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Despite the efforts of ardent advocates such as Chesterfield Smith, former president of the American Bar Association, the legal profession has continually failed to adopt a rule requiring mandatory pro bono services. In this article, Mr. Smith proposes a definitive, yet flexible, pro bono rule to govern lawyers' conduct. The author explains that the flexible nature of such a rule will accommodate the individual circumstances of members of the bar while serving the needs of society.

In recent years, attorneys at all levels of experience have become increasingly aware of the inadequacies of the legal profession, particularly its failure to reach many who desperately need its services. This shortcoming persists despite the often self-proclaimed dedication of many lawyers to public service. Although some observers suggest that the legal profession already meets society's needs, others continue to argue that lawyers should have a formal ethical responsibility to devote some professional time and effort to free, or pro bono, service. Some of the advocates of establishing obligatory pro bono service argue further that the obligation should be strictly enforced by the bar rather than merely by peer pressure.

The American Bar Association (ABA) has from time to time considered implementing an ethical rule mandating pro bono service. Recent developments, however, indicate that the time is not politically ripe for such a move. In January, 1980, the American Bar Association Commission on Evaluation of Professional Standards (the Kutak Commission) published a discussion draft of proposed Model Rules of Professional Conduct[1] that included a rule

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1. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980), *reprinted in* 48 U.S.L.W. 1 (Feb. 19, 1980) (special ed.) [hereinafter cited as MODEL RULES (Discussion Draft)].

requiring attorneys to provide unpaid public service,[2] and to make annual reports concerning their services "to an appropriate regulatory authority."[3] Many lawyers, however, opposed the concept for both philosophical and political reasons.[4] Indeed, this modest step towards a mandatory pro bono standard generated so much opposition that the adoption of the entire set of Model Rules proposed by the Kutak Commission was threatened.

The National Organization of Bar Counsel, in its report on the Model Rules,[5] recognized the laudable intent of the proposed rule mandating pro bono service, but nevertheless recommended against adoption of the rule because of its numerous shortcomings.[6] One major problem was enforcement of the rule. The mere receipt and filing of annual reports, even without the authentication of a representative sample of those reports, would require immeasurable man-hours and severely tax the resources of any disciplinary body.[7] Moreover, the rule did not specify the amount of pro bono service that a lawyer would have to render. Consequently, a reviewing authority would be unable to determine whether a lawyer had violated the rule.[8] The rule also failed to make an exception for those attorneys in military, governmental, judicial,[9] or legal service organizations. Finally, even many of the supporters of a formal pro bono obligation opposed the reporting requirement as reflecting an unwarranted lack of confidence in lawyers.

In late 1980, the Kutak Commission announced that it was eliminating the mandatory nature of its pro bono rule and removing both the pro bono and reporting requirements.[10] This was unfortunate, because, although many magnificent lawyers over the

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2. *Id.* rule 8.1 provides:

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

3. *Id.*

4. Slonim, *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A. J. 33 (1981).

5. National Organization of Bar Counsel, Report and Recommendations on Study of the Model Rules of Professional Conduct (Discussion Draft of Jan. 30, 1980) to the ABA Commission on Evaluation of Professional Standards (Tent. Draft, July 31, 1980) [hereinafter cited as NOBC Report and Recommendations].

6. *Id.* at 91 (comment to rule 8.1).

7. *Id.*

8. *Id.*

9. *Id.*

10. Slonim, *supra* note 4.

years have willingly rendered substantial public service without pecuniary compensation, most have not. Not only have most lawyers found it easier to let a small minority provide pro bono work, they have also found that working for free, part-time, is not a good way to achieve lasting economic success. Of course, too much pro bono service can be a genuine economic burden for the small-firm lawyer or sole practitioner,[11] but this should not have dissuaded the profession from embracing a required standard for pro bono service. It would have been suitable, proper, and timely for the organized legal profession to have formally recognized that each lawyer has an obligation to provide some free public service, which, if unreasonably ignored, would warrant professional sanctions. The Kutak Commission proved itself to be timid when it succumbed to the wishes of an overwhelming majority of attorneys and eliminated the mandatory pro bono standard from the proposed rules. But mandatory pro bono service is not dead; mounting social pressures will ultimately force the profession to adopt such a rule.

