No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services

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No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services

Stephen T. Maher*

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The poor man looks upon the law as an enemy, not as a friend. For him, the law is always taking something away.¹

I. INTRODUCTION

The poor need legal counsel, but cannot afford to pay legal fees. Without counsel, the poor are denied access to our system of justice. These simple facts concern many who believe that the widespread suspicion that law fails to secure justice will “[poison] the faith of the people in their own government and in law itself.”² This article does not attempt an abstract or comprehensive discussion of the parameters of the lawyer’s duty to solve this problem; that has been the sub-

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² R. Smith, Justice and the Poor at xi-xii (1919).

The poor man looks upon the law as an enemy, not as a friend. For him, the law is always taking something away.¹

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² R. Smith, Justice and the Poor at xi-xii (1919).

There is no more serious menace than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty.

C.E. Hughes, Legal Aid Societies, Their Function and Necessity, in 45 Reports of American Bar Association 227, 235 (C. Morrison official reporter 1920) (report of the 43d annual meeting of the A.B.A.).

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ject of other articles. This article will instead focus on the role that the Supreme Court of Florida has assumed in promoting the full availability of legal services and will explore reasonable expectations for future action given that role.

The Florida experience is noteworthy because the issue of the responsibility to make legal services available, especially to the poor, has surfaced in a variety of recent judicial proceedings. Much has been said, but little has yet been done to make legal services more available to the poor. Despite the historical record, there is reason to believe that Florida will lead the way in developing new and innovative methods for delivering legal services to the poor. First, the Supreme Court of Florida seems to be aware of the need for action, and has recognized that it has the duty to promote the full availability of legal services. The court has made a commitment to use its supervisory power to assure that the necessary steps are taken to address this problem. Second, the court’s pioneering role in the creation of the Interest on Trust Accounts (IOTA) Program demonstrates that it is able to develop unique and innovative methods for delivering legal services to the poor.

As this article will demonstrate, the court has, in the past, asked others to study the problem, but has not followed the advice that


5. Florida Bar v. Furman, 376 So. 2d 378, 382 (Fla. 1979).

6. Matter of Interest on Trust Accounts, 372 So. 2d 67 (Fla. 1979); In re Interest on Trust Accounts, 356 So. 2d 799 (Fla. 1978); see also The Florida Bar Foundation Charter, reprinted in FLORIDA RULES OF COURT 171-20 (West 1987); Bylaws of The Florida Bar Foundation, reprinted in FLORIDA RULES OF COURT 721-26 (West 1987). IOTA programs operate on the premise that client trust funds constitute an unused economic resource which may be mobilized to generate income to improve the delivery of legal services to the poor. [IOTA] programs authorize attorneys to pool nominal or short term client trust funds, which before [IOTA] were deposited in interest-free checking accounts, and deposit them in NOW or Super NOW checking accounts. The interest generated from these accounts is then used to support legal services to the poor and to fund other law-related public purposes.

The most frequently made recommendation has been that the court adopt a mandatory public service requirement as a condition of licensure or as part of the profession's ethical rules. This proposal, which has come to be known as mandatory pro bono, has been rejected by both the Bar and the court. This suggestion may seem extreme to those unfamiliar with the poor's unmet need for legal services. It has, however, been made again and again by lawyers who have studied the problem and concluded that something must be done, and that other proposals would provide little relief. It is time for the court to act. The court should convene proceedings under its supervisory power to study the problem and implement solutions.

II. THE FLORIDA EXPERIENCE

The development of legal aid to the poor in Florida paralleled developments in several other states. A 1972 study, sponsored by The Florida Bar and the University of Florida, disclosed "[a] vast unmet need for legal services." The study proposed forty recommen-
dations to increase the supply of legal services to Florida indigents, and noted:

[P]ro bono services will continue to be needed as an essential supplement to whatever institutional programs exist now or in the future, since it is highly unlikely that institutional programs will ever have sufficient resources to provide all legal services needed by the indigent. The extent to which individual lawyers are or should be obligated to make legal services available to indigents without fee has since been an issue in Florida.

A. Furman I

The question of what role the Supreme Court of Florida should play in promoting the full availability of legal services to the poor first arose in Florida Bar v. Furman (Furman I). In Furman I, the court was called upon to decide what to do about a lay person who assisted those of limited means in obtaining divorces. The court found that Furman's unauthorized practice of law was the symptom of a larger problem: the unavailability of counsel to those who cannot afford legal fees. The court directed The Florida Bar to immediately begin a study to determine ways and means to improve the delivery of legal services to the indigent. It recognized its obligation to promote affordable legal services in unequivocal terms:

Without question, it is our responsibility to promote the full availability of legal services. We deem it more appropriate, however, to address this issue in a separate proceeding. By doing so under our supervisory power, we insure a thorough consideration of the overall problem without delaying the present adjudication.

Rosemary Furman was enjoined from the practice of law.

In accordance with the court's mandate, and in cooperation with the Center for Governmental Responsibility at the University of Florida, The Florida Bar conducted a study (the Furman Study) of the

10. Levinson & Strong, Methods of Increasing the Supply of Legal Services to the Indigent in Florida (Feb. 7, 1972) (approved by Legal Aid and Indigent Defendant Committee of The Florida Bar on February 7, 1972).
13. Devising means for providing effective legal services to the indigent and poor is a continuing problem . . . . In spite of laudable efforts by the bar, however, this record suggests that even more attention needs to be given to this subject.
14. Id. at 382.
15. Id.
16. Id.
legal needs of Florida indigents. It reported that while no definitive study on the legal needs of the poor existed, independent researchers estimate that each year poor people have six million legal problems that require the services of an attorney. In addition, the American Bar Association has estimated that 23% of the poor need the services of an attorney each year. The Furman Study summarized the problem by stating that "because of his or her financial condition, a poor person has more severe legal problems and less access to the legal system." 

The Furman Study concluded that although our system of justice is not overtly partial or closed, the complexity of the legal system results in partiality. It concluded that "there are substantial deficiencies in the delivery of legal services to both middle income and poor persons in Florida" and that the problem is more serious for the poor.

