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**Fostering Pro Bono Service in the Legal Profession:  
Challenges Facing the Pro Bono Ethic**

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## **I. Introduction**

There is cause for concern about access to justice in Canada. Legal aid programs struggle to make law accessible to the poor and to those who earn modest wages.<sup>1</sup> While there is clearly a need for greater funding for legal aid programs, they will never eliminate the needs that presently exist. The legal profession itself can improve access to justice by increasing and targeting the work that it already performs on a pro bono basis.

This paper will examine the challenges that face the pro bono ethic in the legal profession. The issue will be addressed in three sections. First, we will review the origins of pro bono and assess whether an historical analysis of this subject supports a duty to perform pro bono work. Second, this paper will canvass the rules of professional conduct and determine whether they support and promote a professional obligation to perform pro bono services. Third, we will evaluate some of the pro bono policies that are currently in place at various Canadian law firms.

## **II. The Origins of Pro Bono Service**

### **A. Historical Analysis**

*Pro bono publico* is a phrase derived from Latin meaning "for the public good and for the welfare of the whole."<sup>2</sup> The phrase pro bono is used to describe legal and other professional work that is undertaken voluntarily and without payment, as a public service.

Pro bono service can be traced to practices in the early Roman tribunals, medieval ecclesiastical courts, and to Scottish and English legal proceedings.<sup>3</sup> Under the Roman system,

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<sup>1</sup> Justice J.C. Major, "Lawyers' Obligation to Provide Legal Services" (1995) 33 Alta. L. Rev. 719 at 723 [Major].

<sup>2</sup> *Black's Law Dictionary*, 4<sup>th</sup> ed., s.v. "pro bono publico".

<sup>3</sup> Deborah L. Rhode, *Pro Bono in Principle and in Practice* (California: Stanford University Press, 2005) at 4 [Rhode, *Pro Bono*].

the heads of patrician families represented their dependents free of charge. In medieval ecclesiastical courts, clerical advocates could be appointed to serve the poor.<sup>4</sup>

During the thirteenth and fourteenth century in England and Scotland, serjeants, the highest order of legal counsel, could be ordered to represent indigent litigants and could be denied the right of practice if this request was refused.<sup>5</sup> The power of the court to appoint counsel was most commonly exercised in the context of criminal proceedings through a ritual known as dock briefs. Under this custom, an indigent defendant who paid a token fee could have the court appoint legal counsel.<sup>6</sup> In the fifteenth century, English and Scottish law required lawyers to represent the poor.<sup>7</sup>

#### **B. Does History Support a Duty to Provide Pro Bono Service?**

Some commentators vehemently deny the view that history supports a pro bono obligation. They argue, for example, that modern pro bono work is not analogous to the free legal services that were provided by patricians in medieval Rome. Rome had a general indifference towards the plight of the poor and only provided free legal service to dependents in their households.<sup>8</sup>

According to David Shapiro of Harvard University, although indigent litigants in fifteenth century England were provided access to the legal system based on a contingency fee system, litigants who lost their cases were often whipped. Shapiro suggests that such practices seem inconsistent with the view that gratuitous legal service was an accepted norm in the legal profession.<sup>9</sup>

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Zino I. Macaluso, "That's O.K., This One's on Me: A Discussion of the Responsibilities and Duties Owed by the Profession to do Pro Bono Publico Work" (1992) 26 U.B.C. L. Rev. 65 at para. 10 [Macaluso].

On the other hand, it is also argued that service of the public good is a premise upon which the legal profession was founded.<sup>10</sup> In the twelfth century, bishops were required to assist indigents with their legal burdens. This duty was based on scripture, which required Christians to alleviate the discomfort and exploitation of the poor.<sup>11</sup> It is argued that this duty was passed onto lawyers in the thirteenth century when legislators began to restrict the reach of the ecclesiastical courts, forcing the poor to turn to municipal courts and to lawyers for aid.<sup>12</sup> Under this view, the duty to provide legal service was inherited from the clergy at the inception of the legal profession.<sup>13</sup>

### **C. The Current Rationale for Pro Bono Responsibilities in the Legal Profession**

Why should the profession do pro bono? A common starting point for many is the sense of core values in the profession. In many countries, including Canada, lawyers understand that they belong to a highly esteemed, self-regulating profession. With the privilege of membership comes an enormous responsibility to the public interest. There are huge unmet legal needs in every society, and lawyers' specialized skills allow them the unique opportunity to make profound and tangible differences in the lives of the disadvantaged.

