

Closing the Justice Gap: Mandatory Pro Bono as a Progressive Initiative

ANTHONY JESSEL, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, CLASS OF 2023¹

Happiness Nyirenda was due before an Allegheny County Magisterial District Judge for a Recovery of Real Property hearing.² She had been less than two months behind on rent, but her landlord filed eviction proceedings against her despite the then-active federal and local pandemic eviction moratoriums.³ Having used up her paid time off to recover from a month of illness with COVID-19, Nyirenda took an unpaid day to appear for the hearing – only to find out it had been postponed.⁴ In addition to back rent, Nyirenda was charged \$265 by her landlord for “attorney’s fees”. She was herself unrepresented by counsel for all the proceedings against her, as she acknowledged is often the case for indigent civil defendants: “We can’t afford an attorney, let alone we can’t afford our rent.”⁵

As the pandemic era eviction moratoriums were lifted, the need for civil legal aid increased, and in some cases, existing structures were left unable to keep up with demand. An Allegheny County landlord-tenant hotline, staffed by a rotating group of volunteer attorneys, struggled to answer the phone. “Since the pandemic and really since the end of [Emergency Rental Assistance] funding, we have seen an explosion in calls,” said Antoinette Oliver of law firm Meyer, Unkovic and Scott. “Where we would get 10 or 15 calls a week, we have over 50 calls a week.”⁶ These

¹ The author is a third-year law student at the University of Pittsburgh. After his graduation and (knock on wood) Pennsylvania law licensure, he will be employed at the Allegheny County Office of the Public Defender.

² Lord, Giammarise, & Manning, *Tenant Cities: One day in Allegheny County’s eviction hotspot*, PUBLICSOURCE, March 11, 2021 <https://www.publicsource.org/tenant-cities-one-day-in-allegheny-countys-eviction-hotspot/>

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Kate Giammarise, *'An explosion in calls': As evictions return, more volunteers needed for Landlord-Tenant Hotline*, WESA, October 10, 2022 <https://www.wesa.fm/courts-justice/2022-10-10/an-explosion-in-calls-as-evictions-return-more-volunteers-needed-for-landlord-tenant-hotline>

stories are only within the eviction and housing context, and the need for other civil legal services within Pennsylvania’s impoverished communities are similarly dire.

Hotlines and services like the one above are often the first line of legal aid for indigent Pennsylvanians facing legal issues, and that they would struggle to find volunteer attorneys is illustrative of a grim moral quandary facing the legal profession: lawyers in general have failed to live up to our ethical goals to serve our communities with pro bono advocacy. Pennsylvania can be a leader in progress towards the fulfilment of this ethical goal by requiring attorneys licensed in the Commonwealth to perform a certain number of qualified pro bono hours per year. If it opts to do so, it should proceed in implementation with tact, care, and an eye towards fairness.

I. Arguments For Mandatory Pro Bono

There is a staggering unmet need for free, accessible civil legal services in Pennsylvania and the country at large, and the justifications for a mandatory pro bono requirement are plentiful. According to the Legal Services Corporation’s (LSC) 2022 Justice Gap Report⁷, 74% of low-income households experienced at least one civil legal problem in the year preceding their report.⁸ Nearly 40% experienced at least five civil legal problems, and about half of survey responders experienced a legal problem described as “substantially impact[ing] their lives – with the consequences affecting their finances, mental health, physical health and safety, and relationships.”⁹ Lack of access to justice and equitable resolution to these problems exemplifies the pervasive gap in justice-related services and commands the need for mandatory pro-bono requirements.

⁷ Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, April 2022 <https://lsc-live.app.box.com/s/xl2v2uraitotbbzrhwtjlgj0emp3myz1>

⁸ *Id.* at 8.

⁹ *Id.*

Nearly half of survey responders cited concerns about cost as a reason why they did not seek legal help.¹⁰ Of those who did seek free legal counsel from one or more of LSC’s funded services in their area, 49% were turned away due to limited resources.¹¹ Perhaps the most shocking statistic of LSC’s comprehensive report is that LSC funded organizations were “unable to provide any or enough legal help” to a staggering 71% of the problems that were brought to them.¹² LSC and the legal aid programs it supports are chronically underfunded. Mandatory pro bono requirements would begin to close the justice gap by serving the legal needs of Pennsylvania’s poorest communities through increasing their access to justice. There is clearly an overwhelming demand, and it is past time to increase the supply of lawyers capable of meeting it. As a condition of state legal practice licensure, the initiative would occur outside of a system subject to the ever-increasing partisan tumult found in today’s federal politics and funding debates.

