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ATTORNEYS’ ETHICAL RESPONSIBILITY TO PROVIDE PRO BONO LEGAL SERVICES TO THOSE IN NEED

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I. INTRODUCTION

Poverty is on the rise in the United States and as the number of Americans living in poverty rises, so does the number of Americans who cannot afford legal services should the need arise.¹ Although legal assistance is not a constitutional guarantee for civil matters, failing to provide affordable legal services to the growing number of poverty stricken Americans is an ethical failure on the part of the American legal profession.² It is important for individual attorneys to engage in pro bono work as it curbs the gap in providing legal assistance to the indigent. Pro bono work is not only desperately needed by many Americans, but pro bono legal services are also ethically required of those in the legal profession.³ Attorneys have an ethical responsibility to perform pro bono work, and the profession as a whole has an ethical responsibility to ensure that attorneys are acting in accordance with the ethical standards set forth by the profession.

II. ETHICAL BEHAVIOR

The broad term “ethics” is defined by Merriam-Webster Dictionary as, “the discipline dealing with what is good and bad and with moral duty and obligation,” or as, “a set of moral principles; a

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³ MODEL RULES OF PROF’L CONDUCT R. 6.1 (2012); Sandefur, supra note 2, at 80.
theory or system of moral values.” Theories concerning what ethical behavior is, and how human beings can come to lead fulfilling, happy, and ethically sound lives, have been at the forefront of philosophical musings for millennia. There are three common theories that pertain to the practical application of ethical actions. First, virtue ethics is concerned with an individual’s moral character and how maintaining virtuous character will lead to ethical actions. Second, the theory of deontology requires one to act in accordance with a communally accepted standard or rule. Deontological ethics does not focus on the consequences of the actions, but instead focuses on one’s duty to act in an ethical way. Finally, consequentialism or utilitarianism defines ethical actions as those which will bring the greatest benefit to the greatest number. The issue of an attorney’s ethical duty to engage in pro bono legal services can be supported by any one of these normative theories.

A. Virtue Ethics

At the center of ethical behavior, for some philosophers, is the concept of virtue. Aristotle’s writings are centered upon the concept that a virtuous life is one that humans should strive for, and Aristotle’s conception of the virtuous life has become a foundation for modern day theories concerning what it means to behave “ethically.” Specifically, Aristotle wrote that the virtuous life is one in which a person fulfills their “purpose” or “intended” life, which was named the telos. Fulfillment of one’s telos extends from a relationship with society through active participation in the community,

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6 Id. at 52, 75, 97.
8 Id. at 33.
9 Blackburn, supra note 5, at 75.
10 Id. at 96-97.
11 Id. at 73.
the use of reason, and an engagement in real love and friendship. These factors will result in greater character in the individual, which will then spill into the individual’s actions, resulting in an ethical existence. For virtue ethicists, what makes one ethical is his or her good and virtuous character, and from this strength of character, ethical actions will follow, although the consequences is not of concern to virtue ethicists. Under Aristotle’s conception of an ethical or virtuous life, one must rely on reason derived through practice and education, only then can one truly gain the character needed to lead an ethical existence. For Aristotle and virtue ethicists, ethical outcomes will be achieved when a person of virtuous character brings his or her actions in line with that character.

For a virtue ethicist, an ethical attorney would be obliged to engage in pro bono legal work. Since virtue ethics relies on how an individual’s moral character is reflected in his or her actions, an attorney faced with the decision to either engage or not engage in pro bono legal work must choose to engage in order to preserve her virtuous character. As Aristotle proposed, a strong moral character is achieved when a person practices and works toward building up good character. By looking at an attorney’s responsibility to provide pro bono services to the poor through the lens of virtue ethics, it would be ethically responsible for the attorney to engage in pro bono work because through this work, an attorney has the ability to improve his or her character and this will lead to more ethically sound decisions in the future.

