

A CLOAK FOR THE BARE: IN SUPPORT OF ALLOWING PROSPECTIVE MALPRACTICE LIABILITY WAIVERS IN CERTAIN PRO BONO CASES

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I. Introduction

Few would challenge the notion that far too many of the legal needs of poor persons go unmet in the United States. Substantial strides have been made in efforts to increase access to justice for poor persons, in areas such as removing barriers to self-representation, “unbundling” legal services, provision of non-lawyer legal assistance, and increasing use of various forms of alternative dispute resolution. In addition, most advocates for increased access to justice for poor Americans also urge increases in the direct legal representation of poor persons by attorneys on a pro bono basis. Despite this fact, the actual proportion of attorneys who provide such pro bono representation is quite low, and the total amount of pro bono legal service provided directly to poor persons remains similarly low.

There are numerous reasons why attorneys as a whole do not provide more in the way of pro bono representation. Many attorneys are overworked and lack the additional time needed to perform pro bono service. Others believe that they lack the substantive knowledge needed to represent clients in areas of the law unfamiliar to the attorneys. Others simply lack the inclination to do such pro bono work. In any event, it seems clear that at least one impediment to attorneys performing more pro bono work is the prospect that a disgruntled pro bono client might turn around and sue the attorney for malpractice. It is bad enough for an attorney to have to defend a malpractice claim brought by a paying client. However, the thought of defending such a claim brought by one for whom the lawyer is doing the “favor” of providing free legal services, is more than many attorneys can stomach.

A seemingly obvious solution to this latter problem would be for the attorney to secure, in exchange for the provision of free legal services, a promise by the client that the client would forgo any future malpractice claims arising from the pro bono representation. However, such a bargain would likely run afoul of the legal profession's longstanding ban on prospective legal malpractice liability waivers by prospective clients. The purpose of this article is to argue that in an effort to increase the direct provision of pro bono legal services to poor clients, the profession should remove its longstanding ban on prospective legal malpractice liability waivers in such cases.

Following this Introduction, the second part of this article traces the history and development of the legal profession's ban on prospective malpractice liability waivers.¹ This part also looks at the common rationales offered in support of the ban, and concludes that the justifications offered for the ban are surprisingly weak given the uniformity in adoptions of the ban across American jurisdictions.² In any event, since the point of this article is only to evaluate the wisdom of allowing liability waivers in certain pro bono cases, Part II stops short of drawing any conclusions with regard to the advisability of allowing or not allowing such waivers in other categories of cases.

Given that pro bono legal representation is the focus of this article, Part III begins by reviewing existing data demonstrating the shortage of legal services provided to poor persons in this country.³ It then goes on to address academic arguments that have been offered questioning

¹ *See infra* Part II.

² *Id.*

³*See infra* Part III.

the advisability encouraging attorneys to perform additional pro bono legal services as a means to improving the lives of poor Americans.⁴ Part III concludes both that the poor have enormous unmet legal needs, and that there is value in undertaking efforts to encourage attorneys to serve more of those needs by performing additional pro bono legal services.⁵

Given the conclusions of Part III, the next part of the article examines whether allowing malpractice liability waivers in pro bono cases would likely help to increase the current low level of pro bono representation by attorneys.⁶ Part IV concludes that while allowing such waivers would not be a panacea, it would at least provide some benefit in terms of increasing the amount of pro bono legal services performed by attorneys.⁷ Thus, Part V of the article returns to the primary justifications offered in support of the current ban on waivers, and concludes that these justifications are even weaker in the pro bono context than they are in the context of paid legal representation.⁸ Moreover, Part V also concludes that the risks often associated with allowing malpractice liability waivers are less in the pro bono representation context than in the paid for legal representation context.⁹ Therefore, the article draws the overall conclusion that prospective malpractice liability waivers should be permitted in a relatively narrow range of pro bono cases,

⁴ *Id.*

⁵ *Id.*

⁶ *See infra* Part IV.

⁷ *Id.*

⁸ *See infra* Part V.

⁹ *Id.*

those where attorneys provide legal representation directly to poor clients.¹⁰

II Liability Waivers Generally

The first codified professional responsibility rule that dealt with the issue of prospective malpractice liability waivers appeared in the American Bar Association's 1969 Model Code of Professional Responsibility (hereinafter "Model Code").¹¹ Disciplinary Rule 6-102(A) states that: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for personal malpractice."¹² Ethical Consideration 6-6 further states that: "A lawyer shall not seek, by contract or other means, to limit his individual liability to his client for his malpractice."¹³

The sudden appearance of the ban on prospective liability waivers in the Model Code lies in marked contrast to lengthy pedigree of many of the Codes's other provisions. For example, Dean Mary C. Daly traced the origins of the Code's confidentiality provisions to the early

¹⁰ See *infra* Part IV.

¹¹ Leonard E. Gross, *Contractual Limitations on Attorney Malpractice Liability: An Economic Approach*, 75 Ky. L. J. 793, 795 & n.6 (noting the absence of similar provisions in prior codifications of attorney professional responsibility standards).

¹² MODEL CODE OF PROF'L RESPONSIBILITY DR 6-102(A) (1969).

¹³ MODEL CODE OF PROF'L RESPONSIBILITY EC 6-6 (1969). As most likely readers of this article are aware, the Model Code contained three different types of provisions, Canons, Disciplinary Rules, and Ethical Considerations. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected by lawyers...." Model Code, Preamble and Preliminary Statement. The Disciplinary Rules, by contrast, "are mandatory in character [,and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* The Ethical Considerations, in turn, "are aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.* Thus, because the prohibition on malpractice liability waivers appeared in the Disciplinary Rules as well as the Ethical Considerations, attorneys could be disciplined under the Model Code for violating the prohibition.

attorney-client privilege, which was referred to in the Elizabethan Law Reports of 1580,¹⁴ and through Judge George Sharswood's famous essays on legal ethics,¹⁵ and the ABA Canons of Legal Ethics' 1928 revision.¹⁶ Similarly, Jeffrey A. Stonerock traced the origin of the Code's version of the advocate-witness rule,¹⁷ to an 1846 English case,¹⁸ and through the Canons of Ethics.¹⁹ And, another writer traced the Code's ban on solicitation of clients,²⁰ even further back, to ancient Greece and Rome,²¹ and through the English wrongs of champerty, barratry, and

¹⁴ Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, An Innocent Condemned Man, and an Ethics Seeking Defense Counsel*, 29 Loy. L.A. L. Rev. 1611, 1614 n. 8 (1996) (hereinafter "Daly, *To Betray*"), citing Dennis v. Codrington, 21 Eng. Rep. 53 (1580).

¹⁵ *Id.* at 1617 n. 22, citing George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. Rep. 1 (5th ed. 1907).

¹⁶ *Id.* at 1618. The Canons of Ethics was the first complete code of ethics proposed by the ABA, and is the direct predecessor to the Model Code. See Mary C. Daly, *The Differences Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct Between U.S. and Foreign Lawyers*, 17 Vand. J. Transnat'l L. 1117, 11125, (1999). Apparently, the original version of the Canons proposed in 1908 did not contain express provisions relating to client confidentiality. Daly, *To Betray*, *supra* note __, at 1617. Canon 37, entitled "Confidence of a Client," was added as part of the Canons' 1928 revision. *Id.* at 1618.

¹⁷ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) & DR 5-102 (prohibiting lawyer from acting as counsel and testifying as a witness in the same case with a limited number of exceptions).

¹⁸ Jeffery A. Stonerock, *The Advocate-Witness Rule: Anachronism or Necessary Restraint?*, 94 Dickinson L. Rev. 821, 823 & n.17 (1990) (citing *Stones v. Byron*, 4 Dowl. & L. 393, 75 Rev. Rep. 881 (Q.B. 1946)).

¹⁹ *Id.* At 824 (citing Canon 19).

²⁰ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103.

²¹ See Betina A. Suessman, Comment, *Subjective and Objective: You Can't Have One Without the Other: A Recommendation for Model Rule 7.3*, 33 Loy. L. A. L. Rev. 229, 233 (1999).

maintenance,²² and Canon 27 of 1908.²³ In comparison, the Code's ban on prospective liability waivers seems to have arisen out of thin air.