In addition, pro bono can play a huge role in societies that profess a commitment to equal justice under the law. Lawyers are the handmaidens of democracy. They help individuals or corporations exercise the rights and responsibilities endowed by the state. By offering their services free of charge, lawyers ensure that the poor, the marginalized and the disadvantaged have the same opportunities to access justice as do those who can afford to pay for legal services. As such, pro bono is an ethical obligation of the profession. It is an obligation that is reflected in

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<sup>10</sup> Major, *supra* note 1 at 721.

<sup>11</sup> Macaluso, *supra* note 9 at para. 6.

<sup>12</sup> Major, *supra* note 1 at 719.

<sup>13</sup> Macaluso, *supra* note 9 at paras. 7-8.

the Model Rules of the American Bar Association and resolutions from the Canadian Bar Association, among others.

Beyond ethical obligations to do pro bono, another traditional impetus for the profession to embrace and support pro bono is its positive impact on the public's perception of the profession. In recent years the profession – particularly among the larger firms – has evolved into what some half-jokingly refer to as “a lean, mean billing machine.” Firms have large staffs, sophisticated technologies and management structures as well as advanced billing and accounting strategies all designed to maximize profitability. As Stephen Hanlon of Holland and Knight once put it: “[t]he modern law firm is perhaps the most capitalist of all enterprises in our modern American economy.”

Moreover, legal fees and costs have risen to levels that effectively make representation inaccessible to the working poor and middle class. Alongside lawyers are paralegals, whose regulation requires a balance to be struck, in the public interest, between the impetus to protect monopolies and the need to maintain high-quality standards.

Not surprisingly, lawyers have become concerned, some might even say obsessed, about their performance in the court of public opinion. By doing pro bono work, lawyers, law firms and law associations – like their business clients - can demonstrate that they are socially involved and are giving back to the community; and that they are driven by more than the bottom line. Their work on behalf of individuals can go a long way to improve their clients' perceptions about the profession and the legal system. Pro bono can improve the profiles of large firm and sole practitioner alike, and serve as a marketing tool in attracting like-minded clients.

Further justification for pro bono service is rooted in the other benefits that such service provides to individual lawyers, legal employers and the legal profession. Pro bono service can:

(1) provide young lawyers with training, contacts and experience; (2) help lawyers develop new areas of expertise and demonstrate marketable skills; (3) provide lawyers with a sense of personal satisfaction by allowing them to contribute to the social good; (4) attract young lawyers and law students to employers that perform pro bono work; and (5) provide benefits to legal employers in the form of job retention and job performance.<sup>14</sup>

### **III. Is Pro Bono a Professional Responsibility in Canada?**

#### **A. The Rules of Professional Conduct**

##### **a) How is the Pro Bono Ethic Expressed in the Rules of Professional Conduct?**

The codes of conduct in each province (hereinafter the Rules of Professional Conduct, the "RPCs") say very little about pro bono service and fail to provide clear guidance with respect to what type of professional responsibility, if any, a lawyer may have to perform pro bono work. However, the pro bono ethic is apparent in at least four areas.<sup>15</sup>

##### **i) The Canons of Legal Ethics**

The Canons of Legal Ethics set out the duty a lawyer has to the state, to the courts and tribunals, to the client and to other lawyers. Under her duty to the state, "[a] lawyer should accept without hesitation, and if need be without fee or reward, the cause of any person assigned

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<sup>14</sup> Rhode, *Pro Bono*, *supra* note 3 at 29-31.

<sup>15</sup> The following RPC's were reviewed: The Law Society of Alberta, *Code of Professional Conduct* [AB, Code]; The Law Society of British Columbia, *Professional Conduct Handbook* [BC, Code]; The Law Society of Manitoba, *Code of Professional Conduct* [MB, Code]; The Law Society of New Brunswick, *Code of Professional Conduct* [NB, Code]; The Law Society of Newfoundland and Labrador, *Code of Professional Conduct* [NL, Code]; Nova Scotia Barrister Society, *Legal Ethics Handbook* [NS, Code]; The Law Society of Upper Canada, *Rules of Professional Conduct* [ON, Code]; The Law Society of Prince Edward Island, *Code of Professional Conduct* [PE, Code]; *Code of Ethics of Advocates*, R.Q. c. B.1, r.1 [QC, Code]; The Law Society of Saskatchewan, *Code of Professional Conduct* [SK, Code]; The Law Society of Yukon, *Code of Professional Conduct* [YT, Code].