B. Deontology

Under a deontological ethical theory, a person will act in an ethical manner when they align their actions with a universal ethical id.
13 McGinnis, supra note 7, at 32.
14 Blackburn, supra note 5, at 97.
15 McGinnis, supra note 7, at 32.
16 Id.
17 Blackburn, supra note 5, at 97.
18 Id.
Determining what is “ethical” under deontology requires one to determine if the correct course of action is “right” or “just.” In order to determine what is right, a person must ask themselves if their action is based on a moral principal that they could accept society as a whole acting on. For deontologists, one’s decision of how to act is not based on the individual’s wants, personal preferences, or even the preferences of others. Instead, a deontological determination of how one should act will be based on ethical principles without regard to consequences. Deontological theories are based on the notion that if people act in accordance with predetermined ideas of what is “right,” then the good will naturally follow. Observance of these principles is absolute under a deontological theory of ethics, and any potential adverse effects will be disregarded in favor of strict adherence to the principles under this theory.

From a deontological standpoint, providing pro bono legal services to the poor is ethically required because such services are the duties of an attorney. A duty under deontological ethics is an action that collectively would be considered “right.” Under the deontological approach it must first be determined if pro bono legal services are an ethical duty. Based on the collective attitudes of the legal profession toward pro bono programs, it can be concluded that providing pro bono legal services is an ethical duty because such an act is one society would benefit from if everyone acted on the principle. Pro bono programs are an ethical requirement under the Model Rules of Professional Conduct, sponsored by the government, and even privately funded for the purpose of providing pro bono

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19 McGinniss, _supra_ note 7, at 34.
20 Blackburn, _supra_ note 5, at 52.
21 McGinniss, _supra_ note 7, at 33-34.
22 Blackburn, _supra_ note 5, at 52-53.
23 McGinniss, _supra_ note 7, at 34.
24 Id.
25 Id.
26 Id. at 34-35.
27 Id. at 33-34.
28 _MODEL RULES OF PROF’L CONDUCT R. 6.1._
legal services to the poor. A system to provide legal services to the poor is unquestionably the “right” thing for an attorney to do under a rule-based ethical theory; therefore, attorneys have an ethical duty to engage in pro bono work under a deontological theory of ethics.

C. Utilitarianism

In addition to virtue ethics and deontology, normative ethics also includes the utilitarianism or consequentialism theory of ethics. Unlike a deontological theory, a utilitarian concept of ethical actions relies heavily on the ends, as opposed to the means. Subscribers to utilitarianism are primarily focused on the greatest good for the greatest number. Utilitarianism rests on the notion that whether an action is “good” or “right” is synonymous with whether the action will be beneficial for the greatest number of people; utilitarianism “concentrates upon general well-wishing or benevolence, or solidarity or identification with the pleasures and pains or welfare of people as a whole.” Utilitarianism is considered a consequentialist theory because unlike deontologists and virtue ethicists, utilitarians are concerned with the outcome of an action at the expense of the means. Under a utilitarian theory, a person’s action can be morally “wrong,” “unjust,” or even illegal, but the ultimate determination as to whether the action is “ethical” will lie in whether the action is beneficial for the overall good of most people. The distinction between deontology and utilitarianism can be further distinguished: under deontology, actions are either inherently good or

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30 McGinniss, supra note 7, at 34.
31 Blackburn, supra note 5, at 75.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
bad; however, under utilitarianism, actions are not wholly good or bad, but instead can be either good or bad depending on the outcome.\textsuperscript{37}

Despite the compassionate intent of utilitarianism to benefit the community as a whole, utilitarianism has been criticized amongst ethical philosophers.\textsuperscript{38} The primary criticism of utilitarianism lies with the theory’s apparent lack of appreciation for the individual.\textsuperscript{39} Utilitarianism neglects to take the individual’s value system into account and requires the individual to sacrifice their personal beliefs for the benefit of the group in order for the individual to do “good.”\textsuperscript{40} Further, a strictly utilitarian viewpoint can result in the sacrifice of an individual’s physical or mental well-being for the sake of the group; such a result is incongruent with the initially benevolent purpose of benefiting humanity.\textsuperscript{41} Despite such criticisms, utilitarian ethics can provide for a useful basis when contemplating the ethical utility of a person’s actions.

When analyzing whether an attorney should provide pro bono legal services under utilitarianism, the attorney’s ethical responsibility to engage in pro bono becomes even clearer. Since utilitarianism’s primary concern lies with the greater good, it would seem that pro bono legal services are by definition an ethical responsibility of attorneys because the benefits of pro bono legal services to the indigent far outweigh the potential costs to the individual attorney providing the service.\textsuperscript{42} The damage that results from a poor individual’s inability to obtain civil legal assistance is potentially great because civil legal matters can result in large financial penalties and loss of property. Since the unmet need for legal assistance to the indigent is large and the consequences are similarly large, attorneys must engage in pro bono work under a utilitarian theory because providing these services will provide a benefit for society as a whole.