Moreover, the breadth of the prohibition on liability waivers contained in the Model Code is striking. In addition to preventing the type of prospective liability waivers that are the focus of the present discussion, the language of DR 6-102(A) would seem to prevent even attempts by lawyers to settle existing malpractice claims by current or former clients based upon prior attorney acts or omissions.²⁴ Indeed, in the past, some took the view that the ban on liability waivers made the carrying of malpractice insurance by attorneys unethical. However, in light of the perceived benefit of settlement of claims brought by disgruntled clients, the provision was quickly interpreted to permit settlement of existing claims.²⁵ And, of course, the possession of malpractice insurance by attorneys is now widely encouraged, if not required.²⁶

²² *Id.* at 234.

²³ *Id.* at 235 & n. 50.

²⁴ *See* GEOFFREY HAZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.8.901 (2D ed. 1990); Charles Wolfram, *MODERN LEGAL ETHICS* § 5.6.7 (1986).

²⁵ *See, e.g.*, NYSBA Comm. On Professional Ethics Op. 275 (1972); NYSBA Opinion 591 (1988). New York is one of only five states that continue to employ professional responsibility codes that are primarily based upon the Model Code. *See* RICHARD A. ZITRIN AND CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 6 (2d ed. 2002) (citing American Bar Association & Bureau of National Affairs, *Lawyer's Manual of Professional Conduct* 1:3-1:4 (rev. 1999)). In 1990, New York revised its version of DR 6-102 (A) expressly to permit settlement of malpractice claims, provided that the lawyer informs an unrepresented client or former client of the advisability of independent representation in conjunction with such settlement. N.Y. Lawyers' Code of Professional Responsibility DR 6-102 (A) (1990).

²⁶ *See, e.g.*, DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 167 (2000). However, Oregon is presently the only state that mandates that attorneys carry malpractice insurance. *Id.* In August 2004, the ABA passed a proposed model

At least by its express language, the ABA's 1983 replacement for the Model Code, its Model Rules of Professional Conduct (hereinafter "Model Rules"), appears to soften up the Model Code's absolute ban on liability waivers. As enacted, Model Rule 1.8(h), provided, in relevant part: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement..."²⁷ Thus, prospective liability waivers were permissible if two conditions were satisfied: 1) that such waivers were "permitted by law" in the relevant jurisdiction; and 2) that the client was independently represented with regard to the waiver. However, the first condition contained an inherent ambiguity that at least on one interpretation, would eliminate any change from the Model Code's absolute ban on such waivers.

The "permitted by law" requirement of Model Rule 1.8(h), could of course be interpreted to mean that liability waivers are permissible in the absence of an express provision in either the case law, statutes, or professional rules of a particular jurisdiction prohibiting such agreements. Alternatively though, the "permitted by law" language could be read to require express authorization for such agreements in the positive law of a particular jurisdiction.²⁸ With regard to

court rule that would require attorneys to disclose to the highest court in their state whether they carry malpractice insurance. See <<<http://www.abanet.org/cpr/Amended108adopted.doc>>> (visited August 23, 2004).

²⁷ MODEL RULES OF PROF'L CONDUCT R 1.8(h) (1983). Rule 1.8(h) also expressly incorporated interpretations of its predecessor Model Code provisions allowing for settlement of malpractice claims provided that the attorney advise the claimant in writing that independent representation is appropriate with regard to the claim. *Id.*

²⁸ *Cf.* Ass'n Bar City of N.Y. Committee on Professional Responsibility, *Developments in the Ethical Rule Governing Limitations of Lawyers' Liability*, 45 *The Record* 693, 709 (1990) (citing Geoffrey Hazard, *Can Lawyers Place Limits on Liability?*, *Nat'l L. J.*, Apr. 11, 1988, at 13).

the latter interpretation, commentators have pointed out that no jurisdiction at the time had an express provision providing for the permissibility of waivers.²⁹ One particularly influential set of commentators has advocated for the latter interpretation, contending that the “permitted by law” language “was intended, *sub silencio*, to forbid” liability waivers because no state had positive law affirmatively permitting such agreements at the time Rule 1.8(h) was enacted.³⁰ Indeed, Professor Geoffrey Hazard’s views as to the meaning of the Model Rules may be entitled to particular weight, as he was the Reporter for the ABA’s Kutak Commission, which drafted the Model Rules.³¹

Nonetheless, the idea that the Model Rules’ drafters would adopt, what Hazard and William Hodes themselves describe as a “back door” approach to banning liability waivers outright,³² is less than completely convincing. Why didn’t the rule simply ban liability waivers outright, as the Model Code had, if that was the intended result?³³ It is true that the adoption of

²⁹ *Id.* 696-67. See also Gross, *supra* note ___, at 795 & nn. 406; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS Sec. 54, Reporter’s Note, cmt. b; CHARLES WOLFRAM, MODERN LEGAL ETHICS § 5.6.7 (1986).

³⁰ Gross, *supra* note ___, at 796 & n.11 (citing GEOFFREY HAZARD, JR. & WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 169-70 (1985)).

³¹ See Michael Milleman & David Luban, *Good Judgement: Ethics Teaching in Dark Times*, 9 Geo. J. Leg. Ethics 31, 46 (1995).

³² Geoffrey Hazard, Jr. & Williams Hodes, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT Sec. 1.8.901 (2D ED. 1990).

³³ Hazard and Hodes’ explanation is as follows. The “permitted by law” language did not appear in the Proposed Final Draft of the Model Rules, as the Kutak Commission wished to allow liability waivers in cases where the risk of malpractice was so great that lawyers would refuse representation without such waivers. *Id.* The “permitted by law” language was proposed during the House of Delegates’ Debate, with the proponents’ full knowledge and intent that the

professional responsibility standards is a political process, and skirmishes regarding the content of certain rules are well documented.³⁴ However, there is little indication from the Model Rule’s “legislative history” that the issue of liability waivers was a particularly contested or contentious one. Moreover, for the most part in American law, something is permitted unless it is expressly prohibited, rather than the other way around. Of course, this default rule supports the first reading of Model Rule 1.8(h)’s “permitted by law” language, rather than the second. Despite these contentions, the drafters of the Restatement (Third) of the Law of Lawyering were persuaded as to the validity of the second interpretation. Thus, section 54(2) of the Restatement states: “An agreement prospectively limiting a lawyer’s liability to a client for malpractice is unenforceable.”³⁵

Regardless, much of the above discussion may be largely academic at this point, as the 2002 revisions to the Model Rules removed the “permitted by law” language from Rule 1.8(h).³⁶ Thus, in its current form, Rule 1.8(h)(1) states that a lawyer shall not: “make an agreement prospectively limiting a lawyer’s liability to a client for malpractice unless the client is

language would result in an effective ban. *Id.*

³⁴ For example, the Hofstra Law Review devoted an entire symposium to the process by which the ALI arrived at the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS’ provisions regarding insurance defense counsel. *See, e.g.,* William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 Hofstra L. Rev. 573 (1998); Lawrence J. Fox, *Leave Your Clients at the Door*, 26 Hofstra L. Rev. 595 (1998); Charles Silver, *The Lost World of Politics and Getting the Law Right*, 26 Hofstra L. Rev. 773 (1998); Charles W. Wolfram, *Bismark’s Sausages and the ALI’s Restatements*, 26 Hofstra L. Rev. 817 (1998).

³⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (1998).

³⁶ MODEL RULES OF PROF’L CONDUCT R 1.8(h) (2002). Of course, as of this writing, many states’ professional responsibility codes continue to reflect the language of the original version of the Rule.

independently represented in making the agreement[.]”³⁷ Though it has been difficult to find an articulated statement of the Ethics 2000 Committee’s reasoning behind the change,³⁸ one can surmise that removal of the “permitted by law” language was intended to clear up the very ambiguity presented by that language that was discussed above. And therefore, at least nominally it would seem that the current version of the Model Rules is more favorably disposed to prospective liability waivers than its predecessor, as one of two explicit barriers to their validity has been removed.

However, as a practical matter, it is unlikely that prospective liability waivers will come more widely into use as a result of the amendment than was the case under the former Model Rule.³⁹ The reason for this is that the remaining requirement of independent representation continues to create a major impediment to the execution of prospective liability waivers. This is likely to be particularly true for individual, as opposed to institutional clients,⁴⁰ and true to an

³⁷ MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (2002). The current version of the Rule also bifurcates treatment of prospective liability waivers and efforts to settle existing liability claims. Thus, subsection (2) of the Rule prohibits settlement of malpractice claims with unrepresented parties unless the party is advised in writing of the desirability of separate representation and is given a reasonable opportunity to seek such representation. MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(2) (2002).

