

**THE MARYLAND JUDICIAL COMMISSION ON PRO BONO
REPORT AND RECOMMENDATIONS**

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Chairperson

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March 2000

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PREFACE

Chief Judge Robert M. Bell established the Maryland Judicial Commission on Pro Bono in the Fall of 1998, as one aspect of the access to justice initiative. The Commission is composed of sixteen people from all parts of Maryland. Its members include appellate, circuit, and district court judges, lawyers in the public sector, solo practitioners and lawyers in practice with large, medium, and small firms, and participants in the legal services community.

The Commission was provided a mission statement and was charged generally with investigating and making findings and recommendations about what role the Judiciary can and should play in expanding pro bono legal services in our State. At the organizational meeting on November 10, 1998, each Commission member was assigned to serve on at least one of five subcommittees: 1) Problem Identification: Needs and Resources; 2) The Role of Judges in Promoting Pro Bono Representation; 3) Court-Based Initiatives to Promote Pro Bono Representation; 4) Maryland Rule of Professional Conduct 6.1/Promoting Lawyer Participation; and 5) Oversight and Drafting/Ethical Issues. Throughout 1999, the Commission held a series of full session meetings and the subcommittees met periodically, addressing issues within their assigned subject areas. In January 2000, the Commission met in final full session and approved all of the recommendations that appear in this report.

In carrying out the Commission's charge, members interviewed judges, court personnel, legal services representatives, Maryland ADR Commission staff, the statewide Family Services Coordinator, Maryland Legal Services Corporation representatives, and bar leaders. They gathered information about pro bono programs and

plans from other states and spoke with judges, court staff, and state bar association pro bono support staff from those states, as well as representatives of the ABA Center for Pro Bono. The Commission invited Kent Spuhler, the Executive Director of the Florida Voluntary Pro Bono Attorney Plan and Florida Legal Services, Inc., to attend one of its meetings and to make a presentation about Florida's statewide pro bono plan. The Commission prepared written surveys that were distributed to all Maryland circuit and district court judges, family services coordinators, court clerks, and Maryland Legal Services Corporation-funded legal services providers. Commission members studied the input that was received from all of these sources during several extended retreat meetings. At those meetings, members worked in full session and in their sub-committee groups to formulate the preliminary recommendations that became the bases for the Commission's final recommendations. Written drafts of the Commission's findings and recommendations were crafted over a period of months.

In issuing this report, the Commission welcomes comments from the legal community, including the organized bar, law firms, individual practitioners, members of the Judiciary, law school faculty and administrators, legal services providers, and court personnel, and from members of the public. The Commission envisions that, once input has been received and considered, the process for adopting the recommendations will begin, and will be given priority. With the adoption and full implementation of the Commission's recommendations, pro bono practice will become integrated into Maryland's legal culture, to the great benefit of our civil justice system.

March, 2000

**REPORT AND RECOMMENDATIONS
OF THE
MARYLAND JUDICIAL COMMISSION ON PRO BONO**

EXECUTIVE SUMMARY

Many of Maryland's poor lack meaningful access to the civil justice system because they cannot afford a lawyer. Even though free legal representation in civil cases is available to some of the State's poor through legal services organizations, and the commitment of time and effort made by lawyers with those organizations is enormous, a significant gap remains. That gap needs to be filled by lawyers donating their services to those in need, "pro bono publico."

Although Maryland has a proud history of pro bono representation, the pro bono effort needs to be revitalized. Experiences in other states show that when the Judiciary brings order to the pro bono commitment and individual judges encourage lawyers to engage in pro bono work, an increase in pro bono services will follow. The Judiciary should provide a framework for a pro bono initiative that will make pro bono service more "user friendly" for lawyers. Lawyers need to be given greater and more specific guidance about what the professional obligation to render pro bono service entails. Finally, there needs to be a system in place to capture accurate and reliable information about the amount and type of pro bono service being rendered from year to year in our State.

To these ends, the Maryland Judicial Commission on Pro Bono has made a series of recommendations, which are summarized as follows:

- ! Each Maryland court should adopt a local pro bono plan that is designed with that court's needs and resources in mind. Local pro bono committees should be created to formulate the plans.

- ! A statewide oversight committee with paid staff should be established to assist the local pro bono committees in formulating their plans, oversee the local pro bono plans once they are in place, receive data about the rendering of pro bono services that can be used to good purpose to increase pro bono services, and otherwise coordinate the effort.

- ! A statewide access to justice liaison committee should be established to coordinate the work of court divisions and other entities within the Judiciary that are studying access to justice problems.
- ! Judges should take steps individually and in groups to encourage lawyers to render pro bono service. They may do so by educating members of the bar about the need for pro bono representation and the professional obligation to serve, by recruiting lawyers to handle pro bono cases, by training lawyers for pro bono representation, by recognizing lawyers for their pro bono work, and by serving on boards and advisory committees of legal services organizations.
- ! Courts should ease pro bono representation by offering flexible scheduling, docket preferences, "piggybacking" of pro bono cases, and other accommodations. Courts should have a system in place to identify *pro se* litigants so they may be "triaged" for pro bono representation and to identify litigants who are being represented pro bono so that accommodations may be made.
- ! Alternative dispute resolution should be used for *pro se* litigants. When feasible and desirable, pro bono lawyers should be brought in to represent otherwise *pro se* litigants in settlement conferences and in mediations. A Mediation Pilot Project should be established in which lawyers will receive free or reduced rate mediation training in exchange for a commitment to render a certain number of hours of free mediation services. If successful, the project should be adopted statewide.
- ! Maryland Rule of Professional Conduct 6.1 should be revised to define what is meant by pro bono services, to set an aspirational goal for the number of hours of pro bono service a lawyer should render each year, to require all Maryland lawyers to report their pro bono service to the Court of Appeals annually, and to provide an option for an appropriate financial contribution in lieu of pro bono service. Changes in local laws and regulations should be considered to enable government lawyers who are prohibited from representing clients to do so pro bono. Courts should not be hesitant to award counsel fees to pro bono lawyers if fees otherwise would be granted.

March 2000

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Deborah Sweet Byrnes

**RECOMMENDATIONS: WHAT THE JUDICIARY CAN
DO TO PROMOTE THE DONATION OF
LEGAL SERVICES TO THE POOR**

I. THE UNMET NEED FOR LEGAL REPRESENTATION AMONG THE STATE'S POOR

A. Many of the State's Poor Lack Access to Legal Services.

The findings of legal needs studies, empirical reports from legal services professionals and lawyers in private practice, legal services program statistics, and court data on *pro se* litigants all show that many of the State's poor lack meaningful access to the civil justice system because they cannot afford to hire a lawyer.

A comprehensive civil legal needs study conducted in Maryland in 1988 revealed that only 20% of the Maryland residents who were eligible for free legal services under Maryland Legal Services Corporation (MLSC) standards,¹ and who were experiencing a legal problem, in fact received free legal services.² A 1994 nationwide ABA study echoed those findings. It concluded that approximately half of low-to-moderate income households (under federal standards)³ experienced a civil legal problem each year, but that

¹MLSC guidelines provide that those earning below 50% of the State's median income qualify. See Maryland Code, Article 10, § 45G(e). Using those guidelines, a family of four with an annual income under \$33,254 would qualify for free legal assistance.

²*Action Plan for Legal Services to Maryland's Poor*, A Report of the Advisory Council of the Maryland Legal Services Corporation (1988) at ix.

³Federal Legal Services Corporation eligibility standards are 125% of the federal poverty level.

almost three-quarters (71%) of those problems were not being resolved through the court system.⁴

These studies confirm that in Maryland, and across the country, the civil justice system is not an available forum for resolving the legal problems of many of the poor. Often, lack of access to the courts is a product of lack of access to a lawyer. In Maryland, lawyers with MLSC grantees work tirelessly representing the poor.⁵ Yet, the gap between the number of poor people in need of lawyers and the number of poor people who receive legal services remains significant. In 1999, one million Maryland residents met the MLSC standards for free legal services. The number of cases

⁴*Legal Needs and Civil Justice, A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public Interest, American Bar Association (1994), at 23.

⁵There are approximately 160 full-time staff legal services lawyers and several thousand volunteer lawyers in the State representing low-income clients in civil matters. Most of these lawyers are affiliated with the following MLSC-funded organizations:

- | | |
|---|--|
| 1. Advocates for Children & Youth, Inc. | 16. Maryland Civil Liberties Union Foundation |
| 2. Allegany Law Foundation, Inc. | 17. Maryland Disability Law Center |
| 3. Alternative Directions, Inc. | 18. Maryland Public Interest Law Project |
| 4. Associated Catholic Charities | 19. Maryland Volunteer Lawyers Service |
| 5. Baltimore Neighborhoods, Inc. | 20. Mid-Shore Council on Family Violence, Inc. |
| 6. Bar Foundation of Harford County, Maryland, Inc. | 21. Montgomery County Bar Foundation |
| 7. CASA of Maryland, Inc. | 22. Pro Bono Resource Center of Maryland, Inc. |
| 8. Community Law Center, Inc. | 23. Public Justice Center, Inc. |
| 9. Domestic Violence Center of Howard County | 24. St. Ambrose Housing Aid Center, Inc. |
| 10. Health Education Resource Organization (HERO) | 25. St. Mary's Women's Center, Inc. |
| 11. Heartly House, Inc. | 26. Stephanie Roper Foundation, Inc. |
| 12. Homeless Persons Representation Project | 27. University of Maryland School of Law |
| 13. House of Ruth | 28. Women's Law Center, Inc. |
| 14. Law Foundation of Prince George's County | |
| 15. Legal Aid Bureau, Inc. | |

handled that year by all of the MLSC grantees combined was 98,332.⁶ Even assuming that only one-quarter of the one million Maryland residents who were eligible for free legal services experienced legal problems, a huge discrepancy existed between the number of cases that the MLSC grantees were able to handle and the number of legal problems of the poor that needed resolution in the civil justice system.

The number of calls for legal assistance that MLSC grantees receive is one measure of the unmet need for legal services for the poor. In Fiscal Year (FY) 1998, MLSC grantees received an estimated 160,000 calls for assistance.⁷ The Legal Aid Bureau alone estimates that it receives 60,000 to 65,000 calls for assistance annually. Approximately 12,000 of those calls result in actual representation.⁸ Each year, approximately 25,000 telephone calls are attempted to the Women's Law Center's Family Law Hotline, the only domestic law hotline in the State. Only ten percent (10%) of those calls actually get through.⁹

What information exists about the number of *pro se* litigants in the Maryland civil justice system likewise indicates that many of the State's poor are not receiving needed legal services. Unfortunately, there is no statewide method for tallying the number

⁶Annual Report, Maryland Legal Services Corporation, July 1, 1998-June 30, 1999, at 3 (hereinafter "MLSC Annual Report").

⁷These statistics are based on the data provided to MLSC by its grantees that provide direct legal assistance. Background materials for Maryland Legal Assistance Network (MLAN), May 11, 1999.

⁸Those figures held true for FY 1998 and FY 1999. It is estimated that another 23,000 callers are given brief advice or referred elsewhere. Interview with Rhonda Lipkin, Deputy Director of the Legal Aid Bureau, March 21, 2000.

