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A POVERTY OF REPRESENTATION: THE ATTORNEY'S ROLE TO ADVOCATE FOR THE POWERLESS

Spencer Rand

Commemorating *Somerset v. Stewart*[1] gives us the unique opportunity to consider the power of legal advocacy in bringing justice to the oppressed. In retrospect, we believe it should have been an easy decision for lawyers to choose to address a condition as "odious" as slavery.[2] At the time, though some questioned the relative value of blacks to whites, with some comparing blacks to animals,[3] others, and

1. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).

2. The decision in *Somerset* makes clear that slavery was considered abhorrent to many in the eighteenth century, even though it was allowed to exist without action being taken for several years prior to this decision. Lord Mansfield himself used the term "odious" to describe slavery in the decision:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.

Id. at 510.

3. See STEVEN M. WISE, THOUGH THE HEAVENS MAY FALL 14–15 (2005), for comparisons of blacks to animals generally. There are those who would suggest that those comparisons have continued through today. *See also* Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 14 n.70 (1995) (citing ANTHONY J. BARKER, THE AFRICAN LINK: BRITISH ATTITUDES TO THE NEGRO IN THE ERA OF THE ATLANTIC SLAVE TRADE, 1550–1807, at 45–47 (1978), for the proposition of blacks being thought of as just above animals). Chase goes on to argue that our American history is little better; our unwillingness to think of blacks as people and give them property rights kept their cases out of

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we would like to think many, thought slavery a horror that must be remedied. Certainly that remedy required a societal shakeup due to the possibility of blacks as an underclass gaining societal status other than the lowest of the low.[4] What better place than the courts to address protecting the rights of all people, particularly the powerless? The British are proud that they could use the courts to afford protection to an underclass as early as 1772 in *Somerset*. As the Lord Mayor of London stated 200 years after the decision, although some abolished slavery through politics, and the United States required a civil war to do so, the British "abolished slavery by legal precedent."[5]

Which of us would not represent Somerset if we found him in slavery in our midst? We would all like to think that we would find the time to represent the slave despite the disincentives. We would give up billable hours, even under the pressures to maximize profits in part to support the ever increasing salaries of our associates. We would not worry about the implied conflict with our paying clients that would exist when we represented the poor in ways that might give them more rights and cost the rich money.[6] We hope that all of those things would fall away in the interest of social justice. We hope that

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courtrooms for too long and continues to affect things as basic as contracts. *See id.*; *see also* Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 741 (1985) (citing O. TAYLOR, NEGRO SLAVERY IN ARKANSAS 256 (1958), for a description "of the 'free Negro so worthless and depraved an animal,' characterized by 'immorality, filth, and laziness.'"

Of equal import for the discussion here is whether we have similar opinions about the poor today as lesser beings than those of us who have more money. If so, this may make us believe that the poor do not deserve our services and, therefore, makes us less likely to provide them. *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1264–65 (2002) (arguing that we attribute problems of the poor to them in part because we associate poverty with being black and part of an "out-group.").

4. Lord Mansfield, among others, understood that overturning slavery would free an estimated 15,000 people. The phrase, "[L]et justice be done, though the heavens may fall[,]" is attributed to him, suggesting he understood his impact on the workforce. Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 326 (1994).

5. WISE, *supra* note 3, at xiv.

6. These are all explanations I have heard for refusing to take on pro bono cases or for choosing to buy out of the responsibility by paying legal services and pro bono providers. I have been surprised that people, such as those I have spoken with following my presentations on this topic in the past, have given me these explanations even after they knew my positions about taking on the cause of the poor. I am not the only person to notice this. The Philadelphia Bar Association stated:

> Increases in salaries have forced corresponding increases in required billable hours, creating an adverse impact upon the availability of pro bono assistance for low-income communities. Pressed with more business than they can handle, law firms have pushed lawyers to raise their billable hours to pay escalating salaries, resulting in sharp cut backs in pro bono work. This phenomenon was aptly summarized by a partner at Wilmer, Cutler & Pickering: We're under pressure to work hard to pay for these rising salaries. I don't think it's going to wipe out the tradition of pro bono, but it's clearly going to have some impact. One partner in charge of pro bono assignments

each of us would respond to the bald display of power that Stewart showed by choosing to sell Somerset into a life of hard labor for having the gall to assert his freedom.[7] Faced with the spectacle of the plight of blacks in general and the injustices of Somerset's case in particular, we would feel compelled as attorneys, and as fellow humans, to take up his case and not simply leave this gross injustice to legal services providers.

Or would we? We have people in the United States today suffering terrible wrongs based on nothing but social status. How many of us work to change this? Who represents aliens waiting in prisons to have their cases heard before deportation, even though our own government statistics show that people have a three or four times better chance of remaining in the country with our help?[8] Who represents working-class people whose neighborhoods are threatened with local nuisances (e.g., dumps) and who do not have the legal ability to respond that their richer neighbors do?[9] Who represents our children in poor sections whose urban schools and infrastructure are allowed to deteriorate?[10] Who represents those discriminated against on the basis of race, gender, age, and disability to the advantage of business interests?[11] Who among us would represent people who are not openly enslaved but are pushed into an underclass from which

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at Crowell and Moring reported that her e-mails go unanswered, memos no longer work and phone calls leave her colleagues unmoved.

PHILADELPHIA BAR ASS'N, CHANCELLOR'S PRO BONO TASK FORCE REPORT FINDINGS AND RECOMMENDATIONS 21 (2001), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/TaskForceReport.pdf (last visited Feb. 25, 2007). Also, see Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 146–47 (2004), in which the author argues in part that pro bono volunteers are beholden to business interests to the point that they cannot always represent the poor on conflicting matters, citing among his examples lawyers volunteering around 9/11 victims who would work on estate matters but would not handle tort matters and others that would not volunteer in gun control cases as it might impact on their gun manufacturing clients.

7. Stewart's plan was to sell Somerset. *See* WISE, *supra* note 3, at 9–10.

8. *See* BD. OF IMMIGRATION APPEALS, DEP'T OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL 12 (Oct. 2004), *available at* http://www.usdoj.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf.

9. This is a prevalent issue in many communities that have predominantly poorer people. For a discussion of how one agency that works with the poor worked to get three polluters from locating in poor cities around Philadelphia, including Chester, Pennsylvania, and Camden, New Jersey, see Press Release, Pub. Interest Law Ctr. of Philadelphia, Jerome Balter Retires, http://www.pilcop.org/ehj.mpl (last visited Feb. 20, 2007).

10. Although our predecessors took cases to integrate the schools despite bad odds, these types of cases have become infrequent, which has led to high dropout rates among children of poverty and racial minorities. *See* GARY ORFIELD & CHUNGMEI LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 36–37 (2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf.

11. See Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 367–70

escape is nearly equally impossible? Who among us will make it a priority in our practice to recognize that there are horrible problems affecting the poor and otherwise underrepresented in matters of real significance, even if our clients cannot pay? Who among us will recognize that these injustices reflect upon each of us just as slavery did in the time of *Somerset*?

In this paper, I look at the work that attorneys are doing to right the wrongs of the underrepresented. This article argues that as a profession, we talk about providing assistance to those that cannot afford representation but that this is more talk than action. This article also examines modes of representing the poor, including legal services and other non-profit legal agencies and laws that allow attorneys to collect fees from third-party payors. Furthermore, this article argues that while the existing methods of representation are good and should be supported, these avenues are limited and, as such, are unlikely to change the position of the poor. This article further argues that many attorneys rely on ABA Model Rule of Professional Conduct 6.1[12] as the expression of their duty to those that cannot afford to pay fully is expressed and that this rule is seriously deficient. Among other things, the rule is too nebulous because it does not address the need to take cases that address the condition of the poor. Furthermore, important provisions are adopted by many states with modifications that largely diminish its value. Finally, this article suggests ways that we could alter Model Rule 6.1 to begin to address the problems of the poor more fully.

Somerset was lucky to find a benefactor like Granville Sharp to come to his aid and pay attorneys to represent him.[13] Were he to come to our offices in the twenty-first century to seek a remedy for our versions of slavery and oppression, I fear he would find very few attorneys ready to assist. As a profession, we must become the purveyors of social justice for the oppressed. We must be more innovative in seeking and attracting funding and assistance from the private and public sectors. We must consider ways that we can encourage more attorneys to take on this work, from making it profitable to making it part of our professional duty.

(2000), in which Rulli studies cases filed in the Eastern District of Pennsylvania and discovers that only 2.7% of plaintiffs prevail in ADA employment cases.

12. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003).

13. Sharp and others were working toward abolition. One of their strategies was to get the matter in court to have slavery found illegal. For a description of predecessor cases that were brought and of John Dunning and other attorneys that took on the representation, see WISE, *supra* note 3, at 31–63. Relevant to this paper are the motivations for taking on this case. Wise suggests that, although Dunning was paid, his motivations included personal issues with Lord Mansfield that pushed him to force these cases upon Mansfield for decision, and possibly included a belief that slavery was wrong. *See id.* at 64–67.