Lawyers have a self-created ethical obligation to pursue pro bono service under ABA model rule 6.1.¹³ The ABA model rule, mirrored by the Pennsylvania rule 6.1 of the same title¹⁴, prescribes 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 public legal services per year.”¹⁵ Both the ABA model rule and the existing Pennsylvania rule are permissive, and voluntary. In 1980, a discussion draft for rule 6.1 based on the 1977 Commission on Evaluation of Professional Standards (chaired by Robert Kutak), included the mandatory language “shall” in

¹⁰ *Id.*

¹¹ *Id.* at 9.

¹² *Id.*

¹³ MODEL RULES OF PROF'L CONDUCT R. 6.1.

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/

¹⁴ PA RULES OF PROF'L CONDUCT R. 6.1. <https://www.padisiplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct#rule-188>

¹⁵ ABA Model Rule 6.1, *supra* note 13.

place of the “should” seen above and in the existing rule.¹⁶ The proposal was met with “intense protest”¹⁷ and failed largely due to attorney opposition.¹⁸ Voluntary pro bono rules of professional conduct, while framed as ethical obligations, remain permissive and ill-positioned to meet the growing need for free legal services in all fifty states. Lawyers have failed to live up to their professional responsibility in this way. Some scholars have examined cross sections of state-specific data, formulating estimations that 15-18% of attorneys in most jurisdictions participate in pro bono work, with average case contributions ranging from 5-20 hours per year.¹⁹ Another study gathered directly from law firm data, estimating a national average of between 3-6 hours of pro bono work per attorney per year. The data collected suggested that “44% of attorneys in the nation’s largest law firms—who likely contribute a ‘sizeable’ share of total pro bono hours—performed even 20 hours per year.”²⁰

It is worth mentioning in the context of an ethical discussion on legal practice that state and national professional bar associations have in some ways exacerbated a key justification for mandatory pro bono service. Unauthorized practice of law restrictions, which legal professional organizations and state bars have vehemently protected²¹, create monopoly conditions whereby only licensed attorneys are statutorily permitted to represent clients, including the indigent, in various legal circumstances. These rules can protect attorneys and clients alike, but they also

¹⁶ TESTIMONY OF THE STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE, FEBRUARY 2000 - CENTER FOR PROFESSIONAL RESPONSIBILITY, February 10, 2000

https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/weiner/

¹⁷ *Id.*

¹⁸ Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 La. L. Rev. 547-595 (2017). *See also*: Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 29–33 (2004) (outlining history of mandatory pro bono proposals within the ABA); April Faith-Slaker, *What We Know and Need to Know About Pro Bono Service Delivery*, 67 S.C. L. REV. 267, 280–81 (2016) (same).

¹⁹ Sirota, *supra* note 18 at 570.

²⁰ *Id.* *see* note 119.

²¹ Sirota, *supra* note 18 at 572.

effectively limit the availability of representation for the indigent.²² As professor Deborah Rhode writes: “Because access to law so often requires access to lawyers, they bear a particular responsibility to help make legal services available. As courts and bar ethical codes have long noted, the state grants lawyers special monopoly privileges that impose special obligations for ‘fundamental fairness’ in the legal system.”²³ Lawyers and legal organizations have in this way, at least in part, created the conditions for need by monopolizing the remedy and obliging themselves to an ethical duty through rules of professional conduct. The sum of these parts suggests that mandatory pro bono requirements are necessary. While the causes of the justice gap are certainly not solely on the shoulders of lawyers, lawyers have created the conditions by which they are the only group able to help address its needs.