³⁸ See, e.g., Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: A Summary of the Work of Ethics 2000*, 15 Geo. J. Leg. Ethics 441, 459 (2002) (article by member of Ethics 2000 Commission describing, but not articulating the reasoning behind changes to former version of Model Rule 1.8(h)).

³⁹ See GEOFFREY HAZARD, JR. & WILLIAMS HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* Sec. 12.18 (3D ED. 2000).

⁴⁰ Institutional clients are more likely to have the resources available to be able to afford independent counsel, or may already have access to independent counsel, such as in an in-house legal department.

even greater degree for individuals of modest means, as opposed to wealthy individuals.⁴¹ Such persons have a very difficult time locating appropriate legal counsel in the first place,⁴² and then have a limited willingness and ability to expend funds for legal representation.⁴³ It would be a great stretch to believe that many such clients will be willing to expend the efforts needed to find a second attorney, and then pay the additional fees required to have the first attorney's proposed liability waiver reviewed.⁴⁴ And, in the case of the client group of particular concern here, those persons who cannot afford legal representation at all, the prospects of engaging a second attorney to review the proposed liability waiver by the principal attorney are close to nil. Thus, for purposes of the remaining discussion, the current state of the law in terms of prospective liability waivers will be treated as an effective ban for clients seeking pro bono legal representation.

Turning to possible reasons underlying the current limits on prospective liability waivers, the primary arguments offered in opposition to prospective liability waivers generally are threefold. First, it has been claimed that such waivers increase the likelihood of indolent or

⁴¹ See generally, *Symposium: Lawyering for the Middle Class*, 70 Fordham L. Rev. 623 (2001).

⁴² See, e.g., Steven K. Berenson, *Is it Time for Lawyer Profiles?*, 70 Fordham L. Rev. 645, 648-656 (2001); Gross, *supra* note __, at 817; Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Professional Should Do About It*, 25 U.C. Davis L. Rev. 283 (1992).

⁴³ See Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 Rutgers L.J. 105, 117-19; Bruce D. Sales, et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases*, 37 St. Louis U.L.J. 553 (1993).

⁴⁴ Additionally, Hazard and Hodes surmise that rarely, if ever, would an independent attorney advise a client to sign another attorney's proposed liability waiver. GEOFFREY HAZARD, JR. & WILLIAMS HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 12.18 (3D ED. 2000).

incompetent representation. Second, it has been contended that clients are unlikely to comprehend fully the implications of the waivers they sign. And third, it has been argued that liability waivers will increase public disdain for the legal profession beyond its already significant level. Each of these objections will be addressed briefly in turn.

According to commentary to the Restatement, liability waivers are disfavored because they “tend[] to undermine competent and diligent legal representation.”⁴⁵ Hazard and Hodes are in agreement.⁴⁶ Yet it is far from obvious that the prospect of a client suing a lawyer for malpractice improves the quality of legal representation. In the medical malpractice context, it has often been stated that the great expansion of medical malpractice claims in the last twenty years has resulted in physicians practicing “defensive medicine,” and that this fact has had a negative impact on the delivery of health care services to patients.⁴⁷ Though recent increases in the filing of legal malpractice claims have not risen to the level of those in the medical malpractice context,⁴⁸ some have similarly decried the practice of “defensive” law, and its

⁴⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Sec. 54, cmt. b.

⁴⁶ Geoffrey Hazard, Jr. & Williams Hodes, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* Sec. 1.8.901 (2D ED. 1990).

⁴⁷ See Timothy Cramm, Arthur J. Hartz, and Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 Wake Forest L. Rev. 699, 715 (2002); Marshall B. Kapp, *Medical Error Versus Malpractice*, 1 DePaul J. of Health Care L. 751, 752 (1997); Elisabeth Ryzen, *The National Practitioner Data Bank: Problems and Proposed Reforms*, 13 J. Legal Med. 409, 447-48 (1992).

⁴⁸ Berenson, *Lawyer Profiles*, *supra* note ___, at 673-74 (citing Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation - Predictions, Analysis, and Proposals for Change*, 30 St. Mary's L. J. 143 (1998)).

corresponding negative impact on lawyers and their clients.⁴⁹ Writing in another context, and relying on the excellent article on legal malpractice by Professor John Leubsdorf,⁵⁰ I contended that some of the results of the recent increase in legal malpractice litigation, such as electronic calendaring and conflict check systems, and general efforts to improve client relations, have been salutary.⁵¹ Nonetheless, the possibility of at least some negative consequences resulting from an increase in legal malpractice litigation on the practice of law must be acknowledged. At a minimum, it would seem that increases in malpractice claims generally, as well as claims filed against particular attorneys, would likely lead to a decrease in trust of clients by their attorneys.⁵² And, as has been discussed extensively in the context of client confidentiality, trust between attorney and client has been lauded as the foundation of a successful attorney/client

⁴⁹ See Gross, *supra* note ___, at 802 & n. 25 (quoting Waldman, *Lawyers Adopt New Strategies to Avoid Suits*, Wall St. J., Apr. 24, 1986, at 27, col. 3) (“[L]awyers are starting to practice much more defensively....The new precautions consume precious billing hours, and, ultimately, clients pay for them.”). See also John Leubsdorf, *Legal Malpractice*, 48 Rutgers L. Rev. 101, 139-140 (noting but rejecting this argument).

⁵⁰ *Id.* at 101. Professor Leubsdorf was the chief drafter of Chapter 4 of the Restatement (Third) of the Law Governing Lawyers, *id.* At 103 no. 11, which includes section 54 and the ban on prospective liability waivers.

⁵¹ Berenson, *Lawyer Profiles*, *supra* note ___, at 681.

⁵² Marshall Kapp notes this phenomenon in medical context. Kapp, *supra* note ___, at 759. Kapp further contends that fears of malpractice litigation cause doctors to attempt to keep from patients information indicating medical errors made by the physician. *Id.* at 757. Yet such non-disclosures not only decrease the likelihood of the error being corrected and a successful medical outcome achieved, but also increase the likelihood of malpractice litigation - as patients feel betrayed when they learn of doctors attempts to “cover up” errors. *Id.* at 758-59. It is easy to imagine a similar dynamic occurring in the legal practice context.

relationship.⁵³

Of course, the possibility of a malpractice action is not the only thing that might cause an attorney to represent a client competently and diligently. In fact, there are a number of other factors that would serve to encourage appropriate professional representation even in the event a malpractice waiver were permitted. Perhaps first and foremost amongst these is the general sense of obligation that lawyers incur when they undertake to assume stewardship over the many pressing and often crucially important matters that their clients entrust to them. Certainly there are “bad apple” lawyers who either fail to internalize such a sense of obligation, or become so bogged down by the demands of law practice that this sense of obligation is overrun. Nonetheless, the vast majority of lawyers take very seriously the awesome responsibilities created by legal representation, and do their best to live up to these responsibilities.

Second, even without the possibility of tort liability, incompetence and/or lack of diligence in handling a legal matter remain ethical violations in all American jurisdictions, and an attorney is subject to professional discipline for such conduct. Rule 1.1 of the Model Rules requires lawyers to provide competent representation to clients.⁵⁴ Rule 1.3 of the Model Rules requires lawyers to act with reasonable diligence and promptness representing clients.⁵⁵ And while it can be argued that many professional responsibility rules go either unenforced or under

⁵³ See, e.g. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6, cmt. 2(2002); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 & n.1 (1969); Monroe Freedman, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Albert Alschuler, *The Preservation of Client Confidences: Our Value Among Many or Categorical Imperative?*, 52 U. Colo. L. Rev. 349 (1981).

⁵⁴ MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1 (2002).

⁵⁵ MODEL RULES OF PROFESSIONAL CONDUCT R. 1.3 (2002).

enforced by disciplinary authorities,⁵⁶ in fact attorneys do get disciplined for at least serious incompetence or neglect of client matters.⁵⁷

A third set of controls of dilatory or incompetent conduct by attorneys comes from agency principles. Clients and attorneys have a form of principal/agent relationship, and clients can employ a variety of tactics commonly employed by principals to ensure that their agents properly serve the principal's interests.⁵⁸ Perhaps foremost amongst these are the client's ability to terminate the relationship,⁵⁹ and to control the fee to be paid for the lawyers' services. If an attorney does not properly perform her obligations to a client, the client can fire the attorney,⁶⁰ or can reduce or withhold entirely the fee that was to be paid for the attorneys' services. Of course, the effectiveness of these remedies are reduced to the extent that the client has paid a retainer fee in advance for the lawyers' services.⁶¹ Nonetheless, most state attorney disciplinary systems now provide for some sort of fee dispute arbitration mechanism,⁶² that would allow clients to recover unearned retainer fees, short of filing a malpractice suit against the attorney.

