

## HAS THE TIME COME TO REVISE OUR PRO BONO RULES?

DANIEL M. TAUBMAN<sup>†</sup>

### ABSTRACT

Rule 6.1 of the Colorado Rules of Professional Conduct, and the same-numbered rule of the American Bar Association's Model Rules of Professional Conduct, focus on a lawyer's professional responsibility to those unable to pay. The rules have a dual focus: to encourage lawyers to provide voluntary, or pro bono, service to poor people or organizations that assist poor people (as well as encouraging other types of volunteer service) and to urge lawyers to financially contribute to organizations that provide legal services to persons of limited means. However, these aspirational rules, not mandatory, have fallen short in meeting these goals. This Article reviews the history of these rules, their ambiguities, and how the limited current information about both pro bono service and financial contributions to organizations that provide legal services to the poor suggest that the amount of pro bono service by lawyers in Colorado and elsewhere may actually be decreasing. The Article then recommends that the rules be revised to require lawyers to (1) focus their pro bono service on organizations providing pro bono service to indigent clients and (2) contribute annually pro bono service, financial support, or a combination of the two. Specifically, the proposed revisions to the rules would require that pro bono service be provided either to recognized pro bono programs or to

---

<sup>†</sup> Daniel M. Taubman served as a judge on the Colorado Court of Appeals from March 1993 to February 2020; he will begin serving as a senior judge in April 2020. He has been a member of the Colorado Bar Association's Ethics Committee for nearly thirty years and has served as a member of the Colorado Access to Justice Commission since 2004. In addition, he cochaired the CBA's Modest Means Task Force from 2012 to 2016 and has served on various other committees concerning pro bono service and access to justice. He would like to express his sincere thanks to the following people for reviewing one or more drafts of this Article, and providing thoughtful comments and useful editorial suggestions: Jon Asher, Executive Director, Colorado Legal Services; Fred Baumann, Lewis Roca Rothgerber Christie LLP and Chair, Colorado Access to Justice Commission; Professor Stephen Daniels, American Bar Foundation; April Faith-Slaker, Associate Director of Research Innovations, Access to Justice Lab at Harvard Law School; Monica Fennell, Pro Bono Manager, Faegre Drinker Biddle & Reath LLP, Indianapolis, Indiana; Ed Gassman, Gassman Law Firm LLC, Loveland, CO; Judge Lino Lipinsky, Colorado Court of Appeals; Senior Judge Gale Miller, Colorado Court of Appeals; Matt Simonsen, law clerk, Judge Liz Harris, Colorado Court of Appeals; Connie Talmage, Executive Director, Colorado Lawyers Committee; and Cheryl Zalenski, Director, Center for Pro Bono, American Bar Association. He would also like to thank the following people for providing him with statistics and other information used in this Article: Pat Craig, Administrator, Northwest Colorado Legal Services Project; Shubi Deoras, Director, ABA Resource Center for Access to Justice Initiatives; Katharine Hales, Colorado Supreme Court Library; Jacqueline Marro, Colorado Access to Justice Coordinator; Toni-Anne Nunez, Director, Metro Volunteer Lawyers, Denver Bar Association; Sarah Plastino, Senior Staff Attorney, Pro Bono Counsel, Detention Program, Rocky Mountain Immigration Advocacy Network; and Diana Poole, Executive Director, Legal Aid Foundation of Colorado and Colorado Lawyers Trust Account Foundation. He would like to extend special thanks to his judicial assistant, Pam Goodman, and his law clerk, Timbre Shriver, for their invaluable assistance in editing, reviewing, and researching multiple drafts of this Article. Of course, any inaccuracies or shortcomings of this Article are his responsibility.

persons of modest means. In addition, the revised rules would provide for an increase in attorney registration fees, in the amount of \$500 per year,<sup>1</sup> with the proviso that the amount can be reduced at the rate of \$10 per hour for each hour of pro bono service provided to a recognized pro bono program as defined in C.R.C.P. 250.9(2), or at the rate of \$5 per hour for each hour of service provided at a substantially reduced fee to persons whose household income is less than 400% of the federal poverty guidelines. Finally, the \$500 increase in registration fees would be paid to the Colorado Supreme Court or a pro bono organization listed in C.R.C.P. 250.9(2). Although these proposed changes will not eliminate the access to justice gap, they would better serve the goals of the pro bono rules by significantly increasing available resources to meet the legal needs of the poor and those of modest means.

#### TABLE OF CONTENTS

INTRODUCTION .....	397
I. PRO BONO SERVICE—THE GOVERNING RULES.....	398
<i>A. Summary of Colo. RPC 6.1 and ABA Model Rule 6.1</i> .....	398
1. First Tier of Pro Bono Service.....	398
2. Second Tier of Pro Bono Service .....	399
<i>B. Differences Between Colo. RPC 6.1 and ABA Model Rule 6.1</i> ...	402
<i>C. Other Rules Relating to Pro Bono Service</i> .....	403
<i>D. The Unmet Need</i> .....	405
<i>E. Existing Pro Bono Programs</i> .....	409
II. HISTORY OF THE PRO BONO RULES .....	410
<i>A. Canons of Professional Ethics</i> .....	411
<i>B. Code of Professional Responsibility</i> .....	412
<i>C. The ABA's Model Rules of Professional Conduct</i> .....	413
<i>D. Colorado Rules of Professional Conduct</i> .....	415
<i>E. Colorado Judicial Advisory Council Recommendations</i> .....	416
III. VAGUENESS AND OVERBREADTH IN CURRENT	
PRO BONO RULES .....	418
<i>A. Ambiguities</i> .....	418
1. "Limited Means" .....	418
2. "Substantial Majority" .....	420
3. "Substantially Reduced Fee" .....	420
<i>B. Overbreadth</i> .....	422
<i>C. Different Interpretations of What Constitutes</i>	
<i>Pro Bono Service</i> .....	422
1. Surveys of Lawyers .....	422
2. Pro Bono Challenges .....	424
3. Rules .....	425
4. Law Schools .....	426
IV. HOW MUCH PRO BONO WORK IS BEING DONE?.....	428

---

1. The current attorney registration fees of \$190 and \$325 would each be increased by \$500 under this proposal.

<i>A. Statistics From ABA Pro Bono Survey</i> .....	430
<i>B. Pro Bono Participation Rates in Colorado</i> .....	431
V. RECOMMENDED REVISIONS TO THE PRO BONO RULE .....	439
<i>A. Eliminating Vagueness and Overbreadth</i> .....	440
<i>B. Ensuring the Provision of Pro Bono Service or         Financial Contributions by Each Lawyer</i> .....	441
<i>C. Possible Objections to Proposed         Pro Bono Rule Amendments</i> .....	444
CONCLUSION .....	448

## INTRODUCTION

What happens when, upon learning that her ex-husband has received a substantial increase in pay, a low-income woman attempts to pursue legal action to increase his monthly child support payments? Also, what happens when an indigent man is sued by a collection agency after his car has been repossessed because he has fallen behind in his payments? In both cases, these individuals may reach out to a free legal services program for help. However, these underfunded programs turn away a significant proportion of those who seek their help, and the individuals in these examples are far from guaranteed assistance. As an alternative, they might contact a local pro bono program to engage a volunteer private or government attorney.<sup>2</sup> Indeed, a pro bono program may be the last resort for many who cannot afford an attorney.

In these circumstances, and numerous others, poor and middle class people benefit from pro bono services provided by volunteer attorneys. Nevertheless, Rule 6.1 of the Colorado Rules of Professional Conduct (Colo. RPC) and Model Rule 6.1 of the American Bar Association (ABA) have been only partially successful in encouraging lawyers to provide pro bono service or financial contributions to poor people or those of modest means. Although many pro bono programs exist in Colorado, the limited information available suggests that many lawyers do not meet the fifty hours per year aspirational provision or make financial contributions to legal services organizations. As a result, the legal needs of low- and middle-income people continue to be unmet, as discussed below. Accordingly, the time has come to redefine the pro bono rules, to eliminate their vagueness and ambiguity, and to substantially limit pro bono service to direct efforts to help poor people and those of modest means, either through direct pro bono service or financial contributions. Modifying the pro bono rules in this manner will promote access to justice and significantly increase resources to meet the legal needs of the poor and those of modest means, even though some legal needs will still not be met.

---

2. Because of limited resources, legal services programs are required to establish priorities for representing prospective clients. *See* 42 U.S.C. § 2996(2) (2018); 45 C.F.R. § 1620.3 (2019).

## I. PRO BONO SERVICE—THE GOVERNING RULES

In this Part, I begin with an explanation of Colo. RPC 6.1<sup>3</sup> and ABA Model Rule 6.1.<sup>4</sup> Second, I address what counts as pro bono service and what does not under the rules. Third, I address ethical rules related to pro bono service. I conclude this Part with a brief discussion of the unmet legal needs of poor people and those of modest means to explain why increased pro bono service and the provision of affordable legal services to modest means litigants are imperative. Finally, I describe existing pro bono programs, focusing on those in Colorado, including the Colorado Supreme Court's Pro Bono Recognition Program.

### A. Summary of Colo. RPC 6.1 and ABA Model Rule 6.1

Colo. RPC 6.1 and ABA Model Rule 6.1 are substantially similar, except for comments to the Colorado rule that set forth model pro bono policies for both law firms and in-house counsel.

Both rules begin with the declaration that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”<sup>5</sup> The rules then establish an aspiration that every lawyer provide fifty hours of pro bono service each year.<sup>6</sup> The rules have a corresponding aspiration that “[i]n addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”<sup>7</sup> Thus, the rules set forth two goals for lawyers: (1) to provide legal assistance for those unable to pay and (2) to contribute financially to support organizations that provide legal assistance to people of limited means.<sup>8</sup>

Guidance regarding how these two goals might be balanced is provided through the description of two tiers of service, each of which is subdivided into additional categories.<sup>9</sup> The first tier provides guidance regarding how the majority of the hours should be dedicated. The second tier provides guidance regarding any remaining hours. Each tier is discussed below.

#### 1. First Tier of Pro Bono Service

In the first tier, lawyers are enjoined to provide “a substantial majority”<sup>10</sup> of the fifty hours of pro bono service “without fee or expectation of

3. COLO. RULES OF PROF'L CONDUCT r. 6.1 (COLO. BAR ASS'N 2019).

4. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 2019).

5. *Id.*; COLO. RULES OF PROF'L CONDUCT r. 6.1.

6. MODEL RULES OF PROF'L CONDUCT r. 6.1; COLO. RULES OF PROF'L CONDUCT r. 6.1.

7. MODEL RULES OF PROF'L CONDUCT r. 6.1(b)(3); COLO. RULES OF PROF'L CONDUCT r. 6.1(b)(3). As discussed below, the term “limited means” is not defined in the rules or the accompanying comments.

8. *See* MODEL RULES OF PROF'L CONDUCT r. 6.1; COLO. RULES OF PROF'L CONDUCT r. 6.1.

9. *See infra* Sections I.A.1, I.A.2.

10. MODEL RULES OF PROF'L CONDUCT r. 6.1(a); COLO. RULES OF PROF'L CONDUCT r. 6.1(a). The term “substantial majority” is not defined in the rules or the accompanying footnotes.

fee.”<sup>11</sup> This tier contains two categories. The first category is the provision of legal services to “persons of limited means,” a term commonly interpreted to mean indigent litigants, or those whose income is 125% or less than the federal poverty guidelines.<sup>12</sup> The second category permits a “substantial majority” of the fifty pro bono hours to be provided to an array of organizations—“charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means.”<sup>13</sup> Comment [3] lists “homeless shelters, battered women’s centers and food pantries that serve those of limited means” as possible qualifying organizations. Comment [3] also explains that “[t]he term ‘governmental organizations’ includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.”<sup>14</sup>

## 2. Second Tier of Pro Bono Service

The second tier of pro bono service applies to something less than “the substantial majority” dedicated to pro bono service for the indigent or organizations that support them.<sup>15</sup> This tier is divided into three categories. The first of the three categories in this tier encompasses the “delivery of legal services at no fee or a substantially reduced fee” to individuals, groups or organizations,” but relaxes some of the income requirements present in the first tier. This category lists the same array of organizations as in the first tier—“charitable, religious, civic, community, governmental[,] and educational”—but the legal services in this category are directed at furthering the organizations’ purpose and “where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.”<sup>16</sup> The first category also encompasses the delivery of legal services at no fee, or a “substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties or public rights.”<sup>17</sup> Accordingly, this cate-

---

11. MODEL RULES OF PROF’L CONDUCT r. 6.1(a); COLO. RULES OF PROF’L CONDUCT r. 6.1(a). As discussed below, this term has been interpreted beyond its plain meaning to include certain situations where lawyers may provide legal services and receive an attorney’s fee provided by statute.

12. MODEL RULES OF PROF’L CONDUCT r. 6.1(a)(1); COLO. RULES OF PROF’L CONDUCT r. 6.1(a)(1). Comment [3] to the rules provides that legal services in the first category are for people who qualify for assistance in programs funded by the Legal Services Corporation (LSC), or those whose income and resources are “slightly above” those programs’ guidelines.

13. MODEL RULES OF PROF’L CONDUCT r. 6.1(a)(2); COLO. RULES OF PROF’L CONDUCT r. 6.1(a)(2).

14. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 3; COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 3. The comment does not further explain what are “public protection programs and sections of governmental or public sector agencies.”

15. See MODEL RULES OF PROF’L CONDUCT r. 6.1(b); COLO. RULES OF PROF’L CONDUCT r. 6.1(b).

16. MODEL RULES OF PROF’L CONDUCT r. 6.1(b)(1); COLO. RULES OF PROF’L CONDUCT r. 6.1(b)(1).

17. MODEL RULES OF PROF’L CONDUCT r. 6.1(b)(1); COLO. RULES OF PROF’L CONDUCT r. 6.1(b)(1). As discussed below, the term “substantially reduced fee” is not defined in the rules or comments. The terms “civil rights,” “civil liberties,” and “public rights” are not defined in the rules or comments.

gory does not require that the pro bono service serve low-income individuals, or even those of modest means. Thus, this part of the rule allows lawyers to count service for a civil rights organization or the American Civil Liberties Union, regardless of whether the client is indigent or of modest means.

The second tier's second category provides for the "delivery of legal services at a substantially reduced fee to persons of limited means."<sup>18</sup> Finally, the second tier's third category states that pro bono service encompasses "activities for improving the law, the legal system or the legal profession."<sup>19</sup> Comment [8] describes the breadth of services covered under this third category. Services that count include serving on a bar association committee, serving on boards of legal services or pro bono programs, participating in Law Day activities, teaching in a continuing legal education program, and serving as a mediator or arbitrator.<sup>20</sup> Comment [8] adds that "legislative lobbying to improve the law, the legal system[,] or the legal profession" also counts.<sup>21</sup> Consequently, the third category allows lawyers' participation on a bar association committee that does not, in any way, address the legal needs of the poor or people of modest means to count as second-tier pro bono service.

Comments not already mentioned add helpful explanations. For example, Comment [4] explains that tier-one pro bono service cannot be considered pro bono if an anticipated fee is uncollected.<sup>22</sup> Accordingly, if a lawyer explains that he or she has provided pro bono service to a client who has not paid for services under a fee agreement, that service may not be considered as satisfying the fifty hour aspirational pro bono provision. On the other hand, an award of statutory attorney fees does not disqualify a case as pro bono. Lawyers receiving such statutory attorney fee awards are encouraged to donate "an appropriate portion" of them to organizations or projects benefiting those of limited means.<sup>23</sup> Thus, in Colorado, a lawyer could represent an impecunious client in a dissolution of marriage case, seek attorney fees from the other spouse under Colorado Revised Statutes § 14-10-119, and then contribute all or some of those attorney's fees to a pro bono program or domestic violence shelter.<sup>24</sup>

---

18. MODEL RULES OF PROF'L CONDUCT r. 6.1(b)(2); COLO. RULES OF PROF'L CONDUCT r. 6.1(b)(2). As noted above, the terms "substantially reduced fee" and "limited means" are not defined in the rules or the comments.

19. MODEL RULES OF PROF'L CONDUCT r. 6.1(b)(3); COLO. RULES OF PROF'L CONDUCT r. 6.1(b)(3).

20. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 8; COLO. RULES OF PROF'L CONDUCT r. 6.1 cmt. 8.

21. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 8; COLO. RULES OF PROF'L CONDUCT r. 6.1 cmt. 8.

22. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 4; COLO. RULES OF PROF'L CONDUCT r. 6.1 cmt. 4.

23. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 4; COLO. RULES OF PROF'L CONDUCT r. 6.1 cmt. 4.

24. *In re Marriage of Swink*, 807 P.2d 1245, 1246, 1248 (Colo. App. 1991).

Although lawyers may count legal services provided at a “substantially reduced fee” to those of limited means under tier two’s second category, Comment [7] clarifies that lawyers may “agree to and receive a modest fee” in such circumstances.<sup>25</sup> Thus, a lawyer with a standard high hourly rate may charge a client a “substantially reduced fee” that still would not qualify as a modest fee. Comment [7] further provides that court appointments for which a lawyer is paid at a rate substantially below the lawyer’s usual rate are encouraged.<sup>26</sup> Therefore, court appointments by Alternate Defense Counsel, the Office of Respondent Parents’ Counsel, and the Office of the Child’s Representative would qualify under this tier-two category of pro bono service.

While the focus of the pro bono rules is on the provision of service in civil cases, Comment [1] notes that pro bono service may be provided in “criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.”<sup>27</sup> Thus, Comment [1] would also permit representation of clients in misdemeanor cases in which there is no possibility of incarceration to count as tier-one pro bono service.

