rendered would undoubtedly be a momentous first step. Thus, this is the primary justification for adopting a **pro bono** tax credit.

## VI. Conclusion

As the foregoing discussion identifies, the need for free legal assistance to the poor is overwhelmingly apparent. Despite its efforts, the ABA has thus far failed to adequately satisfy these needs. It is undeniable that more has to be done, but the question remains of how to effectively stimulate such a result. The answer is to create additional incentives that promote and encourage greater participation in **pro bono** services, including financial incentives that entice lawyers to undertake their **pro bono** obligations. The initiative discussed here is the adoption of a **pro bono** tax credit, which would in essence compensate lawyers for participating in **pro bono** services. It is a strategy for enhancing **pro bono** participation that warrants consideration, especially in light of the ABA's and other state bars' inability to significantly enhance **pro bono** participation through other initiatives. More must be done; additional measures must be taken to ensure that the legal needs of the poor are met. The adoption and implementation of a **pro bono** tax credit is one such measure. No longer should **pro bono** be perceived as a tax on the practice of law. Rather, the time has come for **pro bono** to be reclassified as a tax incentive for lawyers, and the adoption of a **pro bono** tax credit is a means to this end.

## Footnotes

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**1** Candidate for Juris Doctor, Hamline University School of Law, Spring 2006. The author would like to thank his wife, Joslin, and his family for their unwavering love and support, and the members of the Hamline Journal of Public Law & Policy for their assistance with this article.

**2** Stephen F. Befort & Eric S. Janus, The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values, [13 Law & Ineq. 1, 1\(1994\)](#).

**3** Abraham Lincoln, 1809-1865.

**4** Interview with Doug Haag, [Partner, Patterson Law Firm](#) ▼, Des Moines, Iowa (Dec. 6, 2004).

**5** Id.

**6** Id.

**7** Interview with Haug, supra note 4.

**8** See Model Rules of Prof'l Conduct R. 6.1, infra note 55.

**9** Trisha Renaud, Rural Law: No Place to Hide - In the Country People Know Who You Are and How Good, Fulton County Daily Rep.

(Ga.), Oct. 2, 2000 (reporting on a ten-county area in Georgia in which there are only nine practicing attorneys).

**10** Id.

**11** Id.

**12** Renaud, *supra* note 9 (citing Ed Cannington Jr., age 60).

**13** Deborah L. Rhode, **Pro Bono** in Principle and in Practice, 53 J. Legal Educ. 413, 413 (2003).

**14** Rhode, *supra* note 13.

**15** Kellie Isbell & Sarah Sawle, **Pro Bono Publico**: Voluntary Service and Mandatory Reporting, [15 Geo. J. Legal Ethics 845, 846 \(2002\)](#); see Debra D. Burke et al., Mandatory **Pro Bono**: Cui **Bono**?, [25 Stetson L. Rev. 983, 989 \(1996\)](#) (indicating that a majority of these disputes concern "matrimonial issues, debtor-creditor disputes, landlord-tenant questions and criminal actions").

**16** This article will be looking at statistics compiled from Maryland, a state with mandatory **pro bono** reporting, and from New York, a state that rejected mandatory **pro bono** reporting.

**17** Burke et al., *supra* note 15, at 984.

**18** Rhode, *supra* note 13, at 424.

**19** American Bar Association, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, available at <http://www.abanet.org/legalservices/probono/stateethicsrules.html>

(last visited Jan. 3, 2005). See generally Isbell & Sawle, *supra* note 15, at 851 (acknowledging that the legal needs of the poor far exceed the publicly-funded services available to meet those needs).

**20** Black's Law Dictionary, 1203 (6[th] ed. 1990), cited in Nitza Milagros Escalera, *A Christian Lawyer's Mandate to Provide Pro Bono Publico Service*, [66 Fordham L. Rev. 1393, n.1 \(1998\)](#); see also Black's Law Dictionary, 558 (2d pocket ed. 2001) (defining "**pro bono**" as "being or involving uncompensated legal services performed especially for the public good").

**21** See Black's Law Dictionary, 1203 (6[th] ed. 1990), *supra* note 20.

**22** Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, [67 Fordham L. Rev. 2415, 2421 \(1999\)](#); see generally Burke et al., *supra* note 15, at 992 (arguing that the legal profession has an obligation to assure equal access to the legal system).

**23** Rhode, *supra* note 13, at 413.

**24** Escalera, *supra* note 20, at 1393.

**25** *Id.*

**26** David Hoffman, *A Course of Legal Study, Addressed to Students and the Profession Generally* (2d ed. 1836), cited in Escalera, *supra* note 20, at 1394.

**27** Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility, Problems and Materials* 12 (8[th] ed. 2003) (noting that Sharswood's standards are generally cited as the basis for the ABA's 1908 Canon of Professional Ethics); George Sharswood, *An Essay on Professional Ethics* 153-54 (3d ed. 1869), cited in Escalera, *supra* note 20, at 1394 (explaining the obligation in the following manner: "When the client has the ability, [the lawyer's] services should be recompensed... there are many cases, in which it will be

[the lawyer's] duty, perhaps more properly [the lawyer's] privilege, to work for nothing").

**28** ¶

Morgan & Rotunda, *supra* note 27, at 12 (indicating that the Canons remained the standard for over sixty years, although the original Canons of Professional Ethics were supplemented on fifteen occasions during that period).

**29** ¶

Rhode, *supra* note 13, at 424.

**30** ¶

Escalera, *supra* note 20, at 1394. However, Canon 4 was only applicable in criminal cases. *Id.*

**31** ¶

Rhode, *supra* note 13, at 424.

**32** ¶

American Bar Association, Development of ABA Model Rule 6.1: Historical Timeline, available at <http://www.abanet.org/legalservices/probono/stateethicsrules.html> (last visited Jan. 3, 2005); see generally Rhode, *supra* note 13, at 425 (noting that "the growth of poverty and public interest law movements in the 1960s and... 1970s... generated greater interest in **pro bono** work," and that the Bar endeavored to collectively increase the profession's **pro bono** efforts as a way of preventing the government from involving itself in the matter).