⁹Data from Kathleen Fantom Shemer, former Executive Director of the Women's Law Center.

of cases in which litigants proceed *pro se*. The data that is available indicates, however, that approximately one-quarter of the civil docket involves *pro se* litigants and that approximately one-half of the family law cases are filed *pro se*. For instance, in Montgomery County, 1997 figures show that 2,712 cases with at least one *pro se* litigant were filed in the circuit court that year. Those cases represented 26% of all civil filings in that court that year. Fifty-nine percent (59%) of the family law cases filed in Montgomery County in 1997 were brought by *pro se* litigants. In 1998, 22% of the cases on the Montgomery County civil docket involved *pro se* litigants; of the family law cases 57% involved *pro se* litigants.¹⁰ In Baltimore City, a six-month review of filings from July to December 1997 revealed that in 43% of the contested family law cases, litigants were *pro se*.¹¹

In an attempt to address the myriad of problems associated with *pro se* litigation, the Judiciary obtained funding for *pro se* assistance projects in eighteen of the twenty-four Maryland counties. Through these projects, *pro se* litigants receive information and limited advice. The Judiciary also funds the Legal Forms Helpline, sponsored by the Women's Law Center, which offers telephone assistance to *pro se* litigants using court provided domestic relations forms.¹² In 1997, the Women's Law Center

¹⁰Statistics provided by the Circuit Court for Montgomery County, April 30, 1999.

¹¹*Annual Report of the Family Division Coordinator 1997-1998*, Circuit Court for Baltimore City, Family Division/Domestic Docket, compiled by Judith D. Moran (January, 1998), at 4.

¹²These standardized pleadings and forms with instructions are available for free to any member of the public at each circuit court clerk's office in the State.

assisted 2,771 callers statewide through the Helpline. Yet, the Helpline was actually dialed 20,521 times.¹³

Because there is no statewide or local system for tracking *pro se* litigants, tracking has been *ad hoc*. The *pro se* assistance projects typically maintain records of the numbers of people served. The majority of the programs provide assistance to *pro se* litigants regardless of their income levels. The few programs that have collected any data on income levels of *pro se* litigants have determined that a large percentage of those litigants would qualify for free legal assistance. In Prince George's County, for instance, 2,700 people sought *pro se* assistance through the Law Foundation of Prince George's County. Of those, 45% (or 1,200) qualified for free legal help.¹⁴

B. High Priority Areas of Legal Need.

In 1997, the Services Priorities Workgroup of the Maryland Coalition for Civil Justice (MCCJ)¹⁵ contracted with Mason-Dixon Opinion Research, Inc. to determine the types of civil legal problems that members of the low-income community were experiencing. The survey was designed to ascertain the civil legal services that were most important to and most needed by the indigent in a time of declining public funding.

¹³Data from Kathleen Fantom Shemer.

¹⁴Data provided by Neal Conway, Program Coordinator, April 5, 1999.

¹⁵The Maryland Coalition for Civil Justice is a Maryland State Bar Association (MSBA) initiative to engage in statewide planning for civil legal services. Its workgroups have been examining aspects of the legal services delivery system since 1995. The effort is staffed by the Pro Bono Resource Center of Maryland, Inc. and is funded in part by the MSBA and in part by MLSC.

The Mason-Dixon survey results were published in draft form in May 1999.¹⁶ Potential clients canvassed in the survey ranked family law (85.5%), elder law (81.7%), housing/landlord-tenant (80.1%), and wills and advanced directives (79%) as their top four legal priorities. They also ranked education, small personal injury claims, health care, public benefits, real estate, and disability matters as important. Within the area of family law, the potential clients responded that child custody and domestic violence issues were the most important to them (92% and 91% respectively).¹⁷

These findings comport with a survey that the Judicial Commission on Pro Bono (hereinafter "Commission") conducted. At the Commission's request, Chief Judge Robert M. Bell distributed a survey to all circuit and district court judges in Maryland. In one section of the survey, the judges were asked to list the top three areas of the law in which they saw a need for pro bono representation. By an overwhelming margin, the judges ranked family law as the number one area of priority. The judges ranked housing/landlord-tenant cases next, with guardianships a distant third. (See **Appendix A** for a copy of the Commission's survey).

Finally, according to MLSC, in FY 1999, 41% of the cases handled by its grantees were family law matters and 34% were housing/landlord tenant law matters.¹⁸

C. Financial Resources for Legal Services For the Poor.

¹⁶*Draft Report of the Services Priorities Workgroup*, MCCJ, May 14, 1999. Information was collected from potential clients, legal services programs, and non-legal services providers. Each group was asked to rank its preferences.

¹⁷*Id.* at 10.

¹⁸MLSC Annual Report, at 3.

A limited pool of funds is available from public and private sources for legal representation of the poor. The three primary sources for funding civil legal services for the indigent in this State are contracts administered by the Maryland Departments of Human Resources, Health and Mental Hygiene, and Public Safety, which fund services for certain parties in Child in Need of Assistance cases, adult guardianships, and cases involving persons confined to State mental health facilities and State prisons; the federal Legal Services Corporation (LSC), which funds the Legal Aid Bureau; and funding through MLSC, which serves as the repository for all Interest on Lawyers' Trust Accounts (IOLTA) funds.¹⁹

The first primary source is unavailable to those the Commission has identified as being in need.²⁰ Federal LSC funds carry restrictions about the kinds of matters that legal services lawyers may handle. Most civil legal services providers in the State obtain funding from MLSC and depend heavily on IOLTA revenues for their existence.

From all of the information and data set forth above, the Commission concluded that only a significant increase in the donation of legal services to the poor will bring about a significant decrease in the number of indigent people who need

¹⁹IOLTA is a mandatory program requiring all Maryland attorneys to place small or short-term client trust funds into IOLTA accounts. The interest earned is distributed to non-profit grantees that provide legal assistance to eligible clients. MLSC also receives \$500,000 from the Abandoned Property Fund and monies from a filing fee surcharge.

²⁰Those receiving State-funded representation in these cases are entitled to it under the State or Federal Constitutions, State or Federal legislation, or court decrees.

legal services but do not receive them. In other words, *pro bono publico* representation must help fill the gap.²¹

II. EFFORTS BY THE BAR TO HELP MEET THE NEED

A. History of Pro Bono in Maryland.

In Maryland, pro bono legal representation has increased since the first organized pro bono referral programs were established in the early 1980's. Around that time, the federal LSC began to require its grantees to include private bar involvement as a component of their delivery systems and demonstrate that 12½% of their general funds were being spent on obtaining volunteer lawyer services.

In 1989, the Court of Appeals considered a proposal for mandatory pro bono service by Maryland lawyers. As an alternative to mandatory pro bono, it adopted a voluntary recruitment plan that was proposed by the Maryland State Bar Association (MSBA). Under that program, and with financial support from MLSC, the MSBA launched a statewide "People's Pro Bono Campaign" to increase the level of pro bono services being rendered in Maryland. An unprecedented positive response from lawyers brought national attention to the campaign. Approximately 60% of the lawyers in the State responded to a letter and survey sent by then-Chief Judge Robert C. Murphy, with close to 80% of those responding indicating some interest in pro bono activities. The Court's visible support for the voluntary pro bono cause was largely responsible for the campaign's success.

²¹"*Pro bono publico*" means "for the good of the public." Throughout this report, we use the shortened phrase, "pro bono."

B. Numbers of Pro Bono Cases and Volunteers.

The success of the "People's Pro Bono Campaign" spurred the MLSC grantees to create pro bono lawyer panels. MLSC began to fund several new pro bono programs, a number of which were affiliated with local bar associations or foundations. In 1990, the MSBA, MLSC, and the Maryland Bar Foundation together established and funded the People's Pro Bono Action Center, Inc. (PPBAC).²² That entity recruits, trains, and provides support for volunteer lawyers and pro bono legal services programs. PPBAC used the data acquired in response to then-Chief Judge Murphy's survey to refer thousands of potential lawyer volunteers to legal services organizations that were developing pro bono programs. PPBAC then initiated an ongoing recruitment effort for all legal services providers, coordinated training seminars for the volunteers, and attempted to track the level of provision of pro bono services.²³

In most of the years since 1989, the MLSC grantees reported an increase in the number of cases they referred to members of the bar for pro bono representation. Indeed, those numbers more than tripled between 1990 and 1993 (from 1,800 to 5,897). In the mid-1990's, however, funding and staffing problems plagued several programs, and new case placements declined. In FY 1998, programs reported handling 8,177 cases. In FY 1999, however, the number of

²²The People's Pro Bono Action Center, Inc. was recently renamed Pro Bono Resource Center of Maryland, Inc.

²³Under the plan submitted to the Court of Appeals, the MSBA agreed to track the progress of the voluntary pro bono effort and to report back to the Court. The MSBA delegated most of the responsibility for the program to PPBAC. PPBAC collected extensive data on individual cases and attorneys from MLSC grantees during the first three years of the program. The results were compiled in the second of two reports submitted to the Court of Appeals with the MSBA's endorsement. That report, entitled *The Voluntary Pro Bono Effort in Maryland, Status Report to the Court of Appeals*, was submitted by PPBAC and the MSBA Special Committee on Pro Bono Legal Services, and was adopted by the MSBA in February, 1994.

MLSC cases handled by volunteer lawyers actually decreased, to 7,160.²⁴

These statistics seem to bear out what a number of pro bono providers in the State believe: that the pro bono commitment has diminished in recent years. A recent evaluation of the legal services delivery system in Maryland, commissioned by MCCJ, found that in 1999, many pro bono programs reported an increase in difficulty in placing cases with lawyer volunteers²⁵ and a decrease in the number of hours of service provided by pro bono lawyers.²⁶ The consultant who conducted the evaluation observed that the providers themselves had diminished their commitment to pro bono involvement and, with only a few exceptions, were failing to engage volunteer lawyers in innovative and creative ways.²⁷

In a survey of legal services providers conducted by the Commission in the summer of 1999, one-half of those responding claimed that it was more difficult to place cases with volunteer lawyers than in the past. (One-quarter of the respondents stated that it was easier to place cases). One reason given for the difficulty was the insufficient number of volunteer lawyers available. Nonetheless, 80% of the legal services providers surveyed stated that encouragement from members of the local bench would be very helpful to their pro bono efforts.

²⁴*MLSC Revised FY99 Pro Bono Report*, March 2, 2000.

²⁵John A. Tull & Associates, *Unpublished Draft Report on the Evaluation of the Legal Services Delivery System in Maryland* (February 2000), at 27 (hereinafter "Tull Draft Report").

²⁶Tull Draft Report, at 28.

²⁷*Id.*

C. Reporting of Pro Bono Service.

In FY 1998, MLSC grantees reported that 8,760 volunteer lawyers were affiliated with their programs. Of that number, 3,031 were involved directly in providing some type of legal assistance, including representation of indigent clients, serving as mentors to less experienced volunteer lawyers, working on legislative initiatives, staffing legal hotlines, and counseling non-profit organizations.²⁸ Anecdotal evidence would suggest that the number of Maryland lawyers providing pro bono representation in fact is higher than that. There are no solid statistics to confirm a higher number, however, because lawyers who donate their time directly to low-income clients or perform other pro bono services do not necessarily make that known.²⁹

In 1994, PPBAC persuaded the CSTF to include with its annual invoice a voluntary pro bono reporting survey. The survey was designed to obtain input about the level of pro bono services being performed by Maryland lawyers. Since then, the CSTF has included the survey and a letter from the Chief Judge of the Court of Appeals with its invoice each year, except one. In any given year, however, less than 7% of the licensed lawyers in the State responded to the survey.³⁰ Some of those lawyers questioned the definition of "pro bono" used in the survey. Others indicated that they had donated a substantial number of hours of direct pro bono

²⁸Susan Erlichman, *Maryland's Diverse Legal Services System*, 32 *The Maryland Bar Journal*, at 30 (March/April 1999).

²⁹It should be noted that in 1998, CSTF records indicate that there were 27,234 licensed attorneys in Maryland.

³⁰Records of PPBAC.

service, but not through an organized legal services program.³¹ Thus, the true level of participation remains unclear. What is clear is that the pressing need for civil legal services necessitates greater bar and bench participation.