to the lawyer by the court.”<sup>16</sup> Under his duty to the client “the client’s ability to pay ...may require a reduction or waiver of [the lawyer’s] fee.”<sup>17</sup>

## ii) Fees

Under the subject of fees, it is written that:

It is in keeping with the best traditions of the legal profession to reduce or waive a fee or arrange with a client for delayed payment of a fee in cases of hardship or impecuniosity or where a client or prospective client would otherwise effectively be deprived of legal advice or representation.<sup>18</sup>

## iii) Advertising, Solicitation and Making Legal Services Available

Under the subject of advertising, solicitation and making legal services available, it is written that:

Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession.<sup>19</sup>

The Commentary accompanying this Rule provides that in making legal services available, the lawyer may participate in legal aid plans and referral services.<sup>20</sup> The Commentary also establishes that a lawyer has a right to decline a retainer but that “...it is a right the lawyer should

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<sup>16</sup> BC, *Code, ibid.* at Chapter 1, Rule 1(3). See also MB, *Code, ibid.* at Appendix, Rule 1(3).

<sup>17</sup> BC, *Code, ibid.* at Chapter 1, Rule 3(9). MB, *Code, ibid.* at Appendix, Rule 3(9). In addition, “A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.” BC, *Code, ibid.* Chapter 1, Rule 3(10). See also MB, *Code, ibid.* Appendix, Rule 3(10).

<sup>18</sup> NS, *Code, supra* note 15 at Rule 12.2. See also AB, *Code, supra* note 15 at Chapter 13, Commentary G.2.; MB, *Code, ibid.* at Chapter 11, Rule 2, Commentary 2; NB, *Code, supra* note 15 at Chapter 9, Commentary 1; NL, *Code, supra* note 15 at Chapter XI, Commentary 2; ON, *Code, supra* note 15 at Rule 2.08(2), Commentary; PE, *Code, supra* note 15 at Chapter XI, Commentary 2; SK, *Code, supra* note 15 at Chapter XI, Commentary 2.

<sup>19</sup> MB, *Code, ibid.* at Chapter 14. See also NB, *Code, ibid.* at Chapter 16; NL, *Code, ibid.* at Chapter XIV; NS, *Code, ibid.* at Rule 15; ON, *Code, ibid.* at Rule 3.01; PE, *Code, ibid.* at Chapter XIV; SK, *Code, ibid.* at Chapter XIV.

<sup>20</sup> MB, *Code, ibid.* at Chapter 14, Commentary 5. See also NL, *Code, ibid.* at Chapter XIV, Commentary 5; NS, *Code, ibid.* at Rule 15, Commentary 15.3; ON, *Code, ibid.* at Rule 3.01, Commentary; PE, *Code, ibid.* at Chapter XIV, Commentary 5; SK, *Code, ibid.* at Chapter XIV, Commentary 4.

be slow to exercise if the probable result would be to make it very difficult for a person to obtain legal advice or representation.<sup>21</sup>

#### **iv) Responsibility to the Profession**

Under the subject of responsibility to the profession, it is written that, “[t]he lawyer shall uphold the integrity of the legal profession and shall endeavour to participate in its activities.”<sup>22</sup>

The Commentary accompanying this Rule establishes that “the lawyer shall endeavour to participate in activities such as ... legal aid programmes [and] community legal service.”<sup>23</sup>

#### **b) The Alberta Code of Professional Conduct**

The clearest guidance with respect to the profession's obligation to provide pro bono service is found in the Alberta *Code of Professional Conduct*.<sup>24</sup> According to the Alberta Code, “[l]awyers have...an obligation...to act on a pro bono basis in appropriate cases.”<sup>25</sup> The Alberta Code also provides that, “[a] lawyer should support and contribute to the profession’s efforts to make legal services available to all who require them, regardless of their ability to pay.”<sup>26</sup> The accompanying Commentary provides that:

The right of every person to legal counsel creates a corresponding obligation on the part of society and the profession to supply legal representation. Such representation must be available in fact, and not merely in theory, or the right is meaningless. Members of society with the most pressing needs for legal services often encounter difficulty in obtaining representation because of economic or social disadvantages. Lawyers should be willing to

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<sup>21</sup> MB, *Code, ibid.* at Chapter 14, Commentary 6. See also AB, *Code, supra* note 15 at Chapter 1, Commentary C.4; NL, *Code, ibid.* at Chapter XIV, Commentary 6; NS, *Code, ibid.* at Rule 15, Commentary 15.4; ON, *Code, ibid.* at Rule 3.01, Commentary; PE, *Code, ibid.* at Chapter XIV, Commentary 6; SK, *Code, ibid.* at Chapter XIV, Commentary 5.

