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#### McGill Guide 9th ed.

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# POINT/COUNTERPOINT

## TOPIC: WHETHER LAW SCHOOLS SHOULD REQUIRE STUDENTS TO PROVIDE SOME AMOUNT OF FREE LEGAL SERVICES TO INDIGENTS

### *PRO BONO* AND LEGAL EDUCATION

BY

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American society has never suffered from a dearth of lawyers, but it has yet to find a way to channel these talents into help for middle and low-income people who cannot afford legal services. In a society which relies on philanthropy and community efforts to address problems which are not solved through the market, legal services for the majority of Americans remain unavailable.

Bar associations, law firms, public interest groups and individual lawyers have grappled with this problem for years. A number of law schools have recently devised an innovative solution: integrate actual *pro bono* work — with real clients who have real problems — into the curriculum so that all future lawyers, not simply those already inclined to seek out such opportunities, will gain first-hand experience working without pay to help others.

The parameters of the resulting debate can best be understood by examining the programs currently being proposed and implemented on law school campuses. Tulane Law School adopted the first *pro bono* requirement in September of 1987. Over the past two years, five other law schools have voted to require their students to perform community service in order to graduate: Florida State University College of Law, Stetson Law School, the University of Louisville School of Law, the University of Pennsylvania Law School, and Valparaiso Law School.<sup>1</sup>

All six institutions have adopted a similar model, although each program contains permutations designed to meet the exigencies of their individual institutions and local communities. All require each student to complete a minimum number of hours of public service prior to graduation.<sup>2</sup> In all of these

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<sup>1</sup> Several additional law schools were preparing to adopt such programs at the time of publication.

<sup>2</sup> The aggregate number of hours of community service required by each school prior

programs, students can select the forum and the time in which they will complete their public service work.<sup>3</sup>

The crisis confronting our legal system is well documented. Numerous studies report that fewer than 20 percent of the legal needs of the poor are being adequately addressed in our society<sup>4</sup> and that fewer than 20 percent of attorneys participate in *pro bono* programs.<sup>5</sup> New York's Committee to Improve the Availability of Legal Services recently noted "an imbalance of crisis proportions between that need (the need for civil legal services among the poor) and the legal resources now available to address it." The Committee concluded that "lack of free legal assistance effectively denies access to the legal system to vast numbers of poor people, thereby intensifying and prolonging their already harsh distress, and that this condition reflects severely on the legitimacy of our justice system."<sup>6</sup> As Chief Judge Sol Wachtler of the New York State Court of Appeals has stated: "A justice system which allows vast disparities in access to justice based on ability to pay cannot truly be called a system of justice at all."<sup>7</sup>

Our law schools too often fail to educate future leaders of the legal profession about the needs of the poor and middle class. At most a passing reference is made in an ethics class to our profession's canons of ethics regarding service

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to graduation are as follows: Stetson - 10 hours; Florida State, Tulane and Valparaiso - 20 hours; University of Louisville - 30 hours; and University of Pennsylvania - 70 hours.

<sup>3</sup> For example, the University of Pennsylvania Law School offers students the option of developing independent *pro bono* projects or accepting a placement with a series of pre-arranged supervisory agencies. During its first year, placements were available with Community Legal Services, private attorneys accepting cases under the Philadelphia Bar Association's Volunteers for the Indigent Program, the Defender Association of Philadelphia, the Rutherford Institute, the Philadelphia District Attorney's Office, the Securities and Exchange Commission, the ACLU of Pennsylvania, and the Washington Legal Foundation. To provide additional flexibility in the program, students may arrange work over the summer or may seek to have the requirement modified in cases of unusual hardship.

<sup>4</sup> See Advisory Council of the Maryland Legal Services Corporation, *Action Plan for Legal Services to Maryland's Poor* (Jan. 1988); Massachusetts Legal Services Corporation, *Massachusetts Legal Plan for Action* (Nov. 1987); Civil Legal Services Committee of the State Bar Association of North Dakota and the North Dakota Trial Lawyers Association and the North Dakota Supreme Court, *A Workable Plan for the Poor of North Dakota: A Practical, Equitable and Political Proposal for Bar Leadership* (Feb. 1988); New York State Bar Association, Committee on Legal Aid, *New York Legal Needs Study: Draft Final Report* (October 1989); University of Florida, Center for Government Responsibility, *The Legal Needs of the Poor and Underrepresented Citizens of Florida; An Overview* (Jan. 1980).

<sup>5</sup> American Bar Association Consortium on Legal Services and the Public, 1990 Directory of Private Bar Involvement Programs, 146-147 (May 1990).

<sup>6</sup> Committee to Improve the Availability of Legal Services, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (April 1990).

<sup>7</sup> *Id.* at 20.

to those in need. Few serious discussions about the vast unmet legal needs in our society ever take place in classroom settings.

