Pro Bono Publico in Oklahoma: Time for Change

Judith L. Maute

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PRO BONO PUBLICO IN OKLAHOMA:
TIME FOR CHANGE

JUDITH L. MAUTE*

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Introduction

[The term "profession"] refers to a group . . . pursuing a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.1

"Pro bono publico" — Latin for, "for the public good," or "for the welfare of the whole" — is a traditional hallmark of the legal profession. Because only licensed attorneys are authorized to engage in the practice of law, the profession recognizes its collective obligation to provide legal services to the public at large, even to those who cannot pay.2 Pro bono work is considered one factor that distinguishes the legal profession from other forms of self-interested business pursuit.4

Some Oklahoma lawyers provide legal services without charge to persons who cannot afford to pay. Periodically — often in response to a crisis — the organized bar has voiced support to expand legal services for the poor.5 In 1987, the Oklahoma Bar Association (OBA) joined forces with Oklahoma's legal service agencies to evaluate local pro bono efforts. The resulting progress report found that pro bono efforts by private attorneys "were spotty and lacked statewide coordination. Many counties lacked volunteers, while in other counties volunteer attorneys had no access to a legal services program to screen and refer

3. Indeed, it is argued that lawyers' professional responsibility to provide pro bono legal services is given in exchange for their exclusive monopoly to practice law. The state grants a legal monopoly in exchange for lawyers, as officers of the court, discharging their duty to further equality before the law. After all, the very reason the state conferred such a monopoly was so that justice could be served — a notion that surely means that even those unable to pay or those pursuing an unpopular cause can expect legal representation. A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.
5. See, e.g., Dan Murdock, One Year Anniversary: Oklahoma Attorneys Assist Tornado Victims by Donating Legal Services, 71 Okla. B.J. 1082, 1082 (2000) (reporting that over 200 attorneys assisted 650 tornado victims, which exceeded the disaster response effort after Murrah Building bombing).
clients.6 David Petty and Burck Bailey, OBA Presidents in 1987 and 1988, actively recruited members to join pro bono panels throughout the state.7 Because of those efforts, almost thirteen hundred Oklahoma attorneys agreed to serve on local pro bono panels.8 After this recruitment drive, only 13.6% of Oklahoma lawyers reported participating in pro bono activities, trailing behind the national average of 17.7%.9 Statewide coverage remained spotty. Seventeen counties had one or no lawyers agreeing to participate; and 61% of the volunteer attorneys were concentrated in Tulsa and Oklahoma counties.10 The situation has not improved measurably since then. Current economic pressures to increase lawyers' profitability, in some places, may be reducing pro bono involvement.11

Upon recommendation of the OBA Legal Services Committee, in 1996 the Board of Governors authorized the creation of a task force to study and recommend how best to deliver legal services in light of federal funding cuts.12

6. OBA Legal Services Comm., Statewide Pro Bono: A Progress Report, 59 OKLA. B.J. 2827, 2827 (1988) [hereinafter OBA Pro Bono Progress Report]. Legal Aid of Western Oklahoma, Legal Services of Eastern Oklahoma, and Oklahoma Indian Legal Services have regularly experienced drastic budget cuts due to decreased federal support of the Legal Services Corporation. See 1981 LEGAL SERVICES CORPORATION ANNUAL REPORT 7; see also Janet S. Kole, Legal Services Corporation Struggles to Survive, 8 LITIGATION NEWS 3 (1983). In response, the local programs actively seek alternative ways to provide legal services to the indigent population, seeking other funding sources and coordinating volunteer training and referral programs. See LEGAL AID OF WESTERN OKLA., FACT SHEET 4 (1991); LEGAL SERVS. OF EASTERN OKLA., 1999 ANNUAL REPORT 2; C. Steven Hager, Annual Report of Oklahoma Indian Legal Services (forthcoming 2001) (on file with author).

7. See id. at 2827.

8. See id. (stating that more than 1299 volunteers out of 9000 Oklahoma attorneys participate in panels).

9. See id. at 2828.

10. See id. at 2827-29.

11. Compare Karen Hall, Little Wacholles: Gross Revenues Are Fine but Healthy Profits Per Partner Can Put Smaller Firms Among the Elite, AM. LAW., Aug. 2000, at 94, 96 (reporting that within "second hundred" high grossing law firms, those with highest per partner profit rankings logged "much-lower-than average" pro bono hours) and Greg Winter, Legal Firms Cutting Back on Free Services for Poor, N.Y. TIMES, Aug. 17, 2000, at A1 (reporting that lawyers at 100 highest-grossing firms each provided an average of 36 hours pro bono work in 1999, down from 56 hours in 1992) with Dan Carpenter, Speaking Well of Lawyers, INDIANAPOLIS STAR, Sept. 15, 2000, at A17 (describing successful 1998 reorganization of state's pro bono efforts, with "conservative Indiana[s]" Pro Bono Commission now a national example serving as teachers, counselors, and matchmakers for volunteer lawyers and prospective clients).

12. See Summary of Actions of Board of Governors at Aug. 16, 1996 Meeting, 67 OKLA. B.J. 2559, 2560 (1996) [hereinafter Actions of Board of Governors, Aug. 16, 1996]. The creation of this task force corresponds to a resolution adopted unanimously by the OBA Committee on the Rules of Professional Conduct Committee instead of acting upon a rule change similar to that proposed here. In relevant part, the resolution provides:

that the Board of Governors . . . take immediate steps to ascertain whether there is in fact a current crisis in the availability of legal services in Oklahoma to the poor and economically disadvantaged, and if so, promptly to undertake a program which will enlist the Bar leadership and general membership, extending from the State to the local level, in meeting this emergency.

OBA Legal Servs. Comm., Minutes of June 7, 1996 Meeting (on file with author). Since then, the OBA Legal Services Committee has worked actively to support the Legal Services Corporation against threatened funding cuts, to obtain $450,000 additional state funds through the Legal Services Revolving
Most recently, in fall 1999, as part of its long-term strategic plan, the OBA restated its commitment to create and support public service projects and the delivery of pro bono legal services. The Commentary recognized Oklahoma lawyers' common educational backgrounds, organizational and analytical capabilities [and other skills]. These attributes, coupled with our commitment to rigorous ethical standards, uniquely equip us to serve our neighbors and communities. Consequently, we have a moral obligation to contribute to society.

Although the practice of law enables us to earn a living, we lawyers are ever-mindful that we serve, not just as advocates for our clients, but as officers of the judicial systems of our nation, state and hometowns, and citizens dedicated to promoting justice for all members of our society (particularly those who are disadvantaged).

To those to whom much is given, much is required.

The profession must act upon its stated commitment to make available legal services for those in need. Dedication to pro bono services is symbolically touted as one of our core professional values. Even in a flourishing economy, many Oklahomans are left behind, impoverished and unable to obtain essential legal services. Rising tides do not lift all boats equally, freeing poor persons of their legal problems related to poverty. Congress sharply cut federal funding for legal service programs in 1995, which neither the state nor other sources has adequately replenished. These cuts restricted the ability of low income Oklahomans to obtain legal relief, especially in civil matters relating to their poverty. Relatively few Oklahoma lawyers actually provide pro bono legal services to the poor or financially support the specialized legal aid programs.

It is time for Oklahoma lawyers to put more of our professional time and our money behind our symbolic words of support. A concerted effort is needed to create a statewide response. No one solution will suffice. Statewide planning efforts are underway to assess Oklahoma's unmet legal needs and to make efficient use of available resources. It is hoped that these efforts may help "identify ways in which the private bar can be urged to do more of . . . [its] fair

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Fund through the Administrative office of the Supreme Court, and to conduct various fundraisers to support state legal service programs. See OBA Legal Servs. Comm., Minutes of April 18, 1997 Meeting.

13. See Oklahoma Bar Ass'n, Strategic Plan: In Service to the Public Through the Law, 71 OKLA. B.J. 231, 235-36 (2000) [hereinafter OBA Strategic Plan] (reporting Goal V: to promote activities and programs which serve the public; identifying specific strategies, to continue to create and support public service projects; to undertake joint public-service activities with state's law schools and courts; to support legal aid and indigent defense programs; and to conduct systematic surveys on projects that could more effectively serve the public).

14. Id. at 236.
15. See infra text accompanying notes 171-88.
share, and correspondingly, ways in which the OBA, law schools, and local bar associations can do their part in institutionalizing the sense of duty.  

Access to essential legal services is a public problem warranting a public solution, especially increased financial support of legal aid programs. There is much that could be done. Oklahoma lawyers could offer a partial solution by substantially increasing our pro bono involvement, whether through services or financial support. More volunteer attorneys and money could be used to create a statewide referral system to match lawyers with low income clients in need of their particular expertise. This article proposes an amendment to Rule 6.1 of the Oklahoma Rules of Professional Conduct. If adopted, it would read as follows:

Rule 6.1 Voluntary Pro Bono Publico Service

(a) A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

1. provide a substantial majority of the fifty (50) hours of legal services without fee or expectation of fee to:
   (i) persons of limited means or
   (ii) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

2. provide any additional services through:
   (i) 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 otherwise be inappropriate;
   (ii) delivery of legal services at a substantially reduced fee to persons of limited means; or
   (iii) participation in activities for improving the law, the legal system or the legal profession.

(b) in satisfaction of a lawyer's responsibilities under (a), a lawyer may contribute financial support in an amount equivalent to fifty per cent (50%) of the lawyer's effective hourly rate, which usually is determined by the rate billed to non-pro bono clients, for every hour not served up to 50 hours. This amount

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17. E-mail from Gary Dart, Executive Director of Legal Services of Eastern Oklahoma, to author (Sept. 28, 2000) [hereinafter Dart e-mail].
18. Cf. OBA Strategic Plan, 71 OKLA. B.J. 231, 232 (stating objective to develop statewide lawyer referral service).
should be paid to [specify] or to other recognized organizations that provide legal services to persons of limited means.

(c) A law firm may satisfy the responsibility of each of its lawyers by showing that collectively, the firm has provided direct services or financial contributions equivalent to fifty hours for each full-time lawyer in the firm. Lawyers not practicing in a law firm may satisfy their individual responsibilities through alternative pooling arrangements authorized by the Oklahoma Bar Association [or other applicable agency].

(d) As a general principle, all lawyers should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

(e) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services.

The proposed rule is based largely upon the current ABA Model Rule 6.1, stating an aspirational standard of fifty pro bono hours per year and defining qualifying services to emphasize direct legal service to the poor. It also suggests admittedly controversial changes. One proposed change would recognize financial support as an alternative, comparably valued way to fulfill the ethical obligation. Another change would require each lawyer to report, on an annual basis, whether the lawyer had met the aspirational goal of service or financial support. This is intended, not as a preliminary step toward mandatory service, but rather, as an essential vehicle for each lawyer to personally evaluate one's own contributions, and consider taking other steps to fulfill one's professional obligations. Revenue generated by the financial support option could fund a statewide training, supervision, and referral system for lawyers willing to provide direct services and could supplement funding for existing civil and criminal indigent legal service programs. The proposal seeks to encourage all Oklahoma lawyers to contribute qualifying legal services. Lawyers may freely choose how to satisfy the aspirational standard within its stated parameters. Lawyers who decline to provide any pro bono services will not be subject to discipline. The only proposed requirement is annual reporting; rule compliance is achieved by completing and filing with the Bar a simple annual form. It would not require painstaking documentation of time, services, or client identity. If the lawyer has provided no services, the report need only state that fact. If the lawyer reports service exceeding fifty hours, credit can be carried forward to future years. Bar leaders may devise further strategies to encourage voluntary participation; for example, by expanding upon pro bono "honor rolls," recognizing extraordinary service, and other forms of moral persuasion.

Part I of this article briefly considers the history of professional regulation of pro bono publico services from Greco-Roman times to the present, focusing on modern developments in American and Oklahoma legal ethics rules. Part II examines the ongoing crisis in meeting the legal needs of low income Oklahomans. Almost one-fourth of the state's population would qualify economically for free legal services, yet existing resources are woefully inadequate to meet their legal needs. It then considers the limited data available concerning
Oklahoma lawyers' pro bono involvement, and contends that most lawyers would be willing and able to do more, if there were suitable referral and delivery systems in place. Part III shifts the discussion to the national level, describing how other jurisdictions address lawyers' pro bono responsibilities and various options for consideration in an amended Oklahoma ethics rule. Upon consideration of the foregoing, this article urges the Oklahoma bar to move beyond the symbolic rhetoric of professionalism and take concrete steps to meet the legal needs of its poor.

To emphasize, the proposed amendment is just that — a proposal. It is offered with an open mind and spirit, asking that the Oklahoma Bar Association, its leaders, and members consider two questions. First, whether they, in their various roles, contribute fairly to satisfy the legal profession's collective obligation to meet the essential legal needs of all citizens, regardless of ability to pay? Second, what organized efforts could promote efficient delivery of volunteer legal services to the low income population across the state? Proposed Oklahoma Rule 6.1 is not offered as a complete solution to the immense and complicated problems of Oklahoma indigent legal services. Rather, it is just one approach that, when combined with other efforts, may produce significant results.¹⁹

I. History of Pro Bono Publico

A. Ethical Underpinnings

Roscoe Pound's durable definition of a profession embodies key ethical aspects traceable to ancient Greece and Rome.²⁰ Practitioners share specialized training, enabling them to provide complex or technical professional services beyond the capability of laypersons. Altruism, or putting the interests of others ahead of their own, traditionally was a basic tenet of professionalism.²¹ The complexity of legal services and expected altruism were deemed to justify the professional monopoly, which limited who could perform designated professional tasks, such as litigation advocacy and providing legal advice.²² Thus vested with a monopoly power over access to the legal system, those in the profession are joined in a common calling in the spirit of public service.

²¹. SPIRIT OF PUBLIC SERVICE, supra note 1, at 11.
²². The legal profession's monopoly is delegated to the states, which enforce it through licensure. Lest anyone think enforcement of unauthorized practice laws is a dead issue, see TEX. GOV'T CODE ANN. § 81.101 (West Supp. 2000) (excluding self-help legal software from definition of unauthorized practice of law); Unauthorized Practice of Law Committee v. Parsons Technology, Inc., 179 F.3d 956 (5th Cir. 1999) (lifting injunction against sale of legal software program); Birbrower v. Superior Court, 70 Cal. Rptr. 2d 304 (Cal. 1998).
In ancient Greece and Rome, early advocates were men of rank, wealth, and distinction, who undertook the role of orators for clients but were forbidden to accept money or gifts in return for their services. They were to serve the public good by representing individuals in the developing legal system.

From the Greco-Roman era through the development of the legal profession in early England and Scotland, a sense of noblesse oblige prevailed among those who made up its elite ranks. Although later systems acknowledged that lawyers could charge for their services, they viewed compensation as incidental to the public service component. For example, in what may be the first oath of office, the 1275 First Statute of Westminster pledged that lawyers place a higher priority on the client's cause than the fee. Meanwhile, the oaths taken by lawyers in other European countries more explicitly directed that they provide low cost services to the poor.

While significant differences existed among the early American colonies, the legal profession was generally despised throughout much of the seventeenth century. This widespread opposition and distrust arose from diverse and complex reasons. Puritan clergy, religious elements in the community, and Quaker opposition to activity involving litigation and strife were powerful forces behind the hostile regulations. Anti-lawyer legislation persisted until midway through the eighteenth century. For example, a 1645 Virginia law prohibited lawyers from charging a fee for their services — possibly a mandatory pro bono rule enacted to ban the legal profession. Restrictive controls discouraged the practice of law and minimized the number of licensed lawyers.

23. See Pound, supra note 1, at 51-53.
24. See id. As a practical reality, the entry costs of training and tutelage were such that only individuals from wealthier families could become lawyers. See id.
25. Spirit of Public Service, supra note 1, at 10 (quoting Pound, supra note 1, at 5).
26. See Kaufman, supra note 20, at 4 (“Ye shall Swear, That well and truly ye shall serve the King's People...; and ye shall not defer, tract or delay their causes willingly, for covetous of Money, or other thing that may turn you a Profit; and ye shall give due Attendance accordingly; a God you help, and by the Contents of this Book.”).
27. For example, the lawyer oath in the Swiss Canton of Geneva promised “[n]ot to reject, for any consideration personal to myself, the cause of the weak, the stranger, or the oppressed.” Kaufman, supra note 20, at 4. Similarly, a 1424 Scottish statute mandated pro bono work. See Michael Milleman, Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question, 49 Md. L. Rev. 18, 21-22 (1990). Compare the oath adopted by the Parliament of Paris in 1344 (lawyers to lower fees based on importance of case and parties' circumstances) with the Danish and Norwegian 1683 Code of Christian V (pledge to "exact no exorbitant fee from the poor or others") and early German oath to "aid everybody, the poor man quite as willingly as the rich man." Kaufman, supra note 20, at 4 (citations omitted).
29. For one, Puritan and Quaker colonists associated lawyers with the religious persecution they suffered under the English legal system. See Chroust, supra note 28, at 27-29.
30. See id. at 28.
31. See Pound, supra note 1, at 136.
32. See Kaufman, supra note 20, at 4.
33. See Chroust, supra note 28, at 28-29.
"Puritan influence in early America was overwhelmingly dominant."34 While a relative minority religion in terms of population, Puritan settlers came to the New World armed with "an elaborately articulated . . . [a] highly coherent, theologically ordered sense of themselves, their role in history, and the meaning of their settlement . . . ."35 Indeed, they sought to "show the world . . . [how] a holy commonwealth ought to be ordered" as a "biblical, God-ordained church and state."36 The concentric orientation of Puritan thought organized all aspects of life — cultural, social, economic, and political — around their religious beliefs.37

A central tenet of Puritan teaching provided that each man was called by God to live as he was called, to serve in a particular vocation or office, and to furnish services for the benefit and good of all mankind.38 This particular calling requires the faithful to practice the vocation as part of the general calling to all Christians — that they become servants to their brothers, for the common good of all.39 Thus, if called to serve as a Magistrate, one must serve as a Christian Magistrate, acting as an instrument of God in all trades of life.40 While Puritan in origin, this concept of vocation or calling remains an important part of contemporary religious thought on professionalism.41

Early American writings suggest that the pro bono obligation may have arisen out of a religious calling that lawyers should help those who could not afford to pay for needed legal services. Some early American Christian traditions encouraged all persons with needed resources and skills to share them with those in need, as would be expected of a good neighbor. The expectation for lawyers was no different than that of others who heeded the church’s call.

In 1710, Cotton Mather, the highly influential, Harvard-educated religious leader of the Massachusetts Bay Colony, delivered what is thought to be the first

34. WINTHROP S. HUDSON, RELIGION IN AMERICA 17 (4th ed. 1987).
35. JAMES G. MOSELEY, A CULTURAL HISTORY OF RELIGION IN AMERICA 3 (1981).
36. Id. at 7.
37. Id. at 4-5. Puritan thought was concentric in nature, clearly articulated its role in all life matters; this conservative political philosophy encouraged proponents to do "good" for society, with the promise of personal rewards in return. This early formulation of the "protestant work ethic" created a welcoming environment for development of capitalism. See STANISLAV ANDRESKI, MAX WEBER ON CAPITALISM, BUREAUCRACY AND RELIGION, A SELECTION OF TEXTS 111-25 (1983).
38. See WILLIAM PERKINS, ESSAYS ON CALLINGS, IN PURITAN POLITICAL IDEAS, 1558-1794, at 35, 35-37 (Edmund S. Morgan ed., 1965). The writings of Englishman and Cambridge fellow William Perkins were highly influential in Puritan thought.
39. See COTTON MATHER, ESSAYS TO DO GOOD, ADDRESSED TO ALL CHRISTIANS WHETHER IN PUBLIC OR PRIVATE CAPACITIES 116 (George Burder ed.) (Pentzmarth, T.H. Miller, and Gray & Co. 1824) (copy on file with author).
40. See id. at 55-56.
In Bonifacius, Mather adapted the Puritan ideals to attorneys when he stated:

Your Opportunities to Do Good are such . . . [that] the main intention is that you may be wise to do Good . . . . There has been an old Complaint, That a Good Lawyer seldom is a Good Neighbor . . . . Confute it, Gentlemen, by making your Skill in the Law a Blessing to your Neighborhood. You may, Gentleman, if you please, be a vast Accession to the Felicity of your Countreys. 42

Later, in "Essays to Do Good," Mather directed additional comments to lawyers. He urged the "gentlemen of the law" to do good by being skillful, knowledgeable, scholarly, and wise.43 He encouraged daily self-examination as to whether one had "done good to others," as well as "to his own soul."44

Besides doing good in specific transactions, Mather encouraged lawyers to use their talents for larger purposes of protecting the poor and oppressed, promoting charitable acts, and legal reform efforts.

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

Affluent persons, about to make their wills, may frequently ask your advice. You may embrace the opportunity of advising them to such liberality in behalf of pious purposes, as may greatly advance the kingdom of God in the world . . . .

