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RECENT DEVELOPMENTS IN THE PROVISION OF *PRO BONO* LEGAL SERVICES BY ATTORNEYS IN SOUTH AFRICA

D Holness*

> A system of justice that closes the door to those who cannot pay is not deserving of the name.**

1 Introduction

Our law and legal system can and should be a vehicle through which the lives of all those resident in South Africa are enhanced through the protection and promotion of the rights guaranteed in the Bill of Rights.[1] This paper will focus on legal service delivery for the indigent by attorneys in private practice acting *pro bono* in civil rather than criminal matters. In this regard there have been and continue to be considerable gaps between the proper access to the civil justice imperatives of constitutional South Africa and the status quo which has existed from the advent of a democratic South Africa until the present. As has been aptly asked:

> But what happened to all the justice reforms promised to us ... to provide equality before the law, such as in civil cases where cost rather than justice often remains the deciding factor?[2]

The attorney and own client cost fees of private attorneys invariably far exceed the tariffs in place. However, even on the basis of the High Court tariffs it is immediately apparent that access to a lawyer in civil matters is for well-off South Africans only. For example, in terms of the High Court Tariffs, fifteen minutes in court or in a consultation is listed at the sizeable cost of R177.50, and for each page drafted R50

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** Wachtler 1991 *Hofstra L Rev* 744.

1 These transformational imperatives are espoused in a number of parts of the *Constitution of the Republic of South Africa, 1996* (hereinafter "the *Constitution*"). For example: the Preamble; s 2 thereof headed "Supremacy of the Constitution"; and s 7 thereof headed "Rights".

2 Benson "Justice for All" *The Weekend Post* (7 January 1995) 8.

is allowed in terms of the tariff.[3] According to Jaichand,[4] one of the single greatest problems facing South Africa's legal system today is the fact that indigent persons cannot afford the prohibitive costs of legal services. This effectively constitutes a barrier to access to justice. In the light of the relatively wide net of available legal aid in criminal matters provided by Legal Aid South Africa,[5] it is submitted that Jaichand's sentiment has greatest application to access to justice in civil cases. The indigent, like other members of society, have serious legal concerns and problems that need addressing. The legal community needs to commit itself to making sure that the most marginalised, vulnerable and indigent members of our society will have some redress through representation within the justice system.

Law as a vehicle for necessary positive change in the daily lives of South African residents is pertinently considered within the country's woefully unequal socio-economic climate, a situation appositely described by the Constitutional Court:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services.[6]

This paper considers the role which *pro bono* work by private attorneys is playing and should play in promoting a more just and equitable society through making proper access to justice available. It will explore the current position in South Africa as well as the position in selected foreign jurisdictions regarding the offering of *pro bono* services by attorneys in private practice in civil matters. Part of the discussion will focus on the question of whether *pro bono* work should be voluntary or mandatory. The paper critically analyses the merits of introducing a *pro bono* obligation by looking at the effect both on legal practitioners as well as on those receiving the *pro bono* services. Having defined *pro bono* work, the practical need for *pro bono* work by lawyers in private practice will be highlighted due to the dearth of legal aid in civil matters for indigent South Africans. It will then point out possible

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3 High Court Tariffs, Amendment of Rule 70 (Tariff of fees of attorneys). See GN R516 in GG 32208 of 8 May 2009.

4 Jaichand 2002 *De Rebus*.

5 See fn 10 and 11 below and the text to which these notes relate.

6 *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) [8].

constitutional imperatives for the provision of free legal services in civil matters. An important part of the paper is a reflection on some of the *pro bono* work being conducted by private firms of attorneys. The paper concludes with suggestions on means for a (more) effective *pro bono* system in South Africa.

2 Defining *pro bono* work and the need for free civil legal services in South Africa

"*Pro bono public*" translates as "for the good of the public"[7] and means providing or assisting to provide quality legal services in order to enhance access to justice for persons of limited financial means.[8] Whilst this working definition will suffice for this paper, clearly what exactly constitutes *pro bono* can be the subject of considerable debate. The Cape Law Society, for example, has defined *pro bono* work as including advice, assistance or the giving of an opinion in matters falling within an attorney's competence, to facilitate access to justice for those unable to afford the costs thereof, through recognised structures.[9]

This paper focuses on free legal services (taking the form of *pro bono* work by private South African attorneys) in civil rather than criminal matters for two main reasons. Firstly, the vast majority of legal aid in South Africa is provided in criminal and not civil matters.[10] This very uneven split between criminal and civil legal aid services is best seen through the legal service provision of by far the largest provider of legal aid services in South Africa, the state funded Legal Aid South Africa - LASA (formerly known as the Legal Aid Board). In the latest available annual report of LASA's work for 2009/2010, 387 121 new criminal matters were accepted by the organisation, compared with just 29 028 new civil matters.[11] Secondly, there has been much academic writing (and case authority) in South Africa on the rights of an

7 Strossen 1993 *Mich L Rev* 2132.
8 Jaichand 2002 *De Rebus*.
9 Whittle 2003a *De Rebus*.
10 Van As cites various statistics which show that the bulk of legal aid in South Africa is of the criminal variety (Van As 2005 *J Afr L* 54). The statistics of Legal Aid South Africa (formerly called the Legal Aid Board) over the last decade are reflected in their published Annual Reports (LASA 2012 http://bit.ly/XamQGY).
11 LASA 2012 http://bit.ly/XamQGY.

accused person to legal representation when the interests of justice require such representation.[12] However, there has been considerably less case authority and academic analysis on legal aid for the indigent in civil matters.[13]

2.1 Constitutional imperatives

Section 34 of the South African *Constitution* states:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In so far as section 35 of the *Constitution* makes special provision for fair trial rights of criminal accused, including far-reaching rights to legal representation in criminal matters (at state expense in particular circumstances), section 34 casts the net wider in providing for the right to fair judicial adjudication in all matters, including civil disputes. Brickhill interprets access to justice in the light of section 34's requirements as requiring a legal institutional framework to better serve the whole population and to make good on constitutional promises of genuine socio-economic advancement.[14] Brickhill compellingly argues that the right to a fair civil trial in section 34 imposes duties upon lawyers and law students to act *pro bono*.[15] Budlender throws weight behind the argument that section 34's "fair public hearing" requires legal representation in certain instances.[16] He provides a formalistic argument that when one looks at section 34's wording, there is a very close correlation to the wording of Article 6, para 1 of the *European Convention on Human Rights*. The European jurisprudence on Article 6, para 1, he argues, provides for the

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12 A) Examples of academic writing focusing entirely or almost entirely on criminal legal aid rights only are: Abramowitz 1960 *SALJ* 351; McQuoid-Mason 1991 *SACJ* 267; Quansah 2007 *CILSA* 209; Sarkin 1993 *Stell L R* 261; Sarkin 1998 *Hum Rts Q* 628. B) South African case authority which has made pronouncements on criminal legal aid is plentiful and includes: *Legal Aid Board v Msila* 1997 2 BCLR 229 (SE); *S v Mhlungu* 1995 3 SA 867 (CC).

