HALTING THE PROFESSION'S FEMALE BRAIN DRAIN WHILE INCREASING THE PROVISION OF LEGAL SERVICES TO THE POOR: A PROPOSAL TO REVAMP AND EXPAND EMERITUS ATTORNEY PROGRAMS

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I. OVERVIEW

In the twenty-first century, there is some good news and some bad news with respect to gender equality in the legal profession. The good news is women are excelling in law school and becoming lawyers in numbers roughly equal to men. The bad news is women are not sticking around. Disproportionately, women are leaving the profession prematurely; currently less than one-third of the profession is composed of women.[1] A significant reason for this trend is the challenge of balancing new careers and new families at the same time.

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1. *See Goal III Report Card: An Annual Report on Women's Advancement into Leadership Positions in the American Bar Association*, COMMISSION ON WOMEN PROF.: AM. B. ASS'N, 5 (Feb. 2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/women/2011_women_goal_3_report.authcheckdam.pdf. Of the ABA delegates from Arizona, only 40% are women. *Id.* at 9.

Most lawyers begin practicing in their late twenties. Due to the realities of biology, if they are going to have children, female lawyers typically must do so early in their careers.[2] Balancing the dual needs of a demanding new career and young children is hard. Due to the lack of professional opportunities permitting women to advance in their careers while beginning families, many women end up leaving the profession for prolonged periods. Returning to an elite profession after years away is often daunting. As a result, many women never return. This trend signifies a "brain drain" from the legal system and contributes to the underrepresentation of women in the profession.

Meanwhile, the legal needs of low-income people are rarely met. The statistics are astounding. As a nation, we have allowed our legal system to become almost exclusively a privilege of the affluent; the notion of equal access to the law is a myth. In the wake of the Great Recession and staggering government debt, it is unrealistic to imagine funding of legal services for the poor increasing in the foreseeable future. Budget cuts are more likely. In this context, the legal profession must look creatively for other ways to close the "justice gap."[3]

Currently, there are significant financial disincentives preventing lawyers on a mid-career hiatus from volunteering to provide legal services to the poor to satisfy the aspirational goal of Model Rule of Professional Conduct 6.1.[4] Maintaining licensure requires expensive direct and indirect annual costs. Lawyers who step away from compensated practice generally have tight budgets. Frankly, they cannot afford the high cost of maintaining a law license to do pro bono work.

In response, this Article proposes reforms to remove financial disincentives and encourage otherwise-non-practicing lawyers to do pro bono work. The proposed reforms are aimed at eliminating (or at least drastically reducing) mandatory bar dues and other costs associated with maintaining a bar license for practitioners providing only pro bono services. Non-practicing lawyers are a significant pool of untapped

2. Most women who become parents do so by giving birth. There are obvious biological reasons why pregnancy generally must occur by the time women are in their 30s. However, even women who become parents via less-common avenues (e.g., adoption, surrogacy) have biological incentives to embark on motherhood sooner rather than later. It takes a lot of physical strength and stamina to raise a child. Waiting too long also increases the risk that the parent will die before the child reaches adulthood.

3. *See, e.g.*, *Documenting the Justice Gap in America*, LEGAL SERVICES CORP., 1, 27–28 (Sept. 2009), http://www.lsc.gov/justicegap.pdf.

4. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

resources who could provide legal services to low-income people. Additionally, empowering such lawyers to maintain at least limited involvement in the profession will make it more likely they might eventually return full-time.

The proposed reforms are framed in a gender-neutral manner; undoubtedly they should be made available to encourage anyone on a mid-career hiatus to do pro bono work. However, due to the documented trend of women leaving the profession prematurely, it is acknowledged that the proposed reforms would primarily impact female lawyers.

Part II of this Article describes the two underlying problems that inspired these proposed reforms: the female brain drain from the legal profession and the dire need to alleviate the unmet legal needs of low-income people. Part III describes the high cost of maintaining a law license and summarizes the existing emeritus lawyer programs across the country. These programs primarily target attorneys with decades of practice experience or attorneys who are senior citizens. Part III explains why these programs are insufficient to alleviate the problems described in Part II. Part III proposes reforming current programs and creating new ones to empower more pro bono participation by lawyers who have otherwise left the profession for family reasons. Part IV concludes the proposition and encourages the legal profession to act.

II. WHAT'S ALL THE FUSS?

The topic of this Article is near and dear to my heart. I approach it after personal and professional experiences that have helped me understand why it is critical to the health of our profession and the legal system. The narrative in subpart II.A discusses some of the specific experiences that shaped my own views.[5] They are typical. Many lawyers

5. I begin the Article in this fashion because the personal narrative can be a potent tool to make legal issues less abstract and easier for the reader to understand. A personal narrative also humanizes legal issues and provides the reader with insight from perspectives different from her own. I first discovered the immense power of the personal narrative technique several years ago when reading an article by Professor Anthony Infanti, which relied on the author's own life experience to explain his perception of the federal tax code as a "weapon for discrimination and oppression" against sexual minorities. Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 768 (2004). Never before had I been so engaged—and so moved—by tax scholarship. Other scholars have also masterfully employed the personal narrative technique to make their points and persuade the reader. For examples, see Amy Vorenberg, *The Moral of the Story—The Power of Narrative to Inspire and Sustain*

have encountered similar issues.[6] Understanding these experiences makes the need for reform less abstract and easier to comprehend.

After the narrative introduction, subpart II.B presents a more generalized discussion to explain why the current situation is exacerbating the female brain drain from the legal profession. Subpart II.C reports on the dire and offensive justice gap[7] between those who can and those who cannot afford to hire an attorney to solve legal problems. It explains the resulting personal and structural harms to our society. Subpart II.C also documents the crushing need for more attorneys to provide pro bono legal services.

A. An Introduction to the Brain Drain Issue via the Experiences and Observations of One Attorney

At my law school orientation in the late 1990s, the dean shared statistics about our entering class and noted that, for the first time, our school achieved gender parity.[8] As someone who came of age in the 1980s, this was a surprising newsflash.

Women of my generation grew up after the women's liberation movement of the sixties and seventies. Few of us had heard of Betty Friedan; even fewer viewed Gloria Steinem as an appealing role model. My cohort tended to think that focusing on "women's issues" was unnecessary because explicit, structural gender discrimination was rare. We had the right to vote, to go to the schools of our choice, and to apply our talent in the workplace. What else was there?

Women like me were raised after the Equal Rights Amendment was defeated and feminism was considered by many to be passé. We grew up in the age of Title IX and were generally encouraged to pursue the same opportunities as our male peers. It was surprising that there was not gender parity in classes graduating before us, but as long as parity had

Scholarship, 8 LEGAL COMM. & RHETORIC 257 (2011), and René Galindo, *Embodying the Gap Between National Inclusion and Exclusion: The "Testimonios" of Three Undocumented Students at a 2007 Congressional Hearing*, 14 HARV. LATINO L. REV. 377 (2011).

6. *See generally* Michael Winerip, *Mom? Lawyer? The Ambivalence Track*, N.Y. TIMES, Nov. 4, 2007, at 4.

7. *See Documenting the Justice Gap in America*, *supra* note 3, at 1.

8. E-mail from Sondra Tennessee, Associate Dean for Student Affairs, University of Houston Law Center, to author (June 16, 2011) (on file with the author). In the Fall 1997 entering class, 47% of the student body at University of Houston Law Center were women. *Id.*

been achieved, it was not an issue that seemed to merit much attention.

Over the next few years, gender equality continued to be a non-issue to me and my female colleagues. Women in our class did well. We were well represented on law review and moot court. A disproportionate number of *AmJur* awards and prestigious clerkships seemed to go to women. This reinforced the notion that women's issues were not a necessary focus.

Nonetheless, subsequent events caused me to rethink this belief. Perhaps there was equality as we began law school, but I would later see a huge gap within the profession itself. Eventually, I came to understand that much of the inequality was driven by failed attempts to balance demanding work and family needs. As my female friends and I entered law school, it was not on our radar.

In my first semester, our section discussed a case involving children; our professor requested insight from parents in the class. Based on a show of hands, out of nearly one hundred students, only a few indicated they had kids. Most of the parents were second-career students who were above the median age for our section. The rest of us were concentrating on our education and careers; starting a family was not yet a focus for us.[9]

If a similar poll had been taken at the end of our 3L year, it would have yielded different results. A number of female classmates decided to start families just before they began practicing law. One woman began our 3L year visibly pregnant. By the end of the year, there were half a dozen graduating students in the final weeks of pregnancy. Students joked about the possibility that a child might be born at commencement. Interestingly, many of these new mothers had performed well in law school and had already secured good jobs to begin after graduation.

This baby boom was somewhat controversial. I do not recall the male students discussing it much, but the females did. Some women were critical of colleagues' decisions to begin families before working full time. Even those who were supportive generally opined that the ideal sequence was to spend time getting established in one's career before having children.

Meanwhile, other experiences were helping me to understand that

9. *See* Angie Kim, *The 'Mommy Track' Turns 21*, SLATE (Mar. 31, 2010, 10:02 AM), http://www.slate.com/id/2249312/. Kim describes a similar focus among her female classmates in law school at about the same time: As students, they concentrated on professional goals and were dismissive of "mommy track" options. *Id.*

women who had entered the profession found it challenging to begin careers and families in short succession. I was fortunate to have two clerkships my 2L summer. One was with a large, elite firm. The other was with an in-house corporate legal department. In both settings, there were noticeably few women in the elite attorney ranks. At the firm, there was close to gender parity in the associate ranks but a huge gap among the partners. Similarly, in the corporate legal department, the supervisors and managers were disproportionately male. In both settings, few of the female lawyers had children. There were few role models for lawyers who aspired to be mothers.

As a summer clerk, I was struck by certain attitudes in the firm's associate ranks. The women I got to know almost universally indicated an interest in having children. However, there seemed to be subtle angst. This interest was something shared only with other trusted junior females. These women were in no rush to start families. They were careful to express dedication to their jobs and a willingness to work long hours in the foreseeable future.

The firm was large and had many female associates, but there was only one who was pregnant the summer I clerked. She shared with me her years of pre-pregnancy strategizing. When she began her career, she avoided a litigation practice due to the erratic hours. She pursued a duller specialty with more predictable hours. She deliberately did not start her family until after establishing herself over several years. Although she never said it explicitly, she seemed insecure about the firm's tolerance of her impending motherhood. She described her elaborate plans to juggle her child's needs with the demands of the firm, and she was hopeful that she would be able to keep up.

During this time my husband and I longed to start our own family, but we decided to wait until I was established in my practice. My husband's accounting career required long hours. We knew I too would need to put in similar hours when I began practicing. Our then-current professional demands were not conducive to raising kids. We would never even get to see our children if we were working ten or twelve hour days, six to seven days every week. Neither of us had relatives close by, and we were not sure we could find reliable child care for that many hours a week.

After graduation, I spent several years working hard professionally. I worked long hours learning my craft and developing a strong reputation amongst my supervisors and colleagues. Only after reaching that point

did I feel it might be the right time to start a family. There was still much trepidation, however. Women were relatively scarce where I worked, and few were mothers.

Our employer had a policy to comply with the Family and Medical Leave Act (FMLA), and I studied it carefully. My husband and I were applying to adopt, and the policy would permit a certain amount of time off without pay after the adoption. Before I made our plans known at work, I was demoralized when a male colleague made an off-hand comment that "everyone" knew the company's FMLA policy was only for the administrative assistants. He noted that, by law, the company had to offer it to everyone, but there was a clear unwritten rule that lawyers just should not take advantage of FMLA. This comment worried me: There were so few women lawyers where I worked, and I was going to be a trendsetter by taking FMLA time. I fretted about undermining my career by breaking an unwritten rule.

When our adoption plans were eventually announced and I was preparing to take several months off, my colleagues' reactions were interesting. The other female lawyers were incredibly supportive. Even women with whom I rarely worked sought me out to express excitement and to ask for details. The male lawyers were polite but generally reserved. The enthusiasm gap was notable.

At one point, a male colleague tried to make a joke about my plans. In the presence of half a dozen male colleagues, he laughingly asked if he could take a long FMLA summer "vacation" if he sponsored one of those "dollar-a-day kids" you hear about on television. No one said anything, though a few of the other men laughed nervously. I stared in disbelief at the colleague who made the joke; among other things, I discerned a perception that FMLA was an excuse for a vacation. I responded that FMLA time off was unpaid, and my husband and I had been saving for months. My colleague seemed genuinely surprised to learn of this sacrifice.