Is there nothing to be amended in the laws? . . . The reformation of the laws . . . are loudly called for . . . . If some lawyers,"men of an excellent spirit," would direct their attention this way, and call the attention of the legislature to them, all the world might feel the benefit of it.45

And so it appears that lawyers' ethical responsibilities to serve the poor and oppressed have ancient underpinnings. Despite historical shifts in the nature and details of the responsibility, the notion of public service is as old as the legal profession.

42. See CHROUST, supra note 28, at xi-xii.
43. Id.
44. MATHER, supra note 39, at 118-21.
45. Id. at 127.
46. Id. at 127-28.
B. Ethos of Professional Regulations

1. Precursors to Regulation: Hoffman & Sharswood

The early American bar had no formal system of self-regulation. Because lawyers were few in number and homogeneous in background, training, and professional values, informal sanctions within the small legal communities socialized others to comply with those professional values and sought to control deviant behavior.\(^\text{47}\)

As the number of lawyers grew, a greater need developed for training new entrants and transmitting professional norms and values. David Hoffman, a Baltimore lawyer, is credited with the first serious effort to articulate guidelines for professional ethics.\(^\text{48}\) In 1836, he published a book containing "Fifty Resolutions in Regard to Professional Deportment."\(^\text{49}\) He intended that the resolutions serve as universal guides for practitioners and suggested that lawyers recite them twice yearly as a reminder of professional standards of behavior.\(^\text{50}\)

One addressed individual lawyers' pro bono expectations:

XVIII. To my clients... I shall never close my ear or heart because my client's means are low. Those who have none and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.\(^\text{51}\)

As intended, Hoffman's statements lacked any force of law, or any enforcement capability. They were, however, a significant advancement towards creating a distinct teaching on the subject of legal ethics.

In 1850, retired Pennsylvania Superior Court Judge George Sharswood was appointed to serve as dean of the new law school at the University of Pennsylvania. Like Hoffman, Sharswood's contributions are regarded as an important step in the progressive move towards articulating professional norms and values. He soon began a series of annual lectures on ethics. Published versions suggest that he attempted to cover the entire landscape of ethics issues in a short period

\(^\text{47}\) See Geoffrey C. Hazard, Jr. & Debora L. Rhode, The Legal Profession: Responsibility and Regulation 24 (3d ed. 1994) (citing Lawrence Friedman, A History of American Law (2d ed. 1985), and describing apprenticeship training around 1750 as a control device limiting numbers and leaving senior lawyers in firm command; see also Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1279 (1991) (observing that the "bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance"). For more detailed treatment of historical shifts in efforts to organize and supervise professional deportment, see 2 Chroust, supra note 28, at 125, 144-45, 151 (describing local and historical differences between organizational controls over legal profession of the American frontier).

\(^\text{48}\) See L. Ray Patterson, Legal Ethics and the Lawyer's Duty, 29 Emory L.J. 909, 913-14, 925 (1980).


\(^\text{50}\) See Patterson, supra note 48, at 913-14, 925.

\(^\text{51}\) Henry S. Drinker, Legal Ethics 342 (1953).
of time. Naturally, he covered some topics in greater depth than others. He said little on the question of pro bono. In discussing fee matters, Sharswood contrasted the situation of Roman advocates and English barristers to American lawyers. Ancient Roman rules purported to limit payment for advocacy services to minimal compensation — "a gratuity . . . [that] was a mere honorary recompense, the client was under no legal obligation to pay it."\textsuperscript{52} Similarly, English law restricted the fees that barristers could charge and forbade suits to recover fees.\textsuperscript{53} By contrast, the American legal system made no technical distinction between different categories of lawyers.\textsuperscript{54} As applied to American lawyers, Sharswood found the ancient rule artificial, unjust and wholly inconsistent with our ideas of equality to suppose that the business or profession, by which any one earns the daily bread of himself or of his family, is so much more honorable than the business of other members of the community, as to prevent him from receiving a fair compensation for his services on that account.\textsuperscript{55}

It would be a "monstrous legal fiction" to regard "hard-working lawyers of our day, toiling till midnight in their offices . . . [as equivalent to the] patrician jurisconsults of ancient Rome[.].\textsuperscript{56}

Although Sharswood characterized American lawyers in a more populist image than their ancient predecessors, he also recognized that larger policy questions about the profession distinguish lawyers from other trades and businesses. Sharswood treated lawyers with great esteem, claiming that high moral principle was the foundation of professional integrity. "The question really is, what is best for the people at large — what will be most likely to secure them a high-minded, honorable Bar. It is all-important that the profession should have and deserve that character."\textsuperscript{57} Thus, he was concerned that litigation of fee disputes with clients tended to lower the public perception of the legal profession.\textsuperscript{58} Where the client can pay, the lawyer's "services should be recompensed . . . according to a liberal standard."\textsuperscript{59} If a client is unable to pay for needed legal services, honorable counsel should nevertheless provide representation.

There are many cases, in which it will be his duty, perhaps more properly his privilege, to work for nothing. It is to be hoped, that the time will never come, at this or any other Bar in this country, when

\textsuperscript{52} Hon. George Sharswood, An Essay on Professional Ethics 136-44 (4th ed. 1876) (detailing changes in permissible fees to advocates in ancient Rome and English barristers).
\textsuperscript{53} See id. at 142-44.
\textsuperscript{54} See id. at 144.
\textsuperscript{55} id. at 146-47.
\textsuperscript{56} id. at 147.
\textsuperscript{57} id.
\textsuperscript{58} See id. at 150.
\textsuperscript{59} id. at 151.
a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights.60

2. First Regulatory Efforts: Alabama Code of 1887, ABA Canons of 1908

The Alabama State Bar took the initiative and adopted the first formal Code of Ethics in 1887. Its primary author, Judge Thomas Goode Jones, drew heavily from the high moral principles articulated in the Sharswood lectures.61 The Code provisions reflected the practical realities of rural Alabama and were enacted in response to the regional demoralization and social upheaval of the Civil War.62 Upholding the honor, dignity, and usefulness of the profession is the guiding principle for the fifty-six specific duties owed to fellow attorneys, clients, and the state.63 The Alabama Code identified core concepts that are carried forward to modern ethics regulations.64 Pro bono work merited scant attention, only as it related to the billable value of a lawyer's services.

Value of Attorney's Services Not to be Overestimated 48. Men, as a rule, overestimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances, and sometimes none at all.65

60. Id. (emphasis added).
61. See Drinker, supra note 51, app. at 352.
62. See generally Allison Marston, Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association, 49 ALA. L. REV. 471, 488-90 (1998). This Alabama Code, and other emerging professional codes, were important steps in articulating acceptable behavior for practitioners. The Code was a way to demonstrate that the profession had standards to govern behavior. See Kaufman, supra note 20, at 6.
63. See Drinker, supra note 51, at 355.
64. For example, these provisions confine lawyer's conduct within legal limits, exposing other lawyers' professional misconduct, ex parte communications, advertising, and extrajudicial comments about pending litigation. See id. at 309, 310, 315, 316, 319.
65. ALABAMA CODE OF ETHICS (1887), reprinted in Drinker, supra note 51, app. at 361 (emphasis added).
 Nearly twenty years later, spurred on by Alabama and a handful of other state codes, the fledgling ABA adopted the Canons of Ethics in 1908.66 Historian Jerold Auerbach contends the Canons "reflected and reinforced an increasingly stratified profession" equally adaptable to small town lawyers and similarly "homogeneous upper-class metropolitan constituency . . . [and which] served as a club against lawyers whose clients" were urban poor, immigrants and working class.67 Legal services were available to paying clients, and contingent fees for personal injuries reluctantly allowed.68 The pro bono language in Canon 12 closely mirrored that of Alabama Canon 48, and introduced the concept of professional courtesy to discount fees charged to "brother lawyers . . . their widows and orphans."69 Beginning the trend towards greater specificity in legal ethics codes (particularly on matters of economic interest), Canon 12 identified the now-familiar criteria for determining the amount of a fee. Its closing admonition generally reminded that "the profession is a branch of the administration of justice and not a mere money-getting trade."70

Given the historical ethos that lawyers were under some sort of pro bono duty, the Alabama Code and ABA Canons state only a limited expectation that lawyers serve the poor for no or a reduced fee. They may signal the uncomfortable tension between what is deemed honorable and ethical according to professional tradition, and the potential significance of incorporating that principle in a written code intended to have a greater normative effect.71

3. 1969 ABA Code of Professional Responsibility

The Canons endured for sixty years. Criticized as vague, incomplete, outdated, and ineffective, in 1969 the ABA proposed their replacement with a new "Code of Professional Responsibility" (CPR or Code).72 In contrast to the brevity and generality of the Canons, the Code sought to differentiate between general normative statements, ethical considerations, and mandatory disciplinary rules.73

68. See id. at 42-50.
69. ABA CANONS OF PROFESSIONAL ETHICS Canon 12 (1908).
70. Id.
71. It is doubtful the ABA intended the Canons to have "any direct legal effect" although it anticipated they would be influential to courts in disciplinary cases. WOLFRAM, supra note 4, at 55.
72. See ABA SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, MODEL CODE OF PROFESSIONAL RESPONSIBILITY PREFACE (Preliminary Draft 1969).

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

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
Extensive footnotes annotated the Code, citing to related Canons, ethics committee and judicial opinions, and secondary authorities. The ABA launched a formal adoption campaign, and by 1972, all but three states adopted the Model Code. 74 Most jurisdictions adopted the Code verbatim, as recommended by the ABA, after cursory independent consideration. A handful of states, including Oklahoma, formally adopted only the disciplinary rules (DRs) and not the ethical considerations (ECs). In Oklahoma, the axiomatic canons were considered topical headings. 75

Canon 2 generally exhorts, "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." 76 The disciplinary rules are silent on the issue of lawyers' pro bono publico obligations. Given the tripartite structure and a myriad of other reasons, that void was understandable. 77 Ironically, many of the Canon 2 DRs restricted permissible communications between lawyers and their prospective clients. 78 Several ECs addressed lawyers' collective and individual responsibilities to represent persons unable to pay a fee. Ethical Consideration 2-25 is most explicit, and goes further than any of the historical antecedents in urging participation by individual lawyers.

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the

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

Id. 74. See Wolfram, supra note 4, at 57.
75. See Judith L. Maute, A Practitioner's Guide to the Oklahoma Rules of Professional Conduct 4, 8 (1989) (stating that Oklahoma was among eight states that did not adopt ECs, and that no official record explains this decision, but that Supreme Court Justice Robert E. Lavendar recalls that the ECs were considered expressions of opinion). Nevertheless, Oklahoma Ethics Opinions regularly cite to the ABA ECs. See id. at 4; see also, e.g., Oklahoma Bar Association Legal Ethics Op. 293, 49 OKLA. B.J. 936 (1978).
77. See infra text accompanying notes 272-78.
78. The Supreme Court invalidated the core Canon 2 advertising restrictions under First Amendment commercial speech doctrine. See generally Judith L. Maute, Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine, 13 Hastings Const. L.Q. 487 (1986).
efforts of individual lawyers are often not enough to meet the need. Thus it has become necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.  

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

Although the bar proudly boasted of its pro bono publico services, the extent to which its members actually performed such services has long been unclear.

79. Model Code of Professional Responsibility EC 2-25 (1969) (emphasis added). Three other Ethical Considerations obliquely refer to the profession's collective pro bono responsibilities. See id. EC 2-1 (identifying as important function, "to assist in making legal services fully available"); id. EC 2-16 (addressing general need for adequate compensation; "[n]evertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective."); id. EC 2-24 ("A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services... [without appropriate contingent fee] unless the services are provided for him.").

80. See id. EC 2-1 n.3 (quoting former ABA President Lewis F. Powell, Jr., on inability of many unrepresented persons to obtain equal justice because of poverty or ignorance; quoting Cheatham on unmet need for legal services because of inability to pay fees); id. EC 2-1 n.4 (quoting Cheatham for maxim that "privilege brings responsibilities... to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it"); id. EC 2-16 n.41 (quoting 1958 ABA Joint Conference Report, that ideal of "equality before the law... remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees"); id. EC 2-25 n.56 (quoting report of attorney general's commission on poverty and administration of justice) ("Lawyers have peculiar responsibilities for the just administration of the law... [which] include providing advice and representation for needy persons. To a degree not always appreciated by the public... the bar has performed these obligations with zeal and devotion... however... a system of justice that attempts to meet the needs of... [indigent defendants] through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate."); id. EC 2-25 n.57 (quoting 1958 ABA Joint Conference Report) ("[R]epresentation of those unable to pay usual fees is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and -- increasingly -- through the organized efforts of the Bar. If... need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance."); id. EC 2-25 n.58 (citing ABA ethics opinion that free legal clinics "are not ethically objectionable. On the contrary, they serve a very worthwhile purpose and should be encouraged"); id. EC 2-25 n.60 (quoting 1946 resolution of ABA House of Delegates, endorsing bar-sponsored lawyer referral plans and low-cost legal service methods for persons who would otherwise be unrepresented); id. EC 2-25 n.61 (citing ABA ethics opinion approving pro bono defense of indigents).

81. See Wolfram, supra note 4, at 932 (citing conflicting authorities dated in the 1970s for proposition that level of pro bono work by private practitioners is "quite low," and 45% of one survey's respondents); see also Roger C. Cranton, Mandatory Pro Bono, 19 Hofstra L. Rev. 1113, 1124 n.67 (1991) (citing 1982 ABA survey showing that 68% of respondents provide unpaid public service, with the greatest amount of time given to charitable organizations and bar association activities); Oklahoma Bar Association, Results of the 1992 Membership Survey of the Oklahoma Bar Association, 63 Okla. B.J. 3556 (1992) (reporting survey results of OBA poll in which 52% of respondents spend less than
Some larger firms institutionalized their efforts, establishing pro bono committees and other mechanisms to support individual lawyers' involvement. It is likely, however, that sole practitioners and small firms shouldered more of individual pro bono representations, because their offices — especially in smaller communities — were more accessible to the low income population as walk-ins from the street. Professional associations (bar activities and specialized practice groups) and a range of charitable organizations have been the primary recipients of lawyers' volunteer time. As twentieth century legal practice became more segmented into practice areas, law firm organization, and focus on established clientele, it is likely that much of what lawyers began to consider pro bono work furthered the interests of their paying clients or helped with new client development. Volunteer work for civic arts groups and bar committees, while important in their own right, did not directly benefit the poor whose need was greatest. Periodically, national and state bar leaders sought to encourage levels of involvement with general admonitions that each lawyer bears some responsibility to serve the public interest. In the mid-1970s, in the wake of the civil rights and consumer movements, anti-poverty programs, and Watergate, discussion of legal ethics progressed to an unprecedented level.

4. Rules of Professional Conduct

a) ABA Model Rules 1977-1983

Eight years after the Code's adoption, it was in trouble. The U.S. Supreme Court invalidated the broad restrictions on advertising and group legal services in Canon 2. Interpretive difficulties arose because of vague, inconsistent provisions, or gaps in the disciplinary rules. Courts relied on the canons and ethical considerations to aid interpretation. Scholarship criticized its misplaced priorities. John Dean's testimony before the Watergate impeachment inquiry

three hours a week on "civic/community/pro bono/charitable work" and 66% of respondents spend less than three hours a week on "professional legal work/volunteer work").

82. See WOLFRAM, supra note 4, at 950.

83. See id. at 949-50.

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


87. See Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV.
focused public attention on why so many lawyers were involved in the illegal break-in and cover-up. In 1977, ABA President William B. Spann, Jr. appointed Omaha attorney Robert J. Kutak to chair a special committee charged with reviewing "all facets of legal ethics." In contrast to the fairly closed political process of developing the ABA Canons and Code, Ted Schneyer calls the Model Rules process "an extravaganza." It "amounted to the most sustained and democratic debate about professional ethics in the history of the American bar." Early on, the Kutak Commission sought input from the ABA's harshest critics, while remaining aloof to its own membership. This initial period of secret deliberations allowed the luxury of visionary rethinking of grand policy issues, unconstrained by political pressures from within.

An early draft, intended only to be seen by commissioners and a select list of invited readers, proposed forty hours a year of mandatory pro bono service, or its dollar equivalent, to improving the legal system or providing legal services to the poor. That and a handful of other draft provisions prompted loud protest within the bar when revealed by Monroe Freedman at a panel of the August 1979 ABA meeting. In short order, the trade press published the leaked document, prompting dramatic negative reaction from the bar. Besides the pro bono issue, confidentiality exceptions and a proposed requirement of written fee agreements were also controversial. This early fiasco jeopardized the Model Rules project, which, after a period of recoupment, actively sought and considered comments on its later drafts. Voluminous comments were received on a wide array of topics, reflecting the ethical pluralism of the American bar.

The 1980 Discussion Draft kept the mandatory service requirement, added an annual service report, but contained no definition of qualifying services or number of recommended hours. The commission soon dropped the reporting requirement because many lawyers remained "furious" about the rule. As

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89. Schneyer, supra note 84, at 677, 688 (stating that the impetus in appointing the Kutak Commission was partly to shore up the profession's public image, and partly to shore up the ABA's image as "lawgiver for the practice of law" among lawyers and disciplinary enforcement staff).
90. Id. at 678.
91. Id.
92. See id. at 698.
93. See id. at 699-700.
94. See id. at 701 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 9.1 (Aug. 1979 draft)).
95. See id. at 701-02. Other controversial proposals would have required written fee agreements, and more carefully define limits of confidentiality when a client uses a lawyer's services for wrongdoing.
96. See id. at 701-02.
97. See id. at 677, 702-03.
99. Id. (citing commission journals from June 1980 meeting).
finally submitted to the ABA House of Delegates in February 1983, the proposed rule was purely aspirational and generally defined the types of public interest legal services that satisfied the ethical responsibility.\textsuperscript{103} Demonstrating responsiveness to change through the democratic process, the ABA House of Delegates adopted language that included an amendment offered by the Association of the Bar of the City of New York, which also recognized that the responsibility could be discharged by financial support of organizations providing legal services to the poor.\textsuperscript{104} ABA Model Rule 6.1, as first officially adopted in 1983, provided:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.\textsuperscript{105}

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

\begin{quote}
[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf... should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.\textsuperscript{106}
\end{quote}

As distinguished from all but one other blackletter rule, ABA Model Rule 6.1 is cast in nonbinding, aspirational terms.\textsuperscript{107} The only other exception to this drafting convention is Model Rule 1.2(b), asserting that "[a] lawyer's representation of a client... does not constitute an endorsement of the client's political, economic, social or moral views or activities."\textsuperscript{108} Both provisions can be viewed as symbolic and normative statements about professionalism that justify exceptions to the drafting format in order to emphasize the principles of


\textsuperscript{101} See \textit{Model Rules Legislative History, supra} note 100, at 274.

\textsuperscript{102} \textit{Id.} at 273-74.

\textsuperscript{103} \textit{Id.} at 1.


\textsuperscript{105} \textit{Model Rules of Professional Conduct Rule 1.2(b)} (1983).
professional independence from clients and lawyers' public service responsibilities.