\textsuperscript{37} Blackburn, \textit{supra} note 5, at 75.
\textsuperscript{38} \textit{Id.} at 79.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} See \textit{id.} at 75.
Although normative ethics is a broad branch of ethical philosophy that contains various theories on how to measure the ethical value of an action, all of these theories can be applied in varying degrees to the issue of an attorney’s ethical responsibility to perform pro bono legal services. Attorneys have an ethical responsibility to engage in pro bono civil legal work for the benefit of the poor. Regardless of the normative theory one applies to the issue of the ethical duty of attorneys to provide pro bono legal services, the result is the same: engagement in pro bono legal work is the “good” and ethical thing to do. Additionally, these traditional ethical philosophies and theories are the basis for more practical arguments in favor of legal pro bono services like: the deficiency of affordable civil legal services for the indigent, regulatory requirements of attorneys to engage in pro bono work, and constitutional arguments in favor of providing services pro bono.

III. ATTORNEYS’ RESPONSIBILITY TO ENGAGE IN PRO BONO LEGAL ASSISTANCE

The reasons for an attorney to engage in pro bono legal work are plentiful. In addition to the application of traditional ethical principles to the issue of an attorney’s obligation to provide pro bono legal services to the poor, there are arguments in favor of pro bono services ranging from constitutional arguments to need-based arguments, for both practical and regulatory reasons.\(^4^3\) Despite the vast array of titles and designations given to the arguments in favor of legal pro bono, virtually all of these arguments include ethical elements that illustrate attorneys’ ethical responsibilities to engage in legal pro bono services.

A. Lack of Civil Legal Services for the Indigent

There is certainly a need for pro bono legal services in the United States.\(^4^4\) The Legal Services Corporation (LSC), a govern-

\(^{43}\) Burke, supra note 2, at 61-65.
\(^{44}\) Legal Services Corporation, supra note 29, at 5.
ment created and funded organization that provides legal services to those who are unable to afford such services, conducted a study to determine the extent of the “justice gap,” or the difference between the number of people in need of civil legal services and the number of those who actually receive such services. The LSC study found that 50% of those who request help from LSC-funded programs are turned away because the programs lack the requisite needed funds to serve the disadvantaged. LSC estimates that as many as one million cases per year are rejected by LSC-funded programs. Clearly, LSC is perpetually underfunded and unable to meet the vast legal needs of the American people.

In addition to the lack of government funded options for those in need of civil legal services, the availability of funding from Interest on Lawyers’ Trust Accounts (IOLTA) has seen a decline in recent years due to a deflation of the legal market as well as the generally poor economy. IOLTA programs provide much needed funding to organizations that deliver civil legal services to those in need by allowing attorneys to add client funds to a pooled interest bearing account, then siphoning off the interest to fund the cost of legal services for the poor. IOLTA programs result in significant capital for legal assistance programs as all 50 states, plus the U.S. Virgin Islands and Washington, D.C., engage in some form of IOLTA program.

Together IOLTA and LSC-funded legal service programs make up a significant portion of funding for the provision of civil legal services for the indigent. The decline in funding from IOLTA programs, coupled with the already dismal reach of government funded civil legal service programs, means the gap between those who are in need of civil legal services and those who actually receive

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45 Id. at 1.
46 Id. at 6.
47 Id. at 9.
48 Id. at 2.
49 Romerdahl, supra note 29, at 1123.
50 Id.
51 Id.
52 Id.
such services is continually widening. Due to the inability of these programs to sufficiently meet the needs of the disadvantaged, other means are necessary in order to diminish the justice gap in the United States. Closing the justice gap requires an increase in attorney participation in pro bono legal services. Not only is pro bono work necessary to provide a greater number of needy Americans with civil legal assistance, but engagement in pro bono services is also necessary from an ethical standpoint.