The ABA's existing Code of Professional Responsibility[12] states that the individual lawyer has an obligation to render free legal services to those unable to pay.[13] Lawyers who work for little, if any, compensation to solve the problems of the indigent in our justice system are obviously rendering a valuable public service.[14] The complexity of today's society and legal system, however, requires more from attorneys than legal aid to the poor. The majority of lawyers have used the fact that some lawyers have provided legal assistance to the poor for free, or at a reduced fee, as an excuse not to render any type of public service themselves. All attorneys should recognize, however, that the significant needs of the indigent client are only a part of the overall need that society has for legal services. The entire legal profession still has a duty to donate its efforts toward problems beyond those of the poor. The primary onus on lawyers now must be to make society better by using their special and unique skills in the public interest.

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11. For a discussion of the economic burdens of public interest law, see F. MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 273-87 (1972).

12. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as ABA CODE].

13. *Id.* EC 2-25. The Code, however, does not contain a corresponding disciplinary rule establishing a minimum pro bono performance level.

14. Many lawyers representing indigents indicate that the pressure of caseloads on their resources is so great that massive assistance is required from private attorneys if the poor are to be minimally represented. Kettleson, *Revising the Code of Professional Responsibility*, 35 NLADA BRIEFCASE 40, 41 (March 1978).

Throughout history, justice, although always elusive and ideal, has been mankind's greatest aspiration.[15] Lawyers, as ambassadors of the justice system to the people, have an exalted and unique status that demands more from them than from laymen in improving the law. Lawyers not only have a public service responsibility to provide unpaid assistance, or assistance at a substantially reduced fee, they also have a duty to improve the administration of justice in their own communities. It is the responsibility of all lawyers to be continually assisting the poor, to be active in civil rights law, to help charitable organizations, to work for better courts and judges, and to support more efficient legal procedures.[16] One should not get the impression, however, that the arenas for public service are limited. The limits of a lawyer's free public service must be as broad and flexible as his own imagination and experience. And, if the legal profession is to meet this obligation, every lawyer must help.

The Kutak Commission's latest proposed pro bono rule, although a diluted one, represents at least some progress. It affirms the need for lawyers to dedicate some of their efforts to public service by providing legal services at no fee, or at a reduced fee, or by acting to improve either the law, the legal system or the legal profession.[17]

The ABA and other bar associations, however, should go much further in designing a public service requirement. The legal profession will not maintain the public's respect if it supports a random and haphazard standard under which some lawyers contribute pro bono services while others contribute little or none. No standard of pro bono obligation should exonerate some lawyers from free public service while requiring it of others. For example, most large law firms have always performed some pro bono service, but this has usually meant any unpaid service, ranging from closing a real estate sale for a relative to advising the local Junior League.[18] As far

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15. The concept that everyone should have access to the judicial system was well-established even at the time of the Magna Carta. Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid In America*, 44 GEO. WASH. L. REV. 754, 755 (1976). By the end of the fifteenth century, the poor had a statutory right to free legal counsel. *Id.* at 755. The Statutes of Henry stated: "[T]he justice . . . shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same . . . ." Statutes Made at Westminster, 11 Hen. 7, c. 12 (1495).

16. ABA SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE, IMPLEMENTING THE LAWYER'S PUBLIC INTEREST PRACTICE OBLIGATION 1 (1977).

17. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT rule 6.1 (Proposed Final Draft, May 30, 1981).

18. Pollock, *I Gave At the Firm, How Firms Do and Don't Do Pro Bono*, 3 AM. LAW 28

as serving the indigent and unfortunate is concerned, the legal profession has given the idea of pro bono work more "lip service than public service."[19] In fact, the government has assumed a far greater responsibility for providing help to the impoverished than has the legal profession.[20] The grand legend often expressed at bar association meetings that local lawyers will contribute their efforts when needed is, unfortunately, a mere fantasy. Even though many recent law graduates seem to be more dedicated to public service than their senior counterparts, the apathy towards performing public service persists in all generations of lawyers.[21]

There are also many lawyers who find that contributing financially to make free legal services available to others is an appropriate manner of satisfying their obligation. Many people write a check and feel that they have done enough. Some observers, however, believe that cash contributions to an organized legal aid service or fund is a "cop out."[22] The Tallahassee Bar Association has rejected cash payments in lieu of pro bono service.[23] On the other hand, financial support has tremendously improved the capability of many legal aid services. In 1979, for example, the Legal Aid Society of New York raised $2.3 million from the private bar while also staffing one of its offices with a contingent of volunteer private attorneys.[24] The Legal Aid Society of Orange County, California achieved similar success by raising approximately one million dollars from the private bar.[25] Thus, although writing a check may not, by itself, be enough, it can be a factor in determining whether an individual lawyer has discharged his professional responsibility.