Comment [9] reiterates the rules’ provision that pro bono service is the individual ethical commitment of each lawyer. However, it provides that when it is not feasible for lawyers to provide pro bono services, they should “provid[e] financial support to organizations providing free legal services to those of limited means.”<sup>28</sup> Specifically, Comment [9] provides that “[s]uch financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.”<sup>29</sup> This means that lawyers whose hourly rate is \$300 would be expected to contribute \$15,000 to a legal services program when they are unable to provide pro bono services in a given year.<sup>30</sup>

Finally, Comment [11] states that the provisions of these rules are “not intended to be enforced through disciplinary processes.”<sup>31</sup> Accordingly, lawyers may ignore the aspirational provisions of the rules with impunity.

---

25. MODEL RULES OF PROF’L CONDUCT r. 6.1(b)(2) cmt. 7; COLO. RULES OF PROF’L CONDUCT r. 6.1(b)(2) cmt. 7.

26. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 7; COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 7.

27. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 1; COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 1. Ordinarily, the public defender’s office represents defendants in postconviction death penalty appeals.

28. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 9; COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 9.

29. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 9; COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 9.

30. \$300 per hour multiplied by fifty hours would result in a \$15,000 contribution.

31. COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 11. One other provision of the Colorado Rules of Professional Conduct has hortatory, rather than mandatory language. *See id.* at r. 2.1 (“In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution”).

*B. Differences Between Colo. RPC 6.1 and ABA Model Rule 6.1*

Colo. RPC 6.1 contains five provisions not found in ABA Model Rule 6.1, each of which is intended to emphasize the importance of pro bono service. First, at the end of the rule, Colo. RPC 6.1 provides that “[w]here constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in [the first tier], those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in [the second tier].”<sup>32</sup> Thus, this language recognizes that some government lawyers, public sector lawyers, and judges may not be permitted to provide direct representation to indigent clients or organizations that support them. Nevertheless, they are urged to satisfy their pro bono responsibility by engaging in activities such as providing continuing legal education presentations or participating in bar association and local access to justice committees activities.

Second, Comment [1] cites the Colorado lawyers’ oath, which attorneys take when admitted to the bar, as an added reason for providing pro bono service. Although the language is somewhat antiquated, it states that “a lawyer will never ‘reject, from any consideration personal to myself, the cause of the defenseless or oppressed.’”<sup>33</sup>

Third, Comment [8A] encourages government lawyers to engage in pro bono service to the extent they can do so, consistent with their organizations’ internal rules and policies. The rule refers to the “Colorado Bar Association[’s] [(CBA’s)] Voluntary Pro Bono Public Service Policy for Government Attorneys, Suggested Program Guidelines, 29 Colorado Lawyer 79 (July 2000).”<sup>34</sup> Those guidelines recognize the constraints that often prohibit or restrict government attorneys from engaging in pro bono service. For example, even when government attorneys can provide pro bono service, they may not be able to use office resources or appear in court during working hours. However, such limitations would not apply to private attorneys providing pro bono service. Nevertheless, some government organizations, including the Colorado Attorney General’s Office, maintain pro bono programs.<sup>35</sup>

Fourth, while Comment [9] notes that meeting the pro bono responsibility is the ethical commitment of each lawyer, it adds that “in special

---

32. *Id.* at r. 6.1(b)(3).

33. *Id.* at cmt. 1 (quoting *Colorado Attorney Oath of Admission*, COLO. BAR ASS’N, <https://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council> (last visited Dec. 17, 2019)). The Colorado Supreme Court may wish to consider modernizing this language to state that lawyers, because of personal considerations, will not refrain from representing unpopular clients or causes and low- or moderate-income clients who cannot afford to hire an attorney.

34. COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 1.

35. See *Colorado Supreme Court Pro Bono Legal Service Commitment and Recognition Program RPC 6.1*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/Supreme\\_Court/Pro\\_Bono.cfm](https://www.courts.state.co.us/Courts/Supreme_Court/Pro_Bono.cfm) (last visited Dec. 17, 2019).



circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by [the] law firm of the pro bono responsibility.”<sup>36</sup> Comment [9] recognizes that, in some circumstances, lawyers, frequently those in large firms, may provide hundreds of pro bono hours on death penalty, class actions, or other complex litigation.<sup>37</sup> In those situations, it makes sense to average the pro bono hours of a firm’s lawyers.<sup>38</sup>

Fifth, following the comments, Colo. RPC 6.1 contains a feature not present in the model rules or in other states’ pro bono rules—detailed, recommended model pro bono policies for Colorado lawyers, law firms, and in-house counsel.<sup>39</sup> These detailed model policies are intended to illustrate how a large firm, small firm, or an in-house counsel department can establish a pro bono program, including with the appointment of a pro bono committee or coordinator. The policies also note that law firms and in-house counsel pro bono policies should recognize and encourage pro bono service, including having law firms positively consider pro bono service in evaluation and compensation decisions.<sup>40</sup>

In sum, these Colorado variations from ABA Model Rule 6.1 emphasize the Colorado Supreme Court’s recognition of the importance of pro bono service.

### C. Other Rules Relating to Pro Bono Service

While most ethical responsibilities to provide pro bono service are found in Colo. RPC 6.1 and ABA Model Rule 6.1, other rules also apply. Related rules can be found on the topics of judicial engagement in pro bono, conflict of interest policies, and the use of limited scope representation. First, with regard to judicial engagement, Rule 6.2 of both the Colorado rules and the ABA model rules suggests that judges may appoint attorneys to represent indigent clients, although this is rarely, if ever, done in the Colorado state courts.<sup>41</sup> These rules provide that a lawyer shall not seek to avoid a court appointment to represent a person except for good cause.<sup>42</sup> The rules then list examples of good cause: (1) representation would likely result in a violation of the rules of professional conduct or

---

36. COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 9.

37. *See id.*

38. *See id.*

39. *Id.*

40. *Id.*

41. *See* MODEL RULES OF PROF’L CONDUCT r. 6.2 (AM. BAR ASS’N 2018); COLO. RULES OF PROF’L CONDUCT r. 6.2. Both Colorado’s Fourth Judicial District Civil Pro Bono Project and the Colorado U.S. District Court for the District of Colorado Civil Pro Bono Panel appoint lawyers to pro bono cases, but they do so from lists of lawyers and law firms that have already agreed to accept pro bono appointments. *See Civil Pro Bono Panel – Information for Unrepresented Parties*, U.S. D. COLO., <http://www.cod.uscourts.gov/RepresentingYourself/CivilProBonoPanel.aspx> (last visited Dec. 17, 2019); *Civil Pro Bono Project: Fourth Judicial District, State of Colorado*, COLO. JUD. DEP’T (Jan. 1, 2018), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/04th\\_Judicial\\_District/Pro%20Bono%20Program%20Rules%20for%20Fourth%20Judicial%20District.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/04th_Judicial_District/Pro%20Bono%20Program%20Rules%20for%20Fourth%20Judicial%20District.pdf).

42. MODEL RULES OF PROF’L CONDUCT r. 6.2 cmt. 2; COLO. RULES OF PROF’L CONDUCT r. 6.2 cmt. 2.

other law; (2) representation would result in a financial or other oppressive burden on the lawyer; and (3) the client or the cause is so repugnant to the lawyer so as to prevent effective representation.<sup>43</sup>

However, Comment [2] to Rule 6.2 states that “[f]or good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel.”<sup>44</sup> Comment [2] also explains that good cause may exist if the lawyer cannot represent a client competently.<sup>45</sup>

Taken together, Colo. RPC 6.2 and ABA Model Rule 6.2 suggest that a judge may appoint a lawyer to represent an indigent client and that such authority is not limited to criminal cases. On the other hand, if judges were to exercise such authority, some lawyers would assert good cause not to accept the appointment on the basis that they were not competent to represent a client in an area in which they did not practice. However, Comment [4] of Colo. RPC 1.1 and ABA Model Rule 1.1 provides that a lawyer may accept an appointment to represent a pro se litigant (or any other litigant) where “the requisite level of competence can be achieved by reasonable preparation.”<sup>46</sup> Similarly, Comment [2] to those rules notes that “a lawyer can provide adequate representation in a wholly novel field” by educating himself or herself in that area or by associating with a lawyer who has competence in the practice area of the appointment.<sup>47</sup> Accordingly, a court could appoint a business lawyer to represent an indigent client in a dissolution of marriage case, based on the understanding that that lawyer would have to gain familiarity with that area of law or associate with a family law practitioner. In this regard, it is worth noting that the CBA’s Family Law Section has indicated that its lawyers are available to assist pro bono attorneys in family law cases.<sup>48</sup>

Second, another significant rule addressing pro bono service is Colo. RPC 6.5 (and the same numbered ABA model rule), which is intended to relax the conflict of interest requirements for the provision of short-term pro bono services by allowing lawyers providing brief service, without an expectation of continuing representation, to represent a client without conducting a law firm conflict of interest check.<sup>49</sup> Instead, the lawyer is barred from providing such representation only if the lawyer actually knows that the representation involves a conflict of interest.<sup>50</sup> Comment [1] to these

43. MODEL RULES OF PROF’L CONDUCT r. 6.2; COLO. RULES OF PROF’L CONDUCT r. 6.2.

44. MODEL RULES OF PROF’L CONDUCT r. 6.2 cmt. 2; COLO. RULES OF PROF’L CONDUCT r. 6.2 cmt. 2.

45. MODEL RULES OF PROF’L CONDUCT r. 6.2 cmt. 2; COLO. RULES OF PROF’L CONDUCT r. 6.2 cmt. 2.

46. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 4; COLO. RULES OF PROF’L CONDUCT r. 1.1 cmt. 4.

47. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2; COLO. RULES OF PROF’L CONDUCT r. 1.1 cmt. 2.

48. E-mail from Marie Moses, past Chair of the Family Law Section of the Colorado Bar Assoc., to Daniel M. Taubman, Author (Oct. 6, 2019, 12:30 pm MST) (on file with author).

49. See MODEL RULES OF PROF’L CONDUCT r. 6.5; COLO. RULES OF PROF’L CONDUCT r. 6.5.

50. MODEL RULES OF PROF’L CONDUCT r. 6.5(a)(1); COLO. RULES OF PROF’L CONDUCT r. 6.5(a)(1).

rules explains that the rule applies to legal advice hotlines, advice only clinics, and pro se counseling programs run by nonprofit organizations.<sup>51</sup> Significantly, Comment [2] to these rules states that a lawyer providing such short-term assistance must obtain the client's informed consent to obtain limited representation, as required under Colo. RPC 1.2(c) and the same-numbered ABA model rule.<sup>52</sup>

Although Colo. RPC 1.2(c) and ABA Model Rule 1.2(c) do not specifically mention the term, the rules do apply to pro bono service. Colo. RPC 1.2(c) was originally adopted following the request of the Denver Bar Association's Thursday Night Bar Pro Bono Program (now Metro Volunteer Lawyers (MVL)). That program sought to promote unbundling, or limited scope representation, to permit pro bono lawyers to participate in a brief hearing or motion (often in a family law case) without having an ongoing commitment to provide pro bono representation.<sup>53</sup> First, the CBA's Ethics Committee promulgated Formal Opinion 101,<sup>54</sup> authorizing limited representation, followed by the Colorado Supreme Court's 1999 revision to Rule 1.2(c), permitting lawyers to limit the scope of their representation.<sup>55</sup> The supreme court later amended C.R.C.P. 121, Section 1-1(5) to provide that lawyers could automatically withdraw from a case when providing limited representation, after completion of that limited task and filing a notice of completion of limited appearance.<sup>56</sup>

Subsequently, the ABA and most states have similarly revised their equivalent rules to promote unbundling.<sup>57</sup> Much of the focus on unbundling in recent years has been to encourage private attorneys to provide limited representation to paying clients, often in situations where the clients could not afford to pay for full representation.<sup>58</sup> In some unbundling cases, this limited representation results in a substantially reduced fee, and thereby may count as second-tier pro bono service.

#### D. The Unmet Need

To understand the importance of pro bono service and financial contributions to programs that provide legal services to the indigent, it is necessary to understand the unmet need for legal services for the poor. This

---

51. MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 1; COLO. RULES OF PROF'L CONDUCT r. 6.5 cmt. 1.

52. MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 2; COLO. RULES OF PROF'L CONDUCT r. 6.5 cmt. 2; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.2(c); COLO. RULES OF PROF'L CONDUCT r. 1.2(c).

53. *See* COLO. BAR ASS'N COMM. ON ETHICS, FORMAL OP. 101 (2016).

54. *Id.*

55. *Id.*; COLO. RULES OF PROF'L CONDUCT r. 1.2(c).

56. COLO. R. CIV. P. 121 1-1(5); COLO. BAR ASS'N COMM. ON ETHICS, FORMAL OP. 101 (2016). *See also* D.C. Colo. LAttyR 2(b)(1), 5(a) and 5(b).

57. *Unbundling Resources by State*, ABA, [https://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/pro\\_se\\_resources\\_by\\_state/](https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state/) (last visited Dec. 17, 2019).

58. *See* Adam J. Espinosa & Daniel M. Taubman, *Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, §1-1*, 40 COLO. LAW. 89, 89 (2011); Daniel M. Taubman & Adam J. Espinosa, *How Judges Can Encourage Unbundling*, 48 COLO. LAW. 10, 10 (2019).

unmet need, commonly referred to by the bar as “the justice gap,” demonstrates the woeful inadequacies of current efforts to address the legal needs of poor people.

In 2005, the Legal Services Corporation (LSC) issued a report, “Documenting the Justice Gap in America,” noting that the legal needs of the poor were substantially higher than reported in a 1994 national study.<sup>59</sup> To keep pace with inflation between 1980 and 2006, federal LSC funding would have needed to increase to \$717 million, rather than its actual level of \$327 million.<sup>60</sup>

The LSC’s 2017 report, “The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans,”<sup>61</sup> found that, in 2016, “low-income Americans in the past year received inadequate or no legal help” for eighty-six percent of their civil legal problems.<sup>62</sup> The report also found that “[i]n the past year, [seventy-one percent] of low income households experienced at least one civil legal problem, including problems [in the areas of] domestic violence, veterans’ benefits, disability access, housing conditions, and health care.”<sup>63</sup> According to the study, seventy percent of “low-income Americans with [a] recent personal experience of a civil legal problem say the problem has significantly affected their lives.”<sup>64</sup>

A recent article in the *San Antonio Express-News* noted that, although some fifty percent of Texas’s 100,000 licensed lawyers provide pro bono services, “only [ten] percent of the need is being met.”<sup>65</sup> On a national level, California Supreme Court Justice Goodwin Liu noted that legal aid lawyers are estimated to provide only one percent of the total legal needs of poor people in civil cases each year.<sup>66</sup> This is supplemented by pro bono lawyers, who meet another two percent of the civil legal needs of low-income people each year, by providing an average of thirty hours of pro bono work annually.<sup>67</sup> Nevertheless, he added, “Even if we asked every lawyer in America to do 100 more hours of pro bono work a year, all of that additional work would be enough to secure only 30 minutes per problem per household in America.”<sup>68</sup>

---

59. LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 9 (2005).

60. See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 38 (2007).

61. LEGAL SERV. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017).

62. *Id.*

63. *Id.*

64. *Id.* at 7.

65. Rudy Apodaca, *A Justice Gap Still Exists Even After Strenuous Pro Bono Efforts*, MY SAN ANTONIO (May 25, 2019), <https://www.mysanantonio.com/opinion/commentary/article/A-justice-gap-still-exists-even-after-strenuous-13895368.php>.

66. See *3 Ways to Meet the “Staggering” Amount of Unmet Legal Needs*, AM. BAR ASS’N (June 26, 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/3-ways-to-meet-the-staggering-amount-of-unmet-legal-needs/>.

67. *Id.*

68. *Id.*

Describing the unmet need another way, Justice Liu explained, “If you were to fill Petco Park [the 42,445-seat baseball park in San Diego] to capacity with low-income people, there would be just two lawyers to serve them all.”<sup>69</sup>

Significantly, legal services programs, such as Colorado Legal Services (CLS), are able to address less than half of the civil legal needs they are asked to resolve. As Ric Morgan, a longtime board member of MVL, has written, “Because of limited government funding, for every Coloradoan receiving legal aid, another qualifying individual is turned away.”<sup>70</sup> However, this unmet need proves to be much greater than the more than fifty percent turned away by CLS. According to the LSC report, only twenty percent of “[l]ow-income Americans seek professional legal help for [] the civil legal problems they face.”<sup>71</sup> This is so because of uncertainty about whether their problem is legal, not knowing where to look for legal assistance, and trying to address a legal problem on their own.<sup>72</sup> Further, even more people would be turned away from CLS offices if they were aware of the program’s services. Because CLS already turns away at least one of out of every two applicants, it does not widely advertise its services. Therefore, many low-income Coloradans do not know CLS is an option.

According to a recent study by the Colorado Center on Law and Policy, Colorado has less than one legal aid lawyer for every 30,000 people living in poverty.<sup>73</sup> This finding ranks Colorado among the bottom five states in the country.<sup>74</sup>

CLS statistics demonstrate the unmet need in stark terms. According to the Legal Aid Foundation of Colorado’s 2017-2018 report, CLS closed 7,078 cases benefiting 17,389 individuals in 2017.<sup>75</sup> In contrast, Ric Morgan noted that, in the same year, United States Census Bureau data showed that 377,014 residents in the six-county Denver metropolitan area qualified for free legal services because their incomes were at 125% or less than the federal poverty level—\$15,613 for an individual and \$32,188 for a family of four.<sup>76</sup> Under the Justice Gap study above, 71% of those poor people, or 267,680 individuals, may have experienced a legal problem.<sup>77</sup>

---

69. *Id.*

70. Ric Morgan, *Pro Bono Leads the Way: Metro Volunteer Lawyers Adds to America’s Rich History of Pro Bono Service*, 48 COLO. LAW. 6, 7 (2019).