17. FURMAN STUDY, supra note 7.
18. FURMAN STUDY, supra note 7, app. I, at 214.
19. Id. app. M, at 249.
20. Indeed, the poor's need for legal services has always far exceeded the available supply of free or low-cost services. Reginald Heber Smith described the situation as it existed early in this century:

   The essentially conservative bench and bar will vehemently deny any suggestion that there is no law for poor, but, as the legal aid societies know, such is the belief today of a multitude of humble, entirely honest people, and in light of their experience it appears as the simple truth.

R. SMITH, supra note 2, at 11 (footnotes omitted). Although greater resources are being allocated to provide legal services to the poor today, the Legal Services Corporation has estimated that federal support in the amount of $300 million per year will ensure that only 15% of the need is met. FURMAN STUDY, supra note 7, at 5. Federal spending is currently below that level.

21. FURMAN STUDY, supra note 7, at 3. Reginald Heber Smith described this well when he stated:

   We do not, as in Nero's time, write our laws in small letters at the top of high columns, but the multidinous laws in our voluminous case books and statute books are as hard to learn. Similarly, the procedural law, in accordance with which litigation must be conducted, is a maze to the uninitiated; it is a science in itself. The law permits every man to try his own case, but "the lay vision of every man his own lawyer has been shown by all experience to be an illusion."

R. SMITH, supra note 2, at 31-32 (quoting Pound, Administration of Justice in the Modern City, 26 HARV. L. REV. 302, 319 (1913)).

22. FURMAN STUDY, supra note 7, at 6.
23. In the words of the study:

   While there is a gap between needs and services for all levels of income, the need is most critical for the poor. Whereas many legal issues are left unresolved for middle income groups, the unmet needs for the poor usually have more severe consequences in terms of effects on their property, health, and lives.

Id. at 5. The situation in Florida is the norm, not the exception.

Poor people are prone to legal trouble. They are often defendants, rarely plaintiffs. They are bewildered and bemused by legalities they face daily as parents,
The study also presented a "Priority Agenda for Reform," which listed thirteen items requiring action by the Supreme Court of Florida, The Florida Bar, the Legislature, the Executive Branch, and the Legal Services Corporation. The recommendations were divided into three areas, corresponding to areas that the study found to be essential to an effective legal system: (1) information about the system; (2) access to representation; and (3) access to a means of dispute resolution.\footnote{24} In the area of representation, the primary recommendation was mandatory pro bono.\footnote{25} The Florida Bar filed the Furman Study with the court, as ordered. The court, however, did not convene supervisory proceedings as promised.

B. The Emergency Delivery\footnote{26} Case

The Furman Study was conducted when federal legal services funding\footnote{27} was at historically high levels. Beginning in 1982, substantial budget cuts in that program crippled legal services providers and created what some viewed as a legal aid crisis.\footnote{28} Loss of funding\footnote{29} led consumers, tenants, recipients of public assistance, accused offenders. If poverty itself is the root of most of their legal troubles, their escape may lie, at least in part, in establishing legal rights that the landlord, the social agency, the neighborhood merchant, and the police will honor.

\begin{quote}
P. WALD, LAW AND POVERTY: REPORT TO THE NATIONAL CONFERENCE OF LAW AND POVERTY 6 (1965).
\end{quote}

\footnote{24. FURMAN STUDY, supra note 7, at 1-2.}

\footnote{25. The study recommended "[i]mplementation, on a statewide basis, of a plan similar to the Orange County Bar Association Plan for pro bono representation." Id. at 1. The Orange County Bar requires all of its members to either: (1) handle two cases referred by the Legal Aid Society, without fee; or (2) pay $250 per year toward the society's funding. Marin-Rosa & Stepter, Orange County—Mandatory Pro Bono in a Voluntary Bar Association, FLA. B.J., Dec. 1985, at 21.}

\footnote{26. In re Emergency Delivery of Legal Servs. to the Poor, 432 So. 2d 39 (Fla. 1983). Here the court was asked to act on the Furman Study's recommendation by adopting a mandatory pro bono plan.}

\footnote{27. The federal government funds staff attorney programs that provide representation to indigents without fee in civil matters throughout the state, primarily through the Legal Services Corporation. Federal funds are "the primary source of funds for poverty law," and are thus the mainstay of civil legal services programs. FURMAN STUDY, supra note 7, at 26.}

\footnote{28. See The Return of Unequal Justice?, TIME, Dec. 27, 1982, at 48.}

\footnote{29. Federal funding of legal services programs in Florida fell from $10,194,910 in 1981, to $7,885,727 in 1982. Legal Services Corporation, Characteristics of Field Programs Supported by the Legal Services Corporation Start of 1982—A Fact Book 5 (Feb. 1982) [hereinafter Fact Book] (available through Florida Legal Services, Inc.). Nationally, federal funding also fell significantly and has not yet managed to recover to former levels. In fiscal year 1981, the Legal Services Corporation Field Program annualized funding level for basic field programs totaled $264,024,704 nationally. In fiscal year 1982, that funding dropped to $204,163,670. Although by fiscal year 1986 funding had reached $246,172,378, it still fell short of the 1981 level of funding.}
to loss of staff, and the ability of legal services programs to serve the legal needs of Florida's poor was significantly curtailed.

The Florida Bar responded to these developments by appointing a Special Committee on Pro Bono Service to study the situation and to make recommendations to the Board of Governors. The committee found that voluntary pro bono programs had "very limited participation by private attorneys," and determined, as had the Furman Study, that a statewide mandatory pro bono plan like that in operation in Orange County was needed. The Board of Governors unanimously rejected the Committee's proposal. Not satisfied with the Bar's response, members of the committee and other concerned bar members brought the matter directly to the Supreme Court of Florida. They asked the court to amend the Integration Rule to require attorneys, as a condition of licensure, to make legal services available to the poor either by donating their time, donating their money, or participating in the IOTA Program. The petitioners

30. For example, Legal Services of Greater Miami, Inc., the legal services program in Miami, lost 40% of its staff as a result of the cutbacks. Of the 212 fulltime attorneys who worked with legal services programs in Florida in 1981, only 146 remained in 1982. Of the 56 legal services offices operating in 1981, only 39 were operating in 1982. Fact Book, supra note 29, at 9.