**33** ¶

Model Code of Prof'l Responsibility EC 2-25 (1980), cited in ABA, Development of ABA Model Rule 6.1: Historical Timeline, *supra* note 32; Ethical Consideration 2-25 states in full:

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 courts 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 been 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 profession. Every lawyer should support all proper efforts to meet this need for legal services.

Model Code of Prof'l Responsibility EC 2-25 (1980) reprinted in Professional Responsibility Standards, Rules & Statutes 495 (John S. Dzienkowski ed., Thomson West 2004-2005); see Rhode, *supra* note 13, at 425 (noting that ABA did not set forth any disciplinary mechanisms to enforce the obligation); Burke et al., *supra* note 15, at 996 (noting that the Model Code did not contain any disciplinary rules regarding **pro bono**, nor did it set standards for how lawyers should fulfill their **pro bono** responsibility).

**34** ¶

Model Code of Prof'l Responsibility EC 2-25, *supra* note 33, cited in Rhode, *supra* note 13, at 425; see Escalera, *supra* note 20, at 1395 (noting that, in contrast to Canon 4 of the Canon of Professional Ethics, EC 2-25 was applicable to both criminal and civil cases).

**35** ¶

Rhode, *supra* note 13, at 425.

**36** ¶

*Id.* Instead of benefiting indigents, a majority of these contributions "went to friends, relatives, and employees of lawyers and their clients." *Id.*

**37** ¶

ABA, Development of ABA Model Rule 6.1: Historical Timeline, *supra* note 32. The Resolution defined **pro bono** service to include "poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice." *Id.*

**38** ¶

Escalera, *supra* note 20, at 1395.

**39** ¶

Burke et al., *supra* note 15, at 994. The proposed rule held that:

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

*Id.*

**40** Burke et al., supra note 15, at 994. One of the underlying reasons that the initial proposal was rejected was due to enforcement issues that would undoubtedly attach to a mandatory rule. Id. These issues included "the magnitude of corresponding reporting requirements, the failure of the rule to specify the amount of service required for disciplinary oversight, and the failure of the rule to exempt certain governmental lawyers." Id.

**41** Model Rules of Prof'l Conduct R. 6.1, infra note 55.

**42** Befort & Janus, supra note 2, at 3.

**43** Id.

**44** Id.

**45** Id. However, because these programs were not publicly funded, some viewed these programs as simply levying a tax on the practice of law. Id. at 3-4.

**46** Id at 4.

**47** Id.

**48** ABA, Development of ABA Model Rule 6.1: Historical Timeline, supra note 32.

**49** Id.

**50** Escalera, supra note 20, at 1395; see supra note 33.

**51** Rhode, supra note 13, at 426 (noting that the ABA rejected the idea of requiring **pro bono** service in both 1993 and again in 2001).

**52** ABA, Development of ABA Model Rule 6.1: Historical Timeline, supra note 32.

**53** Id.

**54** ABA, Development of ABA Model Rule 6.1: Historical Timeline, supra note 32. A major purpose of the amendment was to emphasize that a "substantial majority" of lawyers' **pro bono** responsibility should be fulfilled "through the provision of legal services to low-income people." Id.

**55** Model Rules of Prof'l Conduct R. 6.1 (2004); see American Bar Association, Rule 6.1: Voluntary **Pro Bono Publico** Servico, available at <http://www.abanet.org/legalservices/probono/rule61.html> (last visited Jan. 3, 2005) (comparing Model Rule 6.1 to the Model Code). Model Rule 6.1 has no counterpart in the Model Code. Id. Ethical Considerations 2-25, 8-9, and 8-3 is as close as the Model Code came to setting forth an ethical responsibility similar to Model Rule 6.1. Id. EC 8-9 acknowledged that ""the advancement of our legal system is of vital importance in maintaining the rule of law... [and] lawyers should encourage, and should aid in making, needed changes and improvements."" Id. Moreover, EC 8-3 advised that ""those persons unable to pay for legal services should be provided needed services."" Id. For EC 2-25, see supra note 33.

**56** ABA, Development of ABA Model Rule 6.1: Historical Timeline, supra note 32. The revision consisted of adding the language "every lawyer has a professional responsibility to provide legal services to those unable to pay" to the beginning of the rule. Id.

**57** See Model Rules of Prof'l Conduct R. 6.1 cmt. 12 (2004) (providing that "the responsibility set forth in this Rule is not intended to be enforced through [the] disciplinary process").

**58** Model Rules of Prof'l Conduct R. 6.1 cmt. 4 (2004).

**59** Model Rules of Prof'l Conduct R. 6.1 cmt. 4 (2004). The Comment does acknowledge, however, that "an award of statutory [lawyers'] fees" in a **pro bono** case falls within the realm of **pro bono** services rendered. Id.

**60** Id. at cmt. 9.

**61** Id.

**62** Id. The Comment provides that "such financial support should be reasonably equivalent to the value of hours of service that would have otherwise been provided." Id.

**63** Burke et al., supra note 15, at 998 (arguing that "collective satisfaction" is sufficient since it is the legal profession collectively that is obligated to provide uncompensated legal services to the poor).

**64** Isbell & Sawle, supra note 15, at 850.

**65** Id.

**66** Isbell & Sawle, supra note 15, at 850.

**67** Rhode, supra note 13, at 429; see also Rhode, supra note 22, at 2415 (noting that the ABA's failure to enhance **pro bono** participation is especially disheartening considering that "many of the nation's landmark public-interest cases" were the direct result of **pro bono** contributions).

**68** Rhode, supra note 13, at 429. Such information would be useful to the ABA in proposing initiatives that address the concerns of **pro bono** participation.

**69**

American Bar Association, Overview of State **Pro Bono** Reporting Policies, Strategies for Emphasizing **Pro Bono** Responsibility and Gather Data, available at <http://www.abanet.org/legalservices/probono/reporting.html> (last visited Jan. 3, 2005) (providing the three states that have mandatory **pro bono** reporting: Florida, Maryland, and Nevada).

**70**

See Rhode, *supra* note 13, at 429 (noting that "the definition of **pro bono** is often expansive and ambiguous"); see Model Rules of Prof'l Conduct R. 6.1, *supra* note 55.