I. WHY LOOK AT PRO BONO RULES AND REPRESENTATION?

It is likely that most Somersets who seek help for legal matters, whether individual matters such as resolving a family law matter or rights-oriented matters such as unshackling bonds from our twenty-first century versions of slavery, will not have a Granville Sharp to foot the bill. *Somerset* could have happened in 1672 instead of 1772 if there had been a movement to abolish slavery then and a Sharp to buy legal assistance. Similarly, we could, in theory, ensure that the poor are represented in cases where they need the help of an attorney to obtain rights or to otherwise resolve legal matters. Yet there are neither enough free-market ways for the poor to obtain that representation nor have we found ways as a profession or through government intervention to fund these services.

The most obvious and easy way to get help for Somerset is to pay the attorney. Although there are no mechanisms through the private market for most types of cases, attorneys may sometimes be able to collect fees for representing poor people.

For example, discrimination cases are often handled on contingent fees.[14] Certainly there are problems with relying on contingent fees as a way to right societal wrongs like discrimination. Attorneys are unlikely to take cases unless they suspect that they will win the fees. At times like the present, when laws are favoring defendants more than plaintiffs, and as discrimination laws are being interpreted more and more narrowly, attorneys may take these cases less often.[15] Since winning fees is the motivation for taking these cases, attorneys may try to convince their clients to accept financially favorable settlements rather than set judicial precedent that would improve the condition of the poor.[16]

Similarly, attorneys take cases that help the poor when there are statutes that allow for fee shifting. For example, 42 U.S.C. § 1983 suits allow for attorneys to get fees from the opposing party if they win,[17] and Equal Access to Justice Act (EAJA) fees are payable in some

14. Among the civil rights statutes, like the Equal Access to Justice Act, that allow one to ask for attorney's fees directly from private parties or government wrongdoers under that or another enabling law, include the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 626 (2000); the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, 794a (2000); the Civil Rights Act of 1991, 42 U.S.C. §§ 1981, 1988 (2000); the Fair Housing Act, 42 U.S.C. §§ 3601, 3612–13 (2000); and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, 12133 (2000).

15. *See* Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595, 616 (2005) (citing statistics that show that attorneys are less willing to take ADA cases based on the substantial likelihood that they will lose).

16. This was a possible end to *Somerset*, as Mansfield wanted the case to settle. A less motivated Somerset may have chosen to take the deal and not stand up for his rights. *See* Finkelman, *supra* note 4, at 326.

17. 42 U.S.C. §§ 1983, 1988 (2000).

cases if an attorney successfully sues the federal government.[18] However, those cases do not cover all types of government abuses and rely on attorneys believing that they are likely to win. Further, they are handled less often as obtaining fees from the government becomes more difficult under recent cases like *Buckhannon Board & Care Home v. West Virginia,*[19] which require court-approved settlements or court victories before attorneys can seek fees.[20] Yet even though the problems with these cases can be significant, contingent fees and fee shifting should be encouraged because they can be the only way for the poor to get representation in these areas.

Along with private attorneys taking cases, we also pay attorneys to take on the interests of the poor by funding attorneys at non-profit legal service agencies explicitly set up for this purpose.[21] These include government funded programs, like the Legal Services Corporation and state grants of aid as well as private foundation grants. However, as much as these programs help, they do not come close to meeting the need for attorneys to represent the poor. Non-profit legal service offices are greatly under-funded.[22] They are able to handle only a small percentage of the cases for which the poor need representation. In 2004, the Legal Service Corporation ("LSC") funded offices served 901,067 people while 1,085,838 more people sought representation and were turned away.[23] This reflects the relative per capita paucity of representation among the poor. Although there is one attorney for every 525 people in the United States, there is only one LSC funded attorney for every 6,861 people who qualify for service.[24] Further, for political reasons, legal service offices often are prevented by private or public rules and regulations from providing legal services

18. *See* 5 U.S.C. § 504 (2000). The fees payable under EAJA are set at 28 U.S.C. § 2412(d)(2)(A) (2000).

19. 532 U.S. 598 (2001).

20. *See id.* at 608–10. Under this case, attorneys are no longer awarded attorneys fees in cases where attorneys sue for civil rights violations, in this case under the Fair Housing Act and the ADA, unless they can be shown to be a prevailing party. *See id.* A lawyer who wins a civil rights benefit for his client through a law suit but cannot prove it by having it memorialized in a settlement that is filed with the court risks any possible attorneys fees awarded under those statutes.

21. It is possible that more funding for legal services organizations will be a major method that the bar will use to implement its "civil Gideon" efforts, discussed *infra.*

22. *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 2 (2005), *available at* http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf. In 1981, Congress gave the Legal Services Corporation (LSC) $321,300,000 (687,063,000 in 2005 dollars) to spend so that there would be a legal services office within the reach of all people. There are almost six million more poor people who would qualify for legal services under the 125% of the federal poverty level standard. *Id.* The Fiscal Year 2006 appropriation was $326,600,000, which is less than half the funding it received 25 years ago in real dollars. *See* LSC: FY 2006 Appropriation (Jan. 26, 2006), http://www.lsc.gov/about/FY06app.php.

23. *See* LEGAL SERVS. CORP., *supra* note 22, at 7.

24. *Id.* at 17.

in cases that impact public policy issues. For example, legal service funding often comes with rules preventing attorneys from lobbying in legislative or administrative bodies to change the conditions of the poor.[25] Even if these restrictions were eliminated, attorneys working in legal service offices are often hardpressed to help people with family law, housing issues, and government benefits matters among others. These concerns are so overwhelming that they cannot focus on issues of oppression in society.

More funding for attorneys to help the poor could be made available from government sources. At present, we do not have a system that guarantees counsel to the poor in many cases. Under Supreme Court precedent, attorneys are provided to people who face a loss of their liberty through the criminal system.[26] Although the counsel provided can often be under-funded,[27] may not be expert or effective in part due to that under-funding,[28] or may not be appointed in every

25. *See* 45 C.F.R. § 1612.3 (2006). See also Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39, 75–84 (1994), for a discussion of the unfairness to the poor of hamstringing their LSC-funded attorneys by taking from them the tools of lobbying and administrative advocacy. Galowitz finds, among other things, that it results in an unethical practice requiring a litigation-first preference, and not one of discussing, considering, and performing legislative and administrative advocacy when those methods may be the quickest and most effective ways to help clients. *See id.*

Subsequent litigation has challenged LSC regulations, in part, based on First Amendment arguments similar to Galowitz's theory. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547–49 (2001) (stating that welfare reform can be challenged in the context of people seeking help with welfare benefits); Velazquez v. Legal Servs. Corp., 349 F. Supp. 2d 566, 613 (E.D.N.Y. 2004) (finding many of the restrictions against lobbying and other advocacy to be legal), *modified*, 356 F. Supp. 2d 267 (E.D.N.Y. 2005).

26. Attorneys are appointed in cases where people face criminal charges if losing the criminal case may result in jail time. *See* Gideon v. Wainright, 372 U.S. 335, 342–45 (1963).

27. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656–63 (1986) (discussing the under-funding of public defenders' offices and other sources of representation under *Gideon*, which the author believes leads to poor representation as well as the poor's distrust of our legal system); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6–12 (1997) (describing the low pay of criminal court appointed counsel, finding common rates of $40 per hour while funding increases for prosecution at rates that unbalance the system); *see generally* Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1 (1999) (discussing the poor counsel received by defendants due to a failure to pay attorneys rates that would attract more skilled counsel).

28. *See* Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837–41 (1994). Although part of Bright's article focuses on death penalty cases that might be exceptional due to the complexity of the representation, he includes statistics such as those demonstrating Atlanta public defenders handling 530 cases per year and perhaps representing 45 clients per day, numbers that cannot help but lead to inattentive and ineffective representation. *See id.* at 1850. Bright further notes the high turnover and lack of training and investigative help given to such attorneys. *See id.* at 1851; *see also*

case they should or at an early enough stage in the case,[29] we have set up a system where attorneys are either paid to represent people full time, take court appointments, or volunteer to take such cases.[30]

We have similar rules mandating representation in a small number of civil cases, but the types of cases in which this help is provided are limited. In some states, attorneys are appointed in cases that involve particularly important interests, such as guardianship, adoption, termination of parental rights, and involuntary mental commitment cases. Often, courts pay for this representation, although sometimes they seek it from attorneys on a pro bono basis. Further, there is a movement to create a "civil Gideon" under which people with legal problems that affect basic human needs would get court-appointed counsel.[31] These efforts include an ABA resolution passed in August 2006 that urged states and the federal government to provide legal services to people at "public expense" to a predetermined list of adversarial cases where "basic human needs are at stake, such as those

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Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1602–03, 1613–14 (2005) (discussing how bad counsel for the poor can be in part due to lack of funding, although the author hopes that this is now compensated for to some extent by evidentiary techniques that he hopes put less of a premium on appointed counsel's effectiveness).

29. For example, see generally Douglas L. Colbert et al.,*Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002), for a discussion of how attorneys are not appointed at pre-trial bail hearings, but when they were appointed at this stage, huge numbers of people avoided jail time. For information on some present advocacy in this area, see Brennan Ctr. for Justice, Indigent Defense Reform, http://www.brennancenter.org/stack_detail.asp?key=104&subkey=7204 (last visited Mar. 4, 2007).