⁵⁶ See, e.g., Lisa C. Levin, *The Emperor's Clothes and Other Tales About the Standards For Employing Lawyer Discipline Sanctions*, 48 Am. U. L. Rev. 1, 7 n. 29 (1998).

⁵⁷ See e.g., Anita Bernstein, *Foreward: What Clients Want, What Lawyers Need*, 52 Emory L. J. 1053, 1056 & n.10 (2003).

⁵⁸ See, e.g. WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 21 (2d ed. 2001); Geoffrey Miller, *Some Agency Problems in Settlement*, 16 J. Legal Studies 189, 189 (1987).

⁵⁹ Gregory, *supra* note ___, at 14.

⁶⁰ See MODEL RULE OF PROFESSIONAL CONDUCT 1.16(a)(3) (2002).

⁶¹ And, of course, the non-payment remedy is completely unavailable in the pro bono cases that we are most concerned with here.

⁶² See, e.g., Cal. Bus. & Prof. Code Sec. 6200, et. seq.

A common strategy used in the effort to minimize principal/agent conflicts is to take steps to ensure the greatest possible alignment between the interests of the principle and those of the agent.⁶³ In theory at least, the contingent fee system, for example, achieves this result by ensuring that attorneys receive the greatest possible fee by achieving the largest possible judgment or settlement for the client.⁶⁴ Contingent fees aside, attorney and client interests are largely aligned to the extent that the attorney and client will both see benefits in maximizing client satisfaction with the outcome of legal representation. Thus, attorneys have incentives to do their best to achieve such outcomes, even in the absence of the possibility of a malpractice claim in the event of an unsatisfactory result.

Relatedly, reputational sanctions may be imposed against attorneys who do not properly pursue matters on behalf of clients, even if malpractice liability is waived.⁶⁵ It is often said that an attorney's reputation is her most valuable resource. Poor performance on behalf of clients will cause reputational harm to the attorney that will ultimately impact the attorney's earning capacity. It is true, perhaps, that the dissemination of information regarding improper practice might be faster if a malpractice suit were instituted. Nonetheless, it is highly questionable how efficiently information regarding malpractice litigation is disseminated throughout the population

⁶³ See, e.g., Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 Maryland L. Rev. 1400, 1424 (1998).

⁶⁴ Miller, *supra* note ___, at 189. Of course, critics of the contingent fee system have nonetheless raised issues of principal/agent conflicts in that context as well. *Id.* at 190. See also Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 U.C.L.A. L. Rev. 29 (1989).

⁶⁵ See generally, Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 525 (1994) (discussing "reputational markets" for lawyers).

of persons who might seek legal representation.⁶⁶ In any event, given that persons overwhelmingly rely on “word of mouth” as their first resource in locating an attorney,⁶⁷ the potential damaging effects to an attorney’s practice of negative comments about that attorneys’ previous performance should not be underestimated.

All of the above reasons suggest why malpractice waivers might not leave clients as vulnerable to poor legal representation as critics of such waivers suggest. In any event, as will be discussed in greater detail below,⁶⁸ there is also reason to believe that the risk to clients of substandard representation may be less in the pro bono context than in other contexts.

The next major reason commonly offered to explain the ban on prospective liability waivers is that clients are unlikely to understand fully exactly what it is that they are giving up when they waive the right to sue their attorneys for malpractice.⁶⁹ This problem may be exacerbated by the fact that the attorney seeking the waiver may have a disincentive to explain fully to the client the possible extent of potential malpractice liability.⁷⁰ Of course, the lawyer client relationship is fraught with potential conflicts of interest of this very sort. Most notably,

⁶⁶ See Berenson, *Lawyer Profiles*, *supra* note __, at 682. Similar questions have been raised about awareness of disciplinary sanctions imposed on lawyers by potential consumers of legal services, particularly in light of the secrecy that presently characterizes many attorney disciplinary systems. *Id.* at 678.

⁶⁷ *Id.* at 648-49.

⁶⁸ See *infra* Part V.

⁶⁹ GEOFFREY HAZARD, JR. & WILLIAMS HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* Sec. 12.18 (3D ED. 2000); *RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS* Sec. 54, Reporter’s Note, cmt. b.

⁷⁰ See Gross, *supra* note __, at 803-04.

every possible fee arrangement between attorney and client yields at least the potential for future conflicts on the ground that disputes over the fee arrangement may adversely impact the representation.⁷¹ Yet of course we allow attorney client relationships to go forward in the face of such risks because the benefits of such relationships outweigh the costs. Even in the context of limiting attorney liability, a variety of types of agreements short of complete liability waivers are permitted, even though clients are no more likely to understand the import of such agreements than they are to understand complete liability waivers. Thus, the different treatment of complete prospective waivers may not be supportable on grounds of incomprehensibility.

First, in the context of limiting attorney liability, although we do not permit prospective liability waivers, we do allow attorneys to settle existing malpractice claims. As discussed above, the policy against attorneys limiting liability to clients was originally construed as prohibiting attorneys even from settling clients' existing malpractice claims.⁷² Also as noted above, largely due to the numerous benefits of settlement, the policy has been construed to allow settlement of malpractice claims.⁷³ However, it is less than clear that clients will be in any better position to understand what they are giving up in settling an existing claim than in granting a prospective liability waiver.

Similarly, it was also controversial for a long period of time whether the policy against attorneys limiting liability to clients prohibited insertion of dispute arbitration provisions in

⁷¹ GEOFFREY HAZARD, JR. & WILLIAMS HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT Sec. 12.18 (3D ED. 2000).

⁷² See *supra* note __ and accompanying text.

⁷³ *Id.*

retainer agreements.⁷⁴ Again, given the advantages recognized in alternative dispute resolution, this form of liability limitation by lawyers has been countenanced by authorities,⁷⁵ despite questions about at least individual, as opposed to institutional clients' ability to understand fully the implications of arbitration agreements.⁷⁶ Perhaps even more questionably, though current authorities do not permit attorneys to prospectively limit their own liability for malpractice, such authorities do permit attorneys to limit various liability for the misdeeds of other lawyers who the particular lawyer practices with.⁷⁷ Of course, such provisions merely incorporate the increasingly popular arrangement of lawyers practicing as part of some sort of limited liability entity.⁷⁸ However, it is reasonable to assume that a client who engages a lawyer who practices as part of a firm, would expect that the resources for the entire firm would be available to satisfy a malpractice judgment against a particular lawyer.⁷⁹ And unlike agreements to settle malpractice

⁷⁴ GEOFFREY HAZARD, JR. & WILLIAMS HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* Sec. 12.18 n. 5 (3D ED. 2000).

⁷⁵ *Id.* See ABA MODEL RULES OF PROFESSIONAL CONDUCT R. 1.8, cmt. 14; RESTATEMENT (THIRD) LAW GOVERNING LAWYERS Sec. 54, cmt. b.

⁷⁶ See Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 Iowa L. Rev. 827, 848-49 (1999); Robert J. Kramer, Comment, *Attorney-Client Conundrum: Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 St. Mary's L. J. 909, 916-17 (2003).

⁷⁷ ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.8, cmt. 14. Ethical Consideration 6-6 similarly recognized that "a lawyer who is a stockholder in or is associated with a professional legal corporation may...limit his liability for malpractice of his associates in the corporation, but only the extent permitted by law." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 6-6.

⁷⁸ See RESTATEMENT (THIRD) LAW GOVERNING LAWYERS Sec. 58, cmt. c.

⁷⁹ GEOFFREY HAZARD, JR. & WILLIAMS HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* Sec. 12.18 n. 5 (3D ED. 1990).

claims or arbitration provisions, there is no disclosure or independent representation requirement with regard to this form of liability limitation.