B. Engagement in Pro Bono Legal Services is an Ethical Requirement of the Profession

The Model Rules of Professional Conduct state that “every lawyer has a professional responsibility to provide legal services to those unable to pay.” Those in favor a pro bono work point to the Model Rules and the ethical duty the Rules impose on attorneys. The Rules, and Rule 6.1 in particular, have been described as, “a set of principles designed to define [the lawyer’s] role in the legal system and [the lawyer’s] relationship to society at large which includes directives on providing pro bono legal services.” But an attorney’s ethical responsibility to provide legal services pro bono is not solely derived from the Model Rules of Professional Conduct. In fact, Rule 6.1, despite containing a pro bono directive to attorneys, is an “aspirational rule” that is not mandatory and does not provide for sanctions of attorneys that choose to disregard the Rule. Despite the non-mandatory nature of Rule 6.1, the ethical duty of the attorney to provide legal services still exists, even if this duty is not enforced.

An attorney’s duty to provide pro bono services under the Model Rules falls squarely into the deontological theory of ethics.
As is demonstrated by the ABA’s adoption of Rule 6.1, and its further codification in many states, attorney provision of pro bono legal services is a duty that should be strictly followed for the purpose of acting in an ethical fashion. The importance of pro bono services as a duty in a deontological sense is illustrated by the Model Rules, and through strict adherence to this duty attorneys can take a step toward a more ethical existence.

C. Constitutional Issues Regarding Pro Bono Legal Services

Both proponents and opponents of attorney providing pro bono services maintain constitutional arguments as a base. The Sixth Amendment of the Constitution guarantees legal representation to criminal defendants and through the Due Process Clause of the Fourteenth Amendment this right to counsel in criminal cases has been made applicable to the States. Despite the lack of a similar guarantee of a right to counsel in civil cases, proponents of pro bono services point to the fundamental entitlement provided by the Sixth Amendment when discussing the importance of providing legal counsel in civil cases. The Constitution provides indigent persons with legal counsel in criminal cases because of the immense importance of such cases: a person’s liberty, and at times life, hangs in the balance. However, a similar argument can be applied to civil cases. Often civil cases are incredibly important to those involved and the outcome of a civil case can have vast financial and personal effects on the people involved. Deontological ethics, or rule based ethics, supports the constitutional argument for extending the right to

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61 MODEL RULES OF PROF’L CONDUCT R. 6.1; Sandefur, supra note 2, at 89.
62 MODEL RULES OF PROF’L CONDUCT R. 6.1; McGinniss, supra note 7, at 34.
63 Burke, supra note 2, at 64-65.
64 Id. at 64.
65 Id.
66 Id.
counsel in civil matters. If we rely on the notion that counsel is required in criminal cases because of the magnitude of what is at stake, then we must also come to the conclusion that civil cases require counsel because civil cases can have equally disastrous results. Under a deontological approach, strict adherence to the rule is required, and since it is required under the Constitution to provide legal services in criminal cases, it stands to reason that it is also required under the Constitution to provide legal services for civil cases.

Of course, as those who oppose vigorous legal pro bono work would argue, the Constitution does not grant all individuals the right to counsel in civil cases. But despite this gap in the law, constitutional arguments in favor of pro bono work have a distinct ethical flavor that still acts to strengthen the argument in favor of attorney provided pro bono work.

**D. Practical Issues Regarding Pro Bono Legal Services**

In addition to the constitutional arguments for and against pro bono legal services, practical concerns regarding the topic also exist. Those in favor of pro bono services for the indigent cite the inability, not only of the poor to acquire legal services because of a lack of means, but also cite the inability of non-lawyers to simply fix a legal problem on their own. These concerns are known collectively as the legal monopoly theory. Under the legal monopoly theory, two tangentially related issues develop. First, because the states empower attorneys to practice law, and the states retains an exclusive right to license and regulate attorneys, then attorneys must engage in pro bono legal services for the purpose leveling the playing

