

# Pro Bono as a Professional Responsibility: Moving Illinois' Indigent Out of the Preamble

by Jonathan J. Tofilon

In a recent American Bar Association survey, attorneys indicated that "Personal Fulfillment/Sense of Duty" was the single most motivating factor in providing pro bono work.<sup>1</sup> However, the single most discouraging factor was simply a "Lack of Time."<sup>2</sup> In other words, most lawyers' careers do not allow them the time to contribute their professional skills to support the principle of equal justice they find fulfillment in and feel responsibility for maintaining. Unfortunately, it is not merely personal satisfaction or the fulfillment of an altruistic duty which is at stake when lawyers are unable to pursue the principles in which they believe—the representation of the poor is also at stake. This author asserts that the goal of professionalism and the needs of the indigent can best be served by allowing attorneys the option to meet continuing legal education requirements through approved pro bono service.

Free legal representation for the indigent is mandated in criminal cases by the U.S. Constitution regardless of the seriousness of the consequences faced by defendants.<sup>3</sup> This constitutional protection, however, has never been extended to civil cases,<sup>4</sup> and courts have largely refused to exercise their limited discretion to appoint counsel for the indigent in civil matters.<sup>5</sup> This is true despite the fact that the potential consequences of many legal problems are as grave as the penalties for some criminal offenses.<sup>6</sup> Thus, a line has been drawn for those seeking access to the civil justice system who cannot afford meaningful representation, regardless of how artificial that line may prove to be in consequence,<sup>7</sup> and those finding themselves on the wrong side of that line will likely be dependent on the fortuity of members of the private bar donating their time.<sup>8</sup>

## The Illinois Conflict

According to the Illinois Equal Justice Act, the Illinois legislature believes maintaining the principle of equal justice to be of paramount importance, declaring that "[e]qual justice is an

integral part of the general welfare."<sup>9</sup> Likewise, the Illinois Supreme Court's Preamble to the Rules of Professional Conduct states:

Basic rights have little meaning without access to the judicial system which vindicates them. Effective access to that system often requires the assistance of counsel.

It is the responsibility of those licensed as officers of the court to use their training, experience and skills to provide services in the public interest for which compensation may not be available. It is the responsibility of those who manage law firms to create an environment that is hospitable to the rendering of a reasonable amount of uncompensated service by lawyers practicing in that firm.<sup>10</sup>

The court goes on to say that a lawyer's service in this area is evidence of his or her "character and fitness" and is essential to the bar's "maintenance of professionalism."<sup>11</sup> However, though this principle of equality before the law is held to be foundational to the general welfare by the Illinois legislature,<sup>12</sup> and critical to professionalism by the Illinois judiciary,<sup>13</sup> access to justice in Illinois is far from equal.

In 2005, the first comprehensive statewide study of the Illinois legal aid system since 1989 was issued.<sup>14</sup> According to the study, five out of every six legal problems faced by the indigent of Illinois were handled without any form of legal assistance.<sup>15</sup> Illinois legal aid intake and referral hotlines were able to merely respond to less than one-third of the calls they receive.<sup>16</sup> The number of cases handled by these Illinois legal aid providers in 2003 was 103,962.<sup>17</sup> Almost seventy percent of those cases fell into a "brief service" category, which includes legal advice and other limited assistance.<sup>18</sup> Only 11,506 of the cases handled by the Illinois legal

aid system were handled by the private bar, which consists of over 60,000 attorneys.<sup>19</sup>

The most common response to legal problems faced by the indigent in Illinois is simply to attempt to resolve their problems on their own, regardless of the complexity or seriousness of the issues, which often include evictions, domestic violence and child custody.<sup>20</sup> This response is not surprising considering the economic disparity between the indigent and the cost of one hour of legal assistance. According to a recent study by the Illinois Bar Association, the average hourly rate of family law services in Illinois is \$183.00.<sup>21</sup> When considering a family living on a gross income of \$27,200.00 (which is 150% of the federal poverty guidelines), 12 hours of legal work would consume an entire month of that family's income.<sup>22</sup>