**71**

Rhode, *supra* note 13, at 429; see Model Rules of Prof'l Conduct R. 6.1 cmt. 4, *supra* note 59.

**72**

See Rhode, *supra* note 13.

**73**

Rhode, *supra* note 22, at 2415; see *supra* note 36.

**74**

Adam Stone, **Pro Bono** Work on the rise, *Bus. J.*, Aug. 23, 2004, available at [http://www.bizjournals.com/industries/business\\_services/legal\\_services/2004/08/23/twincities\\_focus.html](http://www.bizjournals.com/industries/business_services/legal_services/2004/08/23/twincities_focus.html) (last visited Jan. 3, 2005).

**75**

See Scott L. Cummings, The Politics of **Pro Bono**, [52 UCLA L. Rev. 1, 33 \(2004\)](#) (documenting the institutionalization of **pro bono**).

**76**

*Id.*

**77**

See Burke et al., *supra* note 15, at 998; Elizabeth Stull, Small Firm Makes **Pro Bono** Mandatory, *N.Y.L.J.*, Dec. 13, 2004 (reporting on a twelve-person, Albany, New York law firm that recently introduced a mandatory firm wide **pro bono** program).

**78** ¶

See supra note 68; American Bar Association, News & Events, available at [http:// http://www.abanet.org/legalservices/probono](http://www.abanet.org/legalservices/probono) (noting that both Maryland and New York have provided annual reports on **pro bono** activities for 2002).

**79** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, supra note 19. Maryland revised its Rules of Professional Conduct in February of 2002 to mandate **pro bono** reporting. Id.

**80** ¶

Id. New York rejected mandatory reporting in 1994. Id.

**81** ¶

Id. The first state to adopt mandatory reporting was Florida in 1993. Id.

**82** ¶

Id.

**83** ¶

Id. The rule aspires for all lawyers to render fifty hours toward **pro bono** activities. Id.

**84** ¶

Id.

**85** ¶

Frank Broccolina, Admin. Office of the Court, Current Status of **Pro Bono** Service Among Maryland Lawyers, Year 2002 (2003) (page 12). The 2002 report embodies the first assessment of **pro bono** activities within the state of Maryland. Id. at i.

**86** ¶

Broccolina, supra note 85, at 12. This figure represents the average amount of time each lawyer rendered participating in **pro bono** activities in 2002. The amount of time that each lawyer whom actually reported participating in some **pro bono** activity (approximately 48% of the 30,024 lawyers) rendered participating in **pro bono** activities averaged slightly more than sixty-nine hours rendered per lawyer. However, the Report also indicates that 101 lawyers reported participating in **pro bono** work "full time," each rendering in excess of 1,000 hours of such service. Id. So while the average number of hours rendered among all licensed lawyers in the

state (thirty-three hours) was greatly reduced by the percentage of those who did not report any **pro bono** activity (approximately 52%), the average number of hours rendered among those who did report some **pro bono** activity (sixty-nine hours) was similarly inflated by the 101 lawyers reporting to have done **pro bono** work full time (reporting to have rendered 1,000 hours or more of **pro bono** service). But see supra note 63.

**87** ¶

Id. at 16. \$ 2,208,001 was contributed to these organizations in 2002, for an average of approximately \$ 73.50 per lawyer. Id.

**88** ¶

Id. at 18. This averaged out to approximately thirteen and one half hours per lawyer.

**89** ¶

Id. at 21.

**90** ¶

Broccolina, supra note 85, at 8.

**91** ¶

Id. at 13.

**92** ¶

Broccolina, supra note 85, at 20.

**93** ¶

Id. at 21 (indicating the most significant of these to be "lawyers in criminal and government law practice" and "lawyers in jurisdictions with a larger population").

**94** ¶

Broccolina, supra note 85, at 13.

**95** ¶

Id.

**96** ¶

Id.

**97** Id. at 24.

**98** Broccolina, *supra* note 85, at 24.

**99** ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, *supra* note 19 (believing that the adoption of a mandatory reporting requirement "would be the first step toward mandating **pro bono** service").

**100** New York State Unified Court System, Report on the 2002 **Pro Bono** Activities of the New York State Bar, 1 (Jan. 2004).

**101** Id. Similar to the expectations of the Maryland Bar, *infra* note 98, New York hoped that the results of the 1997 survey would establish a standard by which its Bar could assess both current and future levels of **pro bono** participation within the state. Id.

**102** Id. New York lawyers averaged nearly forty-two hours performing "qualified **pro bono** services" in 1997. Id. at iii. "Qualified **pro bono** services" is defined in the Resolution as:

professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; [or]

professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons. Id. at 1.

**103** New York State Unified Court System, *supra* note 100.

**104** Id. at 2. **Pro bono** efforts immediately intensified, with many lawyers providing such services for the first time in their career. Id.

**105** New York State Unified Court System, *supra* note 100, at 2. In doing so, New York became only "the third state in the nation to grant lawyers CLE credit for **pro bono** service." *Id.* However, CLE credit is only available for "qualified" **pro bono** services. *Id.* at 23. Moreover, the 2002 Report revealed that less than 5% of the New York Bar fulfilled their CLE requirements by providing **pro bono** services. *Id.* at 16.

**106** *Id.* at 2. An additional motivation for the 2002 survey was to examine the "full range of initiatives aimed at encouraging **pro bono** service and expanding the availability of legal services to the poor." *Id.* Analogous to the 1997 survey, the 2002 survey was based upon a "10% random sample... of the New York Bar." *Id.* at 3. The obvious reason for this is that **pro bono** reporting is not required in New York. See *supra* note 99.

**107** New York State Unified Court System, *supra* note 100 at iii, 9. Thus, despite the increase in **pro bono** participation experienced following the events of September 11th, the results from the 2002 survey are nearly identical to the results from the 1997 survey. *Id.* Undoubtedly, this is not the result the New York Bar was expecting to find.

**108** *Id.* at iv, 9. The average contribution did increase from \$ 191 in 1997 to \$ 212 in 2002, but unfortunately this "rate of change is comparable to the rate of inflation during the five-year interval between surveys." *Id.* at 12. Again, these figures are comparable to those experienced in 1997. *Id.* at 9.