Given the furor over the early proposal for mandatory service, the generality of Rule 6.1 is unsurprising. It gave no guidance as to the amount of service that would be considered a lawyer's fair share of the collective obligation, nor did it identify any priorities among the types of service. Virtually any type of unpaid or reduced-fee legal service for civic or professional groups could arguably fulfill one's aspirational public interest responsibility. One could claim civic virtue in working for any nonprofit organization, even organizations that cater to the wealthy and could readily afford to pay for legal services. Lawyers with successful class action, public law, and civil rights practices could justify their entire careers as in the "public interest" even though they routinely received court awarded fees. Because of the wide expanse of activities that could fit into the generic term "public interest" and the minimal data collection on the types of services performed and their recipients, it is impossible to assess lawyer contributions. Most lawyers have practical limits to their available volunteer time. Lack of effective referral systems geared to the low income population leaves many persons without needed representation, even for routine problems where volunteer lawyers could do the work. Absent referral systems, uneven distribution of most lawyers' pro bono work is quite probable, with representation given to individuals and groups having social connections to lawyers, and not necessarily to those who are most in need.

b) Oklahoma Rules of Professional Conduct 1988

As it did for the Model Code, the ABA again launched a campaign to encourage states to adopt the Model Rules. In contrast, however, states did not blindly jump on the bandwagon and adopt the new ethics code without independent consideration. Perhaps necessitated by the political fallout from the earlier controversies, the ABA actively encouraged states to evaluate the rules and to make local modifications. Unlike the Model Code, no state adopted the Model Rules in toto. Since 1983, more than two-thirds of the jurisdictions have revised their local ethics rules based in substantial part on the ABA Model Rules.106

The Oklahoma Bar Association (OBA) Model Rules Study Committee was appointed and began work in January 1984.107 More than two years later, the committee proposed adoption of the Oklahoma Rules of Professional Conduct, with about twenty-five local modifications.108 The proposed rules were


108. See id. at 5.
circulated for comments from bar membership, and the OBA Board of Governors and House of Delegates recommended them for supreme court adoption in 1986. The Oklahoma Supreme Court ordered their adoption in March 1988, to become effective July 1, 1988.\footnote{See 5 OKLA. STAT. ch. 1, app. 3-A (1991).}

Oklahoma Rule 6.1 is substantively the same as its original ABA counterpart, but broken into subsections that identify three distinct ways of discharging the responsibility: 1) direct service to the poor, charities, or public service organizations; 2) service to professional organizations and law reform activities; 3) financial support for organizations that provide legal services to the poor.\footnote{See infra app. A.}

The Oklahoma modification, based on a recommendation pending in Florida, was intended to help focus on the alternative categories. In retrospect, this formulation highlights the possibility of financial support, or "buy-out" as a legitimate, indeed, co-equal method of discharging one's responsibility. While this issue has provoked debate elsewhere in the country, it has drawn little local attention.\footnote{See, e.g., In re Amendments to Rules Regulating the Florida Bar, 630 So. 2d 501, 507 (Fla. 1994) (Kogan, J., concurring and dissenting) (finding it "ethically repugnant" to suggest that individual pro bono obligation "can be discharged merely by a contribution of money"); ABA Ethics 2000 Commission 6.1, Comments in Response to Public Discussion Draft (June 29, 2000) (discussing this author's testimony, and whether alternative forms of support should be given "co-equal status with the direct rendering of services") (copy on file with author); Interview with Tony Scott, Executive Director of the Oklahoma Bar Foundation (Aug. 30, 2000) (stating that he regularly addresses this option in talks to Oklahoma lawyers).}

Consistent with its intended aspirational purpose, Rule 6.1 is used to encourage voluntary efforts and not used in the disciplinary context.\footnote{112. Oklahoma Rule 6.1 is rarely cited in ethics opinions. See, e.g., OBA Legal Ethics Op. No. 311 (1998) (indicating client's position compromised in domestic, custody, criminal, and pro bono cases when other side learns of sexual relationship between attorney and client).}

Despite frequent pronouncements reminding attorneys of their collective pro bono responsibilities, studies reported that most legal needs of the poor went

c) 1993 Amendment to ABA Rule 6.1

The general aspirational rule as originally adopted in 1983 did not prompt sufficient response by the practicing bar. In 1988, the ABA House of Delegates adopted the "Toronto Resolution," urging all lawyers to devote "a reasonable amount of time," at least fifty hours a year, "to pro bono and other public service activities, to persons in need or to organizations serving individuals of limited means, or on activities which improve the law, the legal system, or the legal profession."\footnote{113. Report of the Standing Committee on Lawyer's Public Service Responsibility, 118 REP. AM. BAR ASS'N 635, 635 (1993).} In 1991, the ABA House of Delegates again stated the goal of "promoting meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."\footnote{114. Id. at 638.}
unmet. In 1993, after spirited debate, the ABA House of Delegates voted to amend Rule 6.1, incorporating the annual fifty hour goal of the Toronto Resolution and defining how attorneys could satisfy the ethical aspiration. The word "voluntary" was added to the rule title, and comment language explicitly stated the responsibility "is not intended to be enforced through disciplinary process." An attorney should render a "substantial majority" of the fifty hours, without expectation of fee, to "persons of limited means" and organizations designed primarily to meet their needs. With that guidance, lawyers are given wide discretion in choosing how to fulfill their pro bono responsibility. Finally, the amendment also encourages voluntary financial support of "organizations that provide legal services to persons of limited means."

Since the 1988 Toronto Resolution, sixteen jurisdictions have amended their pro bono rules to recommend a specific annual goal for pro bono services. Six other jurisdictions have stated annual hourly goals in some other form of policy statement. Recommendations for similar changes are pending in three additional states. Clearly, there is a national trend for states to set recommended annual goals and seek other ways to encourage greater pro bono involvement.

Bill Paul, immediate past-president of the ABA, and other bar leaders have worked actively to improve access to legal services for all Americans, particularly those who are poor. The ABA House of Delegates adopted resolutions that reaffirm the importance of pro bono involvement. The ABA Center for Pro

115. See id. at 641 (reporting that 80%-90% of poor population's identified legal needs remain unmet).
116. See MODEL RULES LEGISLATIVE HISTORY, supra note 100, at 278 (summarizing reasons for proposed revisions and reporting 228-215 vote in favor of amendment); see also infra app. B (reprinting complete text of MODEL RULE OF PROFESSIONAL CONDUCT Rule 6.1 (as amended in 1993)).
117. See infra app. B, cmt. 11.
118. See infra app. B.
119. The jurisdictions are Arizona, Colorado, District of Columbia, Florida, Georgia, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, Utah, Virginia, and Wyoming. See infra tbl. 1.
120. The jurisdictions are California (resolution, 50 hours); New York (resolution of Administrative Board of the Courts, 20 hours); Ohio (Columbus Bar Ass'n, 20 hours, or two cases); Oregon (Board of Governors, 80 hours); Texas (State Bar Policy, 50 hours); and Vermont (Board of Managers' Resolution, 50 hours). See ABA Standing Comm. Pro Bono & Public Serv., State Pro Bono Service Rules (visited Feb. 26, 2001) <http://www.abanet.org/legalservices/pbpages/pbstateethicsrules.html>.
121. Those states are Delaware (December 1999), Maryland (March 2000), and New Hampshire (November 1999).
Bono provides policy and technical support for jurisdictions exploring innovative ways to encourage voluntary pro bono involvement. The ABA Standing Committee on Lawyer's Public Service Responsibility and Center for Pro Bono are available to consult with local bar associations, to help educate lawyers, to assist with planning and administration of pro bono programs.  

\textit{d) ABA Ethics 2000: Pro Bono Controversy Revived and Subsided}

In 1998, the ABA created a panel to study the existing Model Rules, and to recommend appropriate changes in light of developments in the law and ethics of lawyering. The Commission on Evaluation of the Rules of Professional Conduct, referred to as the Ethics 2000 Commission (or the Commission) has devoted extensive time to the delicate issues of pro bono.  

To present the Commission with alternatives in contrast with the current rule, the Reporters' first draft suggested fifty hours of \textit{mandatory} service, which attorneys could alternatively satisfy by paying $100 for each hour not served, or others within a law firm could collectively satisfy the requirement. Additionally, the initial September 1999 draft proposed that the rule recognize a carryover of excess hours for two succeeding years and state an annual reporting requirement.  

Preliminary discussion kept alive the possibility of considering a recommendation for mandatory service, and the Reporter was asked to prepare another draft. The blackletter text of the second draft used the imperative "shall" to describe the fifty hour annual "pro bono legal service" obligation and annual reporting. It relegated to the nonbinding commentary all other treatment: types of activities, carryover (which was extended to three years), and buy-out (which was reduced to $25 for each hour of unperformed service, or a maximum of $1250).  

Before the next Commission meeting, the legal services community had voiced "considerable opposition" to the possibility of mandatory pro bono. At its next three meetings, the Commission discussed at length

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124. The center may be contacted at: Center for Pro Bono, American Bar Association, 541 North Fairbanks Court, Chicago, Illinois 60611-3314, (312) 988-5768, Steven B. Scudder, Staff Counsel. \textit{See AMERICAN BAR ASS'N, CENTER FOR PRO BONO, MAKING PRO BONO A PRIORITY: A BAR LEADER'S HANDBOOK} (1996) (describing possible strategies for bar associations to consider, including self-assessment; membership input and support; commitment of staff resources; overall approach to delivery of services; bar resolutions and ethics rules; and recruitment and training of volunteer attorneys).


whether it should even circulate for comments a proposal for mandatory service. In lawyers' inimitable fashion of using Roberts' Rules of Order to reach a decision on deeply divisive issues, after voting on motions at each of the meetings, the Commission finally voted 5-4 to "circulate a memorandum inviting comment."\(^\text{130}\) The close division was not on whether to recommend a mandatory service rule, but whether it was prudent even to reopen discussion of that issue.\(^\text{131}\) The decision to invite comment was likely made because of a perceived "need to raise the level of dialogue about pro bono service" and not because the Commission was inclined to recommend mandatory service.\(^\text{132}\) A May 2000 memorandum sought input on "whether a lawyer's pro bono obligation should be voluntary or mandatory and whether, in the event the obligation is to remain voluntary, the rule should incorporate a reporting requirement . . . [and] how a mandatory rule might be implemented."\(^\text{133}\) It summarized some of the opposing views and identified various subsidiary questions.

At the midyear meeting of the ABA in February 2000, the Commission had already heard an earful opposing mandatory pro bono from groups deeply committed to serving the poor. For example, Robert Weiner, chair of the ABA Standing Committee on Pro Bono and Public Service, predicted a "firestorm of resentment, protest, and resistance," diverting attention from the crisis in unmet legal needs, to the controversial and ultimately doomed issue of compulsory service.\(^\text{134}\) Moreover, "forced involvement of reluctant lawyers" would present numerous practical difficulties, and "could undercut the quality of legal services to the poor . . . .\(^\text{135}\)

Others responded to the invitation for comments.\(^\text{136}\) I testified at the

\(\text{footnotes}


\(^\text{132.}\) Id.


\(^\text{135.}\) Weiner Testimony, supra note 134. Also registering their opposition were Doreen Dodson, chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (concerned with diluting the definition of pro bono and the predictable acrimonious debate of a mandatory proposal), Esther Largent, the committee's Ethics 2000 liaison, and Jonathan Vickery, president and CEO of Legal Services of Northern Texas. See Midyear Conference Report, supra note 134.

\(^\text{136.}\) In addition to testimony summarized in text, comments were received from District of Columbia Bar Association, the U.S. Department of Justice and the National Legal Aid and Public Defender Association, the Center for Law and Public Policy, and the Los Angeles County Bar Association. See Ethics 2000 Comm'n, American Bar Ass'n, 6.1 Comments in Response to Public
Commission's June 2000 hearings in New Orleans, opposing mandatory service for two reasons. First, it is inconsistent with the concept of professionalism that law is a public calling; and, second, it is politically unfeasible, with the predictable backlash by the bar risking a public relations debacle.137 Any revisions should begin with the consensus reflected in the 1993 amendments, which resulted from extensive negotiations and compromise.138 Instead of revisiting the divisive issue of mandatory service, the organized bar should focus its efforts upon raising lawyers' awareness of and willingness to satisfy their moral responsibility that comes with being in the profession. Instead, I argued in support of cooperative pooling arrangements and comparable financial contributions as alternatives to direct service.139 Seeking the correct balance between aspirational guidance and regulatory compulsion, I proposed an annual reporting requirement designed to prompt lawyers' regular reflection on their own involvement, to obtain reliable information on volunteer services provided, to encourage increased service activity or financial support, and to create a statewide infrastructure for distributing services to those in need.140

Soon thereafter, prominent members of ABA leadership weighed in, urging no change to the current rule, and specifically opposing either a service or reporting requirement.141 Robert Hirshon, ABA president-elect (2001-2002), chaired the pro bono committee when the rule was last amended in 1993.142 He recalled the "countless hours of research, discussion and debate" and negotiation among various advisors and groups within the organization's policy-making structure.143 He also noted that the amendment "significantly strengthening" the rule passed by "the slimmest of margins in the House of Delegates."144 He saw "no reason to believe that the careful consensus we obtained from a wide array of interested groups and individuals has evolved, and will support a shift to a mandatory rule for either service or reporting." During his year as bar president, Hirshon plans to "call for a new voluntary commitment to pro bono service an important


138. See Maute Testimony, supra note 137.

139. See id.; see also discussion infra Part III.

140. See Maute Testimony, supra note 137; see also discussion infra Part III.

141. It is possible that the author's testimony, which was reported in professional journals and posted to the Ethics 2000 Consultative Council, provoked additional comments. See Conference Report, Laws. Man. on Prof. Conduct (ABA/BNA) 278 (June 7, 2000), e-mail distribution E2000COUNCIL® MAIL.ABANET.ORG (June 14, 2000). Four additional comments discussed in text were dated June 19-June 21, 2000. See id. Any inferences to be drawn to this timing are left to the reader.


143. Id.

144. Id.
initiative...hop[ing] to inspire and motivate our colleagues to fulfill their...obligation. John Pickering, founding partner of the Wilmer, Cutler & Pickering firm and recipient of numerous pro bono awards, strongly opposed any mandatory rule. From his leadership in pro bono work he has learned that "the carrot is far more effective than the stick; a mandatory approach to...service or reporting would be ineffective in broadening access to justice, counterproductive to efforts to better serve the poor and unworkable in practice." Doreen Dodson testified on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), which she chaired. Starting with the premise that the Commission and SCLAID shared a common goal — to increase availability of legal services for the poor — the question was what practical strategies would better yield positive results. She focused attention separately on the issues of mandatory service and reporting. SCLAID "fervently hope[d] that each lawyer...will have an internal moral compass call[ing one]...to give something back to society." Drawing on evidence of ineffective assistance of counsel by appointed counsel in death penalty cases, it was "clear that conscripts make poor lawyers...poor clients in civil matters deserve lawyers who want to represent them and who will do it with vigor." Dodson predicted "[a]n unintended byproduct" of mandatory service would be a broadened definition of qualifying service, thus weakening the primary focus on providing legal services to persons of limited means. Moreover, promulgation of a service requirement that "has no realistic prospect of being adopted would weaken the stature and credibility of the entire Model Rules construct." At this point in time" SCLAID considered "mandatory reporting...neither an appropriate nor a desirable strategy to increase provision of pro bono service." It was "not a panacea." Only Florida has such a rule, "implemented as part of a complete overhaul" of the state's approach, which included "the persuasive authority...by the local judiciary...[as] the more

145. Id.

147. Pickering Testimony, supra note 146.

149. See id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
significant incentive for lawyers." A national model for reporting was not appropriate; the Commission should not "assume that 'one size fits all.'"

[T]he manner in which each state chooses to provide incentives for pro bono service should be left to those states, not dictated by a national model. Legal and bar association cultures are simply too divergent across the states for the ABA to try to promulgate a model rule on something like reporting of pro bono service . . . In . . . [Florida] the involvement of the judiciary was critical to improvement of pro bono statistics. In other states, there may be other adjustments that will produce similar improvement, either by themselves or in conjunction with a reporting rule.

Robert Weiner, on behalf of the ABA Standing Committee on Pro Bono and Public Service, reiterated its opposition to mandatory service, and addressed the separate issue of reporting. He analogized mandatory pro bono to a tax, which people pay reluctantly and "seek loopholes to avoid . . ." The Committee, which closely studied both mandatory and voluntary reporting, concluded that it was:

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

The Committee was most concerned with the negative fallout of reopening the debate, which would be destructive, futile, counterproductive, and generate hostility to the cause of getting lawyers to do more pro bono. The Committee deemed it better for "Model Rule 6.1 to remain in its current form" than to take "the wrong approach at the wrong time." Given the commentators' unanimous opposition to mandatory service as "inconsistent with the needs of the indigent clientele intended to be benefitted," the Commission promptly dropped the idea. At the July 2000 meeting, the

156. Id.
157. Id.
158. Id.
159. See Weiner Testimony, supra note 134.
160. Id.
161. Id.
162. See id.
163. Id.
164. Ethics 2000 Summary of Rule 6.1 Comments, supra note 136; ABA 2000 Conference Report,
Commission agreed to propose no substantive changes to Rule 6.1.\textsuperscript{165} Its final report is expected to explain its belief that pro bono service is an important ethical obligation, that the current system of delivering such services is not working, and that it encourages ABA efforts to increase participation.\textsuperscript{166}

That still did not end the matter. The Commissioners remained deeply divided on the issue until the very end, twice voting to reconsider the concept of mandatory service.\textsuperscript{167} Finally, the Commissioners decided to add at the beginning of the rule the language, "Every lawyer has a professional responsibility to provide legal services to those unable to pay."\textsuperscript{168} An additional comment would provide: "Law firms should act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by this rule."\textsuperscript{169} The Reporter's explanation stated the Commission's belief that pro bono service is an important ethical obligation, that the current system of delivering such services is not working, and that it encourages ABA efforts to increase participation.\textsuperscript{170}

II. The Crisis in Delivery of Legal Services to Oklahomans of Limited Means

A. Unmet Demand for Legal Services

Oklahoma is among the poorest states in the nation, with an estimated 17% of its population living in poverty.\textsuperscript{171} In 1999, the state ranked forty-third in


\textsuperscript{166} See id.

\textsuperscript{167} See Commission on Evaluation of the Rules of Professional Conduct, Center for Professional Responsibility, American Bar Ass'n, Minutes of September 15-17, 2000, Ethics 2000 Meeting (visited Feb. 1, 2001) <http://www.abanet.org/cpra091700mt.html> (copy on file with author) (reporting initial vote in favor of mandatory service passed 6-5, then motion to reconsider passed 8-3). When it next met by teleconference, the Commission first took a straw vote on a motion supporting the concept of mandatory service, splitting 6-6, with the Chair, E. Norman Veasey, casting the deciding vote against the motion. See Commission on Evaluation of the Rules of Professional Conduct, Center for Professional Responsibility, American Bar Ass'n, Telephone Conference of September 26, 2000, Ethics 2000 (visited Feb. 1, 2001) <http://www.abanet.org/cpra0926tele.html> [hereinafter Telephone Conference of September 26, 2000] (copy on file with author). Another motion to clarify perceived ambiguity to alter slightly the aspirational language also failed on a 6-6 vote, with the chair breaking the tie. See id.

\textsuperscript{168} Telephone Conference of September 26, 2000, supra note 167 (copy on file with author).


\textsuperscript{170} Id.

\textsuperscript{171} See U.S. Census Bureau, State Estimates for People of All Ages in Poverty for US: 1996
per capita personal income. While the local economy has improved in the last few years, its median household income still ranks near the bottom.

Stan Foster, Executive Director of Legal Aid of Western Oklahoma, reports compelling data that shows a nagging crisis in provision of legal services for the poor. Approximately 22% of Oklahomans qualify for legal aid services, with their household income less than 125% of the poverty line. They are distributed throughout the state. Of Oklahoma’s seventy-seven counties, twenty-five have 30% or more of their populations financially eligible for legal aid. In each of those counties, the total population is under 100,000, which decreases the likelihood of sufficient volunteer attorneys to meet their legal needs. Between 1980 and 1990, the state’s poverty population grew by 31%. By contrast, federal funding of the Legal Services Corporation (LSC) fell from $400 million in 1995 to $278 million in 1996, a decrease of over 30% in a single year. Appropriations have recovered only slightly since then, to $305 million. Oklahoma legal aid programs experienced a 25% funding reduction. In 1981, Legal Aid of Western Oklahoma had over forty staff attorneys, with a ratio of one legal aid lawyer for every five thousand poor

(visited Nov. 13, 2000) (<http://www.census.gov/cgi-bin/hhes/saipe/gettable.pl>) (estimating that 13.7% of Americans meet federal poverty standards, and including an estimated 564,664, or 17.2% of Oklahomans). In 1999, poverty threshold for a family of one person, under 65 years of age is $8,667; for a family of four, including two children, it is $16,895. See U.S. Census Bureau, Poverty 1999 (visited Feb. 26, 1999) (<http://www.census.gov/hhes/poverty/threshold/thresh99.html>


173. See U.S. Census Bureau, Poverty Rate Lowest in 20 Years, Household Income at Record High, Census Bureau Reports (visited Feb. 25, 2001) (<http://www.census.gov/Press-Release/www/2000/ch00-158.html>) (stating that the 1999 median income for the nation rose 2.7%, from $39,744 in 1998 to $40,876). In Oklahoma, the three-year average median income for 1997-1999 was $33,311, ranking eighth lowest in the nation. See U.S. Census Bureau, Income of Households by State (visited Feb. 25, 2001) (<http://www.census.gov/hhes/income/income99/99tabled.html>) The jurisdictions with lower median household incomes are Arkansas, Louisiana, Mississippi, Montana, New Mexico, North Dakota, and West Virginia. See id. Jurisdictions with lower median household incomes are Arkansas, Louisiana, Mississippi, New Mexico, North Dakota, South Dakota and Tennessee. Id.


175. See id.

176. See id.


178. Id.

179. See Foster Letter, supra note 174.

180. See PERCENT OF POVERTY, supra note 177, at 2; see also NYU Sch. of Law, BRENNAN CTR. FOR JUSTICE, MAKING THE CASE: LEGAL SERVICES FOR THE POOR 9 (1999).

181. See Foster Letter, supra note 174.

182. See id.
people. By contrast, the ratio of licensed, in-state attorneys to the overall population ratio is one lawyer for every three hundred persons.

An ABA study estimates that nearly half of the poverty population needs legal services each year. In Oklahoma, this translates into more than a quarter million poverty-related legal matters annually. Publicly subsidized legal service programs can only serve a small fraction of Oklahoma’s poor in need of legal services.