When I returned to work after taking some time off with our daughter, I was self-conscious and wanted everyone to know I was still a dedicated lawyer who took her job seriously. I did not want anyone to think that I was on some sort of unofficial "mommy track" or was less of a lawyer than I had been before.[10] I especially felt pressure to dispel any

10. *See* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 195–96 (2010). The authors reference Professor Joan Williams's concept of a "maternal wall." *Id.* at 196. When women become

unfavorable assumptions held by my managers and male colleagues.

I did not feel such pressure from my female peers, however. After I became a mom, several junior female attorneys and our female summer clerks actually seemed to view me as a role model. As one of the few lawyer–mothers in our department, these women privately sought my advice on work and family issues. They seemed to want encouragement that they could balance professional demands with parenting. As time went on, it became more difficult for me to provide such encouragement because I struggled with the balance myself. Some information about my own background might make my struggle more understandable.

In the 1970s and 1980s, my husband and I were both raised in dual-career families. This was not because our mothers were ardent feminists, but it was simply due to economic need. We were raised in families of modest means; money would have been even tighter without the second paycheck. Thus, from the beginning of our marriage, we assumed that we would both contribute financially and parent equally. Soon after we adopted, my husband learned to prepare bottles and to feed our daughter. Frankly, he was more adept than I at changing diapers and cajoling our child to sleep. Due to his office's proximity to the daycare center, my husband dropped her off and picked her up. When our daughter periodically got sick, we alternated who would miss work to stay home. Certainly the childcare responsibilities did not fall disproportionally to the mother in our household. That was not the source of my struggle in balancing the demands of work and child rearing.

Indeed, my husband and I both found it challenging to meet the demands of work and home. Although we worked hard to be as efficient as possible, there was never enough time in the day. After missing the due dates of several bills, we experimented with a new option: online bill paying. We rarely cooked; rotisserie chickens and bags of pre-cleaned spinach were mainstays. We also went through the drive-through more frequently than I care to admit. There was no time to do dishes. Despite our concerns for the environment, we used disposable paper plates.

Coming from families of modest means, my husband and I had class-based biases against hiring someone to do our housework. Out of desperation, however, we eventually outsourced some chores. After

mothers, they often encounter "strong negative competence and commitment assumptions" in the workplace. *Id.* (internal quotation marks omitted). *See* Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 84 (2009).

receiving stressful letters from our homeowners' association, we reluctantly hired a lawn service. Fed up with the mildew growing in our bathroom, we even employed a maid service to do some basic cleaning.

But no matter how we tried to eliminate, expedite, or outsource the various household chores, there were never enough hours in the day to do everything after we were done at our jobs. We also had little time with our daughter. To accommodate our work schedules, as soon as we got home, we had to feed and bathe her quickly, then rush her to bed. To get to daycare on time the next day, we had to wake her before dawn to feed and dress her. There was little time to play or get to know her.

Because we both came from dual-career families, it never occurred to my husband or me that one of us should stay home full time. But with the paperwork complete to adopt a second child, I was increasingly pessimistic about our ability to care for two young kids while satisfying our employers' demands. Eventually, I had an epiphany: One of us should quit work to stay home once we had two kids. My husband quickly agreed. Although it would mean a huge reduction in our income, having one spouse devoted full time to household responsibilities would reduce the stress we both felt. We have always been somewhat frugal, so the reduction in income was manageable with some planning and sacrifice.

As we tried to decide who would stay home, my husband and I envisioned only a brief career hiatus until our kids were in school. Having one of us at home permanently was not on the table. We sensed that it would be easier for my husband to resume his career after a hiatus. I practiced in a fairly elite niche area and was still early in my career. We worried I would not be marketable after a couple years off. Moreover, I made more money than my husband at that point, so finances would be less tight if I kept working.

Although it ultimately made more sense for my husband to stay home, in truth, I was quite open to doing it myself. I love spending time with my kids, and childhood goes by quickly. I contemplated the possibility of staying home a few years; for several reasons, I thought it would be important for me to do pro bono work during my time away from full-time practice.

I have always recognized lawyers have an obligation to provide legal services to the poor, so after licensure I became involved in pro bono work. Through that service, I saw the difference made in the lives of indigent clients when a lawyer helps solve their legal problems. I also

became aware that many who qualify for free legal services get no help because of a shortage of volunteers. In fact, many indigent clients wait for years in legal limbo, threatening the stability of their family and finances. I also noticed that a disproportionate number of people in need of pro bono services fall into certain demographic groups: women, people of color, the elderly, and families with young children.

Beyond concerns of societal need and professional responsibility, I also thought pro bono work would help me maintain my legal skills. It would be easier to reenter the legal profession full time after a few years if I continued practicing at least on a limited basis. Realistically, I could not imagine trying to reenter the profession after being away for years.

My one concern about doing pro bono work during a career hiatus was that money would be tight. I could not afford hundreds of dollars every year in state bar dues, state attorney taxes, and CLE fees. I imagined there must be some licensing option for lawyers who were not earning a living, yet wanted to serve their community via pro bono. But when I studied the state bar website I did not see any way to do pro bono practice without a significant financial sacrifice.

Initially I thought I was just missing something when I reviewed the state bar website. My situation was not uncommon. I had heard of women from my law school class who stepped away from the profession to stay home with their kids. Surely the state bar took steps to tap the huge potential resource of pro bono lawyers.

I called the state bar, but the gentleman who answered seemed to think I was raising a dumb question. Even if I made no money, pro bono service would still trigger bar dues, attorney tax, and CLE requirements. Duh. I pointed out that this created an unrealistic financial burden and decreased the likelihood that lawyers who were not working for pay would still be providing pro bono services. After a quick calculation, I noted I would be out-of-pocket almost $1,000 for the privilege of practicing pro bono. With the sacrifice of my salary, our family could not afford the cost. The gentleman from the state bar seemed unimpressed.

That licensing reality had a huge impact on our family's decision. Because of the inability to do pro bono work, I realized my proposed temporary hiatus could easily turn into a permanent one. Because I graduated from law school only a few years earlier and was still paying off my student loans, this did not seem like a prudent move.

Ultimately, my husband quit his job to stay home. It was a great decision for our family, but not many men are willing to do likewise, even for just a couple of years. Instead, many female lawyers I have known have taken time off from their careers to stay home after starting families. It is not clear when (or if) they will return to practice. These women were talented lawyers. The profession suffers a huge loss when such attorneys drift away to attain other goals. Moreover, because of the financial impediments similar to those I encountered, these individuals generally do not do pro bono work once they decide to stay home. This is a huge loss of resources that could potentially help to close the justice gap.

These circumstances are not unique. Many women have similar experiences when entering the legal profession and beginning families.[11] Loss of talent and gender diversity from the profession and failure to exploit potential pro bono resources are widespread problems.

B. A Brief History of Women in the Profession

Over the last several decades, women have come a long way, baby. There was a time not long ago when women were not admitted to law schools.[12] The few who were often faced hostility from male students and faculty.[13] To humiliate female students, some professors would refer

11. *See, e.g.*, Cindy Krischer Goodman, *The Work Life Balancing Act: Getting More Done by Pretending to be on a Plane*, MIAMI HERALD (June 15, 2011), http://miamiherald.typepad.com/worklifebalancingact/2011/06/; Justice Jonsie, *File Me Under Worst Mom Ever*, MAMA L. (May 6, 2011, 2:51 PM), http://mamalaw.com/2011/05/2061/; Kim, *supra* note 9.

12. *See* Angela Nicole Johnson, *A Timeline of Women's History in the Legal Profession* (June 20, 2011), http://womenaslawyers.files.wordpress.com/2011/03/a-timeline-of-womens-history-in-the-legal-profession-last-updated-6-20-11.pdf. In 1868, the first woman who applied to Columbia University Law School was denied admission. *Id.* Later, in 1869, attending Washington University, she became the first woman to formally study law but quit after her first year due to harassment from male students. *Id.* In 1895, four out of five law schools denied women admission, regardless of their qualifications. *Id. But see Law School History: A Living Legacy of Revolution, Evolution, and Excellence*, NEW ENG. L.: BOS., http://www.nesl.edu/engaged/history.cfm (last visited Sept. 17, 2012). Portia Law School opened in 1908 and exclusively offered a legal education to women. *Id.*

13. In 1870, one professor decried the possibility of female law students: "[I]f they admit a woman I will resign for I will neither lecture to niggers nor women." Johnson, *supra* note 12 (quoting HEDDA GARZA, BARRED FROM THE BAR: A HISTORY OF WOMEN AND THE LEGAL PROFESSION 53 (1996)). Yale admitted its first female student in 1919, Columbia did so in 1928, and Harvard followed in 1950. *Id.*

to them with the masculine title of "Mr.,"[14] tell sexist jokes,[15] or observe the tradition of "Ladies Days."[16]

These pioneers had few options even if they did finish their studies. When Sandra Day O'Connor graduated with honors from Stanford in 1952, no firm would hire her as a lawyer, though one offered her a position as a stenographer.[17] In 1959, when Ruth Bader Ginsberg graduated first in her class at Columbia, no firm would hire her; luckily she was able to secure a federal district court clerkship.[18] As illustrated by the unfruitful job hunting efforts of female law students like Elizabeth Dole, Geraldine Ferraro, and others, these experiences were common for the first generations of women graduating from law school.[19]

Over subsequent decades, more women were admitted to law school, and job prospects improved.[20] Eventually, around the turn of the millennium, gender parity had become a reality on law school campuses.[21] Not only have female students achieved equal representation in law schools, but female students continually perform well. Women are well represented in the elite ranks of law school, including law review and moot court teams.[22] Prestigious entry-level jobs are landed by female

14. *See* Whitney S. Bagnall, *A Brief History of Women at CLS: Part 2*, COLUM. L. SCH., http://www.law.columbia.edu/law_school/communications/reports/Fall2002/brief2 (last visited Sept. 17, 2012).

15. KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 104–05 (1986). Harvard faculty and male students had a popular joke comparing female lawyers to talking dogs. *Id.*

16. Ruth Bader Ginsburg, *Women at the Bar—A Generation of Change*, 34 SEATTLE U. L. REV. 649, 653 (2011). *See also* MORELLO, *supra* note 15, at 103–04. Harvard's "Ladies Day" ritual humiliated female law students by asking them questions in a "humorous" tone while displaying them on a podium "rather like performing bears." *Id.*

17. *See, e.g.*, MORELLO, *supra* note 15, at 194.

18. Lynn Hecht Schafran, *History of Women in the Legal Profession: Edited Transcript*, 31 WOMEN'S RTS. L. REP. 211, 214 (2010).

19. *See* Whitney S. Bagnall, *A Brief History of Women at CLS: Part 1*, COLUM. L. SCH., http://www.law.columbia.edu/law_school/communications/reports/Fall2002/brief (last visited Sept. 17, 2012). *See, e.g.*, MORELLO, *supra* note 15, at 194.

20. *See* Johnson, *supra* note 12. By 1979, women were represented at some level in the judiciary in all fifty states. *Id*. By 1985, women constituted 40% of the law student population. *Id.*

21. *See id.* By 1994, 45% of American law students were women. *Id.*

22. *See* Whitney S. Bagnall, *A Brief History of Women at CLS: Part 4*, COLUM. L. SCH., http://www.law.columbia.edu/law_school/communications/reports/Fall2002/brief4 (last visited Sept. 17, 2012). By the class of 2002, seven women had served as editor in chief of *Columbia Law Review*. *Id. See also* Ms. JD, *Women on Law Review: A Gender Diversity Report*, MS. JD (Aug. 3, 2010, 10:15 AM), http://ms-jd.org/women-law-review-gender-diversity-report; Jessie, *Gender on Law Review: An Interview with Outgoing*

graduates at rates comparable to males.[23]

Despite years of improvements in the student ranks, women are still not equally represented in the legal profession. In 1910, less than 1% of the legal profession was composed of women.[24] By 1951, the number was still only 3%.[25] Progress since then has been slow. Despite years of gender parity in law school, women accounted for only 31% of the lawyer population in 2010.[26]

Some of the imbalance may be due to vestiges of past law school discrimination and dismal practice opportunities for past female graduates. However, the further we get from the era of widespread explicit gender discrimination, the less influence past discrimination has on the current composition of the profession.[27] Instead, the primary problem today is that women do not remain in practice as long as men.[28]

Lawyers are often left with only two options: practice full time or not at all.[29] Some employers experiment with providing more flexibility (e.g., "mommy track" or part-time employment).[30] However, these

Arizona EIC Megan Scanlon, Ms. JD (Mar. 31, 2011, 9:15 AM), http://ms-jd.org/gender-law-review-interview-outgoing-arizon-eic-megan-scanlon; David Lat, *Minorities and Women and Law Review, Oh My!*, ABOVE LAW (Aug. 17, 2010, 1:53 PM), http://abovethelaw.com/2010/08/minorities-and-women-and-law-reviews-oh-my/.