**109** *Id.* at 9. More than 34% of New York's **pro bono** efforts involved "civil matters," while less than 10% were assisting indigents in "criminal matters." *Id.* See *supra* note 92. These particular results are similar to those experienced by the Maryland Bar. *Id.*

**110** *Id.* at 16.

**111** *Id.* at 16 (indicating that these lawyers shouldered approximately 78% of the state's **pro bono** efforts).

**112** *Id.* In New York, "small firms" consist of firms with ten lawyers or less, "mid-size firms" range from firms with eleven lawyers to

firms with one hundred lawyers, and "very large firms" employ at least one hundred lawyers. Id. See supra notes 74 and 77.

**113** ¶

New York State Unified Court System, supra note 100. Presumably, the majority of law school faculty engaged in "non-qualifying" **pro bono** services. See supra note 102.

**114** ¶

Id. This is one of the few factors that distinguish **pro bono** participation in New York from similar participation in Maryland.

**115** ¶

Id. at iii.

**116** ¶

Id. Many participants reported that their malpractice insurance simply did not cover representing clients on a **pro bono** basis. Id. at 18.

**117** ¶

Id. at iv. "Non-qualifying" **pro bono** activities are those that fail to meet the **pro bono** definition as stated in the Resolution. Id. at 1.

**118** ¶

New York State Unified Court System, supra note 100, at 24.

**119** ¶

New York State Unified Court System, supra note 100, at iii. The Bar is also hopeful that positive experiences in post-September 11th **pro bono** contributions will have a lasting impact on its **pro bono** efforts. Id. at 24. However, if the 2002 Report is any indication of the impact September 11th had on **pro bono** participation in New York, the Bar may be overly optimistic that a residual impact can be sustained.

**120** ¶

Id. at 20. Not surprisingly, the overwhelming majority felt that **pro bono** should not be made mandatory. Id. at 23. However, many responded that allowing CLE credit for "non-qualifying" in addition to "qualifying" **pro bono** services could entice more lawyers to participate in **pro bono**. Id. Moreover, suggestions were made that enhancement of New York's "**pro bono** program" would provide more lawyers with the necessary resources to undertake their **pro bono** obligations. Id.

**121** Id. at 24.

**122** New York has a higher percentage of its bar (nearly 27%) fulfilling the state's aspirational goals concerning **pro bono** services (as compared to Maryland's 18%), but this difference is likely the result of a lower aspirational goal in New York (twenty hours of **pro bono** service) than in Maryland (fifty hours of **pro bono** service).

**123** Rhode, supra note 13, at 430.

**124** Id.

**125** Id.

**126** Id.

**127** Rhode, supra note 22, at 2418.

**128** Id. The Supreme Court has acknowledged that "the right to sue and defend is the right that protects all other rights." Id. These basic needs include "food, housing, and medical care." Id.

**129** Id.

**130** Id. The "justice system is designed by and for lawyers," leaving those without legal representation at a considerable disadvantage. Id. Not surprisingly, the poor constitute a large portion of those disadvantaged under our current system. Id.

**131** But see Rhode, supra note 13, at 432 (noting many lawyers' justification is that "if access to law is a societal value, society as a whole should bear its costs;" the poor have fundamental needs for

other of life's necessities, but society does not require those who provide such necessities to provide their resources free of charge in satisfying those fundamental needs).

**132** Rhode, *supra* note 13, at 431.

**133** *Id.* **Pro bono** can be especially beneficial for young associates who have little experience in the practice of law. *Id.* Admittedly, however, the underlying purpose of Model Rule 6.1's aspirational calling is not for young associates to "get their feet wet."

**134** *Id.* at 432; see Rhode, *supra* note 22, at 2420 (noting that a recent survey indicated that "nearly half of nonlawyers believed that providing free legal services would improve the profession's image").

**135** Rhode, *supra* note 13, at 432.

**136** *Id.*

**137** See *supra* note 74 (indicating that "the biggest challenge in increasing the volume of **pro bono** services is in putting those opportunities in front of [lawyers]... making it easier for [lawyers] to connect with [particular] **pro bono** situations").

**138** Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York, (1990), cited in Rhode, *supra* note 22, at 2419. See Burke et al., *supra* note 15, at 987-988. There are a variety of justifications for requiring lawyers to provide **pro bono** services. *Id.* First, the poor have unmet needs that lawyers have an obligation to fulfill; lawyers, by their professional calling, "can be compelled to assist in the administration of justice." *Id.* Next, lawyers are "impliedly obligated to render **pro bono** services" as a result of the legal profession's "monopoly over the practice of law." *Id.* Moreover, it is the profession's ethical obligation to provide such services. *Id.* And lastly, lawyers can be required to provide **pro bono** services "because of the inherent power of the courts to compel service." *Id.* See also Escalera, *supra* note 20, at 1397 (putting forth a Christian lawyer's mandate to provide **pro bono** services, arguing that "lawyers have inherited from the clergy the duty to represent and assist the indigent").

**139**

See generally Rhode, *supra* note 13, at 414-416. The article notes that the majority of **pro bono** services provided by the legal profession is not based on altruistic intentions, which, in its authentic form, is defined as "an unselfish regard for the welfare of others." *Id.* Rather, lawyers provide these services out of "personal desires for recognition, contacts, experience, and clients' good will, or in response to shared concerns about their employer's reputation and community relations." *Id.* The article then suggests that lawyers "who provide legal assistance because it expresses deeply felt values or because they empathize with the client are more likely to do their best than those who are merely fulfilling academic requirements or hourly billing quotas." *Id.* While acknowledging that "pure unselfishness is an unrealistic ideal," it is proposed that altruistic motivations "increase the likelihood of sustained charitable involvement" and ultimately enhances the individual lawyer's efforts. *Id.* Moreover, the article cites an assortment of studies that have found volunteering on a regular basis to be linked "with both physical and mental health." *Id.* See also Escalera, *supra* note 20, at 1398-1401 (indicating a heightened obligation for Christian lawyers, whose "involvement in **pro bono**... services entails more than personal reward or career enhancement;" the obligation "derives from a religious commitment" that applies irrespective of the legal profession's aspirational calling). Ultimately, financial incentives should be considered in attempts to increase **pro bono** participation. Although the adequacy of representation in **pro bono** cases may be a corollary issue, the main objective of **pro bono** obligations is to provide free legal assistance to those who need it. This should not be construed to mean that representation in **pro bono** cases should be second rate; the point is that simply getting representation to those that otherwise would not have any is an advantage over no representation at all. See *supra* note 130.