30. In New Jersey, *Gideon* has been implemented in large part through mandatory pro bono representation by enforcement of *Madden v. Delran*, 126 N.J. 591 (1992), which requires 25 hours of mandatory pro bono service, although those cases may not all rise to the level of cases where a client might get jail time. *See* N.J. State Bar Ass'n, *Pro Bono* Counsel Assignment for 2006 – Exemption Categories (Apr. 13, 2006), http://www.njsba.com/probono/index.cfm?fuseaction=exemptions.

31. For an interesting history and argument for a "civil Gideon," see Leonard W. Schroeter, *Civil* Gideon*: If Not, Why Not?*, WASHINGTON STATE ACCESS TO JUSTICE ANNUAL CONFERENCE JURISPRUDENCE WORKSHOP (June 1999), http://www.wsba.org/atj/committees/jurisprudence/civgid.doc . In it, Schroeter argues that the right to counsel in civil cases is a fundamental right that can be found in the Constitution and cites sources supporting a "civil Gideon," including the book often described as being the basis for providing attorneys to the poor: REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW, WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES (1921). *See* Schroeter, *supra*, at 6–7. Schroeter then goes through Supreme Court precedent, describing the basis for a "civil Gideon" in several cases and argues that natural law concepts from the Declaration of Independence embed fundamental rights like the right to counsel. *See id.* at 65.

Others have suggested expanding the right to counsel to areas that they think are particular basic human needs. *See generally* Rachel Kleinman, Comment, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004) (suggesting a right to counsel should exist in eviction cases in part as shelter is basic to living).

involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."[32] Further, there are several allied "access to civil justice" task forces that are working toward getting legal help for the civil matters through many methods.[33] Supporters of these programs want to increase funding but also seek to expand access to legal services by making the courts more accessible to pro se litigants,[34] make potential litigants more aware of services that are available, raise funds through court fees and appropriations for more services, and by expanding pro bono representation.[35]

After considering free market purchase of services by the poor, government and foundation funding of legal services presently, and the current state of our Gideon laws, we are left with a huge gap in legal service delivery to the poor. These mechanisms and pro bono representation have not successfully provided representation to poor people who need it. LSC statistics show that of the 20,000,000 legal problems faced by the poor each year, 16,000,000 are addressed without legal help from either a government-funded or private attorney.[36]

32. ABA HOUSE OF DELEGATES RESOLUTION 112A 1 (Aug. 2006), http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf. This resolution is not perfect, as it may allow for each jurisdiction to decide what types of case involve a basic human need—for example, some might suggest that custody or child support is not a basic human need. Further, looking at the ABA House of Delegates Resolution 112B, it appears that some of the resources, which the states are hoped to tap in obtaining legal services for the poor, are private attorneys either working for compensation or volunteering, which the resolution calls seeking "in-kind resources." *See* ABA, HOUSE OF DELEGATES RESOLUTION 112B 3–4 (Aug. 2006), http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf. This could mean that some states will use the resolution to say that we need to find more public funding, but basically we should just expand the amount that attorneys volunteer to help clients. Toward a "civil Gideon," however, the resolution is a great first step that should be effective in getting more funding for legal services and hopefully can be used to get more legal help for the poor.

Many groups are pushing for "civil Gideon" laws. For more information about these groups, see Brennan Center for Justice, Civil Gideon Initiatives, http://www.brennancenter.org/programs/pov/civil_gideon.html (last visited Mar. 4, 2007); Public Justice Center, http://publicjustice.org (last visited Mar. 4, 2007); *see generally* CLEARINGHOUSE REV., (July-Aug. 2006) (dedicating entire issue to "civil Gideon" laws).

33. For a collection of state initiatives on access to justice, see ACCESS TO JUSTICE SUPPORT PROJECT, ACCESS TO JUSTICE PARTNERSHIPS STATE BY STATE (2005), *available at* http://atjsupport.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf.

34. *See* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 534, 562–63 (1994) (discussing the difficulties of pro se litigants to access the court system).

35. *See* ABA, ACCESS TO JUSTICE SUPPORT PROJECT, ACCESS TO CIVIL JUSTICE FOR LOW-INCOME PEOPLE: RECENT DEVELOPMENTS (2005), *available at* http://www.nlada.org/DMS/Documents/1125693369.66/CCJ%20report%208-05%20revised-final.doc.

36. LEGAL SERVS. CORP., *supra* note 22, at 13. For example, in Philadelphia, a recent study found that of the 739,000 parties listed in the domestic relations database, 92% were pro se. COMM. ON RACIAL & GENDER BIAS, PENN. SUPREME COURT, FINAL REPORT 460 (2003), *available at* http://www.courts.state.pa.us/Index/

This huge number of unmet legal needs affect people who continue to live in difficult conditions that attorneys can address.

II. WHAT REPRESENTATION OF THE POOR WE PROVIDE NOW

A. *One Attorney's Idea of Pro Bono*

In my former capacity as the director of a pro bono organization, I began to learn more both about the needs of the poor and what attorneys are willing to do to address those needs.[37] Pro bono agency staff members are in a unique position to understand both issues, as they must interact with several distinct communities to do their job well.[38] Staff members go into communities where the unrepresented live, and learn the problems facing individuals and populations. Their work may include fielding phone calls from the poor and requests from legal services attorneys to find private help for certain cases. In its best form, it involves doing intake at community sites and otherwise meeting with community members to better understand their legal needs. At the other end of the power spectrum, pro bono staff members interact with private law offices and bar associations to recruit various sorts of assistance in representing clients. The staff members survey private attorneys in order to (1) learn what services attorneys are willing to provide because they think they "should," and (2) explain to attorneys what legal needs they believe need to be met among the underrepresented based on their work with the poor. The most difficult part is to reconcile what the private attorneys feel they should do with what the staff members have found are the most pressing problems in the community that are not being met but need to be.

Pro bono staff members know that their ability to address all of the problems of the poor is limited by the attorney base with which they have to work. Therefore, they cannot simply pair people with legal problems with attorneys willing to help. They have to do a type of triage where they determine which legal problems (1) are most pressing, or (2) are cases for which there is an interest in the private bar.

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supreme/BiasCmte/FinalReport.pdf. If attorneys provided legal services to one-tenth of those people, they would need to find representation for almost 70,000 people, which could not be done through legal services alone.

37. The most longstanding position I held in this area was as a staff attorney and then executive director of The Legal Clinic for the Disabled, an agency that seeks pro bono attorneys to represent people with physical disabilities around matters that would allow them to live more independently in the community. As I am still on the board of that organization and still work in the area of representing poor people with disabilities, I remain connected to this clientele and to the organization's pro bono model. The organization is a small program in Philadelphia, a town that sports 20 agencies that recruit volunteers to work on cases. For a list of those organizations, see Phila. Bar Ass'n, Volunteer Opportunities, http://www.philadelphiabar.org/page/PISVolunteer (last visited Feb. 18, 2007).

38. The ABA has come up with standards for what makes a good pro bono agency. *See* ABA, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (1996).

The staff members must differentiate between the poor person who is unhappy that a neighbor's tree is shading his home and the person who has had his livelihood threatened. Walking between the communities of those with power and those without, pro bono staff members develop an idea of social justice that often includes a goal to apply legal methods to give redress to a powerless and generally unrepresented person or class.[39]

It is unfortunate that frequently what an attorney thinks he "should" do as pro bono work is sometimes not connected with what a pro bono staff member might think is an appropriate use of free legal services. When I was still a pro bono director, I learned this when I joined with some other directors in an attempt to expand the base of attorneys who were representing people in Philadelphia. Believing that law firms were not taking many cases, we arranged a meeting with some attorneys of large firms who were designated as point people for asking those firms for pro bono help.[40]

The meeting showed how little both groups understood each other. We came armed with statistics, believing that between us, we represented virtually all of the pro bono agencies and that we could identify about 5% of the bar taking cases from us. Unless attorneys were finding other ways to represent the underserved, like doing pro bono by getting cases from other sources or by finding a way to get fees for representing our client base, we were pretty sure that the bar would recognize its lack of participation in helping the poor.[41]

The response we got from the firm attorneys, however, was that they believed we were entirely wrong. Attorneys shot back at us how wonderful their firms were in working to advance social justice through pro bono work. Perhaps because we were pro bono agencies, they did not try to argue that their private work did so.[42] Their argu-

39. *See* ABA, *supra* note 38, at 39–40. Standard 2.1 suggests that pro bono agencies do their own legal needs assessments, consult with community groups, and work with other legal services providers to identify needs that lawyers may not know about without their help. *See id.* at 39. They are to develop their own list of priorities and select cases that they believe best meet the needs of their client base. *See id.*

40. Philadelphia is unique in that it has several organizations dedicated to serving the needs of the low-income community. There are at least 35 organizations that serve Philadelphia's poor, at least nine of which rely on the pro bono model as their primary means for delivery of legal services. *See* Phila. Bar Ass'n, Philadelphia Public Interest Organizations, http://www.philadelphiabar.org/page/PISOrganizations (last visited Feb. 18, 2007).

41. *See infra* Section III.A.