Despite the fact that for some attorneys contributing cash is far more practical than contributing time, personal time--that priceless and unique measure of professional devotion—remains the best contribution an attorney can make to the public interest. Each lawyer must, whenever feasible and practical, personally satisfy his duty to serve the public. No one else can. Financial contributions, no matter how substantial, cannot always discharge the

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(1981).

19. *Id.* at 29.

20. *See* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 262-80 (1976).

21. For a discussion of the history of public interest law, see F. MARKS, *supra* note 11, at 7-45.

22. *See, e.g.*, Winter, *'Buy Out'; Is it a Pro Bono Cop-Out?*, 66 A.B.A. J. 1351 (1980).

23. *Id.* at 1352.

24. *Id.*

25. *Id.* at 1351.

individual attorney's obligation. The legal profession is not an elitist organization in which wealth can buy amnesty for failing to do what all lawyers are obligated to do. Indeed, if the legal profession is to be truly great, these obligations must be nontransferable.

This is not to say that all pro bono service must be unpaid to satisfy the responsibility. The determination of a lawyer's pro bono obligation must take into account his individual economic or professional circumstances. In addition, there are many situations in which contributing only time is not practical. In such cases, financial contributions might be an acceptable alternative. For example, many lawyers do not regularly practice law. Others who do practice regularly might not work for law firms or might encounter employer resistance to requests for permission to dedicate time to pro bono work. Bar associations can accommodate such individual circumstances by adopting voluntary guidelines for pro bono service that permit an attorney to satisfy his duty by accepting court appointments or donating money to legal aid societies, as well as by providing unpaid pro bono time.[26]

Another problem that complicates establishing a practical pro bono standard is presented by the lawyer who is paid a salary to represent the indigent or public service groups, or who serves the public through government employment. These attorneys already advance the public interest, but they still have an obligation to provide free public service outside the scope of their employment. For example, these lawyers can greatly benefit the public by participating in law reform or bar association activities. The difficulty lies in striking the proper balance between the time devoted to public service and that needed to make a livelihood.

Despite the many problems and individual circumstances that hinder the development of a meaningful pro bono standard, the need for a standard remains clear. Even those attorneys who have long acknowledged their responsibility to provide free public ser-

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26. *See* ABA SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE, *supra* note 16. Florida Supreme Court Chief Justice Alan Sundberg, a supporter of voluntary pro bono service, recently suggested that lawyers fulfill their legal service obligations by following one of the models proposed by the federal government's Legal Services Corporation. These include volunteer service either on an individual basis, or coordinated by independent organizations established by the local bars or "statewide lawyer referral service[s] along the lines of the existing public interest law bank in Miami, which is essentially a pro bono referral panel." Sundberg, *Professional Duty and Pro Bono*, 55 FLA. B.J. 502, 503 (1981). The Chief Justice further suggested that volunteer attorneys who are experts in their fields could serve as pro bono consultants on cases primarily handled by other volunteer attorneys. Other pro bono activities might include volunteering time in lieu of bar dues, or volunteering equipment such as word processing and computerized research facilities. *Id.* at 504.

vice have almost no guidance as to the type or extent of activities that would discharge their duty. This lack of guidelines is one major reason why many financially successful lawyers have done little pro bono work, leaving only a few to discharge the obligation of the entire legal profession. The collective responsibility of lawyers must be translated into a defined professional duty that each lawyer individually render a share of free public service. If that ethical demand is plainly enunciated, without equivocation or ambivalence, the legal profession can begin the decisional process of interpretation and application that can ultimately define the dimensions of the free public service that society should receive in exchange for granting lawyers the exclusive privilege to practice law.