As law schools hone the analytical skills of their students, they allow students' normative skills to atrophy. As professors don the blissful cloak of impartiality and a belief in the adversarial system's ability to resolve all disputes with justice, they fail to discuss with their students either the impact on the legal system when only one side receives the services of an attorney or the personal professional responsibility of lawyers.<sup>8</sup>

Just as other curricular requirements are designed to prepare a law student to competently represent a client confronting a contractual or personal injury claim, the *pro bono* requirements are intended to aid in developing a student's ability to fulfill the public service responsibility of an ethical practitioner. In essence, law schools have envisioned their requirements as an augmentation of their existing courses on professional responsibility.<sup>9</sup>

Public service requirements adopted on law school campuses aspire to educate students through experiential methods. John Kramer, Dean of Tulane Law School, maintains that Tulane's decision to begin the *pro bono* program reflected "a multiplicity of value judgments, combining concern for the unmet legal needs of the poor with concern for the unmet educational needs of law students."<sup>10</sup>

I am baffled to read statements that ten to seventy hours of required *pro bono* work is coercive or that it robs students of the opportunity to think for themselves. The required courses in torts, contracts, constitutional law, and property law require significantly more time and provide much less discretion to students. Law school is composed of many such requirements, which the faculty have deemed essential for the preparation of a graduate to enter the ranks of the legal profession.

As Howard Lesnick, the faculty member who proposed the Penn public service requirement, stated:

"By adopting the Program, the School has signalled its view that a responsible lawyer can and does succeed in practice, while devoting some time to unpaid or low-paid public service; that students can and should learn while in school to make space for such work in their overall work

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<sup>8</sup> As stated in the Model Rules of Professional Conduct: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT, Rule 6.1 Discussion (1983).

<sup>9</sup> Howard Lesnick, Memorandum on the University of Pennsylvania Law Faculty Decision to Adopt a Public Service Requirement 1 (May 22, 1989).

<sup>10</sup> John Kramer, *Mandatory Pro Bono at Tulane Law School*, NAPIL Connection Close-Up 1 (September 1990).

life at the school; and that the School is willing to devote some time and resources to the facilitation of that learning. Once a student graduates, he or she is as free as are other lawyers to reject our views, with respect to the service no less than the competence aspect of professionalism. But, no less with respect to service than to competence, it is appropriate for a law school to design a program consistent with its perception of the norms of quality lawyering, and require students receiving its degree to have completed that program."<sup>11</sup>

There is already evidence that performing community service has benefitted participating students. According to a survey in 1989-90 of Tulane's graduating class, sixty-five percent reported that their participation in community service increased their willingness to provide *pro bono* services in the future. Seventy-two percent of the students stated that they had gained confidence in their ability to handle cases for indigent clients, while forty-two percent expressed a desire to continue to practice in the area of poverty law.<sup>12</sup> Compared with the current *pro bono* practices of the bar, with fewer than 20 percent participating in *pro bono* programs, these results are very encouraging.

There are clearly other benefits that derive from a *pro bono* requirement. Graduating University of Pennsylvania students will devote over 16,000 hours to public service each year. They will provide *pro bono* service to an estimated 1,600 clients.<sup>13</sup> Such a *pro bono* requirement, if replicated in all of the nation's law schools, would add nearly 1 million hours of legal services to the poor each year.

*Pro bono* requirements are only at their initial stage of development and time and experimentation will enable further improvements and adaptations. Several schools, including the District of Columbia School of Law and University of Maryland Law School, now require participation in clinical programs prior to graduation, thereby addressing many of the issues leading to the establishment of *pro bono* requirements. Touro's Jacob D. Fuchsburg Law Center has just adopted a program providing several options for satisfaction of a public service requirement including participation in a clinical program or a specified number of hours of *pro bono* work. Faculty members are finally becoming more actively involved in *pro bono* programs.<sup>14</sup>

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<sup>11</sup> Lesnick, *supra* note 9 at 3.

<sup>12</sup> John Kramer, *Mandatory Pro Bono at Tulane Law School*, NAPIL Connection Close-Up 1-2, (September 1990). Perhaps the most important testimony to the value of public service requirements came from a Tulane student who had initially challenged both the wisdom and the authority of the school to force him to help others. According to Tulane's Dean, he later wrote to thank the school for giving him the opportunity to do the work and to acknowledge that he had thoroughly enjoyed the endeavor.

<sup>13</sup> A study in Maryland documented that the average *pro bono* service required approximately ten hours of legal work. Cardin & Rhudy, *Proposal: Expanding Pro bono Legal Assistance in Civil Cases to Maryland's Poor*, 49 Md. L. Rev. 9 (1990).

<sup>14</sup> Stetson Law School adopted a faculty requirement identical to the student graduation requirement. At Valparaiso, faculty members will provide much of the supervision required for student *pro bono* projects.

Yet it is from the students themselves that we see the most exciting activity. They have demonstrated their commitment to public service over the past ten years through student-administered community service programs, student-funded public interest grant programs, and a heightened level of competition for the limited number of jobs available in the public interest law community. By initiating *pro bono* requirements, students are beginning to take control of their education and to send a message to the profession to which they aspire.

Apparently, students have taken to heart the crisis in the legal system and have begun to question the disparity that exists between our profession's ethical rhetoric and the low level of participation in *pro bono* work. Apparently, law schools are also beginning to consider their role as more than simply training competent lawyers but also as training ethical lawyers. The resulting experiment in *pro bono* programs perhaps holds out some hope for those who stand alone at eviction proceedings or in numerous other courtrooms because they can neither afford the services of a law school graduate nor find a *pro bono* attorney willing to take time to join them in court.