Through the combined efforts of Legal Aid of Western Oklahoma (LAWO), Legal Services of Eastern Oklahoma (LSEO) and Oklahoma Indian Legal Services (OILS), some limited representation is provided in about twenty thousand cases annually. If the estimated projected needs are accurate, each year about 230,000 poor Oklahomans must make do without a lawyer in situations where they need legal help. There is no reason to expect substantial increases in public funding for legal aid programs or reduction in legal needs.

These numbers do not include Oklahoma’s near poor, elderly on fixed incomes, or the many minimum wage workers who earn too much to qualify for legal aid but cannot afford to hire a lawyer. Most of these people probably fall through the cracks of existing legal service or pro bono referral programs. Some have the tenacity or good luck to happen upon a lawyer who will represent them for free, or a reduced fee. Many solo practitioners practicing in Oklahoma’s towns and rural communities do not turn away prospective clients who cannot pay the customary fee. Sometimes the lawyers explicitly accept the matter on a pro bono basis, but perhaps more often they just do the work and later have

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183. See id.
184. See id.; see also Lawrence K. Hellman, Ethical Considerations: Who Will Look After Legal Aid Clients?, BRIEFCASE (Oklahoma County Bar Ass’n), July 1995, at 4-5 (on file with author); LEGAL SERVS. OF EASTERN OKLA., INC., 1999 ANNUAL REPORT [hereinafter LSEO 1999 ANNUAL REPORT] (stating 1:11,000 ratio of staff attorney to eligible client population); OKLAHOMA INDIAN LEGAL SERVS., INC., 2000 ANNUAL REPORT 2 (draft) (stating 1:20,004 ratio of staff attorney to eligible Native American, economically qualified population); Minutes from Oklahoma Bar Ass’n Rules of Professional Conduct Committee 2 (June 7, 1996) (on file with author).
186. See LEGAL NEEDS AMONG LOW-INCOME AND MODERATE INCOME HOUSEHOLD: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 7-8 (ABA 1994) (reporting that 47% of low income population had legal needs that were prevalent in 1992).
187. See Foster Letter, supra note 174.
188. See id.; see also LSEO 1999 ANNUAL REPORT, supra note 184 (stating legal assistance given to over 9,000 people that year); LEGAL AID OF WESTERN OKLAHOMA, INC., ANNUAL REPORT 3 (1999) [hereinafter LAWO 1999 ANNUAL REPORT] (estimating 12,000 to 14,000 legal matters handled annually).
to write off the bill. Access to a lawyer should depend neither on happenstance nor on a belated accounting decision. After-the-fact realization that the client would not pay may leave both with a bad aftertaste, about possible deception, failed responsibilities, and uncertainty about the quality of representation. Whether the client deliberately stiffed the lawyer for the unpaid fee, or the lawyer reluctantly concluded that the client could not pay, neither one is likely to be satisfied with the outcome. It is far preferable for all concerned to have an advance agreement on the terms of representation.\footnote{190}

Lawyers in small firms and in small towns may handle more of the individual pro bono work because their offices are more visible and accessible to those in need of services. General practitioners may also be accustomed to handling the wide array of common individual legal problems. Conversely, lawyers in Oklahoma's metropolitan areas and those in large firms or more specialized practice may be willing to volunteer their services, but have not been matched with pro bono clients, perceive they lack knowledge in relevant areas of law, or are concerned about potential conflicts with firm clients. To assure its citizens fair access to justice, and to provide for fair distribution of pro bono work among its lawyers, Oklahoma should create a statewide referral system that would match prospective clients with volunteer and reduced-fee lawyers who are competent to provide a wide range of services to persons with legitimate legal needs but who cannot afford to pay market prices.

A person accused of a crime is constitutionally guaranteed to counsel, including appointed counsel at state expense if one cannot afford a lawyer.\footnote{191} Oklahoma criminal defendants with limited financial resources have the benefit of the Oklahoma Indigent Defense System (OIDS). In the state's recent history, funding problems threatened a constitutional crisis. Before 1990, a statutory fee schedule set extremely low caps on fees payable to appointed counsel, regardless of the severity of charges. It undoubtedly affected the extent and quality of services provided.\footnote{192} That year, in \textit{State v. Lynch},\footnote{193} the Oklahoma Supreme Court

190. See Reid F. Trautz & Paul McLaughlin, \textit{The Fine Art of Getting Paid}, 71 OKLA. B.J. 1484, 1487 (2000); see also OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.5(b), 5 OKLA. STAT. ch. 1, app. 3-A (Supp. 1999). When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Fee disputes often underlie disciplinary grievances and malpractice claims filed by former clients. Telephone Interview with Allen J. Welch, OBA Assistant General Counsel (Oct. 12, 2000) (stating that a large percentage of grievances reference a fee dispute, but that as a matter of policy and the rules governing discipline, the bar does not seek to referee such disputes unless the fee appears extortionate or fraudulent).


192. See Rodney J. Uphoff, \textit{The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?}, 28 CRIM. LAW BULL. 419, 433-34 (1992). The maximum fee payable to counsel was $500 in a noncapital case. \textit{See id.} A maximum fee of $100 was payable for services rendered before defendant was discharged or bound over after a preliminary hearing. \textit{See id.} For capital cases, a maximum of $200 was payable for services before the preliminary hearing, $500 for the preliminary hearing, and $2500 for services from the time a defendant is bound over through final disposition in trial court. \textit{See id.}

held unconstitutional this statutory scheme because it fixed an unreasonable, arbitrary rate of compensation.\textsuperscript{194} In 1991, the legislature responded by passing the Indigent Defense Act, which established OIDS.\textsuperscript{195} This state agency was charged with developing a system for the delivery of indigent defense services within each judicial district. OIDS, operating in seventy-five counties, provides trial, appellate, and postconviction defense services to adults and juveniles judicially determined to be entitled to court-appointed counsel.\textsuperscript{196} It represents indigent defendants charged in felony, misdemeanor, and traffic cases punishable by incarceration. Despite periodic increases in allowable rates, the amount paid to contract attorneys falls significantly below the market rate charged by Oklahoma's private practitioners.\textsuperscript{197}

In 1996, it became clear that the meager rates paid to indigent defense contractors did not induce sufficient numbers of competent attorneys to participate in the state's competitive bidding process.\textsuperscript{198} There was concern that the low rates paid to the contract attorneys could result in pro forma, nominal representation of many indigent defendants.\textsuperscript{199} Since then, state funding has improved dramatically, with OIDS's current budget steady at about $16 million, up from around $8 million in 1996.\textsuperscript{200} OIDS currently employs sixty-five staff

\textsuperscript{194} See id. at 153.


\textsuperscript{196} See id. § 1355.6. OIDS also operates in Tulsa and Oklahoma Counties if the public defender's office has a conflict of interest. See Nina Moser, Oklahoma Indigent Defense System: Mission (visited Nov. 14, 2000) <http://www.state.ok.us/-oids/mission.htm>.

\textsuperscript{197} A competitive bidding process determines the amount paid to contract attorneys. See 22 OKLA. STAT. § 1355.8(e) (Supp. 1999). In the event of a conflict of interest precluding representation by a contract attorney, OIDS may hire another attorney outside the system. See Telephone Interview with James Drummond, Chief, OIDS Non-Capital Trial Division (Oct. 17, 2000). The OIDS board sets the hourly rates paid such attorneys. See id. At present, in noncapital cases, they are paid $40 per hour for out-of-court time, $60 per hour for time in court; for capital cases, the allowed rates are $60, and $80, respectively. See id. The statute imposes maximum caps on the amount payable to $800 for misdemeanor, traffic, and juvenile matters and $3,500 for noncapital felonies. See id. § 1355.8 G.1-2. In fiscal year 2000, OIDS was appointed to represent indigent defendants in 29,100 new cases. See OKLAHOMA INDIGENT DEFENSE SYSTEM 2000 ANNUAL REPORT 14 (2000) (on file with author). The legislative appropriation for OIDS in 2000 was $13.9 million. See id. at 13. Basic math, then, indicates payment of an average of $180 per case. Assuming that few, if any of these matters are disposed of with less than two hours of attorney time, the rates paid fall significantly below Oklahoma lawyers' market rates. See 1992 Membership Survey of the Oklahoma Bar Association, 63 OKLA. B.J. 3533, 3564 (1992) (median hourly rate of Oklahoma attorneys approximately $103).

\textsuperscript{198} See, e.g., Libby Quaid, Funding Shortages Threaten Indigent Defense System, NORMAN TRANSCRIPT, Sept. 22, 1996, at 7 [hereinafter Funding Shortages] (citing meager and delayed pay and burdensome reporting requirements as reasons for the sharply diminished pool of contract attorneys).

\textsuperscript{199} In 1995, OBA adopted a Resolution to encourage adequate funding for indigent defense. Duke Logan, immediate past president of the OBA sent the resolution to Governor Frank Keating, urging action to remedy "an extreme crisis . . . in inadequate funding for indigent representation." Letter of J. Duke Logan to Okla. Governor Frank B. Keating (Nov. 22, 1995) (copy on file with author). "Since 1992 the average rate of compensation for all non-capital contract attorneys has decreased from $253.77 per case to $141.68 per case, a reduction of 44.3 percent, ranging from a contract low [in some counties] of $73.00 per case . . . ." OBA Resolution of Nov. 10, 1995 (on file with author) (emphasis added).

\textsuperscript{200} See Nina Moser, Oklahoma Indigent Defense System: Budget (last modified July 14, 2000)
attorneys and 130 full-time staff members statewide. It contracts with about 500 private attorneys, investigators, and experts for indigent defense professional services. Oklahoma County and Tulsa County public defenders offices are separately funded and administered. Statewide, the indigent defense system represents approximately 29,000 clients each year.

B. Current Pro Bono Efforts in Oklahoma

1. Oklahomans Rise to the Occasion

When they are aware of a great need, many Oklahoma lawyers volunteer their services. They respond without hesitation because it is the right thing to do. Oklahomans' generosity, warmth, and strength have impressed the nation, when the state has suffered tragic losses. While not so dramatic, some good citizens regularly volunteer their services to community organizations, recognizing that daily strains of life may drain the spirit of those in need. Some attorneys generously give their professional services to persons who cannot afford to pay market rates for legal services. The OBA annually recognizes individuals and county bar associations for their outstanding pro bono contributions.


202. See OKLAHOMA INDIGENT DEFENSE SYSTEM 2000 ANNUAL REPORT, supra note 197.

203. See Summary of Statement of Dan Murdock, Oklahoma Bar Ass'n General Counsel, Minutes of June 7, 1996 OBA Rules of Professional Conduct Committee (on file with author) [hereinafter ORPC June 1996 Minutes].

204. Of course, the May 1999 tornadoes and April 19, 1995, bombing of the Murrah Building are obvious examples. In addition, Oklahoma's surviving spirit during the dust bowl era of the 1930s was memorialized in John Steinbeck's Pulitzer Prize-winning book Grapes of Wrath (1939), which is now a mainstay of popular culture, in John Ford's movie version (20th Century Fox 1940) and Frank Galati's adaptation for theater, which won the 1990 Tony Award for Best Play on Broadway. Now a true classic, it is regularly produced by local theater companies.

205. For example, at the 1999 Annual OBA Meeting, four small county bars were honored because all of their members participated in pro bono service with Legal Aid of Eastern Oklahoma. See Oklahoma Bar Association: 95th OBA Annual Meeting (visited Aug. 15, 2000) <http://www.okbar.org/annualmeeting99/awards1.htm> (recognizing bar associations from Adair, Atoka, Choctaw, and Pushmataha counties for 100% participation in pro bono panels). Individuals are also singled out for their extraordinary contributions to the public good. Awards in 1999 recognized Randolph Jones for organizing law firm juvenile court pro bono program, and for devoting over 1800 hours of professional service over a three-year period to such work; D. Kent Meyers and Don R. Nicholson for creating, as authorized by Judge Niles Jackson, Oklahoma Lawyers for Children, in which almost 200 lawyers volunteer to represent allegedly deprived children in Oklahoma County; Courtney Briggs and OBA Disaster Response and Relief Committee for activating panel of 250 volunteer attorneys to aid victims of the May 3, 1999, tornadoes; Dave and Peggy Stockwell for coordinating massive May Tornado Disaster Relief effort. See id.; see also LSEO ANNUAL REPORT, supra note 184, at 5 (specially honoring Justice Daniel Boudreau for long-term service, LSEO pro bono awards to five individuals, and listing about five hundred volunteer lawyers on its pro bono honor roll).
2. Extent and Type of Oklahoma Pro Bono Involvement Speculative at Best

It is currently impossible to gauge the extent of Oklahoma lawyers' pro bono involvement. Some records are kept by entities receiving federal money through the Legal Services Corporation. Undoubtedly many lawyers provide pro bono services on an ad hoc basis, to individuals and through other entities that do not keep track of lawyers' volunteer efforts. Still, the available data sheds some light. At present, it may be that "Oklahoma's pro bono participation is abysmally low as compared to other states."206 Nevertheless, one can reasonably expect to find an untapped reservoir of commitment to the public good among Oklahoma's lawyers. This commitment could be employed to create a statewide system for delivery of legal services to poor and moderate income persons.

As part of their federal funding requirements, LAWO and LSEO must file annual reports on the amount of services provided by pro bono legal panels.207 In fiscal year 1999, LSEO reported receiving 2724 hours of pro bono services, and 78 hours of services provided at a reduced fee. Several rural counties have been recognized for 100% participation, with each local lawyer agreeing to serve on a pro bono panel.208 The OBA Pro Bono Program Honor Roll 2000 recognizes 1875 members who have been listed as serving on a panel willing to volunteer services for one of the legal aid programs.209 Over 600 of those listed are noted for having provided services during an eighteen month period.210 If these numbers are accurate, 16.5% of Oklahoma lawyers are listed on the rolls, but only 5.9% actually provided pro bono legal services through the panels.211

No reliable data tracks the amount and type of volunteer services given by Oklahoma lawyers. Although the OBA conducts periodic membership surveys, none have obtained information narrowly focused on extent of pro bono legal work for the poor, or other pro bono legal work.

A 1970 survey focused on the economics of practice, characterized as an issue long stigmatized as "almost unethical if not downright evil."212 Only in the ten or fifteen years preceding the survey (i.e., 1955-70) had the profession awakened to the problem "of reconciling the concept of public good and public service

206. Dart e-mail, supra note 17.
207. Because of the specialized nature of its work, OILS is not required to utilize and report pro bono services as a condition of federal funding. Telephone Interview with Steve Hager, OILS Staff Attorney (Sept. 1, 2000).
208. See LSEO ANNUAL REPORT, supra note 184, at 5 (recognizing Adair, Atoka, Choctaw and Pushmataha County Bars for 100% participation, for a total of 44 attorneys); OBA Pro Bono Progress Report, supra note 6, at 2828-29 (recognizing Cimarron, Greer, Harmon, Jackson, Kiowa and Tillman for 100% participation, for a total of 46 attorneys).
209. See OKLAHOMA BAR ASS'N, OBA PRO BONO PROGRAM HONOR ROLL 2000 (on file with author).
210. See id. (designating with an asterisk 616 lawyers who provided pro bono service in the period Jan. 1, 1999 through June 30, 2000).
with the need to provide an adequate living for the practitioner" and had "been able to openly talk about" the financial aspects of practicing law.\textsuperscript{213} One chart depicted the relationship between median income based on population, and weekly hours spent on civic work, presumably including all civic, community, political, bar, and pro bono legal services for the poor. The results suggest some interesting possibilities. In very small communities, lawyers engaged in a moderate amount of civic work had significantly higher incomes than those less involved in civic matters.\textsuperscript{214} Similar patterns occur in some midsized and all larger communities.\textsuperscript{215} Possibly this suggests that high civic involvement related to public governance and strong political influence helped generate legal business. By contrast, in some small communities, lawyers who did relatively little civic work earned more than those who were moderately, or highly involved in civics.\textsuperscript{216} Perhaps these small communities had significant numbers of poor people, and the moderately public-spirited lawyers absorbed a disproportionate amount of pro bono work, as contrasted with those who did less unpaid work.

The 1982 OBA survey concluded that Oklahoma lawyers "emphatically oppose mandatory pro bono programs," but that 77% would be willing to donate their professional services if the bar "developed an organized system for members to provide free legal services for the poor."\textsuperscript{217} At the time, 65% of respondents

\textsuperscript{213} Id.

\textsuperscript{214} See id. at 2902 (reporting that in communities with populations under 5000, lawyers who do less than five hours of civic work weekly have a median income of $12,000, whereas those who spend five to nine hours weekly on civic matters have a median income of $15,000).

\textsuperscript{215} See id. (reporting that in areas with populations ranging from 20,000 to 30,000, lawyers with fewer than five weekly civic hours had median income of $16,000, while those who spent 10-19 weekly hours on civic work had a median income of $23,200). In communities with populations greater than 60,000, lawyers' median income consistently increased with some, but not all levels of civic involvement. The pattern is most pronounced in two types of communities. In those with populations ranging in size from 60,000 to 200,000, lawyers with fewer than five civic hours earned $20,000, those with five to nine civic hours earned $21,500, and those with 10-19 weekly civic hours earned $24,500. See id. In those with populations over 500,000, lawyers with low civic involvement earned $17,000, those with moderate involvement earned $23,100, and those in the 10-19-hour-per-week range earned $24,700. See id.

\textsuperscript{216} See id. The chart shows that in areas with populations of 5000 to 10,000 and 10,000 to 20,000, lawyers who worked less than five weekly hours on civics had a median income of $17,500 and $19,600 respectively, but those spending five to nine weekly hours on civics had a median income of $13,600 and $15,200. See id. In the 10,000 to 20,000 community, lawyers who worked 10-19 weekly civic hours had $17,500 median income. See id.

\textsuperscript{217} Report of the 1982 Informational and Service Survey, 54 OKLA. B.J. 223, 235 (1983). A total of 77% opposed imposition of a mandatory pro bono requirement, but if there were such a program 66% believed the time required should be limited to one to five hours a month. See id. at 235. One-half of the respondents were "willing to voluntarily donate" one to five hours a month, and 22% to donate six or more hours a month. See id. The survey was conducted pursuant to an order of the Oklahoma Supreme Court, \textit{inter alia}, "to assist in long range planning and development of programs and services to meet the needs of OBA members and the needs of persons utilizing legal services in the state" and specifically to include "delivery of legal services to low and middle income persons." Id. at 220 (S.C.B.D. No. 3049, dated Sept. 2, 1982). The response rate was excellent for such data collection methodology, with 40% of bar members returning the questionnaire. See id. at 224. The survey

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devoted fewer than five hours a week to "civic, community and pro bono work"; 28% spent five to nine hours a week, and 7% donated ten or more hours a week. Because the question does not differentiate between the types of volunteer activities, there is no way to determine how much of the time was devoted to civic and community activities (i.e., Jaycees, United Way, youth sports, scouting, or church), how much time was spent volunteering professional legal services, and further, whether those services were given to individuals, nonprofit educational or cultural organizations, or to organizations designed to assist the poor. Extrapolating from the 1982 report, it can be inferred that 65% of Oklahoma lawyers spent anywhere from zero to 249 hours a year in the generic volunteer categories, 28% gave 250-450 hours, 6% gave 500-950 hours, and 1% volunteered more than that. Key facts that cannot be inferred are amount of work done by the 65% of respondents (who may be either "free-riders" or "exemplary role models"), the type of work done, and categories of recipients.

The 1992 OBA report used a more sophisticated survey instrument, which broke into smaller time units the single question on volunteer services. However, because it used ambiguous service categories, the data obtained again produced questionable information. Generically labeled, the questionnaire sought responses to average weekly hours spent on "Civic/Community/ProBono/Charitable Work" (CCPBCW, or category 1) and on "Professional Legal Work/Volunteer Work" (PLWVV, or category 2). It did not define the two categories, which arguably overlap. The first category could be interpreted very broadly, to include teaching Sunday School, coaching soccer, serving on the lyric theatre board, or providing legal services to low income persons, through a pro bono panel or otherwise. The second category could be interpreted to mean providing legal services to low income persons or to not-for-profit organizations of all types, any bar association activities, and any other volunteer work, including scout leadership, hospital auxiliary guild, and again, not-for-profit board membership. Because the question did not clearly define each category, the resulting responses likely reflected confusion. About half the respondents said they spent three or fewer hours on category 1 activities, which could mean

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instrument was not published in the final report, so closer analysis of specific items cannot be done.