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68 McGinnis, supra note 7, at 34.
69 Id.
70 Burke, supra note 2, at 64.
71 Id. at 67; Fedder, supra note 58, at 6.
72 Burke, supra note 2, at 67; Fedder, supra note 58, at 6.
73 Burke, supra note 2, at 67; Fedder, supra note 58, at 6.
74 Burke, supra note 2, at 67.
field and not looking devious by perpetuating rules that deny access to the legal system to many.\textsuperscript{75} The second practical concern related to the legal monopoly theory is that the sheer complexity of the legal system results in a nearly complete bar to non-attorneys in successfully navigating the system without the help of an attorney.\textsuperscript{76} Therefore, attorneys must provide pro bono legal services to people in need because not doing so is "equivalent to a denial of equal access to justice."\textsuperscript{77} Under the legal monopoly theory, attorney provision of pro bono legal services to the poor is a necessity for the purpose of allowing Americans the right to legal justice.\textsuperscript{78}

Arguments favoring attorneys’ responsibility to provide legal services to the poor can be based on constitutional concerns, practical concerns, need based concerns, and most importantly, the attorney’s ethical duty to provide these services. Lawyers must engage in pro bono work in order to help close the justice gap and to uphold their ethical duty as a member of the legal profession.

\textbf{IV. ETHICAL CONSIDERATIONS REGARDING MANDATORY PRO BONO PROGRAMS}

There is a growing movement in the legal community to increase the amount of time attorneys spend engaged in pro bono work for the benefit of indigent clients.\textsuperscript{79} As the need for civil legal services for the indigent grows, the legal profession must look for viable solutions to the growing problem.\textsuperscript{80} Despite the ethical duty attorneys have to engage in pro bono legal services voluntarily, many do not, leaving the legal needs of many unmet.\textsuperscript{81} Mandatory pro

\textsuperscript{75} Id.
\textsuperscript{76} Id. at 67; Fedder, supra note 58, at 6.
\textsuperscript{77} Burke, supra note 2, at 67.
\textsuperscript{78} Id.
\textsuperscript{80} Legal Services Corporation, \textit{supra} note 29, at 5.
\textsuperscript{81} ABA \textbf{STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE, SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS} 4 (2013).
bono programs are often proposed as a means of closing the justice gap. While many criticisms of mandatory pro bono programs exist, both ethical and otherwise, such programs may be the only way to ensure the profession is engaging in its ethically required duty to provide legal aid to those in need.82

A. Reliance on Attorney’s Voluntary Participation in Pro Bono Legal Service Programs Is Not Enough

Recently the American Bar Association’s Standing Committee on Pro Bono and Public Service (the Committee) issued a report outlining attorney engagement in voluntary pro bono work in the United States.83 The report summarizes a study undertaken by the Committee to evaluate the prevalence of voluntary pro bono work involved in by attorneys.84 The Committee concludes that “the results of this study reflect American lawyers’ continued awareness of pro bono as a professional responsibility and their strong ongoing commitment to volunteering their legal services to meet the legal needs of the poor.”85 Despite the positive conclusions made by the Committee in the report, the actual statistics tell a different story.86

The Committee collected data on pro bono services that fell into two distinct categories labeled Category 1 and Category 2.87 Category 1 is defined as “free (without expectation of fee) legal services to persons of limited means or organizations that address the needs of persons of limited means.”88 The types of services rendered under Category 1 include: full case representation, limited scope representation, legal advice, and representation in mediation.89 Category 2 is defined as “any other service provided for a reduced

82 Id.; MODEL RULES OF PROF’L CONDUCT R. 6.1.
83 ABA Standing Committee on Pro Bono and Public Service, supra note 81, at v.
84 Id.
85 Id. at vi.
86 Id.
87 Id. at 4.
88 Id.
89 ABA Standing Committee on Pro Bono and Public Service, supra note 81, at 4.
fee or no cost (without expectation of fee) to any type of client, not including activities performed to develop a paying client or anything that is part of paying job responsibilities." Services housed under Category 2 work include: legal services for a reduced fee, mediator, speaker on legal issues, trainer or teacher on legal issues, supervising another attorney in providing pro bono representation, lobbying on behalf of a pro bono organization, policy advocacy, grassroots community advocacy, member of board of legal services or pro bono organizations, member of bar committee related to pro bono or access to justice. Category 1 pro bono services are of the type traditionally envisioned when one thinks of pro bono work: services that are provided for the benefit indigent persons.