13 For an example which does provide civil legal aid discussion see: Kemp and Pleasence 2005 *Obiter* 285.

14 Brickhill 2005 *SAJHR* 293.

15 Brickhill 2005 *SAJHR* 293.

16 Budlender 2004 *SALJ* 339.

right to civil legal representation in certain matters,[17] and thus it is argued that our section 34 should be read to include this too. The need for civil legal aid (or some other form of free legal assistance such as *pro bono* work by private lawyers) is paramount where the legal system is either so complex as to make indigent litigants; prospects of successfully bringing or defending their civil cases themselves very small, or there exists a lack of knowledge of a legal right or how to exercise such a right. Where someone lacks money for civil representation in such circumstances, it is submitted that such a person's Section 34 rights are very likely to be denied to them in the absence of adequate free legal services. Section 34 provides a constitutional imperative for the provision of free legal services in civil matters for particular (indigent) litigants. Furthermore, such arguments and constitutional entitlements are augmented by Section 9 of the *Constitution*'s guarantee of equality both before the law and in its application. Referring to section 34, Sarkin states that:

> Equality before the law demands that at least all people have access to legal assistance and the courts to enforce their legal rights and to protect themselves against injustice and exploitation.[18]

A virtually identical idea has been put forward by one of South Africa's most prolific writers on matters pertaining to free legal services for the indigent and access to justice in South Africa and abroad, Professor David McQuoid-Mason. McQuoid-Mason cites the jurisprudence of the European Court of Human Rights which supports such a need for even playing fields in what that Court has termed the need for "equality of arms" between two civil litigants.[19]

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17 Budlender 2004 *SALJ* 339.

18 Sarkin 2002 *SAJHR* 630.

19 Cited by McQuoid-Mason 2005 *Obiter* 213. In this regard consider also s 9 of the *Constitution* which, paraphrased, refers to the guarantee of equality before the law and its fair and equal application and protection.

2.2 Mandatory versus voluntary pro bono work

There has been much debate in legal circles, both domestically and internationally, regarding the introduction of mandatory *pro bono.* Within the context of debating *pro bono* legal work it is crucial to consider whether the responsibility for doing *pro bono* work is or should be an individual, moral decision to be undertaken voluntarily or whether it is or should be a professional obligation which can be imposed upon each member of the profession. Essentially, is there a professional obligation to ensure that the legal needs of everyone are met without regard to the ability to pay? This is particularly relevant in South Africa in the light of the *Legal Services Sector Charter* (the "*Charter*")[20] and the Legal Practice Bill, which seek to introduce mandatory *pro bono* for the legal profession. It will be submitted that the South African legal community needs to commit itself, or failing that, be it through legislation or otherwise, be compelled to provide *pro bono* work. It is the most marginalised, vulnerable and indigent members of our society who typically have no legal representation within the civil justice system through a lack of legal representation. A system of free legal services which does not rely solely on legal aid service providers (like Legal Aid South Africa) but harnesses a small proportion of the work time of private lawyers must have a greater positive impact in providing access to lawyers to the indigent than legal aid providers alone. Constitutional Development Minister, Mr Jeff Radebe, has echoed the rationale for this clear need in aptly stating:

> Resolution of civil disputes cannot continue to be an exclusive terrain for the rich and powerful only … All South Africans must enjoy equal access and protection of the law and where necessary through adjudication by the courts.[21]

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20 The Charter was unanimously adopted by the Law Society of South Africa on 6 December 2007 – it "illustrates the commitment of the attorneys' profession to transformation and the Charter as a binding and guiding principle to provide for an independent legal profession and to eradicate the inequalities of the past". See Department of Justice and Constitutional Development at http://bit.ly/14miGO1.

21 SouthAfrica.info 2010 http://bit.ly/WUbQuQ.

3 *Pro Bono* in selected foreign jurisdictions

The notion that lawyers have special duties to society and those unable to pay is not a new one and has existed since Roman times.[22]

Australia has a public interest law clearing house – a referral body that matches disadvantaged and under-represented individuals and groups with a voluntary legal practitioner member of the clearing house.[23] These Australian *pro bono* clearing houses (such as that in Sydney) act as referral bodies which attempt to marry unrepresented indigent clients with private law firms associated with that clearing house.[24] The Australian clearing house model is reported to be extremely rigorous in its appraisal and acceptance of mandates. A client must show that she has no profit motive, is unable to access the formal legal aid system and qualifies in terms of a financial means test, meaning that such persons could not engage and pay for their own lawyers.[25] Members pay an annual membership fee to the clearing house and, in turn and according to a roster system, they receive two to three cases a year which they conduct on a *pro bono* or reduced-fee basis. [26] In the Australian state of Victoria a *pro bono* "Secretariat" was set up to both encourage and coordinate community service by lawyers in private practice.[27]

The American Bar Association's Model Rules of Professional Conduct identifies the lawyer as a public citizen.[28] While Model Rule 6.1[29] sets out in a clear and detailed manner the avenues for fulfilling the lawyer's *pro bono* responsibility,[30] this provision does not state a mandatory rule and does not create a duty enforceable through

22 Russel 2003-2004 *UMKC L Rev* 442.
23 Whittle 2001 *De Rebus.*
24 Whittle 2002 *De Rebus*.
25 Whittle 2001 *De Rebus*.
26 Van der Merwe 2001 *De Rebus*.
27 Van der Merwe 1999 *De Rebus*.
28 Russel 2003-2004 *UMKC L Rev* 439.
29 The American Bar Association's Model Rules of Professional Conduct Model Rule 6.1 (as revised in 2002) (ABA 2002 http://bit.ly/10VNzpy) states: "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render *at least (50)* hours of *pro bono public legal services per year.*" (Own emphasis added). It goes into detail about who the recipients of such services must be and what constitutes *pro bono* work.
30 Russel 2003-2004 *UMKC L Rev* 440-441.

disciplinary proceedings.[31] However, while *pro bono* may not be mandatory in the USA, it is standard practice in the USA for law firms to partake in *pro bono* programmes and these firms take immense pride in their *pro bono* rankings.[32] The New York Bar Association combines a clearing-house referral system to external firms while also employing legal practitioners to provide legal aid.[33] The Illinois State Bar Association provides the John C. McAndrews *Pro Bono* Service Award as an incentive to produce quality and extensive *pro bono* work.[34] The John C McAndrews Award recognises lawyers' meritorious efforts in delivering *pro bono* legal services. For example, the firm DLA Piper was honoured for its large-scale, long-term, innovative *pro bono* work, in particular the firm's signature Juvenile Justice Project.[35]