218. Id. at 235.
219. See id. at 236 (inferences based on assumption of 50 work weeks).
220. See Oklahoma Bar Association, 1992 Oklahoma Bar Association Survey, 63 OKLA. B.J. 3533, 3555, 3604-08 (1992) [hereinafter 1992 OBA Survey]. Question 22 asks: "In an average week, how many hours do you spend on Civic/Community/Pro Bono/Charitable Work [category 1 and] Professional Legal Work/Volunteer Work [category 2]." Id. Possible responses are: "Less than 3, 3, 4, 5, 6, 7, 8, More than 8." Id.
221. Id.
222. Indeed, there was a significantly lower response rate to this item, which likely reflected confusion, rather than opposition to data collection. The overall response rate was excellent, with 41.6%, or 4089 of all 9837 OBA members returning the mailed questionnaire. See id. at 3540. By contrast, of those responses, 9.8% (402) did not provide information for category 1, CCPBCW, and 23.5% (961) did not provide information for category 2, PLWVV. See id. at 3556.
they did no such work, or donated close to 150 hours annually.\textsuperscript{223} Almost two-thirds of the respondents spent fewer than three hours a week on category 2 activities, again with a possible annual range of zero to 150 hours.\textsuperscript{224} The combined answers yield greater uncertainty, with total service by those respondents ranging from zero to 300 hours a year. Further, there is no tracking of individual responses, so the combined number of volunteer hours in categories 1 and 2 by individual attorneys could be quite high, and some quite low. Notwithstanding these interpretive difficulties, the 1992 survey suggests that many Oklahoma lawyers generously give their time to a wide array of unpaid service activities. Nearly half the respondents spend more than 150 hours a year in category 1 activities, with 9\% giving more than eight hours a week, or 400 hours a year.\textsuperscript{225} One-third of Oklahoma lawyers provide volunteer legal work, with 12.8\% giving about 150 hours a year, and 8\% in the top group, giving more than eight hours a week.

Anecdotal evidence indicates that lawyers have expressed willingness to undertake pro bono representations, but have not received referrals. Three-fourths of Oklahoma lawyers are concentrated in the state's metropolitan areas, although the poverty population is distributed throughout the state, particularly rural areas in the southern part of the state. Unless something is done to distribute volunteer legal services throughout the state, lawyers in rural areas bear an extremely disproportionate burden to represent poor persons.\textsuperscript{226} Using 1990 census data and the 2000 OBA map, 567, or 5\% of the state's 11,335 lawyers reside in the 25 poorest counties, with an estimated 153,716 persons eligible for legal aid. Thus, in these counties, the ratio of lawyer to financially eligible population is an astonishing 1:271 persons. By contrast, the ratios for Oklahoma and Tulsa counties is 1:26, and for Cleveland County 1:36.\textsuperscript{227} This suggests the need for a comprehensive, statewide referral system that can match prospective clients in need of legal services with attorneys willing and competent to provide the services at no cost, or a reduced cost. It also suggests the need for innovative ways to distribute the volunteer efforts of attorneys in cities to the needy client population in outlying areas.

3. Oklahoma's Current Pro Bono Programs

Bar leaders have sought innovative ways to make essential legal services available to all Oklahomans. Lawyers who serve on legal aid panels can attend certain continuing legal education programs without charge.\textsuperscript{228} Over the years,

\textsuperscript{223} See id. at 3556 (reporting 51.5\% spent less than three hours a week on CCPBCW).

\textsuperscript{224} See id. (reporting 65.6\% spent less than three hours a week on PLWVW).

\textsuperscript{225} See id. at 3556.


\textsuperscript{227} Id.

\textsuperscript{228} See OKLAHOMA BAR ASS'N, PRO BONO PROGRAM 5 (n.d.) (describing free or reduced-fee continuing education events for lawyers who serve on pro bono panels).
the Young Lawyers Division (YLD) has served an important leadership role in numerous pro bono efforts. In August 2000, a coalition of faith-based institutions, LAWO, practitioners, and students at Oklahoma City University School of Law established the "Oklahoma City Volunteer Legal Center," with a current focus upon consumer credit counseling.

4. Oklahoma's Financial Support Programs

Oklahoma lawyers also help financially support organizations dedicated to improving access to justice. The OBA Legal Services Committee has worked to replace lost federal funds with other resources. These efforts, supported by the OBA Board of Governors, have produced significant results. The pro bono committee of the Tulsa bar is in the midst of a $1 million fund-raising campaign intended to replace the lost federal funds.

Some attorneys make direct gifts to legal services organizations and the Oklahoma Bar Foundation (OBF). Under 6% are fellows who participate in

229. For example, the YLD has participated in a cooperative effort with Legal Aid of Western Oklahoma, Legal Services of Eastern Oklahoma, and the Oklahoma AIDS Care Fund. See id. The AIDS Legal Resource Project provides free legal representation to low income persons living with HIV/AIDS. See id. Representations cover a wide range of legal issues, including estate planning, debtor/creditor issues, insurance law, state and federal entitlement law (Medicaid and Social Security Disability assistance), family law (where custody or visitation issues involve the HIV status of the parent or child), discrimination issues, and the representation of institutionalized persons. See id. It is staffed by one part-time attorney coordinator and over 150 attorneys who have volunteered to serve on the its Pro Bono Panel and to accept at least one qualified client per year without fee. After the bombing, under contract with FEMA, the YLD coordinated volunteer lawyers to serve affected persons; their efforts provided the equivalent to over $400,000 of legal services. See ORFC June 1996 Minutes, supra note 203, at 4. The YLD also is involved in providing free legal assistance and information to senior citizens, victims of domestic violence, and children involved in termination of parental rights cases. See Oklahoma Bar Ass'n, Young Lawyers Division Report (visited Aug. 15, 2000) <http://www.okbar.org/members/younglawyers/newajuly.htm>.


231. See Actions of Board of Governors, Aug. 16, 1996, supra note 12, at 2560 (reporting appropriation of $450,000 state monies to augment budgets of civil legal aid programs); Summary of Actions of Board of Governors, 71 OKLA. B.J. 1449 (2000) (OBA Governor Bozarth reporting Oklahoma legislature approved $230,000 increase in funding to Legal Services Revolving Fund, bringing fiscal year 2000-2001 state funding to $830,000).

232. Telephone Interview with David Riggs, Chair of Tulsa County Pro Bono Committee (Sept. 19, 2000).

OBF's systematic giving program. Additionally, about 42% of the state's practicing lawyers participate in the voluntary Interest on Lawyers' Trust Accounts (IOLTA) program in which banks remit interest payments to the bar foundation.

Since 1986, the Oklahoma Bar Foundation has distributed more than $2.5 million dollars to legal service providers, public defender and indigent defense programs, and pro bono programs. In the year 2000, the OBF distributed $320,000, with approximately three-fourths given to organizations providing legal services to the poor. Long-standing disciplinary rules strictly prohibit lawyers from comingling the lawyer's money or property with that belonging to clients. When a client pays in advance for legal fees before they are fully earned, or for anticipated expenses of the representation, the lawyer must keep that money separate from the lawyer's own funds, including the office operating account. Before the advent of IOLTA programs, client trust accounts were non-interest bearing because of federal regulations and the administrative burdens in accurately allocating interest to multiple clients, each with varying amounts held for different time periods. Thus, for administrative convenience, lawyers maintained client trust accounts, which held their clients' aggregate funds separate and secure. Because comingling rules prohibited lawyers from receiving interest on their clients' money and accurate accounting was impractical, the depositary banks received a windfall from free use of the money. Where the amount on deposit by a client was nominal or it was held for a short period of time, it was not feasible to open a separate account for that client's funds or to calculate the interest payable for each client's ratable share.

Since 1980, when federal banking laws first authorized payment of interest on demand deposits, every jurisdiction changed its ethics rules to permit interest on trust accounts to be remitted to legal aid and other organizations. IOLTA programs take one of three basic formats: (1) comprehensive, with mandatory participation; (2) opt-out, in which lawyers presumptively participate unless they specifically elect not to; and (3) voluntary, which requires individual enrollment to participate. Although most jurisdictions began with voluntary IOLTA

234. See, e.g., OBF 1998 ANNUAL REPORT, supra note 233, at 8 (President's Message by Judge William R. Burkett) (expressing disappointment that just over 700 lawyers, or only 5% of practicing lawyers in the state, are "fellows" who commit to giving $1000, with payments over 10 years). Currently, only around 5% of the Oklahoma bar's total members are fellows. See id.; Telephone Interview with Tony A. Scott, Executive Director, OBF, Sept. 29, 2000).

235. See, e.g., OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (a), 5 OKLA. STAT. ch. 1, app. 3-A (1991) [hereinafter ORPC 1.15] (showing that Rule 1.15(a) is almost identical to Disciplinary Rule 9-102(a)). Proposed revisions to Rule 1.15 are pending before the Supreme Court, but nothing contained therein affects statements made in text about IOLTA. OBA Rules of Professional Conduct Comm., Minutes of Dec. 17, 1999 Meeting (on file with author).


237. See WOLFRAM, supra note 4, at 183-84.

238. See, e.g., 1998 OBF ANNUAL REPORT, supra note 233, at 3. (describing IOLTA concept as method to raise money for charitable purposes, with emphasis on funding legal service organizations that provide civil legal services to the poor).
programs, twenty-seven are now comprehensive, twenty-one are opt-out, and four, including Oklahoma, remain voluntary.\footnote{239} Since their inception, IOLTA critics challenged their constitutionality.\footnote{240} Detailed treatment of the constitutionality issues is beyond the scope of this article. In 1998, the U.S. Supreme Court held that, for purposes of the Fifth Amendment Takings Clause, interest on client funds in IOLTA accounts constitutes property of the client.\footnote{241} On remand to the district court in the Western District of Texas, Judge Nowlin found there had been no unconstitutional taking and that the client suffered no compensable loss.\footnote{242} Appeal is pending before the Fifth Circuit Court of Appeals.\footnote{243} In another case brought by the Washington Legal Foundation, the Ninth Circuit has recently held that clients and customers are entitled to just compensation for their property interest taken for public purposes.\footnote{244}

5. Oklahoma's IOLTA Approach

In light of this ongoing litigation, the Board of Trustees of the OBF decided to hold in trust continuing IOLTA remittals until the Supreme Court finally resolves the issue.\footnote{245} Oklahoma Rule of Professional Conduct 1.15(d)(4)

\footnote{239} See ABA Comm'n on IOLTA, IOLTA Handbook 4 (Jan. 1995, updated Aug. 2000) (not formally published, on file with the ABA Commission on IOLTA) (listing New Mexico, Oklahoma, South Dakota, and Virgin Islands as jurisdictions with voluntary IOLTA programs).
\footnote{240} See Washington Legal Found. v. Texas Equal Access to Justice Found., 106 F.3d 640 (5th Cir. 1997); Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993); Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir. 1987).
\footnote{243} See IOLTA Litigation Past and Present (visited Feb. 27, 2001) <http://www.abanet.org/legalservices/iolitlit.html> (reporting that TEAJF and six amicus had filed their briefs, and that TEAJF also filed a motion to certify the state law property question to the Texas Supreme Court).
\footnote{244} See Washington Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1115 (9th Cir. 2001); see also Paulsen v. State Bar of Tex., No. 03-00-00254-CV, 2001 WL 23180 (Tex. App. Jan. 11, 2001) (affirming lower court decision not to grant lawyer's requested exemption from comprehensive IOLTA program).
\footnote{245} See OBF 1998 ANNUAL REPORT, supra note 233.
explicitly allows clients to assert a claim for interest because the amount on
deposit is not nominal in amount or held for a short period of time. Because
this procedure contemplates that, in some cases, clients have a protected right
to receive interest on their portion of IOLTA funds, the Oklahoma rule may
avoid the Fifth Amendment issues presented in Phillips. Should the IOLTA
program withstand Supreme Court scrutiny, Oklahoma should consider
converting its IOLTA program to the comprehensive format. This "cost-free
adjustment" could triple or quadruple available subsidies for legal aid,
substantially furthering the promise of equal justice for all. Several years
ago, Lawrence Hellman, who is now Dean of Oklahoma City University Law
School, argued for comprehensive or mandatory IOLTA:

The legal profession truly is to be admired for its long-standing
dedication to the principle that legal services should be available for
all, regardless of means. Still, despite the heroic and selfless efforts
of many, it is unlikely that hit and miss volunteer work can replace
the expertise and reliability of a permanently-staffed office of
lawyers who concentrate on the particular range of problems
confronting poor people. Pro bono work by the bar is an indispen-
sable supplement to full-time legal aid offices; it is not a realistic
substitute.

C. Why Oklahoma Attorneys Should Respond

The demand for legal services to Oklahoma's poor and near-poor population
far exceeds the available supply of financial resources and volunteer lawyers.
Oklahoma bar leaders, the Supreme Court, and individual lawyers could do much
to alleviate the problem.

1. To Those To Whom Much Is Given, Much Is Required

Most Oklahoma lawyers are not fabulously wealthy, nor do they live in the
luxury the media often attributes to lawyers. Nevertheless, it is clear that
legal careers enable an above-average standard of living. Relative to the general
population, Oklahoma lawyers are privileged and affluent. Oklahoma lawyers'
average income far exceeds the standard income measures for other Okla-

246. See Oklahoma Rules of Professional Conduct 1.15(d)(4), 5 Okla. Stat. ch. 1, app. 3-A
247. See Hellman, supra note 184, at 4.
248. Id.; see also Sara Mosle, The Vanity of Volunteerism, N.Y. Times Mag., July 2, 2000, at 22
(arguing that volunteerism has real value, but does not provide a systematic solution to entrenched
problems of poverty, hunger or homelessness).
249. OBA Strategic Plan, supra note 13, at 236.
250. See Hall, supra note 11, at 96 (describing per partner profitability ranking of firms, with Los
Angeles' Irell & Manella 1999 partner profits of $615,000, and New York's Pennie & Edmonds 1999
partner profits of $780,000 placing them in the top 60 most profitable firms).
251. Oklahoma per capita income, for each adult and child in the state was $22,801 in 1999, up

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There is an express or implied *quid pro quo* between the public and legal profession. Our professional license gives us an exclusive monopoly to engage in a wide array of activities defined as the practice of law. Those of us who are educated at (or work in) public law schools are subsidized by state taxes, because the legislative and executive branches deemed legal education worthy of public support. It is true, the law license is earned only after extended study, and some law graduates are burdened by the obligation to repay student loans for years after entering practice. Still, we must remember that various forms of public support make our professional accomplishments, prestige, and earning power possible. In return for the benefits of education, licensure, and the right to practice, all lawyers have the responsibility to serve and support the public interest in whatever ways they are able. Whether through direct services to the poor, or financial support that enables others to serve, each lawyer owes something to the system that supports us. To the extent that essential legal services are available only to those who can afford to hire a private attorney, the profession breaches its public obligations for the quality of justice.

2. As an Attorney, We Pledged to Do the Right Thing

Lawyers should provide pro bono services because it is the right thing to do. In taking the oath of office, Oklahoma attorneys pledge to "support, protect and defend" the federal and state constitutions, to "delay no man for lucre or malice" and to "act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client, so help you God." We are duty-bound "[n]ever to reject for any consideration personal to himself the cause of the defenseless or the op-

from $17,026 in 1993. See Survey of Current Business, Apr. 1995, at 84; see also State Personal Income, supra note 172. The mean starting salary of new University of Oklahoma College of Law graduates, working in Oklahoma, was $41,425 in 1999, up from $31,572 in 1993. See National Ass'n for Law Placement, Class of 1999 School Report (June 2000) (on file with author); see also 1992 OBA Survey, supra note 220 (reporting lawyers' 1991 median income of $57,531, compared to $40,000 in 1982 survey and $18,000 in 1970 survey). The Oklahoma Employment Security Commission, which administers the unemployment compensation system, reports that salaried Oklahoma attorneys in 1999 earned a mean of $63,500. Those in the bottom quartile earned an average of $16.88 per hour, for annual salary of $35,110; those in third quartile earned $45.70 an hour, for annual salary of $95,056. Telephone Interview with Bob Dauffman, Director of Center of Economic and Management Research, University of Oklahoma (Sept. 1, 2000).

252. Cf. Steven Lubet & Cathryn Stewart, A "Public Assets" Theory of Lawyers' Pro Bono Obligations, 145 U. Pa. L. Rev. 1245 (1997) (positing new theory to support pro bono obligations in return for publicly created lawyer assets of confidentiality, conflicts protection, attorney-client privilege, work product doctrine and evidentiary privilege); Bruce Andrew Green, Note, Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance, 81 COLUM. L. REV. 366, 389 (1981) (concluding that there are no constitutional impediments to court-ordered gratuitous legal services to indigents in civil matters; takings clause not violated because state-conferred monopoly to practice in adjudicative system gives "reciprocal economic benefit").


pressed." As recognized in the Preamble to the Rules of Professional Conduct, lawyers owe multiple responsibilities as "a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice."  

3. Pro Bono Service is a Moral Obligation

Service to the poor is also a moral obligation. Traditional notions of professionalism are based on the concept that law is a public calling, a vocation of service for the public good. It is rooted in our Judeo-Christian, Islam, and Baha'i traditions and is also renewed in the contemporary religious lawyering movement. Lawyers have specialized skills that enable them to untangle complex or delicate problems, to resolve festering disputes, and to structure valuable transactions. Attorneys are accorded unique access to courts, administrative agencies, public forums, and private bargaining tables. Because of our special skills and privileges, lawyers receive above-average earnings from our work on behalf of private interests. Most attorneys are blessed with comfortable lives, secure in our financial ability to feed, clothe, shelter, and educate our families. Surely, we each owe a debt of professional service to those less fortunate, in humble gratitude for the gifts we have received. Our days on earth are numbered; no amount of professional success can change this. As such, service to others is an act of faith.

257. For scriptural source in the Hebrew Bible (Old Testament), see, e.g., Deuteronomy 15:7 (Oxford Annotated) (stating "If there is among you anyone in need, a member of your community in any of your towns within the land that the Lord your God is giving you, do not be hard-hearted or tight-fisted toward your needy neighbor"). A familiar New Testament passage provides: "From everyone to whom much has been given, much will be required; and from the one to whom much has been entrusted, even more will be demanded." Luke 12:48b (Oxford Annotated); see also Timothy W. Floyd, The Practice of Law as a Vocation or Calling, 66 FORDHAM L. REV. 1405 (1998); Russell G. Pearce, Learning from the Unpleasant Truths of Interfaith Conversation: William Stringfellow's Lessons for the Jewish Lawyer 38 CATH. LAW. 255, 256, 260 (1998). In Islam, Charity has been institutionalized as the third of the five pillars. CYRIL GLASSÉ, THE CONCISE ENCYCLOPEDIA OF ISLAM 132 (1991 ed.); see also Qur'an 2:177 (translation by Yusuf Ali) (stating "To spend of your substance, Out of love for Him, For your kin, For orphans, For the needy, For the wayfarer, For those who ask, And for the ransom of slaves; To be steadfast in prayer, And practice regular charity . . . "). Charity is also central to the Bahá'í faith. See Shoghi Effendi, Bahá'í Education, reprinted in The Compilation of Compilations 297-98 (1991) ("In philanthropic enterprises and acts of charity, in promotion of the general welfare and furtherance of the public good including that of every group without any exceptions whatever, let the beloved of God attract the favourable attention of all, and lead all the rest"); BAHÁ'U'LÁH, TABLETS OF BAHÁ'U'LÁH 71 ("Charity is pleasing and praiseworthy in the sight of God and is regarded as a prince among godly deeds."). The author gratefully acknowledges research assistance for this note from Dann J. May, Adjunct Professor of Philosophy and Religion, Oklahoma City University.
4. The Attorney Benefits from Serving

Beyond questions of professional and moral duty, lawyers and their firms receive numerous benefits from pro bono involvement. The benefits are both tangible and intrinsic. Those who are new to the practice gain opportunities to learn practice skills and exposure to an unfamiliar area of law. For associates in larger firms, pro bono work may offer rare opportunities for direct work with clients and primary responsibility for a case. Besides enhanced legal skills and knowledge, one may establish potentially valuable community connections. Law firms with active pro bono programs may receive favorable publicity and advantages in recruiting top candidates who seek a gratifying workplace. There are also intrinsic benefits, of developing empathy for those who are less fortunate, of the personal satisfaction that comes with doing something one considers important to the public good. The pro bono attorney gains understanding of how the law impacts those outside the usual client base. Many lawyers tell of how their pro bono work influenced their professional career choices or is the source of profound professional satisfaction. Finally, the legal profession benefits collectively from serving the common good, by enhancing public confidence that the legal system is fair.

258. For novice lawyers, almost everything is new and unfamiliar. Each representation is an opportunity to learn, which is why we refer to lawyering as "practice of law."


Ah yes I can see how my tombstone will read
Here lies someone of exceptional worth
Though she did not do a lot for her kind
Or help hold together this crumbling earth
Here lies a woman they're saying of whom
Sure had a goodlooking living room . . . .

Id.

261. See Garth C. Grissom, Pro Bono and the Transaction Lawyer, 9 GEO. J. LEGAL ETHICS 929 (1996) (providing pro bono services gives a sense of pride and accomplishment for contributing to society, an opportunity to expand upon one's area of expertise, and greater understanding of how one's private representations may impact the community at large).