Perhaps the most significant way in which attorneys presently can prospectively limit their liability to clients is by narrowing the scope of representation itself. Pursuant to Model Rule 1.2(c): “A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances” and with the informed consent of the client.⁸⁰ Given the fact that the cost of much legal representation is beyond the means of ordinary persons, along with the increasing competitiveness of the market for delivery of legal services, such limited legal representation, or unbundling, is becoming increasingly popular.⁸¹ Yet there are questions in this context as well about whether clients fully understand the consequences of agreeing to receive less than the full compliment of services provided in traditional, “full service” legal representation.⁸²

And, as suggested above, agreements involving legal fees are an area with the inherent potential for conflicts between attorney and client,⁸³ not to mention an infinite variety of potentially complex arrangements. Despite the fact that ordinary clients may be less than clear as to the nuances of some of the more complicated fee arrangements utilized, ethical rules only place minimal restrictions on the fee arrangements that attorneys and clients may agree upon.

⁸⁰ ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.2 (2002).

⁸¹ *See, e.g.,* Berenson, *Family Law Residency*, *supra* note ___, at 130-32.

⁸² *See, e.g.* Richard Zorza, *Discrete Task Representation, Ethics and the Big Picture: Toward a New Jurisprudence*, 40 *Family Ct. Rev.* 19, 19 (2002).

⁸³ *See supra* note ___, and accompanying text.

The Model Rules impose a general requirement of “reasonableness” on all attorneys’ fees,⁸⁴ prohibit contingent fees in criminal defense contexts,⁸⁵ and severely restrict contingent fees in the domestic relations context.⁸⁶ Particular jurisdictions impose additional substantive restrictions on contingent fees in particular contexts. For example, Florida caps the amount of the contingent fee an attorney can charge in a personal injury case based upon the amount of the recovery, and whether and at what stage the case is resolved.⁸⁷ Florida additionally requires attorneys to present clients with a rather lengthy and complicated “Statement of Client’s Rights for Contingency Fees,” the compulsory language of which is included in the jurisdiction’s rule on fees.⁸⁸ The point here is not go into great detail regarding the regulation of attorney’s fees, but simply to point out that many fee arrangements which are permissible, are no less complicated or difficult for clients to understand than prospective liability waivers, which are prohibited entirely.

A final justification offered in support of the ban on prospective liability waivers is that allowing waivers is likely to lower public opinion regarding lawyers generally.⁸⁹ However, it is hard to imagine public opinion regarding lawyers dropping any further from its current position.⁹⁰

⁸⁴ ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.5 (2002). Rule 1.5 also lays out eight factors to consider in determining whether or not a particular fee arrangement is reasonable. *Id.*

⁸⁵ ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.5(d)(1) (2002).

⁸⁶ ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.5(d)(2) (2002).

⁸⁷ R. Reg. Fla. Bar 1.5(B) (2004).

⁸⁸ R. Reg. Fla. Bar 1.5(F) (2004).

⁸⁹ Gross, *supra* note __, at 806-07.

⁹⁰ Rhode, *In the Interests*, *supra* note __, at 3-4. In a widely cited Gallup poll, lawyers barely edged out used car salesman toward the bottom of a ranking of professions in terms of

Given that most malpractice litigation goes on well beyond the view of most persons, it is hard to see how allowing more or less such litigation would have much of an impact on public views. In fact, given the substance of the claims in most malpractice litigation, it seems just as likely that public views about lawyers would be further eroded by greater knowledge of the substance of malpractice claims, than by allowing prospective waivers of such claims.

Despite the rather reflexive support for the ban on prospective liability waivers demonstrated in the literature, at least one scholar has publicly questioned the ban. In a 1986 article in the *Kentucky Law Journal*, Professor Leonard Gross argues against the ban on prospective liability waivers on grounds of economic efficiency.⁹¹ Gross starts from the basic position that in general, free contract regimes are economically efficient.⁹² In other words, if lawyers and clients were permitted to bargain over, and agree upon prospective liability waivers, some clients would gladly agree to such waivers in exchange for, say, a reduction in fees.⁹³ On the other hand, some attorneys would gladly agree to reduce their fees in exchange for the benefits to them resulting from a liability waiver.⁹⁴ Provided that the combined benefit to attorney and client of a given agreement outweighs any transaction costs incurred in the process

honesty and integrity. *Id.* at 4 & n.4.

⁹¹ Gross, *supra* note __, at 793.

⁹² *Id.* at 797-98.

⁹³ *Id.* at 799.

⁹⁴ *Id.* at 803. Such benefits might be limited to a decreased change of malpractice liability in the particular case, or, if enough clients agree to waivers, the lawyer might enjoy a reduction in their malpractice liability premium along with other possible benefits. *Id.*

of reaching agreement, the result is economically efficient, i.e., all involved are better off.⁹⁵

There are two primary categories of possible transaction costs that Gross identifies as possibly outweighing the benefits of allowing liability waivers. First, clients may lack the information necessary to understand what they are waiving, and attorneys may lack the incentive to provide such information.⁹⁶ Second, malpractice waivers, by reducing malpractice litigation, may deprive consumers of a source of potentially valuable information in the process of selecting attorneys, possibly resulting in an inefficient distribution of legal services.⁹⁷ However, rather than recommending a ban of liability waivers entirely, Gross concludes that these two categories of potential transaction costs can be ameliorated to the point where the benefits of allowing attorneys and clients to bargain freely with regard to liability waivers will outweigh the costs.⁹⁸ For example, with regard to the first category of transaction costs, what Gross refers to as “impacted information” problems,⁹⁹ Gross contends that requiring waivers to be in writing can solve some of the information imbalances between attorneys and clients.¹⁰⁰ And with regard to the second category of transaction costs noted, Gross contends that any informational

⁹⁵ *Id.* at 798.

⁹⁶ *Id.* at 803-04.

⁹⁷ *Id.* at 812.

⁹⁸ *Id.* at 838-39.

⁹⁹ *Id.* at 803. Impacted information costs occur when one party to a transaction controls most of the relevant information, but lacks incentive to share that information with the other party. *Id.*

¹⁰⁰ *Id.* at 804. Writings may also have the salutary effect of causing clients to reflect on the nature of their agreements with their attorneys to a greater extent than would normally be the case. *Id.*

deficiencies in the market for attorneys services can be compensated for by steps such as further opening disciplinary procedures, and providing additional sources of information about attorney performance.¹⁰¹

Gross' thoughtful analysis may be somewhat beside the point for the particular context that we are most concerned about here, pro bono legal representation. That is because the primary medium of exchange that lawyers and clients may bargain with in conjunction with discussion of liability waivers, namely attorneys' fees, are not a consideration in the pro bono context. Nonetheless, Gross' analysis does help to undermine the traditional reflexive position against liability waivers. Ultimately, the goal here is not to determine whether liability waivers should be permitted across the board. However, when the arguments in this part of the article are considered, along with the special features present in the pro bono context that will be discussed in Part V, *infra*, it should be concluded that liability waivers should at least be permitted in the pro bono context.

III. Unmet Legal Needs of the Poor

There is little if any dispute that the vast majority of the needs for legal representation of poor people in this country go unmet. The most comprehensive study undertaken in recent years regarding civil legal needs in America was the 1994 Comprehensive Legal Needs Study conducted by the American Bar Association.¹⁰² That study concluded that approximately 80% of

¹⁰¹ *Id.* at 818-23.

¹⁰² See American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans - Major Findings from the Comprehensive Legal Needs Study* (1994) (available at <<http://www.abanet.org/legalservices/downloads/sclaid/legalneedsstudy.pdf>>, visited 5/24/04). See also, Linda F. Smith, *The Potential of Pro Bono*, 72 U.M.K.C. L. Rev. 447, 450 (2004).

poor Americans do not have the assistance of an attorney when they are faced with a serious situation where the aid of an attorney might make a difference.¹⁰³ Though the passage of time may call into question the exact ongoing validity of the 80% figure, the Legal Services Corporation (LSC), the federal agency most directly charged with responsibility for the delivery of legal services to poor people, continues to rely on the results of this survey as providing the best information available regarding the need for legal services among America's poor.¹⁰⁴ Moreover, numerous similar if smaller scaled studies have reached substantially the same results.¹⁰⁵ It thus seems relatively indisputable that efforts to increase resources available to meet the legal needs of poor persons should be viewed favorably.

Indeed, wide ranging efforts have been undertaken in recent years to increase access to justice on behalf of poor Americans. Some of these efforts have been initiated by courts themselves. Steps taken by courts to increase access to justice include simplified court forms and instructions, self-help centers both in courthouses and elsewhere, and increased efforts by judges and other court personnel to support the efforts of self-represented litigants to achieve fair

¹⁰³ See Legal Services Corporation, *Serving the Civil Legal Needs of Low Income Americans: A Special Report to Congress* 13 (April 30, 2000).