71. LEGAL SERV. CORP., *supra* note 61, at 7.

72. *Id.*

73. Donna Bryson, *Getting Legal Help Can Be a Barrier for Low-Income Colorado Families Who Need Safe, Clean Housing*, DENVERITE (May 28, 2019, 11:49 AM), <https://denverite.com/2019/05/28/getting-legal-help-can-be-a-barrier-for-low-income-colorado-families-who-need-safe-clean-housing>.

74. *Id.*

75. LEGAL AID FOUND. COLO., PUTTING THE PIECES TOGETHER FOR EQUAL JUSTICE: ANNUAL REPORT 2017–2018, at 4 (2018).

76. Morgan, *supra* note 70 (citing U.S. CENSUS BUREAU, 2013-2017 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: POVERTY RATIO BY COUNTY, TABLE C17002 (2017)).

77. *See* LEGAL SERV. CORP., *supra* note 61, at 21.

The unmet need is further illustrated by statistics from the Colorado Judicial Branch regarding pro se litigants. Those statistics have consistently shown that about 75% of all litigants in domestic relations cases do not have a lawyer.<sup>78</sup> In addition, 98% of defendants in county court civil cases do not have lawyers, and about 40% of district court civil litigants in other than family law cases do not have lawyers.<sup>79</sup> Studies have shown consistently that, while some pro se litigants proceed without lawyers because they believe they can represent themselves competently, most pro se litigants do not have lawyers because they either cannot afford one or cannot obtain representation from a legal services or pro bono lawyer.<sup>80</sup>

Yet another measure of the unmet need for legal services is the disparity between the number of CLS lawyers—57<sup>81</sup>—and the number of public defenders, 535, in Colorado.<sup>82</sup> Of course, the number of public defenders is a function of the constitutional requirement for counsel in cases of possible incarceration, as required by the U.S. Supreme Court in *Gideon v. Wainwright*<sup>83</sup> and *Argersinger v. Hamlin*.<sup>84</sup> While there is not necessarily an equivalence between the need for counsel in civil and criminal legal matters, this tremendous disparity further explains the need for both greater pro bono service and increased financial contributions to organizations that represent poor people.

The unmet legal needs of modest means clients are substantial but difficult, if not impossible, to measure. First, there is no accepted definition of the term “modest means,” other than those whose income makes them ineligible for free legal services (125% of the federal poverty level or up to 200% for senior citizens).<sup>85</sup> Second, as noted above, the term “persons of limited means” is not defined in either Colo. RPC 6.1 or ABA Model Rule 6.1. Third, as noted in the CBA Modest Means Task Force 2013 Report, the number of people in poverty and the number of modest-

---

78. William Hood & Dan Cordova, *The Colorado Equal Access Center: Connecting Unrepresented Litigants to Legal Resources Through Technology*, 45 COLO. LAW. 55, 55 (2016) (citing COURT SERVS. DIV., COLO. JUD. BRANCH, CASES AND PARTIES WITHOUT ATTORNEY REPRESENTATION IN CIVIL CASES FY 2015, at 2 (2015) [hereinafter PARTIES WITHOUT REPRESENTATION 2015]; COURT SERVS. DIV., COLO. JUD. BRANCH, CASES AND PARTIES WITHOUT ATTORNEY REPRESENTATION IN CIVIL CASES FY 2014, at 2 (2014) [hereinafter PARTIES WITHOUT REPRESENTATION 2014]; COURT SERVS. DIV., COLO. JUD. BRANCH, CASES AND PARTIES WITHOUT ATTORNEY REPRESENTATION IN CIVIL CASES FY 2013, at 2 (2013) [hereinafter PARTIES WITHOUT REPRESENTATION 2013]); see also Gregory J. Hobbs, Jr., *Judicial Support for Pro Bono Legal Service*, 89 DENV. U. L. REV. 851, 853 (2012).

79. PARTIES WITHOUT REPRESENTATION 2015, *supra* note 78, at 3, 5.

80. See Martha Bergmark, *We Don't Need Fewer Lawyers. We Need Cheaper Ones.*, WASH. POST (June 2, 2015, 4:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/>.

81. LEGAL AID FOUND. COLO., SUPPORTING JUSTICE CHANGING LIVES RESTORING HOPE (2019).

82. *What We Do*, OFF. COLO. ST. PUB. DEFENDER, <http://www.coloradodefenders.us/information/what-we-do> (last visited Dec. 17, 2019).

83. 372 U.S. 335, 344 (1963).

84. 407 U.S. 25, 37 (1972).

85. Daniel M. Taubman & John S. Zakhem, *CBA Modest Means Task Force 2013 Report*, 42 COLO. LAW. 103, 105 (2013).

means individuals are fluid.<sup>86</sup> For example, a woman in an intact family of modest means may experience domestic violence, file for divorce, and subsequently become an indigent single mother. However, this woman may again become a modest means individual because a new relationship would likely increase stability and potential resources available to meet her legal needs.

Some lawyers serve modest means clients by charging a substantially reduced fee, as provided in the second tier of the pro bono rules. Others make legal services more affordable by providing limited scope representation. According to the CBA's 2017 Economic Survey, ten percent of private attorneys include unbundling as part of their practice.<sup>87</sup>

#### *E. Existing Pro Bono Programs*

Given this unmet need for both indigent and modest means individuals, what pro bono programs exist to meet the justice gap? Nationally, more than 1,500 nonprofit organizations provide pro bono services. These organizations are listed by state in the National Pro Bono Opportunities Guide.<sup>88</sup> In Colorado, numerous organizations enable lawyers to provide pro bono service. For example, MVL helps indigent clients find pro bono attorneys in the Denver metropolitan area.<sup>89</sup>

Colorado, like most other states, does not have a single organization that coordinates the delivery of pro bono services. The CBA website lists fifty pro bono programs in three categories: statewide, the Denver metropolitan area, and Colorado outside the Denver metropolitan area.<sup>90</sup> Consequently, lawyers interested in engaging in pro bono service could spend a good deal of time investigating available pro bono opportunities and deciding the organization with which they will take on a pro bono case. The search might be frustrating as well because the list includes numerous organizations—area agencies on aging—that offer opportunities for pro bono service but do not have income guidelines.<sup>91</sup> Therefore, some pro bono cases undertaken with such organizations may not qualify as pro bono under the Colorado rules.

The Colorado Lawyers Trust Account Foundation (COLTAF) provides grants to twelve pro bono programs that help meet the legal needs of

---

86. *Id.*

87. COLO. BAR ASS'N, 2017 ECONOMICS OF LAW PRACTICE SURVEY 33 (2017).

88. *National Pro Bono Opportunities Guide FAQ*, PROBONO, <http://www.probono.net/opps-guidefaq/> (last visited Dec. 17, 2019). This guide is a joint initiative of Pro Bono Net and the ABA Committee on Pro Bono and Public Service.

89. *Metro Volunteer Lawyers*, DENVER BAR ASS'N, <https://www.denbar.org/mvl> (last visited Dec. 17, 2019).

90. *Find a Pro Bono Opportunity*, COLO. BAR ASS'N, <http://www.cobar.org/For-Members/Pro-Bono-Opportunities/Statewide-Pro-Bono-Opportunities> (last visited Dec. 17, 2019).

91. *See id.* Area agencies on aging are a national network of resource centers that provide assistance to older Americans.

low-income Coloradans.<sup>92</sup> These programs cover much of the state, and many are associated with CLS or local bar associations. The only statewide, bar-related pro bono program is the CBA's Appellate Pro Bono Program.<sup>93</sup> That program assists indigent civil litigants who have potentially meritorious appeals—usually, appeals raising a legal issue on which an indigent litigant is more likely to prevail on appeal.<sup>94</sup>

The Colorado Supreme Court annually recognizes law firms, sole practitioners, in-house counsel, and government groups for their pro bono work through its Pro Bono Recognition Program.<sup>95</sup> Participating firms or other entities must pledge to reach an annual goal of an average of fifty hours of pro bono legal services per attorney. Consistent with Colo. RPC 6.1, a substantial majority of those pro bono hours must be dedicated to representing Coloradans of limited means or organizations supporting such people.<sup>96</sup> In addition, each firm or other entity must value the pro bono work the same way it evaluates compensated work.<sup>97</sup>

At the beginning of each year, the law firms or other entities report whether they have met their pledge for the prior year.<sup>98</sup> If they have, they are so recognized on the supreme court's website and at pro bono recognition ceremonies held in various areas of the state.<sup>99</sup>

## II. HISTORY OF THE PRO BONO RULES

Given this overview of the current pro bono rules, the unmet legal needs of the indigent and modest-means individuals and families in civil cases, and the current array of pro bono programs, it is helpful to review how the pro bono rules have evolved, both nationally and in Colorado. In particular, the historical discussions regarding the regulatory framing of pro bono are insightful regarding reforms that might be helpful in the present context.

The concept of pro bono services has existed for hundreds of years. For example, in medieval canon law, lawyers were encouraged to provide

---

92. *Where COLTAF Funds Go*, COLO. LAWYER TR. ACCOUNT FOUND., <http://www.coltaf.org/where-coltaf-funds-go/> (last visited Dec. 17, 2019).

93. *CBA Appellate Pro Bono Program*, COLO. JUD. BRANCH, [http://www.courts.state.co.us/Courts/District/Custom.cfm?District\\_ID=8&Page\\_ID=322](http://www.courts.state.co.us/Courts/District/Custom.cfm?District_ID=8&Page_ID=322) (last visited Dec. 17, 2019); see COLO. BAR ASS'N, *supra* note 87. The Civil Pro Bono Panel of the Colorado federal district court is also statewide in scope, but it is not bar-related.

94. *Appellate Pro Bono Program Information and Application Form and Affidavit of Financial Need*, COLO. BAR ASS'N, [https://www.cobar.org/Portals/COBAR/CBAAppProBonoProg\\_PublicInfoApp.pdf?ver=2019-02-21-111000-440](https://www.cobar.org/Portals/COBAR/CBAAppProBonoProg_PublicInfoApp.pdf?ver=2019-02-21-111000-440) (last visited Dec. 17, 2019).

95. *Colorado Supreme Court Pro Bono Legal Service Commitment and Recognition Program RPC 6.1*, *supra* note 35.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*



legal services to those too poor to pay their fees.<sup>100</sup> In 1495, the English Parliament provided that the chancellor and justices should assign lawyers to poor people “who should give their counsels without taking any reward.”<sup>101</sup>

According to Ric Morgan, “Long before the American Revolution, the tradition of pro bono service was deeply rooted in our legal profession, and it has remained so ever since.”<sup>102</sup> In 1770, John Adams provided pro bono defense of eight British soldiers being prosecuted for their involvement in the Boston Massacre.<sup>103</sup> In 1841, Adams’ son, former President John Quincy Adams, provided successful pro bono representation in the U.S. Supreme Court on behalf of fifty-three African slaves charged with murder.<sup>104</sup> Also, in 1858, Abraham Lincoln successfully represented a pro bono client in a murder trial.<sup>105</sup>

#### *A. Canons of Professional Ethics*

Ethics codes did not govern the conduct of American lawyers until after the Civil War. In 1908, the ABA adopted the Canons of Professional Ethics based on the 1887 Code of Ethics adopted by the Alabama State Bar Association.<sup>106</sup> According to three commentators, before the twentieth century, the legal profession paid little attention to the legal needs of the poor, dismissing them as “‘paupers,’ morally stigmatized, dependent on charity, and always with us.”<sup>107</sup> Although a tradition of pro bono service may be “deeply rooted in our legal profession,” some lawyers valued pro bono service while others did not.

However, that sentiment changed in 1908 with the adoption of the Canons of Professional Ethics. For example, Canon 12, entitled, “Fixing the Amount of the Fee,” provided, in part: “A client’s ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all.”<sup>108</sup> The Canon continued:

The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration . . . . In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.<sup>109</sup>

---

100. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 *DAEDALUS* 177, 178 (2019) (citing James A. Brundage, *Legal Aid for the Poor and the Professionalization of Law in the Middle Ages*, 9 *AM. J. LEGAL HIST.* 169, 171, 174 (1988)).

101. *Id.*

102. Morgan, *supra* note 70, at 6.

103. *Id.*

104. *Id.*

105. *Id.*

106. ANNOTATED CODE OF PROF’L RESPONSIBILITY, at xv (AM. BAR FOUND. 1979).

107. F. RAYMOND MARKS ET AL., *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY*, 16 (Am. Bar Found. ed., 1972) (footnote omitted).

108. CANONS OF PROF’L ETHICS Canon 12 (AM. BAR ASS’N. 1908).

109. *Id.*

Thus, Canon 12 recognized for the first time that lawyers have an ethical responsibility to provide free or reduced-fee legal services based on the economic status of their clients.<sup>110</sup> It recognized that law is a profession, rather than a trade, and with that notion came the responsibility to serve those who could not otherwise afford to hire a lawyer. This theme was echoed in an ABA formal opinion stating that “[t]here is nothing whatever in the Canons to prevent a lawyer” from defending indigent citizens without compensation.<sup>111</sup>

### *B. Code of Professional Responsibility*

This understanding was carried over to the Code of Professional Responsibility (Model Code), adopted by the ABA in 1969. The Code was divided into three categories: (1) canons, which expressed general standards of conduct; (2) ethical considerations, which described guiding principles; and (3) disciplinary rules, which mandated minimum standards of conduct for lawyers.<sup>112</sup> In Colorado, the supreme court adopted the Code of Professional Responsibility (based on the Model Code) effective August 20, 1970.<sup>113</sup>

Interestingly, the Model Code contained a general canon relating to pro bono service and several ethical considerations encouraging lawyers to engage in pro bono service; however, no disciplinary rule concerned pro bono service. Thus, Canon 2 provided, “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.”<sup>114</sup> Three ethical considerations (ECs) to Canon 2 provided substance with respect to the need for lawyers to represent indigent clients.

First, EC 2-16 provided:

The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.<sup>115</sup>

Second, EC 2-24 provided:

A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a

---

110. See AM. BAR ASS’N COMMITTEE ON CODE OF PROFESSIONAL ETHICS, FINAL REPORT, 567, 572–73, 578–79 (1908).

111. ANNOTATED CODE OF PROF’L RESPONSIBILITY at 98 n.43 (AM. BAR FOUND. 1979) (quoting ABA COMM’N ON PROF’L ETHICS & GRIEVANCES, FORMAL OP. 148 (1935)).

112. MODEL CODE OF PROF’L RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, at 1 (AM. BAR ASS’N 1980).

113. See *Colorado Rules of Professional Conduct*, CBA, <https://www.cobar.org/rulesofprofessionalconduct> (last visited Dec. 18, 2019).

114. ANNOTATED CODE OF PROF’L RESPONSIBILITY Canon 2 (AM. BAR FOUND. 1979).

115. *Id.* at 95 (footnotes omitted).

contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.<sup>116</sup>

Third, EC 2-25 provided:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. 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 workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.<sup>117</sup>

Taken together, these ethical considerations set forth several principles that presaged the provisions of Colo. RPC 6.1 and ABA Model Rule 6.1. First, the ethical considerations recognized that some clients would not be able to pay any legal fees, while others would be able to pay only a reduced fee. Second, they stated it is the individual responsibility of each lawyer to provide legal services to those unable to pay, and every lawyer, regardless of professional prominence or workload, has an “obligation” to assist those unable to pay legal fees. Third, after recognizing that legal services programs, lawyer referral services, and other programs were needed to help those unable to pay for legal services, EC 2-25 encouraged lawyers to support such efforts. While support could ideally be demonstrated by participating in a lawyer referral program, EC 2-25 suggested that lawyers could financially support a legal services or lawyer referral program as well. Finally, EC 6-2, 8-1, and 8-3 encouraged lawyers to engage in activities to support the legal system and the legal profession, concepts carried over to Colo. RPC 6.1 and ABA Model Rule 6.1.<sup>118</sup>

### *C. The ABA’s Model Rules of Professional Conduct*

The ABA’s Kutak Commission proposed the promulgation of the Model Rules, which the ABA’s House of Delegates adopted at its August

---

116. *Id.* at 97.

117. *Id.* at 97–98 (footnotes omitted).

118. *See id.* at 261, 379–80.

1983 annual meeting.<sup>119</sup> The Commission “was charged with evaluating whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law.”<sup>120</sup> As originally proposed, the pro bono rule was quite brief. It provided:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession.<sup>121</sup>

At the ABA’s February 1983 midyear meeting, the Kutak Commission approved an amendment stating that lawyers could discharge their pro bono responsibility by “financial support for organizations that provide legal services to persons of limited means.”<sup>122</sup> The proposed pro bono rule was accompanied by three comments, the most significant of which reiterated much of the language in the Code of Professional Responsibility’s EC 2-25.<sup>123</sup> The ABA’s Standing Committee on Lawyers’ Public Service Responsibility submitted additional amendments to the rule and comment, which were approved at the February 1983 midyear meeting, largely supplanting the earlier amendments.<sup>124</sup>

Interestingly, before the Kutak Commission submitted its draft to the ABA’s House of Delegates, it proposed a mandatory pro bono rule, or its cash equivalent, with lawyers to provide forty hours of pro bono service dedicated to “improving the legal system or providing legal services to the poor.”<sup>125</sup> The draft also added a buy-out option.<sup>126</sup> However, because of strong opposition, the Commission eliminated both the specific hourly requirement and the buy-out provision.<sup>127</sup> Nevertheless, the Commission maintained the mandatory pro bono proposal and added an annual reporting requirement.<sup>128</sup> However, those proposed requirements were ultimately dropped in the face of continuing bar opposition.<sup>129</sup>

Nearly ten years later, in 1993, the House of Delegates narrowly approved an amended rule and comment by a vote of 228–215 over the ob-

---

119. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at vii (Art Garwin ed., 2013).