II. Arguments Against Mandatory Pro Bono

In 2016, at the annual meeting of the American Law Institute in Washington, D.C., Supreme Court Justice Sonia Sotomayor said “I believe in forced labor... If I had my way, I would make pro bono service a requirement.”²⁴ The soundbite provoked substantial criticism²⁵, invoking constitutional arguments against mandatory pro bono stemming from the Thirteenth Amendment’s prohibition on involuntary servitude²⁶, the First Amendment’s prohibition on forced association, and the Fifth Amendment’s prohibition on uncompensated takings.²⁷ Because no state has advanced a mandatory pro bono scheme to date, these constitutional arguments have yet to be

²² *Id.*

²³ *Id.* at 573; citing Deborah L. Rhode, *THE TROUBLE WITH LAWYERS* (2015) at 54.

²⁴ Tony Mauro, *Sotomayor Urges Mandatory Pro Bono for All Lawyers*, *THE NATIONAL LAW JOURNAL*, May 17, 2016.

²⁵ *See eg:* Tony Mauro, *Sotomayor Urges Mandatory Pro Bono for All Lawyers*, *THE NATIONAL LAW JOURNAL*, May 17, 2016; Ilya Somin, *Justice Sotomayor’s Misguided Advocacy of “Forced Labor” for Lawyers*, *WASH. POST* (May 20, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/20/justice-sotomayors-misguided-advocacyof-forced-labor-for-lawyers/?utm_term=.6c544914d86d; Ronald Rotunda, *Forcing Lawyers to Perform Pro Bono Services*, *VERDICT FOR JUSTIA*, July 2018.

²⁶ Somin, *supra* note 23.

²⁷ Sirota, *supra* note 18 at 574.

litigated. However, legal arguments in similar contexts have been generally rejected, including challenges to uncompensated court appointments and mandatory pro bono reporting.²⁸

Numerous courts have rejected the Thirteenth Amendment argument in similar contexts, opining that the constitutional freedom from involuntary servitude is not invoked because mandatory pro bono would not reach the level of restricting an attorney's physical liberty.²⁹ Disbarment or license revocation has not been enough to persuade courts towards supporting an argument based on the Thirteenth Amendment.³⁰

Most First Amendment arguments against mandating pro bono service rely on the right to be free from coerced association with causes, ideas, or groups which attorneys subject to the initiative may not support. Others argue that mandatory pro bono would create a value system that implicates First Amendment rights to freedom of speech.³¹ Pennsylvania could avoid these criticisms by providing a broad spectrum of qualifying pro bono opportunities. The First Amendment arguments largely assume that attorneys will be given no choice as to which pro bono causes they take or decline, which need not be the case. A First Amendment based cause of action could be avoided by allowing attorneys to reserve the right to choose which pro bono cases they will engage in. The initiative would need to be flexible enough that attorneys subject to it would

²⁸ *Id. see also: Family Div. Trial Lawyers of Superior Court, Inc. v. Moultrie*, 725 F.2d 695, 704–07 (D.C. Cir. 1984) (rejecting involuntary servitude and takings arguments, though noting that particularly burdensome appointments could be unconstitutional takings if they deprived attorneys of the ability to make a living); *Madden v. Twp. of Delran*, 601 A.2d 211, 215–16 (N.J. 1992) (rejecting takings argument against municipal court assignments system). The Eleventh Circuit rejected the plaintiffs' due process and equal protection arguments in a case challenging mandated pro bono reporting. See *Schwartz v. Kogan*, 132 F.3d 1387, 1392 (11th Cir. 1998).

²⁹ Tricia DeFilipps, *Attorneys' Ethical Responsibility to Provide Pro Bono Legal Services to Those in Need*, 33 *Buff. Pub. Int. L.J.* 1, 8 (2015); Philip P. Houle, *Is Mandatory Uncompensated Pro Bono in Civil Cases Constitutional?*, *NEV. LAW.*, (June 1995), at 20.

³⁰ *Id. see also: Kendra Emi Nitta, An Ethical Evaluation of Mandatory Pro Bono*, 29 *LoY. L.A. L. REV.* 909, 936 (1995).

³¹ See Houle, *supra* note 27 at 25; *Keller v. State Bar of Cal.*, 496 U.S. 1, 5-6 (1990).

not be forced to espouse any particular belief or expression, and therefore have no association or speech rights implicated.