262. See Kenneth G. Dau-Schmidt & Kaushik Mukhopadhyay, The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Profession, 49 J. LEGAL EDUC. 342, 361 (2000) (empirical showing that pro bono work increases job satisfaction in legal practice, at .01 level of significance); see also E-mail from Kenneth Glenn Dau-Schmidt to author (Jan. 31, 2001) (on file with author).
III. Pro Bono Rules Nationwide Compared to Oklahoma's Current and Proposed Revision

A. National Options

1. Range of Choices

Several states have taken the initiative to make access to justice a reality. Since 1990, twenty-two states and the District of Columbia have amended their pro bono rules.²⁶³ Amendments are pending in two additional states.²⁶⁴ Most of the revisions provide a definite quantitative standard stating an annual goal, in terms of hours, number of cases, or percentage of professional time. Florida has added a reporting requirement as part of annual dues payments, in which the licensed attorney specifies the type and amount of pro bono services provided.²⁶⁵ Several states are experimenting with voluntary annual reports, with recognition or other incentives for attorneys providing a specified amount of service.²⁶⁶

Currently, two states have no pro bono rule,²⁶⁷ and two others recognize the ethical obligation only in the preamble to their rules.²⁶⁸ A nationwide survey reveals many different rules.²⁶⁹ Twenty-two jurisdictions, including Oklahoma, adopted the original 1983 version of ABA Model Rule 6.1, with minor changes. A few jurisdictions still use the language from BC 2-25 of the Model Code.²⁷⁰

²⁶⁴ Those two states are Maryland and Texas. See infra tbl. 1 (copies of proposed Maryland revisions on file).
²⁶⁵ See Fla. Bar Rules of Prof. Conduct 4-6.1(d). A complete version of this rule is included in this work. See infra app. D.
²⁶⁶ See infra text accompanying notes 278-89. States with voluntary reporting are Arizona, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, New York, Texas, Utah, Vermont, and Virginia. See infra tbl. 1.
²⁶⁷ California and Oregon have no rule, but instead have policy statements adopted by their boards of governors. The California bar, in which membership is voluntary, adopted a resolution in 1989 with 50 hours as annual pro bono goal. The Oregon Board of Governors' Policy 15.1, adopted in 1989, states an annual goal of 80 hours, with 20-40 hours or two cases of professional service to the poor. See ABA Ctr. for Pro Bono, State Pro Bono Service Rules, Appendix A, States with other Pro Bono Policies (July 7, 2000) (on file with author).
²⁶⁸ The two states are Illinois and Massachusetts. See infra tbl. 1.
²⁶⁹ See generally infra tbl. 1 (summarizing the diverse approaches throughout the country).
²⁷⁰ The jurisdictions are Iowa, Nebraska, Ohio, and Tennessee. See infra tbl. 1. A proposal to move to the Model Rules format is now pending in Tennessee. See Tennessee Bar Ass'n, Proposed New Ethical Rules (visited Oct. 18, 2000) <http://www.tba.org/committees/conduct/exhibit-A/HTML/stdsrep.html>. Some states have adopted a pro bono resolution by the board of governors. See, e.g., Iowa State Bar Ass'n, Pro Bono Resolution (Sept. 7, 1990) (urging all attorneys to devote a reasonable amount of time, at least 20 hours annually, to provide legal services to poor and disadvantaged; urges legal employers to promote and support attorneys' involvement; and urges law schools to request written pro bono statements from employers which recruit on campus) (copy on file...
The variations present a number of distinct issues, including:
— Whether to specify a certain quantity of pro bono services to be supplied?
— What categories of service recipients should qualify for satisfying the pro bono expectation? Any type of charitable organization, only certain organizations, or only direct services to the poor?
— Should all the services provided be completely free, or is a reduced fee appropriate for certain clients?
— Should any services qualify, or only certain types?
— Should financial support for pro bono organizations be encouraged, and if so, as a supplement to actual services, or as a substitute for those services, and what is an appropriate amount (i.e., "buy-out" options)?
— Should the rule allow collective satisfaction of pro bono obligations, and if so, should collective satisfaction be appropriate in all circumstances, or only certain situations? Should there be special guidelines for the appropriate quantity or type of services?
— How should out-of-state attorneys practicing in the state be treated?
— Are special rules warranted for attorneys employed in the public sector?

2. Proposed Amendment to Oklahoma Rules of Professional Conduct

Historically, the Oklahoma Rules of Professional Conduct Committee has taken great care to determine how best to reflect local policy judgments in proposed rules. Indeed, because the original ABA Model Rule 6.1 was cast in such general terms, the Oklahoma Model Rules Study Committee recommended local revisions based on Florida's original, more specific rule. The Supreme Court adopted the rule as recommended.271

Proposed Oklahoma Rule 6.1, set forth in Appendix C, is presented to stimulate and provide focus for discussion of how the state might articulate its aspirational expectation of lawyers' participation in pro bono activities. The proposal is based on current ABA Model Rule 6.1, rules from other jurisdictions, and other commentary.

B. Mandatory Service as Contrasted with Required Reporting

1. Nationwide

No jurisdiction has adopted a truly mandatory pro bono rule intended to be enforced through the disciplinary process. Although some scholars and bar leaders advocate mandatory service, state proposals to require service have met with an outpouring of opposition and backlash.272 Despite overwhelming

with author).

271. See 5 OKLA. STAT. ch. 1, app. 3-A (1991). A complete version of this rule is included in this work. See infra app. A.

evidence of a substantial unmet need for legal services, there are many practical
and moral obligations to making pro bono service mandatory.223 As discussed
supra, the ABA Model Rule is purely voluntary and remains so in the
recommendations of the Ethics 2000 Commission.224

Florida requires annual reporting so that when attorneys pay their annual dues,
they must complete a form specifying the quantity of pro bono work done, the
type of client, and the services performed. While failure to report constitutes a
disciplinable offense, the professional responsibility to provide pro bono services
remains aspirational in character.225

Efforts to increase the level of pro bono participation can best be ac-
accomplished by invoking the profession's historical commitment to the public
good. An attempt to mandate public service through the regulatory process is
inconsistent with that fundamental concept of professionalism.226 Lawyers are
more likely to provide high-quality, competent legal services if the representa-
tions are voluntary, not compelled. Clients' interests in loyal, competent
representation are at risk when served by lawyers who participate grudgingly.

A proposal to make service mandatory is politically unfeasible and likely to
backfire, reducing the current extent of volunteer services. Loud opposition from
diverse segments of the bar can be predicted. Many lawyers have deep and
principled resistance to a mandatory pro bono requirement. A key question is
whether the debate will be productive and advance the ultimate goal of
improving access to legal services. The resulting backlash within the bar and
negative public relations may do far more harm than good. Instead of revisiting
this divisive issue, the bar should focus its efforts upon raising lawyers'
awareness of and willingness to satisfy this moral responsibility that comes with
being in the profession. Morally, it is preferable that lawyers make the voluntary
choice to serve than be forced by public mandate.227

Different issues, however, are presented by the issue of whether to require all
lawyers to report their pro bono contributions on an annual basis. The challenge

on Legal Aid and Indigent Defendants and Steven Scudder, Counsel for Standing Committee on Pro
Bono and Public Service, to Becky Stretch (Nov. 5, 1999) (on file with author) (discussing vocal
opposition to mandatory service proposals in Colorado, New York, and Nevada).

(discussing practical issues of competency and efficiency, administrative and enforcement problems,
uncertain benefits, and moral objections of involuntary servitude, preference for private choice, regressive
and inequitable burdens). On balance, Professor Cramton urges that lawyers have a moral obligation to serve
the poor, preferring increased public funding of civil legal assistance for the poor and deregulation
of marketplace over mandatory service). See id. at 1136.

274. See supra text accompanying notes 164-68.

275. See FLA. BAR. RULES OF PROF. CONDUCT 4-6.1. A complete version of this rule is included
in this work. See infra app. D.

276. See generally Roger C. Cramton, Mandatory Pro Bono, 19 HOFSTRA L. REV. 1113 (1991)
(discussing arguments for and against mandatory pro bono service, and concluding that, on balance, other
alternatives are preferable).

277. See id. at 1133 (remarking on the validity of former President George Bush's "thousand points
of light").
in formulating any pro bono rule is to strike the right balance between aspirational guidance and regulatory compulsion. The word and concept of anything "mandatory" predictably triggers resistance within the bar and state courts with final authority over rule changes. The expectation that lawyers provide pro bono legal services must remain aspirational and voluntary. There are, however, several reasons to require that lawyers annually report their contributions of legal services and money to legal service organizations.

To be explicit, the proposal to require reporting is not a step towards mandatory service requirements. The information that should be sought is minimal compared to the potential results achieved by a reporting requirement. The annual report form should be narrowly tailored to seek information that substantially furthers legitimate interests of the state in regulating the legal profession. It should not risk invasion of client privacy by seeking the identity of clients and the nature of representation provided. Lawyers should only be asked to report the amount of time spent providing legal services, identify categories of legal service provided, and amount of money donated to qualified legal service organizations. To facilitate creation of referral systems, it should include a voluntary check-off for lawyers to indicate their willingness to provide legal services in designated practice areas.

The state has a substantial and legitimate interest in obtaining reliable and accurate information about the extent of legal services and financial contributions by lawyers to enhance access to legal services for the poor and other pro bono publico legal services. Accurate reporting is essential to evaluate existing legal service programs, to determine what services are being provided, and to determine the areas in which the legal needs of the poor are unmet.278 For example, Florida amended its rule in 1993 to require that lawyers annually report whether they had satisfied the aspirational standard of twenty hours of pro bono legal services to the poor or contributed $350 to a qualified legal service program. The amended rule has withstood challenge in both state and federal court.279 Most resistance to the rule has subsided. Approximately 90% of Florida lawyers responded as required in 1998.280 By contrast, the response rate in states with voluntary reporting systems ranges from 3% to 5% (Illinois) to 33% (Hawaii, New Mexico).281 The low response rates from voluntary systems yield little reliable information and hence have limited practical utility. By

278. See Amendments to Rule 4-6.1 of the Rules Regulating the Florida Bar — Pro Bono Publico Service, 696 So. 2d 734, 735 (1997).
279. See Schwarz v. Kogen, 132 F.3d 1387 (11th Cir. 1998).
280. See Telephone Interview with Michael A. Tartaglia, Director, Programs Division, Florida Bar (May 7, 2000) (on file with author); see also STANDING COMM. ON PRO BONO LEGAL SERV., FLORIDA BAR, THE STANDING COMMITTEE ON PRO BONO LEGAL SERVICE'S REPORT TO THE SUPREME COURT OF FLORIDA, THE FLORIDA BAR, AND THE FLORIDA BAR FOUNDATION 2-3 (1999) [hereinafter 1999 Florida Report] (stating that mandatory reporting has allowed Florida to trace increases in pro bono service and contributions).
compiling information on the extent of pro bono legal services in distinct practice areas and geographic regions within a state, the state can identify and create referral systems and legal service programs to satisfy pressing needs of the low income population. Generating lists of attorneys willing to serve as volunteers does no good unless there is an infrastructure to match prospective client needs with lawyers who are suitable to do the work.

A reporting requirement would raise lawyers' awareness of their professional responsibility to help in making legal services available to all. As Joe Crosthwait, immediate past-president of the OBA argued in a slightly different context:

> It seems to me that we should from time to time reflect on the oaths and vows we have taken throughout our lives — from our marriage vows, to our religious commitments, to our Oath of Attorney — and compare those ideals and principles to how we are presently living our lives. This form of self-evaluation can be sobering, for sure, but it can also lead us to take more positive actions on a day-to-day basis that will bring us closer to achieving those ideals in which we deeply believe and to which we have solemnly committed.\(^2\)

The annual report form would serve as a tangible reminder of Oklahoma lawyers' oath and duties of office. If, upon personal reflection of one's pro bono contributions in the past year, a lawyer realizes he or she has fallen short of professional expectations, the form provides concrete opportunities for action. One may choose to make a financial contribution comparable to the volunteer time not given or could indicate willingness to serve in the future in designated areas of practice. Either alternative would significantly advance efforts to create a statewide infrastructure for delivery of legal services.

In Florida, the reporting requirement has dramatically increased the extent of lawyers' participation in pro bono representation of the poor. A total of 70% of Florida lawyers in 1998 reported donating legal services or money to qualified legal service organizations.\(^3\) They provided almost one million hours of legal services (valued at $1.5 million) and $1.81 million in support to qualified programs. Since 1994, this has resulted in a 12% increase in the number of lawyers donating legal services (76% increase in number of hours reported), and a 48% increase in the number of lawyers who made financial contributions (112% increase in dollars contributed).\(^4\)


\(^3\) See Telephone Interview with Michael A. Tartaglia, *supra* note 280 (stating that 90% of Florida lawyers comply with the reporting requirement; 60%-75% of reporting lawyers said they did something; 26,000 lawyers reported actual service, and 5300 reported contributions); see also STANDING COMM. ON PRO BONO LEGAL SERV., REPORT TO THE SUPREME COURT OF FLORIDA, THE FLORIDA BAR AND THE FLORIDA BAR FOUNDATION 1-5 (1999).

\(^4\) See Telephone Interview with Michael A. Tartaglia, *supra* note 280.

https://digitalcommons.law.ou.edu/olr/vol53/iss4/2
Data collection through annual bar dues, or other periodic required communications with licensed lawyers is administratively efficient. For example, lawyers must annually certify compliance with trust account and continuing education requirements. A brief component could be added to an existing required certification with little added transaction costs to the bar and practitioners. Several jurisdictions have designed reporting forms that can be completed quickly with a minimum amount of prior record keeping. The forms can be computer scannable, enabling the state lawyer regulatory authorities to have the information compiled quickly and at low cost. The Florida reporting system costs approximately $10,000 per year to collect and compile data from the state's 66,000 licensed attorneys. This cost seems quite minimal relative to the number of lawyers and tremendous increase in hours and money contributed to legal service programs attributable to the mandatory reporting requirement. The information gathered could also be used by the state bar leadership in public information programs designed to improve the lay public's perceptions of the legal profession. State bar leaders can use the information to honor lawyers for their contributions, through "Pro Bono Honor Rolls," and distinguished service awards for important individual contributions. Further, the bar leadership could use the information to encourage nonparticipating lawyers to accept pro bono work in their areas of expertise, or in other appropriate ways.

A difficult issue that is unresolved and needs careful local consideration is what remedial measure a state should institute for a violation of the reporting requirement. If the rule requires reporting, then failure to return the form would constitute a violation subjecting the lawyer to discipline. Each state must determine the appropriate sanction for failure to file the required report. For example, an Oklahoma lawyer who fails to file the required annual report for continuing legal education (MCLE) by the deadline is summarily suspended. Reinstatement is routine, but involves a significant fee. Should the same mechanism apply to pro bono reporting? This presents highly delicate and controversial issues. Cogent arguments can be made that pro bono reporting, like MCLE reporting, belongs in the bar's membership rules and not rules of ethics.


286. See Telephone Interview with Michael A. Tartaglia, supra note 280.

287. Note, however, that a lawyer complies with the proposed rule by filing a report stating that no legal services or financial contributions were made.


289. See Dodson Testimony, supra note 148; see also ABA, Strategies for Expanding Pro Bono, supra note 285.
2. Proposed Oklahoma Rule: Aspirational Service Standard but Required Reporting

Like the ABA version, the responsibility to provide services remains aspirational and is not intended to be enforced through the disciplinary process. Nevertheless, the proposed rule recommends mandatory reporting similar to the Florida rule. By collecting this data, the organized bar can evaluate and report to the state supreme court and the consuming public the extent of pro bono efforts taken. Similar to the IOLTA program, special recognition can be given to participating lawyers. In that way, the OBA can encourage and honor those who aid in upholding the professional tradition and can work to enhance the profession's tarnished public image. For lawyers who provide no services, or fall below the stated annual expectation, or make no contribution, bar leaders might consider sending gentle reminders that the collective professional obligation includes individual responsibility. The OBA could offer these attorneys assistance in connecting with a lawyer referral system to receive matters in their areas of expertise, identify them for potential court appointments, or provide them an opportunity to pay the suggested amount to a legal services program of their choice. In sending such communications, the OBA would be exercising an important leadership role in developing an enhanced sense of professionalism among Oklahoma lawyers. While lawyers who outright refuse to participate would not be subject to discipline, the moral leadership would accomplish much towards encouraging voluntary compliance.

C. Specific Quantitative Standard

1. Other Jurisdictions

The ABA first recognized the need for a specific quantitative standard in the 1988 Toronto Resolution. The standard, expressed as a specific number of hours, identifies a minimum amount of time each attorney should devote to pro bono and other public service activities. The specific standard makes the rule more definite and tells attorneys what is expected of them. If all lawyers complied with the quantitative aspirational goal, the pro bono responsibility would be distributed more equitably throughout the bar. The older rules of most states lack a specific quantitative standard or any other guidance on the amount of pro bono work expected from attorneys. Consistently, jurisdictions that amended their rules have set specific quantitative standards. The ABA rule states fifty hours per year, but recognizes that this standard may be customized to suit local needs and circumstances. Several states articulate the standard in a number of hours per year, ranging from twenty to fifty hours. Some jurisdictions

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290. See Fla. Bar Rules of Prof. Conduct 4-6.1(d). A complete version of this rule is included in this work. See infra app. D.
291. See infra tbl. 1 (classifying attributes of the Oklahoma rule and all other jurisdictions).
293. Those states are Arizona, Colorado, District of Columbia, Florida, Georgia, Hawaii, Kentucky,
established other standards, based upon a percentage of professional time or number of cases.

2. Proposed Oklahoma Rule

Current Oklahoma Rule 6.1 provides no guidance on the amount of pro bono services lawyers should render. The proposed rule sets a quantitative standard of fifty hours per year, with the majority of services provided for no fee under subsection (a), to persons of limited means or organizations designed to address the needs of such persons. The remaining services may be provided for no fee or at a reduced fee to the wider range of organizations or individuals.

D. Carryover

1. Nationwide

A related issue is how to treat pro bono services rendered in a given year in excess of the stated standard. The additional time could be ignored or applied to satisfy the standard in future years, with or without limits on the amount carried forward or the number of years to which the time can be applied. The comment to amended ABA Model Rule 6.1 states that "during the course of his or her career, each lawyer should render on average per year, the number of hours set forth in this rule." This language implicitly recognizes that in some years, a lawyer may become involved in a lengthy and time-consuming pro bono representation; fairness considerations would allow the lawyer to take credit in future years for that representation.

Several jurisdictions that specify a quantitative standard also address the issue of carryover. Hawaii and Montana replicate the ABA approach. Arizona simply allows excess hours to be applied to future years. Florida and Georgia allow for future application of up to two or three years, respectively.

2. Proposed Oklahoma Rule

Current Oklahoma Rule 6.1 is silent on the question of carryover. The proposal suggests that Oklahoma allow attorneys to carry forward excess time for two or three years. This will better assure equitable distribution of services across the lawyer population so that lawyers who handle more complex matters involving litigation can receive fair credit for their work. It takes a slightly different approach from the ABA and tracks Florida's approach to allow hours

294. Virginia, for one, sets the amount at 2%. See infra tbl. 1.
295. The District of Columbia expresses the standard alternatively as 50 hours or one court appointment. See infra tbl. 1.
297. See infra tbl. 1.
298. See infra tbl. 1.
299. See infra tbl. 1.
300. See infra tbl. 1.
of pro bono service in a given year in excess of the fifty-hour standard to be applied for up to two years in the future, rather than simple "on average" over the attorney's career. This could be easily administered in much the same manner as CLE credits. The carryforward provision would help more fairly distribute the pro bono workload among the practicing bar.

The Comment language in paragraph I may be amended as follows:

It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, in such event these excess hours may be applied to reduce the attorney's annual obligation for the following two [or] three years. but—during—the course of his or her legal career, each lawyer should render an average per year, the number of hours set forth in this Rule;

E. Type of Clients, Reduced Fee, and Type of Services: ABA, Nationwide, and Proposed Oklahoma Standard

A clear definition of what types of services qualify as satisfying the pro bono expectation is critical. If any services for which the lawyer is not paid qualify, then lawyers could write off uncollectable accounts receivable or count services provided to friends or family as satisfying the stated expectation without giving any time to representing low income persons. Does a reduced fee qualify when offered to some clients or for some services? These issues relate to defining what services qualify for satisfying the pro bono publico expectation. Pro bono services are typically considered to be those for the poor or indigent, that is, defined by the characteristics of the client. However, legal services provided to public service, civic, charitable, or legal improvement organizations also qualify in most jurisdictions. To address what clients and services qualify as pro bono and the role of a reduced fee, it is necessary to focus upon the goal sought to be achieved. If the single goal is to improve access to the legal system for the poor, then the rule should define the client, services, and fees exclusively in those terms, such as only poor clients, at no fee, and any services they need. If the pro bono rule is to address wider concerns, such as improving the legal system or legal profession, then the rule should encompass those activities.

Proposed Oklahoma Rule 6.1 tracks the ABA rule on this issue. It distinguishes between two types of services that qualify as pro bono, encouraging lawyers to provide most of their pro bono services at no fee to the poor and to entities "designed primarily to address the needs of persons of limited means."301 The balance of services may fall within the second category, provided to the poor, legal improvement organizations, "organizations seeking to secure or protect civil rights, civil liberties or public rights," or "civic, community, governmental, and educational organizations in matters . . .