42. As stated in section I, *infra*, many people would see representing a poor person for a fee as a great use of attorney time, as the operative thing people are trying to do is get a poor person help. A pro bono staff member would likely see Granville Sharp as the hero of *Somerset*; he connected with the needs of an underclass, he learned how to connect with attorneys, and he got his client representation, even if he funded it himself or with the help of other fellow abolitionists. *See generally* WISE, *supra* note 3 (discussing Sharp's successful efforts at bringing slavery cases into the courts).

ments were that they were all heavily steeped in pro bono work, and that we were clearly not giving them credit for all that they did. They said that even beyond their interest in serving the community, it was a marketing strategy for getting new associates to come to their firms, and that they pushed or counted pro bono work as billable hours to encourage it. Not only did they feel a civic duty to represent the poor, pro bono made good business sense.[43]

We realized we did not understand each other. Finally, one of the pro bono agency representatives asked the law firm attorneys to describe their pro bono work. Very proudly, an attorney from one of the larger firms in Philadelphia described his crowning moment as a pro bono attorney, which may have been his crowning moment of his career: without charge, he had incorporated a child's athletic league in a small suburban town.

The pro bono representatives were speechless. They all knew the town he named. Several top athletes from the local professional teams lived there, as it is the suburb with one of the 10 highest per capita incomes in the country—the average family income there is well over $150,000 annually. In thinking about it, the attorney's job was an interesting one—by taking a case for free, he had kept down taxes or enrollment fees to play children's sports in a rich town. The league might have had very real concerns that a child from a rich family might get hurt and choose to sue the other rich people in town, perhaps closing down the league, or in a creative law suit, raising the taxes of the rich townspeople if the city had somehow been sued. Rich suburban kids could now play without their parents being concerned that their assets would be taxed.

Protecting the rich from taxes seems like a far cry from freeing slaves. Yet this attorney was convinced that he was using his legal skills to significantly advance the community. He was willing to stand up in a room full of people who bring legal skills to the disenfranchised poor and say that he was fulfilling his professional obligation to represent those that would not be represented otherwise.

B. *A Poverty of Representation—the Dearth of Pro Bono Help*

As Deborah Rhode wrote, attorneys at only 18 of the 100 most financially successful firms perform the 50 hours of pro bono service that is suggested in Rule 6.1.[44] She goes on to note that:

43. For a discussion of why we do pro bono work, and for other reasons that law firms have for doing pro bono work that suggest they should do it whether or not they help the poor, see *infra* Section III.

44. Deborah L. Rhode, *Squeezing the Public Good*, A.B.A. J., Nov. 2000, at 120, 120; *see also* Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 654 (2006) (stating that 2004 numbers suggest that 36% of attorneys contributed 20 hours) (citing Aric Press, *Brother, Can Yo*

> Although comprehensive data are difficult to come by, the figures for the profession as a whole are not more encouraging. Law is the nation's second highest-paying occupation, but most practitioners make no pro bono contributions to the poor. The average for the profession as a whole is less than half an hour a week and half a dollar a day.[45]

Although straining credibility, ABA statistics show that many more people do pro bono work than was found by Rhode or estimated by our pro bono directors. According to the ABA's study, 66% of attorneys take pro bono cases,[46] with each attorney spending an average of 39 hours per year to persons of limited means or organizations serving the poor.[47] Their study goes on to suggest that those attorneys spend another 38 hours per year giving free help to community organizations and other non-profits, toward efforts to improve the legal system, and to individuals or groups seeking to secure or protect civil rights.[48]

However, of the time that attorneys are donating to represent the poor, little appears to address basic human needs or oppression of poor people. For example, although the ABA Report shows that over 30% of attorneys reported handling pro bono family law cases, the second most common type of case handled on a pro bono basis is corporate/business work at 30%.[49] Although there are poor people who need corporate or business help, this statistic puts in question both the poverty of the clients that the typical attorney is assisting with pro bono work and the misallocation of time and effort that is not directed to addressing problems of the poor.[50]

Just as the types of cases attorneys handle raise questions about whether their pro bono work assists the poor, the sources from which attorneys are finding their pro bono cases suggest that they are often just helping out friends and family and not taking cases of poor people. The bar in many communities has specifically set up pro bono agencies to identify matters that could address real needs of the

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Spare 20 Hours?, AM. LAW, Sept. 2005, *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1125479112416).

45. *Squeezing the Public Good*, *supra* note 44, at 120.

46. *See* ABA, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 11 (2005), *available at* http://www.abanet.org/legalservices/probono/report.pdf.

47. *See id.* at 13.

48. *Id.*

49. *See id.* at 15.

50. Similarly, other reports of the types of cases that attorneys handle *pro bono* raise doubts about whether they are doing the type of work that will help the poor. One of the more publicly reported cases of late was that of a Chicago firm that represented former Governor George Ryan against charges of fraud in office and reported this as over $10 million in *pro bono* representation. *See* G.M. FILISKO, *THE DEFENSE RESTS ITS FEE:* Lawyers Say Handling Controversial Cases for Free Makes Sense, A.B.A. J. (Apr. 28, 2006), *available at* http://www.abanet.org/journal/ereport/a28bono.html.

poor.[51] The ABA report shows that 40% of attorneys surveyed who took pro bono cases took them from pro bono agencies.[52] Just as commonly, however, attorneys got calls from family and friends asking for help (43%).[53] Although it is not objectionable to help out family, it is not clear whether this is the type of pro bono meant when the legal community is attempting to improve access of the poor to representation within the legal system.

In summary, at most 66% of attorneys, although probably many fewer than that, are taking pro bono cases and spending three-fourths of an hour a week on these cases. The cases they take are for people who may not be poor with matters like incorporating businesses that likely do little to address the needs of the poor. The bar ought to act to increase participation of our members and to ensure that those that do participate are not misdirecting their energies.

III. How We Think About Providing Help for the Poor—ABA Model Rule 6.1

Unfortunately, our professional rules poorly describe our professional obligations to serve the poor. ABA Model Rule of Professional Conduct 6.1 addresses our "professional responsibility" to represent the poor.[54] It is also how we talk among ourselves in bar associations or in publicity to our potential client bases. From Rule 6.1 or from the versions of it that our states have adopted, an attorney representing a wealthy suburban athletic league could easily decide that he was meeting his pro bono obligation.

A. *Historical Predecessors to Rule 6.1*

Historically, there are two important predecessors to Rule 6.1 in which the ABA first suggested that private attorneys have a duty to address the legal needs of poor people.[55] In neither case did the ABA require attorneys to help the poor. However, in each case, the ABA made clear that helping the poor or otherwise providing public service was a public good.

In the 1969 ABA Model Code of Professional Responsibility at Ethical Consideration 2-25, the ABA noted that the need for legal

51. For a list of pro bono organizations nationwide, see ABA, Legal Help for the Poor—State by State Listing of Pro Bono Programs, http://www.abanet.org/legalservices/probono/directory.html (last visited Feb. 18, 2007).

52. *See* Supporting Justice, *supra* note 46, at 14.

53. *See id.*

54. Model Rules of Prof'l Conduct R. 6.1.

55. There were several statements and attempts to suggest that attorneys should do pro bono work throughout history that are not addressed here as they are not as helpful in explaining how the ABA came to its present Rule 6.1. For a history of the idea of pro bono that discusses some predecessor ideas from Greek and Roman times through the present, see Judith L. Maute, *Pro Bono Publico in Oklahoma: Time for Change*, 53 Okla. L. Rev. 527, 534–55 (2000).

services was not being met through volunteerism or through other mechanisms and codified the belief that it is the "obligation" of lawyers to provide legal assistance to the poor.[56] The "individual lawyer" was said to bear the "basic responsibility" of providing legal assistance to poor people, in part because it is "rewarding."[57] The Rule adds that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."[58] A lawyer should therefore "support all proper efforts to meet this need for legal services."[59]

Interestingly, illuminating footnotes included by the ABA committee for EC 2-25 describe historical statements that had been made to support volunteering to help the poor. Others footnotes suggest that the committee did not think pro bono would work unless it was mandated by the states.[60] The first step that the ABA must have felt necessary to take was to confirm that it is ethical to volunteer attorney services at all. One of the notes describes a 1935 ABA Opinion that found it ethical to represent a person free of charge.[61] In 1939, another ABA Opinion stated that not only are free legal services "not ethically objectionable" but also that they "should be encouraged."[62] Two other notes suggest that subsidizing fees is appropriate. One cites a 1946 House of Delegates Report recognizing that middle income people may not be able to pay full fees and suggesting reduced rates as a solution.[63] Another cites a 1963 report from the Attorney General's Commission on Poverty and the Administration of Criminal Justice that noted the need for inexpensive legal services and the likelihood that not enough attorneys will volunteer those services.[64]

56. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969) (amended 1980).

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* EC 2-25 nn.41–44.

61. *See id.* EC 2-25 n.44. "The defense of indigent citizens, without compensation, is carried on throughout the country by lawyers representing legal aid societies, not only with the approval, but with the commendation of those acquainted with the work. Not infrequently services are rendered out of sympathy or for other philanthropic reasons, by individual lawyers who do not represent legal aid societies. There is nothing whatever in the Canons to prevent a lawyer from performing such an act, nor should there be." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 148 (1935).

62. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 n.42. "Free legal clinics carried on by the organized bar are not ethically objectionable. On the contrary, they serve a very worthwhile purpose and should be encouraged." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 191 (1939).