23. *See, e.g.*, Judith N. Collins, *A Demographic Profile of Judicial Clerks – Patterns of Disproportionality*, NALP BULLETIN, Nov. 2010, at 15, 15, *available at* http://www.nalp.org/nov2010_demog_clerkships. Within the class of 2009, less than half of the graduates were women, but they obtained over half of the judicial clerkships. *Id. See also* Gina Sauer, *Current Legal Employment Trends*, B. EXAMINER, Feb. 2001, at 35, 38, *available at* http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2001/700101_sauer.pdf. By the turn of the millennium, the gender gap in landing private practice jobs narrowed to only three percentage points. *Id.*

24. *See* Johnson, *supra* note 12.

25. *See* COMMISSION ON WOMEN PROF.: AM. B. ASS'N, *supra* note 1, at 4.

26. *Id.*

27. Some vestiges of past gender discrimination are still with us. *See* TENN. CODE ANN. § 23-1-107 (2009) (specifying women age eighteen or older "and otherwise possessing the necessary qualifications, may be granted a license to practice law in the courts of this state").

28. *See, e.g.*, Kathleen J. Wu, *When Women Leave, Dollars Leave*, ANDRES KURTH LLP (May 23, 2005), http://www.andrewskurth.com/pressroom-publications-WhenWomenLeaveDollarsLeave.html.

29. Indeed, some of the structural issues prompting women to leave the legal profession also plague other elite professions who are being asked to work forty-plus hour work weeks. *See generally* Seth Fiegerman, *The End of the 40-Hour Work Week*, YAHOO! FIN. (July 6, 2011, 3:00 AM), http://finance.yahoo.com/career-work/article/113075/end-40-hour-workweek-mainstreet?mod=career-worklife_balance.

30. *See* Kim, *supra* note 9.

options are relatively rare[31] and are not ideal for lawyers trying to balance work and family. Full-time practice is demanding;[32] even programs with reduced time requirements are taxing and leave little time to attend to family needs.[33] Furthermore, there is often a professional stigma associated with taking advantage of these options.[34]

It is especially difficult for lawyers to meet high professional expectations while raising young children at home early in their careers.[35] Both careers and children need extra attention in their infancy. However, starting families early in one's career is common. Law students typically graduate and begin practicing when they are in their late twenties.[36] But a woman's most fertile years are also in her twenties; female fertility starts to decline beginning around age thirty.[37] There is a great drop in fertility by age thirty-five, and the likelihood of getting

31. *See, e.g.*, Kimberly Palmer, *The New Mommy Track*, U.S. NEWS & WORLD REPORT, Aug. 26, 2007, at 40, 41.

32. *See* Paul L. Caron, *Death of a 32-Year Old Skadden Associate*, TAXPROF BLOG (June 30, 2011), http://taxprof.typepad.com/taxprof_blog/2011/06/death-of-a-.html.

33. *See* Anna T. Collins, *The "Mommy Penalty" in the Legal Profession*, GLASS HAMMER (Jan. 19, 2009, 11:00 PM), http://www.theglasshammer.com/news/2009/01/19/the-%E2%80%9Cmommy-penalty%E2%80%9D-in-the-legal-profession/. Kate Green, an attorney, describes "full time" work in a law firm as requiring working until 9 p.m. every day of the week. *Id.* A study at George Washington University Law School by Neil Buchanan indicated that part-time status among lawyers equates to a 30% reduction in work hours, and women with child-rearing duties constitute the majority of lawyers using this option. *Id.* A 30% reduction of a 60-hour work week would still require 42 hours of work each week, which is considered full time in other employment settings. *Id.* Likewise, a 30% reduction in an 80-hour work week would mean working 56 hours per week. *Id.*

34. Jennifer A. Kingson, *Women in the Law Say Path is Limited by 'Mommy Track,'* N. Y. TIMES, Aug. 8, 1988, at A1.

35. *See, e.g.*, Winerip, *supra* note 6, at 4. Attorney Taylor Daly, an equity partner in her 50s at a large law firm, described that the most difficult time in juggling work and home demands was when she had young children in her 30s. *Id.*

36. The average age of graduating students at Suffolk University Law School is 27. *See Student Statistics for Suffolk University Commencements*, SUFFOLK U. (May 22, 2006), http://www.suffolk.edu/698.html. The average age of the University of Virginia Law School's class of 2015 is 24. *See Admissions at the University of Virginia School of Law*, VA. L., http://www.law.virginia.edu/html/prospectives/prospectives.htm (last visited Sept. 17, 2012). The average age of the Yale 2014 entering class was 24. *See Yale Law. School Entering Class Profile*, YALE L. SCHOOL, http://www.law.yale.edu/admissions/profile.htm (last visited Sept. 17, 2012). Students who enter law school at age 24 will likely be 27 at graduation.

37. *See* Jennifer Monti, *Expectations of Fertility by the Decade*, HEALTHLINE (June 16, 2011), http://www.healthline.com/health/fertility/age; *Your Age and Fertility*, BABYCENTER, http://www.babycenter.com.au/preconception/activelytrying/ageandfertility/ (last visited Sept. 17, 2012).

pregnant decreases as a woman gets older.[38] The risk of pregnancy-related health concerns also increases for women in their thirties.[39] Thus, for most female lawyers, there is intense pressure to start families early in their careers. This leads to an unrealistic, unsustainable juggling that disproportionately drives women away from the legal profession.[40]

This phenomenon is evident in data on law firm demographics. Out of thirty-nine randomly sampled U.S. law firms of various sizes and geographic locations, there is typically gender parity in the associate ranks;[41] the percentages of female associates tend to be in the forties and fifties.[42] Associate attorneys are generally in early years of practice; it can take up to five to ten years to be eligible for partner status.[43] These

38. Monti, *supra* note 37; BABYCENTER, *supra* note 37.

39. *See* Monti, *supra* note 37.

40. *See, e.g.*, Wu, *supra* note 28; Amy Bloom, *Branching Out: What Real Love Looks Like*, O MAG., July 2011, at 118, 119 ("3% of stay-at-home parents are dads"). *See also* JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 214 (2000).

> Men know that if they do not provide care for children, women will, whereas women know that if they do not do the caregiving themselves, the only alternative is to delegate it to a domestic worker. Thus the ideal-worker mothers typically come face-to-face with the norm of parental care in ways most ideal-worker fathers do not.

Id. Juggling arguably begins even earlier as the stress of a demanding law practice negatively impacts fertility. *See, e.g.*, Nicholas H. Wolfinger, Mary Ann Mason & Marc Goulden, *Alone in the Ivory Tower: How Birth Events Vary among Fast-Track Professionals*, 11 (Feb. 11, 2008), http://paa2008.princeton.edu/download.aspx?submissionId=81253. *See also* Anita L. Allen, *Responses to Working Women's Infertility Crisis*, REPRO. RTS. PROF BLOG (Feb. 7, 2010), http://lawprofessors.typepad.com/reproductive_rights/2010/02/wheres-my-bump-just-responses-to-working-womens-infertility-crisisanita-l-allen-penn-law-schoolintroduction-while.html.

41. *See generally* Claudine V. Pease-Wingenter, *Appendices*, SSRN (Sept. 13, 2012), http://ssrn.com/abstract=2146093 [hereinafter *Appendices*]. The data for this sampling was gathered from the Directory of Legal Employers published by the National Association for Legal Career Professionals. The thirty-nine firms sampled are geographically diverse, representing twenty-nine municipalities ranging from small to mid-size to large cities. Included in the sampling were firms in the Northeast, the Southeast, the Southwest, the Midwest, the Rocky Mountains, and the Pacific Rim. The firms were also diverse in terms of size; firms from each of the eight NALP size categories were included.

42. *See id.*

43. *See, e.g.*, MORELLO, *supra* note 15, at 195. The associate level is the first stage of attorney employment in most law firms; an attorney must work five to seven years prior to going "up" for partnership or being forced "out" of the firm altogether. *Id. See also* Susan G. Manch, *The Emerging Role of Counsel*, SHANNON GROUP 1, 4 (Oct. 2003) http://www.shannonandmanch.com/publications/Counsel%20article.pdf (describing an eight to ten year partner track as the norm).

associate-rank statistics are similar to the current gender breakdown in law school student bodies,[44] which demonstrates that women are entering the legal profession in numbers equivalent to men.

By contrast, a less encouraging picture emerges when studying the rest of the law firm population. In the same thirty-nine firm sampling, the highest percentage of female partners was 38%.[45] Several smaller firms had no female partners at all.[46] Most other firms either had a percentage of female partners in the high teens or low twenties or no female partners at all.[47] These bleak percentages were even the case in firms with female majorities in their associate ranks.[48] Assuming equivalent talent and effort between the sexes, the most obvious explanation is that many women are just not sticking around long enough to make partner.[49]

Interestingly, the statistics are not much better in the of-counsel population of the thirty-nine firm sampling. Such of-counsel positions

44. *See, e.g.*, Thomas M. Haney, *The First 100 Years: The Centennial History of Loyola University Chicago School of Law*, 41 LOY. U. CHI. L. J. 651, 695 (2010). Women comprised a majority of each of the school's entering classes from 1986 through 2008. *Id*.

45. *See Appendices*, *supra* note 41, at 1–8. The two firms were Warner Norcross & Judd, a firm with 251–500 attorneys in Southfield, Michigan, and Altshuler Berzon, a firm of 11–15 attorneys in San Francisco. *Id.* at 3, 7.

46. *Id.* at 1–8. One firm in the 11–25 attorney category and all three sampled firms in the 2–10 attorney category had no female partners. *Id.* at 7–8.

47. *Id.* at 1–8.

48. *Id.* For example, this was the case for firms including Fulbright & Jaworski, Washington, D.C.; 57.14% of its associates are women, but only 20% of its partners are. *Id.* at 2. Mitchell, Silberberg & Knupp, Los Angeles, had 62.86% of its associate ranks populated by women, but only 22.06% of its partner ranks. *Id.* at 4. Benesch, Friedlander, Coplan & Aronof, Wilmington, Delaware, had the dubious distinction of 100% female associates and 100% male partners. *Id.* at 7.

49. *See* Kim, *supra* note 9. *But see* Irin Carmon, *When The Mommy Track Leads Out the Door*, JEZEBEL (June 8, 2010, 5:00 PM), http://jezebel.com/5558387/when-the-mommy-track-leads-out-the-door. *See, e.g.*, MORELLO, *supra* note 15, at 250.

> More women need to understand that although the statutory prohibitions and restrictive admissions policies have been removed, discrimination against them still exists and is still widespread, only now it is taking far more subtle forms. Women have entree to the major law firms as associates but as the *Hishon* case indicated, they still have little chance of making partner. . . .
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> . . . .
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> We must recognize too that the entry of substantial numbers of women into the law will not necessarily mean that women will move on to the higher levels of the profession. Women are likely to be relegated to a second tier . . . . The forces that once kept women out of the law altogether simply have shifted now to keeping them out of powerful positions within the law.

Id.

are generally not on a partner track.[50] Thus, they are less prestigious and not as well compensated but consequently can be somewhat less time demanding than associate positions.[51] Of-counsel positions might appear to be an appealing option for women looking for a better work–life balance. However, of the thirty firms in the sampling that had positions like this, two-thirds had a higher percentage of male attorneys.[52] Three of the thirty firms had an even split of male and female of-counsel attorneys,[53] and only seven firms had higher percentages of women in of-counsel positions.[54] These trends support the understanding that women leave practice rather than seeking less-demanding positions.[55]

50. *See* Manch, *supra* note 43, at 1–2.

51. *Id.* at 2.

52. *See Appendices*, *supra* note 41, at 1–8.

53. *Id.*

54. *Id.*

55. *See, e.g.*, Wu, *supra* note 28. To better understand why women leave, the work of several scholars is insightful.

Dr. Susan Moller Okin's landmark book *Justice, Gender, and the Family* noted the link between gender-based wage discrepancies and certain continuing realities in our society (e.g., the implicit societal assumption that women are primarily responsible for child rearing, the conventional unequal division of labor within the family unit, marketplace assumptions that "serious and committed members of the work force" do not have significant responsibility for child rearing). SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 4–5 (1989). As Dr. Okin observed, "The old assumption of the workplace, still implicit, is that workers have wives at home." *Id.* at 5.