120. *Id.*

121. *Id.* at 705.

122. *Id.* at 706.

123. *See id.* at 708–10.

124. *Id.* at 707.

125. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 30 (2004) (quoting Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 131 (2002)).

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.* at 30–31.

jections of the ABA's Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professionalism.<sup>130</sup> The amended rule and comment are substantially the same as the present model rule and comment. Significantly, the amended model rule quantified, for the first time, a lawyer's annual pro bono responsibility at fifty hours per year, with a substantial majority of those hours to be provided to persons of limited means or organizations that support them. The amended rule and comment were approved in February 1993 at the ABA's midyear meeting.<sup>131</sup>

In 1997, the ABA established the Ethics 2000 Commission to review the Model Rules, including Model Rule 6.1. Following the Ethics 2000 Commission's recommendations, the House of Delegates approved a minor change to the rule and added a minor comment at the ABA's midyear meeting in February 2002.<sup>132</sup> The rule amendment added a provision at the beginning of the rule that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."<sup>133</sup> The new comment stated, "Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule."<sup>134</sup>

Significantly, the Ethics 2000 Commission considered, but rejected, proposing that lawyers be required to provide pro bono service. In so doing, the Ethics 2000 Commission said that it "remains committed to the proposition that providing pro bono legal service to persons of limited means is an important obligation of every lawyer."<sup>135</sup> The Commission added that it "also believes that the current system for mobilizing lawyers to provide pro bono legal service is not adequate to the task at hand."<sup>136</sup> Accordingly, "the Commission encourage[ed] the ABA to heighten its efforts to find more appropriate and effective means to increase the voluntary participation of lawyers in the provision of legal services to persons of limited means."<sup>137</sup>

#### *D. Colorado Rules of Professional Conduct*

Colorado trailed the ABA in the adoption of its model rules. Following a study by a committee appointed by the Colorado Supreme Court, the court adopted the Colorado Rules of Professional Conduct on May 7,

---

130. Opponents feared that the aspirational rule would escalate into a mandatory pro bono requirement, citing efforts to institute mandatory pro bono by other state and local bar organizations. Some members voiced concerns that the rule narrowed the definition of pro bono to exclude other important forms of pro bono service. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 119, at 707-10.

131. *Id.* at 707.

132. *Id.* at 711.

133. *Id.*

134. *Id.* at 712.

135. *Id.* at 711.

136. *Id.*

137. *Id.*

1992, with an effective date of January 1, 1993.<sup>138</sup> As discussed above, Colo. RPC 6.1 is substantially similar to ABA Model Rule 6.1, with a few notable exceptions.

#### *E. Colorado Judicial Advisory Council Recommendations*

Historically, judges have been encouraged to play a critical role in encouraging and facilitating pro bono service. In 1998, the Colorado Supreme Court's Judicial Advisory Council created a Legal Services/Pro Bono Committee, consisting of both judges and lawyers, which made a variety of recommendations to increase funding for legal services programs, steps judges could take to encourage pro bono service, mandatory pro bono service (twenty-five hours per year), and mandatory pro bono reporting.<sup>139</sup> As an alternative to mandatory pro bono service and pro bono reporting, the Committee recommended that the Colorado Supreme Court adopt the fifty-hour annual aspirational provision contained in ABA Model Rule 6.1.<sup>140</sup>

Following a robust discussion, in January 1999, the CBA's Board of Governors rejected the mandatory pro bono service proposal by a 10-1 margin and the mandatory pro bono reporting proposal by a 9-1 margin.<sup>141</sup> Then, in March 1999, the Council deadlocked 11-11 on the mandatory pro bono service recommendation but unanimously approved the recommendation for mandatory pro bono reporting.<sup>142</sup> Nevertheless, the Board of Governors adopted a resolution objecting to the Council's initial mandatory pro bono service recommendation, but added "that there be substituted a program conceived and undertaken which emphasizes the need for each and every attorney to contribute pro bono services on a voluntary basis to the poor in the areas of his or her practice where he or she can best serve."<sup>143</sup> After acknowledging that seventy-five percent of the legal needs of poor Coloradans were unmet, the resolution continued, "The lawyers who are members of this association take pride in their profession and feel their obligation to, and do provide pro bono work where they believe they can make their greatest contribution, all without the demands imposed by mandatory direction from the Supreme Court . . . ."<sup>144</sup>

Perhaps recognizing the disparate views of its members, the CBA has not adopted a program emphasizing the need for every Colorado attorney to provide voluntary pro bono services. Although the Colorado Supreme Court's Pro Bono Recognition Program encourages lawyers to provide

---

138. *Colorado Rules of Professional Conduct*, COLO. BAR ASS'N, <https://www.cobar.org/rulesofprofessionalconduct> (last visited Nov. 10, 2019).

139. JUD. ADVISORY COUNCIL, DRAFT REPORT OF THE LEGAL SERVICES/PRO BONO SUBCOMMITTEE 37-74 (1998) (on file with author) [hereinafter DRAFT REPORT].

140. *Id.*

141. *Id.* at 2-3.

142. JUD. ADVISORY COUNCIL, SECOND REPORT OF THE LEGAL SERVICE/PRO BONO COMMITTEE (1999) (on file with author) [hereinafter SECOND REPORT].

143. *Id.* at 3.

144. *Id.*

voluntary pro bono service, the number of participating law firms and other entities has declined significantly over the past few years. Further, despite the declaration that Colorado lawyers “feel the obligation to, and do provide pro bono work where they make their greatest contributions,” a significant number of Colorado lawyers apparently do not do so.<sup>145</sup>

Notwithstanding the CBA’s opposition to mandatory pro bono service and mandatory pro bono reporting, two 1999 surveys of the public indicated that a majority of respondents favored the adoption of a mandatory pro bono rule. First, the State Court Administrator’s Office surveyed 1,500 registered Colorado voters regarding the initially proposed mandatory pro bono rule, which would have required lawyers to contribute twenty-five hours of pro bono service annually.<sup>146</sup> Sixty-two percent of respondents said that the legal profession should be required to provide free legal services to the poor, and ninety percent believed attorneys should provide free legal services in the areas of child support, domestic violence, and disputes involving abused children.<sup>147</sup> Significant majorities supported mandatory pro bono service in the areas of landlord-tenant disputes (seventy-two percent), welfare benefits (seventy percent), and divorces (sixty-seven percent).<sup>148</sup>

The second related survey, conducted by 9News, was reported on January 20, 1999. Sixty-five percent of those surveyed agreed that the proposed requirement of twenty-five hours per year of pro bono service was fair.<sup>149</sup>

In recommending the adoption of a mandatory pro bono reporting rule, the Judicial Advisory Council noted that only Florida had adopted a similar rule.<sup>150</sup> In a brief order, the Colorado Supreme Court rejected the mandatory pro bono reporting recommendation in May 1999, noting that it could lead to the unacceptable alternative of a mandatory pro bono service rule.<sup>151</sup> Since then, eight other states have adopted mandatory pro bono reporting rules, and eleven have adopted voluntary pro bono reporting rules.<sup>152</sup>

The Colorado Access to Justice Commission<sup>153</sup> adopted a comprehensive strategic action plan in January 2018, recommending, among other things, a campaign to increase the number of lawyers engaged in pro

---

145. *Id.*; see *infra* Section IV.B.

146. DRAFT REPORT, *supra* 139.

147. *Id.*

148. SECOND REPORT, *supra* note 142, at 4–5.

149. *Id.* at 5.

150. *Id.* at 9.

151. Letter from Mary Mullarkey, Chief Justice, Supreme Court of Colo., to Members of the Judicial Advisory Council (May 28, 1999), in JUDICIAL ADVISORY COUNCIL, THIRD REPORT OF THE LEGAL SERVICES/PRO BONO COMMITTEE, Appendix A (1999) (on file with Supreme Court of Colorado).

152. See *Pro Bono Reporting*, AM. BAR ASS’N, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/arguments/](https://www.americanbar.org/groups/probono_public_service/policy/arguments/) (last visited Dec. 17, 2019).

153. See *infra* note 269 and accompanying text.

bono representation and an evaluation of whether to endorse the adoption of a mandatory or voluntary pro bono reporting rule.<sup>154</sup> However, only preliminary steps have yet been taken to implement these recommendations.

The Colorado Supreme Court has not considered mandatory pro bono service proposals in recent years, but the subject has been addressed frequently in law review articles.<sup>155</sup> While supporters of mandatory pro bono rules have championed the value of such proposals as enhancing access to justice, opponents have “raise[d] a host of objections, ranging from [violations of] the Thirteenth Amendment to [some lawyers’] lack of expertise” in the subject matter areas most in need of pro bono service.<sup>156</sup> Although no state has adopted a mandatory pro bono service rule, New York has adopted a rule requiring its 10,000 annual bar applicants to complete fifty hours of pro bono service before admission to the bar.<sup>157</sup> No other state has followed the New York rule.

### III. VAGUENESS AND OVERBREADTH IN CURRENT PRO BONO RULES

This Part addresses ambiguities in the current rules and their overbreadth. As a result, organizations measure pro bono service differently, making it impossible to assess the extent to which lawyers are actually providing pro bono service consistent with Colo. RPC 6.1 and ABA Model Rule 6.1.

#### A. Ambiguities

Both Colo. RPC 6.1 and ABA Model Rule 6.1 contain at least three ambiguous terms that increase the difficulty in determining whether lawyers have complied with the rules’ aspirational provisions: (1) “persons of limited means,” (2) “substantial majority,” and (3) “substantially reduced fee.”<sup>158</sup>

##### 1. “Limited Means”

The rules do not define the term “persons of limited means.” The term was first introduced in the Kutak Commission’s proposed pro bono rule

---

154. Since its adoption, the Commission has implemented some recommendations of the Strategic Action Plan, including the Judicial Branch’s appointment of a full-time access to justice coordinator. See COLO. ACCESS TO JUST. COMMISSION, STRATEGIC ACTION PLAN 32–33 (2017).

155. See, e.g., Cummings, *supra* note 125, at 29–33; see generally Steven Wechsler, *Attorneys’ Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE L. REV. 909 (1990); Joseph L. Torres & Mildred R. Stansky, *In Support of a Mandatory Public Service Obligation*, 29 EMORY L.J. 997 (1980).

156. Wechsler, *supra* note 155, at 909.

157. Anne Bernard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES (May 1, 2012), <https://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-IN-NEW-YORK-TO-BE-REQUIRED-TO-DO-SOME-WORK-FREE.html>.

158. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR. ASS’N 2019); COLO. RULES OF PROF’L CONDUCT r. 6.1 (COLO. BAR ASS’N 2019).



and now appears three times in the current rules.<sup>159</sup> In the first category of the first tier of the rules, lawyers are encouraged to provide a substantial majority of pro bono hours to “persons of limited means.”<sup>160</sup> The term also appears in the second tier’s second category, which provides for “delivery of legal services at a substantially reduced fee to persons of limited means.”<sup>161</sup> Finally, the penultimate sentence of the rule says that lawyers should provide financial support “to organizations that provide legal services to persons of limited means.”<sup>162</sup> The 1908 Canons of Professional Ethics referred to a lawyer’s responsibility to assist those who, because of their poverty, could not afford to hire a lawyer.<sup>163</sup> The Code of Professional Responsibility did not use the term “poverty” but instead referenced those “unable to pay” and people of “moderate means” who might not be able to pay a reasonable legal fee.<sup>164</sup>

Thus, the origin of the term “persons of limited means” is not clear. Nevertheless, while the original Kutak Commission’s proposed pro bono rule referred to “persons of limited means,” Comment [2] to that rule stated that legal assistance was “imperative for persons of modest and limited means, as well as for the relatively well-to-do.”<sup>165</sup> This language suggests that the Kutak Commission intended to differentiate people of limited means from people of modest means. If that was the Kutak Commission’s intent, it made sense to refer to people of limited means as the indigent, who would not be able to pay any legal fee, and those of modest means who would be able to pay a reduced fee. Although this interpretation is logical, it does not explain why the Kutak Commission’s proposed rule only referred to those of limited means.

In any event, the 1983 revisions to the rules eliminated the term “modest means.” Therefore, the term “persons of limited means” now refers both to poor people who cannot pay any legal fee and those of modest means who can afford a reduced fee. Further, the term “limited means” is vague and lends itself to multiple interpretations. Accordingly, the pro bono rules would provide more guidance to lawyers if they referred to providing legal service without fee or expectation of fee to poor people, defined as in Comment [3] to Colo. RPC 6.1 and ABA Model Rule 6.1. That way, the rules would apply to those who qualify for participation in programs funded by the LSC or those whose incomes and financial resources are slightly higher. Generally, LSC eligibility requires that a

---

159. MODEL RULES OF PROF’L CONDUCT r. 6.1; COLO. RULES OF PROF’L CONDUCT r. 6.1; *see* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 119, at 705.

160. MODEL RULES OF PROF’L CONDUCT r. 6.1(a)(1); COLO. RULES OF PROF’L CONDUCT r. 6.1(a)(1).

161. MODEL RULES OF PROF’L CONDUCT r. 6.1(b)(2); COLO. RULES OF PROF’L CONDUCT r. 6.1(b)(2).

162. MODEL RULES OF PROF’L CONDUCT r. 6.1 ; COLO. RULES OF PROF’L CONDUCT r. 6.1.

163. *See* CANON OF PROF’L ETHICS Canon 12 (AM. BAR ASS’N 1908).

164. MODEL CODE OF PROF. RESPONSIBILITY at 97 (AM. BAR ASS’N 1980).

165. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 119, at 706.

household's income be less than 125% of the federal poverty guidelines, except for up to 200% of the federal poverty guidelines for senior citizens.<sup>166</sup>

Similarly, the pro bono rules would provide more guidance to lawyers by stating that lawyers could charge a reduced fee to those of modest means when providing tier-two representation. Although the term “modest means” does not have a generally agreed upon definition, it could be defined for purposes of the pro bono rules as households whose income is less than 400% of the federal poverty guidelines.<sup>167</sup> This is the standard used by some existing modest means programs.<sup>168</sup>

## 2. “Substantial Majority”

Both Colo. RPC 6.1 and ABA Model Rule 6.1 provide that lawyers should aspire to provide fifty hours of pro bono service annually, and that they should provide “a substantial majority” of those hours to those of limited means or organizations that support such individuals.<sup>169</sup> However, nowhere in the rules or in the comments is the term “substantial majority” defined. As a result, lawyers must guess what percentage of their pro bono hours constitutes a “substantial majority” under the first tier of the rules.

The rules would offer more guidance if they specified the number of hours to be provided under the first tier of the rules. For example, the rules could state that a lawyer must devote at least thirty-five hours of their pro bono service to first-tier activities.

## 3. “Substantially Reduced Fee”

The first and second categories of tier two of the pro bono rules state that lawyers may charge a “substantially reduced fee” when delivering pro bono services to “persons of limited means.”<sup>170</sup> The rules also provide, in the second category, that a lawyer may provide “legal services at no fee or [a] substantially reduced fee to individuals, groups[,] or organizations” in nine different categories, as long as the payment of “standard legal fees” would be prohibitive for such individual, group, or organization.<sup>171</sup>

---

166. LEGAL SERV. CORP., *supra* note 61, at 6, 53; 45 C.F.R. § 1611.3 (2019).

167. See Taubman & Zakhem, *supra* note 85 (describing Washington state's modest means program).

168. See 2008 Modest Means Survey, ABA Standing Committee on Lawyer Referral and Information Service, pp. 11–17, [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_referer](https://www.americanbar.org/content/dam/aba/administrative/lawyer_referer) (last visited Jan. 17, 2020). The New York City Bar Association Moderate Means Program uses 400% of the federal poverty guidelines for small businesses. Other programs use a variety of financial eligibility guidelines.

169. MODEL RULES OF PROF'L CONDUCT r. 6.1; COLO. RULES OF PROF'L CONDUCT r. 6.1.

170. MODEL RULES OF PROF'L CONDUCT r. 6.1(b)(2); COLO. RULES OF PROF'L CONDUCT r. 6.1(b)(2).

171. MODEL RULES OF PROF'L CONDUCT r. 6.1(b)(1); COLO. RULES OF PROF'L CONDUCT r. 6.1(b)(1).

Like “limited means,” the term “substantially reduced fee” suffers from vagueness, making it difficult to determine what constitutes a “substantially reduced fee.” For example, a lawyer whose standard hourly rate is \$500 may determine that charging \$300 per hour constitutes a substantially reduced fee. However, such fee might still be unaffordable for those of limited means, no matter how that latter term is defined. Also, lawyers whose target clientele is modest-means clients may state that all their fees are at a substantially reduced rate compared to fees charged by other lawyers in their community. However, this substantially reduced rate may nonetheless remain unaffordable for modest-means clients.

Additionally, the term “substantially reduced fee” does not answer the question: “Compared to whose rate?” Attorney fees vary greatly depending on a lawyer’s experience, size of law firm, community, and area of specialization.<sup>172</sup> Thus, a big-firm commercial litigator may charge an hourly rate much higher than that charged by a lawyer of the same experience who is a solo practitioner or who practices in a rural community.