31. Fla. Pro Bono Report, supra note 7, at 2. The Committee, chaired by Neil Chonin, sought first to coordinate and encourage pro bono programs. Members assembled information, made personal contact with bar leaders and members, and assisted in the preparation of criteria for pro bono awards. Id. at 2-3. The Committee's request that the members of the Board of Governors each take a pro bono case and lead the effort by example got a positive response from only one member. Id. at 3. The lack of success with voluntary efforts prompted the mandatory proposal. Id. at 4. The Committee suggested that the Board petition the Supreme Court to adopt a mandatory plan. Id. at 7.


34. Integration Rule of The Florida Bar art. XIII (1986).

35. The proposed amendment sought to require, as a requirement of continued membership in The Florida Bar, that each member, at his or her option:

1. donate, without the expectation of receiving a fee, at least twenty-five (25) hours of his or her professional service to assist in the delivery of legal services to the poor; or
2. donate five hundred ($500) dollars to The Florida Bar Foundation to assist in the delivery of legal services to the poor; or
3. fully participate in the Interest on Trust Account Program.

Emergency Petition to Amend Integration Rule By Addition of an Article Entitled "Delivery Of Legal Services To The Poor" at 1, In re The Emergency Delivery of Legal Services to the Poor, 432 So. 2d 39 (Fla. 1983) (No. 62,889) [hereinafter Petition] (footnote omitted). The last two options were designed to make funding available for staff programs. The petition was filed
advised the court that budget cuts had created a crisis in representation of the poor, and that a mandatory pro bono plan was the Furman Study's primary suggestion for increasing representation. They also argued that the Code of Professional Responsibility confirmed the lawyer's special responsibility in this area and provided a basis for strong court action. The Florida Bar opposed the petition.

The court recognized that the problem it had identified in Furman I still existed. It rejected the petition, not because it denied its responsibility to make counsel available, but because it believed mandatory remedies were inappropriate and might be unconstitutional. The court characterized the ethical requirements of the Code as "idealistic talk," and found the ethical canons in this area to only be directory: to enlighten the conscience rather than to compel the involuntary act. The court neither adopted a substitute measure nor conducted further proceedings—a response inconsistent with the

pursuant to articles 2 and 5 of the Florida Constitution and article XIII of the Integration Rule of The Florida Bar, and was signed by more than 50 bar members.


37. 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.

Model Code of Professional Responsibility EC 2-25 (1980). Ethical consideration 8-3 provides, in part, that "[t]hose persons unable to pay for legal services should be provided needed services." Id. at EC 8-3. The petitioners sought "mandatory enforcement of these stated ethical considerations." In re Emergency Delivery of Legal Servs. to the Poor, 432 So. 2d 39, 41 (Fla. 1983).

38. Response of The Florida Bar in Opposition to the Petition. The Bar argued that it was working to address the legal needs of the poor, that the proposed rule would create more problems than it would solve, and that the plan was constitutionally infirm. More recently, the Bar sought and obtained court approval of a mandatory continuing legal education requirement. See Changes to Come: Supreme Court Approves CLE Requirement, Florida Bar News, Apr. 1, 1987, at 1, col. 1.

39. The court conceded that "[t]here are people in need of legal services who are unable to pay for those services. All persons, however, should have the opportunity of obtaining effective legal services and should have meaningful access to the courts." 432 So. 2d at 41. The court did not appear sensitive to the fact that budget cuts had made the situation worse than when it ordered the Furman Study.

40. The court stated: "We have been loathe to coerce involuntary servitude in all walks of life; we do not forceably take property without just compensation; we do not mandate acts of charity. We believe that a person's voluntary service to others has to come from within the soul of that person." Id. This decision drew response from outside the legal community. See Challenge for State's Lawyers, Fla. Times-Union, May 24, 1983, at 1; Justice Is a Warm Glow, Gainesville Sun, May 23, 1983, at 4A; Poor Justice, Miami Herald, May 23, 1983, at A12, col. 1.

41. 432 So. 2d at 41.
court's recognition, in *Furman I*, that it is obligated to promote the full availability of legal services.

C. *Furman II*

The Florida Bar renewed its attack on Rosemary Furman in 1982 (*Furman II*),\(^{42}\) even though it had done little to implement the recommendations of the Furman Study, and had actively opposed the petition in the *Emergency Delivery* case. This time the Bar alleged that Furman had violated the earlier injunction against practicing law and should therefore be punished by incarceration.\(^{43}\) An amicus brief filed in that case suggested that the court "should not pass judgment in this case without pausing to consider the progress which has been made towards providing legal services to indigents since this matter last came before this Court."\(^{44}\) The brief quoted the specific recommendations made in the "Priority Agenda for Reform" set out in the Furman Study, and detailed the lack of progress that had been made in studying and implementing them.\(^{45}\) The brief concluded:

This Court must follow through on its commitment to "examine the problem and consider solutions," 376 So. 2d at 382, before it decides the issue of punishment in this case. Some realistic solution to the problem must be adopted and given time to work before non-lawyers are prosecuted for stepping in to provide services the legal profession has refused to make available. In the *Furman* decision, this Court has recognized that it has the authority under its supervisory power to address the problem. This Court also has the duty to do so, and to do so not only in reaction to proposals from members of the bar.\(^{46}\)

The court paid no heed. It noted only that the amicus had "favored us with dissertations on what . . . measures this court should initiate in order to provide free legal services in civil proceedings" and that "[w]e are not here, in this instance, to consider the broad [question] of . . . what, if any, free legal services should be provided in civil actions."\(^{47}\) The court did not indicate when it might convene the supervisory proceedings which it had promised in 1979.\(^{48}\)

Although lawyers have not traditionally been held in the highest

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\(^{42}\) Florida Bar v. Furman, 451 So. 2d 808 (Fla. 1984).

\(^{43}\) See *id*.