In Chile the *Pro Bono* Foundation in Santiago is an initiative primarily of legal practitioners in private practice. A case placement system for referral organisations and contracts of *pro bono* service with law firms have been developed and are financed mainly through international donor funding.[36] This is in addition to a national system requiring up to 18 months compulsory legal service post university study before entrance is gained to the private profession.[37]

Malawi introduced legislation in terms of which lawyers have to provide proof of their 50 hours of *pro bono* work before their practice certificates, which are issued by the High Court on an annual basis, are renewed.[38]

The set-up in Spain and Belgium is even more prescriptive. In Belgium each bar has a statutory obligation to represent someone unable to afford their services.[39] Similarly in Spain every lawyer must represent indigent civil clients *sans* a charge therefor. Cases are assigned to lawyers alphabetically, and if a lawyer wishes to be

31 Russel 2003-2004 *UMKC L Rev* 441.
32 Russel 2003-2004 *UMKC L Rev* 441.
33 Van der Merwe 2002a *De Rebus* 1; De Klerk 2003 *De Rebus*.
34 DLA Piper 2005 http://bit.ly/XEEFsx.
35 DLA Piper 2005 http://bit.ly/XEEFsx.
36 De Klerk 2003 *De Rebus*.
37 De Klerk 2003 *De Rebus* 4.
38 Whittle 2006 *De Rebus*.
39 Sarkin 2002 *SAJHR* 641.

excused from his or her 'turn', there is a sum of money payable by that practitioner.[40]

There are various lessons to be learnt from these examples in South Africa's path towards promoting *pro bono* work. The range of lessons extends from systems based entirely on volunteerism to strictly mandatory requirements. It is submitted that the experiences of foreign jurisdictions show that there can be a space for both a "carrot" and "stick" approach to introducing pro bono services by lawyers. Wherever possible the incentive-based American style of volunteer *pro bono* work is preferable, as interference in the running of the legal profession is kept to a minimum thereby. However, where lawyers fail to embrace the ideals and concepts of *pro bono* work, there are examples of successful implementation of mandatory *pro bono* mechanisms which could be considered in this country,

4 Current position in South Africa

Presently in South Africa, mandatory *pro bono* work is theoretically part of the rules of each of the constituent provincial law societies and the various bar councils. A refusal by any attorney to perform his or her *pro bono* service hours without good cause will be regarded as unprofessional conduct.[41] The word *theoretically* is added as there has been very little enforcement of this requirement and to date there has been no report of an attorney having been disciplined for failing to undertake *pro bono* work.[42] *Pro bono* work was initially mandatory only for attorneys practising in the three Cape provinces.[43] In 2003 the Cape Law Society introduced a minimum requirement of 24 hours a year of mandatory *pro bono* work.[44] In subsequent years almost identical rules have been adopted countrywide. For example, Rule 27 of the KwaZulu-Natal Law Society provides for mandatory *pro bono* work by its members.[45]

40 Sarkin 2002 *SAJHR* 641.
41 The Charter: Clause 2.2.2.
42 Van Der Merwe 2006a *De Rebus*.
43 Van Der Merwe 2006a *De Rebus*.
44 Whittle 2003b *De Rebus*. Adopted in 2003, this minimum requirement is found in Cape Law Society Rule 21. See in this regard Singh 2005 http://bit.ly/11Ivb2t.
45 The rules of the KwaZulu-Natal Law Society are accessible at http://bit.ly/179tRtj.

Sub-rules 27.3 and 27.4 provide the approved structures through which *pro bono* work may be offered. Notwithstanding the detail of Rule 27, no punitive consequence is listed for failing to meet one's pro bono obligations.

The hesitancy of the legal community in much of South Africa to embrace mandatory *pro bono* work is well illustrated by the aforementioned situation in KwaZulu-Natal. The KwaZulu-Natal Law Society has debated the issue of mandatory *pro bono* service since 2002,[46] but its members repeatedly voted against the mandatory requirement,[47] following the Cape model only in the second half of 2010.[48] Similarly, the Law Society of the Northern Provinces has for a number of years adopted the view that *pro bono* services would best be rendered by its members on a voluntary basis.[49]

However, it should also be noted that a number of South African law firms (most notably the large, national firms) have *mero motu* undertaken to perform a great deal of voluntary *pro bono* work. What follows is a description of the *pro bono* work of certain South African firms of attorneys, and some analysis thereof.

The *pro bono* policy of Bowman Gilfillan attorneys commits all its lawyers to:

> ... make significant contributions to assist poor or otherwise disempowered persons to access justice and quality legal services; to the development of the Constitution and constitutional jurisprudence; to the clarification or resolution of legal matters of public interest and to the creation of a positive public image of the attorneys' profession, directly or by co-operating with or assisting appropriate organisations or individuals.[50]

In the financial year ended 28 February 2006, Bowman Gilfillan provided 8 432 hours of *pro bono* services at an average contribution of 34 hours per legal practitioner from candidate attorneys through to senior partners. The value of that

46 Van Merwe 2006 *De Rebus*.
47 Whittle 2003b *De Rebus*; Van der Merwe 2006a *De Rebus*.
48 The Charter: Clause 2.2.2.
49 The Charter: Clause 2.2.2.
50 See Bowman Gilfillan 2013 http://bit.ly/YrdRzU.

contribution was in the region of R6.5 million for the financial year.[51] More recent statistics (admittedly from the firm itself) illustrate an even greater commitment to *pro bono* work by this firm. Each professional member of staff, from Directors to Candidate Attorneys, is expected to contribute an average of 50 hours to *pro bono* work every year.[52] According to Bowman Gilfillan the aforementioned 50 working hours per year of *pro bono* work for every professional staff member amounts to about 1 000 hours a month across its national offices – worth almost R1 million.[53] Whilst not as impressive as the recent 50 hours per professional staff member, there are impressive *pro bono* statistics from the firm over the last decade. From June 2003 to February 2010 they reported contributing about 51 000 hours of pro bono work, worth an estimated R43 million. This amounts to an average of about 30 hours per attorney or candidate attorney per year.[54] It is interesting to note that Bowman Gilfillan's model of *pro bono* service delivery involves each professional staff member doing *pro bono* work, rather than the creation of a dedicated *pro bono* department, which has been the route chosen by certain other large South African firms. Whilst the appropriateness to other firms of the Bowman Gilfillan-model of *pro bono* work could be debated at length, its commitment to *pro bono* work generally is something to be emulated by other firms.