Even if the standards become codified, however, there will still be inherent difficulties in evaluating compliance with them. An individual attorney's work habits, job requirements, self-discipline, employment constraints, personal integrity, and professional competence will all affect the degree of his compliance. Because of the obvious difficulties in the "enforcement and . . . equitable distribution of [the] burden,"[27] the Kutak Commission's first proposed rule[28] did not detail a specific level of contribution. Complex enforcement problems, however, have not prevented the organized bar from adopting strict standards in the past.[29] The bar must begin, therefore, by outlining and enforcing general aspirational goals, while recognizing that lawyers' individual characteristics and practice demands will prevent their pro bono contributions from being equal. For some attorneys, pro bono activity might involve extensive work within the bar itself, for example, disciplinary committee service or legal reform.[30] For others, it might mean working with a public interest law firm or agency that renders free legal aid to clients otherwise unable to obtain representation. Alternatively, free public service might involve representing charitable organizations, enhancing confidence in the profession, improving the availability and delivery of legal services, providing civil rights legal assistance, or representing indigent criminal defendants.

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27. NOBC Report and Recommendations, *supra* note 5, at 91 (comment to rule 8.1).

28. MODEL RULES (Discussion Draft), *supra* note 1, rule 8.1.

29. *See, e.g.*, Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUNDATION RESEARCH J. 939, 950-51.

30. Local bar associations afford many opportunities for public service activities. Attorneys can join committees or sections that contribute to public interests. The Florida Bar, for example, has committees on consumer protection laws, lawyer referral, and legal assistance to the poor, among others. *See Committee Reports*, 55 FLA. B.J. 440, 441, 448-49 (1981).

The kinds of public service that might satisfy the pro bono obligation are certainly not limited to the activities described above; they might also encompass activities designed to improve the justice system through statutory or constitutional revision. Many interests in fields such as environmental protection, public assistance, consumer protection, civil liberties, and privacy are either unrepresented or underrepresented before legislatures, administrative agencies, and the courts.[31] No matter what activities qualify for satisfying a lawyer's obligation, the final decision of qualification rests with a lawyer's peers. While the emphasis should be on diversity and experimentation in determining whether activities performed on a recurring and substantial basis fulfill the duty, the organized bar is well-equipped to understand the various ways individual lawyers can render public service.

Despite convincing arguments favoring a pro bono requirement and the capability for implementing it, some lawyers continue to argue that pro bono service should only be voluntary, rather than mandatory.[32] Some suggest that a mandatory standard would subject attorneys to involuntary servitude and would be demeaning to their professional status. Still others maintain that the profession is not at fault and need not change its ethics. They claim that those who do not cherish the profession as it is should do something else for a living. This view, of course, is unacceptable. No lawyer should accept the profession as it is. The law and its profession are dynamic; they are constantly changing to meet society's needs. Indeed, it seems that the lawyers who accept the profession's status quo do it little justice, while those who seek to improve it bring it the greatest honor. The fact remains that society needs legal services and that lawyers must improve the system to meet those needs.[33]

If the legal profession does not address society's needs, society will satisfy those needs through other means, thus reducing the autonomy that the profession currently enjoys. Society has historically recognized that a fiercely independent and unshackled legal profession is essential to our system of government and to the indi-

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31. *See, e.g.*, Rodriguez, *Public Participation in Rulemaking Proceedings*, in COMMITMENT TO PUBLIC INTEREST LAW 56 (1980).

32. *See* Sundberg, *supra* note 26, at 503. Justice Sundberg stated that a mandatory pro bono rule is "inconsistent with the pro bono concept, which is founded upon professional aspirations and the individual attorney's conscience and sense of charity," and that "[t]he spirit of public service must be [the profession's] motivation, not a disciplinary rule." *Id.*

33. For an analysis of the need for the assistance of lawyers in general, see ABA, FINAL REPORT OF THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS (1978).

vidual rights of its citizens. Society enabled lawyers to be both free and independent by establishing a monopoly for those who practice law. Consequently, the nurturing of the skills used extensively in the practice of law, such as advocacy, counseling, negotiating, and drafting were chilled, and perhaps denied, to nonlawyers. This grant of monopolistic privilege creates, however, an obligation to make those special skills, nurtured by that monopoly, available to society.[34] If the profession does not provide the needed services, the public will have no choice but to permit encroachment by nonlawyers. Today, our society may already be close to concluding that its interests would be best served if other professionals or paraprofessionals shared some of the work traditionally performed only by lawyers.[35] Unless the profession realigns its ethical standards, including pro bono guidelines, to meet the public's needs, it will find its monopoly curtailed.