Opponents argue that attorney services are property within the scope of the Fifth Amendment's prohibition on uncompensated takings (as applied to the states through the Fourteenth Amendment), and that mandatory pro bono would be akin to taking "a grocer's stock, an electrician's tools, or an individual's home."³² Similar to the other constitutional arguments, courts have been unwilling to support the Fifth Amendment argument, though there is no demonstrable consensus in this line of jurisprudence as to mandatory pro bono requirements.³³

Outside of constitutional concerns, some opponents argue that mandating pro bono would result in an inferior quality of representation from attorneys who would rather not work the case at all.³⁴ Attorneys may not dedicate the same time or quality to pro bono cases as their paid work, and pro bono clients may be less willing to pursue remedial action against incompetent counsel.³⁵ Attorneys subject to Pennsylvania's initiative would need to be reminded that professional competency is just as much a duty to pro bono clients as those paying. This oppositional argument seems to be abrogated by the hope that most attorneys would provide competent and zealous advocacy for their pro bono clients as prescribed by the rules of professional conduct in their jurisdiction. At the very least, attorneys would be motivated by the protection of their reputations and law licensure.³⁶

³² Nitta, *supra* note 28 at 921.

³³ Compare *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) ("[T]he lawyer has consented to, and assumed, this [pro bono] obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.'"), *cert. denied*, 382 U.S. 978 (1966) with *Roper*, 688 S.W.2d at 769 ("We will not permit the State to deprive a citizen of this constitutional right [to the enjoyment of the gains of their own industry] as a condition to granting a license or privilege.").

³⁴ Sirota, *supra* note 18 at 576.

³⁵ *Id.*

³⁶ *Id.*

Some further arguments suggest that mandatory pro bono requirements would simply be ineffective at addressing the justice gap.³⁷ However, there is a clear need amongst our most impoverished communities for free or reduced cost legal services. Increasing the number of available attorneys would only help. The ineffectiveness argument does not hold water as a criticism of mandatory pro bono, so much as it reinforces the need for an expansion of civil legal aid. In addition to mandating pro bono, Pennsylvania could dedicate more funds to existing legal aid services and support “low-bono” initiatives for clients who cannot afford market-rate attorneys but otherwise would not qualify for free legal aid due to income restrictions.³⁸ Mandatory pro bono should be considered one tool in the toolbox, but one that very much has the potential to address access to justice and legal equity concerns for Pennsylvania’s indigent population.

III. Conclusion

The justice gap embodies pervasive, systemic, and ever-growing access to justice problems in Pennsylvania and indeed the United States as a whole.³⁹ The need for free civil legal aid is enormous, and lawyers have an ethical obligation to meet that need. The legal industry has at least in part created the conditions for many of these problems, through monopolizing legal services without holding up the other end of the ethical duty. Lawyers should not continue to have it both ways. If Happiness Nyirenda had been able to acquire free or reduced cost legal representation, her chances at a favorable outcome would have increased dramatically. A 2021 study by The Pittsburgh Foundation found that in nearly all the landlord-tenant cases it studied, tenants, as well

³⁷ *Id.*; Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 152 (2010) (“[E]ven if every lawyer in the country did 100 more hours a year of pro bono work, this would amount to an extra thirty minutes per U.S. person a year, or about an hour per dispute-related (potentially litigation-related) problem per household.”)

³⁸ Sirota, *supra* note 18 at 577.

³⁹ LSC, *supra* note 7.

as landlords, were unrepresented.⁴⁰ The same study found that landlords won about 85% of their cases, and tenants won less than 2%, with the remainder being settled or withdrawn.⁴¹ Mandating pro bono service as a condition of legal practice licensure will only help to address injustice concerns for impoverished communities. Pennsylvania can and should make the implementation of such a progressive initiative a sincere priority: in the name of justice, equity, and fairness.

⁴⁰ The Pittsburgh Foundation, EVICTION IN ALLEGHENY COUNTY: A MIXED-METHODS STUDY, 2021 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://pittsburghfoundation.org/sites/default/files/Eviction%20in%20Allegheny%20County-a%20mixed%20methods%20study_0.pdf

⁴¹ *Id.*