III. THE NEED TO INVOLVE THE JUDICIARY IN THE EFFORT TO INCREASE THE DONATION OF LEGAL SERVICES TO THE POOR

As noted earlier, the unprecedented success of the People's Pro Bono Campaign was largely attributable to the leadership role of the Court of Appeals. Across the nation, state and local pro bono programs have engaged the Judiciary to lend credibility to their efforts and to increase participation. The consensus of those involved in such efforts is that a Judiciary that actively promotes pro bono efforts is critical to the success of any effort to expand the voluntary donation of legal services to the poor.

For a substantial increase in the level and scope of pro bono legal services to occur in Maryland, there must be strong and visible leadership by the Judiciary. The impact of judicial participation on pro bono services cannot be overstated. Leadership from the bench in cooperation with the bar is the necessary catalyst to reinvigorate Maryland's pro bono effort. The Judiciary can be instrumental in educating the bar about the need for pro bono work and its value, and about each lawyer's professional responsibility to provide pro bono service. Only with the direct involvement of the Judiciary can the rendering of pro bono service by lawyers become incorporated as an integral, accepted, and expected part of the practice of law in this State. A judicially proposed and monitored plan that encourages lawyers to

³¹Every year a number of survey respondents also requested information on available pro bono opportunities.

render pro bono service and facilitates access to the courts for litigants with pro bono representation will enhance the delivery of legal services to the poor in Maryland and will ease the administration of the civil justice system.

IV. MISSION AND GOALS OF THE COMMISSION

The Commission was established for the primary purpose of determining what role the Judiciary can and should play to promote the rendering of pro bono legal services in Maryland. With that purpose in mind, the Commission set about to make recommendations that when implemented will: 1) inform the Judiciary about the demand for pro bono services and about the resources needed and available to meet that demand; 2) educate the bar about the need for pro bono representation and about each lawyer's professional responsibility to engage in pro bono legal work; 3) encourage and enable judges to take the lead in developing statewide and local plans for increasing private bar involvement in pro bono representation; 4) increase the number of lawyers participating in pro bono activities; 5) lead to the development of court-based policies and procedures to facilitate pro bono representation; 6) address obstacles to the efficient and effective representation of low-to-moderate income clients; and 7) provide a mechanism for evaluating the effectiveness of the Commission's initiatives. The Commission worked to devise a blueprint for judicial encouragement of pro bono services and lawyer participation in pro bono work.

The Commission's secondary purpose was to frame issues and make recommendations for possible further study respecting the Judiciary's role in enhancing access to justice for low-to-moderate income Marylanders. The Commission focused its attention on the narrow issue of private bar involvement, instead of studying the

broader issue of access to justice, so as to develop specific recommendations that can be adopted in the near future. Once those recommendations are implemented and the desired increase in pro bono legal services is achieved, a more expansive effort can be undertaken to address other access to justice issues.

V. ETHICAL CONSIDERATIONS

Judicial activities to encourage the rendering of pro bono services by lawyers must comport with the Judicial Code of Conduct. There is a dearth of published case law and ethical opinions addressing the propriety of judicial involvement in pro bono efforts. The few articles on the subject indicate that although some common basic principles apply, each jurisdiction must interpret its own Code, and therefore activities that are permissible in one jurisdiction may not be permissible in another.³² Those who have written on the topic most frequently discuss Canon 4, which addresses a judge's extrajudicial activities. Canon 4 provides that an activity is acceptable if it does not compromise a judge's ability to act impartially, does not demean the office, and does not interfere with the performance of duties. Paragraph A of Canon 4 permits judges to "speak, write, lecture, and teach on both legal and non-legal subjects" and to "participate in other activities concerning the law, the legal system and the administration of justice."³³

³²For an in-depth review of some of the ethical concerns relating to judicial involvement, see Hon. Judith Billings and Jenny M. McMahon, *Expanding Pro Bono: The Judiciary's Power to Open Doors*, 2 *Dialogue* (ABA Division for Legal Services) (Spring 1998); and Jarilyn Dupont, *Judicial Participation in Pro Bono: How Far Can It Extend?*, ABA Press (1987).

³³The Maryland Code of Judicial Conduct is set forth in Maryland Rule 16-813.

Activities that have been challenged in other states include solicitation of individual lawyers to do pro bono work and service by a judge on an advisory board of an organization that might be engaged in proceedings before the judge or the court on which the judge sits. Relevant ethical issues will be discussed *infra*, with the Commission's recommendations.

VI. JUDICIAL PARTICIPATION IN THE PRO BONO EFFORT IN OTHER STATES

A. Conference of Chief Justices Resolution on Encouraging Pro Bono.

In 1997, the Professionalism and Lawyer Competence Committee of the Conference of Chief Justices proposed, and the Conference of Chief Justices adopted, Resolution VII, entitled "Encouraging Pro Bono Services in Civil Matters." By that document, the Chief Justices resolved that they "should promote broader access for people unable to afford legal services and should encourage the legal profession to increase pro bono efforts." The Conference recommended that each state court conference consider establishing a committee of judges, bar leaders, legal services providers, and community leaders to plan and implement methods of increasing the delivery of civil legal services and encouraging judges to recruit pro bono lawyers, participate in events to recognize their work, consider scheduling accommodations for them, and act as advisors to pro bono programs. (See **Appendix B** for a copy to the Resolution).

Also in 1997, the ABA Division for Legal Services distributed a "Judicial Support for Pro Bono" questionnaire to the Chief Justices of the 50 states.³⁴ Half of the Chief Justices responding

³⁴Thirty-five Chief Justices (or 82%) responded to the survey.

reported that their states had established "a statewide committee to plan and implement methods of increasing the delivery of civil legal services to the poor." Sixty percent (60%) of those Chief Justices participated in activities to recruit lawyers to do pro bono work while 64% helped recognize lawyers for their pro bono efforts. Over half of them encouraged other judges in their state to take part in activities supporting pro bono work. Many of those Chief Justices also reported supporting ABA Model Rule 6.1 and the adoption of a required or voluntary pro bono reporting rule.³⁵

B. Pro Bono Plans in Other States.

Even before the 1997 Conference of Chief Justices Resolution VII, the high courts of several states acted to encourage the rendering of pro bono service by adopting rules establishing statewide plans and structures for judicial and bar involvement in the pro bono effort.

1. The Florida Model

In 1993, the Florida Supreme Court adopted a rule that created a court-based structure for the promotion of pro bono services at the local level. Under that rule, each of that state's judicial circuits must adopt a local pro bono legal services plan that is implemented and overseen by a committee headed by the chief circuit

³⁵One-third of the Chief Justices supported Model Rule 6.1 and/or promoting the adoption of a reporting rule. Results of the survey were compiled by the ABA Center for Pro Bono and were incorporated into a presentation made by Chief Justice Major B. Harding at the Conference for Chief Justices Midyear Meeting, on February 2, 2000, in Austin, Texas.

ABA Model Rule 6.1 is addressed later in this report. Additional survey questions solicited information about judicial participation in procedural or scheduling accommodations in pro bono cases, court-based pro bono projects, and judicial service on pro bono advisory boards. All of those activities are discussed *infra*.

judge or his designee.³⁶ Representatives from the voluntary bar associations and the pro bono and legal services providers in the judicial circuit sit on the committee, together with public and client members. Each circuit must prepare an annual written report that is submitted to a statewide Standing Committee on Pro Bono Legal Service for evaluation. (A copy of the Florida rule is attached as **Appendix C**).

The Florida rule includes as a key element required reporting of pro bono services. Each year, lawyers in Florida must report the amount of time they have devoted to rendering pro bono services. At first, the reporting requirement was met with some resistance. Once the Florida rule went into effect, however, the resistance diminished. Florida lawyers realized that reporting was not burdensome and that the local plans provided new and creative opportunities for pro bono participation. The required reporting rule lessened the pressure to adopt a mandatory pro bono service rule.

In the time since Florida implemented its rule, its organized legal services to the poor programs have witnessed a 40.4% increase in the number of lawyers handling pro bono cases through them and a 25% increase in the number of hours of pro bono service donated by affiliated lawyers. In 1998, over 50% of Florida lawyers performed pro bono work.³⁷ The dramatic increase in donation of legal services to the poor in Florida gained unprecedented positive press for lawyers. (See **Appendix E** for article entitled *Mandatory*

³⁶See *Amendments to Rules Regulating the Florida Bar*, 630 So.2d 501 (Fla. 1993).

³⁷*The Standing Committee on Pro Bono Legal Services Report to the Supreme Court of Florida, The Florida State Bar, and the Florida Bar Foundation*, at 4 (February 1999), attached as **Appendix D**.

Movement Dies as Pro Bono Hours Rise, Lawyers Weekly USA, (May 22, 1995)). Florida's comprehensive plan and required reporting program set a new national standard for bench and bar collaboration in increasing pro bono representation.

2. Indiana

In 1997, the Supreme Court of Indiana adopted a rule establishing a "Voluntary Attorney Pro Bono Plan."³⁸ The structure, borrowed from Florida, includes a pro bono committee in each judicial district with oversight by an Indiana Pro Bono Commission appointed by the Supreme Court and the president of the Indiana Bar Foundation. The commission is responsible for reviewing plans and funding requests submitted by the local committees on an annual basis.³⁹ The initial plans are to be submitted in June 2000.

3. Nevada

The Supreme Court of Nevada amended its rules effective July 1996 to establish a voluntary pro bono plan with "District Court Pro Bono Committees" in each judicial district. The committees are appointed by the Chief Judge of the District Court. They consist of "representatives of various members of the bench and bar as well as pro bono services and community organizations of that judicial district."⁴⁰ The rule provides for a statewide Access to Justice

³⁸See **Appendix F** for a copy of Indiana's Rule 6.5 and the 1999 Annual Pro Bono Report and Plan.

³⁹According to Dave Remondini, Counsel to Chief Justice Randall T. Shepard of the Indiana Supreme Court, since the rule was adopted, several Indiana counties have proposed innovative pro bono projects. Interview with Dave Remondini, February 7, 2000.

⁴⁰See Nevada Rule 191.3(a). For a copy of the Nevada rule, see **Appendix G**.

Committee responsible for implementing the pro bono plans and for supporting the local pro bono efforts. The rule also includes a definition of pro bono service and a yearly aspirational pro bono goal for lawyers. One result of adoption of the rule has been the creation of local bar foundations to develop pro bono opportunities, lend support to existing legal services providers, and educate the public and the bar about the need for pro bono services.⁴¹

4. Minnesota

In 1993, the Minnesota Supreme Court authorized the formation of a committee to consider ways in which the judges of the state court system could assist in addressing the unmet legal needs of the state's poor in a manner consistent with judicial ethical requirements. The committee recommended that each judicial district, in consultation with local pro bono programs, adopt a "comprehensive policy that encourages judges to be involved in recruiting and training pro bono attorneys, and educating attorneys and the public regarding the need for pro bono services."⁴² It further suggested focusing on three principal areas: 1) recruitment and retention of volunteer lawyers; 2) procedural practices to facilitate pro bono representation; and 3) judicial training and education. In 1995, the Minnesota Conference of Chief Justices issued a resolution adopting the recommendation.⁴³

⁴¹Interview with Hon. Connie Steinheimer, Second Judicial District Court, and Chairperson of the Access to Justice Committee in Nevada (February 14, 2000).

⁴²*Report of the Joint Legal Services Access and Funding Committee (Minnesota)*, December 31, 1995.