**140**

This section is an overview of the incentives currently available for promoting **pro bono** participation among the legal profession. As such, mandatory **pro bono** participation will not be included in this discussion. Compare Merriam Webster's Collegiate Dictionary 587 (10th ed. 1993) (defining "incentive" as "something that incites or has a tendency to incite to determination or action") with Merriam Webster's Collegiate Dictionary 706 (10th ed. 1993) (defining "mandatory" as "containing or constituting a command: obligatory").

**141**

Admittedly, **pro bono** reporting - whether it be mandatory or voluntary - is not per se an incentive for lawyers to participate in **pro bono** activities. It is, however, an effective tool for assessing the level of **pro bono** participation, using this information to develop better initiatives for **pro bono** enhancement. **Pro bono** reporting is also very useful in bolstering the public's perception of the legal profession, by publicizing the legal profession's **pro bono** efforts among the general public. Moreover, in making individual lawyer's **pro bono** contributions public knowledge, those who fail to actively participate, and who fear the public backlash associated with such non-participation, may be induced into participating in the future.

Thus, **pro bono** reporting systems should be considered at the very least a quasi-incentive for lawyers to participate in **pro bono** activities. See ABA, Arguments For and Against **Pro Bono** Reporting, *infra* note 157 (recognizing peer pressure as an effective means for enhancing **pro bono** participation).

**142** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, *supra* note 19. **Pro bono** reporting systems provide the information that is necessary for proposing effective initiatives aimed at increasing the availability of free legal services to the poor. *Id.*

**143** ¶

*Id.*

**144** ¶

*Id.*

**145** ¶

*Id.* **Pro bono** reporting systems allow state Bars to fairly accurately evaluate the "quantity and nature of lawyers' **pro bono** activities" for a given time period. *Id.*

**146** ¶

*Id.*

**147** ¶

*Id.*; see *supra* note 46.

**148** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, *supra* note 19.

**149** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, *supra* note 19. **Pro bono** reporting systems "requiring" lawyers to report are referred to as "mandatory" reporting systems, while those simply encouraging lawyers to "voluntarily" report the information are referred to as "voluntary" **pro** reporting systems. *Id.*

**150** ¶

See ABA, Overview of State **Pro Bono** Reporting Policies, Strategies for Emphasizing **Pro Bono** Responsibility and Gather Data, supra note 69; ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, supra note 19. Florida was the first to implement any sort of **pro bono** reporting system in 1993, when it put its mandatory reporting system into practice. Id. Maryland was the next state to implement a mandatory reporting system, though not until nine years later in 2002. Id. Thirteen states currently have voluntary **pro bono** reporting systems in place: "Kentucky and Texas have had voluntary reporting systems in place since 1992; Arizona implemented its system in 1994; Hawaii in 1995; New Mexico in 1996; Georgia, Illinois, and Missouri in 1997; Louisiana, Mississippi, and Utah in 1998; Virginia in 1999; and Montana in 2000." Id. In addition, three states - Michigan, Vermont, and Washington - are considering the adoption of a voluntary reporting system. Id. See also American Bar Association, News & Events: Nevada Supreme Court Makes Annual **Pro Bono** Reporting Mandatory, available at <http://www.abanet.org/legalservices/probono/> (last visited Jan. 3, 2005) (noting that Nevada became the third state to require members of its Bar to submit annual reports regarding **pro bono** activities in 2003; the new requirement, as adopted, urges lawyers to render "a minimum of [twenty] hours annually of free **pro bono** services, sixty hours of services at reduced fees to persons of limited means, or a minimum of \$ 500 yearly to organizations providing **pro bono** services").

**151** ¶

See generally ABA, Overview of State **Pro Bono** Reporting Policies, Strategies for Emphasizing **Pro Bono** Responsibility and Gather Data, supra note 69 (indicating that eight states - Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee, and Utah - have rejected a mandatory **pro bono** reporting system; and of these states, only Utah has adopted a voluntary **pro bono** reporting system).

**152** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, supra note 19. The amended rule indicates that lawyers "must complete a portion of the annual membership dues statement by reporting the number of hours of **pro bono** legal services performed during the year." Id. Though lawyers are not required to provide **pro bono** services, failure to file a report regarding the extent of their **pro bono** activities "constitutes a disciplinary offense." Id. However, it is interesting to note that no action has even been taken against a lawyer who failed to report. Id.

**153** ¶

Isbell & Sawle, supra note 15, at 860; see ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering

Strategies for Expanding **Pro Bono**, supra note 19 (noting that amendment was affirmed by the Supreme Court in 1997).

**154** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, supra note 19.

**155** ¶

Isbell & Sawle, supra note 15, at 860-861 (noting that Florida has experienced a 30% increase in **pro bono** hours and a 65% increase in monetary contributions since the system was adopted in 1993).

**156** ¶

Maryland in 2002, and Nevada in 2003. The results from Maryland's first experience with a mandatory reporting system is discussed supra III(A)(1). Nevada, having only recently implemented their system, is still anticipating their results.