63. *See id.* EC 2-25 n.43.

64. *See id.* EC 2-25 n.40.

> The Committee is persuaded, however, that a system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. . . . A

On the whole, the bar wanted to encourage attorneys to work toward getting attorney services to people who could not afford them.[65]

Although the ABA made other statements concerning attorneys' responsibilities to work with the poor in the forthcoming years,[66] the matter was revisited again in 1980 by the Kutak Commission. The Kutak Commission was charged with considering new rules of ethics for attorneys. Its work led to the adoption of the Model Rules of Professional Conduct in 1983. In the 1980 report, section 8.1 stated that an attorney "shall render unpaid public interest legal service."[67] However, representing the poor was only one way that the Commission anticipated that an attorney could provide that service. Although the comment to 8.1 notes the importance of an attorney providing access to equal justice, the order of the proposed rule suggests that representing the poor was only one way to do so and perhaps not the primary one.[68] The Rule first notes the need to donate service to improve the law, the legal system and the legal profession, and secondarily to provide services to people who cannot afford them.[69]

> system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance. . . . Webelieve that fees for private appointed counsel should be set by the court within maximum limits established by the statute.

ATTORNEY GEN.'S COMM. ON POVERTY AND THE ADMIN. OF CRIMINAL JUSTICE, POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 42 (1963).

One wonders from this comment whether there was an expectation at that time that attorneys would believe it their responsibility to assist the poor or whether, during the year of Gideon, the bar was trying to lobby for counsel to be appointed, at least in criminal cases.

65. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 n.41. "At present this representation [of those unable to pay usual fees] is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and—increasingly—through the organized efforts of the Bar. If those who stand in need of this service know of its availability, and their need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance. It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

66. For a brief historical timeline that the ABA has produced suggesting its view of the history of volunteer work for the poor, see ABA Standing Comm. on Pro Bono & Pub. Serv., State-By-State Pro Bono Service Rules, http://www.abanet.org/legalservices/probono/stateethicsrules.html (last visited Mar. 10, 2007). The table notes that the Montreal Resolution of 1975 as the statement that bridged the gap between EC 2-25 and Model Rule 6.1 in saying that it is "'*the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services.*'" *See id.*

67. MODEL RULES OF PROF'L CONDUCT R. 8.1 (Discussion Draft 1981).

68. *See id.* at R. 8.1 cmt.

69. Rule 8.1 of the discussion draft to the Model Rules of Professional Conduct Rule states:

> 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 person of limited means or to public service groups or organizations. A law- 560

In addition to stipulating the moral imperative of providing services (though not specifying the exact sort of services), the original Rule included a reporting requirement that has been the source of continued debate.[70] However, as there was no statement of how much service an attorney should provide, the Commission feared that many attorneys simply would not do pro bono work.[71] Further, it was explicitly stated that although pro bono requirement rules were just, they were generally unenforceable and impractical.[72]

Several modifications in the later notes of the Kutak Commission suggest that Rule 6.1 had to be watered down to be accepted by the bar in 1983. Although the 1982 meeting attempted to reprioritize representation of the poor above other types of public service (by reordering the alternatives listed within the Rule), the Rule became a much more voluntary one. For example, the wording was weakened from stating that a lawyer "shall" render public interest legal service to recommending that one "should" do so.[73] Furthermore, comments in that report reassured the bar that the rule would not be enforced in the disciplinary process.[74] By the 1983 meeting, outs for providing this public service were added to the proposed Rule, including donating money to other services that represent the poor.[75]

The first Rule 6.1 was adopted in 1983. It suggested that public service was a public good and allowed that representing the poor was one of the things of which public interest consisted. It did not require public service, removed the initial Kutak Commission reporting requirements, and included no specific time commitments:

> 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.[76]

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yer shall make an annual report concerning such service to appropriate regulatory authority.

Id.

70. Ways that mandatory reporting has worked and the way it has been debated is discussed *infra* in section III.B.

71. The comment suggests "some contribution" and anticipated that the burden might be spread inequitably among attorneys. *See* MODEL RULES OF PROF'L CONDUCT R. 8. cmt. (Discussion Draft 1981).

72. *See id.*

73. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969) (amended 1980).

74. *See* MODEL RULES OF PROF'L CONDUCT R. 8.1 cmt (Discussion Draft 1981).

75. *See* Letter from L. Stanley Chauvin, Jr., to Members of the House of Delegates, Members of the House of Delegates et al., (July 11, 1983), *in* ABA, REPORT 401 PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT 132 (1983), *available at* http://www.abanet.org/cpr/mrpc/kutak_8-83.pdf.

76. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

The 1983 Model Rule is very important because many states never moved on from this Rule, including Pennsylvania, where the attorney who incorporates athletic leagues for the rich practices.[77] Indeed, according to the 1983 version, this attorney was doing exactly what the rule asks—he provided a professional service for no fee to a public service group. As no strong preference is expressed toward helping the poor over doing such work, he could spend all of his pro bono hours helping this wealthy suburban town and fully discharge this duty. All the 1983 version of the rule requires is not getting paid as much as usual.[78] For those operating under that rule, representing the poor is not clearly a goal to which each attorney must or even should strive. Somersets have to wait in line with the little league to get help.

B. *Model Rule 6.1 Today*

Rule 6.1 was modified in 1993 and again in 2002 to suggest more directly that attorneys should do work helping the poor.[79] The 2002 version of this rule is as follows:

> *Voluntary Pro Bono Publico Service*
>
> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of 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 that are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or

77. *See* PA. RULES OF PROF'L CONDUCT R. 6.1 (2001).

78. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

79. There was an intermediate resolution, the "Toronto Resolution," under which the House of Delegates recognized that how much pro bono work an attorney performs needs to be quantified and a goal was set of 50 hours per year toward all public service activities. *See* ABA Standing Comm. on Pro Bono & Public Serv., *supra* note 66.

> (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.[80]

Rule 6.1 is deficient in two ways. First, the Rule is voluntary, has many ways to comply with it that involve doing very little to help the poor, and has been adopted by states in such weak fashions that it is ineffective at encouraging attorneys to devote time to helping the poor. Second, the Rule does not state why an attorney ought to assist the poor. Without such a statement, attorneys who choose to represent the poor are given little guidance as to what types of cases to take. A name change is no different from a custody case, which is no different from ending slavery.

1. Rule 6.1—Complying with a Rule by Doing Virtually Nothing

If it is not clear from the Rule being called "Voluntary Pro Bono Publico Service" that we are not ready to suggest with any weight that we expect attorneys to represent the poor, the Rule goes on to ask only that an attorney "aspire" to render 50 hours of public interest service.[81] The voluntary nature of this rule is further emphasized in Comment 12 to the Rule where it states that "[t]he responsibility set forth in this Rule is not intended to be enforced through disciplinary process."[82] Apparently, although we would like to codify our professional duty to represent those that cannot pay, we lack as a profession the will to perform the duties.[83]

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80. MODEL RULES OF PROF'L CONDUCT R. 6.1.

81. *Id.*

82. *Id.* at cmt 12.

83. The Ethics Commission, reviewing this matter for the ABA, seemed concerned that they wanted to make the Rule seem more of an obligation by adding the first sentence to the Rule that specifically states "every lawyer has a professional responsibility" to do so. However, in its report on this provision, it backtracks and notes that Rule 6.1 certainly does not make it a requirement:

> Promoting the Provision of Pro Bono Legal Service
>
> The Commission invited and considered extensive comment about the possibility of modifying Rule 6.1 to require all lawyers to provide pro bono legal services. As a result of its inquiry, the Commission remains committed to the proposition that providing pro bono legal service to persons of limited means is an important obligation of every lawyer. The Commission also believes that the current system for mobilizing lawyers to provide pro bono legal service is not adequate to the task at hand. After considerable reflection, however, the Commission has concluded that amending Rule 6.1 to require all lawyers to provide pro bono legal service is not an appropriate response to the problem. Rather, the Commission encourages the ABA to heighten its efforts to find more appropriate and effective means to increase the voluntary participation of lawyers in the provision of legal services to persons of limited means.

In adopting this Rule, states have been careful to ensure that the obligation remain voluntary. As of July 2006, no states have made pro bono work mandatory. Only five have taken the interesting step of making it mandatory for attorneys to report pro bono hours while 11 have voluntary reporting requirements and eight have explicitly rejected mandatory reporting.[84] The lack of states' initiatives to collect data on actual pro bono practices through mandatory reporting reflects the desire at many levels to ignore the issues surrounding pro bono services. Certainly the lack of monitoring pro bono activities encourages attorneys to overlook this obligation both individually and as a profession.[85]

Further, we do not want to ask each other to put too much time into the work. Rule 6.1 suggests only that an attorney do 50 hours of pro bono service each year,[86] which works out to one hour of work each week or 12 minutes a day. This time is almost inconsequential in the life of most attorneys.

However, even though 50 hours is such a small amount of time, it is more time than most states are willing to suggest their attorneys should perform.[87] Only 15 states and the District of Columbia have adopted a 50-hour standard.[88] For example, in Michigan, attorneys

ABA, Ethics 2000 Commission, Report on the Model Rules of Professional Conduct Model Rule 6.1 Reporter's Explanation of Changes, http://www.abanet.org/cpr/e2k/e2k-rule61rem.html (last visited Mar. 1, 2007).