⁴³*Id.*

VII. RECOMMENDATIONS FOR A JUDICIALLY ESTABLISHED FRAMEWORK FOR INCREASING PRO BONO SERVICES

A. Local Pro Bono Plans/Statewide Oversight.

Issue and Findings:

The Florida Model and similar plans to promote pro bono services in other states show that a significant increase in the rendering of pro bono legal services in civil cases can be achieved when the Judiciary establishes the framework for a pro bono initiative, and participates in the initiative. The Maryland Judiciary should do so itself by requiring all state courts to adopt and implement local pro bono plans.

Recommendation 1:

The Court of Appeals Standing Committee on the Rules of Practice and Procedure ("Rules Committee") should propose to the Court of Appeals the adoption of a rule establishing a structure by which the Judiciary will promote and facilitate the delivery of pro bono legal services. The rule should call upon the Chief Judge of the Court of Appeals to direct each appellate, circuit, and district court to convene a local pro bono committee to devise a local pro bono plan that is tailored to the needs and resources of that court and jurisdiction.

The rule should address the composition of the local pro bono committees and their responsibilities. It also should address the goals to be accomplished by adoption of the local pro bono plans and the means by which the plans will be designed, implemented, and monitored.

The rule should permit the district and circuit courts in a single county to form one local pro bono committee and should permit and encourage those courts to collaborate in the development of a single local pro bono plan. Whenever appropriate, the district and circuit courts in one county should submit a joint plan. The rule also should allow courts in adjoining counties to submit collaborative plans, when feasible.

The rule should provide for the creation of a Standing Committee on the Donation of Legal Services to the Poor ("Standing Committee") that will oversee development and implementation of the local pro bono plans. The rule should address the composition of the Standing Committee and its responsibilities.

The rule should provide that appellate, circuit, and district courts will have one year from the time the rule becomes effective to develop their local pro bono plans.

A draft of the proposed Rule is attached as Appendix H.

Commentary:

The Commission discussed at length whether it is necessary and/or desirable for the local pro bono plans to be established and required by court rule. The strong consensus was that the continuity and uniformity of a court rule is critical to the long-term success of any effort by the Judiciary to promote the donation of legal services to the poor. The success of the Florida Model is due in large part to the Florida Supreme Court adopting a rule requiring courts in that state to establish local pro bono plans.

The Commission realizes that each county and court has unique needs, resources, and levels of bench and bar participation in pro bono activity. Thus, while statewide structure and oversight is necessary to institutionalize the commitment to pro bono services, it is just as important that each court have the flexibility to tailor its plan to fit its own circumstances.

All of the Commission's additional recommendations should be viewed in light of the structure that the local pro bono plans provide. The plans establish a framework for the bench and bar in each jurisdiction to work together to adopt measures to facilitate, and thereby increase, the rendering of pro bono services, and to do so with the needs and resources of the local community in mind. The Standing Committee should assist in this effort by providing sample plans and standardized forms for reports. (See **Appendix I** for sample plans).

The Commission expects that the local pro bono committee planning process will take up to a year to complete. There are a number of recommendations proposed in this report that can be implemented before then, however, and the appellate, circuit, and district courts are encouraged to act as soon as possible to experiment with options for supporting pro bono services.

B. Staffing the Coordination and Development of the Plans.

Issue and Findings:

Additional resources will be needed to implement the comprehensive planning proposed in Recommendation 1. The Standing Committee will need qualified professional staff to craft standardized reporting forms and to monitor the work and output of

the local pro bono committees. Each court may need guidance and assistance in developing its plan, coordinating its activities, and implementing its initiatives. Several other recommendations in this report, such as the creation of a Pilot Mediation Project, also will require staff to ensure their success. In Florida, the legal services director and his assistant were hired to act as a "circuit rider" for the first year of the program to assist the courts in developing their plans. That resource was critical to ensuring progress on a local level and to maintaining a statewide focus on pro bono plans and activities. Likewise, resources will be needed to enable the Maryland courts to adopt and implement their local pro bono plans.⁴⁴

Recommendation 2:

The Administrative Office of the Courts should engage professional staff to assist in the development and implementation of the local pro bono plans. The staff should include a full-time executive director and an executive assistant who will work under the auspices of the Administrative Office of the Courts and report to the Chief Judge of the Court of Appeals. The executive director should work closely with the Standing Committee to assist it in developing standardized forms and reports, collecting and evaluating plans and reports, and reporting to the Maryland Judicial Conference. Finally, the executive director should assist in developing and implementing any other recommendations of the Commission that are adopted, such as the creation of the Mediation Pilot Project.

⁴⁴In Indiana, funding was provided for a consultant to assist the local committees in formulating their plans. Interview with Dave Remondini, February 7, 2000.

The Administrative Office of the Courts should include funding for these positions in its FY 2001 budget so that they may begin as of July 1, 2000, and thereafter should request funding for the positions on an annual basis.

Commentary:

Full-time executive level staff will be needed to accomplish the ambitious plan articulated in this report. The positions recommended should be established and funded as soon as possible to enable the local jurisdictions to begin planning. Staff will be needed throughout the planning and implementation phase for the long-term stability and success of the program.

C. Creation of a Liaison Committee on Access to Justice.

Issue and Findings:

The Commission discussed many issues not within the narrow scope of its charge that relate in some way to access to the courts and to legal services. Several committees and commissions created by the Judiciary are addressing court access issues. For example, the Maryland Alternative Dispute Resolution Commission, the Public Trust and Confidence Implementation Committee, and this Commission are studying many of the same concerns, and the Standing Committee will continue to examine access to justice issues in the future. Likewise, the Family Divisions of the circuit courts regularly confront access to justice issues. Also, there are topics, such as *pro se* litigation, that while touched upon to some degree by this Commission have broader implications and need to be addressed by

more than one entity.⁴⁵ A broad-based liaison committee on access to justice is needed to coordinate these efforts.

Recommendation 3:

The Maryland Judicial Conference should establish a Liaison Committee on Access to Justice that will address access to justice issues and serve as a coordinating body for those judicial commissions, committees, and court divisions that are addressing related issues. The Liaison Committee should bring together representatives from the Standing Committee, the Maryland Alternative Dispute Resolution Commission, the Family Divisions of the circuit courts, the Public Trust and Confidence Implementation Committee, and other relevant bodies to ensure collaboration and to prevent duplication or overlap of initiatives. The Liaison Committee also should determine when resources can be shared and what modifications in court-based initiatives need to occur.

Commentary:

The benefit of the Access to Justice Liaison Committee will be to carry forward the work begun by the Commission respecting court access for those of limited means, while addressing overarching issues affecting the civil justice system. For instance, the increasing use of alternative dispute resolution ("ADR") and the growing number of *pro se* filings can be examined from a broader perspective so that changes to rules or policies can work for all those seeking access to the courts. Without this type of

⁴⁵There are a multitude of other issues relating to access, such as assisting those with disabilities, non-English speaking citizens, and those who are illiterate, that need to be addressed uniformly.

oversight, the courts may be instituting contradictory or *ad hoc* policies that do not promote the smooth administration of justice.

VIII. RECOMMENDATIONS ABOUT THE ROLE OF JUDGES IN INCREASING PRO BONO LEGAL SERVICES

A. Education of the Bar.

Issue and Findings:

Many lawyers are not familiar with the unmet need for legal services among the poor, the pro bono options available to them to help meet that need, and their professional responsibility to engage in pro bono service. The first step in any plan to increase private bar involvement in pro bono services is for the Judiciary to take an active role in educating members of the bar about these issues.

Recommendation 4:

The Judiciary should take a leadership role in educating members of the bar about the need for pro bono legal services, the opportunities available for providing such services, and the professional responsibility of lawyers to engage in pro bono service, including the full implications of Rule 6.1 of the Maryland Rules of Professional Conduct. The local pro bono plans should address this issue. Members of the Judiciary should participate in the following activities:

1. sponsorship of monthly, bi-monthly, or quarterly bench/bar meetings for discussion of pro bono issues;

2. making presentations to newly admitted lawyers that will educate them about pro bono issues;
3. participating in letter-writing campaigns in coordination with the local bar, bar foundations, or legal services providers to inform lawyers of particular pro bono services needs and options; and
4. delivering speeches at bar events in which they address the need for pro bono services and available opportunities to serve.

Commentary:

Judges will need to work closely with local bar associations and legal services providers to ensure that education is an integral part of the local pro bono committee planning process.

B. Recruitment of Pro Bono Lawyers.

Issue and Findings:

Judicial recruiting is the most effective means for increasing lawyer participation in pro bono services. Recruitment activities can range from making speeches at local and state bar association functions to signing personal letters addressed to individual lawyers requesting that they accept particular pro bono cases.

Maryland's Judiciary already has addressed the issue of "solicitation" of lawyers by judges. The Maryland Judicial Ethics Committee ("Ethics Committee") was asked to address whether it is ethical for circuit court judges to solicit attorneys to provide pro bono assistance to indigent parties in child custody cases.

Ultimately, it concluded that that activity is not unethical.⁴⁶ In Opinion No. 124, the Ethics Committee stated that it is not a violation of the Judicial Canons for judges as a group to solicit individual attorneys to handle one pro bono case per year or for individual judges to contact attorneys to ask that they volunteer for such service. The Ethics Committee further opined that circuit court judges may place advertisements in local bar newspapers soliciting lawyers to engage in pro bono work and may appear at group meetings of the bar to solicit volunteers.⁴⁷ (See **Appendix J** for a copy of Ethics Committee Opinion No. 124.)

Opinion No. 124 paved the way for members of the Maryland Judiciary to participate in pro bono recruitment activities. Recognizing this, Maryland Volunteer Lawyers Service ("MVLS") seized the opportunity to involve members of the Baltimore County Circuit Court bench to sign letters to individual members of the county bar encouraging them to accept pro bono family law cases from MVLS. Lawyers were requested to respond to the judge writing to them to indicate their willingness to participate. The results

⁴⁶Maryland Judicial Ethics Committee Opinion No. 124, October 22, 1996.

⁴⁷Opinion No. 124 withdrew an earlier opinion of the Ethics Committee. In the withdrawn opinion (No. 123), the Ethics Committee had equated recruitment of volunteers with "solicitation" of funds for charitable purposes, in violation of Canon 4C(2) of the Maryland Code of Judicial Conduct. Upon reflection, the Committee reversed course. In Opinion No. 124, it opined that:

[T]he solicitation of volunteer pro bono assistance to indigent parties in child custody cases does not constitute 'solicit[ation of] funds for [a civic or charitable] organization or use...the prestige of the judge's office for that purpose....' Such services are of value only to 'indigent parties in child custody cases,' and the uninterrupted functioning of the circuit courts. Consequently, the solicitation of such pro bono services is far different from 'the dangers inherent in a judge's participation in civic and charitable fund raising.' For example, we see no danger of an attorney volunteering for such pro bono work being viewed as later entitled to a favor from the judges. Moreover, we believe it illogical for an attorney declining such pro bono work to fear retribution from the judges.

were significant. Out of the 112 lawyers who responded, 64 were new volunteers for the program.

Prior to the issuance of Opinion No. 124, then-Chief Judge Murphy wrote several letters to all practicing lawyers in Maryland encouraging them to participate in pro bono service. This effort enhanced the visibility of the pro bono effort and caused some lawyers to be persuaded to volunteer. The success of the effort was difficult to measure, however, because unlike the Baltimore County effort, there was no tracking of new volunteers.

Another approach for judges to take in recruiting pro bono lawyers is to assign cases to lawyers who have previously agreed to accept cases of that type. Almost 50% of the judges who responded to the Commission's pro bono survey indicated that they had participated in activities to recruit lawyers to do pro bono work. Forty four percent (44%) actually assigned pro bono cases in certain circumstances.