Another of South Africa's largest firms of attorneys, Edward Nathan Sonnenbergs (ENS), appears to have made a commitment to *pro bono* work well in excess of law society expectations. It has committed each of its attorneys to 32 hours per attorney per calendar year and *pro bono* hours cannot be traded for other work done.[55] As with the Bowman Gilfillan model, ENS has taken the route of its entire professional staff making a contribution to *pro bono* work rather than dedicating one department to the task. However, ENS has taken the bold and logical step of making its *pro bono* work more geographically accessible to indigent communities. This it has done by establishing a satellite office in Mitchells Plain (on the so-called "Cape Flats"). The Mitchells Plain office co-ordinates the firm's *pro bono* efforts through screening

51 Geral 2006 *De Rebus*.
52 Bowman Gilfillan 2011 http://bit.ly/YziiuA.
53 Bowman Gilfillan 2011 http://bit.ly/YziiuA.
54 Bowman Gilfillan 2011 http://bit.ly/YziiuA.
55 ENS 2013 http://bit.ly/ZwP2hm.

potential matters and then assigning *pro bono* cases accepted to individual legal professionals at ENS's Cape Town offices. The firm reports that in just over a year it handled about 250 *pro bono* matters, amounting to over 2000 hours of professional work time.[56] The Chairperson of ENS's *pro bono* committee has noted the scepticism of some as to such a *pro bono* model working within a firm's other commitments. Such sceptics, he says, believe such work can be "dangerously disruptive to a busy commercial practice". The ENS response thereto has been to attempt to make *pro bono* work part of its organisational culture through the hands-on approach by each and every one of its professional staff.[57] Similarities in this regard may be drawn with the widespread inculcation of a *pro bono* culture described above in American law firms.

Norton Rose South Africa has established a hybrid between a dedicated *pro bono* department and a commitment by each candidate attorney or attorney to perform some *pro bono* work. This it has done through the establishment of a Public Interest (*pro bono*) Law Department at Norton Rose's Johannesburg offices. Concomitant with the dedicated department, each candidate attorney and attorney is required to perform 24 hours of *pro bono* work per year.[58]

Another of South Africa's largest law firms, Webber Wentzel, has approached *pro bono* work through establishing what is of essence in a *pro bono* department (they term it a "*Pro Bono* Practice Group").[59] Webber Wentzel have applied for and received funding to brief advocates in *pro bono* matters. The firm lists particular advocates who have provided their services either free or at a reduced rate in Webber Wentzel's *pro bono* cases. The firm also works closely with the legal non-governmental organisations ProBono.Org and the Tshwaranang Legal Advocacy Centre (the latter's focus is on the prevention of violence against women) to perform *pro bono* work.[60]

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56 Ackermann 2006 http://bit.ly/ZwPV9V.
57 Ackermann 2006 http://bit.ly/ZwPV9V.
58 Norton Rose 2013 http://bit.ly/pwprmN.
59 Webber Wentzel 2013 http://bit.ly/ZYNsIO. See also Webber Wentzel *Pro Bono Report* 2011 http://bit.ly/16s9Pco.
60 Webber Wentzel 2013 http://bit.ly/ZYNsIO.

Although providing fewer specifics than the aforementioned large corporate firms, BKM Attorneys in Johannesburg provides an example of a smaller firm showing a commitment to performing *pro bono* work beyond any regulated requirements to do so. BKM's commitment to social responsibility is evidenced through *pro bono* targets for each year and the inclusion of those targets in their annual management goals.[61]

A significant development in the provision of *pro bono* work by private lawyers in South Africa was the establishment in 2005 of the *pro bono* clearing house, ProBono.Org.[62] ProBono.Org, which is registered as a law clinic, seeks to match civil clients with strong cases (in terms of both facts and law) who are unable to afford the cost of appointing their own legal representatives with attorneys and advocates who take on those matters on a *pro bono* basis. ProBono.Org's current focus areas are with refugees in South Africa, family law matters involving children, and the legal problems of HIV-positive persons.[63] A notable limitation to ProBono.Org's work lies in the fact that until late 2010 it had offices in Johannesburg only. It has subsequently expanded through the opening of an office in Durban; but has not yet opened offices outside of these two urban centres. The organisation's erstwhile National Director has identified certain significant limiting factors to its work. These challenges include funding limitations, identifying (with its limited staff and volunteers) sufficient meritorious cases to match volunteer legal practitioners whilst at the same time recruiting more attorneys willing to do *pro bono* work, and a hesitancy from the constituent law societies not to control *pro bono* referrals.[64]

Within the realm of labour law, a fairly recent development has been the provision of *pro bono* legal services by the South African Society for Labour Law (SASLAW) at the

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61 BKM Attorneys 2011 http://bit.ly/11IvL09.

62 ProBono.org has over 40 law firms that it refers its requests for *pro bono* requests to. In addition, ProBono.org has a formal referral relationship with various groups of advocates, the largest of which is the Johannesburg Bar Council. See www.probono.org.za.

63 A number of the aforementioned large corporate firms assist ProBono.Org in these different projects on client intake days termed "clinics", Webber Wentzel being one example.

64 Taken from an interview with Ms Odette Geldenhuys, formerly the National Director of ProBono.Org, now the KwaZulu-Natal Provincial Director based in Durban. Geldenhuys 2010 http://bit.ly/11dyGzb.

Labour Court one morning per week in Cape Town, Port Elizabeth and Durban, and three mornings per week in Johannesburg.[65]

From this section, on the status of *pro bono* work amongst South African attorneys, it is clear that there has been some hesitancy on the part of the organised profession to fully embrace *pro bono* work by its members. Notwithstanding the shortcomings at a law society level, a number of the large national firms have taken it upon themselves to set up quite extensive forms of *pro bono* work by their professional staff. The two main forms which this *pro bono* work in the large firms has taken are establishing exclusive *pro bono* departments within the firm, or supposedly prescribing hour benchmarks for each lawyer in every department. Finally, the work of the clearing house, ProBono.Org, provides a very useful vehicle with which to harness the *pro bono* potential of private law firms in a far more coordinated and controlled manner.

5 The *Charter*

Adopted by the Law Society in December 2007, the *Charter* states:

> The legal profession undertakes to recognise the ethical obligation to carry out pro bono work and develop and enhance the pro bono system with a view to making it compulsory for all practitioners.[66]

The final *Charter* does not seek to introduce mandatory *pro bono* services for the legal profession. In terms of the first and second drafts of the *Charter*, the legal profession was to undertake to devote at least 5% of its total billing hours per month to *pro bono* work.[67] *Pro Bono* is defined in the draft *Charter* as the provision of legal services to poor, marginalised and indigent individuals, groups or

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65 SASLAW 2012 http://bit.ly/14mldYB.