Professor Joan C. Williams has written extensively on work–life balance issues, as well as the linkage between gender inequality and employment practices. Williams's work is particularly critical to understanding why women leave. In her seminal book, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, she explains domesticity, the gender-based system for the "organization of market work and family work that arose around 1780" and remains firmly entrenched today. WILLIAMS, *supra* note 40, at 1. Professor Williams describes a time before the emergence of domesticity, when market and family work were not geographically or temporally separated. *Id.* Domesticity is based on the paradigm of the father going to a factory or office to earn wages while mothers stayed home to rear children and assume other household responsibilities. *Id.* Previously child-rearing was viewed as too important to be left to mere women, and fathers bore primary responsibility. *Id.* at 22. But with the rise of domesticity, fathers' involvement with families decreased. *Id.* at 34. An "ideal worker" norm developed, around which market work was organized. *Id.* at 24. Ideal workers work full time, take off little or no time for childbearing or child rearing, and are assumed to have a free flow of family work (i.e., provided by a wife) to enable their focus on market work. *Id.* at 33. Because the ideal worker has no significant responsibility with regard to family work, he is able to provide significant amounts of overtime and even relocate if his job demands. *Id.* at 5. Professor Williams explains that currently about 90% of all women are mothers at some point during their market work career, but "American women still do 80% of the child care and two-thirds of the housework" within families. *Id.* at 2. Few women have the free flow of family work that the ideal worker norm

This trend is troubling, especially considering the gender parity in law school and associate ranks. Significant numbers of female lawyers are leaving the profession after a brief period of practice. Moreover, because women perform as well as males in law school, this trend suggests that a disproportionate percentage of highly-talented lawyers drift away from the profession. This brain drain is harmful to the bar and the legal system.

C. The Tremendous Unmet Need for Legal Services

The poor have many needs that go unmet. Food and housing usually get the most attention because they are essential to survival. As a result, efforts to meet the needs of the poor tend to focus primarily on food and housing.[56] The legal needs of the poor may be less obvious to the casual observer,[57] but they are extremely important. It is catastrophic if a low-income woman is trapped in a violent marriage because she cannot afford a divorce, or if a senior citizen on a fixed income is at risk of losing his home because he was swindled or because a mortgage

assumes, so they rarely live up to the ideal worker norm. *Id.* at 3.

Also particularly insightful, Dr. Sylvia Ann Hewlett's book *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success* documents that 60% of highly qualified women have nonlinear career models. SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 13–14 (2007). Dr. Hewlett explains that the traditional career model for professionals evolved primarily in the 1950s and 1960s based on male breadwinners with wives at home to support their professional endeavors. *Id.* It emphasizes continuous work histories, full-time employment, and face time. *Id.* This model does not meet the needs of women, and leads to their underachievement in the workplace because they are forced to take "off-ramps" by taking career hiatuses or working part time. *See id.* at 14–15.

56. *See, e.g.*, Robert Rector & Rachel Sheffield, *Air Conditioning, Cable TV, and an Xbox: What is Poverty in the United States Today?*, HERITAGE FOUND. (July 19, 2011), http://www.heritage.org/research/reports/2011/07/what-is-poverty; Joy Moses, *Basic Needs Assistance for the Poor Advances Economic Recovery and Employment Goals*, CENTER FOR AM. PROGRESS (Feb. 3, 2009), http://www.americanprogress.org/issues/2009/02/basic_needs_brief.html (discussing poverty reduction efforts focus primarily on food and shelter, as well as education and access to healthcare).

57. For purposes of this Article, I use the terms "indigent," "poor," and "low-income" interchangeably. The term "low-income" is used by the federal government to refer to households with a combined annual income of less than 125% of the poverty level. These households qualify for publicly supported legal services. *See* AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf.

company made a mistake.[58] But in these situations, the rest of society is also impacted. If only the affluent have access to the legal system, then the system no longer functions as intended. Despite the foundational concept of equality under the law, the reality is that the legal needs of the poor are often unmet. That situation is untenable in a society based on the rule of law.

Providing legal services today is expensive, and poor (and even middle-income) individuals are often priced out of the market.[59] Atticus Finch might have been able to accept payment in firewood and fresh produce from his clients,[60] but even the most frugal modern attorneys could not realistically accept such payment.

To start, law school graduates are often saddled with six-figure student loan debt.[61] For years into their practice, attorneys face considerable economic pressures to earn a significant liquid income to service that debt. Further, modern law practice is expensive. Even the most competent lawyers need the protection of malpractice insurance.[62] Client records must be maintained for years,[63] which necessitates storage costs. Even in a small practice, lawyers need help with administrative

58. *See* Stephen Daniels & Joanne Martin, *Legal Services for the Poor: A Supply Side Analysis*, AM. B. FOUND., http://www.americanbarfoundation.org/research/project/21 (last visited Sept. 17, 2012) ("Consumer and family matters are among the areas of greatest unmet demand.").

59. Anne Lazarus, *Pro Bono: A Case for Judicial Intervention, or How the Judiciary Can Bridge the Justice Gap in America*, 80 PA. B. ASS'N Q. 47, 47 (2009).

60. *See* HARPER LEE, TO KILL A MOCKINGBIRD 23 (40th anniv. ed. 1999).

> One morning Jem and I found a load of stovewood in the back yard. Later, a sack of hickory nuts appeared on the back steps. With Christmas came a crate of smilax and holly. That spring when we found a croker-sack full of turnip greens, Atticus said Mr. Cunningham had more than paid him.
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> . . . .
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> As the Cunninghams had no money to pay a lawyer, they simply paid us with what they had.

Id.

61. *See, e.g.*, Patty Stonesifer & Sandy Stonesifer, *The Law-School Debt Trap*, SLATE (Jan. 22, 2009, 6:49 AM), http://www.slate.com/id/2209031/. *See also* Christine Dugas, *Graduates Saddled with Debt, Student Loans Can't Easily Turn to Bankruptcy*, USA TODAY (last updated May 15, 2009, 1:33 PM), http://usatoday30.usatoday.com/money/perfi/2009-05-12-studentloans13_N.htm.

62. *See, e.g.*, Paul Tharp, *Legal Malpractice Checkup*, N.C. L. WKLY., June 6, 2011, at 3.

63. *See, e.g.*, *Materials on Client File Retention*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch/materials_on_client_file_retention.html (last visited Sept. 17, 2012).

tasks. It is not cost-effective for the lawyer to answer phone calls, print documents, order supplies, and mail letters.

Despite these impediments, many lawyers provide pro bono services. Model Rule of Professional Conduct 6.1 states that every lawyer has a professional responsibility to provide legal services to those unable to pay; the Rule establishes an aspirational benchmark of fifty hours of service annually.[64] Many lawyers understand their professional responsibility and a majority do some pro bono work.[65] More service is needed to close the justice gap, but most attorneys already work incredibly long hours for paying clients. Even the most idealistic people may find it hard to do more work under the circumstances.

The legal needs of the poor have long been left to various organizations. The first legal aid society "in the United States dates back to 1876 [when a group was founded] to protect the rights of German immigrants."[66] In the next few decades, similar private organizations began in other urban areas.[67] Eventually, the federal government became involved. The Legal Services Program was developed as part of President Johnson's "War on Poverty," and Congress later created the Legal Services Corporation (LSC) to provide continuous funding to represent those in need.[68]

Nonetheless, LSC and other legal aid organizations have been underfunded for decades. In 2007, it was estimated that "there [was] one legal aid attorney available for every 6,415 low income persons."[69] By contrast, the ratio was "one private attorney . . . for every 429 people *above* the . . . poverty level."[70] At that time, it was "estimated [that a] five-fold increase in federal funding [was] needed to help meet the civil legal needs of low-income persons."[71] Funding problems have become even more acute in recent years. The Great Recession has necessitated

64. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

65. *See* Barbara Power, *Nearly Three-Fourths of America's Lawyers Do Pro Bono Work*, AM. B. ASS'N (Feb. 18, 2009), http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=556. A 2008 report indicated that 73% of lawyers did pro bono work. *Id.*

66. *See* Barbara Armstrong, *Unmet Legal Needs in the U.S. and Alaska*, ALASKA JUSTICE FORUM, Summer 2010, at 1, 1, *available at* http://justice.uaa.alaska.edu/forum/27/2summer2010/a_unmet.html.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

sharp budget cutbacks of governmental and philanthropic funding sources.[72] Interest on Lawyers' Trust Accounts (IOLTA) funding of legal aid organizations has also suffered.[73]

It is estimated that 80% or more of the legal problems experienced by the poor in our country are not addressed with the assistance of counsel.[74] Stated another way, only 20% or less of the legal problems of the poor are resolved with a lawyer's help.[75] This is a devastating statistic, but the justice gap is even worse in certain areas of the country.[76] Moreover, the issue of unmet legal needs is not limited to those at the bottom rungs of the socio-economic ladder. It is estimated that "between forty and sixty percent of the legal needs of middle-income individuals remain unmet."[77]

Predictably, those who are unable to obtain an attorney, despite a need for one, are left to appear in court *pro se*, leaving them at a significant disadvantage compared to represented litigants.[78] This justice gap is seen most acutely in the area of family law, which has profound impacts on children and women.[79] Family law courts make critical

72. *See, e.g.*, *Texas LSC-Funded Programs' Budgets Are Cut*, TEX. ACCESS TO JUSTICE COMMISSION UPDATE, Sept. 2011, at 4 ("Congress approved a cut of $15.8 million for the Legal Services Corporation (LSC) in April, retroactive to the beginning of 2011."); Michael Gerson, *Our Fiscal Paradox: Governments Too Costly to Function*, WASH. POST (Feb. 22, 2011), http://www.washingtonposst.com/wp-dyn/content/article/2011/02/21/AR2011022104246.html; Kafia A. Hosh, *The Cupboard Is Nearly Bare*, WASH. POST (Oct. 23, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/22/AR/2008102200157.html.

73. *See, e.g.*, Dru Stevenson, *A Million Little Takings*, 14 U. PA. J.L. & SOC. CHANGE 1, 2 (2011); Ed Finkel, *Late Save: Restoring FDIC Backing for IOLTAs Averts an Ethics Dilemma*, A.B.A. J., April 2011, at 24, 24.

74. Lazarus, *supra* note 59, at 48.

75. *Id. See also* Ian Millhiser, *Report: Legal Needs of the Poor Unmet Over 80% of the Time*, THINK PROGRESS (July 25, 2009, 10:00 AM), http://thinkprogress.org/justice/2009/07/25/176666/legal-services/.

76. *See, e.g.*, *The Washington State Civil Legal Needs Study*, WASH. ST. SUP. CT., 25 (Sept. 2003), http://www.courts.wa.gov/newsinfo/content/taskforce/civillegalneeds.pdf. This study indicated that 88% of low income people in Washington face legal problems without help.

77. Lazarus, *supra* note 59, at 48.

78. *Id. See also* Rebecca L. Sandefur & Aaron C. Smyth, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, AM. B. FOUND. (Oct. 7, 2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_executive_summary.pdf .

79. Lazarus, *supra* note 59, at 48. *See also The Washington State Civil Needs Study*, *supra* note 76, at 8. In Washington, women and children face more legal problems than the low-income community in general. *Id.*

decisions about matters including divorce, spousal support, child custody, and child support, as well as accusations of child abuse and neglect; a lack of representation may result in dire economic repercussions or endanger physical safety.[80]

This justice gap is untenable in a nation that purports to be a land of laws, not of men. Our legal system ceases to operate in a meaningful way if only the affluent are represented by competent counsel.[81] In turn, such exclusion undermines societal respect for our legal system and compliance with our laws.[82]

Other developed nations apparently understand this dynamic: "[T]he United States invests far less in [providing civil] legal services for the poor than other Western industrialized nations."[83] For example, relatively frugal Germany and Finland each spend three times as much of their gross domestic product as the United States does in order to meet the civil legal services needs of the poor.[84] More generous England spends twelve times as much of its gross domestic product as the United States.[85]

In an era of historic budget deficits and fiscal crises, however, it seems unrealistic to anticipate greater government funding for legal services providers. As a result, empowering greater pro bono participation must be a key strategy to reduce the justice gap in our country.[86] To date, most pro bono volunteers are attorneys still actively practicing law, but a growing awareness has recently emerged that non-practicing attorneys are a significant untapped source for pro bono volunteerism.[87]

80. Lazarus, *supra* note 59, at 48.

81. *See The Washington State Civil Needs Study*, *supra* note 76, at 9. The study in Washington determined that "[l]ow-income people who get legal assistance experience better outcomes." *Id.*

82. *Id.* The Washington study determined that low-income people who receive legal assistance have greater respect for the justice system than those who do not. *Id.*

83. *See* Millhiser, *supra* note 75.