<sup>22</sup> NB, *Code, supra* note 15 at Chapter 19. See also MB, *Code, ibid.* at Chapter 15; NL, *Code, ibid.* at Chapter XV; NS, *Code, ibid.* at Rule 18; PE, *Code, ibid.* at Chapter XV; SK, *Code, ibid.* at Chapter XV.

<sup>23</sup> NB, *Code, ibid.* at Chapter 19, Commentary 3. See also MB, *Code, ibid.* at Chapter 15, Commentary 6; NL, *Code, ibid.* at Chapter XV, Commentary 4; NS, *Code, ibid.* at Rule 18, Commentary 18.6; PE, *Code, ibid.* at Chapter XV, Commentary 4; SK, *Code, ibid.* at Chapter XV, Commentary 5.

<sup>24</sup> AB, *Code, supra* note 15.

<sup>25</sup> *Ibid.* at Chapter 1, Commentary G.1.

<sup>26</sup> *Ibid.* at Chapter 1, Rule 4.

assist such persons through participating in legal aid programs, accommodating requests by the court to represent parties appearing before the court, and reducing or waiving fees in appropriate circumstances.<sup>27</sup>

**c) Do the Rules of Professional Conduct Support a Professional Responsibility to Provide Pro Bono Service?**

In varying degrees the RPCs establish the following: (1) lawyers should reduce or waive fees for impecunious clients; (2) lawyers should participate in legal aid plans, referral services and community legal service; (3) lawyers should be slow to decline a retainer if the probable result would be to make it very difficult for a person to obtain legal advice or representation; and (4) lawyers have a duty to act on a pro bono basis in appropriate cases.

Arguably, the RPCs ultimately support a professional responsibility to provide pro bono service. However, the scope and content of this duty is not clearly defined, and this leaves the legal profession with very little guidance.

**B. The Canadian Bar Association's Resolution on Pro Bono**

In 2003, the CBA established a Pro Bono Committee. The Committee's mandate is "to promote and facilitate pro bono service in the legal profession on an ongoing basis."<sup>28</sup> The Committee's Founding Resolution (the "CBA Resolution") called "for each member of the legal profession to strive to contribute 50 hours or 3% of billings per year on a pro bono basis."<sup>29</sup>

Although the CBA Resolution is a step in the right direction, its effect on the legal profession is unclear. First, since the CBA does not regulate the legal profession, the CBA Resolution is not binding upon it. Second, it is important to note that the CBA Resolution is in

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<sup>27</sup> *Ibid.* at Chapter 1, Commentary C.4.

<sup>28</sup> *Pro Bono Committee*, Canadian Bar Association, online: Canadian Bar Association <<http://www.cba.org/cba/groups/probono/committee.aspx>> [CBA, *Resolution*].

<sup>29</sup> *Pro Bono Working Group Report*, Canadian Bar Association, online: Canadian Bar Association <<http://www.cba.org/cba/resolutions/2003res/03-04-M.aspx>>.

fact only a resolution and has not been incorporated into the CBA's own *Code of Professional Conduct*.<sup>30</sup> One therefore has to wonder what effect the CBA Resolution was intended to have on the ethical obligations of the profession.<sup>31</sup> Third, the CBA Resolution calls on the profession to only “strive” to contribute 50 hours or 3% of billings per year on a pro bono basis. The CBA Resolution does not require the profession to perform pro bono work, nor does it unequivocally mandate a professional obligation to do so. Rather, pro bono is something the profession should simply try to do.

### C. The American Bar Association and Model Rule 6.1

The American Bar Association (the "ABA") has developed *Model Rules of Professional Conduct*<sup>32</sup> (the “ABA Model Rules”). Rule 6.1 of the ABA Model Rules provides that:

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.<sup>33</sup>  
[emphasis added]

Various states have adopted ABA Model Rule 6.1 into their codes of conduct, specifying an annual goal of 50 or more hours of pro bono service per year.<sup>34</sup> Other states have adopted variations of ABA Model Rule 6.1.<sup>35</sup>

The language of ABA Model Rule 6.1 was adopted by the Benchers of the Law Society of Saskatchewan in March of this year. The Law Society of Saskatchewan hopes that other law

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<sup>30</sup> Canadian Bar Association, *Code of Professional Conduct* [CBA, *Code*]. The CBA *Code* is essentially identical to the Canadian RPCs discussed in the previous section. Therefore, it will not be discussed.