84. ABA, Reporting of Pro Bono Service (July 17, 2006), http://www.abanet.org/legalservices/probono/reporting.html. Mandatory reporting is an interesting step that can encourage attorneys to do this work. For example, Florida required attorneys to report how much pro bono work they were doing in 1993. From 1994 to 2002, the amount of donated hours increased from 561,351 to 1,313,950, and donations to legal services from attorneys increased from $876,837 to $2,531,455. Numbers have continued to increase. Katja Cerovsek & Kathleen Kerr, Comment, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697, 709 (2004). Although this does not take into account a precipitous drop prior to 1994 of reported pro bono service that they report in their cited information from the Florida bar and other changes in the law, like requesting that attorneys volunteer 20 hours per year or donate $350 to legal services agencies; mandatory reporting likely contributed to this increase. *See* FLA. BAR ONLINE, PRO BONO PUBLICO (FOR THE GOOD OF THE PUBLIC), http://www.floridabar.org/divcom/pi/bips2001.nsf (follow "Pro Bono Publico" hyperlink) (last visited Mar. 2, 2007).

85. Scott Cummings comes to this same conclusion when looking at an earlier version of Model Rule 6.1, suggesting that an attorney could read in it that representing the poor is entirely voluntary and that even if a person wanted to take on the obligation of doing so, allowing work with charitable groups to discharge the obligation is an "open invitation" to allow one to believe that they have entirely discharged their obligation to the poor without ever representing a poor person. He does not feel that further iterations of the Rule, including the 2000 modification, made significant changes in this area. *See* Cummings, *supra* note 6, at 32–33.

86. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006).

87. *See* ABA Standing Comm. on Pro Bono & Pub. Serv., *supra* note 66.

88. *See id.* The states that do so are Arizona, Arkansas, California, Colorado, the District of Columbia, Georgia, Hawaii (although 25 of those hours case be aimed at the public good generally), Kentucky, Louisiana, Maryland, Minnesota, Montana, New Mexico, Oregon (which asks for 80 hours), Texas, and Vermont. *Id.*

have been asked by the Michigan Bar Association to perform 30 hours of work per year, a request that is only recently being considered by the state supreme court.[89] Many states have no hour standards at all. For instance, Pennsylvania adopted many of the provisions of the Ethics 2000 ABA Commission, but did not change Rule 6.1 to add any hour requirement.[90]

However, even if states were to adopt the 50-hour standard, the ABA suggests giving attorneys a loophole to excuse them from doing pro bono work. If the attorney thinks that pro bono service will take too much time or focus away from other work or finds it otherwise impractical, the attorney can discharge his professional duty by buying out this obligation with a donation to a legal services organization in an amount that is reasonably commensurate with the customary charge for 50 hours of work by that attorney.[91]

States have interpreted this to be a very small financial requirement. If one considers what this could mean in practice, attorneys could do a lot to support legal services attorneys trying to further the position of the poor. Presumably, an attorney who normally worked for at the rate that the government pays private attorneys who successfully sue the government under the Equal Access to Justice Act ("EAJA") of $125 per hour (increased for the cost of living)[92] would give an amount over $6,250 per year. One that worked for the average rate of an attorney in the state of Wisconsin, for example, would give 50 times $146 per hour or $7,300 per year,[93] while attorneys who

89. *See* Bob Gillett, *The Bar and Pro Bono: Structure and Spontaneity*, MICH. BAR J., May 2006, at 33, 34.

90. The Pennsylvania Supreme Court adopted many of the provisions of the Ethics 2000 Commission on August 23, 2004, effective January 1, 2005. It did not alter the text of Rule 6.1 from the 1983 version, other than adding the word "Voluntary" to the title, perhaps to make certain that no attorney thought he had to do pro bono work. *See* Press Release, Admin. Office of Pa. Courts, Pennsylvania Supreme Court Revises Conduct Rules for Lawyers (Aug. 23, 2004), *available at* http://www.courts.state.pa.us/index/aopc/pressreleases/prrel04823.asp.

91. Comment 9 to Rule 6.1 of the ABA Model Rules of Professional Conduct states:

> 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.

MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 9.

92. Under the Equal Access to Justice Act, an attorney is entitled to fees if they are a prevailing party in some suits against the government. *See* 5 U.S.C. § 504. The rate was reset in 1996 to $125 per hour as adjusted by the cost of living. 28 U.S.C. § 2412(d)(2)(A).

93. *See* Dianne Molvig, *The Economics of Practicing Law: A 2001 Snapshot*, WIS. LAW., Dec. 2001, at 9, 54.

make top rates of $875 per hour in Philadelphia would give $43,750 per year, and an attorney billing $1,000 per hour in Baltimore would give $50,000 per year.[94]

The amount of these donations, however, has not been adopted by states in practice. For example, in Michigan, the state is working to adopt a version of Rule 6.1 that would ask attorneys to perform 30 hours of work, take three cases, or donate $300 to legal services.[95] In Ohio, a Supreme Court task force is working toward amending its Rule 6.1 to ask attorneys to perform 50 hours of work or donate $500 and report whether they do so.[96] In all, six states and the District of Columbia have financial contribution amounts recommended in their statute that range from $200 to $500.[97]

Although it is difficult for a Pennsylvanian to complain about the small size of the payoff requested when we request nothing in our Code, it is not clear how $200, or even $500, approximates the costs anticipated by the Rule. It is possible that states that suggest donating $300 or $500 in place of performing pro bono work are attempting to provide customary payment for legal services attorneys to provide the services. However, estimating a salary as low as a $40,000 annually to provide 2,000 hours of work,[98] a legal services attorney would cost $20 per hour or $1,000 per 50 hours (if the attorney got no benefits and worked in donated space). The money given does not closely approximate covering this work.[99]

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94. *See* Lindsay Fortado, *Going Up Still*, NAT'L L.J., Dec. 12, 2005, at S1. It is very possible that the attorneys mentioned in this article choose to give 50 hours per year of pro bono service or donate substantial sums to legal services. The figures are used more as a comparison to what bar associations are aspiring to have happen.

95. *See* Gillett, *supra* note 89, at 34.

96. *See* THE SUPREME COURT OF OHIO, REPORT AND RECOMMENDATION OF THE SUPREME COURT TASK FORCE ON PRO SE & INDIGENT LITIGANTS 9–12 (2006), *available at* http://www.supremecourtofohio.gov/publications/prose/report_april06.pdf (stating also that no sanctions will occur if attorneys do not do so).

97. ABA Standing Comm. on Pro Bono & Pub. Serv., *supra* note 66. The seven states are the District of Columbia, Florida, Massachusetts, Mississippi, Nevada, New Mexico, and Utah. *Id.*

98. For example, a first-year Equal Justice Works Fellow at a legal services organization has $37,500 put toward his or her salary, meaning that many legal services pay their first-year staff attorneys a similar amount. *See* Equal Justice Works, http://www.equaljusticeworks.org/fellows/info.php (last visited Mar. 2, 2007). A survey of legal services organizations has suggested that a first-year legal services attorney makes $34,000 per year while a fifth-year legal services attorney makes the $40,000 suggested above. *See* NALP, New Research on Attorney Salaries at Public Sector and Public Interest Organizations, http://www.nalp.org/content/index.php?pid=191 (last visited Mar. 3, 2007).

99. I am not arguing that the amounts of money that are being contributed are not helpful. In Philadelphia, the "Raising the Bar" campaign asks attorneys to contribute $300 per year to legal service organizations. The Bar has calculated that this has led to $1.4 million in pledged funds for legal services. In the case of this campaign, the money is not supposed to take the place of pro bono work but is to buy 15 hours of work of a legal services attorney. PHILADELPHIA BAR ASS'N, CHANCELLOR'S PRO BONO TASK FORCE REPORT FINDINGS AND RECOMMENDATIONS 21 (2001), *available*

Also important is that donating money instead of time toward helping the poor subtracts substantially from an attorney's ability to understand the problems facing the poor.[100] Having someone write a check to legal service organizations does little to help an attorney understand the problems of the poor. By never meeting with or talking to a poor person, the attorney never learns from this experience any of the problems that the poor face and that the attorney might want to address.[101] The attorney is more likely to think of this donation as a tax on his practice than as a professional responsibility stemming from a clear need that all attorneys must address.

In addition, the practice of buying out of professional obligations also limits the legal expertise available to the poor. Volunteer attorneys from a wide range of private sector practices would both broaden and deepen the services available compared to that of legal services practitioners alone.

Under Rule 6.1, then, an attorney can voluntarily choose whether (or not) to help the poor. The attorney can comply by representing people for 50 hours per year, or in many states by spending much less time than that. The attorney can decide that doing such work is too demanding and give a very small amount of the money they make to others representing the poor and still meet this obligation.