The report found that in 2011, 38% of respondents engaged in less than 20 hours of Category 1 pro bono work for the entire year, with a staggering 20% of those engaging in zero pro bono hours in 2011. According to the report, 26% of respondents performed between 20 and 49 hours of pro bono services in 2011. Only 35% of respondents indicated that they performed over the Model Rules’ Rule 6.1 recommendation of 50 or more pro bono hours during the year. Of the 35% who performed over 50 hours of pro bono work in 2011, 16% engaged in more than 100 hours of Category 1 pro bono services. Despite the survey’s indication that attorneys are engaging in pro bono legal services for those in need, higher engagement levels are still needed.

As was demonstrated previously, the need for pro bono legal services is great. Even if the ABA’s report does accurately reflect how many pro bono hours American attorneys engage in yearly, then at least 65% of attorneys are falling below the recommendation

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90 Id.
91 Id.
92 See id.
93 Id. at 5.
94 Id.
95 MODEL RULES OF PROF’L CONDUCT R. 6.1; ABA Standing Committee on Pro Bono and Public Service, supra note 81, at 5.
96 ABA Standing Committee on Pro Bono and Public Service, supra note 81, at 5.
97 Id. at 34.
98 Legal Services Corporation, supra note 29, at 5.
articulated in Rule 6.1 of the Model Rules of 50 hours a year. Furthermore, the Report shows that at least 20% of American attorneys engage in no pro bono legal work for indigent citizens at all. Although the methodological nature of the Committee’s report may have led to an accurate representation of the current amount of pro bono services provided by attorneys, studies that rely wholly on self-reflection and reporting can often be skewed. First, the survey was sent to attorneys via e-mail and those who completed the survey self-selected themselves to participate. Therefore, the results could be skewed in one of two ways: the survey could be skewed in favor of those who are more likely to engage in voluntary pro bono work, or the survey could be skewed by those with strong opinions, either for or against pro bono work, meaning that those engaging the most and the least in pro bono work could be overly represented. In addition to the potential self-selection bias, surveys of this sort, which rely completely on self-reflection regarding behavior, are susceptible to biases resulting from respondents misrepresenting the truth because of a desire to respond in a socially desirable way.

At best the ABA’s report on the attorney engagement in pro bono work illustrates a need for increased involvement; if the statistics are in fact skewed in favor of those who voluntarily engage in pro bono work at a higher rate, then the true need for a more regimented pro bono requirement is even greater than the stated statistics suggest. The ABA’s report is evidence that the legal profession is in need of a means to entice attorneys to fulfill their ethical responsibility of engaging in pro bono work. The ABA’s report is further confirmation that a mandatory pro bono program is necessary.

99 ABA Standing Committee on Pro Bono and Public Service, supra note 81, at 4; MODEL RULES OF PROF’L CONDUCT R. 6.1.
100 ABA Standing Committee on Pro Bono and Public Service, supra note 81, at 4.
101 Id. at A-2.
102 Id. at 2, A-2.
103 Id. at A-2.
104 Id.
105 Id.
B. Mandatory Pro Bono Programs: Past and Present

Mandatory pro bono programs have been proposed in various states and jurisdictions over the course of the last thirty years.\(^{106}\) However, mandatory pro bono programs have largely been unable to take root in the United States.\(^{107}\) Despite the ever increasing need for attorney provided legal pro bono, the legal community as a whole has rejected the programs that would require attorneys to engage in their ethical duty to provide pro bono services to the needy.\(^{108}\)

Currently, New Jersey is the only state that has implemented any sort of mandatory pro bono program.\(^{109}\) Following the New Jersey State Supreme Court ruling in *Madden v. Delran*, attorneys in NJ are required to take court appointed civil cases when the matter involves “consequences of magnitude.”\(^{110}\) Further, only seven states have mandatory pro bono reporting policies; the mandatory reporting policies are designed to gather data on the subject and to emphasize the importance of the attorney’s responsibility to provide pro bono services.\(^{111}\)

Mandatory pro bono programs have not received widespread support from the legal community and such program proposals are often met with numerous objections.\(^{112}\) Nevertheless, although mandatory pro bono programs have drawbacks, the benefits of such programs would far outweigh the disadvantages by providing a


\(^{107}\) Wechsler, supra note 79, at 909.

\(^{108}\) Id.