66 Item 2.2.2(i) of the final *Charter* (Department of Justice and Constitutional Development at http://bit.ly/14miGO1).The first draft of the *Charter* is dated August 2006 (Department of Justice and Constitutional Development at http://bit.ly/10LCfw9); the second draft is dated August 2007 (South Africa Government Online 2013 at http://bit.ly/10iWhNz). The final *Charter* was adopted in December 2007 (Department of Justice and Constitutional Development at http://bit.ly/14miGO1).

67 Item 7.7 first draft *Charter*; and Item 11.2.7.6 of the second draft *Charter*.

communities without a fee or expectation of compensation, in order to enhance access to justice for such people who cannot afford to pay for legal services.[68] Unfortunately, the final Legal Services Charter does not contain a mandatory requirement, but instead requires the profession to undertake to carry out *pro bono* work with a view to making it compulsory for all practitioners.[69]

Even if the draft Charters' proposed introduction of mandatory *pro bono* requirements were to be adopted, there would be a number of problems with the formulation.

Firstly, it is crucial to officially evaluate *pro bono* work and the quality thereof which, as Tabak argues, is far more important than "counting" *pro bono* time.[70] The actual effects of a mandatory *pro bono* programme on the delivery of legal services depend very largely on how the obligation is enforced. Unless a *pro bono* obligation is enforced and monitored, it may not result in the greater representation of poor people.[71] The requirement as set out in the drafts of the Legal Services Charter does not contain any guidelines as to the enforcement and monitoring of *pro bono* work and focuses on quantity rather than quality.

Furthermore, the requirement does not specify what type of work will constitute *pro bono* work for the purposes of fulfilling the requirement. While it is important to allow flexibility in any *pro bono* scheme and to afford legal practitioners a choice of how and where they choose to render services,[72] the failure to provide any parameters could frustrate the purpose of the provision as it may not increase access to justice for the poor.

The lack of a buy-out option[73] could also be considered a negative, as some commentators have argued that cash contributions may be the most efficient means

68 Item 2 of the definitions and interpretation chapter of the first and second drafts of the *Charter*.
69 Item 2.2.2(i) of the final *Charter*.
70 Tabak 1995 *Geo J Legal Ethics* 931-932.
71 Cramton 1991 *Hofstra L Rev* 1129.
72 De Klerk 2003 *De Rebus.*
73 This is where a firm could pay a rand equivalent instead of performing the requisite hours.

of delivering the legal services needed.[74] Conversely, it could be argued that the obligation to serve is a personal one that should not be capable of being satisfied by a personal cheque.

A further issue with the draft formulation is that it does not provide for the possibility of exemption for a valid reason. Those who could be exempt might include practitioners over a certain age, those on maternity leave, and those on extended sick leave or family responsibility leave. It could also include those who maintain their practice licences but are engaged in some non-legal occupation.[75]

Notwithstanding these criticisms, the mandatory requirement contained in the drafts of the Legal Services Charter would go further than the aspirational formulation in the final Legal Services Charter. Perhaps the most telling criticism lies in the fact that the Charter remains mere words on a piece of paper, lacking the force of law or any real substance. For the Charter to have real substance it should have spelt out how many hours of *pro bono* would be required, and rules enacted in terms of the Charter would need to include sanctions for non-compliance.

6 Arguments for introducing mandatory *pro bono*

A number of reasons have been suggested for introducing mandatory *pro bono.* What follows is a list of some of the core reasons why *pro bono* work by private lawyers is absolutely essential, whereafter the arguments against and for the mandatory nature will follow.

Firstly, it is argued that it is the very nature of their profession that requires lawyers to perform *pro bono* work, as evidenced by the embodiment of their aspirations concerning justice in their codes of professional ethics.[76] It is argued that lawyers have a special responsibility to provide legal assistance to the poor because of the

74 Burke, Mechling and Pearce 1996 *Stetson L Rev* 997.
75 Tudzin 1987 *J Leg Profession* 116.
76 Burke, Mechling and Pearce 1996 *Stetson L Rev* 992; Cramton 1991 *Hofstra L Rev* 1123.

profession's public commitment to justice.[77] Their role as officers of the court requires legal practitioners to assist in the administration of justice by performing compulsory *pro bono* services.[78] The Constitutional Court has also made reference to the "public responsibility of the organised legal profession".[79]

The second argument raised is that as lawyers enjoy a profitable monopoly on the provision of legal services, it does not seem unduly burdensome to impose such an obligation in order to afford everyone in the country access to the courts.[80] Due to the opportunities and benefits that lawyers enjoy as a result of their privileged position, they have a moral duty to contribute to society and share those benefits with others.[81] On the other hand, Wachtler raises the point that other professionals such as doctors,[82] electricians and restaurateurs are also licenced and yet we do not expect them, let alone require them, to provide free services.[83] Why should this duty be selectively enforced against lawyers only and not against members of other restricted professions?

The third argument is that *pro bono* work can help to counter negative attitudes toward the legal profession[84] and help restore the tarnished reputation of the legal profession both in South Africa and abroad.[85] If members of the legal profession show the public that they are contributing to the broader interest of society,[86] this will hopefully enhance the sense of the integrity of the legal profession.[87] Thus, so

77 Cramton 1991 *Hofstra L Rev* 1126.
78 Burke, Mechling and Pearce 1996 *Stetson L Rev* 987.
79 *De Kock v Minister of Water Affairs and Forestry* 2005 12 BCLR 1183 (CC) 11851-1186B as quoted in Van der Merwe 2001 *De Rebus*.
80 Tudzin 1987 *J Leg Profession* 110-111; Wachtler 1991 *Hofstra L Rev* 740; Burke, Mechling and Pearce 1996 *Stetson L Rev* 987.
81 Tudzin 1987 *J Leg Profession* 111.
82 Whilst doctors (like pharmacists) have a requirement for entry into their profession that they perform a year's mandatory community service, this differs from lawyers' *pro bono* work in that the community service in the medical professions is remunerated. See Erasmus 2012 *SAMJ* 655.
83 Wachtler 1991 *Hofstra L Rev 740.*
84 Strossen 1993 *Mich L Rev* 2132.
85 Van der Merwe 2001 *De Rebus*; Strossen 1993 *Mich L Rev* 2132.
86 Geral 2006 *De Rebus.*
87 Van der Merwe 2006b *De Rebus*; Tabak 1995 *Geo J Legal Ethics* 931*;* Strossen 1993 *Mich L Rev* 2135.

the argument goes, it is in the interest of the legal community to uphold and maintain the legal profession's integrity by introducing mandatory *pro bono.*[88]

The fourth reason for mandatory *pro bono* is that a failure to engage in such work violates the right to access to justice expressed in section 34 of the *Constitution*, as argued above. Legal services are otherwise available only to those who are able and willing to pay relatively high professional charges. Low-income people are especially disadvantaged.[89] The poor often go without legal services because the monetary and other costs of using the legal system are greater than their ability to bear them.[90] Millions of citizens are being denied their constitutional rights to access the legal system and those rights cannot be returned without the help of the people who have the knowledge, training, and expertise to make the legal system work – namely lawyers.[91]

Pro bono work is crucially necessary for granting adequate access to civil justice for so many in South Africa. This state of affairs would seem to support such work being a mandatory requirement for practicing law in this country. The aforementioned discussion lacks statistics as to the number and extent of *pro bono* cases in the hands of private lawyers precisely because no such statistics are available outside of organisations such as Probono.Org and a handful of large commercial firms. Juxtapose this with the sheer volume of the need for *pro bono* services and it is obvious that the lack of volunteerism amongst professionals generally necessitates the imposition of a mandatory approach.