¹⁰⁴ See Legal Services Corporation, *State Planning and Reconfiguration: Special Report to Congress* 3 & N. 9 (September 2001) (noting that legal needs surveys conducted by several states subsequent to the ABA's Comprehensive Legal Needs arrived at similar results, and that requests by the LSC to Congress for funding to conduct a new national legal needs survey had not been approved). See also Deborah L. Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785, 1785 n.1 (2001) (hereinafter, Rhode, *Access to Justice*) (providing additional support for the 80% figure).

¹⁰⁵ See Smith, *supra* note __, at 450 n.23.

outcomes in court matters.¹⁰⁶ Additionally, bar associations, law school clinics, and legal services offices have all offered self-help clinics to provide instruction and information to self represented litigants.¹⁰⁷ The market for legal services is beginning to provide,¹⁰⁸ and both scholars,¹⁰⁹ and professional entities,¹¹⁰ have advocated for increased provision of legal services by non-lawyers as a lower cost alternative to representation by attorneys. Increases in alternative dispute resolution are also seen as a possible means to increase access to fair legal outcomes on the part of low income parties.¹¹¹ Finally, virtually all serious considerations of efforts to increase access to justice for poor Americans advocate for efforts to increase pro bono representation by lawyers.¹¹² While efforts to increase litigants' ability to use the court system effectively without the assistance of lawyers are both salutary and necessary given the limitations on the availability of full service legal representation, it is often the case that such assistance

¹⁰⁶ See, e.g., Berenson, *Family Law Residency*, *supra* note __, at 123-27; Rhode, *Access to Justice*, *supra* note __, at 1804-05.

¹⁰⁷ Berenson, *Family Law Residency*, *supra* note __, at 127; Rhode, *Access to Justice*, *supra* note __, at 1816.

¹⁰⁸ Berenson, *Family Law Residency*, *supra* note __, at 128; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 *Geo. J. Legal Ethics* 209, 213-14 (1990).

¹⁰⁹ See *id.*; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 *N.Y.U. Rev. of L. & Soc. Change* 701 (1996).

¹¹⁰ ABA Comm. On Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations* (1995); Cal. State Bar, *Comm'n on Legal Technician's Report* (1990).

¹¹¹ Berenson, *Family Law Residency*, *supra* note __, at 130; Rhode, *Access to Justice*, *supra* note __, at 1816.

¹¹² Berenson, *Family Law Residency*, *supra* note __, at 133; Rhode, *Access to Justice*, *supra* note __, at 1819.

presents a next best alternative to the services of a lawyer. Indeed, scholars such as Professor Russell Engler have demonstrated convincingly that ordinary persons fare far worse in their encounters with the court system when they lack the assistance of a lawyer, than when they have such assistance available.¹¹³

Thus, given the nearly universally held view that efforts to increase pro bono legal representation of poor Americans would be a positive thing, it makes sense to consider whether allowing for prospective liability waivers in pro bono cases would be likely to lead to an increase in pro bono representation. That will be the task of the next section of this article. However, before proceeding to that task, it is worth taking a moment to address the objections of a couple of scholars who have forcefully argued against expanding the provision of pro bono legal services. In their thoughtful and effectively argued review of well known litigator Arthur Liman's autobiography, University of Texas Law Professors Charles Silver and Frank B. Cross challenge the advisability of the provision of pro bono legal services.¹¹⁴ The heart of Silver and Cross' argument is the simple claim that poor people need other things, such as food, clothing,

¹¹³ See, e.g., Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators and Clerks*, 67 Fordham L. Rev. 1987 (1999).

¹¹⁴ See Charles Silver and Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 Yale L.J. 1443 (2000) (in addition to questioning the morality of pro bono legal service, Silver and Cross' review essay provides both a spirited defense of private sector, for profit legal practice, and a critique of the notion that public service represents a "higher calling" than private sector, for profit work). Note that other scholars have argued against mandatory pro bono requirements. See, e.g., Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 Md. L. Rev. 78 (1990); Jonathon R. Macey, *Mandatory Pro Bono: comfort for the Poor or Welfare for the Rich?*, 77 Cornell L. Rev. 1115 (1992). However, Silver and Cross seem to go the farthest in arguing against even the encouragement of increased voluntary pro bono legal representation, as opposed to other forms of charity by lawyers. Silver and Cross, *supra* note ___, at 1478, 1483.

transportation or medical care, more than they need legal services.¹¹⁵ Thus, most poor persons would prefer a direct cash payment to receipt of the equivalent value in legal services, because the recipient could put the funds towards needs the recipient views as being more significant than the need for legal services.¹¹⁶ In addition to being more economically efficient than direct provision of legal services, Silver and Cross contend that their approach shows greater respect for the autonomy of the poor recipients of assistance, because the recipients decide for themselves how it serves their interests to use the resources provided.¹¹⁷

Though Silver and Cross' position has appeal as a theoretical matter, it falters when confronted with a variety of realities regarding persons' charitable giving patterns. Silver and Cross treat charitable activity as if it were a zero-sum game - every dollar's worth of pro bono legal services provided is a dollar less in cash that could be contributed to the poor, and visa versa.¹¹⁸ However, studies show that people who donate services in addition to money, actually tend to donate greater amounts of money than people who donate only money.¹¹⁹ Moreover, the

¹¹⁵ *Id.* at 1383.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1487. Of course, the latter argument can be made with regard to all forms of "in kind," as opposed to direct cash assistance programs. See, e.g., Lawrence A. Frolik and Alison McChrystal Barnes, *ELDER LAW: CASES AND MATERIALS* 22-26 (3d ed., 2003).

¹¹⁸ Silver and Cross, *supra* note ___, at 1486.

¹¹⁹ Independent Sector, *Giving and Volunteering in the United States: Key Findings* (2001) (available at <<<http://www.independentsector.org/PDFs/GV01keyfind.pdf>>>, visited 6/2/04). According to the 2001 national survey conducted by Independent Sector, a nonprofit, nonpartisan coalition of more than 700 national organizations, foundations, and corporate philanthropy programs, the average contribution of all households that donated money to charity was \$1,620. *Id.* However, that figure rose to \$2,295 among households that volunteered services in addition to donating money alone. *Id.* This effect was also demonstrated in Maryland's recent

total amount of cash that persons are willing to donate to charity seems to be relatively inelastic. For example, the proportion of wealth donated to charity actually decreases as wealth levels rise.¹²⁰ And, while American wealth increased significantly during the 30 years between 1970 and 2000, charitable contributions were relatively flat, and may have even decreased over that period.¹²¹ For these reasons, reductions in pro bono legal services, rather than leading to an increase in cash donations to charity, are likely to lead to a net decrease in cash and in-kind charitable contributions taken as a whole. As Silver and Cross demonstrate a sincere interest in seeing an increase in giving as a whole, this result should be disturbing to them.

This effect is arguably supported by the Florida Bar's approach to regulating the delivery of pro bono legal services. Though no American jurisdiction has taken the frequently suggested step of mandating pro bono legal service,¹²² Florida was the first to take steps in this direction by mandating that attorneys report annually whether they have made the suggested minimum

study of attorney pro bono service and giving. *See* Administrative Office of the Courts, Current Status of Pro Bono Service Among Maryland Lawyers, Year 2000 20 (hereinafter, "Maryland Report") (available at <<http://www.courts.state.md.us/probonoreport_2002.pdf>>, visited June 9, 2004) ("lawyers who participated in activities for improving the law and who made financial contributions to organizations that provide legal services to people of limited means rendered significantly more pro bono [service] hours.")

¹²⁰ Council of Economic Advisors, Philanthropy in the American Economy, Executive Summary 7 (1999) ("Among those with positive net worth, families in the 20-40 percent range of the wealth distribution gave 1 percent of their wealth to charitable organizations, while the wealthiest gave just 0.4 percent.") *Accord* Rhode, *Pro Bono in Principle*, *supra* note __, at 417.

¹²¹ Claire Gaudiani, THE GREATER GOOD: HOW PHILANTHROPY DRIVES THE AMERICAN ECONOMY AND CAN SAVE CAPITALISM 161-62, 164 (2003).