<sup>31</sup> In other words, if the CBA is suggesting that pro bono is a professional responsibility, it would seem appropriate, if not necessary to incorporate this Resolution into their *Code*.

<sup>32</sup> American Bar Association, *Model Rules of Professional Conduct* [ABA, *Model Rules*].

<sup>33</sup> *Ibid.* at Rule 6.1.

<sup>34</sup> For example, Alabama, Arkansas, Iowa and Minnesota have all adopted ABA Model Rule 6.1 into their professional codes of conduct. See Alabama, *Rules of Professional Conduct* at Rule 6.1; Arkansas, *Model Rules of Professional Conduct* at Rule 6.1; Iowa, *Rules of Professional Conduct* at Rule 32: 6.1; Minnesota, *Rules of Professional Conduct* at Rule 6.1.

<sup>35</sup> For example, Arizona, Hawaii and Massachusetts have adopted a rule that states pro bono is as aspirational goal (rather than a professional responsibility as indicated in ABA Model Rule 6.1). See Arizona, *Rules of Professional Conduct* at Rule 6.1; Hawaii, *Rules of Professional Conduct* at Rule 6.1; Massachusetts, *Rules of Professional Conduct* at Rule 6.1.

societies across Canada will support similar language and lobby for the inclusion of such language in the model code of conduct being developed by the Federation of Law Societies of Canada.<sup>36</sup>

#### **D. Pro Bono Students Canada**

Pro Bono Students of Canada ("PBSC") was established at the University of Toronto in the 1996. The goal of PBSC is to

engage law students from early on in the noble pro bono tradition in our profession, with an eye to ensuring that each new generation of lawyers enters the profession already schooled in and committed to pro bono philosophy and practice.<sup>37</sup>

The program matches students and lawyers with public interest and community organizations that are ineligible for legal aid but in need of legal and law-related services.

Today, the program is found in 21 law faculties across Canada. Students who participate in the program conduct legal research and drafting, provide public legal education, advocate on behalf of communities in need, research legislation, legal issues and policy questions, draft policies and manuals and help organizations provide legal information and assistance to their clients. Each of these projects and tasks is overseen by a lawyer.<sup>38</sup>

PBSC not only increases access to justice but introduces law students to pro bono service in the early stages of their legal education. This undoubtedly strengthens the pro bono ethic. This year, Osgoode Hall Law School has introduced a new public interest service requirement which requires law students to perform service for the public good as a condition of their graduation. Osgoode is the first Canadian law school to adopt such a requirement.

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<sup>36</sup> The Federation of Law Societies of Canada has been working towards developing a model code of conduct. While the model code is not intended to apply to individual law societies it is hoped that it will form the basis for harmonizing codes of conduct in the future. The model code of conduct has been distributed to law societies for review.

<sup>37</sup> *History and Overview*, Pro Bono Students Canada – PBSC, online: <<http://www.osgoode.yorku.ca/pbsc/history.htm>>.

<sup>38</sup> *Ibid.*

## E. A Mandatory Pro Bono Requirement?

It has been argued that the obstacles to advancement in the current pro bono regime are insurmountable.<sup>39</sup> Therefore, a mandatory pro bono requirement is needed to ensure that lawyers offer pro bono service.<sup>40</sup> Many have suggested that a system of sanctions and disciplinary measures could force lawyers to perform pro bono work.<sup>41</sup>

There is strong opposition to a mandatory pro bono requirement. Many have argued that, “requiring pro bono work would undermine its moral significance and compromise altruistic commitments.”<sup>42</sup> According to David Shapiro of Harvard University

to turn an aspiration of public service into an enforceable obligation, then, would be to deprive the profession of an element of choice that may be important to self-fulfillment. Compelled altruism is not much of a virtue.<sup>43</sup>

In the United States, constitutional arguments have been raised against a mandatory pro bono requirement. It has been argued that a mandatory requirement would be a form of “involuntary servitude” and a violation of freedom of speech and association.<sup>44</sup> However, according to Deborah Rhode, of Stanford University, requiring a lawyer to commit one hour per week to pro bono service would hardly amount to involuntary servitude. Moreover, according to Rhode, a mandatory pro bono requirement would not seriously threaten a lawyer’s freedom of

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<sup>39</sup> Macaluso, *supra* note 9 at para. 34.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at para. 37. However, many have noted the problems that exist with enforcing a mandatory scheme. How would a mandatory requirement be enforced? Would the cost of enforcement outweigh the benefits of the mandatory scheme? See Rhode, *Pro Bono*, *supra* note 3 at 38.