7 Arguments against mandatory *pro bono*

A number of arguments have also been raised against the implementation of mandatory *pro bono,* mostly by practising members of the profession.

88 Tudzin 1987 *J Leg Profession* 112.
89 Cramton 1991 *Hofstra L Rev* 1118.
90 Cramton 1991 *Hofstra L Rev* 1119.
91 Tudzin 1987 *J Leg Profession* 128.

One of the most common arguments against the introduction of mandatory *pro bono* is the fear that it will result in a poor quality of representation for those receiving it.[92] There are essentially two aspects to this argument: firstly that mandatory *pro bono* work will add a reluctant or resentful attorney to an already difficult scenario.[93] Where legal practitioners are required to represent a client without compensation, there is no incentive to provide a high-quality level of representation to the assigned client, and as long as the lawyer performs in a way that is minimally competent, there can also be no recourse through disciplinary action.[94] Such an assignment would technically provide "access to justice" for the client, but in form only – not in substance.[95] This would effectively defeat the purpose of introducing mandatory *pro bono.* Furthermore, individuals who receive *pro bono* services expect a willing and zealous representative and believe that they would benefit most when lawyers voluntarily enter the attorney-client relationship.[96]

However, Jacobs argues that this fear is in fact unfounded. Assigned lawyers would still be required to meet their ethical obligations of providing competent and zealous representation to indigent clients. Failure to do so would subject lawyers to disciplinary procedures just as a failure to provide competent representation to a paying client would trigger disciplinary action.[97] Furthermore, it is submitted that if a particular practitioner or firm consistently provided poor quality representation to *pro bono* clients, this would damage his/her representation with paying clients and would thus be contrary to the best interests of the practitioner himself/herself. Thus self-preservation could serve to motivate the legal practitioner into providing quality legal services to indigent clients.

The second aspect of the quality argument is that it is contrary to the interests of justice, as the poor will be subjected to a horde of lawyers who are incompetent to

92 Strossen 1993 *Mich L Rev* 2140; Scully 1990 *Hofstra L Rev* 1263; Burke, Mechling and Pearce 1996 *Stetson L Rev* 985.
93 Jacobs 1998 *Fla L Rev* 509.
94 Russel 2003-2004 *UMKC L Rev* 443.
95 Jacobs 1998 *Fla L Rev* 520-521.
96 Russel 2003-2004 *UMKC L Rev* 444.
97 Jacobs 1998 *Fla L Rev* 511.

perform the specialised work involved in representing their interests.[98] It is argued that the legal problems of poor people involve special knowledge and skills that many legal practitioner lack.[99] For example, a qualified conveyancer working for a large corporate firm may have no knowledge or experience of how to deal with a domestic abuse matter.

The fear of setting incompetent lawyers loose on the already disadvantaged poor raises a concern which *prima facie* appears legitimate. However, Jacobs argues that there would be little difference between the effectiveness of this system and that of employing for the same purpose a recent law school graduate who may have limited competency in doing many things that experienced lawyers do every day. Yet most graduates can build on what they know, assisted by more experienced lawyers, to carry out many routine legal tasks in a reasonably satisfactory manner.[100] In the same way, the attorneys in *pro bono* matters would be able to seek advice from colleagues with more experience and expertise in that particular field of law.

Another possibility would be the provision of supervision and resources to lawyers unskilled in the area of law to which they are donating their time.[101] Or training sessions for participating lawyers could be offered, possibly calculated into the time requirements in the mandatory provisions.[102] This would also give legal practitioners an opportunity to expand their fields of knowledge and experience and hone their legal skills. Furthermore, if a clearing-house model (as described above) were to be adopted, then legal practitioners could be forwarded matters which match their field of expertise rather than matters in some field in which they have no experience or knowledge. ProBono.Org, for example, provides the facility of ”law clinics” at the magistrate’s court on a weekly basis, where attorneys volunteer their time to assist clients directly with legal advice. These include a refugee clinic, a maintenance clinic,

98 Tudzin 1987 *J Leg Profession* 117; Burke, Mechling and Pearce 1996 *Stetson L Rev* 986.
99 Burke, Mechling and Pearce 1996 *Stetson L Rev* 986.
100 Cramton 1991 *Hofstra L Rev* 1127.
101 Tudzin 1987 *J Leg Profession* 117.
102 Tudzin 1987 *J Leg Profession* 117.

a divorce clinic and so on. The attorneys receive the requisite training in that field and access the clients directly at these morning clinics.[103]

The second argument is that a mandatory *pro bono* work plan is a form of conscription and amounts to an unworkable tax.[104] Furthermore, as with all taxes, the producer (the lawyer) is likely to pass the cost of the tax on to his consumers (the clients). The result of the plan would be to increase the costs of legal services to other clients.[105] While an increase in legal fees could probably be absorbed with relative ease by large companies, this would particularly disadvantage those who are just above the minimum threshold for being eligible for *pro bono* services, as they would then be unable to afford the increased fees.

The third reason that has been suggested is related to the second reason, and is that mandatory *pro bono* work is at best an inefficient way to deliver the very specialised kind of legal services that poor people need.[106] The most common and critical problems facing the poor require the aid of a lawyer who works on a day-to-day basis with the complex and ever changing maze of statutes and regulations that govern matters relating to poverty.[107] One of the suggested alternatives is that a Rand contribution should be used to employ poverty law specialists, who could provide more and better service.[108] Funds for the provision of the training, back up, and support of thousands of lawyers compelled to offer *pro bono* services might better be spent in hiring poverty law specialists to do the job.[109] Such funds could be gathered from society as a whole in the form of a tax, rather than from the legal profession exclusively. This would mollify the critics who argue that lawyers should not be held responsible for a pervasive social problem which requires a solution from society as a whole.[110] It is unfair to impose such a duty on lawyers, they say, if other