[furthering] their organizational purpose" and financially unable to pay a full fee. These services should be provided for no fee or for a reduced fee.

These two categories emphasize that the primary need for pro bono services relates to poor persons, while also recognizing the value of volunteer service in many other circumstances. By allowing services to those other than the poor, the rule nevertheless encourages participation by attorneys who may be limited in their ability to represent individual clients because of public sector employment or other restrictions on their practice. The variety of qualifying services allows virtually every lawyer to meet this responsibility and receive the personal and professional rewards derived from the work performed pro bono publico.

All jurisdictions agree that any legal services to the poor qualify as pro bono. However, jurisdictions differ concerning what, if any, other services qualify as pro bono. Florida completely excludes services for reduced fees and to clients other than the poor. Half of the jurisdictions allow for reduced-fee services to any type of client and services to improve the law, legal system, or legal profession.

The greatest diversity among jurisdictions arises with respect to what organizations, other than legal improvement entities, qualify for treatment as a pro bono client. Several states allow a broad spectrum of any type of civic or charitable organization, while others restrict it to certain entities or certain services for those entities. The most common approach, derived from the original Model Rule 6.1, restricts the services to those securing civil or public rights, and for charitable entities. Twenty-nine jurisdictions adopt that approach. The amended ABA Rule 6.1 slightly modifies its predecessor by limiting services done for charities, to charities pursuing their organizational mission, and that are unable to pay a full fee.

F. Alternatives to Service

Some lawyers are not able or inclined to engage in direct service for pro bono clients. A multitude of reasons exist, including heavy workload, economic efficiency, conflict, and specialization concerns. If the collective obligation is to remain meaningful for the legal profession, then alternative mechanisms must exist for these lawyers to satisfy their responsibilities in ways other than direct

302. See id.
303. See infra tbl. 1.
304. These jurisdictions include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Texas, Utah, Vermont, Virginia, Wyoming. See infra tbl. 1.
306. Jurisdictions adopting a similar approach include the District of Columbia, Georgia, and Hawaii.
service. The author proposes that the Oklahoma rule recognize two alternatives: (1) financial support in an amount comparable to the net cost of the direct services not provided; and (2) collective satisfaction through pooling of resources. While the professional tradition clearly prefers direct service, changes in the business-professional paradigm demand frank recognition that this is no longer a realistic expectation. Ethical expectations can either conform to current reality and provide respected alternative means of satisfaction or lose persuasive moral force because a substantial segment of the bar will not provide direct service. Rather than writing off the reluctant volunteers as "free riders," it is far preferable to offer them viable, co-equal means of satisfaction. Lawyers may have more or less available time or money at different times in their professional careers. "For everything there is a season." A realistic pro bono rule would recognize these episodic shifts, encouraging each lawyer to give as she or he is able at different career stages.

Some critics oppose any buy-out of the individual professional duty as ethically repugnant. The author suggests that this option reinforces the ethical duty by neutralizing the objections of those lawyers who decline to provide direct service. All lawyers, regardless of their expertise or profitability, are expected to participate in whatever ways they are willing and able. Those lawyers who believe their time is better spent working for paying clients can continue to do so and make financial contributions that will enable others to provide the direct services. Financial contributions to qualified legal service programs are, of course, tax deductible.

Financial contributions can be made to qualified legal service organizations or to an entity designated by the state lawyer regulatory agency, which would then make allocations to fund delivery systems. The revenue generated could be used to create an effective, statewide referral system, fund programs for the delivery of pro bono legal services, and provide direct funding to other qualified legal service organizations. It could also fund malpractice insurance coverage for all lawyers who provide direct services through qualified legal service organizations.

1. Financial Support, or Buy-out Option

a) Nationwide

Financial support may be a supplemental, separate obligation in addition to actual services or an alternative option in substitution for actual services. Most

307. Ecclesiastes 3:1 ("For everything there is a season, and a time for every matter under heaven") (New Oxford Annotated, RSV 1973).

308. Cf., Marc Galanter, "Old and in the Way": The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services, 1999 Wis. L. Rev. 1081 (1999) (analyzing demographic shifts in lawyers' professional careers that suggest mature lawyers may become an important source of legal services for low income clients, after their peak years of intense, financially remunerative practice).

jurisdictions consider financial support a supplemental obligation.310 Thirteen jurisdictions, including Oklahoma, recognize financial support of legal service programs as a full or partial alternative to actual service.311 A few are silent on the issue.312 ABA Model Rule 6.1 does not mention financial support in the blackletter text; a comment recognizes the financial support alternative when it is not feasible to engage in pro bono services. At such times, the pro bono responsibility may be discharged by providing financial support to organizations dedicated to legal representation of the poor. The amount "should be reasonably equivalent to the value of the hours of service that would have otherwise been provided."313 Additionally, all lawyers are encouraged to give financial support to legal service programs.314 Because the financial support language is buried in the comment, and most states typically keep no separate records of such contributions, no data indicates the extent to which lawyers use this as an alternate means of satisfaction.315

Similar to the ABA rule, most state rules do not define the amount of expected financial support, which is described only as a supplemental obligation.316 In a recent trend, several states have amended their rules to specify a fixed dollar amount, percentage of income, or other formula.317 Although each format has its problems, there are significant advantages to this newer approach. In quantifying both the annual service expectation and the financial support alternative, lawyers have a clear standard for evaluating whether they personally have satisfied the ethical obligation.

Given the recommendation to set an annual hourly goal, the proposed rule would also specify the basis for calculating the appropriate financial contribution in substitution for service. Lawyers who are unwilling or unable to provide

310. Those jurisdictions are Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia and Wisconsin. See infra tbl. 1 (some recognize financial support as both alternative and supplemental obligation); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1993).

311. These 13 jurisdictions are Arizona, District of Columbia, Florida, Hawaii, Kentucky, Massachusetts, Nevada, New Mexico, Oklahoma, South Dakota, Utah, Virginia, and Wyoming. See infra tbl. 1.

312. These jurisdictions are Georgia, Iowa, Maine, Nebraska, New Hampshire, North Carolina, Ohio, and Tennessee. See infra tbl. 1.


315. See, e.g., ABA CTR. FOR PRO BONO, PRO BONO DELIVERY AND SUPPORT: A DIRECTORY OF STATEWIDE MODELS (1998) (identifying various components, including IOLTA revenue, number of pro bono service providers and active lawyers, but not other forms of financial support by lawyers).

316. See infra tbl. 1 (financial support: supplemental; unspecified amount).

317. Those jurisdictions are: District of Columbia (lesser of $400 or 1% of earned income); Florida ($350); Massachusetts ($250 to 1% annual income); Nevada ($500); New Mexico ($350); Wyoming ($500). See infra tbl. 1.
direct legal services should be encouraged to provide financial support to qualified legal service organizations based on a formula keyed to their earnings, whether based on a percent of adjusted gross income derived from legal services or based on their effective hourly rates.

The proposed formula is designed to distribute equitably the burden between lawyers who provide service and those who contribute money. Lawyers who are willing to provide direct services forego earnings. Direct services often involve administrative overhead costs. The contribution of labor is not tax-deductible. It is fair to expect that lawyers whose hourly earnings are high should have to fulfill the responsibility in a manner commensurate with their earnings, which would respect the lost opportunity costs incurred by those who serve. By setting the expected financial contribution at each lawyer's approximate earning level, the proposed formula is durable, self-executing, and provides guidance for the individual lawyer.

A flat dollar amount, or fixed buy-out sum, is regressive in that the expected amount costs disproportionately more to lower-paid lawyers and less to higher-paid lawyers. A fixed sum also tends to be arbitrary. If the expected dollar contribution is set low, it may be criticized as being nominal and a disincentive to providing direct services. If the expected dollar contribution is fixed at a higher amount, it can be criticized as unfairly regressive. Significant economic variations exist throughout each state and among different fields of practice, making it impracticable to fix a dollar amount or hourly rate. Moreover, any fixed sum will lose value over time due to inflation and market fluctuations. To maintain a constant value of the monetary contributions, states either would need to adopt a formula for automatic adjustment of the expected dollar contribution, or would need to overcome inertia and periodically revise the rule. Either option is cumbersome.

A standard based upon a percentage of annual earnings or adjusted gross earnings has the advantage of simplicity, because each lawyer already must calculate annual figures for federal and state tax returns and also probably maintains tax records of contributions. Salaries are typically stated on an annual basis. Tithing or contributions for charitable or religious purposes is also thought of in terms of a percentage of one's income. Using a percentage of income has the unfortunate appearance of a tax.

318. See Cramton, supra note 276, at 1133 (criticizing New York proposal for $1000 alternative to mandatory service obligation; both service and tax are "highly regressive"; percentage of income or of legal fees would "more fairly reflect economic reality").

319. "A tithe is a tenth part of one's income, contributed for charitable or religious purposes." In re Packham, 126 B.R. 603, 604 n.2 (Bankr. D. Utah 1991) (quoting BLACK'S LAW DICTIONARY 1330 (5th ed. 1979)). Its historic origins are found in the Old Testament. See, e.g., Leviticus 27:30-32 ("All tithes from the land, whether the seed from the ground or the fruit from the tree, are the Lord's; they are holy to the Lord") (New Oxford Annotated, RSV 1994); Malachi 3:10 ("Bring the full tithe into the storehouse, so that there may be food in my house, and thus put me to the test, . . . see if I will not open the windows of heaven for you and pour down for you an overflowing blessing.").
The proposed standard provides for financial contributions equivalent to 50% of the lawyer's effective hourly rate made in full or partial satisfaction of the fifty-hour service expectation. The proposed 50% figure takes into account office overhead costs associated with pro bono work, so there is relative economic parity between lawyers who do and lawyers who do not perform pro bono services. The phrase "effective hourly rate" is intended as a flexible formula that would also encompass lawyers employed on an annual salary by corporations and public employers, as well as those who customarily work on a contingent basis. Salaried lawyers could calculate their fair share of contribution by dividing their annual pay by an estimated 2000 hours of annual work. Because these salaried attorneys do not account for their time in billing units, it is assumed they are paid for fifty weeks, at forty hours a week. Of course, actual time varies by season, workplace, and other variables. Nevertheless, the formula seems fairly comparable to that for lawyers who bill private clients on an hourly basis for their time. Lawyers who work on a contingent basis could similarly calculate their fair share contribution.

b) Proposed Oklahoma Rule

Current Oklahoma Rule 6.1(c) presently recognizes financial support as one of several ways to satisfy the ethical obligation. This is continued under the proposed rule, with a suggested formula for calculating the monetary donation. The proposal attempts to approximate the projected cost savings achieved by lawyers who choose this option in lieu of providing direct services. The payment is intended to treat equitably both lawyers providing direct services and those electing to pay money in lieu of services. The proposed language is intended to communicate that while aspirational, all full-time practicing attorneys should satisfy the pro bono responsibility. An Oklahoma comment could explain the formula's application to contexts besides hourly billing.

2. Collective Satisfaction & Pooling Arrangements

a) Nationwide

Current Model Rule comment language acknowledges that sometimes direct service is not feasible for an individual lawyer, and that one's responsibility may be discharged either through financial support of legal service organizations or through collective efforts within a law firm. A few jurisdictions allow a law firm or group of lawyers to satisfy their individual obligations collectively, in which the lawyers may hire and support overhead expenses for a single attorney or

320. See Jack Londen, The Impact of Pro Bono Work on Law Firm Economics, 9 GEO. J. LEGAL ETHICS 925, 926 (1986) ("marginal attorney compensation-related costs a firm incurs in doing pro bono work amounts to something in the range of forty cents per revenue dollar"); see also 1992 OBA Survey, supra note 220, at 3585 (78.7% of respondents reported spending less than 50% of a firm's gross income on overhead; all remaining income paid for attorney compensation).

321. See ORPC Rule 6.1(c), reprinted infra app. A.
group of attorneys to handle pro bono matters on their behalf. Most jurisdictions are silent on this issue. Florida Rule 4-6.1(c) expressly permits collective satisfaction in limited circumstances. A collective satisfaction plan must be filed previously with the circuit pro bono committee. The plan must provide for pro bono service to the poor in a major case, through a full-time staff, or other manners approved by the circuit pro bono committee.

Collective satisfaction offers greater variety for lawyers to satisfy their individual responsibilities, perhaps encouraging law firms to accept more institutional responsibility and develop innovative pro bono programs. On the other hand, recognition of pooling resources runs some risk that pro bono work would acquire second class status, or would be delegated to low cost or inexperienced lawyers. The possibility of pooling arrangements might not have the same positive professionalism value to law firms' ethical culture as would direct involvement, where senior lawyers actively mentor those junior to them in the course of doing pro bono work. Moreover, involvement by prominent lawyers in lesser forums commonly frequented by the poor can improve the quality of justice for others in the same forum.

b) Proposed Oklahoma Rule

With some ambivalence, the author encourages consideration of Proposed Oklahoma Rule 6.1(c), expressly recognizing that lawyers may pool their resources in satisfaction of their individual responsibility to make legal services available to low income persons and other public interest legal services. While there are reasons to prefer that every lawyer provide pro bono legal services, endorsing alternative means of satisfaction serves the larger goal of encouraging all lawyers to improve access to representation. The proposed language recognizes that pooling for collective satisfaction is permissible whether or not the lawyers practice in private law firms.

G. Special Exceptions

1. Public Sector Lawyers
   a) Nationwide

   Government employment frequently limits employees' outside activities to avoid potential conflicts of interest, use of public resources, and other perceived difficulties. A comment to Model Rule 6.1 acknowledges that possible

322. Those jurisdictions are Arizona, Florida, Utah, and Virginia. See infra tbl. 1.
323. See infra tbl. 1.
325. See id.
327. See generally Lisa G. Lerman, Public Service By Public Servants, 19 HOFSTRA L. REV. 1141 (1991) (discussing in depth federal statutory, agency regulatory, and other restrictions on private activities
constitutional, statutory, or regulatory restrictions may prevent public sector lawyers and judges from representing poor persons and related organizations specified in paragraph (b). When applicable, these attorneys may fulfill their pro bono responsibilities through the wide array of service activities described in paragraph (a). The legal ethics rules of most jurisdictions are silent on the issue. Colorado and Utah follow the ABA approach, redirecting volunteer efforts to other programs which serve the poor. Florida, by contrast, exempts judicial and public sector employees from the narrow duty to provide legal services to the poor or other directly related activities. The District of Columbia, which has the greatest concentration of government lawyers, provides that "[w]hen personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel." Several states have made legislative changes that relax the restrictions on pro bono work by government lawyers. Elsewhere, some state attorneys general have authorized government lawyers' pro bono work on behalf of indigent persons as serving a public purpose. To avoid use of state resources, the Attorney General's office in Washington maintains a private fund to cover incidental expenses of pro bono work.

b) Proposed Oklahoma Rule

It is proposed that the Oklahoma rule adopt the ABA approach, to include a comment recognizing that government attorneys can fulfill their responsibilities in a wide range of community or law improvement activities. Further exploration may be appropriate as to whether Oklahoma state and municipal attorneys could volunteer legal services through other pro bono programs.

of government workers, and their application to government lawyers' pro bono work); Cynthia Rapp, Volunteer Legal Services and Government and Public Sector Attorneys, FLA. B.J., Feb. 1996, at 66. 328. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1, cmt. 5, reprinted infra app. B. 329. See id. 330. See infra tbl. 1 (exceptions column). 331. See COLD. RULES OF PROF. CONDUCT Rule 6.1 (2000); UTAH RULES OF PROF. CONDUCT Rule 6.1 (1998). 332. See FLA. BAR RULES OF PROF. CONDUCT 4-6.1 (1993). 333. D.C. RULES OF PROF. CONDUCT Rule 6.1. 334. See Rapp, supra note 327, at 67 (identifying North Dakota as groundbreaker; with legislative changes also made in Arizona, Michigan, Oregon, South Carolina, and Washington). 335. See Administrative Policy, Office of the Attorney General, State of Washington, 1.3.10 (Wash. Att'y Gen. Christine O. Gregoire, Jan. 4, 1999) (copy on file with author); E-mail from Narda Pierce, Solicitor General of Washington, to author (June 8, 2000) (on file with author) (hereinafter Pierce e-mail) (stating as key to policy the recognition that providing pro bono services to low income individuals is a public purpose); see also Rapp supra note 327, at 67 (discussing actions by Connecticut, Maryland and Texas Att'ys Gen.). 336. See Pierce e-mail, supra note 335 (describing use of private fund, with donations made to pay for incidental costs of pro bono work, such as paper, and phone services).
2. Part-time Attorneys

a) Nationwide

Another possible exception concerns lawyers who are practicing only part-time, who are retired, or who are temporarily not engaged in active practice. There should be no stated expectation of pro bono service upon lawyers who are not actively in practice. Arizona takes a sensible approach and reduces the number of hours of pro bono services for part-time practitioners.337 Another alternative would be to exempt those attorneys not practicing full-time. In jurisdictions that set a flexible standard based on a percentage of professional time, these issues would not arise. A possible solution would be to set an aspirational goal such as 2.5% of professional time, or fifty hours.338 This would allow for a pro rata expectation for the part-time or temporarily non-practicing lawyer, while still stating the general goal of fifty hours. Model Rule 6.1 does not address the pro bono responsibility of attorneys who practice on a part-time basis.

b) Proposed Oklahoma Rule

It is recommended that an Oklahoma comment include the underlined language below to clarify that lawyers are expected only to provide pro bono services commensurate with the amount of time devoted to practice. Thus, the attorney practicing half-time would be expected to provide 25 hours of service, and the attorney practicing three-quarter time would serve 37.5 hours.

It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render an average per year, the number of hours set forth in this Rule. The annual standard should be reduced for the attorney practicing part-time to an amount proportionate with the amount of time the attorney spends engaged in the practice of law. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

Conclusion

Calls to rekindle professionalism by bar leadership has a hollow ring, as empty symbolism, unless these calls are acted upon in concrete ways furthering

337. See infra tbl. 1.
338. This example is drawn from the ABA standard of 50 hours, and the percentage computed based on the fact that 50 hours is 2.5% of a 40-hours-per-week, 50-week, work year. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1993) (suggesting a minimum of 50 hours of pro bono work per year).
the goal of equal justice. Collective contributions by volunteer lawyers can make a real difference in the well being of Oklahoma citizens. In 1990, then-President George Bush proclaimed:

America today needs more from the legal profession. At a time when most of our nation enjoys an historic level of prosperity and comfort, we must devote special attention to those living on the edge, those lacking adequate food or shelter, those addicted or mentally ill, those whose neighborhoods have been decimated by crime and decay.

Oklamans have earned their reputation for being good neighbors, responding generously to those known in need of help. This article contends that vocational calling to the profession carries the responsibility for each lawyer to serve pro bono publico, contributing a fair share of legal services for the poor. After tracing the ethical tradition from ancient times to the present, it focused on current formulations of ethical rules designed to encourage all lawyers to participate in whatever way they are able. Oklahoma has many poor persons who lack sufficient access to essential legal services. The state's poverty population is geographically dispersed, while its lawyers are concentrated in metropolitan areas. As a consequence, the few pro bono lawyers in rural areas bear a grossly disproportionate burden in representing the poor. The legal needs of many poor Oklahomans remain unmet. It is time for Oklahoma lawyers and bar leaders to join forces and address this issue by amending Rule 6.1, and by creating a comprehensive, statewide system for the delivery of pro bono legal services. How Oklahoma lawyers respond to those in need of our help is the true measure of our profession.

341. See OBA Reference Guide, supra note 226, at 214 (finding ratio of Oklahoma lawyers in poor rural counties to eligible low income population an astonishing 1:271 persons, compared to that in metropolitan areas of 1:36).
APPENDIX A: CURRENT OKLAHOMA RULE 6.1

Rule 6.1 Pro Bono Public Service
A lawyer should render public interest legal service. A lawyer may discharge this responsibility by:
(a) providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations;
(b) serving without compensation in public interest activities that improve the law, the legal system, or the legal profession; or
(c) financial support for organizations that provide legal services to persons of limited means.
(adopted March 10, 1988, effective July 1, 1988.)

APPENDIX B: ABA RULE 6.1 (as amended in Feb. 1993)

Rule 6.1 Voluntary Pro Bono Publico Service
A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. 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 which 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 otherwise be 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.

COMMENT
1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service which may be expressed as a percentage of
a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those who incomes and financial resources place them above limited means.
It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social services, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exist among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

MODEL CODE COMPARISON

There was no counterpart to this Rule in the Disciplinary Rules of the Model Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." EC 8-9 stated 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." EC 8-3 states that "those persons unable to pay for legal services should be provided needed services."
APPENDIX C: PROPOSED OKLAHOMA RULE 6.1

Material added to the current Model Rule is italicized. Deletions from the current Model Rule are struck-through.