\(^{109}\) Sandefur, supra note 2, at 89.


larger pool of attorneys using their skills to empower those in need.\(^ {113}\)

### C. Common Issues and Concerns Regarding Mandatory Pro Bono Programs

Although mandatory pro bono programs have not received large scale support from the legal community and have failed in almost every case to come to fruition, mandatory pro bono programs are still the best option the legal community has for increasing the volume of pro bono legal services.\(^ {114}\) Providing pro bono legal assistance to the indigent is still ethically necessary and providing such assistance should be a main concern of the profession.\(^ {115}\) Despite this necessity, opponents of mandatory pro bono programs often challenge such programs on ethical, constitutional, and practical grounds.\(^ {116}\)

#### 1. Ethical Arguments Against Mandatory Pro Bono Programs

Pro bono work is an ethical necessity whether this responsibility is measured under a virtue ethics theory, a deontological theory, or a utilitarian theory. Therefore, enforcing mandatory pro bono programs across the country is ethically required by the profession in order to begin to close the justice gap and to provide legal assistance to those in need of it.\(^ {117}\) Although the need for increased attorney pro bono is clear, many still oppose mandated pro bono programs based on separate ethical grounds.\(^ {118}\)

The first ethical criticism leveled against proponents of mandatory pro bono is that such programs will result in a failure by


\(^{114}\) Wechsler, *supra* note 79, at 909; Sandefur, *supra* note 2, at 89.

\(^{115}\) RULES OF PROF’L CONDUCT R. 6.1.

\(^{116}\) Nitta, *supra* note 113, at 936.

\(^{117}\) Legal Services Corporation, *supra* note 29.

\(^{118}\) Nitta, *supra* note 113, at 931.
attorneys participating in mandatory pro bono to engage in zealous advocacy for their mandated clients. Critics posit that attorney’s will “be reluctant to serve clients because that obligation had been forced on them and because they no longer received the psychic value of voluntarily doing a good deed.” However, this is a weak criticism. For example, legal pro bono work has been labeled as “a professional duty, discharged outside the normal course of billable practice, to provide free services to persons of limited means or to clients seeking to advance the public interest.” The good feeling derived from engaging in pro bono services for those in need is not tied to the voluntary nature of the deed, but instead to the act of helping a person in need and receiving the benefit of a “conscious good.” Furthermore, whether a behavior is ethical is not measured against the subjective feelings of the attorney and how they feel about the client or the situation; zealous representation is measured objectively. Therefore, a mandated pro bono attorney-client relationship will not lead to an ethical issue concerning zealous advocacy any more than an attorney-client relationship mandated by a senior partner to a first year associate could undermine zealous advocacy for the client.

The second ethical argument mandatory pro bono critics proffer involves a concern over attorney competence with respect to pro bono client’s issues. Opponents claim that attorneys will be in violation of the profession’s ethical standards when they are required to take on cases that deal with areas of the law in which they may have no experience. While it would be an ethical violation for an incompetent attorney to provide an unsuspecting client with inadequate assistance, such problems could be easily avoided. For

119 Id. at 932.
120 Id.
123 Nitta, supra note 113, at 932.
124 Id. at 933.
125 Id.
example, attorneys could choose to perform legal pro bono in an area of law in which they are familiar. Further, attorneys possess the skills necessary to learn areas of law in which they have never practiced; an attorney’s skill set “transcend[s] particular specialized legal knowledge, so it would not cause ethical violations to undertake pro bono cases in areas where attorneys have little prior experience.”

Mandatory pro bono programs can be implemented without implicating ethical dilemmas. Simple steps can be taken by attorneys engaging in mandated pro bono to avoid ethical issues. These steps include maintaining the same level of advocacy for one’s pro bono clients as the attorney would for a paying client and by educating one’s self in the area of law the pro bono case is situated in.

2. Non-Ethical Arguments Against Mandatory Pro Bono Programs

In addition to the ethical arguments against mandatory pro bono, opponents also pose several non-ethical criticisms of proposed programs. Non-ethical opposition consists of constitutional, practical, and societal arguments against mandatory pro bono. However, these criticisms can be avoided through carefully crafted mandatory pro bono rules, thus preserving the attorney’s ethical responsibility to provide pro bono services to the poor.