\(^{44}\) Brief for Amicus Curiae Southern Legal Counsel, Inc. at 3, Florida Bar v. Furman, 451 So. 2d 808 (Fla. 1984) (Nos. 63,380, 62,676).

\(^{45}\) *Id.* at 4-10.

\(^{46}\) *Id.* at 23.

\(^{47}\) Florida Bar v. Furman, 451 So. 2d 808, 812-13 (Fla. 1984).

\(^{48}\) The court found Furman in contempt and imposed a sentence of 120 days, with 90 days suspended. The Florida Cabinet later awarded Furman a pardon.
esteem by the public, many would probably agree that the public's opinion of our profession has fallen sharply in the last few years. We need not search far for the cause of this public discontent. The Furman cases have been a primary source of adverse publicity. And while bar members may understand that our poor public image is the result of our meager efforts to guarantee access to the justice system, many members seem to believe that the proper response is a good public relations campaign.

The referee in Furman II found that Rosemary Furman was "flying under the flag of 'access to the court,'" and acknowledged that, to "the poor, the illiterate—the man on the street—she may seem a fighter—a champion." If we are determined to change the public's perception of the bar, perhaps we should begin by taking up the flag of access to the courts, and through our actions, prove that we are the champion of the man on the street.

D. The Adoption of Rules of Professional Conduct

The court had the opportunity to take up the flag of access to the courts in the proceedings that it convened in 1984 to replace the Code of Professional Responsibility with the Rules of Professional Conduct. In the Emergency Delivery case, the court held that the ethical requirements of the Code in this area were not enforceable. The proceedings to replace the Code gave the court the opportunity to adopt enforceable requirements.

The Florida Bar recommended that the court adopt Model Rule 6.1. That rule, proposed in Florida as Rule 4-6.1, provides: "A law-

49. One commentator has noted: "From Shakespeare to Sandburg and beyond, poets have eloquently expressed popular dissatisfaction with lawyers and with their trade." Shapiro, supra note 3, at 789.

50. See Furman Case Victory Is Hollow for State Bar, Ruling Highlights a Festering Issue: Legal Aid to Poor, Miami Herald, Feb. 13, 1984, at A1, col. 2 (case is looking "like a public relations disaster for the state's legal establishment"); Case Challenges the Legal System, N.Y. Times, Aug. 12, 1984, at 17, col. 1. Sixty Minutes also did a segment with Rosemary Furman. Sixty Minutes: People's Court (CBS television broadcast, Jan. 29, 1984).

51. It may be that in the eyes of the public progress on all the other ethical problems will not be considered as significant as it might be until this difference between the rich and the not-so-rich in access to lawyers' services is eliminated. Pincus, One Man's Perspective on Ethics and the Legal Profession, 12 SAN DIEGO L. REV. 279, 281 (1975).


53. Id. at 27.

54. This revision followed the adoption of the Model Rules of Professional Conduct by the American Bar Association.

55. In re Emergency Delivery of Legal Servs. to the Poor, 432 So. 2d 39 (Fla. 1983).
yer should render public interest legal service." Although the language of this ethical requirement may seem clear enough, there is reason to question what the rule actually requires. First, there is a question concerning its enforceability. The comment to the rule provides: "This Rule expresses that policy but is not intended to be enforced through disciplinary process." This is the only rule of professional conduct that is not enforceable by disciplinary process. If the rule is not to be enforced through disciplinary process, the traditional method of enforcing ethical requirements, is it to be enforced some other way? For example, should courts enforce the rule by making uncompensated appointments? The rule does not give any guidance on this point. Even if it were enforceable by disciplinary process, the rule would still be deficient because it does not specify how much public service is required. One observer has noted: "Not imposing a quantity minimum is 'like saying you've got to love your mother'... It makes the obligation meaningless." The American Bar Association (ABA) "legislative history" of the rule gives further reason to question the nature of the obligation it imposes. The history shows that the rule was watered down in response to criticism from bar members who feared that the rule might impose a definite and enforceable public service requirement. The initial draft of the proposed rules contained a rule titled: "Service to pro bono publico." It proposed a requirement of forty hours per year of pro bono service, or the financial equivalent thereof. Other early drafts called for mandatory public service and contained report-
These drafts were consistent with the call for a strong public service requirement that predated the rulemaking in this area. The ABA’s final draft dropped the reporting requirement and changed the requirement that a lawyer “shall” perform such service, to the requirement that the lawyer “should” do so. The Chairman’s Introduction to the Proposed Final Draft states: “The Discussion Draft . . . called for mandatory pro bono legal service. This Final Draft does not.”

Notwithstanding the legislative history and the comment on enforceability, there is still an argument that the adoption of the rule creates a mandatory public service obligation. This argument finds three sources of support. First, the structure of the rules was intended to be a departure from the aspirational/mandatory dichotomy of the Ethical Considerations/Disciplinary Rules format of the Code. It is difficult to see how a rule can be other than mandatory under the approach the drafters chose to adopt. Second, the Florida legislative history refers to the rule as creating a “‘pro bono publico’ obligation.” Third, although the comment and the legislative history are aids to construction, “the text of each rule is authoritative,” and the text unambiguously states that lawyers should perform uncompensated service.

Concerned bar members asked the court to clarify the obligation imposed by the rule. When the court considered the new rules, members appeared and argued that the court should adopt a clear and enforceable ethical requirement instead of the bar proposal, or should at least revise the proposal to replace “should” with “shall” and


62. In August 1975, the American Bar Association’s House of Delegates adopted the Montreal Resolution, which recognized “[t]hat it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services . . . [which are] legal service[s] provided without fee or at a substantially reduced fee.” N.Y. Pro Bono Report, supra note 7, app. A-1, at 26.

63. The reporting requirement was dropped “[a]mid warnings that opposition to a provision requiring annual reporting of mandatory pro bono service could lead to rejection of [the Commission’s] entire draft of the Model Rules of Professional Conduct.” Slonim, Commission Votes Down Pro Bono Reporting, 66 A.B.A. J. 951, 951 (1980). Commission Chairman Robert Kutak reported that “the mandatory pro bono rule had drawn more fire than other controversial proposals” contained in the draft. Id.