¹²² *See* Rhode, *Pro Bono in Principle*, *supra* note __, at 427.

contribution of 20 hours of legal service, or a \$350 payment to a legal aid organization.¹²³ By simple mathematical calculation, one might conclude that the drafters of the Rule see an hour's worth of pro bono legal services as being worth an approximately \$17.50 cash payment to a poor person. Indeed, Silver and Cross appear to suggest as much.¹²⁴ However, such reasoning is fallacious for at least a couple of reasons. First, the cash payment called for under the Rule does not go directly to a poor person, but rather to a legal aid organization that in turn will provide legal services to poor people. Thus, rather than reflecting the value to a poor person of an hour's worth of legal services, the \$17.50 figure would more accurately be described as reflecting the marginal cost to a legal services office of providing an additional hour of legal services.¹²⁵ Moreover, the relatively low dollar figure of the contribution required as an alternative to pro bono service is more likely a reflection of the above-described limits on individuals' willingness

¹²³ R. Reg. Fla. Bar 4-6.1 (2004). Maryland and Nevada now also require attorneys to report on their pro bono activities. *See* Md. Rule 16-903; Nev. Sup. Ct. Rule 191.

¹²⁴ Silver and Cross, *supra* note ___, at 1485.

¹²⁵ Silver and Cross point out that since most attorneys bill their time at greater than \$17.50 per hour, a rational attorney would be better off spending an hour working for a private client, paying the \$17.50 to the bar, and then keeping the balance of her fee above the \$17.50 amount. *Id.* From a purely economic perspective, this argument makes sense. Indeed some advocates for increased legal services for the poor have argued for something like a tax on revenues from paid legal services, with the proceeds going to legal aid organizations, as a more efficient alternative to mandatory pro bono service by individual attorneys. *See* Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 Fordham L. Rev. 1879, 1886-87 (1999). However, such a program would fail to provide the benefits to individual attorneys from pro bono service discussed *infra* at notes ___-___ and accompanying text. Additionally, such proposals also fail to provide for Professor Steven Lubet's now well known "Eleventh Floor Principle," which notes the benefits to the legal system, and access to justice for poor people when legal services are delivered to such persons by highly regarded private practitioners, such as Chicago's Albert Jenner, as opposed to often lowly regarded legal aid lawyers. *See* Steven Lubet, *Professionalism Revisited*, 42 Emory L.J. 197, 204 (1993).

to make financial charitable contributions,¹²⁶ than a reflection of the value ascribed by poor person's to an hour's worth of legal services. Thus, it might be said that attorneys are viewed as being indifferent between contributing an hour's worth of legal services, or making a cash donation, at the \$17.50 level.

Silver and Cross' argument in favor of shifting resources from delivery of pro bono legal services to direct cash contributions to poor persons also seems to assume that donors are completely indifferent as to the means by which their charitable contributions are delivered. In other words, if one were to assume for the sake of argument, that cash payments to poor people really do benefit them more than providing pro bono legal services, then lawyers should prefer to donate cash rather than pro bono legal services.¹²⁷ However, for this to be true, person would need to be altruistic in the purest sense of the word.¹²⁸ Such persons could have no other objective in donating money or services than providing the maximum benefit to the recipient of such charity. But virtually no theoretical perspective accepts this notion of pure charity - all of a wide range of theoretical accounts of altruism attribute to at least some measure of self-interest to the donor of charitable contributions.¹²⁹ Indeed, the economic perspective that much of Silver and Cross' analysis is based upon starts with the fundamental assumption that rational persons

¹²⁶ See *supra* notes ___-___ and accompanying text.

¹²⁷ For example, by working an extra hour for paying client, and then donating the fee earned to charity. Silver and Cross, *supra* note ___, at 1483.

¹²⁸ See Rhode, *Pro Bono in Principle*, *supra* note ___, at 414-15.

¹²⁹ *Id.* at 415. See also Guadiani, *supra* note ___, at 145.

operate in their own self-interest.¹³⁰ And while it is likely true that persons derive a certain amount of psychic benefit from writing a check to their favorite charity, it is also likely the case that many lawyers derive even greater benefits from the pro bono legal services they perform. In any event, it seems that beyond a certain level of financial giving, the marginal benefit to the donor of another dollar given to charity would seem very likely to be less than the marginal benefit to the donor of the contribution of a dollar's worth of legal services. In such a circumstance, encouraging financial contributions, as opposed to pro bono legal service, is also unlikely to yield a net gain in total charitable contributions.

Silver and Cross question common arguments that lawyers themselves benefit from the pro bono legal services they perform. First, it is argued that lawyers' lives will be enriched by pro bono service as a result of exposure to persons of greatly different backgrounds, circumstances and experiences from the lawyer's own.¹³¹ Second, it is contended that lawyers benefit from pro bono in terms of the development of legal practice skills and experience.¹³² The latter may be particularly true for new lawyers, who are less likely to be given substantial

¹³⁰ Rhode, *supra* note __, at 415. See also Gross, *supra* note __, at 799.

¹³¹ Note that this justification is different from one that Silver and Cross attribute to Deborah Rhode, namely that exposure to the problems of the poor will make lawyers more likely to extend future efforts to reforming laws, the legal system, and other public programs in ways that are more sensitive to the needs and concerns of poor people. See Silver and Cross, *supra* note __, at 1492 (citing Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415, 2420 (1999)). In addition to questioning whether this result will in fact follow from lawyers' pro bono experiences, Silver and Cross point out that the question of whether giving people experiences will cause them to move in one direction or the other along the political spectrum from conservative to liberal is a good thing is at least contestable. *Id.* at 1492-93.

¹³² Rhode, *Pro Bono in Principle*, *supra* note __, at 431.

responsibility for cases early in their careers, and lawyers whose work for paying clients does not expose them to the range of skills and issues that is presented by pro bono work.¹³³ In response, Silver and Cross contend that if the benefits to individual lawyers of performing pro bono work were so clear, lawyers would be falling all over themselves to do pro bono work.¹³⁴ Yet they point to statistics that will be discussed in greater detail in the next part of this article showing relatively low levels of pro bono participation by lawyers as evidence to the contrary.¹³⁵ Silver and Cross' point seems more apropos to the debate over mandatory pro bono requirements. Certainly, it does seem at least somewhat problematic to compel lawyers to do pro bono work because it is good for them, when many lawyers themselves don't view the situation as such.¹³⁶ But the question of mandatory pro bono is not the issue here. Rather, the question here is whether, for attorneys who do see such benefits to themselves in performing pro bono work as those identified above, one possible impediment to them performing such work, the ban on prospective liability waivers, should be removed. It is quite likely that attorneys who do see such benefits to themselves in contributing pro bono legal services are more likely to do so, as opposed to making cash contributions to the poor, which do not provide them with such benefits. Thus, removal of the ban on liability waivers might lead to a net increase in charitable contributions, whether in-kind or in cash, to the poor, which is a result Silver and Cross would

¹³³ *Id.*

¹³⁴ Silver and Cross, *supra* note __, at 1488.

¹³⁵ *Id.*

¹³⁶ However, other benefits from mandatory pro bono may outweigh this particular problem.

countenance.

In addition to benefits to the individual attorney who perform pro bono services, there are benefits to third parties and society at large that result from the delivery of pro bono legal services to poor people that would not be served by direct cash contributions to such people. One such benefit would be to the image of the bar itself.¹³⁷ As pointed out above, the bar's image is sorely in need of repair, and the results of an improved image would likely benefit clients and society as a whole, as well as lawyers.¹³⁸ Silver and Cross question this argument, pointing out that much pro bono work is done on behalf of unpopular clients and causes, and is therefore as likely to further depress public views of lawyers as it is to improve it.¹³⁹ However, when asked what it is about lawyers that they do not like, members of the public consistently put greed at the top of their list,¹⁴⁰ rather than anything about the nature of lawyers' engagements. Certainly the increased provision of legal services to the poor would help reduce public perception of lawyers as greedy.¹⁴¹ Indeed, when polled, members of the public clearly indicate

¹³⁷ Rhode, *Pro Bono*, *supra* note __, at 432.

¹³⁸ See *supra* notes __-__ and accompanying text.

¹³⁹ Silver and Cross, *supra* note __, at 1488-89.

¹⁴⁰ See *supra* note __, and accompanying text.