Other states have enlisted the support of members of the bench to directly recruit pro bono lawyers. The Supreme Court of Montana requested that every judge in that state assist in recruiting pro bono lawyers for the Montana Pro Bono Project. Each judge received a manual with sample recruitment and case assignment letters, volunteer lawyer enrollment forms, examples of projects, commonly asked questions, and a resource guide for further assistance. The manual recommended three methods for recruitment:

- a) "All-in" in which all lawyers in a jurisdiction are informed by a letter from the judge that they are expected to participate absent a conflict;

- b) "Opt-out" in which all lawyers in a jurisdiction are informed that they will be expected to participate unless they notify the judge that they decline to participate; and
- c) "Opt-in" in which all lawyers in a jurisdiction are informed of the project and are asked to take affirmative steps to enroll.

All Montana judges were encouraged to contact their local bar pro bono committees so they would understand the types of cases to be placed before embarking on case placements. Once the lawyer list was compiled, the pro bono projects screened the cases and made assignments based on a rotation schedule. The judge then contacted a lawyer (usually by letter) and asked whether he/she would accept the case. The judge's staff then contacted the program, and the program staff sent the case information to the lawyer and conducted all follow-up contacts.

The Montana program produced impressive results. In 1994, before the program began, 4% of the resident bar in Montana was participating in organized pro bono programs. By June 30, 1999, 25% of bar members had participated in organized pro bono work with over 20% accepting cases or providing service within the previous 18 months.⁴⁸

In analyzing the ethical issues involved in its recruitment program, the Supreme Court of Montana concluded that promotion of pro bono representation in that manner did not contravene the Judicial Canons and was permissible. The court found that

⁴⁸Interview with Judith Williams, Director of the Montana Pro Bono Project (August 17, 1999).

recruitment of pro bono lawyers by judges "serve[d] access to and enhance[d] the administration of our justice system."⁴⁹

Recommendation 5:

Members of the Judiciary should be encouraged to actively participate in recruiting lawyers for pro bono legal service. The local pro bono plans should address recruitment activities by judges. Recruitment activities may include:

1. meeting with members of a bar association and requesting their assistance;
2. identifying a placement coordinator to help refer cases in a particular jurisdiction;
3. making personal contact with lawyers when appropriate;
4. writing editorials or articles for bar newsletters or other law-related press encouraging volunteer participation;
5. holding periodic luncheons or meetings to discuss pro bono activities, either in conjunction with training programs or bar events or independently;
6. developing lists of volunteer lawyers for court staff to contact respecting specific referrals;
7. delivering speeches at state, local, and specialty bar events;
8. making presentations about pro bono service to law firms or to corporate law departments;
9. explaining the pro bono service obligation when addressing new lawyers at admission ceremonies;

⁴⁹Letter from Justice James C. Nelson, Supreme Court of Montana, to George L. Bousliman, Executive Director of the State Bar Association of Montana, April 8, 1997.

10. maintaining a roster of lawyers who have volunteered to accept difficult-to-assign cases;
11. contacting lawyers and law firms to request that they or their members attend recruitment meetings or register for particular pro bono projects; and
12. making court assignments of cases to lawyers who have agreed to serve on a pro bono service panel.

Commentary:

It is permissible and indeed important for judges to engage in the recruitment activities described above. The Commission anticipates that the local pro bono committees will consider various recruitment options in formulating their plans. The information gathered by the Commission indicates that thus far in Maryland the following pro bono recruitment methods have been productive: letters from judges to individual lawyers requesting their participation in a project or program; telephone calls to lawyers who have agreed to be on a panel of pro bono lawyers for particular types of cases; having a judge select a lawyer who will make calls to place pro bono cases; and speeches by judges to bar associations about the pro bono obligation and how to fulfill it.

C. Recognition and Support of Pro Bono Work.

Issue and Findings:

As challenging as recruitment of pro bono lawyers can be, retaining the interest and commitment of those who already volunteer can be just as difficult. Most volunteers appreciate being recognized for their contributions, especially by members of the Judiciary. Several Maryland legal services providers have

invited members of the Judiciary to attend recognition ceremonies or to assist in presenting awards to volunteer lawyers. For instance, the statewide Pro Bono Service Awards (formerly the People's Pro Bono Awards) are presented at the MSBA Annual Meeting each year by the Chief Judge of the Court of Appeals. This type of recognition champions pro bono contributors and lends prestige to the pro bono effort.

Recommendation 6:

Members of the Judiciary should participate in programs to recognize volunteer lawyers. The local pro bono plans should encourage recognition activities. Examples of recognition activities include:

1. presenting pro bono awards at local and specialty bar events;
2. conducting award presentations at judicial conferences;
3. sending letters to firm managers to commend individual lawyers;
4. sponsoring judicial receptions for volunteer lawyers;
5. publicly acknowledging lawyer volunteers in court, when appropriate, or in chambers;
6. placing plaques with the names of volunteer lawyers in the courthouse; and
7. recognizing pro bono lawyers in court publications or in special notices posted in prominent places in the courthouse.

Commentary:

Throughout the country, members of the Judiciary have engaged in all of the activities listed above. There appears to be little

debate about the propriety of judges participating in these activities. Nevertheless, before they are undertaken, new recognition activities need to be considered in light of the Judicial Code of Ethics to ensure that no perceived or actual favoritism results.

D. Training of Pro Bono Lawyers.

Issue and Findings:

Judges can assist in training lawyers for pro bono service by teaching at training seminars, compiling educational material for use in training seminars, and appearing at training seminars to speak to lawyers about the importance of pro bono service. When judges attend training seminars, attendance increases, and the pro bono program benefits from greater visibility and from the credibility that having a judge attend confers. Approximately 15% of the judges responding to the Commission's survey indicated that they have participated in some type of training activity for volunteer lawyers. Their participation sends a strong message to the bar about the value of pro bono service. The Court of Appeals recently adopted a policy allowing judges to take administrative leave for training purposes.

Recommendation 7:

Members of the Judiciary should participate in training and continuing legal educational programs for pro bono lawyers. Judges and masters should work with statewide continuing legal education providers, local bar associations, and legal services providers to organize training and education programs geared to pro bono service. The local pro bono plans should address the training and

legal education activities in which members of the bench will engage.

E. Judicial Service on Advisory or Program Boards.

Issue and Findings:

There is some disagreement in other states about the propriety of judges serving on advisory or pro bono program boards. Section C of Canon 4 provides that "a judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, law-related or civic organization not conducted for the economic or political advantage of its members." That Canon prohibits such service, however, when the organization will likely be "engaged in adversary proceedings in any court" or when the organization "deals with people who are referred to the organization by the court on which the judge serves or who otherwise may likely come before that court." See Canon 4(C)(1). The concern addressed here is the potential for a conflict of interest or the appearance of favoritism. Many argue, however, that most pro bono referral programs are neutral bodies in that they do not represent clients or engage in adversarial proceedings themselves.

Recommendation 8:

When feasible and proper, members of the Judiciary should serve on boards and advisory committees of legal services providers. The Standing Committee should assist members of the Judiciary in examining issues of potential conflict of interest as they relate to service on boards and advisory committees and other

similar activities and in obtaining direction from the Judicial Ethics Committee about those issues. Judges should not be hesitant to sign letters of endorsement for grants to legal services organizations.

Commentary:

Many judges and masters can determine from the nature of the cases handled through a particular legal services provider whether serving on its board or committees would pose a conflict of interest or create an appearance of impropriety. The commentary to Canon 4 suggests that judges should regularly reexamine the activities of the organizations with which they are affiliated to determine the propriety of continuing the affiliations. The commentary explains that "in many jurisdictions charitable organizations are now more frequently in court than in the past or make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication." Yet, the commentary encourages judges to participate in such activities, noting that a "judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice."

The Standing Committee should assist judges in seeking guidance from the Ethics Committee about these issues, including whether certain organizations and their activities are political in nature and therefore subject to greater scrutiny.

IX. RECOMMENDATIONS FOR COURT-BASED INITIATIVES TO FACILITATE COURT ACCESS FOR LITIGANTS WITH PRO BONO LAWYERS

A number of courts across the country have experimented with court-based initiatives to ease the representation of indigent clients by volunteer lawyers. Most of these initiatives are aimed at reducing the frustration of handling pro bono matters under circumstances in which time and resources are severely limited. The adoption of procedures that facilitate court access for pro bono litigants will make pro bono representation more feasible for many lawyers. The procedures must not interfere with parties' due process rights or with the prompt disposition of cases, or create the appearance of partiality, however.

Not all of the proposed initiatives will be appropriate in all jurisdictions. The local pro bono committees should determine which ones are suitable to their courts/jurisdictions and adopt those that will significantly enhance pro bono participation in their counties.

A. Identification and Tracking of Pro Se Litigants.

Issue and Findings:

In most courts in Maryland, the number of cases involving pro se litigants is unknown and there is no workable system for early identification of those cases in which litigants are without counsel. Not all pro se litigants need counsel, and not all pro se litigants are without counsel because they lack resources. Nevertheless, the pool of pro se litigants includes those who would benefit from and who are in need of pro bono representation. In the absence of a court-based system to identify them, and track their cases, early intervention to assist them in obtaining pro bono lawyers cannot occur. The administration of justice will best be served if pro se litigants who need and desire pro bono

representation receive it as early as possible in the course of their cases. Early assignment of pro bono lawyers will be of immediate benefit to the otherwise *pro se* litigants and will alleviate some of the burden on the courts that results when litigants who need lawyers do not have them.

Recommendation 9:

The Administrative Office of the Courts should put in place a system for courts to use to identify and track *pro se* filings and litigants. Criteria for the system should be developed in conjunction with the Standing Committee, the local pro bono committees, court clerks, court administration staff, *pro se* assistance staff, and family support services coordinators. To the extent possible, the criteria for identification and tracking should be consistent statewide. On an annual basis, each appellate, circuit, and district court should compile data showing the numbers and types of *pro se* cases filed in that court. That data should be reported to the Standing Committee.

Each local pro bono committee should fashion a system to "triage" *pro se* cases so that litigants who are in the greatest need of pro bono representation are identified early in the litigation process and are referred to a legal services provider, a courthouse pro bono panel, a mediation project, or other appropriate resource for assistance. The committee should work with the court administration to determine which of the courthouse personnel (e.g., court clerks, *pro se* assistance staff, family support services coordinators) or volunteer lawyers will be

responsible for screening and triaging the cases. In some courts, additional staff may be required for that purpose.

Commentary:

Many of the judges responding to the Commission's survey commented about the problems involved in presiding over cases in which litigants are unrepresented and emphasized that an increase in pro bono services would benefit the administration of justice by reducing those problems.

The Administrative Office of the Courts has taken an active role in helping *pro se* litigants in family law cases by disseminating standardized forms and instructions and providing funding for courthouse staff who give information and assistance. These *pro se* assistance programs have resulted in thousands of *pro se* litigants receiving guidance that has helped them negotiate the court system with less confusion. Also, the programs are thought to have brought about a reduction in the number of *pro se* filings per litigant.

Given the heavy volume of *pro se* litigants in family law cases, identification and tracking of *pro se* litigants should begin in the Family Divisions, for those circuit courts that have them. Some of the Family Divisions already have resources that could be used for that purpose. For instance, family services coordinators could assist in screening cases. The Director of Family Services Program in the Administrative Office of the Courts should work with the family services coordinators, the local pro bono committees, and the Standing Committee to determine what information is needed to develop the criteria for tracking and triaging cases.

B. Identification of Pro Bono Litigants.

Issue and Findings:

Many respondents to the Commission's pro bono survey to judges indicated that a significant obstacle to giving logistical assistance to pro bono lawyers and their clients is the inability to flag litigants who are being represented by pro bono lawyers. A judge usually does not know that a lawyer in a given case is donating his or her services, or only learns of that at the time of trial. For court-based initiatives that accommodate pro bono representation to be feasible, this information must be known early in the litigation process.