84. *Id.*

85. *Id.*

86. *See* NC EQUAL ACCESS TO JUSTICE COMMISSION, http://www.ncequalaccesstojustice.com/ (last visited Sept. 17, 2012). In a list of the top eight recommendations to solve the gaps in access to justice, the first two involved more government funding, but the third was to "Encourage/Support Pro Bono Attorney Participation." *Id.*

87. *See Report*, AM. B. ASS'N, 2 (Aug. 8, 2006), http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_118.authcheckdam.pdf [hereinafter *ABA Emeritus Report*].

III. CURRENT EMERITUS PROGRAMS AND SUGGESTED REFORMS

Subpart III.A documents the great expense associated with maintaining the privilege of practicing law. This expense is a huge impediment to doing pro bono work when lawyers are on temporary or permanent hiatus from the profession and have limited financial means. Subpart III.B describes the existing emeritus attorney programs implemented in some jurisdictions to reduce that impediment. Subpart III.B also explains why these existing programs insufficiently address the concerns described in Part II of this article. Finally, subpart III.C provides suggestions for reforming existing programs and creating new ones.

A. The High Cost of Maintaining a Law License

Maintaining a law license is not cheap. First, there are direct costs. Depending on the jurisdiction of licensure, attorneys are required to pay bar dues, special taxes, or various other fees to maintain the privilege of practicing law.[88]

Eighteen jurisdictions have a voluntary bar, which means that it is not necessary to join the state bar association to practice law.[89] However, thirty-two states and the District of Columbia have a unified (a.k.a. "integrated" or "mandatory") bar, which means that bar membership is required to practice law.[90] In unified bar jurisdictions, payment of annual bar dues is required to maintain one's law license.

The cost of dues varies among jurisdictions. A relative bargain can

88. See *Appendices*, *supra* note 41, at 9–19, for a complete summary of the direct costs to maintain a law license in each of the fifty-one U.S. jurisdictions.

89. *See*, *e.g.*, *Unified State Bars/The Florida Bar*, FLA. B., http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/ee84c9f3e29ca3b58525669e004e0cee!OpenDocument (last visited Sept. 17, 2012) ("Some 18 jurisdictions remain voluntary: AR, CO, CT, DE, IL, IN, IA, KS, ME, MD, MA, MN, NJ, NY, OH, PA, TN and VT."). *See also* Robert D. Welden, *History of Washington State Bar Association*, WASH. B. ASS'N, http://www.wsba.org/About-WSBA/History (last visited Sept. 17, 2012).

90. *See* FLA. B., *supra* note 89. "At least 37 jurisdictions are unified: AL, AK, AZ, CA, DC, FL, GA, GUAM, HA, ID, KY, LA, MI, MS, MO, MT, NE, NV, NH, NM, NMI, NC, ND, OK, OR, PR, RI, SC, SD, TX, UT, VA, VIR. IS., WA, WV, WI, and WY." *Id*. Eliminating Guam, the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands from the list, this means that thirty-two states and the District of Columbia have unified bars.

be had in the District of Columbia where annual bar dues are $237[91] or in Georgia where they are $250.[92] But the cost is much higher elsewhere. Mandatory bar dues are $380 in North Dakota[93] and $410 in California.[94] They are up to $450 in Nevada,[95] and up to $492 in Oregon,[96] depending on the length of time an attorney has been admitted to the bar. In Alaska, the annual $620 bar dues are particularly pricey.[97]

Regardless of whether one is licensed in a voluntary or unified bar jurisdiction, attorneys must routinely pay other direct costs to maintain their licenses. Such costs exist in a variety of species but include excise taxes,[98] assessments to support client protection funds,[99] fees to fund programs to regulate the legal profession,[100] and fees to maintain programs for attorneys with substance abuse issues.[101]

Even in voluntary bar jurisdictions, direct costs can be expensive. In Pennsylvania, attorneys must pay a $200 fee with their annual registration.[102] Massachusetts requires a mandatory annual fee be paid to the Board of Bar Overseers, which can be as high as $300 depending on the length of licensure.[103] In Tennessee, attorneys must pay a total of $570 in non-bar fees to maintain their law licenses[104]: an annual fee of $170 is paid to the Board of Professional Responsibility of the Supreme Court of Tennessee and a $400 annual Professional Privilege Tax is collected by the Department of Revenue.[105]

In unified bar jurisdictions, the cumulative sum of various mandatory direct costs can be quite burdensome. For example, New Mexico requires the payment of bar dues and two other fees, which together tally $400

91. *See Appendices*, *supra* note 41, at 10 (summarizing District of Columbia requirements).
92. *Id.* at 11 (summarizing Georgia requirements).
93. *Id.* at 16 (summarizing North Dakota requirements).
94. *Id.* at 9 (summarizing California requirements).
95. *Id.* at 14 (summarizing Nevada requirements).
96. *Id.* at 16 (summarizing Oregon requirements).
97. *Id.* at 9 (summarizing Alaska requirements).
98. *Id.* at 10, 17–18 (summarizing Connecticut, Tennessee, and Texas requirements).
99. *Id.* at 16, 18 (summarizing Rhode Island, Vermont, and Virginia requirements).
100. *Id.* at 12, 14–15 (summarizing Iowa, New Hampshire, and New Jersey requirements).
101. *Id.* at 10, 15 (summarizing Delaware and New Jersey requirements).
102. *Id.* at 16 (summarizing Pennsylvania requirements).
103. *Id.* at 13 (summarizing Massachusetts requirements).
104. *Id.* at 17 (summarizing Tennessee requirements).
105. *Id.*

each year.[106] Wisconsin imposes a variety of fees that total up to $467 depending on the length of licensure.[107] To maintain a law license in Washington state, attorneys must pay bar dues and a Lawyers' Fund for Client Protection each year, which cumulatively add up to $480 depending on how long attorneys have been admitted to the bar.[108] Texas has three mandatory costs attorneys must pay; their sum can be as high as $500 depending on the length of licensure.[109] Hawaii requires attorneys to pay bar dues and two other separate fees totaling up to $501 annually depending on the length of licensure.[110] New Hampshire imposes three different fees with a sum of up to $520 based on the length of licensure.[111]

In addition to direct costs such as mandatory bar dues, taxes, and other imposed fees, there are indirect costs to maintain a law license through Continuing Legal Education (CLE) credits and malpractice insurance requirements.[112] A small handful of jurisdictions do not require any CLE to maintain licensure, but the majority do.[113]

Some jurisdictions have very minimal CLE requirements. Alaska mandates just 3 hours annually,[114] California requires 25 hours over three years (an average of just over 8 hours annually),[115] and Rhode Island attorneys must earn 10 credits each year.[116] However, most mandatory CLE jurisdictions have annual requirements ranging from 12 to 15 hours of credit each year.[117] Some jurisdictions require the equivalent amount over a multi-year period. Colorado mandates 45 hours over each three-

106. *Id.* at 15 (summarizing New Mexico requirements).
107. *Id.* at 19 (summarizing Wisconsin requirements).
108. *Id.* at 18 (summarizing Washington requirements).
109. *Id.* at 17–18 (summarizing Texas requirements).
110. *Id.* at 11 (summarizing Hawaii requirements).
111. *Id.* at 14–15 (summarizing New Hampshire requirements).
112. See *id.* at 20–25 for a complete summary of the CLE requirements of each of the fifty-one U.S. jurisdictions. *See also* PA. RULES PROF'L CONDUCT R. 1.4(c) (West, Westlaw through June 2012 amendments) (burdensome notification rules are imposed on attorneys who fail to meet certain minimal levels of malpractice insurance coverage, and they act as an implicit requirement to maintain such coverage).
113. CLE is currently not mandatory in Connecticut, Hawaii, Maryland, Massachusetts, Michigan, South Dakota, or Washington, D.C. *See CLE State Requirements-Credit Reporting*, JUSTICE.ORG, http://www.justice.org/LegalEducation Conventions/Tier3/Forms/CLECreditReportingInfo.aspx (last visited Sept. 17, 2012).
114. *See Appendices*, *supra* note 41, at 20 (summarizing Alaska requirements).
115. *Id.* (summarizing California requirements).
116. *Id.* at 24 (summarizing Rhode Island requirements).
117. *See id.* at 20–25.

year compliance period,[118] and Delaware requires 24 hours over each two-year period.[119] A few states have more burdensome CLE requirements to practice law. Utah requires 18 hours of CLE annually.[120] Similarly, Indiana requires 6 hours of annual CLE plus 36 more hours per each three-year cycle (an average of 18 hours annually).[121]

The cost for an attorney to earn mandatory CLE credit varies considerably depending on the options chosen. Some options for credit are free. For example, hours can be earned through "self-study," which includes reading bar journals or other legal publications to keep abreast of developments.[122] But, it can be difficult, time consuming, and costly to find such materials. Further, due to the challenges of confirming the hours spent in self-study, there are usually limits as to how much credit can be earned this way.[123]

CLE credit is sometimes awarded when lawyers write articles for law journals or law reviews.[124] However, writing articles is extremely time consuming. It is also not within every lawyer's range of interests or skills. Moreover, writing articles is not necessarily a free option to earn CLE. Depending on the nature of the research necessary, writing an article can be costly. Finally, the amount of CLE one can earn from writing an article might be limited or contingent on whether the final product is published.[125]

Another route to earning CLE credit can be teaching CLE or law school courses.[126] The teacher rarely incurs a financial cost, and it may even earn her an honorarium or stipend. But these opportunities are limited. There is not space or funding available to allow every interested attorney to teach accredited CLE or law school courses.

Local bar associations or other organizations occasionally sponsor free online or live seminars.[127] But space may be limited and the subject

118. *Id.* at 20 (summarizing Colorado requirements).
119. *Id.* at 21 (summarizing Delaware requirements).
120. *Id.* at 25 (summarizing Utah requirements).
121. *Id.* at 21 (summarizing Indiana requirements).
122. *See, e.g.*, *Determine MCLE Hours*, ST. B. TEXAS, http://www.texasbar.com/AM/Template.cfm?Section=Determine_MCLE_Hours (last visited Sept. 17, 2012).
123. Texas permits only 3 of 15 hours annually to be earned via self-study. *Id.*
124. *See, e.g.*, *Education Options*, ST. B. CAL., http://mcle.calbar.ca.gov/Attorneys/EducationOptions.aspx (last visited Sept. 17, 2012).
125. Writing published legal materials qualifies for self-study CLE credit in California. *Id*.
126. *See, e.g.*, *id.*
127. *See, e.g.*, *CLE# 20102-311: 2010 Ethics: No Rewind in the Real World*, ALASKA

may bear no meaningful relation to a particular attorney's practice area.[128] Additionally, there may be scheduling or geographic obstacles preventing an attorney's participation.

To the extent that an attorney is unable to earn free CLE credit, she will incur costs to attend online, telephonic, or live seminars. The price of such options varies tremendously. There are opportunities to earn credit at luxury locales at vacation destinations.[129] But there are plenty of cheaper options for attorneys in urban areas.[130] The costs vary, but a $30 to $50 per credit hour rate (exclusive of transportation expenses) is common.[131]

Depending on where one lives, transportation expenses to attend

B. ASS'N, https://www.alaskabar.org/servlet/clecalendaritem?id=498 (last visited Sept. 17, 2012); *Courts in the Classroom: Legal History Lecture Series*, IND. JUD. BRANCH, http://www.in.gov/judiciary/citc/2544.htm (last visited Sept. 17, 2012); *CLE*, LA. ST. B. ASS'N, http://www.lsba.org/2007cle/cle.asp (last visited Sept. 17, 2012).

128. *See* sources cited *supra* note 127.

129. It is possible to earn CLE credit while on a cruise. *See* CLE CRUISE LINES, http://www.clecruiselines.com/ (last visited Sept. 17, 2012). CLE can also be earned in Aspen, Colorado with discount lift tickets available. *See CME, CLE, CDE and CE in Aspen, Colorado*, AM. EDUC. INST., http://www.aeiseminars.com/lp-cme.asp?idpage=1 (last visited Sept. 17, 2012).

130. In Texas, there are a number of relatively low cost options to earn CLE credits in major cities like Dallas, Houston, Austin, and San Antonio. *See, e.g.*, *UTCLE*, U. TEX. SCH. L., http://www.utcle.org/online_courses_search.php?pa=41 (last visited Sept. 17, 2012); *Continuing Legal Education*, S. TEX. C.L., http://www.stcl.edu/cle (last visited Sept. 17, 2012).