## Illinois' Progress Toward a Competent Profession

The Illinois Supreme Court adopted Supreme Court Rule 756(f)<sup>23</sup> shortly after the results of the Illinois legal aid study.<sup>24</sup> This rule makes Illinois one of six states which mandate reporting of pro bono service hours.<sup>25</sup> The rule was adopted as a response to the findings of the Special Supreme Court Committee on *Pro Bono Publico* Legal Service formed by the Illinois Supreme Court in 2001.<sup>26</sup> Essentially, mandatory reporting in Illinois is an extra box to fill in while attorneys are completing their annual registration process with the Attorney Registration and Disciplinary Commission.<sup>27</sup> The committee comments state the purpose for the new rule:

Through this annual reminder, the primary intended goal is to increase the delivery of legal services directly to persons of limited means. . . . the vast unmet need calls out for increased direct legal services to persons of limited means and support of the organizational

infrastructure providing those legal services.<sup>28</sup>

Although this stated purpose of the new rule is to increase pro bono service to the poor by the private bar, it is still unclear how an annual reminder in the form of an extra field on a registration form translates into additional access to the courts for Illinois' indigent.<sup>29</sup> If pro bono service is not provided because attorneys do not have enough time,<sup>30</sup> nothing in the rule provides that time or adds any further motivation for law firms to make that time. Therefore, although the move to mandatory reporting appears to be a step toward increasing pro bono service, it is not helpful in addressing the attorney's dilemma.<sup>31</sup>

Although the Illinois Supreme Court claims that pro bono service by attorneys is essential to the bar's "maintenance of professionalism,"<sup>32</sup> mandatory reporting is as far as the court has exercised its oversight of the bar in this area of professionalism. Instead, the court has turned to the Minimum Continuing Legal Education ("MCLE") program it began in 2005.<sup>33</sup> Illinois is one of forty-three states to have instituted MCLE requirements<sup>34</sup> in hopes of raising their bars' professionalism.<sup>35</sup> In addition, the MCLE rules include extensive enforcement provisions,<sup>36</sup> accreditation standards and guidelines,<sup>37</sup> exemptions,<sup>38</sup> as well as creating an MCLE board to administer the program.<sup>39</sup> The Illinois Supreme Court simultaneously created the Illinois Commission on Professionalism<sup>40</sup> to oversee, among other things, the new MCLE initiative<sup>41</sup> and "ensure that [the Illinois legal and judicial] systems provide equitable, effective and efficient resolution of problems and disputes for the people of Illinois."<sup>42</sup>

To the dismay of any attorney who is crunched for time or money, the MCLE requirements are much more burdensome than the mandatory pro bono reporting requirement.<sup>43</sup> The MCLE program initially requires ten hours of an attorney's time per year, which is to be increased to fifteen hours per year in 2010.<sup>44</sup> Not only are these trainings mandatory, but the program is designed to be entirely self-sustaining by charging attorneys

to give their time.<sup>45</sup> In addition, all new attorneys are now required to take an additional fifteen hour basic skills course.<sup>46</sup> Such a wide-sweeping and costly endeavor in the name of professionalism raises serious questions about what type of effort by the bar would best be calculated to increase professionalism.

### Professional Competence vs. the Competence of the Profession

According to Webster's Dictionary, a "profession" is characterized by two distinct traits—a commitment to continuing study and the rendering of public service.<sup>47</sup> With the new MCLE program and mandatory reporting program, Illinois has shown its dedication to its stated goal of maintaining the professionalism of the bar.<sup>48</sup> The MCLE program has been determined to be of paramount importance to the bar's goal of increasing attorney competence,<sup>49</sup> and the mandatory reporting requirement has been implemented to remind the bar that the profession itself must be competent in providing the vital services which the public requires to maintain order and to resolve disputes civilly.<sup>50</sup>

Though both of these initiatives are laudable, it is perplexing that the priorities evident in the implementation of these two initiatives are so obviously reversed. The current priority established by the juxtaposition between Illinois' MCLE requirement and mandatory reporting requirement for pro bono services, implemented in 2005 and 2006 respectively, places professional competence as the primary goal of the bar, relegating the overall competence of the profession in meeting a vital societal need to a discretionary answer on the attorney registration form.<sup>51</sup> The Illinois bar's goal of re-establishing professionalism cannot be achieved by wedging mandatory trainings into already tight schedules, while at the same time only *encouraging* the profession to keep an eye on equal access for the poor.