<sup>42</sup> Rhode, *Pro Bono*, *ibid.* at 37.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* at 38.

speech and association, given the range of activities and choices that a lawyer would have to fulfill this requirement.<sup>45</sup>

Practical objections have also been raised against a mandatory pro bono requirement. For example, some lawyers may be unable to provide adequate service to low income clients because these lawyers lack expertise in serving the interests of the poor.<sup>46</sup> It has been suggested that this concern could be addressed by allowing lawyers to satisfy their obligations collectively through contributions from their most qualified colleagues.<sup>47</sup> Many have also pointed out that although lawyers may not be fully trained and qualified to serve the interests of their low income clients, current alternatives are scarcely preferable.<sup>48</sup>

#### **IV. Pro Bono Policies at Law Firms**

One relatively new development on the Canadian legal landscape is the implementation of pro bono policies at law firms. These policies are significant because they demonstrate an attempt to institutionalize pro bono service into firm culture.

##### **A. Law Firm Survey**

Seven prominent law firms were surveyed with respect to the pro bono initiatives and policies that were currently underway at their offices.<sup>49</sup> The following is a summary of the data collected from these firms.

##### **a) A Formal Policy on Pro Bono?**

Of the seven law firms surveyed, six had a formal written policy on pro bono, while one firm did not.

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* at 40.

<sup>47</sup> *Ibid.* at 42. For example, three of the most qualified lawyers at a firm could satisfy the yearly pro bono contributions for the entire law firm.

<sup>48</sup> That is, if it is assumed that a lawyer may be incompetent to help the poor, after three years of law school, and years of practice, then it can be assumed that the poor are even far less competent to help themselves. *Ibid.*

<sup>49</sup> A representative from each firm was contacted and interviewed over the telephone. Each representative was asked a standard set of questions concerning the pro bono policies in place at his or her firm.

## **b) What Constitutes Pro Bono Legal Work?**

Of the six law firms that had a written policy on pro bono, five had a formal definition of pro bono service. These definitions varied. However, most definitions closely resembled the definition expressed by PBLO.<sup>50</sup>

## **c) A Pro Bono Committee?**

Of the firms included in the study, four had established pro bono committees<sup>51</sup> while three had not. Regardless of whether formal committees were established, each of the firms had some administrative body that was responsible for screening and approving pro bono projects.<sup>52</sup>

## **d) How is Pro Bono Work Assigned?**

Generally, each of the firms that were surveyed indicated that it did not assign pro bono work to its lawyers. Rather, at most of these firms, individual lawyers brought pro bono projects to the firm and sought approval for these projects.<sup>53</sup> The firms surveyed also indicated that they did not put much effort into recruiting and staffing pro bono.<sup>54</sup>

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<sup>50</sup> PBLO defines pro bono as, “The provision of legal services [without a fee being charged] to low income and disadvantaged individuals, or to clients whose case raises a wider issue of public interest affecting such individuals...The term also includes legal services provided to charitable organizations working for disadvantaged groups for the public good.” Pro bono legal services do not include non-legal volunteer activities or sitting as a director of a non-profit organization. *Best Practices Manual*, Pro Bono Law Ontario, online: Pro Bono Law Ontario <<http://www.pblo.org.lawyers/for-project-coordinators.cfm>> [PBLO, *Best Practices*].

<sup>51</sup> Pro Bono Committees are often created to establish and monitor procedures for obtaining and screening pro bono work, distributing assignments and monitoring the quality of work. See Melanie Kushnir, “How to Create an Effective Law Firm Pro Bono Program” *NALP Bulletin* (February 2007), online: The National Association for Legal Career Professionals <<http://www.nalp.org/archives/index.php>> [Kushnir].

<sup>52</sup> For example, one of the firms without a pro bono committee handled pro bono service through its Professional Development department. Another firm that was without a pro bono committee handled pro bono projects through the Management Committee.

<sup>53</sup> In other words, at most firms, individual lawyers are contacted by organizations or persons seeking pro bono services. These lawyers then go to their Pro Bono Committee or whatever administrative body screens pro bono work and seek approval for their projects.

<sup>54</sup> However, some firms indicated that on occasion work will come to the attention of its Pro Bono Committee. In such cases, pro bono opportunities will be posted internally in order to recruit volunteers.