65. For a somewhat optimistic view of Model Rule 6.1 and the obligation it imposes, see Spencer, supra note 3, at 513-15 (The Rule is a “partial victory” although it “represents a comparatively minor change from the status quo.”).

66. Committee Report, supra note 56, at 149.

67. Id. at 5.
delete the comment on enforceability. It was suggested that if the rule was not meant to be enforceable, it should be withdrawn from the rules altogether to avoid giving the public the wrong impression of what lawyers believe their responsibility to be.

While the rulemaking proceeding was pending, the Bar conducted yet another study of the legal needs of the poor in Florida. The Special Commission on Access to the Legal System issued a report to the Board of Governors of The Florida Bar on May 16, 1985.

For those who were unconvinced by the Levinson Study of 1971, or the Furman Study of 1980, we report the overwhelming testimony of lawyers and the lay citizens expressed at our public hearings concerning the unmet need for legal services within the State. If anything, the overwhelming statistics of need have been exacerbated by recent cutbacks in federal programs.

We see only two solutions which can provide any real relief to this need: (1) Money to hire lawyers to represent the poor; (2) Time devoted by private lawyers to representation of those who cannot pay. Other solutions, such as simplification of procedures so people can represent themselves can provide some relief but cannot come close to addressing the need. Unless we can obtain additional funding and/or additional donated time, we as a profession are basically unable to meet this problem. Unless we are willing to take steps to obtain funding or donated time, we should admit to ourselves and the public that we have no real solution.

The Special Commission’s primary recommendation was the amendment of proposed Rule 4-6.1, then pending before the court, to substitute “shall” for “should” and to revise the comment that indicated the rule would not be enforceable by disciplinary process. The

68. Brief in Support of the Adoption of a Clear and Enforceable Public Service Requirement passim; Brief in Opposition to Proposed Rule 4-6.1 at 8, Rules Regulating The Florida Bar, 494 So. 2d 977 (Fla. 1986) (No. 65,877). These briefs specifically addressed the court’s earlier concerns with involuntary servitude, the taking of property without just compensation, and mandating charity, and reviewed the legislative history of the rule.


71. SPECIAL COMMISSION, supra note 7. The Commission, composed of 16 members, was appointed by the Governor, the Chief Justice, and the President of The Florida Bar, to explore various alternatives to increase access to the legal system. The Commission included lawyers and nonlawyers from a geographical cross section of the state. Over a 10-month period, the Commission met throughout the state and held public hearings in Tallahassee, Tampa, and Miami. Id. at 1.

72. Id.

73. Id. at 3-6. The Commission’s second most important recommendation was that the Board of Governors press for the adoption of a mandatory IOTA Program. Id. at 7.
Commission was critical of the Bar’s proposal. It noted:

This is not a statement of principle to which the profession should repair. To the contrary, it says to the lawyer who does not want to meet the profession’s responsibilities, “That’s o.k., we don’t think this Rule is as important as the others.” It is the wrong signal to the student, the young lawyer, the lawyer who fails to shoulder ethical duty, and the public who asks what this profession stands for.74

The court ignored the recommendation of the Special Commission and proceeded to adopt Rule 4-6.1 as proposed by the Bar. The opinion accompanying the new Rules of Professional Conduct did not discuss this issue. Remarkably, it did not even mention that questions had been raised concerning the lawyer’s duty to serve the public interest, although that was the most contested issue in the proceeding.75 The status of the lawyer’s duty in this area therefore remains unclear.

III. REASONABLE EXPECTATIONS FOR FUTURE ACTION

The studies we continue to commission—and ignore—tell us that strong action is needed. The latest study found that the only solutions that can provide real relief are the donation of time or money to provide counsel to those who cannot afford it. Seven years have passed since Furman I, and the situation has gotten worse rather than better. The court has not yet convened the proceedings it promised to institute pursuant to its supervisory power. The court’s failure to “examine the problem and consider solutions,”76 as it said it would, is difficult to understand. It is clear that the leaders of the organized bar do not have the independence from member sentiment necessary to propose a meaningful response.77 Only the Supreme Court of Florida

74. Id. at 5.
75. See In re Rules Regulating The Florida Bar, 494 So. 2d 977 (Fla. 1986).
76. Florida Bar v. Furman, 376 So. 2d 378, 382 (Fla. 1979).
77. For example, the Board of Governors and other elected bar leaders are well aware of the opposition of most bar members to mandatory pro bono. The Florida Bar Membership Attitude Survey results reflect this opposition:

a. Would you support a mandatory pro bono legal services program administered by any of the following:
   THE FLORIDA BAR (9.7%)
   VOLUNTARY BAR ASSOCIATION IN WHICH YOU ARE A MEMBER (7.9%)
   STATE CIRCUIT COURTS (2.1%)
   FEDERAL DISTRICT COURTS (0.3%)
   OTHER (0.3%)
   NO—WOULD NOT SUPPORT A MANDATORY PROGRAM (75.8%)
   NO OPINION (3.6%)
   DNA (0.2%)
can address the problem of the unavailability of affordable legal services.

There is reason to believe that the court will yet provide strong leadership in this area. The court's limited response to this problem may be attributable to the fact that, in the past, it has been content to react to proposals brought before it for consideration, and has not taken the initiative to conduct its own study of the problem. If the court puts itself in the position of those who conducted the Levinson Study, the Furman Study, and the Special Commission's study, it is possible that it will come to the same conclusions reached in those studies. No relief is in sight while the court continues to leave the poor to the mercy of what may or may not spring from the "soul" of the individual practitioner.

The court has no reason not to act on its pledge to promote the full availability of legal services. Strong action is both constitutional and appropriate. Voluntary efforts do not justify inaction. The inde-

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b. If you responded in the affirmative to the preceding question, how would you be willing to support a mandatory pro bono legal services program?