### The Short and Necessary Step to CLE Credit for Pro Bono Service

The next step which must be taken to reclaim the credibility of pro bono service as an essential part of the bar's "maintenance of professionalism"<sup>52</sup> is to simply treat pro bono service as equal to the professional

responsibility of continued learning. Such a step would not require any disruption or re-organization of the principles and priorities already held to in the Illinois Rules of Professional Conduct.<sup>53</sup> Furthermore, considering the utmost importance which the Illinois Supreme Court attributes to professionalism, as evidenced in its new MCLE initiative,<sup>54</sup> the vital contribution of pro bono service to professionalism<sup>55</sup> is certainly important enough to merit action by Illinois attorneys beyond filling in a blank on their registration form.<sup>56</sup>

To this end, Illinois must adopt a system whereby its attorneys can fulfill MCLE requirements with pro bono work. By one estimation, the collective efforts of American attorneys engaging in pro bono services could satisfy the legal needs of the poor with only a slightly higher number of hours than those currently required for MCLE credit.<sup>57</sup> A system which favors teaching lawyers about being competent professionals over lawyers actually furthering the competence of the profession by engaging in activity "essential to the bar's maintenance of professionalism"<sup>58</sup> simply cannot continue if the profession's ideals are truly in line with that stated by the Illinois Supreme Court.<sup>59</sup> Not only would such a program require very little additional resources, but there are already multiple models for Illinois to adopt, as similar programs have already been implemented in conjunction with the MCLE programs of six states.<sup>60</sup>

Such a program would accomplish the same goals as the MCLE program through furthering both the overall competence of the profession<sup>61</sup> and the competence of individual attorneys.<sup>62</sup> Furthermore, such programs are able to increase the indigent's access to representation and avoid the problem of lawyers simply providing pro bono service to family and friends<sup>63</sup> by requiring that the service be performed through an approved non-profit entity or law school within the state.<sup>64</sup> The lawyer then fills out a form for CLE credit and submits it to the non-profit entity, which in turn verifies that the lawyer is entitled to the credit.<sup>65</sup>

Most importantly, the recent initiatives by the Illinois Supreme Court

toward maintaining the bars' professionalism already provide much of the necessary systems and infrastructure which would be needed to maintain such a program. A definition of qualifying pro bono activity, though short of the detail which will be required, has already been articulated by the court.<sup>66</sup> The current MCLE Board, which is overseen by the Supreme Court Commission on Professionalism,<sup>67</sup> and is responsible for reviewing applications and accrediting CLE providers,<sup>68</sup> could serve the similar function of accrediting pro bono organizations and law schools to issue CLE credit for pro bono work. Furthermore, because the MCLE initiative has been instituted upon and aligned with the same principles of maintaining professionalism which would support pro bono service,<sup>69</sup> and because the MCLE initiative provides an additional funding mechanism,<sup>70</sup> these two complimentary programs could easily be synergized to achieve the goal of professionalism without making further demands on attorneys' time.

<sup>1</sup> AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 18 (2005), available at <http://www.abanet.org/legalservices/probono/report.pdf> (last visited May 2, 2008) (stating that this choice was picked by 70% of respondents).

<sup>2</sup> *Id.* at 19 (stating that this choice was picked by 69% of respondents).

<sup>3</sup> *Id.* See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding indigent criminal defendants have the right to an attorney under the Sixth and Fourteenth Amendments).

<sup>4</sup> James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 312 (2006).

<sup>5</sup> "In . . . *Lassiter v. Dep't of Soc. Servs.*, the Supreme Court interpreted the due process clause to require appointment of counsel in civil cases only if the proceeding would otherwise prove fundamentally unfair. . . . Although that standard is not unreasonable on its face, courts have applied it in such restrictive fashion that counsel is almost never required in civil cases." Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 373-375 (2004).

<sup>6</sup> THE LEGAL AID SAFETY NET, A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 2 (2005), available at <http://www.chicagobarfoundation.org/documents/Full%20Study.pdf> (last visited

May 2, 2008) (hereinafter "The Legal Aid Safety Net").

<sup>7</sup> James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 312 (2006).