131. *See, e.g.*, *Estate Litigation*, N.Y. ST. B. ASS'N, http://www.nysba.org/AM/Template.cfm?Section=Events1&Template=/Conference/ConferenceDescByRegClass.cfm&ConferenceID=4697 (last visited Sept. 17, 2012). A New York State Bar Association seminar on Estate Litigation cost $250 for non-members of the state's voluntary bar association and participants could earn up to 7.5 MCLE credits. *Id.* That is a cost of about $33.33 per hour for tuition alone; transportation costs are not included. The Oklahoma Bar Association sponsors various webcasts to earn CLE credit. *See Catalog Home*, OKLA. B. ASS'N, http://okbar.inreachce.com/ (last visited Sept. 17, 2012). The cost generally runs $50 for 1 hour of credit and $100 for 2 hours of credit. *Id.* The Louisiana State Bar Association sponsors online CLE seminars that generally cost $30 per hour of credit. *See CLE*, LA. ST. B. ASS'N, http://www.lsba.org/2007cle/cle.asp (last visited Sept. 17, 2012). However, lawyers can only earn 4 hours of their annual 12.5-hour CLE requirement this way. *Id.* The Nebraska State Bar sponsored an 11-hour CLE seminar on solo and small firm issues, which cost $300 for members who registered in advance, which is equivalent to a cost of about $27 per credit hour. *See 2011 CLE: Nebraska-Iowa Solo and Small Firm Conference*, NEB. ST. B. ASS'N, https://m360.nebar.com/event.aspx?eventID=29440&instance=0 (last visited Sept. 17, 2012). This amount does not include transportation costs, which could be fairly consequential considering Nebraska's low population density and the seminar location on the Iowa side of the Nebraska–Iowa border. *Id.*

lower-cost CLE seminars may be necessary. Attorneys in smaller towns and rural areas may have to drive hours or perhaps even fly to attend CLE events. Even attorneys who do not have to travel far may incur parking charges to attend seminars in congested urban areas. Transportation costs are not an issue when an attorney takes advantage of online or telephone CLE opportunities. However, some jurisdictions limit the amount of credit that can be earned through media.[132]

In light of the foregoing options, one could estimate conservatively that to maintain the privilege to practice law in most states an attorney would need to spend between $360 to $750 (24 to 30 hours) on CLE alone—in addition to direct costs like mandatory bar dues, taxes, and other imposed fees.[133] Thus, depending on the jurisdiction and length of time she is licensed, as well as the CLE options chosen, an attorney might spend up to $1,000 or more on a combination of direct and indirect costs to maintain licensure.[134]

132. *See Education Options*, *supra* note 124. Electronic education (i.e., online seminars) is characterized as participatory or self-study credit depending on how it is delivered. There is a limitation of the amount of self-study credit that an attorney can use to satisfy the MCLE requirements in California. *See Requirements*, ST. B. CAL., http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx (last visited Sept. 17, 2012). *But see CLE Credits Information*, CLEONLINE.COM, http://www.cleonline.com/info/clecred.php (last visited Sept. 17, 2012). In Texas, attorneys can now satisfy all CLE credits through online seminars. *Id.* The Oklahoma Bar Association permits up to 6 hours of the 12-hour annual requirement to be satisfied via archived online programming, but there is no limitation to the amount of credit that can be earned via live online and telephone seminars. *MCLE Change Allows More Online CLE*, OKLA. B. ASS'N, http://www.okbar.org/members/mcle/clechange09.htm (last visited Sept. 17, 2012).

133. This estimate is based on the 12- to 15-hour CLE requirement in most jurisdictions, and the prior $30 to $50 per CLE hour credit estimate. *See Appendices*, *supra* note 41, at 9–25. *See also* OKLA. B. ASS'N, *supra* note 131; LA. ST. B. ASS'N, *supra* note 131. Twelve credit hours at $30 each would cost $360; 15 credit hours at $50 each would cost $750.

134. An attorney in Georgia would have to pay $250 in annual membership dues to the state bar and earn 12 credits of CLE annually. *See Appendices*, *supra* note 41, at 9–25. Based on the prior estimated cost of $30 to $50 per credit hour, one could estimate a cost of between $360 to $600 for the same Georgia attorney to comply with the CLE requirement. Compliance would cost a Georgia attorney $610 to $850 to maintain her law license. It was previously noted that bar dues were a relative bargain in Georgia. Moreover, the 12-hour CLE requirement is also on the lower end of what mandatory CLE jurisdictions require. Thus, the estimate for a Georgia attorney is potentially less expensive than in other states. For example, Oregon attorneys licensed more than 2 years must pay $492 to maintain their bar licenses, and are required to earn 45 hours of CLE over 3 years (an average of 15 hours per year). Applying the prior estimate of $30 to $50 per CLE credit, this would impose an average cost of $450 to $750 each year to comply with the CLE requirements. Cumulatively, that would total between $942 to $1,242 for

B. Current Emeritus Programs Do Not Go Far Enough

For lawyers who are no longer practicing law for pay, these costly requirements are understandably a huge barrier to providing pro bono services.[135] Without compensation, finances are tight. Cutting non-imperative costs from the household budget is necessary. Often the first costs to be cut are those associated with maintaining a bar license that is no longer in use.

In the 1980s, some jurisdictions began to adopt exemption rules to reduce or eliminate some or all of the direct and indirect licensure costs to encourage pro bono participation. Exemption was a privilege based on age, experience, or retirement.[136] In 1981, the Florida Bar became the first to adopt an emeritus program, and similar rules were adopted by Arizona, California, and Oregon in 1987.[137]

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an Oregon lawyer to spend each year for the privilege of maintaining her law license. North Dakota lawyers have a $380 annual license fee and must earn 45 hours of CLE over 3 years (an average annual requirement of 15 hours). Applying the prior estimate of $30 to $50 per CLE credit, this would impose an average cost of $450 to $750 each year to comply with the CLE requirements. The total cost to maintain one's law license in North Dakota is estimated to be between $830 and $1,130 each year.

For the sake of simplicity, these estimates do not take into account the potential to earn free CLE or the potential significant cost for transportation to CLE seminars. Ignoring these possibilities is justified to provide a simple set of examples. As previously noted, opportunities to earn free CLE may be limited and may not include offerings in an attorney's area of expertise. Some attorneys may not earn any CLE credit via free options. However, many attorneys take advantage of distance learning options like online and telephone seminars to satisfy at least some of their CLE requirements and eliminate transportation costs. Therefore, it seems reasonable to ignore these competing possibilities.

135. Some states have long provided exemptions to these costly requirements. For example, some provide exemptions or reductions in the requirements for attorneys who are on active military duty or who work for the government. However, these categories are tied to full-time employment in a particular context and are not helpful for someone who is on hiatus from the practice of law. *See Senior Lawyers Division for Legal Services*, AM. B. ASS'N, http://www.americanbar.org/groups/probono_public_service/resources/volunteer_opportunities/senior_lawyers.html#projects (last visited Sept. 17, 2012) ("Due to the significant cost of state bar memberships, many seniors change their bar status to inactive or simply let their bar memberships lapse altogether."); JoAnn Vogt, *New Rule Allows Retired and Inactive Lawyers to Provide Pro Bono Legal Services*, COLO. LAW., Sept. 2007, at 75, 75 ("However, such lawyers often face barriers to doing pro bono work. They may, for example, have taken inactive status to avoid the expense of annual registration fees . . . .").

136. *See ABA Emeritus Report*, *supra* note 87.

137. *See* Holly Robinson, *No Longer on Their Own: Using Emeritus Attorney Pro Bono Programs to Meet Unmet Civil Legal Needs*, AM. B. ASS'N, 3, http://www.americanbar.org/content/dam/aba/migrated/aging/docs/V2_pro_bono_emerit

Though some states have followed suit, not all have.[138] Those that adopted programs typically limit eligibility to retired lawyers, or lawyers who are of retirement age.[139] Indeed, many programs use the term "emeritus" in their name (e.g., "Pro Bono Emeritus," "Emeritus," "Active Emeritus," etc.).[140] That term denotes retirement from active professional duty.[141] The programs were developed to take advantage of the tremendous skill and knowledge of lawyers who spent their careers in the legal profession.[142] They were developed to empower retirees (who are often on fixed incomes) to help fill the huge demand for pro bono legal services without incurring significant financial costs associated with maintaining one's law license. These developments removed the financial disincentive (in whole or in part) and enabled more retired lawyers to provide pro bono services.[143] Unquestionably, these are fabulous goals. Emeritus attorney programs are a win-win situation not only for participating attorneys, the bar, and pro bono clients, but for society as a whole.

Despite these strengths, emeritus attorney programs are insufficient to meet the current dynamics of the profession. Because they were initially developed to remove the financial disincentives for retirees,[144] emeritus programs are often unavailable to lawyers who take time off to focus on family needs early in their careers.[145] Emeritus programs

us_brochure_3_5.authcheckdam.pdf (last visited Sept. 17, 2012).

138. See *Appendices*, *supra* note 41, at 25–45 for a complete summary of all of the current emeritus or other pro bono licensure programs in the fifty-one U.S. jurisdictions.

139. *Id. See* GA. B. R. 1-202. In Georgia, emeritus status is limited to members in good standing who are age seventy or older and who have been admitted to practice for at least twenty-five years. *Id.*

140. *See ABA Emeritus Report*, *supra* note 87.

141. "Emeritus" is an adjective defined as "retired or honorably discharged from active professional duty, but retaining the title of one's office or position: *dean emeritus of the graduate school*; *editor in chief emeritus*." *See Define Emeritus*, DICTIONARY.COM, http://dictionary.reference.com/browse/emeritus (last visited Sept. 17, 2012).

142. *See ABA Emeritus Report*, *supra* note 87.

143. For example, Montana emeritus attorneys do not have to pay annual membership dues or the assessment to the Lawyers' Fund for Client Protection. *See Frequently Asked Questions*, MONT. B. ASS'N, www.montanabar.org/associations/7121/files/Frequently%20Asked%20Questions.pdf (last updated Dec. 28, 2011). However, they still have a mandatory CLE obligation, but it is less than that required of active status attorneys. *Id.*

144. *See* Vogt, *supra* note 135 ("[R]etiring lawyers were the impetus for the rule . . . .").

145. Tennessee has a pro bono emeritus program, but to qualify one must have engaged in the active practice of law for at least twenty-five years before applying. *See* TENN. SUP. CT. R. 50A.

developed under the assumption that one would not step away from the active practice of law until one had practiced law continuously for several decades. That assumption is not always accurate in the profession today.[146]

Not all states have emeritus programs.[147] In 2006, the ABA Commission on Law and Aging suggested that state and territorial bars adopt practice rules to permit and encourage retiring or otherwise-non-practicing attorneys to volunteer their skills to provide legal assistance to low- and moderate-income individuals.[148] Many jurisdictions heeded the call of the ABA's "Second Season of Service" initiative and adopted programs.[149] But not all jurisdictions have taken action. Eighteen of the fifty-one U.S. jurisdictions made no effort whatsoever to remove the financial disincentive of licensing costs to encourage non-practicing attorneys to do pro bono work.[150] This failure is inexcusable in light of the current dire state of unmet legal needs of the poor.

The failure negatively impacts the legal profession and the legal system in other ways. Once lawyers leave practice early in their careers to stay home full-time with their children, returning to the profession can be difficult.[151] In some jurisdictions, merely switching to an inactive status requires lawyers to pay significant out-of-pocket amounts to preserve the possibility of returning to active status.[152] Some lawyers let their law licenses lapse altogether due to the costs. Returning to the profession could be burdensome; sometimes lawyers must pay missed bar dues or retake the bar exam.[153]

146. *See, e.g.*, Wu, *supra* note 28.

147. *See* David Godfrey & Erica Wood, *Emeritus Attorney Programs*, AM. B. ASS'N, 13 (Sept. 2010), http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/emeritus_best_practices_9_27.authcheckdam.pdf.

148. *See* Holly Robinson, *Checklist for Creating an Emeritus Attorney Pro Bono Participation Program*, BIFOCAL, Nov. 2007, at 5, 5.

149. *See* Vogt, *supra* note 135.

150. *See* Godfrey & Wood, *supra* note 147, at 3. This 2010 report indicated that only thirty-three jurisdictions had provisions for emeritus practice. *Id.*

151. *See, e.g.*, Winerip, *supra* note 6, at 4. One study indicated that "93[%] of the women who took time off . . . wanted to return to their careers, but only 74[%] of them were able to do so." Wu, *supra* note 28.

152. For example, inactive South Carolina lawyers have to pay an annual license fee of $175. *See Bylaws*, S.C. B., http://www.scbar.org/AboutUs/Bylaws.aspx (last visited Sept. 17, 2012).