In opposition to mandated pro bono, many times attorneys claim that the justice gap is not a problem that should fall onto the shoulders of lawyers. Such critic’s claim that since the problem is large and mostly a societal problem that the issue of the justice gap should be handled by legislatures and the burden should be placed on society at large, and not on attorneys specifically. Additionally,

\[\text{References}\]

\[\text{Nitta, supra note 113, at 933.}\]
\[\text{Id. at 932-33.}\]
\[\text{Id. at 933.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. at 924.}\]
\[\text{Nitta, supra note 113, at 924.}\]
critics of mandatory pro bono cite the professional bodies of other professions, like medical professionals, and note that such professional organizations do not require their members to engage in pro bono work.\textsuperscript{134} However, these evaluations are not entirely comparable. First, many would say that the legal profession is in the best position to bear the burden of pro bono because the profession had a hand in creating the inequity.\textsuperscript{135} For example, “the legal profession has traditionally discouraged cost-reducing innovations such as mediation, arbitration, and other alternative dispute resolution strategies, relegating indigent citizens to a cycle of ever-growing legal problems.”\textsuperscript{136} To remedy this issue, the profession must take the initiative to resolve the problems in civil litigation in which it helped to create and a mandatory pro bono program is a means to resolve this problem.\textsuperscript{137}

Constitutional arguments are often raised by opponents of mandatory pro bono programs.\textsuperscript{138} Constitutional arguments include freedom of association and belief, and freedom from involuntary servitude.\textsuperscript{139} First, opponents argue that mandatory pro bono would violate the attorney’s First Amendment right to freedom of association.\textsuperscript{140} However, this criticism assumes that mandatory pro bono programs will afford attorneys no right to choose which pro bono cases they take and which they do not; a First Amendment violation could simply be avoided by reserving an attorney’s right to determine what pro bono cases they will engage in.\textsuperscript{141} Also, opponents argue that mandatory pro bono is a form of servitude that is prohibited under the Thirteenth Amendment.\textsuperscript{142} In response to such an argument, courts have found that mandatory pro bono is not in violation of the constitutional freedom from involuntary servitude.

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 920.
\textsuperscript{139} Nitta, supra note 113, at 919.
\textsuperscript{140} Id. at 920.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 921.
because such requirements do not result in the loss of an attorney's liberty, and that disbarment for failure to act under a mandatory pro bono rule is not enough to invoke the Thirteenth Amendment.\textsuperscript{145}

Although those opposed to mandatory pro bono programs implicate numerous ethical and non-ethical arguments against pro bono programs, such arguments are ultimately overshadowed by the ethical responsibility attorneys owe to those in need of legal assistance.

V. CONCLUSION

In the United States, the need for pro bono civil legal assistance is large and continuously growing.\textsuperscript{144} Practical ethical theories can be used to analyze an attorney's responsibility to engage in pro bono legal work. Under these normative theories, attorneys' ethical responsibilities to engage in pro bono become even clearer. Virtue ethics provides that an attorney contains a strong and virtuous character which can be derived from reason and engagement in the community; not only will virtuous character lead to an attorney's ethical action of engaging in pro bono work, but engaging in pro bono work can help an attorney build the virtuous character necessary to lead an ethical existence.\textsuperscript{145} Deontology requires attorneys to take action based on broad and unwavering ethical rules and providing legal services to the indigent becomes an ethical duty under a deontological approach to ethics.\textsuperscript{146} Finally, a utilitarian theory of ethics further illustrates attorneys' ethical responsibilities to engage in pro bono legal work because an individual attorney providing these services is truly exercising the concept of the greatest good for the greatest number.\textsuperscript{147} In addition to the practical application of ethical theories that govern an attorney's responsibility to provide pro bono services, the ethical standards that govern the profession, contained in the Model Rules of Professional Conduct,

\textsuperscript{143} Id. at 921.
\textsuperscript{144} Legal Services Corporation, supra note 29.
\textsuperscript{145} Blackburn, supra note 5, at 97.
\textsuperscript{146} Model Rules of Prof'l Conduct R. 6.1; McGinniss, supra note 7, at 34.
\textsuperscript{147} Blackburn, supra note 5, at 75.
require attorneys to engage in legal pro bono work.\textsuperscript{148} By extension of this responsibility, plans derived to propel attorneys into pro bono service, such as mandatory programs, are also ethically required by the profession.

\textsuperscript{148} \textsc{Model Rules of Prof'l Conduct R. 6.1.}