The difficulty with the phrase “substantially reduced fee” is that it is not sufficiently targeted to ensure that a lawyer’s tier-two pro bono service will actually benefit clients of limited means or modest means. One way to better target tier-two pro bono service is to specifically tie a lawyer’s substantially reduced fee to a client’s income, as is done in Washington’s moderate-means program.<sup>173</sup> Thus, for clients whose income is between 200% and 250% of the federal poverty guidelines, fees are reduced by seventy-five percent; for clients whose income is between 250% and 350% of the federal poverty level, fees are reduced by fifty percent; and for clients whose income is between 350% and 400% of the federal poverty guidelines, fees would be reduced by twenty-five percent.<sup>174</sup> Such guidelines could be supplemented by a provision that in no event could a lawyer charge more than a specified hourly rate, say \$200.

Some lawyers may object that it would be burdensome for them to determine whether a potential pro bono client’s income fell within a certain percentage of the federal poverty guidelines. However, lawyers who regularly represent modest means clients frequently ask potential clients for income information because they do not want to charge a substantially reduced fee to a client who could afford to pay more. Further, the federal poverty guidelines are easily accessible on the Internet,<sup>175</sup> and the judicial

---

172. See, e.g., Bergmark, *supra* note 80 (“[Legal help can cost] about \$200 to \$300 an hour on average and [be] drastically higher at the largest law firms . . .”).

173. Washington state’s moderate means program suggests a sliding fee scale model that attorneys may use when negotiating and determining their fee for representation. *Moderate Means Program*, WASH. ST. BAR ASS’N, <http://www.wsba.org/connect-serve/volunteer-opportunities/mmp> (last updated Nov. 26, 2019).

174. *Id.*

175. See, e.g., *Poverty Guidelines*, OFF. ASSISTANT SEC’Y FOR PLAN. & EVALUATION, [aspe.hhs.gov/poverty-guidelines](https://aspe.hhs.gov/poverty-guidelines) (last visited Dec. 17 2019).

branch or the Colorado Access to Justice Commission could easily post the current figures on its website.

### *B. Overbreadth*

In addition to these ambiguities, the pro bono rules suffer from trying to be all things to all people. As discussed, the rules encompass a myriad of scenarios: (1) the provision of free legal services to indigent clients or organizations that serve them; (2) services at a substantially reduced fee to certain individuals, groups, or organizations; and (3) participation in activities for improving the law, the legal system, and the administration of justice.<sup>176</sup> Consequently, much pro bono service under the current rules does not meet the rules' avowed goal of lawyers' professional responsibility to provide legal services to those unable to pay. Following the ABA's adoption of the Ethics 2000 Commission's changes to Model Rule 6.1, one commentator noted:

The new rule, in the end, looked quite similar to the old, affirming the ethical centrality of pro bono without providing any external sanctions for noncompliance. It therefore underscored the potency of the volunteer ideal, which reinforced claims of professional altruism while ultimately avoiding the thorny question of how actually to ensure equal access to justice.<sup>177</sup>

### *C. Different Interpretations of What Constitutes Pro Bono Service*

Because of the breadth of Colo. RPC 6.1 and ABA Model Rule 6.1, numerous organizations have struggled with defining pro bono service and determining the extent to which lawyers have complied with the rules. Further, different organizations, including the ABA, have defined pro bono service differently, often adhering to only part of the pro bono ethics rules. These ambiguities can be seen in the language of various surveys of lawyers, pro bono challenges, rules, and other public service communications.

#### 1. Surveys of Lawyers

In 2018, the ABA's Standing Committee on Pro Bono & Public Service and the Center for Pro Bono published its fourth national pro bono empirical study.<sup>178</sup> According to the report:

The results from the three previous national studies made it clear that the definition of pro bono is subjective and personal for many attorneys. Consequently, establishing a definition for survey purposes has been one of the greatest challenges. Indeed, in the process of coordinating with the 24 states that partnered on this project, the definition

---

176. See MODEL RULES OF PROF'L CONDUCT r. 6.1; COLO. RULES OF PROF'L CONDUCT r. 6.1.

177. Cummings, *supra* note 125, at 32–33 (footnote omitted).

178. APRIL FAITH-SLAKER, AM. BAR ASS'N, SUPPORTING JUSTICE: A FOURTH REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 3–4 (2018).

of pro bono service was the single most debated aspect of the survey.<sup>179</sup>

While the ABA pro bono survey gathered an abundance of useful information from nearly 50,000 respondents in twenty-four states, its questions did not track the pro bono rules.<sup>180</sup> The survey's author applied a definition of pro bono service substantially similar to tier one of ABA Model Rule 6.1.<sup>181</sup> Although the term "limited means" is not defined in the pro bono rules, as discussed above, the survey defined "persons of limited means" as "financially disadvantaged persons who are unable to pay for legal services."<sup>182</sup> The term was further clarified by referencing the federal poverty guidelines and the typical client eligibility criteria applied by most legal services program—individuals and families whose income was within 125% or 200% of the federal poverty guidelines, "depending [ ] on the type of case and client involved."<sup>183</sup>

The report further explained that some surveyed attorneys lamented that the survey definition omitted both the good work done by public interest attorneys in the course of their paid work and free legal services provided to friends and family members with moderate incomes.<sup>184</sup> Nevertheless, the report noted such work was beyond the scope of the study.<sup>185</sup>

The survey also provided information about "other public service activities," consisting of specified activities generally based on tier two of the pro bono rules.<sup>186</sup> Some of the listed activities were broader than those in the pro bono rules, while others were narrower.<sup>187</sup> For example, the most common activity was "legal services [at] a reduced fee," rather than legal services at a substantially reduced fee as provided in the pro bono rules.<sup>188</sup> Further, the survey did not ask if the reduced fee work was provided for persons of limited means.<sup>189</sup> Thus, this activity was broader than that provided in the pro bono rules. Conversely, the survey included "[m]ember of bar committee related to pro bono or access to justice," even though the pro bono rules consider any bar-related committee work as fitting within the second tier of the pro bono rules.<sup>190</sup>

Likewise, efforts in Colorado to survey attorneys about their pro bono service have faced similar limitations. "[T]he Service/Access to Justice Working Group of the Chief Justice's Commission on Professional Development [(now part of the Delivery Committee of the Access to Justice

---

179. *Id.* at 4.

180. *Id.*

181. *See id.*

182. *Id.* at app. 44.

183. *Id.*

184. *Id.* at 4.

185. *Id.*

186. *Id.* at app. 45.

187. *See id.*

188. *See id.* at 6, 25 fig.22.

189. *See id.*

190. *See id.* at 25, fig.22, app. 45.

Commission)] conducted a survey [in January 2015] of all licensed Colorado lawyers to learn, [among other things,] their level of pro bono participation.”<sup>191</sup> Although the *Colorado Lawyer* article describing the survey results summarized the provisions of Colo. RPC 6.1;<sup>192</sup> the actual survey did not. Instead, without reference to the rule or defining the term “pro bono,” respondents were asked, “Do you do pro bono work?”<sup>193</sup> The survey then asked, without defining the term “limited means,” “Do you do pro bono work for persons of limited means?”<sup>194</sup> Thus, while over 2,000 Colorado lawyers responded to the survey, the survey did not provide a clear picture of the extent to which respondents were providing pro bono service in accordance with Colo. RPC 6.1.<sup>195</sup>

## 2. Pro Bono Challenges

The Pro Bono Institute (PBI), a national nonprofit organization, urges major law firms to support its Law Firm Pro Bono Challenge to encourage pro bono service.<sup>196</sup> According to PBI’s website, its mission is to

explore and identify new approaches to and resources for the provision of legal services to the poor, disadvantaged, and other individuals or groups unable to secure legal assistance to address critical problems. [PBI does] so by supporting, enhancing, and transforming the pro bono efforts of major law firms, in-house corporate legal departments, and public interest organizations in the U.S. and around the world.<sup>197</sup>

Under the law firm challenge, participating law firms commit to “contribute 3 or 5 percent (or at a few firms, 60 or 100 hours per attorney) of their annual total paying client billable hours to pro bono activities as defined by the Challenge.”<sup>198</sup>

In defining pro bono activities, PBI uses an amalgam of the provisions contained in ABA Model Rule 6.1. Thus, it defines pro bono services as encompassing tier one of the rules—providing legal services to persons of limited means or organizations that support them. It also includes the provisions of the first category of tier two—providing legal services to a wide variety of organizations.<sup>199</sup> The Commentary to Principle 7 states that

---

191. David W. Stark, *Colorado Survey on Pro Bono Participation*, 45 COLO. LAW. 57, 57 (2016).

192. *Id.* at 57–58.

193. Survey of Serv./Access to Justice Working Grp. of the Chief Justice’s Comm’n on Prof’l Dev. 4 (on file with author).

194. *Id.* at 5.

195. *Id.*

196. See *Law Firm Pro Bono Challenge Initiative*, PRO BONO INST., <http://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge/> (last visited Dec. 17, 2019).

197. *Our Mission*, PRO BONO INST., <http://www.probonoinst.org/about-us/our-mission/> (last visited Dec. 17, 2019).

198. *Law Firm Pro Bono Challenge Reports*, PRO BONO INST., <http://www.probonoinst.org/projects/law-firm-pro-bono/celebrate/law-firm-pro-bono-challenge-reports/> (last visited Dec. 17, 2019).

199. PRO BONO INST., LAW FIRM PRO BONO CHALLENGE: COMMENTARY TO STATEMENT OF PRINCIPLES (2017).

this definition, “although somewhat revised, tracks existing policy definitions adopted by the [ABA], state and local bar associations, and many law firms.”<sup>200</sup> However, in a discussion of “what counts,” PBI states that its pro bono definition does not include reduced fee representation.<sup>201</sup> In this respect, PBI’s definition is narrower than that contained in the pro bono rules. On the other hand, the PBI policy is broader than the pro bono rules, requiring only that a majority, rather than a substantial majority, of hours be provided to persons of limited means or organizations that support them.<sup>202</sup>

Notwithstanding the PBI’s hybrid definition of pro bono service, its policy echoes the provisions of the pro bono rules in recognizing the obligation of major law firms to contribute financially to organizations that provide free legal services to persons of limited means.<sup>203</sup>

While PBI’s definition of pro bono service is comprehensive, it is somewhat different from the pro bono rules’ provisions. Consequently, a participating law firm reporting that it has satisfied its pro bono pledge by providing three percent of its billable hours to pro bono service may not necessarily satisfy the provisions of the pro bono rules.

Yet another example of a definition—or lack thereof—concerning pro bono service appeared in the January 2019 issue of *Super Lawyers Magazine/Colorado*.<sup>204</sup> Summarizing a January 2017 survey of 4,444 “super lawyers” and “rising stars,” the magazine asked, “How many hours do you spend per year on pro bono work?”<sup>205</sup> However, the published charts did not indicate how or whether the term “pro bono” was defined for those surveyed.<sup>206</sup> An inquiry to the magazine yielded a response that the magazine did not have a report to accompany the published charts, and “[t]his was simply an informal Survey Monkey survey for creating engaging and interesting editorial content, and not a scientific study.”<sup>207</sup> Thus, the survey results present another example of apparently detailed information about pro bono service, without ever indicating how the survey defined pro bono service.

### 3. Rules

As discussed, New York State requires that every applicant to be admitted to the state’s bar after January 1, 2015, must complete fifty hours

---

200. *Id.*

201. *See* PRO BONO INST., WHAT COUNTS (2008).

202. PRO BONO INST., *supra* note 199.

203. *Id.*

204. *See Super Lawyers/Legal Market Trends Survey: The “Pros” of Pro Bono*, SUPER LAWYERS, Jan. 2019, at 18.

205. *Id.*

206. *See id.*

207. E-mail from Ron Cahill, Dir. of Research, *Super Lawyers*, to Timbre Shriver, Law Clerk to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (Mar. 22, 2019, 11:28 MST) (on file with author).

of pro bono service.<sup>208</sup> New York's definition of pro bono service is similar to the pro bono rules, but in some respects, it is much broader. The definition includes three categories. The first is assisting in the provision of legal services without charge to persons of limited means, nonprofit organizations, or "individuals, groups or organizations seeking to secure or promote access to justice, including, but not limited to, the protection of civil rights, civil liberties or public rights."<sup>209</sup> The second category is assisting in the provision of legal services "in public service for a judicial, legislative, executive or other governmental entity."<sup>210</sup> The third is serving as a student lawyer under New York law or the law of another state.<sup>211</sup>

Like the Colorado and ABA pro bono rules, the New York rule uses the term "limited means" without defining it.<sup>212</sup> However, the New York rule is broader than the definition in the Colorado and ABA pro bono rules because it includes assisting in the representation of any nonprofit organization without qualification.<sup>213</sup> Further, it includes legal clerkships or externships, even though employment for a judge or other government employee does not fall within the ambit of the Colorado and ABA pro bono rules.<sup>214</sup> Consequently, although former Chief Judge Jonathan Lippman of the New York Court of Appeals praised the new rule as providing "a half-million hours of badly needed legal services to those with urgent problems, like foreclosure and domestic violence,"<sup>215</sup> it allows a New York bar applicant's pro bono service requirement to be satisfied without addressing the legal needs of the poor or those of modest means.

#### 4. Law Schools

Just as the New York pro bono rule encourages law students intending to practice in New York to gain pro bono experience before admission to the bar, some forty law schools have pro bono or public service requirements, which may require students to complete between twenty and seventy-five hours of pro bono service before they graduate.<sup>216</sup> An unspecified number of law schools have voluntary pro bono or public service programs.<sup>217</sup>

---

208. N.Y. CT. R. § 520.16(a) (McKinney 2019).

209. *Id.* § 520.16(b)(1).

210. *Id.* § 520.16(b)(2).

211. *See id.* § 520.16(b)(3); N.Y. JUD. LAW § 484 (McKinney 2019).

212. *See* N.Y. CT. R. § 520.16.

213. *See id.* § 520.16(b)(1)(ii).

214. *See id.* § 520.16(c)(3).

215. *See* Bernard, *supra* note 157.

216. *Pro Bono*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/pro\\_bono/](https://www.americanbar.org/groups/legal_education/resources/pro_bono/) (last visited Dec. 17, 2019).

217. *Id.*



Both Colorado law schools encourage pro bono service. The University of Denver Sturm College of Law (Denver Law) adopted a public service requirement,<sup>218</sup> and the University of Colorado School of Law (Colorado Law) employs a voluntary public service pledge program.<sup>219</sup> Significantly, both schools' programs are described as "public service" programs. While program participation may be satisfied by engaging in pro bono service, as defined in the pro bono rules, both programs are far broader in scope.

At Denver Law, a student must perform a minimum of fifty hours of supervised, uncompensated, legal public service work.<sup>220</sup> That requirement may be fulfilled in one of four ways: (1) passing an externship for credit at a government agency, judge's chambers, or nonprofit organization, provided that the student receives no financial compensation of any kind; (2) receiving a grade of *C* or better in a clinic in conjunction with the Student Law Office; (3) receiving a grade of *C* or better in one of twelve specified courses, including Federal Appellate Advocacy and Poverty and Low Wage Work in America; and (4) volunteering, and engaging in fifty hours of supervised, uncompensated legal work, at a government agency, judicial chambers, nonprofit organization, or private firm, as long as the work at the firm is pro bono, and provided no financial compensation of any kind, whether from the employer or outside source, was received for the externship.<sup>221</sup>

Under the fourth category, "[a]ll students are expected to conform to the standard of the Code of Professional Responsibility," even though it has not been in effect in Colorado since 1993, as well as to the Colorado Rules of Professional Conduct.<sup>222</sup>

Thus, Denver Law students may satisfy their public service requirement in various ways, such as through a judicial externship, without engaging in any activity encompassed by the pro bono rules.

At Colorado Law, students may sign the Public Service Pledge, agreeing to commit to at least fifty hours of law-related public service work, not for credit or other compensation during their time at the law school.<sup>223</sup> "Students who fulfill their pledge [are] recognized at graduation, and their public service [is] reflected on their transcripts."<sup>224</sup> Qualifying work includes volunteer hours for nonprofit organizations, public interest

---

218. *Public Service Requirement*, UNIV. DENV. STURM COLL. LAW, <https://www.law.du.edu/public-service-requirement> (last visited Dec. 17, 2019).

219. *Public Service Pledge*, UNIV. COLO. LAW SCH., <https://www.colorado.edu/law/academics/experiential-learning/public-service-pledge> (last visited Dec. 17, 2019).

220. *Public Service Requirement: Information for Students*, UNIV. DENV. STURM COLL. LAW, <https://www.law.du.edu/public-service-requirement/information-students> (last visited Dec. 17, 2019).

221. *Id.*

222. *Id.*

223. *Public Service Pledge*, *supra* note 219.

224. *Id.*

law firms, local government agencies, public defenders, legal services offices, and private firms with pro bono projects.<sup>225</sup> Qualifying activities also include participation in school-related pro bono programs, such as the Acequia Assistance Project and the Korey Wise Innocence Project.<sup>226</sup> According to Emily Horowitz, Director of Experiential Learning & Public Service Programs at Colorado Law, although the school's definition of public service is "pretty broad," a large percentage of the "public service work that our students do is pro bono."<sup>227</sup>

As the above analysis demonstrates, it is virtually impossible to determine how much pro bono service lawyers in Colorado and elsewhere provide is in accord with the pro bono rules. This difficulty is due, in part, to ambiguities in the pro bono rules, which allow for varied interpretations. Also, because of the breadth and complexity of Colo. RPC 6.1 and ABA Model Rule 6.1, different organizations employ variants of these rules to determine what constitutes pro bono service. Consequently, one organization may measure pro bono service in a manner markedly different from another. Further, to the extent that law schools have "public service" programs, whether required or voluntary, that broader term makes it even more difficult to determine the extent to which law students are engaging in tier-one pro bono service.