**157** ¶

American Bar Association, Arguments For and Against **Pro Bono** Reporting, available at <http://www.abanet.org/legalservices/probono/reportingarguments.html> (last visited Jan. 3, 2005). There have been various arguments put forth in favor of mandatory **pro bono** reporting, including: "promotes involvement in **pro bono**; promises high rates of reporting; creates positive peer pressure; provides data essential for design of successful programs; promotes increased access to the courts; is inexpensive; enables recognition of contributing lawyers; facilitates engendering confidence in the bar; allows comprehensive demographics to be collected; encourages fulfillment of professional responsibility and can raise consciousness about professional responsibility; and can raise awareness of the need for free or reduced legal fees and the opportunities for **pro bono** involvement," among various other arguments put forth in favor of mandatory reporting or **pro bono** activities. *Id.* Contrarily, various arguments have been put forth opposed to mandatory **pro bono** reporting, including: "it violates constitutional right to privacy and right to be free from involuntary servitude; invites political opposition; is difficult to find support; is unnecessary and counterproductive; does not serve the public interest; is an onerous responsibility for lawyers; invites negative peer pressure; allows the public and the press to use the information to criticize the bar; is difficult to determine what type of discipline is appropriate; administrative costs involved in collecting and processing the information would be high and thus is a financial burden on the state; **pro bono** could ultimately become a negative rather than a positive concept if members of the bar express opposition; and finally, its true motive is to persuade or shame lawyers into doing **pro bono** work," among various other arguments opposed to mandatory **pro bono** requirements. *Id.* But see Katja Cerovsek & Kathleen Kerr, Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent, *17 Geo. J.*

[Legal Ethics 697, n. 32 \(2004\)](#). (indicating that the constitutional arguments most commonly raised in opposition of mandatory **pro bono** - that mandating **pro bono** service "constitutes involuntary servitude prohibited by the Thirteenth Amendment; violates the Fifth Amendment as a taking of property without just compensation; violates equal protection under the Fourteenth Amendment; and violates First Amendment freedom of association" - have been rejected by the courts); Rhode, *supra* note 13, at 428 (noting that, with respect to Thirteenth Amendment claims of involuntary servitude, "a well-settled line of precedent holds that [such] prohibitions extend only to physical restraint or confinement... [since] the sanctions for refusal [to accept] **pro bono** [appointments] have not included incarceration").

**158** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, *supra* note 19. New York rejected a mandatory **pro bono** reporting policy in 1994 on the basis that it would be "the first step toward mandatory **pro bono** service," as did Colorado in 1999. *Id.* Massachusetts rejected a similar initiative in 1998, but based its rejection due on capacity constraints. *Id.* Utah also rejected a mandatory reporting system in 1998; Utah's proposed rule "did not pose a disciplinary threat, but instead precluded license renewal for noncompliance." *Id.* Finally, Minnesota rejected a mandatory reporting policy in 1999, essentially concluding that a mandatory **pro bono** reporting system would have little effect on the level of **pro bono** participation within the state. *Id.*

**159** ¶

*Id.*

**160** ¶

*Id.*

**161** ¶

See American Bar Association, *supra* note 69.

**162** ¶

*Id.* (evidenced by the fact that thirteen states have adopted a voluntary reporting system against only three states that have adopted a mandatory reporting system).

**163** ¶

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, *supra* note 19. Under this reporting system, lawyers are not required to divulge their **pro bono** involvement. *Id.* Consequently, these reporting

systems are mostly incapable of assessing the comprehensive status of **pro bono** participation. Id.

**164** Id.

**165** Id. In 2002, the highest reported response rate generated under a voluntary **pro bono** reporting system was Texas at slightly more than 29%. Id.

**166** ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, supra note 19. Florida's response rates are almost triple that of Texas. Id.

**167** See Isbell & Sawle, supra note 15, at 862 (arguing that it is "likely that if compliance with voluntary [**pro bono**] reporting is low, then compliance with voluntary **pro bono** service rules is also low").

**168** See ABA, Arguments For and Against **Pro Bono** Reporting, supra note 157 (providing various arguments against voluntary **pro bono** reporting, including: "its ineffective; promotes low response rates; collects insufficient data to draw valid conclusions; does not encourage or promote fulfillment of lawyers' professional responsibility to provide equal access to the justice system;" and is generally a waste of time, effort, and resources, among other things).

**169** See supra note 162.

**170** See ABA, Arguments For and Against **Pro Bono** Reporting, supra note 157 (providing various arguments in favor of voluntary **pro bono** reporting, including: "its optional nature is not a burden on lawyers; no threat to constitutional rights; easy to implement; inexpensive; allows for the collection of demographics, whatever its value; can raise awareness of the need for free or reduced legal services;" and ultimately can lead to increased **pro bono** participation, among other things).

**171**

ABA, State **Pro Bono** Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding **Pro Bono**, supra note 19 (acknowledging the number of states currently employing voluntary reporting systems).

**172**

Id.

**173**

See generally American Bar Association, Summary - ABA **Pro Bono** & Public Service Awards, available at <http://www.abanet.org/legalservices/probono/abaawards.html> (last visited Jan. 3, 2005).

**174**

American Bar Association, ABA **Pro Bono Publico** Award - Program Overview, available at <http://www.abanet.org/legalservices/probono/probonopublicoaward.html> (last visited Jan. 3, 2005).

**175**

American Bar Association, ABA **Pro Bono Publico** Award - Program Overview, available at <http://www.abanet.org/legalservices/probono/probonopublicoaward.html> (last visited Jan. 3, 2005).

**176**

American Bar Association, Nomination Form, available at <http://www.abanet.org/legalservices/probono/2005nominationsolicitationweb.pdf> (last visited Jan. 3, 2005). Eligible candidates include lawyers "who do not obtain their income delivering legal services to the poor." Id. Legal institutions whose members have demonstrated an exemplary commitment to the provision of **pro bono** services are also eligible for the awards. Id.

**177**

ABA, ABA **Pro Bono Publico** Award - Program Overview, supra note 174; see American Bar Association, ABA **Pro Bono Publico** Award - Current Recipients, available at [http://www.abanet.org/legalservices/probono/pbp\\_current&uscore;recipients.html](http://www.abanet.org/legalservices/probono/pbp_current&uscore;recipients.html) (last visited Jan. 3, 2005). In light of the true incentive underlying achievement awards, here is a listing of the 2004 award recipients: Roy E. Barnes, Atlanta; Stephen Cullen, Towson, Maryland; Toby H. Hollander, Portland, Maine; Warren Sinsheimer, New York; and [Arnold & Porter LLP](#) ▼, Washington, D.C. Id.

**178** ¶

Namely, the enhancement of the legal profession in the public persona, and more importantly, the promotion and encouragement of **pro bono** participation within the profession.

**179** ¶

American Bar Association, Policies - State CLE/**Pro Bono** Rules, available at <http://www.abanet.org/legalservices/probono/clerules.html> (last visited Jan. 3, 2005).