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>WITH HOURS ONLY (0.5%)</td>
<td>OTHER (0.4%)</td>
</tr>
<tr>
<td>WITH MONEY ONLY (0.4%)</td>
<td>NO OPINION (1.4%)</td>
</tr>
<tr>
<td>WITH MONEY OR HOURS (9.2%)</td>
<td>DNA (79.1%)</td>
</tr>
</tbody>
</table>

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78. The court has taken some action to increase the delivery of legal services to the poor. The most noteworthy effort was the creation of the IOTA Program. The court also approved an amendment to the Integration Rule to permit retired attorneys from other jurisdictions to assist in the delivery of legal services to the poor, after initially rejecting that petition. Amendment to the Integration Rule, Article XXII (Emeritus Attorneys Pro Bono Participation Program), 490 So. 2d 947 (Fla. 1986); In re Amendment to the Integration Rule, Article XXII (Emeritus Attorneys Pro Bono Participation Program), 478 So. 2d 338 (Fla. 1985); In re Amendment to Integration Rule (Addition of Article XXII, Emeritus Attorneys Pro Bono Participation Program), 434 So. 2d 304 (Fla. 1983) (denying petition without prejudice); Rules Regulating The Florida Bar ch. 12, reprinted in 494 So. 2d 979, 1118 (Fla. 1986). In response to Furman, the court simplified the dissolution of marriage procedure for certain types of cases. The Florida Bar re Amendment to Florida Rules of Civil Procedure (Dissolution of Marriage), 450 So. 2d 810 (Fla. 1984); The Florida Bar re Amendment to Florida Rules of Civil Procedure (Dissolution of Marriage), 450 So. 2d 817 (Fla. 1984) (noting that the court had previously simplified procedures in small claims and probate). The dissent noted that the court's mandate to the Bar in Furman I was to recommend greater access to legal services, not to the judicial process. The dissent found that simplification of procedures "does nothing to increase access to legal services," 450 So. 2d at 815, and that "those persons identified as most in need of relief are those least able to intelligently utilize this rule of simplified procedure." 450 So. 2d at 816.

79. Levinson & Strong, supra note 9.

80. Special Commission, supra note 7.
pendence of the bar is not threatened by strong action, it is promoted by it.

A. Strong Action Is Constitutional and Appropriate

In the Emergency Delivery case, the court stopped short of holding that a mandatory plan would violate constitutional proscriptions. In rejecting the proposal, however, the court made three points: It was loathe (1) to coerce involuntary servitude; (2) to forceably take property without just compensation; and (3) to mandate acts of charity. These concerns should not paralyze the court.

The lawyer's duty to serve when required to do so by the courts is not involuntary servitude.81 Few who have advanced the argument have done so based upon any historical analysis of the thirteenth amendment, or the many decisions interpreting it.82 An examination of that case law makes it clear that the thirteenth amendment does not prohibit the court from requiring an attorney to serve at the courts' direction without compensation.83 The overwhelming majority of courts have held that requiring representation without compensation does not constitute a taking of property without due process of law in violation of the fifth and fourteenth amendments.84 Courts have held there is no unconstitutional taking because of the established rule that the enforcement of an obligation already owed to the public cannot constitute a taking for public use prohibited by the fifth

81. Both the involuntary servitude and due process arguments have, in this context, been characterized as "professionally unattractive and rationally unpersuasive." Yarbrough v. Superior Ct. of Napa County, 150 Cal. App. 3d 388, 197 Cal. Rptr. 737, 741 (1983).
amendment.\textsuperscript{85}

The requirement that each lawyer serve the public interest is not fairly categorized as mandating acts of charity. Charity is giving that which one has no duty to give. Lawyers have a state sanctioned monopoly on the public justice system. They are ethically bound to help the poor gain access to that system because to do otherwise would be to deny equal justice to all.

There is serious injustice in the present distribution of legal resources in our society. The inability to obtain legal assistance means that people suffer abuses due to lack of knowledge of legal rights and the inability to enforce these rights under existing laws—and indeed due to the slow evolution of the laws themselves in areas of vital concern. As an elite profession holding a monopoly on access to the keys of legal power, and as a profession dedicated to justice, the legal profession has a special ethical concern for alleviating this inequity. Mandatory public service, directed toward providing legal resources to people who otherwise could not obtain them, is a just and reasonable step toward affirming and fulfilling that concern.

Public service so conceived is not charity; rather, it is a regular part of an attorney’s professional life, as much an obligation as is competence. While public service should not be expected to solve the problem of unjust distribution of legal resources, a considerable impact is possible.\textsuperscript{86}

The requirement that lawyers spend some time or money to assist the poor in gaining access to our legal system is not unreasonably burdensome. Courts have sustained much more burdensome requirements. For example, one Florida court found that it had the authority to appoint counsel to the position of “Acting State Attorney,” but that because that appointment was not authorized by statute, there was a duty to serve but no right to compensation.\textsuperscript{87}

\textsuperscript{85} Rosenfeld, supra note 82, at 288. In United States v. Dillon, the court found that forcing an attorney to provide legal services without compensation does not constitute a taking because he is performing “an obligation imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice.” 346 F.2d 633, 636 (9th Cir.), cert. denied, 382 U.S. 978 (1965). The court relied on the Dillon holding in Hurtado v. United States, 410 U.S. 578 (1973) (material witness).

\textsuperscript{86} Spencer, supra note 3, at 519.

\textsuperscript{87} Dade County v. McCrary, 260 So. 2d 543 (Fla. 3d DCA 1972).

When a court in exercise of its inherent power requests or appoints a practicing attorney to undertake a representation, where no provision is made by law for public compensation of the attorney, whether the appointment is to represent an indigent, or to represent a court in opposing prohibition or in prosecuting a contempt, it is the duty of the lawyer to respond, and to so serve without compensation. This is so because attorneys are a privileged class which alone is permitted to practice in the courts, and their privileges as such carry
around the country have generally upheld uncompensated appointments. A requirement that all lawyers devote time or money to public service is less burdensome than appointment. When acting to satisfy an ethical requirement, the attorney can choose the project on which he or she will work or to which he or she will contribute, and can participate at a convenient time and place. If appointment is constitutional, so is an ethical requirement.