#### IV. HOW MUCH PRO BONO WORK IS BEING DONE?

Given the different definitions of pro bono service discussed above, it is difficult, if not impossible, to assess the extent to which lawyers in Colorado and elsewhere comply with the aspirational provisions of Colo. RPC 6.1 and ABA Model Rule 6.1. For example, the ABA's 2018 pro bono survey indicated that the surveyed lawyers average 36.9 hours of pro bono service annually,<sup>228</sup> while the *Super Lawyers* survey stated that the surveyed Super Lawyers and Rising Stars averaged 72.9 hours of pro bono service annually.<sup>229</sup> Whether these disparate figures are reconcilable is impossible to know. As discussed, the ABA pro bono survey focused on tier-one pro bono service under ABA Model Rule 6.1. In contrast, the *Super Lawyers* survey did not provide any information regarding how it defined pro bono service. Similarly, the Pro Bono Institute uses its own definition of pro bono service. Thus, when it reports that a law firm has met its pledge to have three percent of its billable hours dedicated to pro bono service, it is not possible to know what percentage of those pro bono hours fit within tier one and tier two of the pro bono rules.

---

225. *Id.*

226. *Id.*

227. E-mail from Emily Horowitz, Dir. of Experiential Learning & Pub. Serv. Programs, Univ. of Colo. Sch. of Law, to Timbre Shriver, Law Clerk to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (July 1, 2019, 19:13 MDT) (on file with author).

228. See FAITH-SLAKER, *supra* note 178, at 6.

229. *Super Lawyers/Legal Market Trends Survey: The "Pros" of Pro Bono*, *supra* note 204.

Additionally, Colorado law firms and other entities that have satisfied their pledges to complete, on average, fifty hours of pro bono service per attorney annually do not provide a reliable indicator of the amount of pro bono service they have provided. The Colorado Supreme Court has simply requested pledging law firms and other entities to indicate whether they have met their pledge, without requiring any documentation.<sup>230</sup>

States with mandatory and voluntary pro bono reporting rules also do not provide accurate information regarding the amount of pro bono service carried out in those states. States with mandatory pro bono reporting rules permit lawyers to report that they have provided no pro bono service.<sup>231</sup> Therefore, such rules do not necessarily provide an incentive for lawyers to engage in pro bono service. In any event, those states rely on self-reporting by lawyers, exacerbating the difficulty to determine whether lawyers' understanding of the pro bono rules is consistent with what the applicable rules actually provide. Further, in states with voluntary reporting rules, a relatively small percentage of lawyers ever report whether they have provided pro bono service, resulting in unreliable statistics of the amount of pro bono service provided in those states.<sup>232</sup>

According to two recent commentators:

Although the legal profession has a long history of rhetorical support for pro bono assistance, its concrete contributions have been less impressive. Studies in the late 1980s found that although most lawyers donated some free services, little of their aid went to those most in need. Fewer than seventeen percent of practitioners participated in organized pro bono programs for the poor. The richest firms were among the worst performers. In ninety-two of the 100 largest firms, a majority of attorneys had contributed fewer than twenty hours of service in the preceding year.<sup>233</sup>

According to two other commentators, among large law firms, “the [amount of] pro bono [ ] has burst with the economy.”<sup>234</sup> They noted that, according to *American Lawyer* magazine, the number of pro bono hours of Am Law 200 firms decreased over twelve percent between fiscal years 2008 and 2011.<sup>235</sup> This decrease, from 5,567,231 to 4,892,937 hours, was equivalent to losing approximately 340 full-time pro bono lawyers.<sup>236</sup> They further noted that, while this decline might be temporary, it might

---

230. See *Colorado Supreme Court Pro Bono Legal Service Commitment and Recognition Program RPC 6.1*, *supra* note 35.

231. *Pro Bono Reporting*, *supra* note 152.

232. See *id.* Pro Bono Reporting, ABA; [https://www.americanbar.org/groups/probono\\_public\\_service/policy/arguments](https://www.americanbar.org/groups/probono_public_service/policy/arguments) (last visited Jan. 17, 2020). The ABA reports that in states with voluntary reporting rules, participation rates in 1996, 1997, and 2001 ranged from 3% to 35%.

233. Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 493 (2017).

234. Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 109 (2013).

235. *Id.* at 109–10.

236. *Id.*

also reflect changes in law firm staffing and increased focus on cost control.<sup>237</sup> Further, these commentators observed that little information enables us to assess lawyers' rates or hours of pro bono activity.<sup>238</sup>

*A. Statistics From ABA Pro Bono Survey*

Although the *American Lawyer* statistics may suggest the Great Recession was responsible for the national decrease in pro bono service, the amount of pro bono service has continued to decline. The ABA's 2019 Profile of the Legal Profession states that only twenty percent of lawyers surveyed for the 2018 ABA pro bono survey met the fifty-hour aspirational goal.<sup>239</sup> This was the lowest percentage of ABA pro bono surveys released in 2005, 2009, 2013, and 2018.<sup>240</sup>

On the positive side, the survey reported that eighty-one percent of surveyed attorneys provided pro bono service at some point in their lives, and fifty-two percent provided pro bono service in 2016.<sup>241</sup> Additionally, in 2016, attorneys provided an average of 36.9 hours of pro bono service.<sup>242</sup>

The flip side of those statistics is that approximately one fifth of surveyed attorneys have never undertaken any pro bono service.<sup>243</sup> Also, approximately forty-eight percent of attorneys did not provide pro bono service in 2016, and less than half of the surveyed attorneys said they were likely or very likely to provide pro bono service in 2017.<sup>244</sup> Further, while the overall average of 36.9 hours of pro bono service is encouraging, it falls significantly below the aspirational goal of fifty hours per year.

While significant numbers of pro bono attorneys received client referrals from legal services pro bono programs, which screen clients for financial eligibility, a substantial number of pro bono clients came from referrals from an attorney's friends or family members<sup>245</sup>—where financial screening is not usually conducted. According to the survey, more than sixty-nine percent of pro bono lawyers determined that a client was low income from the word of the client or the lawyer's knowledge of the client's situation. However, only about forty percent of pro bono lawyers determined the client's low-income status from a referral source, typically a pro bono program.<sup>246</sup>

Finally, while family law was the most common area of practice for full and limited scope pro bono representation by survey participants—

---

237. *Id.* at 110.

238. *See id.* at 100.

239. AM. BAR ASS'N., ABA PROFILE OF THE LEGAL PROFESSION 42 (2019).

240. *Id.*

241. *See* FAITH-SLAKER, *supra* note 178, at 6.

242. *Id.* at 1.

243. *Id.* at 6.

244. *Id.*

245. *See id.* at 11 fig.6.

246. *See id.* at 11–12.

over 5,000 cases—the second highest category was criminal law, with over 2,000 cases.<sup>247</sup> This finding is somewhat surprising, because most legal services and bar-related pro bono programs limited their pro bono service to civil cases.

### *B. Pro Bono Participation Rates in Colorado*

Colorado has undertaken numerous efforts to encourage pro bono representation. As with the ABA's 2018 pro bono survey, Colorado's history of encouraging pro bono service contains both good news and bad news.

In 1981, the CBA established a Public and Legal Services Department (now Local Bar Relations and Access to Justice Department) to assist local bar associations in establishing pro bono programs to represent indigent clients.<sup>248</sup> This Department was created in the wake of a significant decrease in federal funding for legal services. Five years later, the CBA Board of Governors adopted a resolution declaring that its aspirational goal was that “each member . . . be urged in the strongest of terms to maintain at all times at least one active pro bono case.”<sup>249</sup>

Fifteen years later, in 1996, the CBA wrote to then-Chief Justice Anthony Vollack, that despite significant decreases in federal funding for legal services programs, “it appears that volunteer lawyer participation is decreasing in some bar associations and is static in most others.”<sup>250</sup> That letter also requested that Justice Vollack establish a blue-ribbon committee to, among other things, make recommendations to the supreme court on ways to increase the amount of pro bono service performed by Colorado lawyers and explore the role of judges in encouraging lawyers to engage in pro bono service.<sup>251</sup> The letter also pointed out that, in a June 1995 article, then-President of the Denver Bar Association John Castellano reported that approximately 670 lawyers—only about ten percent of practicing lawyers in the Denver metropolitan area—had provided pro bono service in 1994 through the Thursday Night Bar program.<sup>252</sup>

In response, Justice Vollack asked the supreme court's Judicial Advisory Council to study these issues and make appropriate recommendations.<sup>253</sup> The Council's January 1998 draft report noted that the number of

---

247. *Id.* at 14 fig.10.

248. Cile Pace, *Pro Bono Programs and Lend-A-Lawyer, Inc.*, 26 COLO. LAW. 39, 39 (1997).

249. Jo Ann Viola Salazar, *Examining Pro Bono in Colorado*, 23 COLO. LAW. 1049, 1049 (1994) (quoting COLO. BAR ASS'N, BOARD OF GOVERNORS RESOLUTION (1986)).

250. DRAFT REPORT, *supra* note 139, at 36.

251. FIRST REPORT OF THE LEGAL SERVICES/PRO BONO COMM. JUDICIAL ADVISORY COUNCIL, iv (1989) (on file with author) [hereinafter FIRST REPORT]. In 2000, the Colorado Supreme Court amended the Code of Judicial Conduct to encourage lawyers to perform pro bono services. *See* Rebecca L. Kourlis & Daniel M. Taubman, *Changes to Code of Judicial Conduct Allow Judges to Support Pro Bono Legal Services*, 29 COLO. LAW. 41, 41 (2000). When the Code of Judicial Conduct was amended, the comment to former Canon 4 encouraging judges to promote pro bono service was repealed. *Id.* at 252.

252. DRAFT REPORT, *supra* note 139, at 37.

253. FIRST REPORT, *supra* note 251, at iv.

unassigned Thursday Night Bar pro bono cases had increased from 100 to 400 in the previous two years.<sup>254</sup> The draft report also explained that recent efforts to encourage large and medium law firms to increase their number of pro bono cases had been met with limited success.<sup>255</sup> About ten years earlier, around 1988, many large law firms pledged to take one pro bono case per lawyer per year.<sup>256</sup> Because that pledge proved to be unsuccessful, a renewed pledge was made a few years later—at only half the previous level, one pro bono case annually for every two firm lawyers, but that pledge also proved unsuccessful.<sup>257</sup>

Meanwhile, in 1997, the CBA Public and Legal Services Department supported eighteen pro bono programs around the state.<sup>258</sup> At that time, the percentage of participating attorneys varied greatly, ranging from a high of seventy-six percent in Weld County to a low of eleven percent in El Paso County, and twelve percent in the Denver metropolitan area (through the Thursday Night Bar program, now MVL).<sup>259</sup> As discussed below, geographical differences in the rate of pro bono participation continue to occur.

In its First Report, the Legal Services/Pro Bono Committee of the Judicial Advisory Council observed that a one-third decrease in federal legal services funding in 1996 “has not been offset by an increase in the number of attorneys willing to provide pro bono representation.”<sup>260</sup> Following up on the January 1997 *Colorado Lawyer* article noting the geographical disparities in the provision of pro bono service, the Legal Services/Pro Bono Committee interviewed ten pro bono coordinators with bar-sponsored pro bono programs in mid-1997.<sup>261</sup> The Committee found that the geographical disparities in pro bono service continued, ranging from a high of seventy-three percent in Grand Junction to a low of six percent with MVL.<sup>262</sup> Noting that these disparities did not reflect pro bono service provided by lawyers on their own or through other nonprofit organizations, the Committee nevertheless concluded that the statistics “portray a system in which more than half the lawyers in many of the state’s judicial districts, including some of the state’s most populous, are not participating in organized, bar-sponsored pro bono programs.”<sup>263</sup>

The Committee also noted a widening gap between demonstrated need and available pro bono services.<sup>264</sup> Accordingly, many pro bono programs limited their areas of service. For example, pro bono programs did

---

254. See DRAFT REPORT, *supra* note 139, at 37; see also Taubman & Zakhem, *supra* note 85.

255. DRAFT REPORT, *supra* note 139.

256. *Id.*

257. *Id.* at 37.

258. See Pace, *supra* note 248.

259. *Id.*

260. FIRST REPORT, *supra* note 251, at vii.

261. *Id.*

262. *Id.* at 10.

263. *Id.* at 11.

264. *Id.*

not provide pro bono assistance in post-dissolution of marriage issues such as child support and maintenance.<sup>265</sup>

In light of these findings, the Committee recommended that existing legal services programs be expanded and emphasized “that it is essential to increase significantly the number of lawyers in Colorado who perform pro bono work.”<sup>266</sup>

Following the creation of the Colorado Access to Justice Commission in 2003,<sup>267</sup> the Commission persuaded the supreme court to adopt several rules and to amend Chief Justice Directive (CJD) 98-01<sup>268</sup> to encourage pro bono service. Those changes, under the leadership of former Colorado Supreme Court Justice Gregory Hobbs, included establishing a model law firm pro bono policy as an additional comment to Colo. RPC 6.1; allowing Colorado attorneys to earn up to nine hours of continuing legal education credit per three-year period for pro bono service (under C.R.C.P. 250.9, formerly C.R.C.P. 260.8);<sup>269</sup> and establishing a pro bono emeritus program for otherwise retired attorneys under C.R.C.P. 223, now repealed and expanded in C.R.C.P. 204.6 to include attorneys on inactive status in Colorado, including retired attorneys.<sup>270</sup> In addition, the supreme court expanded CJD 98-01 to allow pro bono attorneys providing representation through pro bono programs to obtain *in forma pauperis* status for their clients by completing a Judicial Branch form, rather than filing a motion.<sup>271</sup> The court also expanded CJD 06-03 to provide increased interpreter services.<sup>272</sup> As discussed earlier, the supreme court also established its Pro Bono Recognition Program to recognize law firms and other legal entities whose lawyers average fifty hours of pro bono service per year in accordance with Rule 6.1.<sup>273</sup>

---

265. *Id.*

266. *Id.* at 12.

267. The Colorado Access to Justice Commission was established by the Colorado Supreme Court, the CBA, and the Statewide Legal Services Planning Group. Its mission is to “develop, coordinate, and implement policy initiatives to expand access to and enhance the quality of justice in civil legal matters for persons who encounter barriers in gaining access to Colorado’s civil justice system.” Constance C. Talmage, *2008 ATJ Commission Report*, 38 COLO. LAW. 79, 79 (2009) (quoting *Access to Justice Commission Bylaws*, COLO. ACCESS TO JUST. COMM’N, [www.coloradojustice.org/Bylaws](http://www.coloradojustice.org/Bylaws) (last visited Dec. 17, 2019)).

268. Chief Justice Directive 98-01 originally set forth procedures for indigent litigants to seek *in forma pauperis* status in court so they would be excused from paying court filing fees and service of process fees. See COLO. SUP. CT. R., COLO. C.J. DIRECTIVE 98-01 §§ I, IV (amended Aug. 2011).

269. COLO. R. CIV. P. 250.9(1). One hundred twenty-five Colorado attorneys have received CLE credit for pro bono work during the past several years. E-mail from Jessica Yates, Att’y Reg. Couns., Colo. Sup. Ct., to Author (Sept. 18, 2019, 17:18 MDT) (on file with author).

270. COLO. R. CIV. P. 204.6(1)(a)(i). Under COLO. R. CIV. P. 204.1(4), single-client counsel certification, a lawyer not otherwise licensed to practice in Colorado may provide pro bono representation in addition to representation of a single client. This rule allows in-house counsel not licensed in Colorado to provide pro bono service.

271. COLO. SUP. CT. R., COLO. C.J. DIRECTIVE 06-03 § II (amended May 2016).

272. *Id.*

273. Gregory J. Hobbs, Jr., *Judicial Support for Pro Bono Legal Service*, 89 DENV. U. L. REV. 851, 855 (2012).

In 2016, the CBA adopted a strategic plan, called REFOCUS 20/20. The “F” in REFOCUS stands for facilitating access to justice.<sup>274</sup> The goal is to “[f]acilitate access to justice by continuing pro bono coordination and advocacy efforts, and by continuing emerging programs to promote and educate members on methods to feasibly serve people of modest means, all while monitoring developments.”<sup>275</sup> Since the adoption of this strategic plan, however, the CBA has not undertaken any new efforts to increase pro bono service. Further, shortly after the approval of the strategic plan, the CBA changed its Modest Means Task Force to the Modern Law Practice Initiative, dropping the term “people of modest means” from the Task Force’s focus.<sup>276</sup>

Despite these measures to promote pro bono service by Colorado lawyers, the amount of pro bono service in recent years may actually be decreasing. It is impossible to know for sure, because Colorado lawyers are not required to report whether they provide pro bono service, and, if so, how much. To the extent statistics exist, they strongly suggest that the amount of pro bono service has decreased or remained static.

For example, while the number of law firms and other entities pledging to provide an average of fifty hours of pro bono service per year in the supreme court’s Pro Bono Recognition Program increased from 270 in 2012 to a high of 297 in 2015, the number plummeted to 226 in 2016 and only 167 in 2018.<sup>277</sup> During this period, the number of firms and other entities meeting their pledge shrank from 165 to 117.<sup>278</sup>

These figures are admittedly imprecise because they do not reveal how many lawyers were employed by the pledging firms and entities or the extent to which the pledging law firms consolidated with other firms. It is possible, of course, that the forty-four percent decline between 2015 and 2018 in the number of participating firms and entities reflects a smaller decrease in the number of lawyers providing pro bono service. Similarly, the thirty-one percent decline during these years in the number of firms and other entities meeting their pledge may not accurately reflect an apparent decrease in the amount of pro bono service provided.