103 ProBono.Org 2012 www.probono.org.za.
104 Cramton 1991 *Hofstra L Rev* 1115-1116.
105 Scully 1990 *Hofstra L Rev* 1262.
106 Tudzin 1987 *J Leg Profession* 117.
107 Wachtler 1991 *Hofstra L Rev* 740.
108 Cramton 1991 *Hofstra L Rev* 1128.
109 Cramton 1991 *Hofstra L Rev* 1128.
110 Tudzin 1987 *J Leg Profession* 113.

professions do not have corresponding unpaid responsibilities, and society as a whole should serve, not just lawyers.[111]

The fourth suggested reason for not introducing mandatory *pro bono* requirements is that if poor people have access to lawyers at the same level as paying clients, there will be an explosion of litigation which will force the already crowded dockets of the courts to collapse.[112] However, it is submitted that this reason has little merit. Firstly, the implicit (although unstated) conclusion is that poor people should be excluded from the process so that the process can continue to function to the benefit of those with means. This is as close to a statement that the rights of the poor are not important as one can find.[113] It is submitted that this would be an unreasonable and unjustifiable limitation of the right to dignity, equality and access to court of poor people, and is not acceptable in our new constitutional dispensation. Secondly, just because legal practitioners would be required to provide *pro bono* services does mean that they would be required to take each and every matter to court. If the legal practitioner believes that a claim has no merit, then he/she would be required to advise the client of this fact.

The fifth argument is that mandatory *pro bono* requirements pose substantial practical problems. For example, Kruuse's[114] research in the Grahamstown region found a high proportion of attorneys ignorant as to their *pro bono* requirements in terms of the Cape Law Society's rules. Furthermore, this research showed an absolute lack of monitoring by the Law Society into compliance by its members, and no penalties in place for non-compliance. The same research into the Eastern Cape Society of Advocates showed that the Society had been experimenting with the performance of a minimum of two days' *pro bono* service per annum - however, this also was not being enforced.[115] The potential administrative and enforcement problems surrounding mandatory *pro bono* requirements are substantial and

111 Tudzin 1987 *J Leg Profession* 113.
112 Jacobs 1998 *Fla L Rev* 517.
113 Jacobs 1998 *Fla L Rev* 517.
114 Kruuse 2009 http://bit.ly/15QYIYd.
115 Kruuse 2009 http://bit.ly/15QYIYd.

troublesome.[116] Furthermore, the requirement would fall more heavily on smaller firms, and those who are new to the profession or who are struggling to make a living might find the *pro bono* requirement especially onerous.[117] However, Tudzin argues that there are ways of reducing these costs, such as the random and selective sampling of records to determine compliance, similar to those used by the tax authorities. Furthermore she argues that hopefully the legal community could rely on and would ultimately have to rely on voluntary compliance.[118] Making time for projects that do not pay the bills can be challenging for lawyers and firms because both depend on billable time to finance the enterprise of the firm. In addition, law firms have a commitment to the needs of their existing clients.[119]

The sixth argument is that voluntary service is preferable to compulsory service in any endeavour as clients will be better served by lawyers who stand at their side willingly.[120] One cannot and should not force someone to be charitable.[121] Rather, incentives and recognition should be offered[122] to firms who voluntarily perform *pro bono* work, as rewards are often more efficacious in changing behaviour than commands or threats of punishment.[123] However, such arguments are perhaps well answered by Kruuse's view that:

> In principle, pro bono work should be voluntary, but given the situation of access to justice in South Africa, I think it has to be mandatory. …we have such a constitutional crisis here. I believe that the legal profession can't have a monopoly on the legal system without giving back to the community.[124]

Most of these arguments against mandatory *pro bono* work can be reduced to a fear of the delivery of inefficient, impractical, conscriptive, unworkable, costly and bad quality legal services to non-paying clients. Yet all of these lawyers are equally

116 Cramton 1991 *Hofstra L Rev* 1128; Tudzin 1987 *J Leg Profession* 118.
117 Cramton 1991 *Hofstra L Rev* 1128-1129.
118 Tudzin 1987 *J Leg Profession* 118.
119 Russel 2003-2004 *UMKC L Rev* 444.
120 Wachtler 1991 *Hofstra L Rev* 743; Tudzin 1987 *J Leg Profession* 104.
121 Tudzin 1987 *J Leg Profession* 114.
122 This possibility has been discussed below under the alternatives to mandatory *pro bono*.
123 Cramton 1991 *Hofstra L Rev* 1138
124 Quote from Ms Helen Kruuse, admitted attorney and legal academic at Rhodes University (Kruuse 2009 http://bit.ly/15QYIYd).

bound by their respective Law Societies' rules of ethics, and these can be enforced against bad service, whether the client is paying or not.

8 Academic opinion on mandatory *pro bono*

Academic opinion on mandatory *pro bono* work is divided, but the majority appears to oppose mandatory service. Jacobs argues that if the profession wants to provide a measure of social justice to the poor, mandatory *pro bono* work will not accomplish this goal.[125] Similarly, Russell argues that it seems appropriate that the duty of *pro bono* service is couched in terms of voluntary compliance.[126] Van der Merwe argues that a voluntary scheme with contributions encouraged and appropriately recognised by the organised profession is the preferred route.[127] A compulsory scheme may well serve only to replace a spirit of volunteerism with one of resentment and resistance.[128] Burke *et al* argue that without sufficient empirical research to analyse the effect of a specific mandatory *pro bono* proposal on the delivery of legal services, it is difficult to see how the perceived problem and perceived solution will be joined to form a reasonably complete and worthwhile cure.[129] However, Tudzin argues that instituting a mandatory programme would begin to address the problems of unmet legal needs.[130]

9 Alternatives to mandatory *pro bono*

Those who oppose the introduction of a mandatory requirement have proposed a number of alternative means of facilitating access to justice for the poor. One alternative might be to permit paralegals to perform more non-courtroom services, such as the drafting of wills and uncontested divorce agreements. An expansion of access to the Small Claims Court is another alternative that might aid all citizens, but

125 Jacobs 1998 *Fla L Rev* 521.
126 Russel 2003-2004 *UMKC L Rev* 444.
127 Van der Merwe 2002b *De Rebus*.
128 Van der Merwe 1999 *De Rebus.*
129 Burke, Mechling and Pearce 1996 *Stetson L Rev* 984. These authors provide an interesting empirical analysis of the effect of introducing mandatory *pro bono* work.
130 Tudzin 1987 *J Leg Profession* 128.

particularly the poor.[131] Already lawyers are barred in certain labour matters, for example, conciliations and most misconduct and incapacity arbitrations; such legal developments serve to make justice more accessible to the people in so as there is no need for the services of a lawyer.