Recommendation 10:

The Administrative Office of the Courts should put in place a system for courts to use to identify litigants who are represented by pro bono lawyers as early in the litigation process as possible. Cases in which lawyers are representing clients pro bono should be "flagged" before trial to enable courts to make special accommodations. A system to identify these cases should preserve the privacy of the pro bono litigants to the greatest extent possible.

Each appellate, circuit, and district court should compile data annually on the numbers and types of cases filed in that court in which there is pro bono representation. That data should be reported to the Standing Committee. The pro bono lawyers handling these cases can be identified for recognition.

Commentary:

Early identification of cases in which at least one litigant is being represented pro bono will allow courts to make special arrangements for scheduling, docket preferences, waivers of fees, and accommodations such as making courthouse space available. (See recommendations relating to other court-based initiatives and fee waivers, *infra*). Also, early identification will enable judges to thank and give recognition to lawyers who have donated their legal services.

The local pro bono committees should work with the Administrative Office of the Courts, Judicial Information Services, and local court personnel to determine how early identification of litigants receiving pro bono representation can be accomplished.

C. Distribution of Information on Legal Resources.

Issue and Findings:

Many courthouses (particularly in the district courts) have little up-to-date information on the availability of pro bono legal services programs. This information should be made available by the courts to *pro se* litigants who may qualify for free or reduced fee legal representation.

Recommendation 11:

Courts should make available printed, videotaped, and/or on-line information about available resources for pro bono legal representation for people who qualify. The information should be kept current and tailored to the jurisdiction of the court. The

Administrative Office of the Courts should act as a clearinghouse for this information.

Commentary:

The Pro Bono Resource Center of Maryland, Inc. has compiled a *Guide to Legal Services in Maryland* that lists virtually all of the pro bono resources available for low-to-moderate income people. Most of the courthouses have received a copy of the *Guide* as well as abbreviated lists of resources. Both the *Guide* and abbreviated directories need updating. The Pro Bono Resource Center of Maryland, Inc. should work with the MSBA, local bar associations, and legal services providers to establish a means for consistent, periodic updating of the *Guide*. The *Guide* also may be made available through a website accessible to the public.

The *Guide* should specify to the extent possible the types of cases handled by each organization, the eligibility criteria, and any limitations on service. The MSBA should assist in funding the compilation of the *Guide* or a similar resource list. The Administrative Office of the Courts should fund the duplication and distribution of the *Guide* and other similar resources that will be distributed through the courthouses. The Administrative Office of the Courts should be responsible for the timely dissemination of these materials to courthouses statewide. These materials should be readily identifiable from jurisdiction to jurisdiction. The Administrative Office of the Courts should work with the Maryland Legal Assistance Network to enhance the distribution of these materials to members of the public.

D. Docket Preferences, Flexible Scheduling, and Other Accommodations For Pro Bono Cases.

Issue and Findings:

Many courts across the country have experimented with ways to ease volunteer lawyers in their representation of indigent clients. Some judges in Maryland already try to accommodate pro bono lawyers by placing their cases first on the docket or by granting continuances when appropriate. In fact, 41% of the judges responding to the Commission's survey indicated that at some time they have made special procedural or scheduling accommodations for pro bono lawyers. While certain procedures may not be appropriate or necessary in all jurisdictions, adoption of some uniform procedures could significantly increase pro bono participation statewide.

One of the most effective ways the courts can accommodate pro bono lawyers is by scheduling specific days for pro bono cases to be heard. In an informal survey of court clerks, instituting pro bono court days was the favored method for the courts to assist pro bono lawyers and their clients. Designating court days for pro bono cases is a great accommodation to lawyers who are handling multiple pro bono cases. Some court clerks suggested that additional accommodations such as courthouse space, free copying, and telephone access be provided also.

Some jurisdictions in Maryland already allow flexible scheduling of pro bono cases so that a pro bono lawyer can "piggyback" a pro bono case onto other litigation obligations. Flexible scheduling also includes giving a pro bono case preference

on the docket so that a volunteer lawyer will spend less time in court waiting for a hearing or trial to begin.

Recommendation 12:

To the extent feasible, courts should provide for flexible scheduling and docket preferences for pro bono cases when doing so will not contravene statutes or policies that give preferences to other cases. Maryland Rule 16-202(a) should be modified to provide that the procedures for assignment of actions for trial should be designed to provide special accommodations for cases in which lawyers are volunteering their services. Special accommodations for pro bono cases should be a part of a circuit court's case management plan under Maryland Rule 16-202(b). Courts should consider adopting other flexible scheduling practices, including:

1. scheduling hearings and conferences in pro bono cases on the same days that pro bono lawyers have other matters pending before the court, or "piggybacking" one pro bono case onto others;
2. allowing routine matters such as scheduling conferences to be handled by conference call;
3. calling pro bono cases early in the docket;
4. designating specific days for pro bono cases to be heard and providing conference space and other support services for the pro bono lawyers and their clients on those days;
5. sponsoring lunchtime hearings for pro bono lawyers;
6. scheduling hearings in pro bono cases during off-hours;
7. making courthouse space available for pro bono activities; and

8. **supporting "attorney of the day" projects in which courts offer space to volunteer lawyers and permit them to announce their availability and meet with clients on the day of their hearings.**

Commentary:

The Commission considered whether docket preferencing and other scheduling accommodations could best be accomplished by a modification to the rules or by issuance of an administrative order. The Commission concluded that at the circuit court level, accommodations of this sort are feasible as part of the court's case management plan. The suggested change to Maryland Rule 16-202(a) will promote the concept of pro bono case allowances while permitting needed flexibility. Changes in circuit court administrative policies and practices still will be necessary to support these accommodations. At the district court level, the allowances can be addressed by administrative order.

Accommodations for pro bono cases will make pro bono service feasible for more lawyers. Assignment offices must be given direction about scheduling accommodations for pro bono cases. Individual judges should be encouraged to call pro bono cases at a convenient time on the docket. The judges responding to the Commission's survey did not oppose making such accommodations; nevertheless, some clerks expressed concern about the perception of favoritism that preferences might create. The Commission believes that accommodations can be made fairly and even-handedly without posing undue burdens on other litigants and without giving an impression of favoritism.

Each local pro bono committee, in conjunction with the court's administrative judge, should fashion specific accommodations that

take into consideration the needs of the court, the pro bono lawyers, and the litigants. The local pro bono committees should be creative in designing their local pro bono plans and determining practical approaches to easing access to their courts for pro bono litigants. When there can or should be uniform practices or procedures throughout the State, the Standing Committee should recommend modifications to existing rules or policies necessary to accomplish that end. The Chief Judge of the District Courts should confer with the District Administrative Judges and clerks to develop statewide policies respecting docket preferences and scheduling accommodations in the district courts.

E. Fee Waivers for Pro Bono Litigants.

Issue and Findings:

The Revised Schedule of Circuit Court Charges, Costs, and Fees, under Courts Article § 7-202, provides, at Part III.J., for the waiver of prepayment of filing fees and court costs to any individual represented by an MLSC grantee. A memorandum with standard language citing the rule was prepared for all MLSC-funded legal services programs. This memorandum was to be used in lieu of motions, affidavits, and financial statements, as had been the practice with Legal Aid Bureau clients. Several programs have reported that not all jurisdictions recognize this memorandum and, despite the rule, require pro bono litigants to file the full panoply of documents and await disposition on a request for an order waiving prepayment of filing fees. This consumes unnecessary lawyer time and defeats the purpose of the rule.

Recommendation 13:

Courts should grant automatic advanced waivers of filing fees to litigants who have been screened for income-eligibility and are being represented by pro bono lawyers through MLSC-funded pro bono referral programs so as to conform with the Revised Schedule of Circuit Court Charges, Costs, and Fees, under Courts Article § 7-202. The Standing Committee should take steps to monitor compliance. Courts should encourage masters, examiners, and mediators to consider waiving fees to accommodate low-income litigants.

Commentary:

Automatic advanced waiver of filing fees is only one example of simplifying court procedures to expedite the process for pro bono lawyers and to increase access to the courts for those with limited means. The local pro bono committees and the Standing Committee should consider other procedures to expedite proceedings and reduce litigation expenses for pro bono litigants. Masters, examiners, and mediators can assist by waiving their fees, when appropriate.

F. Alternative Dispute Resolution.

Many cases in which one or both litigants are *pro se* could be resolved at the early stages of litigation through ADR. Often, ADR processes are not used in these cases because litigants do not realize that they are available or cannot afford them, or because the courts do not anticipate that ADR will be of use. If the Judiciary encourages lawyers to donate their services as mediators

and as counsel for *pro se* litigants in ADR proceedings, a significant reduction in the *pro se* caseload is likely to follow.⁵⁰

1. Mediation Pilot Project

Issue and Findings:

Across the country, court-based mediation programs have been well received by the public and have achieved positive results.⁵¹ Benefits of mediation include: 1) good settlement rates (75% or higher in small claims mediation; 50%-75% in family law case mediation; and 40%-60% in general civil case mediation); 2) savings in client funds; 3) savings in lawyer time; and 4) a high level of client satisfaction. Litigants who have been asked to assess their reactions to mediation, trial, non-binding arbitration, and pre-trial judicial settlement conferences have given mediation the highest marks, probably because they value the opportunity to participate that mediation provides.⁵² Lawyers who participate in mediation sessions refer more clients to mediation and view the process as achieving a fair result for the parties. In the words of the Maryland ADR Commission, "well-structured mediation can move up settlement, saving expenses for the parties and contributing to their satisfaction with the courts."⁵³

⁵⁰Steps to encourage ADR for *pro se* litigants and to involve pro bono lawyers in representing *pro se* litigants in ADR proceedings need to be coordinated with the Maryland ADR Commission.

⁵¹*Report to the Maryland ADR Commission by the Court Consultation Project of the Ohio State University College of Law Dispute Resolution Program in cooperation with The National Center for State Courts* (June 1999), at 11, 17-19.

⁵²*Id.* at 17.

⁵³*Id.* at 19.

The Maryland ADR Commission's *Practical Action Plan* explains the value of mediation as follows:

The growing popularity of ADR, and mediation in particular, is due to the array of benefits associated with ADR. In exit surveys following court-related mediation sessions, the vast majority of participants in mediation sessions reported a high level of satisfaction with playing an active role in resolving their own conflicts. Participants can be creative in tailoring the results of mediation to meet their needs, unlike the limited outcomes available in court or by resorting to violence. Thus, it is not surprising that studies show participants comply with mediated agreements to a greater extent than solutions that have been imposed by courts. ... Over and above the delight with cost and time savings, in states where ADR is used extensively, it receives enthusiastic reviews from the judiciary, bar associations, participants, educators, government officials, the business community, religious organizations and the community-at-large.^[54]

Recommendation 14:

At its expense, the Administrative Office of the Courts should establish a Mediation Pilot Project in which in exchange for receiving free or reduced cost mediation training, volunteer lawyers will donate a designated amount of mediation services to qualified low-income litigants. The mediation training shall meet the standards set forth in Maryland Rule 17-106. The pilot project should be designed so that *pro se* litigants can participate and, in appropriate cases, *pro bono* lawyers may be assigned to represent litigants in mediation and/or to draft and review agreements produced through mediation.

⁵⁴*Practical Action Plan*, Final Draft, Maryland Alternative Dispute Resolution Commission, August 12, 1999, at 5.