153. *See, e.g.*, Telephone Interview by Suwini Foe with Ms. Mirna Lerma, Membership Records Dep't, State Bar of Ariz. (Sept. 26, 2011) (on file with author). Ms. Lerma indicated that if a member lets her bar license lapse, she will have to pay back all missed dues in order to be reinstated, get all the missed MCLE credits, and take the bar

Losing skills, and not keeping up with changes in the law and the way law is practiced, can make it daunting to try to reenter the profession after a break of several years.[154] Emerging programs can assist lawyers who wish to practice after time away.[155] However, not everyone can afford the price or overcome geographical obstacles to participate in these programs.

Cynical lawyer jokes suggest that the fewer lawyers, the better. But in reality, there are serious pitfalls when an attorney never returns to the legal profession after leaving to start a family. First, there are immediate economic pitfalls for the attorney who leaves practice to parent. Most law students today pay for their education with student loans, which are challenging enough to pay back when one earns a comfortable living. When one makes the financial sacrifice of going without an income, the economic well-being of the lawyer's family is negatively impacted. Such sacrifice might be tolerable for a short period, but it can be much more serious and threatening if the sacrifice becomes permanent because the attorney never returns to practice law. Ultimately, the family may face the possibility of default on the student loans or even bankruptcy.

Both possibilities have significant repercussions on our economy and the availability of student loans in the future. Defaulted loans are a burden ultimately borne by taxpayers.[156] It may affect the availability of student loans, making it difficult for low-income students to finance law school. Moreover, because most lawyers leaving the profession for

exam if the lapse has been more than five years. *See also* Telephone Interview by Suwini Foe with Ms. Sandy Gavin, Membership Dep't, State Bar of Tex. (Sept. 26, 2011) (on file with author). Ms. Gavin explained that if a member lets her license lapse, she must pay back dues and retake the bar exam to be reinstated. *Id*.

154. *See* Winerip, *supra* note 6, at 4.

155. *Id.* The American Bar Association and Hastings College of Law offer courses to aid lawyers returning to practice. *Id.* Pace Law School's *New Directions* program for returning to law practice helps lawyers prepare to reenter the profession. *See New Directions for Attorneys*, PACE L. SCH., http://www.pace.edu/newdirections (last visited Sept. 17, 2012); *Pace Law School has Program to Help Lawyers on Sabbatical get Back into Practice*, LEGAL SKILLS PROF BLOG (June 20, 2011), http://lawprofessors.typepad.com/legal_skills/2011/06/pace-law-school-has-program-to-help-lawyers-whove-taken-a-sabbatical-from-practice-get-back-in-the-g.html.

156. *See, e.g.*, *Get a Law School Loan*, COLLEGESCHOLARSHIPS.ORG, http://www.collegescholarships.org/loans/law-school-loan.htm (last visited Sept. 17, 2012); Kim Clark, *The 4 Best Grad Student Loans*, U.S. NEWS & WORLD REPORT (Apr. 15, 2010), http://www.usnews.com/education/articles/2010/04/15/the-4-best-grad-student-loans (stating that most graduate students finance their educations via federal government loans).

family reasons are women,[157] the status quo contributes to a lack of gender parity in the profession and impedes efforts for equality. The profession and the legal system benefit when there is a diversity of perspectives represented at the bar. The current situation may prompt a backlash against women in the profession. Employers might become reluctant to hire female applicants if statistics suggest they will not stay long.

The difficulty in returning to full-time practice after staying home with a family is largely due to the lack of flexibility in the profession. Yet, there are solutions that can improve the situation. If there were more realistic options to permit stay-at-home attorneys to remain somewhat involved in the profession, it would be easier for them to eventually return to full-time practice. Pro bono work is an excellent way to maintain skills and keep abreast of changes in the law or methods of practice. It could also be a means of exploring new practice areas or networking within the legal community. Networking could aid an eventual return to full-time practice. Moreover, these opportunities are flexible; they allow attorneys to decide what type of and how much work to accept while still accommodating their families' schedules.

Exploiting the often overlooked resources of non-practicing stay-at-home lawyers would help satisfy the unmet need for legal services for low-income people and strengthen our legal system. It would open the doors of justice to more people in our society and make our legal system less exclusively the realm of the affluent.

C. Proposals for Reforming Existing Policies and Implementing New Ones

As described previously, similar to the experiences of retired lawyers, attorneys early in their careers often face financial obstacles when trying to do pro bono work after stepping away from the profession (temporarily) to start families.[158] Enacting emeritus rules in all U.S. jurisdictions, and expanding the scope of qualifying attorneys under

157. *See, e.g.*, Wu, *supra* note 28; Nicole Black, *Are Successful Women Avoiding Motherhood?*, N.Y. L. BLOG (May 23, 2008), http://nylawblog.typepad.com/women_lawyers/mommytracked/; Jrennie, *"Opt Out" or Pushed Out: Are Women Choosing to Leave the Legal Profession?*, MS. JD (Feb. 27, 2009, 1:43 AM), http://ms-jd.org/quotopt-outquot-or-pushed-out-are-women-choosing-leave-legal-profession.

158. *See Senior Lawyers and Pro Bono*, AM. B. ASS'N, http://apps.americanbar.org/legalservices/probono/senior_lawyers.html (last visited Sept. 17, 2012).

these programs, would widen the "potential pool of . . . volunteers."[159] This would not only meet the needs of low-income clients,[160] but it would also decrease the likelihood of lawyers permanently drifting away from the legal profession.

After studying the current emeritus programs, I have compiled specific suggestions to reform existing emeritus attorney policies or create new ones. My suggestions focus on three common themes. First, the rules should qualify as many non-practicing attorneys as possible to provide pro bono legal services. Second, policies should encourage attorneys to do pro bono work. Third, programs should empower attorneys to provide pro bono clients with high quality legal services. The eleven suggestions below focus on goals to qualify, encourage, and empower as many lawyers as possible to help close the justice gap.

1. No Age Restrictions

The most glaring problem with existing emeritus programs is that they tend to have narrow qualification parameters. Most qualifications are defined by age. These limitations should be entirely eliminated. They serve no valid purpose in qualifying, encouraging, or empowering lawyers to meet the legal needs of low-income people. Age limitations needlessly exclude from qualification generations of attorneys who might otherwise be able to contribute to the closing of the justice gap.

Some current emeritus programs do not explicitly impose an age-based qualification, but they imply one when they limit qualification to "retired" lawyers. That critical term is not always defined and may create ambiguity. People today do not stay in a particular job or profession until they qualify for Social Security benefits, and it is not clear what it means to "retire." One definition of the term suggests that one is not "retired" if one leaves paid employment in early or middle adulthood: "to withdraw from office, *business*, or active life, usually because of age: *to retire at* the *age of sixty*."[161] Thus, even if a jurisdiction implements a rule without an explicit age requirement, if a qualification is phrased in terms of being "retired," there is arguably an implicit age requirement.

159. Godfrey & Wood, *supra* note 147, at 3.

160. *See* Robinson, *supra* note 137, at 1. "Emeritus attorney pro bono programs . . . offer additional resources and are one method of supplementing existing legal services in light of growing need and finite resources." *Id.*

161. *See Define Retire*, DICTIONARY.COM, http://dictionary.reference.com/browse/retire (last visited Sept. 17, 2012) (first emphasis added).

Last, existing emeritus programs should be renamed to avoid the implicit age-based limitation of the term "emeritus." Thus, these suggestions will incorporate the proposal that the age-neutral term "pro bono licensure" be used in the future.

2. Modest Requirements as to Length of Licensure or Practice

Similar to age-based restrictions, some current emeritus programs limit participation to attorneys who have been licensed or practiced for a certain number of years. Some limitations are quite onerous, others are less burdensome.

New Mexico's emeritus attorney qualifications are available to lawyers who have been admitted to practice for at least twenty years.[162] Georgia imposes a requirement of at least twenty-five years.[163] Michigan's emeritus membership is restricted to attorneys who have either reached a certain age or been a member of the state bar for at least thirty years.[164] By contrast, California and Texas now have less burdensome rules, requiring attorneys to be admitted to practice law for at least five years.[165]

The more onerous licensure or practice limitations appear to be a proxy for age-based restrictions and should be eliminated. They are overly restrictive and exclude lawyers on a mid-career professional hiatus. However, minor practice restrictions are arguably an attempt to limit participation to well-qualified attorneys. To the extent that these limits aim to protect pro bono clients from incompetent legal representation, they are meritorious. It is indisputable that low-income persons need and deserve competent attorneys. But there is no clear-cut correlation between the length of time one has practiced and her competency.

Moreover, even a five-year practice or licensure requirement is unduly burdensome for many lawyers. The incessant ticking of the biological time clock compels many women to start families early in their careers. They may not make it to the five-year point before needing to take time off to attend to family needs.

162. *See* N.M. R. ADMISSIONS 15-301.2(A)(2), (B).

163. *See* GA. B. R. 1-202.

164. *See* MICH. B. R. 3(F).

165. *See The State of California Pro Bono Practice Program*, ST. B. CAL., http://cc.calbar.ca.gov/LinkClick.aspx?fileticket=QPVaObGXoyI%3D&tabid=1195 (last visited Sept. 4, 2012); *Determine MCLE Hours*, *supra* note 122.

A less drastic three-year practice or licensure requirement would qualify more attorneys and would simultaneously ensure experience before they take on cases for low-income clients. It would satisfy the goals of qualifying and empowering more attorneys to do pro bono work.

3. Minimize Attorney Paperwork to Participate

Existing emeritus programs often require attorneys to apply or register before doing pro bono work. This requirement should be eliminated for otherwise-non-practicing attorneys.[166] For example, Delaware's Supreme Court Rule 69(d)(i) generally defines "inactive" status to forbid the practice of law, but it provides an explicit exception for providing pro bono services in certain contexts.[167] Delaware does not require going on a special pro bono licensure status but has broadened the definition of "inactive" status to permit all attorneys to do pro bono work without special petitioning or filings. This approach may be ideal because it streamlines the process and qualifies as many attorneys as possible to provide pro bono legal services.

One might argue that otherwise-non-practicing attorneys should have to take affirmative steps to be permitted to provide pro bono services and not all attorneys should qualify. Indeed, many jurisdictions require proof of good standing and a record without professional discipline for emeritus attorneys. Pro bono clients need and deserve attorneys of high caliber. Lawyers lacking competence, diligence, or professionalism are still a concern in the pro bono context. Requiring a clean record with the governing jurisdiction is a legitimate requirement.

However, to the extent that a jurisdiction does mandate an application or registration process, that process should be as expedited as possible. Filing an easily accessible standard form with a court clerk, bar association, or other administrator is preferable to requiring attorneys to go to court and petition to qualify. The latter option requires the drafting of an original document in a particular format and may require a courthouse appearance or the payment of court fees. Having one form that all applicants fill out would simplify the process and encourage more lawyers to participate. It would also preserve court resources.

166. A 2006 survey indicated that a frequent complaint about emeritus attorney programs is paperwork that is "needlessly burdensome." *See* Godfrey & Wood, *supra* note 147, at 14.

167. *See* DEL. SUP. CT. R. 69(d).

Some jurisdictions have burdensome rules that drop an attorney from emeritus status if they cease to do pro bono work.[168] Once dropped, an attorney must restart the process in order to provide pro bono services. Similarly, some jurisdictions require attorneys to reapply every year in order to do pro bono work.[169] Though possibly well intentioned, these requirements create disincentives for otherwise-non-practicing attorneys to provide pro bono legal services and decrease participation. Qualification to practice pro bono should continue unless an attorney violates the jurisdiction's professionalism rules.

4. Maximize Flexibility of Pro Bono Work

Some jurisdictions impose restrictions on the work of emeritus attorneys or enumerate the specific activities that attorneys can perform to serve low-income clients.[170] Other states impose minimum hours of service in order to reach emeritus status.[171] These restrictions are counterproductive and may discourage otherwise willing participants.[172]

Listing specific activities that an emeritus attorney can do creates confusion. It implies that some activities otherwise within the sphere of practice are off-limits for an emeritus attorney. However, these lists are often expansive and unclear, discouraging attorneys from handling certain pro bono cases. These specifications are unnecessary and should be eliminated to allow volunteer attorneys to do anything an active-status lawyer can do.

Similarly, pro bono licensure programs should not impose a minimum number of hours to be completed. Record keeping alone discourages practicing attorneys from pro bono work. These requirements are even more daunting to volunteers with family

168. Illustratively, in Montana to retain emeritus status lawyers must complete twenty-five hours annually. *See Frequently Asked Questions*, *supra* note 143. Connecticut has a more onerous requirement of at least 250 hours to be an emeritus attorney. *See Connecticut's Emeritus Project*, CONN. B. ASS'N, https://www.ctbar.org/Attorney%20Resources/ProBono/EmeritusProject.aspx (last visited Sept. 17, 2012).