Certainly all alternatives warrant further examination before the legal profession's ethical canons undergo substantial, formal revision. The time for this analysis and reexamination, however, has arrived. Although lawyers do owe their peers individual courtesy and integrity in their dealings, lawyers owe individual lawyers who are unworthy absolutely nothing. The organized bar is not an exclusive club and its members cannot be mutually protected. Its members who do not fulfill their professional obligations can no longer be protected by those who do.[36] The organized legal profession is not and cannot be merely a trade guild. It must be an organization of learned professionals banded together to serve more effectively the public as a whole.

The individual attorney also owes an obligation to the bar as an entity. Each lawyer should assist in maintaining the integrity

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34. Petrey, *The Public Service Responsibility of the Bar*, in COMMITMENT TO PUBLIC INTEREST LAW 2 (1980).

35. In State Bar v. Cramer, 399 Mich. 116, 140, 249 N.W.2d 1, 10 (1976) (advice and preparation for others of "do-it-yourself" divorce kits constitutes unauthorized practice of law), Justice Williams, in a concurring opinion, predicted that laymen would increasingly continue to encroach on the legal profession's monopoly to practice law unless the organized bar acted to "make skilled professional services available to those who have reasonable need of them." *See also* Florida Bar v. Peake, 364 So. 2d 431 (Fla. 1978) (the sale of divorce kits, including all legal papers and instructions for filing of a noncontested divorce, constituted unauthorized practice of law); Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978) (woman engaging in secretarial service prohibited from giving advice to clients on available remedies and procedures for obtaining divorces, but permitted to sell forms and type client's information on the forms).

36. *See* ABA CODE, *supra* note 12, EC 1-2.

and competence of his profession.[37] And although a pro bono requirement would help instill this sense of responsibility, much would still depend upon each lawyer's personal standard of conduct. Self-evaluation of a lawyer's own ethics must be a part of each lawyer's life. A lawyer, however, also has an affirmative duty to cleanse the bar of its shysters, crooks, liars, incompetents, and laggards.[38] This duty includes disciplining every lawyer who *unreasonably ignores* his obligation to perform pro bono service. Whether an attorney has "unreasonably ignored" his duty, however, must be determined on a case-by-case basis by the lawyer's peers. The flexibility of this standard will permit the profession to accommodate the differing individual circumstances of lawyers. For example, the bar should encourage large law firms to allow some members to pursue primarily or even exclusively major pro bono projects while the other lawyers in the firm perform their regular work. This arrangement may not be applicable to smaller firms, which should adopt alternative methods for satisfying their obligations.

The ethical progress of establishing a mandatory pro bono standard can be achieved now. The author, during his tenure as a bar official, has personally seen disciplinary measures for a particular ethical violation develop from mere disapproval to disbarment. In prior years, most bars refused to discipline lawyers for simple negligence. Until relatively recently, professional incompetence was not even considered as a ground for discipline. The rationale was that discipline would contradict a state's supreme court's order certifying an attorney entering the bar as competent. Today, most bars' ethical temperaments have changed. Repeated or gross negligence now warrants the most severe censure. No longer does the profession permit marginally capable attorneys to practice law.[39] Thus, the profession should be ready to accept a mandatory pro bono standard, requiring fulfillment by each lawyer within prescribed guidelines that the lawyer's peers would set and periodically review. For example, the standard might be expressed in hours of professional time, not to exceed ten percent.

The thesis is simple—if the legal profession is to meet the aspirations of the society that created it, the title "attorney-at-law" must denote to all people integrity, unity, courage, specialized

37. *Id.* Canon 1.
38. *See id.* DR 1-103.
39. *Id.* Canon 6.

competence, and unselfish involvement in improving the public welfare. Unfortunately, it does not now.[40] Therefore, I suggest to the ABA a rule similar to the following: "Each lawyer shall provide free public interest legal services. That obligation may be discharged by professional activities on behalf of the public for improving the justice system, the law, and the legal profession. A lawyer may take his own particular and special circumstances into account in determining, for any period, compliance with that obligation. Willful, unreasonble, and continued failure by an individual lawyer to discharge that obligation shall result in appropriate disciplinary sanctions."

I suggest that such a mandatory rule does not demand too much. The ethical standards governing lawyer conduct have developed through usage to require increasingly greater dedication from those who wear the legal mantle. Lawyers should, indeed they must, live nobly in the law.

40. *See* Smith, *Improving the Image of the Organized Bar*, 49 JUDICATURE 139, 139-41 (1965).