Strong action is not only constitutional, it is appropriate. The ethical requirements in this area have created an obligation of uncertain dimensions. A clear and enforceable obligation is needed. The Orange County experience suggests that lawyers are more opposed to the imposition of an enforceable requirement than they are to working under one. Mandatory pro bono is a tradition of the Orange County Bar Association. Each member takes two legal aid cases or pays $250 to the Legal Aid Society each year. There is no problem with lawyer noncompliance, and no criticism. New lawyers who enter that bar are instilled with the tradition, and come to accept it as their own. There is every reason to believe that other members of The Florida Bar would come to accept a mandatory plan in much the same way.

B. The Voluntary Activities of Florida Lawyers
Do Not Justify Inaction

The court's failure to take strong action cannot be justified on the grounds that lawyers are voluntarily shouldering their ethical burden. The Florida Bar has gone to great lengths in recent years to demonstrate the significance of voluntary efforts. The simple answer to the corresponding duties and obligations, including the undertaking of those representations when called upon by a court, notwithstanding the services thus performed otherwise could justify substantial compensation.

Id. at 545-46 (emphasis in original omitted).

88. Note, supra note 82, at 371 (collecting cases).

89. For example, the Bar produced a special issue of The Florida Bar Journal in December 1985, titled Maintaining Justice Through Pro Bono Legal Services: How Much Progress Has Florida Made?, which attempted to justify the Bar’s voluntary approach. The Bar published articles that supported its position, and refused to publish those that did not. An article by this author on the “Lawyer’s Duty to Serve the Public Interest” was rejected after the author refused to delete references to mandatory pro bono and mandatory IOTA. The article, although critical of the Bar’s position, had been written at the invitation of the Bar committee sponsoring the issue on a topic of its choosing. An article by Peter Siegel and Randall C. Berg, Jr. titled “Mandatory IOTA—Why Not?” was also rejected. The Bar, in rejecting an article by Neil Chonin, yet another contributor who was skeptical of the Bar’s progress on the pro bono front, explained its position as follows:

My Editorial Board recommends that the debate on mandatory pro bono and mandatory IOTA participation not be included in this issue. They feel that the topics have been thoroughly aired in many forums—in The Florida Bar News, in Supreme Court petitions, before the Board of Governors, and elsewhere.
Bar's public relations campaign is that, because the demand for free or low cost legal services will always far exceed the supply, voluntary efforts are not adequate to the task. The Bar's position is supported by its judgment that the increase in services which logic dictates would result from a mandatory program is not worth that effort. It is doubtful that the poor share this perspective.

The Bar has attempted to establish the amount of pro bono service provided by Florida lawyers through annual membership surveys. Even if the validity of the survey approach is conceded, the statistics that the Bar has compiled to justify its voluntary approach are not impressive. The 1984 survey reports:

How many hours in calendar year 1983 did you voluntarily spend providing pro bono legal services to individuals you knew could not afford to pay for the services?

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>NONE</td>
<td>30.3%</td>
</tr>
<tr>
<td>1 - 10</td>
<td>21.8%</td>
</tr>
<tr>
<td>11 - 25</td>
<td>20.1%</td>
</tr>
<tr>
<td>26 - 50</td>
<td>13.6%</td>
</tr>
<tr>
<td>MORE THAN 50</td>
<td>13.4%</td>
</tr>
<tr>
<td>DNA</td>
<td>0.9%</td>
</tr>
</tbody>
</table>

The 1986 survey reports:

How many hours of pro bono legal work during 1986 did you provide to individuals you knew could not afford to pay for your services?

Letter from Linda H. Yates to Neil Chonin (Oct. 17, 1985). However, the Bar's bias went beyond screening out articles that mentioned the word "mandatory." One article that was accepted was edited, without the author's permission, to delete material inconsistent with the Bar's thesis that all is well. For example, the editors deleted the following text from Berg, *Making a "Firm" Commitment*, FLA. B.J., Dec. 1985, at 45:

[M]any associates and young partners report that their firms give only "lip service" to pro bono. In fact, they give little—or no—encouragement to the actual fulfillment of their professed commitment to help those in need.


90. There is reason to suspect the accuracy of the responses to these surveys for three reasons. First, it is possible, if not likely, that the respondents—who as a group are overwhelmingly opposed to mandatory pro bono, see supra note 77, and as a group are sensitive to the well publicized criticism of lawyers on this score, see, e.g., *Lawyers Squirm in Face of Plan to Help Needy*, Miami Herald, Feb. 1, 1982, Business Monday Section, at 5—would tend to be expansive in the quantification of their contributions to society. Following this logic, the respondents' admission of no or low pro bono hours might be more credible than higher hour estimates. Second, the survey does not require the respondents to identify any particulars of the pro bono service they claim to have rendered. A study requesting such information would be more reliable. Third, the survey does not distinguish between free work done for the poor and for other income groups who cannot afford the high cost of legal services. The President of The Florida Bar conceded, in a press release titled "Four out of Five Florida Lawyers Provide Some Free Legal Services" announcing the results of the latest survey, that "in all probability much of the legal work was donated to middle class persons."


91. SURVEY, supra note 77, question 15a.
Although these statistics show an increase in pro bono activity, they also demonstrate that many lawyers are not meeting their ethical obligations. By the respondents' own admission, more than half still contribute only 25 hours or less to pro bono representation of individuals, and many admit contributing none at all. Thus, even a mandatory 25-hour requirement would significantly increase the availability of legal services to the poor.

The surveys also demonstrate another reason for considering a mandatory plan. Current voluntary efforts fall too heavily on the shoulders of a small and already burdened segment of the Bar.

Those lawyers who are already overburdened in their practices provided more pro bono services than other attorneys in Florida. Nearly 80% of those attorneys who spend over 60 hours per week practicing law provided pro bono hours . . . .

A mandatory pro bono system would assure that the Bar's ethical burden is borne by all lawyers.