169. For example, in Illinois, inactive or retired attorneys can seek pro bono authorization, but such authorization will lapse if it is not renewed annually. *See* ILL. R. ADMISSION 716(g), 756(j).

170. *See* N.D. SUP. CT. R. 3.1; TENN. SUP. CT. R. 50A.

171. *See Connecticut's Emeritus Project*, *supra* note 168. *See also By-Laws of the NHBA*, NHBA (July 28, 2011), http://www.nhbar.org/about-the-bar/bylaws.asp.

172. Flexibility in attorney work and scheduling is important. *See Senior Lawyers Division for Legal Services*, *supra* note 135.

responsibilities. They are apt to disincentivize attorneys who are interested in doing pro bono work but who do not have significant time to commit or have child care issues. Minimum service requirements may be more than an attorney with pressing family needs can perform competently. Eliminating requirements will empower attorneys to provide quick, quality services.

Indeed, pro bono licensure attorneys should be able to choose from a variety of ways to serve. While handling an entire case alone might not be feasible, they should be allowed to serve as co-counsel with another attorney or to handle discrete tasks on several cases. Although a parent may be unable to leave home regularly to go to court or meet with clients, she could still provide useful service by drafting motions, petitions, and other documents necessary for other pro bono attorneys. Alternately, an attorney with courtroom experience may find it more manageable to appear in court periodically, but she may not have the ability to work from home to prepare documents to be filed in a particular case. Maximizing work flexibility helps empower more attorneys to do pro bono work and provide high-quality service.

5. Require Attorneys to Do Pro Bono Work Under the Auspices of an Approved Legal Services Provider

The suggestions in subpart III.C encourage a liberalization of the qualification rules for pro bono licensure programs. However, there is one key restriction that ought to be a part of such programs. Many existing policies limit the practice of emeritus attorneys to pro bono work done under the auspices of an approved legal services provider. These are important rules that should be retained or adopted when appropriate.

Such rules help provide some critical minimal oversight to participating attorneys. This ensures that such attorneys provide services only on a non-compensated basis. These rules also funnel needy clients to volunteer attorneys. Moreover, they provide a useful infrastructure for training or mentoring support to best serve their clients.

Although it is prudent that attorneys be required to perform pro bono only for approved legal services providers, requirements should not be drafted in an overly burdensome manner. For example, some current emeritus policies require "all activities" to be performed under the "direct supervision" of a licensed attorney employed by the approved

legal services provider.[173] This requirement entails extensive involvement of an attorney from an approved legal services provider. While this rule makes sense for law students providing pro bono support, it does not for attorneys who have proven themselves and met the requirements of the profession.

Moreover, this rule is simply unworkable on a large scale. Approved legal services providers tend to have limited resources, making it difficult to supervise more than a small number of volunteer attorneys. Burdensome supervision requirements do not allow for many volunteers and may disempower those who do volunteer.

Instead, a better approach would simply require pro bono licensure attorneys to perform work only on cases sanctioned by the approved legal services provider. This would qualify more non-practicing attorneys to offer pro bono services. Additionally, states should require approved legal services providers to offer certain types of support, empowering attorneys to provide highly competent services. This latter requirement is elaborated in the next several suggestions.

6. Empower Attorneys with the Necessary Skills to Handle Pro Bono Cases Well

Pro bono licensure programs should acknowledge that participating attorneys may not initially have all the requisite skills and knowledge needed to provide high-quality legal services on pro bono cases.[174] Such cases may involve areas of law quite different from those in which the attorney previously practiced. For this reason, pro bono licensure programs should require approved legal services providers to host a tailored training program for their pro bono licensure volunteers and get them up to speed in specific areas relevant to the work they will do.[175]

There is no need for a state bar or other governing body to micromanage the content, length, or even the format of the training. Approved legal services providers should have flexibility to determine the best way to teach the participating attorneys to competently handle cases.

Attorneys who are more knowledgeable about the area of law in which they practice will be more confident and do a better job for their

173. *See* VA. ST. B. ORG. & GOV'T R. 3.
174. *See* Godfrey & Wood, *supra* note 147, at 13.
175. *See id.* at 12.

clients. They are also more likely to take additional pro bono cases in the future. Such training will support the aim of empowering lawyers to provide high-quality pro bono legal services.

7. Support Attorneys When They Are Working a Pro Bono Case

Initial or periodic training of pro bono licensure lawyers is critical to empowering them to do competent work. However, training is not the only method to empower participating lawyers. To be "approved," legal services providers should be required to take additional steps to support pro bono licensure attorneys who are serving clients.[176]

For example, after training is over, attorneys may have questions or need guidance on how to handle tricky issues. Approved legal services providers should supply experienced mentor attorneys to offer direction. Mentors should be well versed in the practice area in which the pro bono licensure attorney is working. Mentors should be available to provide guidance, share pro forma documents, and answer questions that volunteering attorneys may encounter. Mentors may be employees of the approved legal services provider or private practice attorneys volunteering their time.

Beyond training and mentoring, approved legal services providers should be required to provide meeting space for pro bono licensure attorneys. Otherwise-non-practicing attorneys will not have such space to use for professional meetings. Due to privacy, security, or other concerns, they may be hesitant to have clients and others in their own homes. Office space should be set aside to permit attorneys to meet with clients or opposing counsel.

8. Remove Financial Disincentives As Much As Possible

Financial limitations of non-practicing lawyers are often tight; it is imperative to remove financial barriers to encourage participation. In doing so, both direct and indirect costs should be considered.

To this end, there should be a complete waiver of all direct costs. Even if all direct costs are waived, a pro bono licensure lawyer may still incur significant financial expenses. Babysitting, transportation costs,

176. Providing support for volunteer attorneys is key. Recommended support includes document templates, access to research services, coaching and mentoring, as well as technology and administrative support. *See id.* at 15.

and dry cleaning costs may be necessary for lawyers to meet with clients, file documents, or attend court. Such personal expenses are not reimbursable by the bar or an approved legal services provider, and these may create a financial obstacle for the pro bono licensure attorney. Therefore, a complete waiver of the direct costs of licensure is critical to minimize the financial disincentives preventing lawyers from doing pro bono work.

If a complete waiver is not feasible in a particular jurisdiction, a nominal amount should be charged—for example, $10 for all direct fees that would otherwise be charged for active status attorneys. Otherwise, the cumulative out-of-pocket cost to maintain one's license may prove too burdensome and the stay-at-home attorney may have no option but to let her license lapse.

Additionally, efforts should be made to eliminate the indirect costs of maintaining one's license. Some jurisdictions eliminate all CLE requirements for emeritus attorneys. This approach helps because it removes the financial disincentives of pro bono work. However, some might argue that eliminations are only justified for retired lawyers who spent decades learning the law through practice and prior CLE courses. Others may feel that an elimination of CLE requirements is not appropriate for attorneys early in their careers because it puts pro bono clients at risk to receive substandard legal services.

This argument has some merit. Some jurisdictions might opt to retain a CLE requirement for attorneys on pro bono licensure. But removing CLE costs is critical. Thus, jurisdictions retaining a CLE requirement for pro bono licensure might reduce the number of credit hours required each year. Reductions would lower the indirect costs to the attorney and be justified since the attorney would be doing less legal work through pro bono licensure than when she was on active status. An attorney handling fewer legal responsibilities is less likely to need as much ongoing training in the law as someone who devotes more time to practice over the course of the year. Ensuring that pro bono licensure attorneys have ample opportunities to meet mandatory CLE requirements through free seminars is also important.

Nonetheless, it is preferable to do away with formal CLE requirements for pro bono licensure attorneys and simply require approved legal services providers to deliver tailored training. This approach is appealing because it eliminates arbitrary hour requirements and ensures that the training received is relevant to the work she

performs. This would also cut back on indirect costs to the attorney maintaining her law license. Additionally, it would allow pro bono service providers to monitor the quality of the training volunteers receive before they are assigned pro bono work.

9. Collaborate Early with Local Pro Bono Service Providers

The prior suggestions envision making demands of approved legal services providers. Therefore, it is critical for policy drafters to collaborate with local providers who will be carrying out key portions of the policy.[177] Representatives of legal services providers are invaluable resources and can help drafters create the most feasible policy possible to maximize the likelihood of success. Providers are on the front lines in attempts to close the justice gap and have experience working with volunteer attorneys. Their guidance may prevent policy drafters from overlooking critical realities.[178]

Moreover, a collaboration between drafters and legal services providers may also identify the best ways to address other issues. For example, pro bono licensure attorneys will need office support services. They may need to use facsimile or photocopying machines, they may need to print or bind documents, or they may require notary services. The costs for these services would typically be passed along to a paying client, but in a pro bono context the attorney may be forced to incur costs out-of-pocket. A situation like this can create an untenable financial disincentive for an otherwise-non-practicing lawyer whose own family budget is tight. Unfortunately, a legal services provider may not have the resources to provide office support services. But with early collaboration between drafters of pro bono licensure policies and legal services providers, they may fashion solutions ahead of time to support pro bono licensure attorneys.

Similarly, allowing for malpractice insurance may be an incentive for attorneys to do pro bono work.[179] It also protects pro bono clients. Some existing emeritus programs require legal services providers to furnish volunteers with malpractice insurance; still, this may not be

177. *Id.*

178. It is recommended that licensure policies be established contemporaneously with the creation of programs to enact the policies and to provide actual volunteer opportunities. *See* Robinson, *supra* note 137, at 5.

179. *See* Godfrey & Wood, *supra* note 147, at 4; *Senior Lawyers Division for Legal Services*, *supra* note 135.

feasible for all approved legal services providers. Again, early collaboration between drafters and legal services providers may help ensure that malpractice insurance will be provided to pro bono licensure attorneys.

10. Draft the Policy in Clear and Complete Terms

Complicated pro bono licensure policies may discourage participation. Drafters should write a clear, straightforward policy. It should be simple and relatively brief. Complex or wordy text might create confusion.

Drafters should take care to include all the relevant rules in one place. A pro bono licensure policy should be long enough to answer all the basic questions without cross-referencing other sections of court rules or association bylaws. It should clearly state the qualification process, CLE or other training requirements, and the cost of participation. Attorneys are more likely to participate if they do not have to do in-depth research just to understand the basic rules of the policy. Undue complexity or vagueness would create a disincentive and potential confusion.

11. Publicize the Pro Bono Licensure Option

Even the best-drafted policy will do little good if few people know it exists. For that reason, after implementation, significant efforts should be made to publicize the pro bono licensure option.

The policy should be featured prominently on websites of bar associations and other governing bodies. It should be integrated and featured in multiple pages of the website (e.g., when discussing licensing fees, CLE requirements, the jurisdiction's pro bono efforts). The pro bono licensure policy should also be marketed in bar association mailings or newsletters.

Additionally, the bar association or other governing body should target various groups and publicize the emeritus policy. Women lawyer groups are an obvious source of outreach, but reaching out to other organizations would also get the word out.

The bar associations or other governing bodies should also reach out to attorneys who are currently inactive or who have allowed their law licenses to lapse. Depending on the circumstances, these lawyers might be good candidates for pro bono licensure.

IV. CONCLUSION

The status quo of our legal system is intolerable and unsustainable for a healthy democracy. The halls of justice must be made available to everyone, regardless of income or wealth. Moreover, the keys to justice should be held by a diverse group of people who are representative of the wider society, and not monopolized by one gender.

Based on our current fiscal environment, creative solutions must be implemented to meet the legal needs of low-income people. Empowering the demographic of non-practicing early- or mid-career lawyers to do pro bono is not a panacea, but it would significantly help close the justice gap. This change seems like a logical step for a self-regulating profession that purports to take Model Rule 6.1 seriously. If there are structural impediments preventing some lawyers from meeting their professional responsibility under Model Rule 6.1, state bar associations and other governing bodies should alter the rules to remove such impediments.

Empowering more pro bono involvement could also help curb the devastating female brain drain in the profession. Despite the best efforts of medical professionals, it is unlikely that the window of women's fertility will drastically change in the near future. Encouraging women to go to law school after starting families is also unrealistic. Thus, for the foreseeable future we are likely to see a continuation of female lawyers taking time off from their careers to have babies and care for young children.

Realistically, the pressures of the market and the inertia of the status quo make it unlikely that many legal employers will take meaningful steps in the near-term to retain women or reintegrate them into the profession after a hiatus. Nonetheless, governing bodies that regulate the legal profession can take important steps towards these goals. Reforming licensure options to remove financial disincentives and empower otherwise-non-practicing lawyers in pro bono efforts would keep talent within the profession.