An alternative to the requirement that legal practitioners perform a certain number of *pro bono* hours could be to allow law firms instead to release candidate attorneys or paralegals to work full-time at poverty offices for four to six months,[132] or to sponsor internships to enable recent law school graduates to work in *pro bono* programmes. Law firms could also provide technical assistance to specialist organisations which provide *pro bono* legal services in areas such as computerisation, library development and training for support staff.[133] Another viable option would be the introduction of loan forgiveness programmes for law school graduates who work in *pro bono* offices after they graduate.[134] Law firms could also encourage *pro bono* work by making it one of the criteria to be taken into account in determining compensation arrangements within a firm.[135]

Legislative bodies could respond to the needs of indigent people by encouraging rather than mandating the services of attorneys[136] - by implementing a carrot rather than a stick approach to *pro bono* services. One suggestion would be to allow attorneys a tax incentive by deducting every hour that is spent on *pro bono* work from income at the normal charge-out rate.[137]

The Law Society of South Africa could also increase the exposure given to firms who voluntarily perform *pro bono* work. For example, in England the Young Solicitors Group has launched an award for outstanding *pro bono* efforts by young solicitors.[138]

131 Scully 1990 *Hofstra L Rev* 1269.
132 Dean 1996 *Geo J Legal Ethics* 927.
133 Dean 1996 *Geo J Legal Ethics* 928.
134 Wachtler 1991 *Hofstra L Rev* 739.
135 Southley 2001 *De Rebus*.
136 Burke, Mechling and Pearce 1996 *Stetson L Rev* 991.
137 Whittle 2002 *De Rebus*.
138 Van der Merwe 1999 *De Rebus*.

Such an approach encourages legal practitioners to undertake *pro bono* work rather than forcing them to do so.

10 Conclusion

Associate Justice Ruth B Ginsburg of the United States Supreme Court aptly described the principles around *pro bono* work in the words of the former American Bar Association's President Michael S Grego, viz.:

> ... a recommitment to the noblest principles that define the profession: providing legal representation to assist the poor, disadvantaged and underprivileged; and performing public service that enhances the common good.[139]

Unquestionably *pro bono* work is indeed something to support; the question remains what is the best form for *pro bono* work to take? There is some major opposition to the introduction of a mandatory *pro bono* requirement in South Africa, even though there are some notable exceptions within a small number of large law firms. Furthermore, there are also problems with regard to the current formulation of the *pro bono* requirement in terms of the draft Legal Services Charter. Some possible alternatives have been suggested, but if mandatory *pro bono* is to be successfully implemented in South Africa, then there needs to be enforcement and regulation mechanism in place in order to ensure that the quality of the service provided is of a sufficient standard to ensure access to justice for the poor.

However, it is submitted that even if mandatory *pro bono* is not the best solution for the legal needs of the poor, it is undisputed that members of the legal profession owe a duty of public service which embraces the provision of equal access to justice.[140] The norms applicable to lawyers must do more than constrain conduct that is contrary to the public good.[141] Lawyers and the legal profession must act affirmatively to meet the needs of clients and society.[142] Lawyers in private practice

139 Ginsburg 2006 http://bit.ly/16gcnZd.
140 Burke, Mechling and Pearce 1996 *Stetson L Rev* 992.
141 Burke, Mechling and Pearce 1996 *Stetson L Rev* 992.
142 Burke, Mechling and Pearce 1996 *Stetson L Rev* 992.

must take on the responsibility of providing some assistance to their colleagues working full-time in the legal non-governmental sector. In relation to this last point, in 1995, soon after the advent of democratic South Africa, Judge of Appeal, Judge Navsa, stated:

> There is a growing perception that, in spite of South Africa having one of the best Constitutions in the world, its legal practitioners are losing their consciences. Whereas the Constitution has created many opportunities for the use of law to promote social justice and democracy, there are probably fewer lawyers practising in this area than was the case under apartheid... There was a sense of mission and moral duty.[143]

The lack of conscience is clear from the dearth of a culture of volunteerism of graduates and practising lawyers alike, unlike in other jurisdictions where internships and volunteerism act to promote access to the job market and are held in high esteem. Such sentiments are supported by the generally well accepted view that South Africa's *Constitution* creates from a legal perspective a highly progressive and liberal society[144] - something which *pro bono* work should foster.

143 Van der Merwe 2001 *De Rebus*.
144 Sarkin 2002 *SAJHR* 630.

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List of abbreviations

ABA	American Bar Association
CILSA	Comparative and International Law Journal of Southern Africa
Fla L Rev	Florida Law Review
Geo J Legal Ethics	Georgetown Journal of Legal Ethics
Hofstra L Rev	Hofstra Law Review
Hum Rts Q	Human Rights Quarterly
J Afr L	Journal of African Law

J Leg Profession	Journal of the Legal Profession
LASA	Legal Aid South Africa
LSSA	Law Society of South Africa
Mich L Rev	Michigan Law Review
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAMJ	South African Medical Journal
SASLAW	South African Society for Labour Law
Stell L R	Stellenbosch Law Review
Stetson L Rev	Stetson Law Review
UMKC L Rev	University of Missouri at Kansas City Law Review

RECENT DEVELOPMENTS IN THE PROVISION OF *PRO BONO* LEGAL SERVICES BY ATTORNEYS IN SOUTH AFRICA

D Holness*

A system of justice that closes the door to those who cannot pay is not deserving of the name.**

SUMMARY

This paper focuses on legal service delivery for the indigent by attorneys in private practice acting *pro bono* in civil rather than criminal matters. In this regard there have been and continue to be considerable gaps between the proper access to civil justice imperatives of constitutional South Africa and the status quo which has existed from the advent of a democratic South Africa until the present. Law as a vehicle for necessary positive change in the daily lives of South African residents is pertinently considered within the country's woefully unequal socio-economic climate. This paper considers the role which *pro bono* work by private attorneys is playing and should play in promoting a more just and equitable society through proper access to justice. It explores the current position in South Africa as well as the position in selected foreign jurisdictions regarding *pro bono* services by attorneys in private practice in civil matters. Part of the discussion focuses on the question of whether *pro bono* work should be voluntary or mandatory. The merits of introducing a *pro bono* obligation are critically analysed by looking at the effect on both legal practitioners as well as those receiving the *pro bono* services. Having defined *pro bono* work, the practical need for *pro bono* work by lawyers in private practice is highlighted due to the dearth of legal aid in civil matters for indigent South Africans. Possible constitutional imperatives for the provision of free legal services in civil matters are highlighted. An important part of the paper is a reflection on some of the *pro bono* work being conducted by private firms of attorneys. The paper

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** Wachtler 1991 *Hofstra L Rev* 744.

concludes with suggestions on means for establishing a more effective *pro bono* system in South Africa.

KEYWORDS: legal service delivery; indigent; attorneys; *pro bono;* civil matters; private practice; constitutional; South Africa; socio-economic; access to justice; foreign jurisdictions; voluntary; mandatory; legal aid; free legal services