2. Rule 6.1—No Description of Social Justice to Guide the Work We Do[102]

Assuming, however, that an attorney decides to do 50 hours of pro bono work, what work should be done? The Rule is pretty good in

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at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/TaskForceReport.pdf (last visited Feb. 25, 2007). NEWS RELEASE: 135TH FIRM AGREES TO RAISE THE BAR; NEARLY $1.5 MILLION RAISED (December 21, 2006), *available at* http://www.philadelphiabar.org/page/NewsItem?appNum=2&newsItemID=1000543&wosid=r4tixBNqbNQHDzQqDOJB9M. Pro bono coordinators have told me that this campaign has substantially increased donations to their agencies.

100. *See* Maute, *supra* note 55, at 571 (arguing that attorneys benefit from pro bono work).

101. In another article, I discuss working with law students to define social justice in a clinical setting. *See* Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 CLINICAL L. REV. 459 (2006). There, I discuss ways to have law students interact with low-income people in the clinical law setting to begin to identify the poor as part of our community and to think about social justice. Similarly, lawyers may develop a sense of social justice through working with the poor. A buyout of one's obligation to serve the poor, however, makes it more likely that one could not learn with the poor the problems they face and gain from this a desire to work on issues that the attorney would identify with them.

102. I have written elsewhere about Rule 6.1's lack of a definition of social justice. *See id.* at 459. That article discusses the lack of definitions of social justice in the ABA Model Rules of Professional Conduct generally and how this makes it difficult to teach students the value of practicing toward social justice. *See id.* I take social work's "empowerment approach" and suggest teaching parts of it to students in

suggesting that a "substantial majority" of those hours should be spent representing people unable to pay or representing entities that are working on behalf of people who are unable to pay.[103] Although we recognize in the Rule and Comments that an attorney should get some credit for serving the public by providing some work at a reduced fee, like serving charitable organizations that might find it difficult to pay a fee and working to improve the law, this is clearly secondary to the work on behalf of the poor.

But because the Rule does not explain why we help the poor, attorneys have little to guide them in deciding what work they should do to meet this goal. Left to come up with their own rationales, attorneys might come up with several that have nothing to do with bringing justice to the oppressed. One of these is our desire to keep a monopoly on the legal process. Lawyers have done a lot to make practicing law the province of lawyers alone, from allowing the legal system to be more complex than it must be[104] to policing the unauthorized practice of law.[105] Some base the duty to serve the poor on the belief that if we are going to make it difficult for people to practice without attorneys, it is unfair for us to foreclose access to the legal system to those that cannot afford it. These attorneys could not triage client requests for service in any way.

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clinical settings so that professors can engrain in them a public interest value that includes valuing social justice. *See id.*

A part of the argument in this paper comes from a section in that article that discusses some of the deficiencies in Rule 6.1 in describing what an attorney is to do to represent the poor.

103. "A lawyer should . . . provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
(1) persons of limited means or
(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means . . . . " MODEL RULES OF PROF'L CONDUCT R. 6.1.

104. In Pennsylvania, this starts from not even being able to find the court clerk's office unless you know to look for the prothonotary. It continues from things as simple as making the execution of a legal document difficult for the uninitiated. For example, in Pennsylvania, an advance directive must be witnessed while a power of attorney needs to be notarized, but then only if it involves property, and that could not be known from looking at the power of attorney statute. It continues by allowing the court system to be difficult to navigate. At my legal aid office, for example, we get frequent calls from people who have been sued and have 20 days to answer and cannot figure out how to formally do so. For another example, consensual divorce filings require specific affidavits filed not too soon after separation nor signed too soon after filing. For a further discussion of this, see Cramton, *supra* note 34, at 534, 562–63 (arguing for "delegalization and simplification" of the legal system, in part so that people do not have to go to attorneys in the first place).

105. MO. ANN. STAT. § 484.020 (West 2004) (stating that the unauthorized practice of law is a misdemeanor). Missouri is not unique in criminalizing this practice. See Pennsylvania's rule at 42 PA. CONS. STAT. ANN. § 2524 (West 2004). Almost all states have bar association committees specially constituted to prohibit people who are not attorneys from practicing. *See* ABA, DIRECTORY OF UNLICENSED PRACTICE OF LAW COMMITTEES (2006), *available at* http://www.abanet.org/cpr/clientpro/cp-dir_upl.pdf (last visited Mar. 4, 2007).

Others may believe that serving the poor has more to do with creating a positive impression of attorneys generally. As some attorneys make a living from the misfortunes of others, many attorneys feel that pro bono activities are necessary to improve the standing of attorneys in the community by addressing community needs (for example, athletic leagues, but more ideally perhaps by addressing larger issues). One might rationalize that helping the poor is good publicity as it will make people believe that attorneys are valuable community members caring about others. This rationalization is fraught with problems when thinking about whether an attorney's work with the poor should even involve the legal system. A group picture of attorneys working to build houses for Habitat for Humanity is just as good, and maybe better, at accomplishing this goal as an attorney representing a poor person at a hearing to get someone welfare benefits.[106] It is not clear from this rationalization that there is any real direction as to what sort of legal work Rule 6.1 demands.

Another reason that has been proffered for having a pro bono obligation is serving the courts. Judges can be very unhappy trying to sort through claims and defenses of litigants who do not have attorneys. Many of those litigants cannot express their legal positions in standard legal terms that judges understand. Judges have appointed attorneys for the purpose of having the attorneys sort through these claims and represent those that cannot otherwise get representation.[107] Similarly, in certain civil and criminal cases where judges are required to ensure that defendants are represented but conflicts or other reasons intervene, judges have asked attorneys to represent poor people without charge. When these are the only type of cases taken, clearing a court docket takes precedence over determining the importance of the case in addressing the client's needs.

Still another rationale for pro bono work is attorney training. Some attorneys who might not get into court for several years in their firms are encouraged to take pro bono cases for litigation experience. This can relieve the boredom of practicing law without ever getting into a courtroom, as well as let the attorney learn how to litigate on the backs of a nonpaying client: the client is better represented than he would have otherwise been, and the attorney learns litigation strategies he can use when he begins to represent paying clients. Under this

106. The argument is that it is great for law firms and other organizations to volunteer to help people generally—many of our local firms volunteer for Habitat for Humanity or for holiday toy drives. This is good but is not pro bono work, which is using your skills to affect the legal system.

107. The courts have noted the difficulty of having pro se litigants in their courtrooms. Some actions have included courts producing pro se handbooks in hopes that litigants can conform to court rules. *See* U.S. DIST. COURT FOR THE DIST. OF IDAHO, *Pro Se Handbook* (1997), *available at* http://www.id.uscourts.gov/pro-se.htm (last visited Mar. 4, 2007). Others have their own court-hired attorneys to help pro se litigants or had staff attorneys obtain volunteer counsel in cases.

rationale, if the client's interest does not match a training interest, a client will not be represented.

The rationales above for pro bono work lead to handling a different cohort of cases, such as divorces of friends and incorporations of businesses, many of which do not necessarily address the needs of the poor. For these reasons, it would be beneficial if the reasons for doing pro bono work were stated in Rule 6.1. As it stands, neither the underlying purpose of the Rule nor the best approaches to achieve that purpose are articulated.

The Preamble to the Rules describes a lawyer's duty as a public citizen.[108] The Preamble notes that "lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."[109] This is a nice statement suggesting that poor people need access to the legal system. It does not say why. There is nothing to suggest, for example, that working on issues of poverty or discrimination have special value. Issues of race, gender, class, inequality, and discrimination in society are absent.[110]

Similarly, the Preamble suggests that lawyers should work toward "improvement of the law."[111] However, there is nothing suggesting what improvement in the law would be. For example, an attorney could argue that taking cases to reduce funding for legal services would meet their pro bono obligation. One way this could happen is for attorneys to take cases fighting Interest of Lawyer Trust Account (IOLTA) programs. Under the IOLTA program, many states require attorneys who are holding small amounts of a client's money that could not practically make interest for that client to pool all of their client's money in a bank account. IOLTA offices take all the pooled interest to fund legal services for the poor. Attorneys could argue that taking a case seeking to have IOLTA accounts declared unlawful could meet pro bono requirements by using the argument that the

108. *See* MODEL RULES OF PROF'L CONDUCT pmbl (2003).

109. *Id.*

110. Some states have added rules to cover these issues at least in terms of ensuring that attorneys do not discriminate against their clients and staff if not to state that attorneys should work to end discrimination. Rand, *supra* note 101, at 471 n.25. For an example of a state doing so, see Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 ALB. L. REV. 153, 156–57 (2000) ("A lawyer or law firm shall not: Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation." (quoting 22 N.Y. COMP. CODES R. & REGS. §1200.3(a)(6) (2006))). Note that the rule does not suggest that discrimination is necessarily a societal wrong or that a lawyer should take cases that would prevent discrimination or other matters that are just wrong.

111. MODEL RULES OF PROF'L CONDUCT pmbl (2003).

IOLTA accounts unjustly tax individuals with unrelated legal cases to fund legal programs for the poor.[112]

Not once is the phrase "social justice," or anything like it, mentioned in Rule 6.1.[113] Never does it say that the poor should have access to attorneys because the poor are powerless and that attorneys need to ensure that people are not oppressed. Nothing in Rule 6.1 says that attorneys should seek out Somersets and help them, or that attorneys should represent oppressed people of whom they are made aware through their own observation or through others who have noticed them, like Granville Sharp.

The failings in Rule 6.1 matter. The few attorneys we have representing the poor have little guidance as to why or how to achieve the goal.