Components of the pilot project should include:

- ! Income eligibility and merit screening to qualify participants;
- ! High quality training that complies with Maryland Rule 17-104 and any criteria developed by the Maryland ADR Commission;
- ! Malpractice insurance coverage for volunteer lawyers;
- ! A defined time frame for the project with a plan for evaluating its effectiveness and recommendations about expanding the model to other courts; and
- ! A means to accept referrals for mediation clients from various referral sources, including the courts, local mediation programs or centers, private practitioners, pro bono programs, contractual mediators, *pro se* assistance projects, family services coordinators, and community groups.

The Mediation Pilot Project should be established in the circuit court for two counties to be selected by the Chief Judge of the Court of Appeals, with input from the Maryland ADR Commission and this Commission. The local pro bono committees of the selected circuit courts should work together with the Administrative Office of the Courts and the Maryland ADR Commission to design the project. The local pro bono committees also should confer with court personnel, local mediation centers, pro bono and legal services programs, *pro se* assistance workers, and members of local and specialty bar associations in designing the project. Publicity about the project should be coordinated with the Maryland ADR Commission's public awareness campaign.

Commentary:

The Maryland Rules already provide for court-ordered mediation of child custody and visitation disputes in cases not involving a genuine issue of physical or sexual abuse.⁵⁵ The Maryland Rules also require that qualified mediators be willing "to accept a reasonable number of referrals on a reduced fee or pro bono basis upon request by the court."⁵⁶ According to the Maryland ADR Commission, however, court-ordered mediation in child custody and visitation cases is not occurring with regularity around the State and mediators are not being referred reduced-fee or pro bono cases to any significant degree. This may be due to insufficient numbers of trained mediators or to a lack of administrative support.

According to the Maryland ADR Commission, another reason for the limited use of mediation may be that some courts have been reading the mediation rules applicable to child custody and visitation disputes to mean that unless both parties are represented by counsel, mediation should not be ordered.⁵⁷ The Maryland ADR Commission is proposing an amendment to Maryland Rule 9-205 to clarify that courts may refer *pro se* parties to mediation. That commission is of the view that mediation is proper in cases in which litigants are *pro se*, in part because under the definition of "mediation" in Maryland Rule 17-102, no individual party receives

⁵⁵Maryland Rule 9-205b(2).

⁵⁶Maryland Rule 17-104(a)(6). On January 1, 1999, new rules and amendments to existing rules pertaining to Alternative Dispute Resolution in the circuit courts became effective.

⁵⁷Maryland Rule 9-205(b)(i) provides that "[p]romptly after an action subject to this Rule is at issue, the court shall determine whether: (A) both parties are represented by counsel; (B) mediation of the dispute as to custody of visitation is appropriate and would likely be beneficial to the parties or to the child; and (C) a properly qualified mediator is available to mediate that dispute." Then, under Rule 9-205(b)(3), "[i]f the court concludes that mediation is appropriate and feasible, it shall enter an order requiring the parties to mediate the custody or visitation dispute."

legal advice or case evaluation from the mediator.⁵⁸ Thus, courts may properly order mediation of disputes in which the litigants are *pro se* and refer them to the pilot project, provided there is no fee-for-service. The Maryland ADR Commission has noted that in Prince George's County, approximately 40% of the cases handled by the child custody and visitation mediation program involve *pro se* litigants.⁵⁹

A number of positive results are expected to come from the recommended Mediation Pilot Project: 1) the development of a model for a mediation program that will involve volunteer lawyers and will be appropriate for low-income clients and perhaps others; 2) the early resolution of *pro se* litigant cases through mediation; and 3) an increase in the number of qualified lawyer mediators. The pilot project should be developed with input and support from the MSBA, local bar associations, MLSC, and MICPEL. If the pilot program is successful, the model should be replicated in other jurisdictions.

⁵⁸Mediation is defined in Rule 17-102 as follows:

[A] process in which the parties appear before an impartial mediator who, through the application of standard mediation techniques generally accepted within the professional mediation community and without providing legal advice, assists the parties in reaching their own voluntary agreement for the resolution of all or part of their dispute. A mediator may identify issues, explore settlement alternatives, and discuss candidly with the parties or their attorneys the basis and practicality of their respective positions, but unless the parties agree otherwise, the mediator does not engage in arbitration, neutral case evaluation, or neutral fact-finding and does not recommend the terms of the agreement.

⁵⁹*Practical Action Plan, Final Draft, Maryland Alternative Dispute Resolution Commission, August 12, 1999, at 46.*

2. Use of Volunteer Lawyers, Judges, and Masters in Settlement Conferences

For several years, the Circuit Court for Baltimore City has operated a settlement conference program in which volunteer lawyers act as facilitators. That program has been highly successful, and has significantly reduced the backlog of civil cases in that court.

Under Maryland Rule 17-105(b), judges and masters are permitted to conduct non-fee-for-service settlement conferences in circuit court. The settlement conference program in the Circuit Court for Baltimore City should be adopted in other circuit courts and should be expanded so that settlement conferences are conducted not only by pro bono lawyers but also by volunteer judges and masters, on a non-fee-for-service basis. These settlement conferences should be scheduled for cases in which the litigants are *pro se*, and courts should act to obtain pro bono lawyers to attend the conferences with the litigants. To the extent feasible, pro bono lawyers should be tapped to represent *pro se* litigants in settlement/prehearing conferences in the district courts and the Court of Special Appeals.

Recommendation 15:

Circuit courts should provide for and/or expand their non-fee-for-service settlement conferences so that the conferences are conducted by pro bono lawyers, judges, and masters, and so that *pro se* litigants have the option of obtaining pro bono lawyers to represent them at the conferences. To the extent feasible, the district courts and the Court of Special Appeals should use the services of pro bono lawyers for settlement/prehearing conferences.

Commentary:

The expanded use of settlement conferences will benefit low-income and *pro se* litigants in appropriate circumstances. Volunteer lawyers, masters, and judges can assist in expanding the practice of conducting settlement conferences in which no fee is charged. Expected benefits include: 1) a reduced backlog of civil cases; 2) engagement of volunteer lawyers in defined, time-limited pro bono projects; 3) involvement of members of the Judiciary in the process; 4) resolution of cases more expeditiously; and 5) greater satisfaction with the court system for those of limited means. Evaluation of successful volunteer efforts in certain jurisdictions, such as Baltimore City, will be helpful in establishing and/or expanding similar services in other jurisdictions and other courts.

X. RECOMMENDATIONS FOR PROMOTING LAWYERS' PROFESSIONAL RESPONSIBILITY TO RENDER PRO BONO SERVICE

A. Proposed Revisions to Rule 6.1.

1. Definition of Pro Bono

Issue and Findings:

Current Rule 6.1 of the Maryland Rules of Professional Conduct, entitled "Pro bono publico service," states that, "[a] lawyer should render public interest legal service." It further provides that, "[a] lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, or by financial support

for organizations that provide legal services to persons of limited means." The commentary to the rule makes plain that its intended focus is on those of limited means. "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." (See **Appendix K** for current Maryland Rule 6.1).

While the objective of Rule 6.1 is obvious, questions persist about its application. The largest problem with the rule is that it does not provide a clear-cut definition of what constitutes pro bono work. The rule also fails to provide guidance about the amount of time that lawyers should devote to pro bono activities.

In an effort to address the weaknesses in Rule 6.1, the American Bar Association (ABA) House of Delegates adopted revisions to Model Rule 6.1 on February 8, 1993. The revisions encompass certain key elements:

- 1) a 50-hour per year per lawyer aspirational standard for pro bono service;
- 2) a definition of pro bono service that incorporates the expectation that a "substantial majority" of those 50 hours of service will be rendered to persons of limited means or charitable, religious, civic, community, governmental, and educational organizations in matters primarily designed to address the needs of persons of limited means; and
- 3) a provision that additional services may be rendered to organizations for which the payment of standard legal fees would significantly deplete their economic resources, or would be inappropriate; or may be rendered through reduced fee

services to persons of limited means, or through activities for improving the law, legal system, or profession.

In adopting its model rule, the ABA also encouraged lawyers to make voluntary financial contributions to organizations that provide legal services to those of limited means. The ABA anticipated that the standards adopted in its model rule would give members of the bar a better understanding of what is expected of them under Rule 6.1 and would encourage them to strive to increase their annual commitment to pro bono service.

Eighteen (18) states and the District of Columbia have adopted ABA Model Rule 6.1 or a rule very similar to it. The eighteen states are: Arizona, California, Colorado, Florida, Georgia, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Vermont, and Virginia. Three additional states have adopted rules that emphasize service to those of limited means. (See **Appendix L** for a chart describing the rules of those states with rules similar to the ABA Model Rule 6.1 and a separate chart comparing all 50 states' rules.)

Recommendation 16:

The Rules Committee should propose to the Court of Appeals the repeal of current Rule 6.1 of the Maryland Rules of Professional Conduct and the adoption of Rule 6.1(A), as specified in Appendix M. Rule 6.1(A) will provide, *inter alia*, an aspirational goal of 50 hours per year of pro bono legal service, a substantial majority of which is to be rendered to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations that are designed to address the needs of persons of limited means. Rule 6.1(A) will specify that a lawyer

who does not provide at least 25 hours per year of pro bono service of that type should make a voluntary financial contribution to a legal services organization instead. Finally, Rule 6.1(A) will describe the type of pro bono services that can be rendered to fulfill the balance of the 50 hour aspirational goal.

Commentary:

The Commission discussed at great length whether Rule 6.1 should be revised and, if so, how it should be revised. The consensus was that changes should be made and that the revisions proposed are essential in order to integrate an ethic of pro bono service into the legal culture of our State and to increase the donation of legal services to the poor. Adoption of proposed Rule 6.1(A) will assist the pro bono effort by ensuring that all lawyers and law firms are operating under the same definition of "pro bono." It will heighten awareness of the need for volunteer legal services, increase pro bono participation among members of the bar, and enhance the reputation of the profession.

A number of MSBA Sections, law firms, local bar associations, and organizations already have endorsed changes to Rule 6.1 that are much like those the Commission is recommending. The MCCJ suggested similar changes to Rule 6.1 in its report to the MSBA, and worked with the Pro Bono Resource Center of Maryland, Inc. to garner support for the proposed revisions. Thus, there already has been a fair amount of education and discussion about the proposed changes within the organized bar.

The proposed rule revision recognizes that there is an important distinction between charitable activities in which a lawyer may engage and the rendering of pro bono service, which is

part of a lawyer's professional responsibility. In Opinion No. 124, the Judicial Ethics Committee made plain that pro bono legal service is a lawyer's professional obligation and is not to be equated with charitable activities.

The standard proposed for the number of hours that a lawyer should devote to pro bono service each year is aspirational. The suggested number of hours is a goal that each lawyer should aim to reach. It is not mandatory, and carries no negative ramifications for a lawyer who cannot meet it. The Commission recognizes that not all lawyers will be able to donate the suggested number of pro bono service hours every year. For that reason, proposed Rule 6.1(A) allows for a financial contribution in lieu of service.

The commentary drafted to accompany the proposed revisions to Rule 6.1 clarifies the nature of activities outside of representation of the poor that qualify as pro bono service, the rule's application to government, legal services, and part-time lawyers, and the concept of law firm collective responsibility. The Commission proposes that the MSBA and all local and specialty bar associations be provided with copies of the proposed revisions to Rule 6.1 so they may comment upon them to the Rules Committee.

2. Reporting of Pro Bono Activities.

Issue and Findings:

As we have discussed, our State has no reliable means to obtain accurate figures about the amount and nature of pro bono legal services being rendered. Legal services programs often have difficulty obtaining disposition reports from their lawyer volunteers; as a consequence, the figures that those programs

report to their funding sources may be underestimated. Also, a substantial number of lawyers perform pro bono work outside of the legal services provider network by rendering free or reduced fee legal services directly to persons of limited means. The figures reflecting these contributions are not being fully captured. Finally, the response rates to the surveys of pro bono representation sent by the CSTF have been so low that the voluntarily given reports have not produced statistically valid data.⁶⁰ A required reporting system is needed to obtain complete and accurate information about the rendering of pro bono services in Maryland.