**180** ¶

Id. (noting that of the seven states that have experimented with this idea, only two states - Arizona and Vermont - have either rejected the initiative or simply not pursued it further).

**181** ¶

Id. The five states that have adopted this strategy are: Delaware, New York, Tennessee, Washington, and Wyoming. Id.

**182** ¶

Id. The formulas range from one hour of CLE credit for every five billable hours (Wyoming) to one hour of CLE credit for every eight billable hours (Tennessee), with the mean being one hour of CLE credit for every six billable hours. Id. In addition, every state has a cap on the number of CLE credits that can be earned annually for rendering **pro bono** services, with the majority capping such credit at three per year. Moreover, in most cases CLE credit can only be earned for participating in "qualified" **pro bono** activities, i.e. rendering free legal assistance to low-income clients. Id.

**183** ¶

This is typically accomplished by attending workshops and seminars throughout the year, most of which focuses on improving lawyers' knowledge of the law, keeping lawyers current on legal developments, and improving lawyers' abilities to interact with their clients, the courts, and one another.

**184** ¶

See supra notes 15 and 127.

**185** ¶

See generally Rhode, supra note 13, at 435 (suggesting that CLE credit could be awarded for the "time spent in training for **pro bono** work," in addition to allowing lawyers to earn CLE credit for actually performing **pro bono** services).

**186** Low-income clients receive the legal advice they so desperately need, while lawyers are able to satisfy both their mandatory CLE requirements and their ethical **pro bono** responsibilities.

**187** See Interview with Haag, supra note 4 (indicating that, in his opinion, allowing lawyers to fulfill their mandatory CLE requirements through **pro bono** work would be the only way to get "good" lawyers to participate in **pro bono** activities).

**188** But see supra note 139.

**189** See supra note 105.

**190** See supra note 15.

**191** See supra note 45; Interview with Doug Haag, supra note 4 (referring to **pro bono** as a "tax on lawyers").

**192** See supra note 131.

**193** See supra note 131

**194** See supra note 138.

**195** Black's Law Dictionary, 695 (2d pocket ed. 2001).

**196** Webster's Dictionary (Online), available at <http://www.websters-dictionary-online.net/definition/english/Ta/Tax+Credit.html> (last visited Jan. 3, 2005).

**197** Id. Contrary to a tax deduction, a tax credit reduces the tax itself.

**198** See Black's Law Dictionary, supra note 195, at 695 (defining a "tax incentive" as "a governmental enticement, through a tax benefit, to engage in a particular activity"); IRS.gov, The Difference Between a Tax Credit and a Tax Deduction, available at <http://www.vcnet.com/carlson/deduction.html> (last visited Jan. 3, 2005) (exemplifying the superiority of a tax credit as compared to a tax deduction).

**199** Webster's Dictionary (Online), supra note 196.

**200** Id.

**201** Id.

**202** Id.

**203** Though it is doubtful that a tax credit for **pro bono** participation would reduce most lawyers' tax liability below zero, the overarching objective of a **pro bono** tax credit is to entice lawyers to provide additional legal services to the poor, not to enable lawyers to avoid taxation altogether. In any event, a tax refund is not the result a **pro bono** tax credit is designed to effectuate.

**204** CompleteTax, Federal Income Tax Credits Available,, available at <http://taxguide2002.completetax.com/text/c60s15d765.asp?style=> (last visited on Jan. 3, 2005).

**205** CompleteTax, Federal Income Tax Credits Available,, available at <http://taxguide2002.completetax.com/text/c60s15d765.asp?style=> (last visited on Jan. 3, 2005). "Credits for certain taxes" refer to tax credits available to neutralize certain tax consequences. Id. The most prominent among these are the FICA taxes levied on the tips restaurant employees receive and certain applicable foreign taxes, among others. Id. "Credits for activities that benefit

disadvantaged or low-income persons" refer to tax credits intended to relieve the tax burden of specific groups of people, including the welfare-to-work credit and the low income housing credit, among others. Id. "Credits for activities that benefit the environment" are among the most expansive of all the tax credits currently available. Id. The main objective of these tax credits is the preservation of the environment. Id. Such credits include the alternative fuels credit, the reforestation credit, and the energy credit, among others. Id. Finally, "credits for certain other investments" are the least inclusive form of tax credits currently available, and they refer to "investments that are deemed socially beneficial." Id. Among the more notable of these tax credits are the rehabilitation credit and the research and development credit. Id.

**206** ¶

CompleteTax, Credits Benefiting Disadvantaged Groups,, available at <http://taxguide2002.completetax.com/text/c60s15d775.asp?style=> (last visited on Jan. 3, 2005).

**207** ¶

Wisconsin Department of Workforce Development, Tax Credits for Employees, available at <http://www.dwd.state.wi.us/dws/bjs/taxcredit/othertaxcredits.htm> (last visited Jan. 3, 2005).

**208** ¶

Wisconsin Department of Workforce Development, Tax Credits for Employees, available at <http://www.dwd.state.wi.us/dws/bjs/taxcredit/othertaxcredits.htm> (last visited Jan. 3, 2005). EIC can be claimed for adjusted gross income as high as \$ 35,000, depending on the individual's marital status and the number of qualifying children. Id. EIC allows a maximum credit of \$ 2,604 for workers with one child, and \$ 4,300 for workers with two or more children; the maximum credit allowed is much smaller for individuals with no children - \$ 390. Id. Moreover, even workers who did not pay income taxes during the year can receive EIC benefits. Id.

**209** ¶

Id.

**210** ¶

Wisconsin Department of Workforce Development, Tax Credits for Employees, supra note 207.

**211** ¶

Id.

**212** Id.

**213** In addition to tax credits, other tax incentives are designed with the same policy implications in mind, including the betterment of society as a whole.

**214** Senator John Warner, Warner Introduces Teacher Relief Act of 2002, available at <http://www.senate.gov/diff/warner/pressoffice/pressreleases/20020620.htm> (last visited Jan. 3, 2005). The Teacher Tax Relief Act of 2002 was designed with the intent of increasing the tax benefits available to teachers, by increasing the tax deduction from \$ 250 to \$ 500. Id. In advocating for this amendment, Senator Warner acknowledged:

Our teachers have made a personal commitment to educate the next generation and to strengthen America. While many people spend their lives building careers, our teachers spend their careers building lives. The Teacher Tax Relief provisions in this bill go a long way towards providing our teachers with the recognition they deserve by providing teachers with important and much needed tax relief.