<sup>8</sup> See *supra* text accompanying notes 9-22.

<sup>9</sup> 30 ILL. COMP. STAT. 765/5(g) (West 2008).

<sup>10</sup> Ill. Sup. Ct. R. Art. VIII, pmbl.

<sup>11</sup> *Id.* Additionally, it is important to note that the Preamble does not refer to pro bono representation exclusively as the sole public interest activity involved in its determination of a lawyer's "character and fitness to practice law." *Id.* However as has been pointed out, "one should applaud lawyers who spend time staffing soup kitchens or tutoring learning-disabled children. Nonetheless, lawyers have a special skill and a comparative advantage that suggests a legitimate professional obligation to apply these skills on behalf of the needy." Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 222, 229 (1993).

<sup>12</sup> 30 ILL. COMP. STAT. 765/5(g) (West 2008).

<sup>13</sup> Ill. Sup. Ct. R. Art. VIII, pmbl.

<sup>14</sup> Sponsored by the Chicago Bar Association, the Illinois State Bar Association, the Chicago Bar Foundation, the Illinois Bar Foundation, and the Lawyers Trust Fund of Illinois, it is the second comprehensive statewide study of the legal aid system in Illinois. The first, the *Illinois Legal Needs Study*, was completed in 1989. THE LEGAL AID SAFETY NET, *supra* note 6, at 1.

<sup>15</sup> *Id.* at 2 (stating that 1.1 million out of 1.3 million legal needs were going unmet).

<sup>16</sup> *Id.* at 3 (employees estimated they were able to respond to anywhere from fifteen percent to thirty-three percent of the calls they received).

<sup>17</sup> *Id.* at 173.

<sup>18</sup> *Id.*

<sup>19</sup> AMERICAN BAR ASSOCIATION, NATIONAL LAWYER POPULATION BY STATE (2007), available at

[http://www.abanet.org/marketresearch/2007\\_Natl\\_Lawyer\\_FINALonepage.pdf](http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf) (last visited May 2, 2008).

<sup>20</sup> THE LEGAL AID SAFETY NET, *supra* note 6, at 2.

<sup>21</sup> ILLINOIS STATE BAR ASSOCIATION, 2004 MEMBERSHIP LAW FIRM ECONOMIC BENCHMARKING SURVEY RESULTS 69 (2004), available at

<http://www.isba.org/2004economicsurvey.pdf> (last visited May 2, 2008).

<sup>22</sup> Virginia Grant, *Highlights of the 2004 ISBA Law Firm Economic Benchmarking Survey*, 92 ILL. B.J. 624, 625-26 (2004) (citing ILLINOIS STATE BAR ASSOCIATION, 2004 MEMBERSHIP LAW FIRM ECONOMIC BENCHMARKING SURVEY RESULTS 69 (May 2004)), available at

<http://www.isba.org/2004economicsurvey.pdf> (last visited May 2, 2008).

<sup>23</sup> Ill. Sup. Ct. R. 756(f).

<sup>24</sup> THE LEGAL AID SAFETY NET, *supra* note 6.

<sup>25</sup> AMERICAN BAR ASSOCIATION, OVERVIEW OF STATE PRO BONO REPORTING POLICIES, available at <http://www.abanet.org/legalservices/probono/reporting.html> (last visited May 2, 2008).

<sup>26</sup> Gathering the results of a recent survey of the indigent's legal need, the committee reported that only 1 out of every 5 legal needs of low-income Illinoisans was being met. Helen W. Gunnarsson, *The New Pro Bono Reporting Requirement*, 94 ILL. B.J. 468, 469 (2006).

<sup>27</sup> ARDC Chief Legal Counsel James Grogan says that his agency's role will be "very limited. We'll just be making sure that the information is collected and available to the supreme court for statistical purposes." Says Grogan of the reporting requirement, "[i]t's just another box to fill in." *Id.* at 471.

<sup>28</sup> Ill. Sup. Ct. R. 756 cmt.

<sup>29</sup> See Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyer's Monopoly*, 101 NW. U. L. REV. 1342 n.103 (2007).

<sup>30</sup> SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS, *supra* note 1.

<sup>31</sup> SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS, *supra* note 1, at 2.