**e) How is Pro Bono Work Treated in the Firm?**

Five of the firms provided billable hour credit for pro bono work performed by their lawyers. Most of these firms placed a formal cap on the number of pro bono hours that could be counted towards billable hours. This cap ranged from 50 to 60 hours per year.

Two firms did not provide billable hour credit for pro bono work. One of these firms indicated that hours docketed for pro bono work were taken into account at the end of the year if a lawyer failed to meet his or her billable quota. The other firm indicated that time spent on pro bono was given serious consideration when assessing a lawyer's compensation and bonus.

Of the seven firms surveyed, two had set annual goals for pro bono service.<sup>55</sup> One firm set an annual goal of 60 hours of pro bono service for every lawyer. The other set an annual goal of 50 hours of pro bono service for every lawyer.

**f) How are Pro Bono Contributions Recognized?**

Of the seven firms surveyed, two firms indicated that they attempted to recognize pro bono contributions made by their lawyers through awards and other forms of recognition. One of these firms indicated that it made internal announcements, which were intended to put employees at the firm on notice when a lawyer made a significant pro bono contribution. The other firm indicated that it provided its lawyers with pro bono awards at the end of the year, such as plaques and small gifts.

Many of the firms that did not formally recognize the pro bono contributions of their lawyers indicated that recognition came in the form of respect from both the firm and the community. Many of these firms also pointed out that their lawyers received pro bono awards from outside the firm.

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<sup>55</sup> Five firms had not established annual goals regarding pro bono service. One of these firms indicated that annual goals were not required to motivate lawyers to participate in pro bono projects because a long history of pro bono service had institutionalized pro bono into their firm culture.

## **B. Can the Pro Bono Policies Surveyed be Improved?**

Law firms that do not have a written pro bono policy should work towards drafting a written policy. Of the seven firms surveyed, one firm did not have a written policy on pro bono. This firm openly admitted to an unstructured system of pro bono service and appeared to lack a clear understanding of what constituted pro bono work.<sup>56</sup>

Many lawyers do not have time to do pro bono work because they must meet billable hour quotas. Providing billable hour credit encourages and promotes participation in pro bono service by ameliorating this institutional constraint. Five of the firms surveyed provided billable hour credit for pro bono work performed by their lawyers.

The firms that did not provide billable hour credit for pro bono work offered alternatives. For example, one of the firms surveyed indicated that hours docketed for pro bono work were taken into account at the end of the year if a lawyer failed to meet his billable quota. Another firm indicated that time spent on pro bono matters was given serious consideration when assessing a lawyer's compensation and bonus. Although these initiatives are helpful, billable hour credit is arguably a better method of increasing pro bono contributions. By providing billable hour credit a lawyer is guaranteed that her contributions will be recognized. This provides a clear incentive to take on pro bono work.

The CBA recommends that a pro bono policy identify potential recipients of pro bono services, set out the process for taking a pro bono case, describe how pro bono cases will be managed in the firm's administrative systems, explain how the firm will measure a lawyer's pro

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<sup>56</sup> For example, when asked about the extent of their pro bono service, the firm mentioned community involvement, food drives and other charitable projects that it had participated in. Charitable work should not be considered pro bono service. See PBLO, *Best Practices*, *supra* note 50.

bono contribution, and define links to pro bono organizations and community organizations.<sup>57</sup> PBLO makes similar recommendations.<sup>58</sup> The pro bono policies that were surveyed had most of these recommended elements. However, there were some common deficiencies.

Most policies lacked instruction on how firms would link themselves to pro bono organizations and community groups.<sup>59</sup> Similarly, most policies lacked any sort of description of how pro bono projects would be staffed. In fact, most firms that were surveyed indicated that pro bono work was brought into the firm by individual lawyers. If firms linked themselves to community and pro bono organizations and established procedures for recruiting pro bono volunteers, it is likely that pro bono efforts would increase.<sup>60</sup>

Moreover, most policies failed to establish any type of framework or scheme to recognize the contributions of their lawyers. Many firms indicated that internal awards and other forms of recognition were not necessary in order to promote pro bono participation in the firm. Although recognition may not be necessary in some firms, implementing a system that acknowledges pro bono efforts would likely encourage more participation.<sup>61</sup>

Two of the firms surveyed set annual goals that matched or surpassed the 50 hour goal set by the CBA regarding the number of hours to be contributed through firm pro bono programs.<sup>62</sup> Other law firms should aim at similar aspirational targets.<sup>63</sup>

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<sup>57</sup> *The ABCs of Creating a Pro Bono Policy for Your Law Firm*, Canadian Bar Association, online: Canadian Bar Association <<http://www.cba.org/cba/PracticeLink/CS/probonopolicy.aspx>> [CBA, *ABCs of Pro Bono*].