Rule 6.1 Voluntary Pro Bono Publico Service

(a) A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

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

(i) (1) persons of limited means or

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

(2) (b) provide any additional services through:

(i) (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 otherwise be inappropriate;

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

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

(b) In satisfaction of a lawyer's responsibilities under (a), a lawyer may contribute financial support in an amount equivalent to fifty percent (50%) of the lawyer's effective hourly rate, which usually is determined by the rate billed to non-pro bono clients, for every hour not served up to 50 hours. This amount should be paid to [specify] or to other recognized organizations that provide legal services to persons of limited means.

(c) A law firm may satisfy the responsibility of each of its lawyers by showing that collectively, the firm has provided direct services or financial contributions equivalent to fifty hours for each full-time lawyer in the firm. Lawyers not practicing in a law firm may satisfy their individual responsibilities through alternative pooling arrangements authorized by the Oklahoma Bar Association or other applicable agency.

(d) As a general principle, all in addition, a lawyers should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

(e) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services.
APPENDIX D: FLORIDA RULE 4-6. PUBLIC SERVICE

4-6.1 PRO BONO PUBLIC SERVICE

(a) Professional Responsibility. Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should

(1) render pro bono legal services to the poor and
(2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions. Neither does this professional responsibility apply to those members of The Bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline.

(b) Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. The professional responsibility to provide pro bono legal services as established under this rule is aspirational rather than mandatory in nature. The failure to fulfill one's professional responsibility under this rule will not subject a lawyer to discipline. The professional responsibility to provide pro bono legal service to the poor may be discharged by:

(1) annually providing at least twenty hours of pro bono legal service to the poor; or
(2) making an annual contribution of at least $350 to a legal aid organization.

(c) Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. Each member of The Bar should strive to individually satisfy the member's professional responsibility to provide pro bono legal service to the poor. Collective satisfaction of this professional responsibility is permitted by law firms only under a collective satisfaction plan that has been filed previously with the circuit pro bono committee and only when providing pro bono legal service to the poor:

(1) in a major case or matter involving a substantial expenditure of time and resources; or
(2) through a full-time community or public service staff; or
(3) in any other manner that has been approved by the circuit pro bono committee in the circuit in which the firm practices.

(d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual dues statement. The form will contain the following categories from which each member will be allowed to choose in reporting whether the member has provided pro bono legal services to the poor: (1) I have personally provided ___ hours of pro bono legal services; (2) I have provided pro bono legal services collectively by: (indicate type of case and manner in which service was provided); (3) I have contributed $___ to: (indicate organization to which funds were provided); (4) I have provided legal services to the poor in the
following special manner: (indicate manner in which services were provided); or (5) I have been unable to provide pro bono legal services to the poor this year; or (6) I am deferred from the provision of pro bono legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule, or regulation from providing services; retired, or inactive). The failure to report this information shall constitute a disciplinary offense under these rules.
(e) Credit Toward Professional Responsibility in Future Years. In the event that more than 20 hours of pro bono legal service to the poor are provided and reported in any 1 year, the hours of excess of 20 hours may be carried forward and reported as such for up to 2 succeeding years for the purpose of determining whether a lawyer has fulfilled the professional responsibility to provide pro bono legal service to the poor in those succeeding years.
(f) Out-of-State Members of The Bar. Out-of-state members of The Bar may fulfill their professional responsibility in the states in which they practice or reside.
Comment
Pro bono legal service to the poor is an integral and particular part of a lawyer's pro bono public service responsibility. As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people be they rich, poor, or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in Florida have been recognized by the Florida Supreme Court and by several studies undertaken in Florida over the past two decades. The Florida Supreme Court has further recognized the necessity of finding a solution to the problem of providing the poor greater access to legal service and the unique role of lawyers in our adversarial system of representing and defending persons against the actions and conduct of governmental entities, individuals, and nongovernmental entities. As an officer of the court, each member of The Florida Bar in good standing has a professional responsibility to provide pro bono legal service to the poor. Certain lawyers, however, are prohibited from performing legal services by constitutional, statutory, rule, or other regulatory prohibitions, members of the bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline are deferred from participation in this program. In discharging the professional responsibility to provide pro bono legal service to the poor, each lawyer should furnish a minimum of twenty hours of pro bono legal service to the poor annually or contribute $350 to a legal aid organization. Pro bono legal service to the poor is to be provided not only to those persons whose household incomes are below the federal poverty standard but also to those persons frequently referred to as the "working poor." Lawyers providing pro bono legal service on their own need not undertake an investigation to determine client eligibility. Rather, a good faith determination by the lawyer of client eligibility is sufficient. Pro bono legal
service to the poor need not be provided only through free legal services to individuals; it can also be provided through free legal services to charitable, religious, or educational organizations whose overall mission and activities are designed predominantly to address the needs of the poor. For example, free legal service to organizations such as a church, civil, or community service organization relating to a project seeking to address the problems of the poor would qualify. While the personal involvement of each lawyer in the provision of pro bono legal service to the poor is generally preferable, such personal involvement may not always be possible or produce the ultimate desired result, that is, a significant maximum increase in the quantity and quality of legal service provided to the poor. The annual contribution alternative recognizes a lawyer's professional responsibility to provide financial assistance to increase and improve the delivery of legal service to the poor when a lawyer cannot or decides not to provide legal service to the poor through the contribution of time. Also, there is no prohibition against a lawyer's contributing a combination of hours and financial support. The limited provision allowing for collective satisfaction of the twenty-hour standard recognizes the importance of encouraging law firms to undertake the pro bono legal representation of the poor in substantial, complex matters requiring significant expenditures of law firm resources and time and costs, such as class actions and postconviction death penalty appeal cases, and through the establishment of full-time community or public service staffs. When a law firm uses collective satisfaction, the total hours of legal services provided in such substantial, complex matters or through a full-time community or public service staff should be credited among the firm's lawyers in a fair and reasonable manner as determined by the firm. The reporting requirement is designed to provide a sound basis for evaluating the results achieved by this rule, reveal the strengths and weaknesses of the pro bono plan, and to remind lawyers of their professional responsibility under this rule. The twenty-hour standard for the provision of pro bono legal service to the poor is a minimum. Additional hours of service are to be encouraged. Many lawyers will, as they have before the adoption of this rule, contribute many more hours than the minimum. To ensure that a lawyer may, if the lawyer chooses, receive credit for future years for the time that may be required to handle a particularly involved matter, this rule provides the lawyer an opportunity to carry forward the lawyer's time provided in excess of twenty hours in any one year over two successive additional years.
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<tr>
<th>Jurisdiction/Rule</th>
<th>Comparison Format</th>
<th>Specific Annual Goal</th>
<th>Type of Clients</th>
<th>No/Reduced Fee</th>
<th>Type of Services</th>
<th>Financial Support</th>
<th>Collective Satisfaction</th>
<th>Carry-over</th>
<th>Exceptions</th>
<th>Reporting/Other</th>
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<td>ABA Model Code of Professional Responsibility EC-2-25. Effective: 1969</td>
<td>No</td>
<td>Poor</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>ABA Rules-Model Rules of Professional Conduct 6.1 (Revised) (1993). Amend: Feb. 1993</td>
<td>50 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable</td>
<td>Alternative; amount equivalent to value of hours of service not provided; paid to entities that provide legal service to the poor</td>
<td>Allowed in comment</td>
<td>Broad range of activities allow assistance from those prohibited from traditional pro bono</td>
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<td>Jurisdiction/Rule</td>
<td>Comparison Format</td>
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<td>Type of Clients</td>
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<tr>
<td>Alabama - AL R. S. CT. R.P.C. Rule 6.1, Effec: Jan. 1991</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor; public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable organization representation and the administration of justice</td>
<td>Supplemental; unspecified amount</td>
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<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
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<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable organization representation and the administration of justice</td>
<td>Supplemental; unspecified amount</td>
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<td>Arizona - 17A A.R.S. Sup. Ct. Rules, Rule 42 R.P.C. ER 6.1, Effec: Dec. 1990</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor; entities that assist poor, legal improvement entities, or charities</td>
<td>Either, reduced fees shall be written</td>
<td>Poverty, civil rights, civil liberties or public rights law, charitable, law-related education</td>
<td>Alternative; unspecified amount</td>
<td>Allowed</td>
<td>Allowed</td>
<td>Reduced hours for part-timers</td>
<td>Voluntary on dues statement; 35% reported in 1996</td>
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<td>Arkansas - ARK. Cr. R. M. R.P. C. RULE 6.1, Effec: Jan. 1986</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor; public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable</td>
<td>Supplemental; unspecified amount</td>
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</table>

1. California does not have a pro bono rule, however, there is a pro bono obligation for attorneys participating in lawyer referral service organizations. CAL. BUS. & PROF. CODE 6155(a)(1), (f)(5) and CAL. ATT'Y & STATE BAR, LAWYER REFERRAL STDS. §7.4.
<table>
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<tr>
<th>Jurisdiction/Rule</th>
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<th>Type of Services</th>
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<th>Collective Satisfaction</th>
<th>Carry-over</th>
<th>Exceptions</th>
<th>Reporting/Other</th>
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<td>Colorado - Co. Ct. R. R.P.C. RULE 6.1. Effec: Jan. 2000</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor, entities that assist and educate poor, legal improvement entities, or needy, charities</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable, lobbying</td>
<td>Alternative; amount equivalent to value of hours of service not provided; paid to entities that provide legal service to the poor</td>
<td>Allowed in special circumstances such as death penalty and class actions</td>
<td></td>
<td>Those prohibited may fulfill by other uncompensated assistance to programs serving poor</td>
<td>Court rejected mandatory reporting proposal in 1999</td>
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<td>Connecticut - Ct. R. R.P.C. RULE 6.1. Effec: June 1986</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable</td>
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<td>Delaware - DE. R. R.P.C. RULE 6.1. Effec: 1985</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable</td>
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<td>District of Columbia- D.C. Ct. R. R.P.C. RULE 6.1. Effec: Jan. 1991 Amended: July 1999</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>One court appointment, 50 hours, or financial contribution in comment</td>
<td>Poor, organizations who provide legal services to the poor, or those otherwise unable to obtain counsel</td>
<td>Either</td>
<td></td>
<td>Alternative; specifies lesser of $400 or 1% of earned income</td>
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<td>considers prohibited government attorneys</td>
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<td>Reporting/Other</td>
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<td>Required; 90% report</td>
<td>Judicial and public, except 1.5%</td>
<td>Allowed for up to 2 years</td>
<td>Government and public, except those designated as small</td>
<td>Allowed under 5%</td>
<td>Alternative, religious, charitable, educational, public and charitable organizations that directly address the needs of the poor</td>
<td>No fee</td>
<td>Poor, or similar to those eligible under the ABA Rule 6.1</td>
<td>Same or similar to those eligible under ABA Rule 6.1</td>
<td>Florida - Fla. Bus. &amp; Prof. R. 46.1, Effec. Oct. 1993</td>
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<tr>
<td>Jurisdiction/Rule</td>
<td>Comparison Format</td>
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<td>Type of Clients</td>
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<td>Indiana - Ind. Ct. R. R.P.C. Rule 6.1, Effec: Jan. 1987</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>Ind. Ct. R. R.P.C. Rule 6.5 effec. Feb. 1998, creates state commission and pro bono committees in each judicial district</td>
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<tr>
<td>Iowa - I. C. A. Ttr. 10, ch. 602 app. (West 2000) Effec: July 1993</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor; Legal aid and similar organizations</td>
<td>No fee</td>
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<td>Consists of ABA comment, rule omitted</td>
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<tr>
<td>Kansas - Ks.Ct. R. Rule 226 R. P. C. 6.1, Effec: 1988</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<tr>
<td>Kentucky - K.R.S. S. C. R. 3.130 (6.1) (West 1994), Effec: Oct. 1994</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Poverty, civil rights law, public rights law, charitable organization and the administration of justice</td>
<td>Alternative or supplemental; unspecified amount</td>
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<td>Voluntary on annual dues statement; award given; 12% report</td>
</tr>
</tbody>
</table>

2. Preamble to Illinois Rules of Professional Conduct, recognizes the individual responsibility of providing pro bono services, however, explicitly refuses to adopt 6.1 because the aspirational nature of the rule makes it inappropriate for disciplinary rules. ILL. SUP. CRT. R. PROP. COND., PREAMBLE.
<table>
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<tr>
<th>Jurisdiction/Rule</th>
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<tbody>
<tr>
<td>Louisiana - LSA-R.S. ART. 16, RULE 6.1. (West 2000)</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Alternative; contribute from $250 to 1% annual income to entities providing legal aid to the poor</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Voluntary since 1998; form enclosed with dues statement; 8-9% reported in 1998/Rule omits comment</td>
<td></td>
</tr>
<tr>
<td>Maine - ME. BAR. R. C.P.R. 3.10.</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Alternative; contribute from $250 to 1% annual income to entities providing legal aid to the poor</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Voluntary since 1994; form sent with dues; 7-8% reported in 1996/Proposed Revisions pending</td>
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<tr>
<td>Maryland - MD. R. app. R.P.C RULE 6.1.</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Alternative; contribute from $250 to 1% annual income to entities providing legal aid to the poor</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Voluntary since 1998; form enclosed with dues statement; 8-9% reported in 1998/Rule omits comment</td>
<td></td>
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<tr>
<td>Massachusetts - MASS. S. CT. RULES 3.07, RULE 6.1</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>25 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Alternative; contribute from $250 to 1% annual income to entities providing legal aid to the poor</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Rejected proposed requirement in 1998</td>
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</tr>
<tr>
<td>Michigan - Mt. R. Ct. M.R.P.C. 6.1.</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Alternative; contribute from $250 to 1% annual income to entities providing legal aid to the poor</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Proposes for voluntary pending</td>
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<td>Jurisdiction/Rule</td>
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<tr>
<td>Minnesota - Minn. Ct. R. R.P.C. Rule 6.1 Effec: Jan. 1996</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Supplemental; unspecified amount</td>
<td>Allowed</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Court rejected proposed reporting requirement in April 2000</td>
</tr>
<tr>
<td>Mississippi - Miss. Ct. R. M.R.P.C. Rule 6.1 Effec: Sept. 1996</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Supplemental; unspecified amount</td>
<td>Allowed</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Voluntary since 1998</td>
</tr>
<tr>
<td>Missouri - Mo. Bar Rule 4 R.P.C. Rule 4-6.1 Effec: Jan. 1986</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
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<td>Supplemental; unspecified amount</td>
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<td></td>
<td>Voluntary since 1998; enclosed with dues statement</td>
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<tr>
<td>Jurisdiction/Rule</td>
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<tr>
<td>Montana - Mt. Ct. R. R.P.C. RULE 6.1. Effect: May 1995</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Supplemental; unspecified amount</td>
<td>Allowed</td>
<td>Comment states that specific number should be annually over legal career</td>
<td>Prohibited attorneys may find alternative means to meet obligation</td>
<td>Adds sentence stating that rule is not to be enforced through disciplinary proceedings</td>
</tr>
<tr>
<td>Nebraska - Neb. Ct. R. &amp; P. C. P. R. EC 2-25. Effect: Feb. 1996</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td></td>
<td>Supplemental; unspecified amount</td>
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<tr>
<td>Nevada - NV. St. S. Ct. R. &amp; P.C. RULE 191. Effect: July 1, 1996</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>20 hours or 60 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>20 hours at no fee, or 60 hours at a reduced fee</td>
<td></td>
<td>Alternative; $500 to pro bono service organization</td>
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<td>Rejected proposed reporting requirement</td>
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<tr>
<td>New Hampshire - N.H. Ct. R. B.P.C. RULE 6.1. Effect: Jan. 2000</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Prefer entities that assist poor, but public service, charitable, or legal improvement organizations allowed</td>
<td>Either</td>
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<td>Voluntary under consideration</td>
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<td>New Jersey - N.J. R. R.P.C. 6.1. Effec: July 1984</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<tr>
<td>New Mexico - N.M. Ct. R. R.P.C. RULE 16-601. Effec: Jan. 1997</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Charitable, religious, civic and community, governmental and educational services designed to meet the needs of the poor</td>
<td>Alternative; $350 annually</td>
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<tr>
<td>New York - NY. St. C.P.R. EC 2-25. Effec: Sept. 1990/Amended: Apr. 2000</td>
<td>Other</td>
<td>20 hours</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Public interest law</td>
<td>Supplemental; unspecified amount</td>
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³ Despite the purely aspirational statement in 6.1, the New Jersey Supreme Court imposed an obligation on the private bar to provide funding where the representation is inadequate. See Madden v. Delran, 601 A.2d 211 (N.J. 1992).
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<tr>
<td>North Dakota - N.D. R.P.C. RULE 6.1. Effec: May 1987</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<tr>
<td>Ohio - O. St. C.F.R. EC 2-24. Effec: Mar. 1986</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>20 hours or 2 cases per year</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>Oklahoma - 5 O.S., Ch. 1, App. 3-A Effec: July 1988</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<tr>
<td>Oregon-- OR. ST. BAR BD. OF GOV. PL. 15.1 Effec: 1989</td>
<td>Other</td>
<td>80 hours, 20-40 hours or two cases directly to the poor</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>No</td>
<td>Alternative; unspecified amount</td>
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<tr>
<td>Pennsylvania - 42 PA. C. S. A. RULE 6.1 Effec: April 1988</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>Rhode Island - R.I. R. S. CT. ART. V R.P.C. RULE 6.1. Effec: Nov. 1988</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>South Carolina - S.C.R., A. 407 R.P.C. 6.1. Effec: Sept. 1990</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>South Dakota - S.D. St. T. 16, Ch. 16-18 app. RULE 6.1 (1996). Effec: Dec. 1987</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor, public service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Supplemental; unspecified amount</td>
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<td>Tennessee - TN. R. S. CT. RULE 8 C.P.R. EC 2-25. Effec: Oct. 1970</td>
<td>Same or similar to original ABA Rule 6.1</td>
<td>No</td>
<td>Poor; legal aid and similar organizations</td>
<td>Either</td>
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<td>MCLE credit: 1 hr. credit for 8 hrs. service Currently revamping entire Rules of Professional Responsibility</td>
</tr>
<tr>
<td>Texas - TX. ST. R.P.C. PREAMBLE. Effec: Jan 1990</td>
<td>Other</td>
<td>50 hours</td>
<td>Poor; legal aid and similar organizations</td>
<td>Either</td>
<td>Poverty, civil rights, public interest, charitable organizations, administration of justice</td>
<td>Supplemental; give to legal service organizations that represent poor</td>
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<td>Voluntary since 1992; 27% reported in 97-98</td>
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<tr>
<td>Utah - UT. R. R. P.C. RULE 6.1. Effec: Jan 1998</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>36 hours</td>
<td>Poor, entities that assist poor, legal improvement entities, or needy charities</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable</td>
<td>Alternative; $10/hr. for services not provided</td>
<td></td>
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<td>Voluntary since 1998; rejected proposed requirement</td>
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</tbody>
</table>

**PRO BONO PUBLICO IN OKLAHOMA**
<table>
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<tr>
<th>Jurisdiction/Rule</th>
<th>Comparative Format</th>
<th>Type of Service</th>
<th>Specific Annual Goal</th>
<th>Type of Client</th>
<th>No/Reduced Fee</th>
<th>Reporting/Outlier</th>
<th>Exceptional Satisfaction</th>
<th>Carry-over</th>
<th>Financial Support</th>
<th>Voluntary, under consideration</th>
<th>Voluntary since 1999</th>
<th>Frequency/Amount</th>
</tr>
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<tbody>
<tr>
<td>Virginia - Va. R. C.R.</td>
<td>Poor, Rule 6.1</td>
<td>Rule 2:10 to 2:34</td>
<td>Effect: Jan. 2000</td>
<td>No</td>
<td>Poor, entities</td>
<td>Both</td>
<td>Voluntary, unspecified amount</td>
<td>Allowed</td>
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<tr>
<td>Washington - Wa. R. P.C.</td>
<td>Poor, Rule 6.1</td>
<td>ABA Rule 6.1</td>
<td>Effect: July 1995</td>
<td>No</td>
<td>Poor, public service</td>
<td>Both</td>
<td>Voluntary, unspecified amount</td>
<td>Allowed</td>
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<tr>
<td>Wisconsin - Wi. R. P.C.</td>
<td>Poor, Rule 6.1</td>
<td>ABA Rule 6.1</td>
<td>Effect: Jan. 1988</td>
<td>No</td>
<td>Poor, public service</td>
<td>Both</td>
<td>Voluntary, unspecified amount</td>
<td>Allowed</td>
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<tr>
<td>Wyoming - WY. R. R.P.C. RULE 6.1.</td>
<td>Same or similar to revised ABA Rule 6.1</td>
<td>50 hours</td>
<td>In-state poor, public, service, charitable, or legal improvement organizations</td>
<td>Either</td>
<td>Poverty, civil rights, or public rights law, charitable</td>
<td>Alternative; $500 to specified entities</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Conventions
If a table cell is empty, then the rule was silent on that factor.

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