<sup>32</sup> Ill. Sup. Ct. R. Art. VIII, pmbl.

<sup>33</sup> Ill. Sup. Ct. R. 790.

<sup>34</sup> AMERICAN BAR ASSOCIATION, SUMMARY OF MCLE STATE REQUIREMENTS, available at <http://www.abanet.org/cle/mcleview.html> (last visited May 2, 2008).

<sup>35</sup> "The course or activity must have significant intellectual, educational or practical content, and its primary objective must be to increase each participant's professional competence as an attorney."

Ill. Sup. Ct. R. 795(a)(1).

<sup>36</sup> Ill. Sup. Ct. R. 796.

<sup>37</sup> Ill. Sup. Ct. R. 795.

<sup>38</sup> Ill. Sup. Ct. R. 791.

<sup>39</sup> Ill. Sup. Ct. R. 792.

<sup>40</sup> Ill. Sup. Ct. R. 799.

<sup>41</sup> Ill. Sup. Ct. R. 799(c).

<sup>42</sup> Ill. Sup. Ct. R. 799(a).

<sup>43</sup> Ill. Sup. Ct. R. 790.

<sup>44</sup> Ill. Sup. Ct. R. 794(a).

<sup>45</sup> Ill. Sup. Ct. R. 792(e).

<sup>46</sup> Ill. Sup. Ct. R. 793.

<sup>47</sup> Webster's Third New International Dictionary (2002).

<sup>48</sup> Ill. Sup. Ct. R. 795(a)(1).

<sup>49</sup> *Id.*

<sup>50</sup> See Ill. Sup. Ct. R. Art. VIII, pmbl.

<sup>51</sup> Ill. Sup. Ct. R. 756(f).

<sup>52</sup> Ill. Sup. Ct. R. Art. VIII, pmbl.

<sup>53</sup> *Id.*

<sup>54</sup> Ill. Sup. Ct. R. 790.

<sup>55</sup> See Ill. Sup. Ct. R. Art. VIII, pmbl.

<sup>56</sup> Ill. Sup. Ct. R. 756(f).

<sup>57</sup> "If every licensed attorney provided at least twenty-five hours of pro bono services annually, together they would generate more than 26 million hours of legal service, satisfying the legal needs of America's poor. Further, if each lawyer engaged in the recommended fifty hours of pro bono service encouraged by the Model Rules of Professional Conduct, together they would generate a surplus of legal services for the disenfranchised totaling 53 million hours." Jessica Davis, *Social Justice and Legal Education: Mandatory Pro Bono Legal Services*, 1 CHARLESTON L. REV. 85, 87 (2006).

<sup>58</sup> Ill. Sup. Ct. R. Art. VIII, pmb1.

<sup>59</sup> *Id.*

<sup>60</sup> The states which currently allow pro bono hours to be used for CLE credit are Colorado, Delaware, New York, Tennessee, Washington, and Wyoming. AMERICAN BAR ASSOCIATION, CONTINUING

LEGAL EDUCATION/PRO BONO STATE RULES, available at

<http://www.abanet.org/legalservices/probono/clerules.html> (last visited May 2, 2008).

<sup>61</sup> Ill. Sup. Ct. R. 795(a)(1).

<sup>62</sup> Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 422 (2007) (stating that "pro bono service enables attorneys to acquire experience in court . . . and to gain exposure to the positive and negative aspects of the legal system" and that "performing pro bono service provides private practice attorneys exposure to the legal needs of the poor while aiding in their professional development.").

<sup>63</sup> David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the*

*Courts*, 95 GEO. L.J. 1127, 1133 (2007).

<sup>64</sup> See JoAnn Vogt, *New Rule Authorizes CLE Credit for Pro Bono Representation*, 34 COLO. LAW. 25 (2005).

<sup>65</sup> *Id.* at 26.

<sup>66</sup> Ill. Sup. Ct. R. 756(f)(1).

<sup>67</sup> Ill. Sup. Ct. R. 792.

<sup>68</sup> Ill. Sup. Ct. R. 795.

<sup>69</sup> Ill. Sup. Ct. R. 795(a)(1).

<sup>70</sup> Ill. Sup. Ct. R. 792(e).

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