Recommendation 17:

The Rules Committee should propose to the Court of Appeals the adoption of Rule 6.1(B), which will require each lawyer licensed to practice law in Maryland to make an annual report of his or her pro bono service. The Court of Appeals should transmit these reports to the Standing Committee, which will be responsible for monitoring the level of pro bono services being rendered in the State and submitting an annual report on that topic to the Court of Appeals.

Commentary:

Several states have experimented with voluntary pro bono reporting programs, in which lawyers are encouraged but not required to respond to a questionnaire. Texas, in which membership in the state bar association is mandatory, has achieved the highest voluntary reporting response rate: close to 40%. Most states that

⁶⁰For a copy of the current voluntary Annual Pro Bono Reporting Form that is sent with the CSTF invoice, see **Appendix N**.

have used voluntary reporting have experienced disappointingly low response rates, however. Organizations conducting those voluntary programs have reported that lawyer response rates are so low that the resulting data is of limited value.⁶¹ This has been the experience in Maryland also.

In 1993, the Florida Supreme Court modified its version of Rule 6.1 to define pro bono service primarily as service to the poor, to set an aspirational pro bono service goal of 20 hours per lawyer per year, and to require that lawyers annually report their pro bono services. A small segment of the bar objected to the required reporting rule, and it was twice challenged in court. In *Amendments to Rule 4-6.1 of Rules Regulating the Florida Bar-Pro Bono Public Service*, 696 So.2d 734 (Fla. 1997), the Supreme Court of Florida denied a petition by a group of lawyers to make reporting voluntary. In *Schwarz v. Kogan*, 132 F.3d 1387, 1392 (11th Cir. 1998), the Court of Appeals for the Eleventh Circuit rejected a challenge to the constitutionality of required reporting, holding that "there is a constitutionally sound basis for expecting bar members to report their compliance with the Rule's aspirational goals" and that "accurate reporting is essential for evaluating the delivery of legal services to the poor and for determining where such services are not being provided."

The information generated by the Florida required reporting rule has verified the Florida Model's success promoting pro bono services. Using 1994-1995 as a base for reporting, by 1997-1998 the number of Florida lawyers rendering pro bono services had

⁶¹*Report on Pro Bono Reporting*, Legal Assistance to the Disadvantaged Committee (Minnesota), April 15, 1999, at 2.

increased by 11.7%.⁶² During that same time period, the number of hours donated increased dramatically, by about 76%.⁶³ In addition, there was a surge in financial contributions, with the number of contributors increasing by over 48% and the amount of contributions increasing by more than 112% (from \$876,837 to \$1,861,627).⁶⁴

The accuracy of the self-reporting system in Florida has been validated by the statistics of the legal services providers there. As we have indicated, during the pertinent time frame, Florida legal services programs reported a 40.4% increase in the number of lawyer volunteers (from 12,931 to 18,500) and a 25% increase in the number of hours of service donated.⁶⁵ They also reported a 78.58% rise in the number of contributors and a 70.89% surge in contributions.⁶⁶ Florida now boasts the highest pro bono participation rate in the country -- over 53%.

In a 1997 opinion, a Florida Supreme Court justice explained the importance of the reporting requirement to the success of that state's pro bono effort:

There can be no doubt that the reporting requirement has been effective. Accurate statistics are now available as to the number of pro bono legal hours being provided in Florida each year. These statistics can be used by this court to analyze the extent to which the constitutional mandate of court access is being met. Additional

⁶²*The Standing Committee on Pro Bono Legal Service's Report to the Supreme Court of Florida, the Florida Bar, and the Florida Bar Foundation*, (February 1999), at 3. For a copy of the report, see **Appendix D**.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.* at 4.

⁶⁶*Id.*

resources can then be directed intelligently to areas of need. Without the reporting requirement, such evaluations would be made with incomplete information ... While the rule was not developed to force attorneys to provide pro bono legal services, the fact that the rule has raised consciousness and thereby increased the performance of such services does not disturb me.^[67]

The author of an article about voluntary versus required reporting of pro bono services made the following observations about the Florida required reporting system:

Florida, the only state with a required reporting program, has a nearly 100 percent response rate. The annual reports that analyze data from the program illustrate the reliability, accuracy, and usefulness of the information that can be gathered through a required reporting form. When these data are compared to data from states with voluntary reporting programs, there is no question that requiring lawyers to report is essential to ensuring a high response rate and data that are reliable and useful. Moreover, it is evident that Florida's required reporting program has moved the bar as a whole to substantially increase its donations of both money and pro bono legal services."^[68]

It should be noted that in Florida, considerable time and resources were devoted to educating the bar about the changes to its Rule 6.1 and, specifically, the requirement for lawyers to report their pro bono work. After the first year in which reporting was required, the Florida bar experienced a significant decrease in the number of calls about the reporting process and monitored the reporting process with little resistance.

⁶⁷*Amendments to Rule 4-6.1 to the Rules Regulating the Florida Bar-Pro Bono Publico Service*, 696 So. 2d at 736 (Overton, J., concurring).

⁶⁸Thomas C. Mielenhausen and Charles A. Krekelberg, *A Better Idea: Reporting Pro Bono Services, Bench & Bar of Minnesota*, vol. LVI, no. 3, at 26 (March 1999).

Florida's experience shows that the combination of comprehensive local pro bono plans and required reporting of pro bono service can have a profound impact on pro bono participation. The Commission is convinced that once the proposed revisions to Rule 6.1 and the local pro bono plan rule are adopted, Maryland will witness a significant increase in the donation of legal services to the poor. Moreover, for the first time, Maryland will have an accurate accounting of the amount of pro bono work being rendered in the State.

B. Exception for Government Lawyers to Engage in Pro Bono Work

Issue and Findings:

Proposed revised Rule 6.1(A) takes into account that some government lawyers are not permitted to represent clients pro bono because they are restricted from engaging in the private practice of law. The rule as revised will provide that in circumstances in which constitutional, statutory, or regulatory restrictions prohibit government and public sector lawyers from performing pro bono work, those lawyers may fulfill their pro bono service obligation by participating in other activities, such as those that improve the law, the legal system, or the legal profession.

While this allowance is acceptable, the Commission believes that steps should be taken to enable government lawyers to engage in individual pro bono representation, legal counseling, or other direct pro bono legal services. Maryland has many lawyers who practice in the public sector. These lawyers have experience and knowledge that would benefit indigent litigants. There are circumstances in which pro bono representation by public or government lawyers would not pose a conflict of interest. In fact,

many government lawyers who are not restricted from doing so have rendered pro bono legal services in the past.

Through its Pro Bono Representation Program, the Maryland Attorney General's Office supports the involvement of its Assistant Attorneys General in pro bono work. In fact, the Office makes an exception to the prohibition against engaging in the private practice of law for pro bono cases. Assistant Attorneys General accept pro bono cases from a number of legal services organizations once the cases have been screened for conflicts.⁶⁹

Local laws pertaining to other government lawyers, such as the Assistant State's Attorneys and County Attorneys, vary in terms of prohibitions against engaging in the private practice of law. (For a summary of the state and county laws, see **Appendix O**) In Prince George's County, for instance, lawyers in the State's Attorneys Office are prohibited from engaging in the practice of law, but may participate in the pro bono program administered by that county's Bar Foundation.

Recommendation 18:

Each local pro bono committee should consider recommending changes to local statutes, codes, charters, or regulations that would except the rendering of pro bono legal services from the definition of the practice of law, thus permitting government lawyers to represent clients in pro bono cases. The Standing Committee should examine this issue and assist the local pro bono committees in formulating their recommendations.

⁶⁹The Maryland Attorney General's Office's pro bono policy and program are known nationally and used as a model of how public and government lawyers can become involved in pro bono work.

Commentary:

The Commission considered proposing a rule change that would enable government lawyers to engage in pro bono legal representation. Given the jurisdictional diversity of restrictions on government lawyers, however, the Commission concluded that it would be more productive to have the local pro bono committees review the applicable local enactments and determine the means to allow government lawyers to render pro bono services. In the immediate future, exceptions will need to be adopted on a county-by-county basis. The Standing Committee should study the feasibility of a statewide court rule that would permit government lawyers to engage in pro bono representation.

C. Counsel Fees.

Issue and Findings:

The Commission was made aware of several instances in which pro bono lawyers who requested an award of counsel fees at the conclusion of a case were denied such an award because of their "volunteer" status. There is no statute, rule, or policy that prohibits volunteer lawyers from receiving court-awarded counsel fees. A volunteer lawyer who agrees to represent a client on a pro bono basis with no assurance of any fee or compensation is entitled to accept or donate awarded counsel fees. In fact, the ABA has adopted a policy encouraging pro bono lawyers to seek statutory counsel fees when the source of those fees is other than client funds.⁷⁰

⁷⁰*Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means*, ABA Standing Committee on Lawyers' Public Service Responsibility, February 1996, Standard 3.5-8 (Relations with Volunteers-
(continued...))

Case law supports the propriety of counsel fee awards to volunteer lawyers. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court held that volunteer lawyers and legal services programs should be awarded counsel fees at the same rate as private lawyers with paying clients.

The commentary to ABA Model Rule 6.1 states that a lawyer who receives an award of fees in a pro bono case should be encouraged "to contribute an appropriate portion of the fees to organizations or projects that benefit persons of limited means." The ABA Standard on Attorneys' Fees Policy also encourages lawyers to split awarded fees with the legal services organizations that refer cases. ABA Formal Opinion 93-374 states that an agreement to share fees between a volunteer lawyer and a legal services program does not violate ethical rules.

Recommendation 19:

Members of the Judiciary should be made aware that the mere fact that a party to a case has pro bono representation does not preclude an award of counsel fees to that party.

Commentary:

When lawyers accept pro bono cases for handling, they do not expect to be compensated for their services. That does not mean, however, that pro bono representation should preclude an award of counsel fees in a case in which such an award otherwise would be appropriate. The courts should not treat volunteer lawyers differently in this respect.

⁷⁰(...continued)
Attorneys' Fees Policy).

XI. CONCLUSION

The Judiciary must take the forefront in making pro bono representation an integral part of the practice of law in Maryland. If adopted, these recommendations will enable it to do so. When implemented, they should bring about a profound change in the level of pro bono services rendered, to the benefit of litigants, lawyers, and the courts.

APPENDICES

Commission Surveys to Circuit and District Court Judges	A
Conference of Chief Justices Resolution VII	B
Florida Rule 4-6.1 on <i>Pro Bono Publico</i> Service	C
Report to the Supreme Court of Florida, Standing Committee on Pro Bono Legal Services, February 1999	D
Article entitled "Mandatory Movement Dies as Pro Bono Hours Rise" from <i>Lawyers Weekly USA</i>	E
Indiana Rule 6.5 - Voluntary Pro Bono Plan and Annual Report and Plan	F
Nevada Rule 191	G
Proposed Rule: Local Pro Bono Plans	H
Sample Plan and Report from Florida's Fifth Judicial Circuit .	I
Judicial Ethics Committee Opinion No. 124	J
Current Maryland Rule of Professional Conduct 6.1	K
Charts Comparing States with Rules Similar to ABA Rule of Professional Conduct 6.1 and Comparing State Pro Bono Rules . .	L
Proposed Revisions to Maryland Rule 6.1 and Commentary	M
Annual Pro Bono Reporting Form and Letter from CSTF	N
Memorandum on Provisions Regarding the Private Practice of Law by Public Lawyers	O