The surveys show an estimate of the aggregate number of pro bono hours contributed by Bar members: 699,468 hours in the 1986 survey. Although some may find these statistics comforting in the abstract, there is no question that the poor's need for legal services far exceeds the hours provided. In addition, these figures also show that "the few" are carrying the burden of "the many." Of the 699,468 hours contributed in 1986, 581,023, or 83%, were contributed by 39.9% of Bar members. The inequity of the current voluntary system can be corrected if an enforceable ethical requirement is adopted.

The Commission on Access to the Legal System also suggested that current pro bono efforts were unsatisfactory:

Our public hearings revealed that many lawyers are performing substantial pro bono services for those who cannot afford them. For example, the Orange County, Tallahassee and Palm Beach Bar Associations require their members to participate in legal aid as a condition of membership. At our Tampa hearing, a representative

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94. There is reason to question these figures, because the lawyers polled did not estimate their hours, they merely responded in ranges of hours. The median in each range was used to calculate the hours estimate. Thus, the hours estimates may be wrong even if respondents all answered the survey correctly.
of Bay Area Legal Services reported that over 350 attorneys, including members of corporate legal staffs, have signed up as pro bono counsel.

Nevertheless, the performance varies widely throughout regions of the state. Many lawyers do nothing at all, leaving fulfillment of the profession’s obligations to their brethren.

We believe that the Florida Supreme Court and The Florida Bar have a responsibility to speak unequivocally and firmly concerning the obligation of every lawyer to assure that persons who cannot afford representation obtain counsel.95

We cannot assume that the situation will improve over time because the situation has deteriorated since the Furman Study, and experts foresee cutbacks in voluntary pro bono activities in the future as a result of pressures for more billable hours.96

C. The Independence of the Legal Profession Is Promoted, Not Threatened, by Strong Action

It has been suggested that the “spirit of public service in which the profession of law is and ought to be exercised” is what distinguishes our profession from a trade or business.97 It may be that if we lose that spirit, we lose part of the rationale that has traditionally been advanced for regulating the Bar differently than any other trade or business.98 The court’s leadership abilities are another important part of the rationale for maintaining the current structure of Bar regulation.99 The court has shown that it has the ability to be creative in meeting the challenge of delivering legal services to the poor. It demonstrated exemplary insight and leadership when it pioneered the IOTA Program. Since Florida became the first state to adopt IOTA,

95. Special Commission, supra note 7, at 3-4.
98. For example, during the course of legislative hearings to review regulation of the legal profession in Florida, the following occurred:
Representative James Harold Thompson asked Bar President L. David Shear why an integrated bar was better than a voluntary one. Shear responded that an integrated bar can marshal the manpower and the resources necessary to implement the public service programs that the Bar provides.
Florida Select Subcommittee on the Legal Profession, Report to the House of Representatives 73 (June 5, 1980).
99. When Chief Justice Arthur England opposed the concept of sunset review, and defended the special position of lawyers among regulated professions in legislative hearings, his principal points were that the Supreme Court of Florida had demonstrated effective leadership in the governance of the Bar, and that the court was not isolated from real supervisory control. “Justice England testified that the court acts on its own initiative to change Bar rules and policies. It does not always wait until someone comes to it with a problem.” Id. at 54-55.
forty-two states and the District of Columbia have followed Florida's lead and adopted IOTA programs. Similar leadership and initiative are needed today.

Periodic calls to move regulation of the Bar from the court to the Department of Professional Regulation, which regulates other professionals, should not be treated lightly. The relationship between the Bar's public service responsibility and its independence is closer than many realize. Independence can only be preserved by a profession whose members are so well guided by their personal sense of professional obligation to the public that the public chooses to leave them largely free from outside regulation. Conversely, unless the profession does cultivate and its members do act upon a high sense of public obligation over and above pursuit of the client's self interest, it cannot—and will not deserve to—retain its freedom from outside control.

IV. CONCLUSION

Popular dissatisfaction with lawyers and the legal system is more widespread than many are willing to admit. Our monopoly on access to the justice system is not secure. It is significant that two of the legal proceedings discussed in this article (Furman I and II) were actions to prevent the unauthorized practice of law. There are those who believe that the repeal of provisions prohibiting unauthorized practice of law offers a solution to the access problem. For example, W. Clark Durant III, Chairman of the Legal Services Corporation, recently advocated the repeal of unauthorized practice restrictions in an address to the American Bar Association. He contended that those laws could very well be the greatest barrier to low-cost legal services, and advocated deregulation of lawyers, and permitting paralegal and lay persons to practice law. Whole organizations have arisen to advocate these positions. If we hope to effectively

100. IOLTA Programs, IOLTA UPDATE, Winter 1987, at 4-9.
101. Cox, The Conditions of Independence for the Legal Profession, in THE LAWYER'S PROFESSIONAL INDEPENDENCE 55 (1984) (published by the American Bar Association). This theme also is expressed in the preamble to the Model Rules:

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar.

MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).
103. Id. at 2453-54.
104. For example, HALT (Help Abolish Legal Tyranny), Inc., an organization seeking "legal reform," has recently begun opening local chapters. Significantly, its pilot effort was in
respond to such efforts, we cannot continue to ignore the unmet need for access to legal services. The court can change the perception that the legal system works for the rich but not for the poor, but it must change that perception with actions, not with words. If we continue to be satisfied to make lawyers available only to those who can afford the high cost of litigation, people will lose their faith in our system of justice. When that happens—and unless we act, it will happen—even the remedies now rejected as too radical will be of little use.

Florida. HALT Launches Effort to Build Local Chapters, Americans for Legal Reform (ALR), Summer 1986, at 6; see also Competition Would Boost Access to the Legal System, St. Petersburg Times, Nov. 23, 1984, at A19, col. 1 (HALT director Thomas Mostowy stated: “One has to wonder just how committed the Florida Bar is to improving access to the legal system in light of this delay” in implementing the Furman Study.).

105. The significance of such a development is hard to overstate.

The law is real, but it is also a figment of our imaginations. Like all fundamental social institutions it casts a shadow of popular belief that may ultimately be more significant, albeit more difficult to comprehend, than the authorities, rules, and penalties that we ordinarily associate with law. What we believe reflects our values; it also colors our perceptions. What we believe about the law is related directly to the legitimacy of our political institutions.