Further, we do not know whether the amount of pro bono service provided by law firms and other entities meeting their pledge was static or whether there was an increase in the amount of pro bono service provided by those firms and entities. This is so because the supreme court only

---

274. Loren M. Brown, *The CBA Strategic Plan—REFOCUS 20/20*, 45 COLO. LAW. 5, 6 (2016).

275. *Id.*

276. *Cf.* Taubman & Zakhem, *supra* note 85 (focus on representation of moderate-income people), with Colorado Bar Association Modern Law Practice Strategic Action Plan, 2018-2020 (mission to “revolutionize the legal profession by enhancing access to innovative, client-driven, and cost-effective legal services that encourage lawyers to build thriving law practices”) (March 11, 2019).

277. E-mail from Jacqueline Marro, Access to Justice Coordinator, State Court Adm’r’s Office, to Timbre Shriver, Law Clerk, State Court Adm’r’s Office (July 3, 2019, 10:40 MDT) (on file with author).

278. *Id.*



asked whether the firms and other entities had met their pledge, not by how much. Also, we have no information on the amount of pro bono services provided by firms and other entities that either did not meet their pledge or by those firms that had made a pledge but then did not continue to do so in subsequent years.

Nevertheless, the significant decrease in participation in the supreme court's Pro Bono Recognition Program suggests that there has been a decline, perhaps a significant one, in the amount of pro bono service provided by Colorado lawyers during the last several years. Other statistics, discussed below, support this inference.

Twelve pro bono programs, grantees of COLTAF, report their pro bono participation annually. Each program is asked to report how many lawyers are available to take pro bono cases, meaning how many lawyers in each program's bar association or associations "should be able to take pro bono cases (i.e., there is no conflict with their current employment), whether or not they are on your pro bono referral panel or otherwise participating in your pro bono program?"<sup>279</sup> During the past five years, the number of lawyers taking on pro bono matters has either remained static or declined—sometimes significantly.<sup>280</sup>

For example, MVL, the state's largest pro bono program, had 588 attorney volunteers in 2013-2014, but the number declined dramatically to only 273 in 2017-2018.<sup>281</sup> This finding was from a pool of 10,000 available attorneys. Boulder County Legal Services, with 1,200 available attorneys, reported a decrease in the number of attorney volunteers from 126 in 2013-2014 to 86 in 2017-2018.<sup>282</sup> The Pikes Peak Pro Bono Project, in Colorado Springs, reported 42 volunteer attorneys out of a pool of 930 in 2013-2014, increasing to 62 volunteer attorneys, out of a pool of 873 attorneys, in 2017-2018.<sup>283</sup> In Alamosa, the San Luis Valley Bar Association Pro Bono Project reported a decline from 24 to 12 volunteer attorneys, out of a pool of 33, during the past five years.<sup>284</sup>

The overall figures show that in 2013-2014, 9.7% of available attorneys provided pro bono service (1,301 out of 13,404) through these pro bono programs.<sup>285</sup> These figures declined in 2017-2018 to only six percent (777 out of 13,009).<sup>286</sup> The figures demonstrate that the number of attorneys handling pro bono cases through these twelve pro bono programs has

---

279. E-mail from Diana Poole, Exec. Dir., Colo. Lawyers Tr. Account Found., to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (July 3, 2019, 11:17 MDT) (on file with author).

280. *Id.*

281. Attorney Pro Bono Participation, 2013-18, provided to COLTAF; E-mail from Diana Poole, Exec. Dir., Colo. Lawyers Tr. Account Found., to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (June 30, 2019, 02:04 MDT) (on file with author).

282. *Id.*

283. *Id.*

284. E-mail from Diana Poole, *supra* note 279.

285. *Id.*, 247, 248.

286. *Id.*, 252, 253.

declined significantly during the last five years, and only involved less than ten percent of available attorneys five years ago.

These statistics are self-reported by the pro bono programs and may reflect inconsistencies in reporting among the programs.<sup>287</sup> A cursory review of the statistics indicates that they include approximations regarding the number of available attorneys. For example, MVL and Boulder County Legal Services listed 10,000 and 1,200 available attorneys respectively for each of the five reporting years.<sup>288</sup> Alpine Legal Services in Glenwood Springs reported 200 available attorneys in each year from 2014-2015 to 2017-2018.<sup>289</sup> To the extent these estimates are approximations, the percentage of available attorneys taking pro bono cases may be even lower than reported.

Statistics provided by CLS regarding pro bono attorney participation, through its Private Attorney Involvement (PAI) programs in twelve locations throughout the state, reflect another measure of the amount of pro bono services.<sup>290</sup> CLS is required by federal law to use a percentage of its federal LSC funding to support PAI, much of which is pro bono service. In 2018, CLS reported that eleven percent of its cases closed in 2017 were PAI cases.<sup>291</sup> CLS's annual PAI report comprehensively describes its pro bono efforts throughout Colorado.<sup>292</sup>

The CLS PAI statistics for recent years show only a 3.1% increase in the number of PAI cases between 2010 and 2018.<sup>293</sup> During that period, the number of PAI cases of extended representation<sup>294</sup> decreased dramatically from 626 to 355, while the number of cases of brief representation<sup>295</sup> increased substantially from 551 to 859.<sup>296</sup> While these figures indicate the number of cases handled by pro bono attorneys in CLS's PAI programs, they do not reflect the number of pro bono attorneys. The actual number of pro bono attorneys is presumably lower, because many pro bono attorneys handle more than one matter.

The pro bono statistics from both COLTAF and CLS's PAI programs provide information about pro bono service to low-income clients whose income would qualify them for representation by CLS. However, the statistics do not indicate the number of pro bono attorneys providing pro bono

---

287. E-mail from Diana Poole, *supra* note 279.

288. *Id.*

289. *Id.*

290. Some of the PAI programs are also COLTAF recipients.

291. COLO. LEGAL SERVS., PRIVATE ATTORNEY INVOLVEMENT PLAN 2019 30 (2019) (draft on file with author).

292. *See id.*

293. E-mail from Patricia Craig, Adm'r, Northwest Colo. Legal Servs. Project, to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (July 2, 2019, 07:14 MDT) (on file with author).

294. "Extended representation" refers to services covered in LSC CSR 8.3. LEGAL SERVS. CORP., CASE SERVICE REPORT HANDBOOK 20–22 (2008 ed.).

295. "Brief representation" appears to fall under the purview of "limited services," as defined by LSC CSR 8.2. *Id.* at 19.

296. E-mail from Patricia Craig, *supra* note 293.

service on their own or through other nonprofit organizations, such as the Colorado Lawyers Committee or the American Civil Liberties Union.

Because there is no central reporting site for pro bono service by nonprofit organizations, it is difficult to know how much assistance they receive from pro bono lawyers. However, the Colorado Lawyers Committee, a nonprofit “consortium of [eighty] Colorado law firms dedicated to creating and increasing opportunities for children, the poor and other disadvantaged communities,” annually reports the number of its volunteers and their hours.<sup>297</sup> The volunteers participate in numerous task forces, including children’s rights and education, civil rights and criminal law, and poverty and public benefits.<sup>298</sup> In 2018, more than 1,000 volunteers contributed some 7,823 hours and \$3.03 million worth of time to Committee projects.<sup>299</sup> Although the number of Committee volunteers far exceeds the number of volunteers at MVL, the average annual number of hours per volunteer is less than eight.<sup>300</sup>

Much of the volunteer time provided through the Lawyers Committee would qualify as pro bono service under the pro bono rules. However, the Committee does not indicate what percentage of its volunteer hours would fit within the first and second tiers of those rules.<sup>301</sup>

The Justice and Mercy Legal Aid Center (JAMLAC) is a faith-based legal services provider with a robust pro bono program. In 2018, 116 lawyers donated over 3,500 hours of pro bono service in such areas as family law, immigration, civil protection orders, and bankruptcy.<sup>302</sup> Therefore, the program’s volunteers contributed an average of just over thirty hours of pro bono service—a figure slightly lower than the average reported in the 2018 ABA pro bono survey.

The Rocky Mountain Immigrant Advocacy Network (RMIAN) also has a robust pro bono program. In fiscal years 2018 and 2017, pro bono attorneys contributed 8,440 and 9,760 hours, respectively.<sup>303</sup> At an average of forty hours per case, pro bono lawyers donated time in approximately 211 and 244 cases.<sup>304</sup> These numbers approximate the number of pro bono

---

297. COLORADO LAWYERS COMMITTEE, ANNUAL REPORT 3 (2019).

298. *Id.*

299. *Id.*

300. *See id.*

301. *See generally* COLORADO LAWYERS COMMITTEE, ANNUAL REPORT (2019).

302. Shelly Dill, *Justice and Mercy Legal Aid Center: Transforming Lives Through Faith-Based Legal Aid*, 48 COLO. LAW. 18, 19 (2019).

303. E-mail from RMIAN, to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (Oct. 21, 2019, 12:28 MDT) (on file with author); *see also* Facts, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, <https://rmian.org/facts> (last visited Dec. 17, 2019).

304. *See* E-mail from RMIAN, to Hon. Daniel M. Taubman, Colo. Ct. of Appeals, *supra* note 303.

lawyers, but the numbers are likely somewhat lower because some pro bono lawyers represented clients in more than one case.<sup>305</sup>

With regard to modest means representation, no statistics exist regarding the number of lawyers who provide modest means representation, much less modest means representation that would be consistent with tier two of the pro bono rules.

Information regarding the number of lawyers who contribute financially to legal services programs or other nonprofit organizations providing legal services for poor people is also limited. The Legal Aid Foundation of Colorado (Foundation), Colorado's major fundraising organization for CLS, reports annually on contributions by law firms and individuals. The Foundation has raised more than \$2 million during each of the past two years.<sup>306</sup>

In 2018-2019, 292 Colorado law firms contributed to the Foundation, 120 of them—representing approximately 2,250 lawyers—at the target rate of \$450 per lawyer.<sup>307</sup> One hundred seventy-two firms, representing approximately 1,550 lawyers, contributed at a significantly lower level.<sup>308</sup>

Additionally, 2,022 lawyers made individual contributions in varying amounts; many of those contributors worked for law firms that also contributed.<sup>309</sup> Even if we assume there was no overlap, fewer than 6,000 lawyers contributed to the Foundation.<sup>310</sup> This figure is less than one-fourth of the 24,004 active attorneys in Colorado in 2018.<sup>311</sup> However, given the substantial overlap in contributions by law firms and individual contributors, the percentage of Colorado lawyers contributing to the Foundation is even lower.

Of course, Colorado lawyers contribute to other organizations that provide pro bono legal services, but there is no way of knowing how many lawyers donate to such organizations or how much they give.

In sum, it appears that relatively few Colorado lawyers are providing pro bono service for low-income Coloradans. A higher number, but still relatively few, are contributing financially to organizations that support legal services for the poor.

---

305. E-mail from Sarah Plastino, Senior Staff Attorney, Pro Bono Counsel, Rocky Mountain Immigrant Advocacy Network, to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (Sept. 5, 2019, 12:58 MDT) (on file with author).

306. LEGAL AID FOUND. COLO., PUTTING THE PIECES TOGETHER FOR EQUAL JUSTICE: ANNUAL REPORT 2017–2018, at 33 (2018); LEGAL AID FOUND. COLO., STANDING FIRM WITH JUSTICE: ANNUAL REPORT 2016–2017, at 35 (2017).

307. E-mail from Diana Poole, Exec. Dir., Legal Aid Found. of Colo., to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (Aug. 3, 2019, 16:48 MDT) (on file with author).

308. *Id.*

309. *Id.*

310. *Id.*

311. See OFF. ATT'Y REG. COUNS., 2018 ANNUAL REPORT, at 56 chart C-3 (2018).

## V. RECOMMENDED REVISIONS TO THE PRO BONO RULE

The primary goal of Colo. RPC 6.1 and ABA Model Rule 6.1 is to encourage lawyers to provide fifty hours per year of pro bono service, primarily to low-income individuals or organizations that support them. A second goal is to encourage lawyers to contribute financially to programs that provide legal services for low-income individuals or organizations that support them. The information above shows that: (1) the current pro bono rules are vague and overbroad; (2) different organizations define pro bono service differently, and some simply use the term “public service” instead of pro bono service;<sup>312</sup> (3) in Colorado and nationally, substantial numbers of attorneys do not meet the fifty-hour aspirational provisions; (4) at least in Colorado, the number of lawyers providing pro bono service to low-income individuals appears to be declining; and (5) in Colorado, while many lawyers generously support legal services and pro bono programs, a substantial majority of lawyers does not contribute financially to organizations providing legal services to those of limited means.

Innumerable articles have been written to promote the “three Rs” of pro bono service: recruitment, retention, and recognition. As noted above, numerous articles have urged the establishment of mandatory pro bono rules, thus far without success.<sup>313</sup> In addition, a few articles have recommended changes to the ethics rules. In a recent article, one commentator contends that “the Model Rules have not kept pace with the demands of the justice gap” because their “[a]mbiguity and vagueness [] serve the needs of traditional, private sector attorneys.”<sup>314</sup> He recommends the creation of a “high-level, blue-ribbon ethics commission” to comprehensively review the Model Rules with an eye toward “promoting access to justice through ethical lawyering.”<sup>315</sup> This commentator also recommends examination of ABA Model Rules 1.2 and 6.5 to promote unbundling, or limited scope representation, the wisdom of the restrictions on lawyers’ financial assistance to clients under Model Rule 1.8, and modification of Model Rule 1.16 concerning when and how a lawyer can withdraw from representation of a client.<sup>316</sup> Oddly enough, however, this commentator does not recommend reconsideration of ABA Model Rule 6.1. Another commentator has proposed that mandatory continuing legal education rules become voluntary, and that voluntary pro bono rules become mandatory.<sup>317</sup>

---

312. As discussed, some programs state that public service is equivalent to pro bono service, even though some public service clearly does not qualify as pro bono service under the pro bono rules.

313. See Cummings, *supra* note 125, at 29 n.163.

314. Louis S. Rulli, *Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients*, 17 U. PA. J. L. & SOC. CHANGE 347, 349 (2014).

315. *Id.*

316. See *id.* at 360.

317. See Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 LA. L. REV. 547, 578 (2017); see also Susan Martyn, *Justice and Lawyers: Revising the Model Rules of Professional Conduct*, 12 PROF. LAW. 20, 22 (2000) (musing as to whether the Ethics 2000 recommended changes to the ABA Model Rules will encourage the promotion of justice by lawyers).

Surprisingly, little attention has otherwise been devoted to examining Colo. RPC 6.1 and ABA Model Rule 6.1 to see if modifications to the pro bono rules would address some of the shortcomings noted above and help increase access to justice.<sup>318</sup> What follows is a proposal that addresses the above-noted limitations of the pro bono rules in a practical manner.<sup>319</sup>

As former Colorado Supreme Court Justice Rebecca Kourlis has noted, Colorado lawyers “need to make the judicial system more accessible and [] user friendly,” both for the indigent and those of modest means.<sup>320</sup>

#### A. *Eliminating Vagueness and Overbreadth*

Eliminating the terms “persons of limited means,” “substantial majority,” and “substantially reduced fee” would contribute to a clearer understanding of the pro bono rules. As discussed above, those terms are not defined in the pro bono rules or comments and lead to significantly different interpretations as to their meaning.

First, the term “persons of limited means” should be eliminated and replaced by the term “low-income individuals,” defined as those whose household income is less than 200% of the federal poverty guidelines. This is the standard often used by legal services and bar-sponsored pro bono programs, especially for representing senior citizens. In addition, the pro bono rules should add the term “moderate-income individuals” to be defined as those whose household income is between 200% and 400% of the federal poverty guidelines. While no recognized definition of moderate-income individuals exists, this is the income limit used by various modest-means, reduced-fee programs.<sup>321</sup>

Second, the term “substantial majority” should be replaced with a specific number—thirty-five—so it is clear what percentage of a lawyer’s pro bono service should be provided, at a minimum, to low-income individuals or organizations that support them. There is no magic to the num-

---

318. Several years ago, the Author and Colorado attorney, Ed Gassman, proposed to the Service/Access to Justice Working Group of the Chief Justice’s Commission on Professional Development (now part of the Colorado Access to Justice Commission’s Delivery Committee) that Colo. RPC 6.1 be modified to focus on access to justice. Extended discussions and numerous drafts did not produce an agreement on recommended changes. Consequently, the project was tabled.

319. While the proposal described below addresses the major aspects of revising the Colorado and ABA pro bono rules, no proposal of this nature can anticipate all questions that might be raised about it before or after its adoption. Consequently, if the proposal is adopted, it would be necessary for the Colorado Supreme Court, another state’s supreme court, or the ABA to establish a committee to answer implementation questions as they arise. This is what the Pro Bono Institute does in its effort to answer hundreds of confidential questions each year “to define pro bono legal services in principled, clear, and consistent fashion.” PRO BONO INST., *supra* note 201.

320. Daniel M. Taubman, *The Depth and Breadth of Pro Bono Work in Colorado*, 26 COLO. LAW. 53, 53 (1997).

321. See COLO. ACCESS TO JUST. COMMISSION, *supra* note 154. For ease of administration, use of the federal poverty guidelines makes sense. Nevertheless, I recognize that some have questioned whether the guidelines accurately measure poverty in the United States. See, e.g., Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1507 n.122 (2019).

ber thirty-five, but that is the number former Colorado Supreme Court Justice Gregory Hobbs used to explain the term “substantial majority.” A specific term would provide guidance to attorneys in fulfilling their pro bono responsibilities.

Third, the term “substantially reduced fee” should be defined as a fee not exceeding \$200 per hour.<sup>322</sup> At present, a lawyer whose hourly rate is \$500 could charge \$350 as a substantially reduced fee but still not offer affordable legal services to those of modest means. For that reason, it is necessary to explain what the term “substantially reduced fee” actually means.