IV. SOME CONCLUSIONS

It would be wonderful if there were more Granville Sharps in the world. People with money and power should open their eyes to the often horrific conditions of those without either. Attorneys should do so by making themselves a part of the same community of the poor and recognizing that it is important to work on their problems.[114] As attorneys, we should be angry with ourselves and others that we have allowed these conditions to exist. We should become advocates for those that need our help.

112. Not only do the Rules fail to define substantive ideals of what social justice might be, the rules specifically state that lawyers should be able to practice toward any goals with impunity. Model Rule 1.2 states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2003). This permission to engage in amoral practice allows attorneys to undertake legal representation without evaluating whether what their client is accomplishing is consistent with substantive definitions of social justice.

This raises the issue beyond the scope of this article about whether there is anything that should prevent an attorney from representing Stewart when he comes and says that he wants the attorney to enforce slavery to the hilt. For a suggestion on this issue, see Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable,* 70 FORDHAM L. REV. 1805, 1805–09 (2002).

113. As I elaborated in a previous article, attorneys make arguments that a profession cannot make such declarations as to what social justice is. However, other professions find it much easier, and as attorneys like to think of themselves as purveyors of justice, it is unclear why they cannot do this, too. In their versions of Rule 6.1, other professions are willing to say in their rules that they help the underserved in order to bring power to the oppressed or to otherwise right societal wrongs. The article gives examples from the National Association of Social Worker's Code of Ethics (1996, revised 1999), and The American Nursing Association's Center for Ethics and Human Rights Code of Ethics for Nurses with Intepretive Statements (2001) of specific definitions of social justice that include statements demanding that oppression of the poor be met with their professional expertise. *See* Rand, *supra* note 101, at 475, 477–78.

114. *See id.* at 488.

Attorneys have often not been the ones to see these conditions, or at least the ones to identify them first and take them on. Attorneys must, however, become the advocates that take on the cause of the poor. Although attorneys can hope that there will be more fee shifting and government or grant funding of their fees when they see injustice or it is brought to their attention, attorneys know that there are not enough ways to pay them to help the poor—we still have 16,000,000 poor people per year who are not receiving representation.[115] Putting some teeth in Rule 6.1 to encourage more representation of the poor is one way to encourage attorneys to take on the causes of the poor. There are several ways this could be accomplished:

1. Put a time commitment back into Rule 6.1. Every state should incorporate a specific time commitment (building on the example of the 15 states and the District of Columbia that already do),[116] and the commitment should be significant to achieve impact.

The commitment should also be extended to include more than 50 hours. For example, in Oregon, the requirement is 80 hours.[117] By the time an attorney is spending 80 hours per year, there will be several weeks when they will spend at least two hours on cases representing the poor. These cases will become part of what they think about each week, and attorneys will begin to have exposure to relevant issues and to address them.

2. Strengthen buy-out clauses. Encouraging attorneys to buy themselves out of their obligation by giving money to legal services is not ideal. As discussed in Section III, buy-out clauses keep attorneys away from the poor and make it likely that attorneys will see their buy-out obligations as a tax on their practice instead of a valuable donation toward getting help for the poor. However, if attorneys are going to have buy-out clauses for those that do not want to work with the poor or cannot, those buy-out clauses should be meaningful. The buy-outs should reflect the cost of billable hours or at least a fixed rate that is much higher than $200 to $500 per year.[118] If attorneys paid $50 per hour for an 80 hour per year obligation, the $4,000 they would give would be a substantial contribution for most pro bono services.

3. Put in a connection to pro bono agencies. It would be wonderful if more attorneys felt the needs of the poor. Many attorneys will not. Not everyone can or wants to feel a kinship with those that have less than they have.

That does not mean, however, that attorneys cannot take on meaningful cases for the poor that have been identified for them by people

115. *See* LEGAL SERVS. CORP., *supra* note 22, at 13.

116. *See* ABA Standing Comm. on Pro Bono & Pub. Serv., *supra* note 66.

117. OR. STATE BAR BYLAWS § 13.1 (2007), *available at* www.osbar.org/_docs/rulesregs/bylaws.pdf.

118. *See* ABA Standing Comm. on Pro Bono & Pub. Serv., *supra* note 66.

who do feel those needs. One way to do this is to put in Rule 6.1 a preference that attorneys take some of their pro bono work from pro bono agencies. When attorneys take on the bulk of their pro bono work by helping out family and friends,[119] they either must be fortunate that their family and friends are in tune with the needs of the poor or they begin to take on cases of the not very poor to do things like set up corporations.[120] Pro bono agencies, when they are run correctly, are good at sorting out the needs of the poor and referring cases that address the basic human needs of clients.[121]

Rule 6.1 should be rewritten to state that in the work that attorneys do to help the poor, attorneys should prefer cases that they believe address the basic human needs of their clients. In order to account both for the attorney who connects with the poor and feels he or she can identify cases that address basic human needs as well as those that do not, it should add that attorneys should learn the priorities of their local pro bono agencies and should either (1) take cases from the agency that the agency has identified as addressing a basic human need, or (2) consult with the agency on the types of cases the attorney takes to ensure to the attorney's satisfaction that the work addresses basic human needs.

4. Make clear that other types of public service are good but do not go toward meeting a pro bono obligation. Representing charitable groups is a good service that attorneys provide in the community, even if they are wealthy suburban athletic leagues. Teaching continuing legal education classes are good for our profession, and although attorneys may do it to get business or referrals from other attorneys, the classes are important to keep the bar an educated one with current knowledge. These things, however, do not address the legal needs of the poor and should not take away from attorneys' duty to do so. They could be removed from Rule 6.1 and given their own Rule. Alternatively, they should be left in the Rule but it should be made clear that the hourly requirement to represent the poor is not to be diminished substantially by such work.

5. Consider adding parts of the "civil Gideon" Resolution 112A to Rule 6.1. When the ABA House of Delegates passed its "civil Gideon" resolution, it included language that said that there are "low income persons" who are involved in "adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody."[122] This is good language that describes some of the reasons why poor people need legal help.

Although the "civil Gideon" resolution asks for public funding to get this representation, it is clear that unless there is a major funding

119. *See* SUPPORTING JUSTICE, *supra* note 46, at 14.
120. *See id.* at 15.
121. *See* ABA, *supra* note 38, at 40.
122. ABA, HOUSE OF DELEGATES RESOLUTION 112A, *supra* note 32.

initiative, all poor people will not be served by legal services or by sponsored private attorneys.[123] By putting language into Rule 6.1 that says that one of the things attorneys want to do with representation is provide legal services to people to meet their basic human needs, attorneys would make clear to people that incorporating businesses and representing wealthy suburbanites may meet some goals for pro bono work but not the goals that we are trying to meet toward helping the poor.

Similarly, the Rule should state that the ABA and local bar associations regularly review the conditions of the poor to come up with ideas of what basic human needs need to be addressed. Through the "civil Gideon" work, the ABA acknowledged some of these basic needs to include "shelter, sustenance, safety, health or child custody . . . ."[124] The bar could regularly look at the condition of the poor and modify this list to address oppressions of the time. Attorneys would then have some agreement as to what societal wrongs need to be addressed. They would have a position that although it would be good for other professions and for government entities to address social justice as well, it is particularly the legal profession's responsibility to right those wrongs through pro bono and other representation and initiatives.

6. Get rid of the overabundance of ways the rule says it is voluntary. Although the bar is likely not ready for mandatory pro bono through stating that an attorney "shall" volunteer his or her time, there is no need to bombard attorneys repeatedly with language telling them that they really do not need to do it. One or two "shoulds" would make clear that we want attorneys to do it without demanding it.

A new Rule 6.1 might look like this:

PRO BONO PUBLICO SERVICE

(a) Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should render at least (80) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial majority of the (80) hours of legal services without fee or expectation of fee to:

(1) low-income persons; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of low-income persons.

The lawyer should take particular care to ensure that the cases he or she takes are ones in which basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody. The lawyer should become

123. *See* LEGAL SERVS. CORP., *supra* note 22, at 13.

124. *See* ABA, HOUSE OF DELEGATES RESOLUTION 112A, *supra* note 32.

aware of local pro bono agencies in his jurisdiction and consider them a source of such cases.

(b) Although every lawyer should take pro bono cases, in the rare instance that circumstances do not permit him or her to do so, the lawyer should contribute to the local legal services organization or pro bono agency an amount commensurate with the billable hours he or she would provide to low income persons if the service was provided. This should be at least the rate one would charge one's client for (80) hours of work.

(c) An attorney should provide additional services through:

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

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

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

None of the services provided in this section (c) should be considered to meet the obligation of every attorney to provide legal services to low income people as described in section (a).

Perhaps attorneys in the United Kingdom were the profession that prevented civil war by representing the legal interests of the slave. Attorneys should live up to the example of *Somerset* by representing the interests of the poor and oppressed to address their needs. Although some of this can be done through handling cases for which we can be paid, if we want to be the profession that ensures social justice for all, we must make sure that all can be represented on issues of basic human needs, whether we can be paid or not. Strengthening our pro bono rules is a beginning toward ensuring that we bring social justice through our legal advocacy to the oppressed among us.