Kathleen Alape Carpenter, Teacher Tax Relief Act Leaves Many Teachers Behind, available at <http://teachers.net/gazette/FEB03/covera.html> (last visited Jan. 3, 2005).

**215** Warner, Warner Introduces Teacher Relief Act of 2002, supra note 214. Current estimates indicate that "the average teacher spends \$ 521 out of their own pocket each year on classroom materials." Id.

**216** Admittedly, there is a significant disparity between teachers' salaries and lawyers' salaries, but the underlying purpose - providing essential services to targeted beneficiaries - of each tax incentive, respectively, remains congruent. See Warner, Warner Introduces Teacher Relief Act of 2002, supra note 214 (noting that the financial burden teachers encounter in providing education to our nation's youth cause many teachers to give up the fight and leave the profession altogether). This seems to suggest that the benefit to teachers may be more prevalent than previously indicated. But see Carpenter, Teacher Tax Relief Act Leaves Many Teachers Behind, supra note 214 (indicating that the amount of the deduction, \$ 500, is so small in comparison to what teachers spend out-of-pocket that the Act does little to provide the tax relief which it purports to provide). Thus, it appears that the primary goal of the Act is to

improve educational standards by providing some tax relief for teachers that purchase classroom supplies out-of-pocket.

**217** ¶

See Carpenter, Teacher Tax Relief Act Leaves Many Teachers Behind, *supra* note 214 (indicating that eligible recipients include "teachers, instructors, counselors, principals or aides in both public and private schools in grades K-12 who have worked at least 900 hours in elementary or secondary education during the school year"); Warner, Warner Introduces Teacher Relief Act of 2002, *supra* note 214.

**218** ¶

See generally [I.R.C. 25A](#) (referring to the Hope and Lifetime Learning Credits, which enable secondary-education students to claim a tax deduction for portions of their qualified education expenses).

**219** ¶

See Section IV, *supra*.

**220** ¶

See *supra* note 198.

**221** ¶

Since lawyers' salaries greatly vary, an incentive for one lawyer may not be an incentive for another. The optimal limitation, therefore, would have to balance these considerations.

**222** ¶

The hourly rate would likely be a predetermined statutory amount, although it could also be computed as a percentage of the individual lawyer's "normal rate." For the purposes of the model set forth here, a predetermined amount will be used in calculating the total tax credit.

**223** ¶

Thus, for every hour rendered in **pro bono** services in a given year, a lawyer would be able to bill \$ 100 towards his or her tax credit for that year. Again, this "billable amount" has no bearing on the client, as the client would not be billed for these services.

**224** ¶

See *supra* note 182. However, a strong argument can be made that current "CLE credit for **pro bono** services rendered" formulas have yet to achieve their optimal objective, as evidenced by the ineffective impact such initiatives have made on **pro bono**

participation levels in those states in which such initiatives have been implemented. Nonetheless, the overarching point is that the hourly rate for the proposed **pro bono** tax credit should be a fixed, statutory amount, which is lower than most lawyers' hourly rates, and thus comparable to the billable hour/CLE credit equivalency under the varying CLE incentives.

**225**

A limitation set too low will result in the **pro bono** tax credit having little impact on **pro bono** participation, while a limitation set too high, though it undoubtedly would increase lawyers' participation in **pro bono** activities, would likely be criticized for essentially allowing lawyers to avoid income taxation.

**226**

See Model Rules of Prof'l Conduct R. 6.1, supra note 55. The \$ 5,000 limitation is computed as follows: fifty hours of **pro bono** services rendered annually multiplied by the predetermined hourly rate of \$ 100.

**227**

The \$ 5,000 limitation appears significant enough to entice lawyers to render enough **pro bono** services to reach this limitation, while tolerable enough for the IRS to allow lawyers to claim this amount against their tax liability for the year such services were rendered.

**228**

Undoubtedly, a **pro bono** tax credit would likely include an income restriction, as most tax credits contain similar restrictions. This model proposes not placing such a restriction on the credit, as it seems incongruent with the spirit of the tax credit. Nonetheless, should an income restriction be required, the restriction would have to be placed at a high enough amount to ensure that a majority of the legal profession would be able to reap the benefits of the tax credit. If placed too low, such a restriction would completely undermine the purpose of the tax credit, thus limiting the credit's ultimate impact on **pro bono** participation.

**229**

See supra notes 15 and 46.

**230**

This methodology is akin to that of allowing CLE credit for **pro bono** services rendered. See supra IV(C).

**231** ¶

See Model Rules of Prof'l Conduct R. 6.1, supra note 55; but see supra note 139.

**232** ¶

The positive impact would result from lawyers having to render at least fifty hours of **pro bono** service in order to receive the full amount of the tax credit. The \$ 5,000 limitation would entice lawyers to render at least fifty hours of **pro bono** service, which would satisfy the ABA's aspirational goal. Accordingly, a positive perception of **pro bono** could also lead to greater participation in **pro bono** activities.

**233** ¶

See supra note 198.

**234** ¶

It is inevitable that a \$ 5,000 tax credit will have little to impact on certain lawyers' tax liability. Although these lawyers would still be able to claim this credit against their taxable income (the full \$ 5,000), the benefit of receiving the credit would be outweighed by the amount of "true" billable hours they sacrificed in order to serve the needs of the poor. This is a classic example of opportunity costs. It is worth noting, however, that these lawyers would still receive the full benefit of the **pro bono** tax credit. The problem with this is that the tax benefit would be overshadowed by the value their services could have generated in pursuit of other, more lucrative opportunities.

**235** ¶

Especially in light of recent, good-natured estimates suggesting that by the year 2020 there will be more lawyers in the world than people.

**236** ¶

Since a majority of lawyers live fairly comfortable lives, allowing the legal profession to enjoy additional tax benefits by satisfying the needs of the poor may not sit well with the consciences of some.



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