*B. Ensuring the Provision of Pro Bono Service or Financial Contributions by Each Lawyer*

As discussed above, it appears that at least half of practicing lawyers do not satisfy their pro bono responsibilities. In Colorado, it appears that a substantial majority of lawyers do not contribute to programs that provide legal services for the poor or organizations that support them. Consequently, it is proposed that lawyers be required to either provide pro bono service to low- or moderate-income individuals, or organizations that support them, or contribute at the rate of \$10 per hour, or \$500 annually, to satisfy their pro bono responsibility.<sup>323</sup> This requirement would be accomplished as follows:

1. A lawyer could provide fifty hours of pro bono service to low-income individuals or organizations that support them through a recognized pro bono program, as defined in C.R.C.P. 250.9(2).<sup>324</sup> This structure would ensure that the pro bono service is provided to low-income individuals and would not depend on a lawyer’s self-identification of pro bono clients, including friends and family members, as low-income individuals.
2. Lawyers could provide up to fifteen hours of their fifty-hour responsibility through tier-two pro bono service to moderate-income individuals, defined as those in households whose income is less than 400% of the federal poverty guidelines. To fulfill this tier-two pro bono option, lawyers would have to attest that these clients satisfied the moderate-income limitations of the rule.<sup>325</sup> Because moderate-

---

322. This figure could be indexed to reflect annual cost-of-living increases.

323. These figures could also be raised over time to account for cost-of-living increases.

324. This rule provides that “to be eligible for CLE credit hours, the pro bono matter in which [the] registered lawyer provides representation must have been assigned to the registered lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; a law school; or an organized, non-profit entity, such as Legal Services Corporation, Metro Volunteer Lawyers, or Colorado Lawyers Committee, whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons.” These entities must ensure the client’s financial eligibility. *See* COLO. R. CIV. P. 250.9(2).

325. Just as attorneys certify their clients indigence under CJD 98-01 when seeking *in forma pauperis* status, attorneys could similarly attest that their modest-means clients’ incomes are within 400% of the federal poverty guidelines.

means clients would typically pay a reduced fee, lawyers would be credited at the rate of \$5 per hour, rather than \$10 per hour, towards what would be their expected financial contribution and, thus, providing thirty hours of reduced fee representation would equal a credit of fifteen hours towards a lawyer's fifty-hour responsibility.<sup>326</sup>

3. Tier two would be limited to representation of moderate-income clients at a substantially reduced fee. The first and third current tier-two options would be eliminated. Thus, providing pro bono services without fee or at a substantially reduced fee to secure or protect civil rights, civil liberties or public rights, or service to various nonprofit and governmental organizations—now in the first category of tier two—would no longer count, unless those served were moderate-income clients. Also, the third tier-two option would be narrowed in scope. Instead of permitting countable pro bono service for participation in activities for improving the law, the legal system, or the legal profession, credit would be limited to activities promoting access to justice, such as serving on the board of a legal services organization or service on a local access to justice committee.
4. The proposed requirement for providing pro bono service or financial contributions would not apply to those government attorneys who are prohibited from engaging in pro bono service. However, the requirement would apply to government attorneys who can provide pro bono service, albeit under more restrictive conditions than pro bono service provided by other lawyers. According to the Office of Attorney Regulation Counsel's 2018 report, 4,518 Colorado lawyers are active attorneys in government practice.<sup>327</sup> Of that number, 403 are employed by the Attorney General's Office,<sup>328</sup> which has operated a pro bono program for many years. However, the extent to which other government attorneys may engage in pro bono service is unknown. Consequently, each government agency would need to determine whether its lawyers could provide pro bono service. Even if they cannot, their lawyers alternatively would be encouraged to make financial contributions to the Foundation or similar organizations.
5. The Colorado Supreme Court should increase the annual attorney registration fee by \$500 above the current amounts of \$190 and \$325—for the first three years of practice and four years or more, respectively—to provide an alternative means of satisfying a lawyer's pro bono responsibility. This fee would represent a contribution of \$10 per hour, far less than the recommendation in Comment [9] to the pro bono rules that when pro bono service is not feasible,

---

326. This amount could also be indexed to reflect annual cost-of-living increases.

327. OFF. ATT'Y REG. COUNS., *supra* note 311, at 57 chart C-4.

328. *Id.*



lawyers should contribute an amount “reasonably equivalent to the value of the hours of service that would have otherwise been provided.”<sup>329</sup> If a lawyer values his or her pro bono service the same as his or her standard hourly rate, the amount suggested by this comment is beyond what virtually every lawyer contributes to the Foundation or other organizations. For example, a lawyer whose standard hourly rate is \$300 would be expected to contribute \$15,000.

By paying the increased registration fee, the amount of the annual fee would not be prohibitive,<sup>330</sup> and it would be reduced by contributions to organizations, such as the Foundation, or by the amount of pro bono service provided. A few examples are helpful. First, a lawyer who contributes \$300 to the Legal Aid Foundation would receive a credit for that contribution and would only be required to pay an additional \$200 increased registration fee. Second, a lawyer who has provided thirty hours of tier-one pro bono service would only be required to contribute an additional \$200 to his or her registration fee. Further, an attorney whose pro bono service was limited to tier two would be required to pay an increased registration fee of \$350 or contribute that amount to organizations providing pro bono service, no matter how many hours of tier-two service the lawyer provided.

These provisions could be implemented easily by a one-page, check-the-box form to be submitted with an attorney’s registration fee and other certifications, such as attesting to the currency of any child support payments. The lawyer could simply state that, during the preceding twelve months, he or she had completed “x” hours of pro bono service with a specified pro bono program that he or she had contributed “y” dollars to a specified program addressing the legal needs of low- or moderate-income individuals or organizations that support them. Any contributions up to \$500 would be accompanied by a receipt. The lawyer would then calculate the additional registration fee, if any. That fee would go to a designated fund to support CLS, pro bono programs, and similar organizations, such as the Judicial Branch now allocates state funds of the Family Violence Justice Fund<sup>331</sup> and the recently created Eviction Legal Defense Fund.<sup>332</sup>

If adopted, the proposed amendments to Colo. RPC. 6.1 and ABA Model Rule 6.1 would have a significant beneficial effect. For example, 5,000 additional lawyers providing pro bono service in accordance with the amended rule in Colorado would generate 250,000 additional pro bono

---

329. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 9 (AM. BAR ASS’N 2018); COLO. RULES OF PROF’L CONDUCT r. 6.1 cmt. 9 (COLO. BAR ASS’N 2019).

330. Just as the Colorado Supreme Court imposes a lower attorney registration fee for attorneys in their first three years of practice, it could establish a lower contribution level for such attorneys.

331. See COLO. REV. STAT. § 14-4-107(1) (2019). Under this statute, the state court administrator makes grants to qualifying organizations providing civil legal services to indigent Coloradans.

332. *Id.* § 13-40-127(2). The proposal does not require lawyers to report pro bono hours in excess of fifty or financial contributions in excess of \$500 (or some combination of the two). Of course, the Colorado Supreme Court could require lawyers to report all their pro bono hours and all their financial contributions to pro bono organizations, thereby providing a more complete accounting of lawyers’ donations of time and money.

service hours for low- and moderate-income Coloradans—the equivalent of 125 full-time attorneys. Additionally, another 5,000 lawyers contributing \$500 annually would lead to \$2.5 million in additional funding for CLS or other similar organizations. This additional funding would more than double the funding currently provided by the Foundation. Nevertheless, even with increased hours of pro bono service and increased financial contributions, additional efforts would be needed to bridge the justice gap.

Of course, it is impossible to know the extent to which Colorado lawyers would provide additional pro bono service as opposed to financial contributions. Indeed, some lawyers, as is presently the case, may choose to do both. In any event, the amount of pro bono service and financial contributions would increase substantially and enable Colorado lawyers to provide increased access to justice for low- and moderate-income Coloradans.

### *C. Possible Objections to Proposed Pro Bono Rule Amendments*

Proposals to modify the pro bono rules invariably lead to vigorous discussion and sometimes controversy, and the above proposal is likely to be no different for several reasons.

First, when the Judicial Advisory Council considered recommending a mandatory pro bono rule over twenty years ago, the General Assembly enacted a law that would seem to prohibit implementation of the above proposal. Section 12-1.5-101(1), C.R.S. 2019, broadly prohibits any state government from requiring “[a] person practicing a regulated profession or occupation to donate [such] person’s professional services without compensation to [any other] person as a condition of admission to or continued licensure, or other authorization to practice [such] profession or occupation; [nor shall] [p]ayment of money in lieu of [such] uncompensated service [be required].”<sup>333</sup> This statute would seem to prohibit the promulgation of a rule requiring lawyers to provide pro bono service to low- or moderate-income Coloradans, or to financially contribute to organizations that do so. Nevertheless, the constitutionality of such statute may be subject to challenge based on the Colorado Supreme Court’s broad power to regulate the legal profession. In *Colorado Supreme Court Grievance Committee v. District Court, Cty. of Denver*,<sup>334</sup> the supreme court declared, “The Colorado Supreme Court, as [p]art of its inherent and plenary powers, has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public.”<sup>335</sup>

Given this apparent conflict between the statute and the Colorado Supreme Court’s plenary power to regulate the legal profession, as a practical

---

333. *Id.* § 24-1-138.

334. 850 P.2d 150 (1993).

335. *Id.* at 152.

matter, the CBA or the Judicial Branch could encourage the General Assembly to repeal or amend the statute. Alternatively, the supreme court could declare the statute unconstitutional as applied to the legal profession to implement the proposed changes to Colo. RPC 6.1.

Regardless, the Colorado statute would not constrain the ABA or other states from implementing the proposed changes to ABA Model Rule 6.1 or similar state ethics rules.

Second, some may assert that the proposed changes to the pro bono rules are nothing more than a mandatory pro bono rule with a buy-out provision. However, the proposed changes should not be viewed in that light because they do not provide for required pro bono service as a default, subject to a buy-out alternative. Rather, the proposal provides lawyers the option to provide pro bono service or to contribute financially to organizations that provide legal assistance to low-income Coloradans or low-income residents of other states. A third alternative is that lawyers may choose to pay an additional \$500 registration fee, with the money to be directed to pro bono organizations helping poor people. This construct weakens or eliminates the traditional objections to mandatory pro bono service on the grounds that some lawyers do not have the time, interest, or competence to represent pro bono clients.

Third, some might object that the proposal unfairly narrows the scope of permissible pro bono service as set forth in the current pro bono rules. It would do so, but only to a limited extent. The proposed rules still focus pro bono representation on assisting low-income individuals. To the extent it would require such pro bono service to be provided through recognized pro bono programs, it would eliminate lawyers counting as pro bono service legal assistance provided to friends and family members without any assurance that such assistance is provided to those of low, or even moderate, income. To the extent the proposed changes would eliminate the first category of tier-two pro bono service and narrow the third category, those changes are not likely to significantly impact the amount of tier-two pro bono service currently provided. This is so because the proposal would continue to credit lawyers tier-two pro bono service for modest-means clients, and not counting other tier-two pro bono service would only affect, at most, fifteen hours of a lawyer's fifty-hour pro bono responsibility. Currently, these provisions apply only to the minority of pro bono service not focused on representation of low-income clients. Further, various organizations discussed above do not even count this pro bono service in determining the extent to which lawyers provide pro bono service.

Fourth, some may argue that the above proposal is administratively infeasible. However, as noted above, a one-page, check-the-box form could easily be created to facilitate lawyers' annual provision of information concerning pro bono service and financial contributions.

Fifth, some may assert that the proposed changes would fundamentally alter the ethical rules, which have never required lawyers to provide pro bono service or make financial contributions. However, the proposed changes are consistent with most other provisions of the Colorado and Model Rules of Professional Conduct, which contain only one other provision that uses the term “should” rather than “shall.” Colo. RPC 2.1 and ABA Model Rule 2.1 provide that in a matter expecting to result in litigation “a lawyer should advise the client of alternative forms of dispute resolution.”<sup>336</sup> The addition of a required provision regarding pro bono service or financial contributions to attorney registration requirements is consistent with the requirements that lawyers report whether they are current in any child support obligations and whether they carry malpractice insurance.<sup>337</sup> Additionally, Colorado lawyers are required to report their compliance with continuing legal education requirements. Therefore, adding a pro bono requirement is not inconsistent with other principles reflected in the rules.

Sixth, one objection that may be raised to the proposal is that it would violate the separation of powers doctrine because the responsibility to provide funding for CLS and similar programs rests with the General Assembly, not with the Judicial Branch. This argument misses the mark for several reasons.

Seven states—Illinois, Indiana, Minnesota, Missouri, Pennsylvania, Texas, and Wisconsin—include funding for legal services programs in their annual attorney registration fees or state bar dues.<sup>338</sup> Second, thirty-three states use court filing fees or fines to raise money for legal services programs.<sup>339</sup> Third, at the request of the Access to Justice Commission and the CBA’s Board of Governors, the supreme court authorized grants of \$750,000 each in 2012 and 2013 to CLS from its attorney registration fund.<sup>340</sup> Fourth, the Commission’s 2014 report recommended that \$20 of the attorney registration fee for attorneys practicing more than three years be dedicated to support access to civil justice in Colorado<sup>341</sup> and that court rules be amended to increase *pro hac vice* fees from \$300 to \$450, with the increase also supporting access to civil justice in Colorado.<sup>342</sup>

---

336. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2018); COLO. RULES OF PROF’L CONDUCT r. 2.1 (COLO. BAR ASS’N 2019).

337. *Attorney Registration Statement - Compliance Statements*, <https://www.coloradosupremecourt.com/PDF/Registration/Compliance%20Statements%202019.pdf> (last visited Dec. 18, 2019).

338. E-mail from Shubi Deoras, Dir., ABA Res. Ctr. for Access to Justice Initiatives, to Hon. Daniel M. Taubman, Colo. Ct. of Appeals (Sept. 4, 2019, 19:01 MDT) (attaching chart, Civil Legal Aid Funding through State Bar Dues &/or Attorney Registration Fee Forms, Mandatory and Voluntary). Eight other states have a voluntary opt-out provision for civil legal aid funding.

339. *Id.* Chart, Statutes, Court Rules, & Attorney Practice Rules Supporting Civil Legal Aid Funding (July, 2016).

340. COLO. ACCESS TO JUST. COMMISSION, JUSTICE CRISIS IN COLORADO 2014: REPORT ON CIVIL LEGAL NEEDS IN COLORADO 15 (2014).

341. *Id.* at 2.

342. *Id.*

In short, there is no separation of powers barrier to court rules that would raise money to support access to civil justice in Colorado or elsewhere.

Seventh, some attorneys may assert that the proposal violates their First Amendment rights because it requires them to provide pro bono service or, in the alternative, to contribute financially to support legal services or pro bono programs. This contention may be based on the 2018 decision of the U.S. Supreme Court in *Janus v. American Federation of State, County, and Municipal Employees*,<sup>343</sup> which ruled that public sector union activity, such as collective bargaining, is political and directly affects the allocation of public funds.<sup>344</sup> Therefore, the Court held, mandatory union dues or forced union membership violated employees' First Amendment rights. This decision has resulted in lawsuits in several states seeking to invalidate mandatory bar associations or to prohibit mandatory political activities.<sup>345</sup>

Although these lawsuits are not directly applicable to the CBA, which is a voluntary bar association, some may contend that neither the Colorado Supreme Court nor another state supreme court may promulgate rules requiring attorney registration fees to be used to promote access to justice or pro bono service. However, the U.S. Supreme Court did not invalidate *Keller v. State Bar of California*,<sup>346</sup> which held that a mandatory bar association may not finance political activities with mandatory dues, but that a state could constitutionally require membership and dues payments from lawyers for "germane" activities, such as "regulating the legal profession and improving the quality of legal services."<sup>347</sup>

While the proposal involves regulation of the legal profession and improving the quality of legal services, it may be subject to challenge under *Janus*. However, *Janus* is distinguishable from the proposal because the proposal does not require lawyers to financially contribute to the Judicial Branch, and lawyers could contribute financially to organizations of their own choosing. Thus, Colorado lawyers who did not want to contribute to the Judicial Branch or the Foundation because they were opposed to divorce, for example, could contribute to a pro bono organization consistent with their political or philosophical views, perhaps JAMLAC or RMIAN.

Additionally, the supreme court's authority to regulate the practice of law presumably includes the authority to impose fees on all Colorado lawyers to ensure the efficient operation of the Judicial Branch. To conclude

---

343. 138 S. Ct. 2448 (2018).

344. *See id.* at 2460.

345. *See, e.g.,* Eugster v. Littlewood, No. 2:17-CV-0392-TOR, 2018 U.S. Dist. LEXIS 80082, at \*1–2 (E.D. Wash. May 11, 2018).

346. 496 U.S. 1 (1990).

347. *Id.* at 13–14.

otherwise would subject virtually any Judicial Branch activity to challenge on First Amendment grounds.<sup>348</sup>

In sum, while various objections to the proposals may be raised, persuasive arguments exist to rebut them. It is incumbent on the legal profession to consider the proposal as one way to address the shortcomings of the current pro bono rules.

#### CONCLUSION

The above proposals to modify Colo. RPC 6.1 and ABA Model Rule 6.1 would eliminate ambiguities and overbreadth in the current rules. They would emphasize the primary goals of those rules—providing pro bono service to low- and moderate-income clients and encouraging financial contributions to organizations that provide legal services to low-income clients or organizations that support them. Available statistics suggest that while many lawyers provide pro bono service and financial contributions to organizations providing legal assistance to the poor, many lawyers do not. The above proposals will not solve the access to justice crisis, but they have the potential of making our judicial system accessible to thousands more low- and moderate-income individuals.

---

348. The Judicial Branch clearly has an interest in ensuring the efficient litigation of cases involving litigants without lawyers. See text accompanying notes 78–80. Such cases require a substantial time commitment by judicial officers and other court staff.