<sup>58</sup> See PBLO, *Best Practices*, *supra* note 50.

<sup>59</sup> The CBA recommends the following as a sample clause, "Lawyers are welcome to bring pro bono clients to the firm. We will also, as a firm, seek out and maintain connections with appropriate organizations in the community, explaining our pro bono policy and inviting a limited number of requests for pro bono service." CBA, *ABCs of Pro Bono*, *supra* note 57.

<sup>60</sup> That is, if a firm establishes links to community and pro bono organizations they will be presented with more pro bono projects. If a firm develops better mechanisms for recruiting volunteers there is an increased chance that these pro bono projects will be staffed.

<sup>61</sup> Some ideas for recognition include: an honour roll of all lawyers who contribute a certain number of hours; articles about the program participants and firm success; award nominations; and special reception, luncheon or dinners recognizing outstanding pro bono service. Kushnir, *supra* note 51.

<sup>62</sup> One firm set an annual goal of 60 hours. The other firm set an annual goal of 50 hours.

## V. Conclusions

Academics disagree with respect to whether a pro bono duty is historically founded. Perhaps this uncertainty has affected the profession's ability to foster a pro bono ethic. Those who deny or disregard their pro bono obligations today are likely the same individuals who deny or question the historical foundation of this duty.

Regardless of one's view of history, the provision of pro bono service can be justified today. Many Canadians are currently being denied access to the legal system. If access to justice is an interest society should promote, then it is reasonable to suggest the legal profession should contribute to this goal. Altruistic considerations aside, pro bono service is something that can benefit lawyers, employers and the legal profession.

It is not surprising that legal clinics in Canada are having difficulty recruiting lawyers in private practice to provide free legal services.<sup>64</sup> Lawyers are offered little guidance with respect to the nature and extent of their pro bono obligation. While the RPCs ultimately support a professional responsibility to provide pro bono service, the scope and content of this duty is not clearly defined. Further, while the CBA Resolution provides some guidance to the profession, the Resolution is not binding upon lawyers and even if it were, it would require lawyers to only "strive" to do pro bono work.

At the very minimum, there are a few steps the legal profession can take to strengthen the pro bono ethic in Canada. First, the CBA Resolution can be implemented into the CBA Code and into the RPCs, and similar language can be implemented into the model code being

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<sup>63</sup> PBLO recommends developing a firm's pro bono program in phases and advises that a firm set aspirational goals or targets after the program has operated for five years. See PBLO, *Best Practices*, *supra* note 50.

<sup>64</sup> Geoff Kirbyson, "Recruiting for pro bono: Why is it such a challenge?" *The Lawyers Weekly* 26:12 (21 July 2006).

developed by the Federation of Canadian Law Societies.<sup>65</sup> Entrenching the CBA Resolution would codify pro bono as a professional obligation and establish a standard to which lawyers could aspire. Second, the CBA Code and the RPCs can be improved in order to facilitate pro bono service. This would be accomplished by providing lawyers with instruction on what constitutes pro bono service and how such service can be provided.<sup>66</sup>

The pro bono policies surveyed are moving in the right direction. However, there are three key areas that can be improved. First, these policies should establish links to pro bono and community organizations and establish procedures for assigning pro bono work. Second, firms should put more effort into recognizing the contributions and achievements of their volunteers. Third, firms should work towards establishing annual goals that match or surpass the 50 hour goal established by the CBA.

There has been considerable debate on whether a mandatory pro bono requirement should be established. The argument for a mandatory requirement is premised on the idea that problems currently facing the pro bono regime are insurmountable. I do not believe that this is the case. There are other measures that the legal profession can take to overcome the deficiencies affecting the pro bono ethic: codify a pro bono obligation into Canadian RPCs; implement pro bono policies at all Canadian law firms; improve existing policies; and support pro bono initiatives in law schools.

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<sup>65</sup> Various states in the U.S. have adopted ABA Model Rule 6.1 into their professional codes. *Supra* note 34.

<sup>66</sup> For example, the Commentary accompanying ABA Model Rule 6.1 defines pro bono service to include, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The Commentary also makes it clear that, "Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning [of pro bono service]." See ABA, *Model Rules*, *supra* note 32 at Rule 6.1.