¹⁴¹ It is true that the increased financial contributions to the poor that Silver and Cross call for would help counter lawyers' image as being greedy as well. Silver and Cross, *supra* note __, at 1489-90. However, for reasons outlined earlier, it is contended here that a combination of pro bono services and direct financial contributions to the poor is likely to yield a greater net contribution than efforts to channel contributions into purely financial form. See *supra* notes __-__ and accompanying text.

that increased provision of free legal services would improve their impression of lawyers.¹⁴²

Additionally, the provision of more pro bono legal services to poor people would have salutary effects for our justice system as a whole. The American legal system, as an aspect of the country's democratic system of governance, as well as an institution that relies heavily on the input of the litigants who participate within it, requires the effective participation of all economic strata of the populace in order to maintain both legitimacy and efficacy in the dispensation of justice.¹⁴³ If the voices of the poor are not heard in the legal decision making process, the result will be both unfair to the poor themselves, and will result in a reduction of the effectiveness of the system even for those whose access is not barred.¹⁴⁴ While the availability of self-representation may mean that access is not barred to the poor in an absolute sense, it is quite clear that access to justice often requires attorney representation in our adversary system.¹⁴⁵ Additionally, the assistance of counsel is often required in order to articulate the claims of poor litigants in a manner that will be accounted for properly by judges and other participants in the system.¹⁴⁶ Therefore, increase in pro bono representation of poor people will result in greater

¹⁴² Rhode, *Pro Bono in Principle*, *supra* note __, at 432 & n. 38; Deborah L. Rhode, *Access to Justice*, 17 *Geo. J. Leg. Ethics* 369, 374 (2004).

¹⁴³ *See* Rhode, *Pro Bono in Principle*, *supra* note __, at 431.

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g. id.*; Russell Engler, *And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987 (1999).

¹⁴⁶ *Id.*

access to justice for them, and a better justice system for everyone else as well.¹⁴⁷

Another commonly advanced justification in support of pro bono legal representation is the claim that lawyers have a monopoly on the practice of law.¹⁴⁸ Silver and Cross dispute this claim, pointing out that at least in the strict economic sense, there is no monopoly on the delivery of legal services.¹⁴⁹ And, it does seem that the practice of law has become increasingly competitive in recent years.¹⁵⁰ However, even if a monopoly in the strict sense of the word does not exist, it is indisputable that there remain both barriers to entry into the legal field,¹⁵¹ and anti-

¹⁴⁷ Professor David Luban offers a similar justification for the provision of pro bono legal services. Luban argues that law is a public good, access to which often requires the assistance to a lawyer. See David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. Leg. Educ. 58, 63 (1999). Silver and Cross take issue with this characterization, arguing that persons can and frequently do access the law without the assistance of an attorney, such as every time a person buys something in a store. Silver and Cross, *supra* note ___, at 1491. While Silver and Cross are correct that effective use of the law often does not require assistance of an attorney, it is equally true that with regard to some of the most important legal issues that one might face in a lifetime (e.g., divorce, personal injury, eviction, inheritance, business incorporation) the difference in the quality of a person's access to law depending on whether or not access to the services of an attorney are available may be striking. See Engler, *supra* note ___, at 1987. Thus, Luban's argument deserves more weight than Silver and Cross accord to it.

¹⁴⁸ Silver and Cross, *supra* note ___, at 1490.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Such barriers include, but are not limited to, three years at an accredited school, the cost of which is beyond the means of many, passage of a bar examination, and restrictions on multi jurisdictional practice. See Benjamin H. Barton, *Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulations*, 33 Az. St. L. J. 429, 435 (2001); Jennifer G. Brown, *Rethinking "the Practice of Law,"* 41 Emory L. J. 451, 453 (1992).

competitive rules,¹⁵² that limit the supply of legal services available to consumers. Simple economic theory compels the conclusion that such limitations must have the effect of driving up the price of legal services at least to some degree.¹⁵³ This, it is not unreasonable to ask something in return from lawyers in exchange for the premium they enjoy as a result of the current regulatory regime regarding the practice of law.¹⁵⁴

In the end, it is worth observing that at least at the rhetorical level, support of pro bono legal representation has been a core commitment of the American legal profession for decades.¹⁵⁵ Thus, it would seem that the burden of proof should be upon those who would abandon the commitment. For reasons stated above, Silver and Cross have failed to carry that burden. Therefore, it is the conclusion here that efforts to expand the delivery of pro bono services to poor persons are a worthwhile endeavor. The next part of this article will explore whether allowing prospective liability waivers in pro bono cases might have that effect.

IV. Liability Waivers and Pro Bono Legal Representation

It certainly appears to be the case that when it comes to pro bono legal representation, the

¹⁵² The most obvious of which are restrictions on the unauthorized practice of law. *See* Barton, *supra* note __, at 435; Brown *supra* note __ at 453. Deborah Rhode points out that there is virtually no academic support for such restrictions, and that even bar entities that have studied the issue have failed to come up with adequate justifications. *See* Rhode, IN THE INTERESTS, at 135 n.48 (citing studies). Nonetheless, the ABA recently appointed a task force to come up with a model definition of the practice of law. *See* ABA, Report of the Task Force on the Model Definition of the Practice of Law (2003) (available at <<http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf>>, visited May 28, 2004.

¹⁵³ Barton, *supra* note __, at 441-42.

¹⁵⁴ *See* Rhode, *Pro Bono in Principle*, *supra* note __, at 432.

¹⁵⁵ *See* Rhode *Pro Bono in Principle*, *supra* note __, at 424-28.

bar's performance fails to live up to its rhetoric. Conservatively, it would appear that more than half of the attorneys in the United States do no pro bono work at all on a regular basis.¹⁵⁶ Of those lawyers that do at least some pro bono work, it would appear that a relatively small percentage live up to the annual contribution of 50 hours recommended by the ABA's Model Rules.¹⁵⁷ Moreover, reports by lawyers may well overstate the actual amount of pro bono legal service performed. Natural tendencies to embellish one's own good works aside, attorneys often employ differing interpretations of what work should or should not be considered to be pro bono. Some lawyers consider providing free assistance to a friend or close relative to be pro bono activity, regardless of the recipient's means.¹⁵⁸ Others include work that was originally intended to be fee generating, but turned out not to be so because the client did not pay the agreed upon

¹⁵⁶ In her exhaustive review of the studies that had been done regarding pro bono participation as of the time of the writing of her recent article on pro bono legal services, Deborah Rhode pointed out that New York state presented the highest level of pro bono participation, at 46% of its attorneys, where most states' surveys demonstrated pro bono participation rates in the 15-18% range. Rhode, *Pro Bono in Principle*, *supra* note __, at 429 & n.32. Two states have issued new studies regarding pro bono legal services since the writing of Professor Rhode's article. First, New York issued a follow up study to its 1997 study that was cited by Professor Rhode. See New York State Unified Court System, *The Future of Pro Bono in New York: Report on the 2002 Pro Bono Activities of the New York State Bar* (2004) (hereinafter, "New York Report") (available at <<<http://www.nycourts.gov/reports/probono>>>, visited June 9, 2004). The more recent report indicated that the overall level of participation of New York attorneys in pro bono activities remained virtually unchanged, at 46%. *Id.* at 9. Second, Maryland also issued a report concluding that 48% of its lawyers performed some pro bono activity in 2002. See Maryland Report, *supra* note __, at 12. The Maryland Report was issued as a follow up to that jurisdiction's adoption of a mandatory reporting rule regarding pro bono service. See *supra* note __.

¹⁵⁷ See Model Rule 6.1. According to the Maryland Report, only approximately 18% of the members of the Maryland Bar met the 50 hour recommendation. Maryland Report, *supra* note __, at 13. And, recall that Maryland lawyers' overall participation in pro bono activities is among the highest in the nation. See *supra* note __.

¹⁵⁸ See Rhode, *Pro Bono in Principle*, *supra* note __, at 429.

fee. Most definitions of pro bono work adopted by bar authorities do not include the above-mentioned categories of services. However, many may include legal services performed for not-for-profit, civic, and/or religious institutions such as museums, hospitals, churches or educational institutions.¹⁵⁹ Even more would include legal services performed for such organizations if the primary objective of the organization is to serve the needs of persons of limited means.¹⁶⁰ All, of course, include the direct provision of legal services to poor people within their definition of pro bono legal services.¹⁶¹

The concern here is predominantly with the direct delivery of legal services to poor people. When other types of pro bono service are excluded, the statistics relating to the delivery of free legal services to poor people seem even more modest. For example, according to the

¹⁵⁹ Indeed, the Maryland Report included this category in its definition of pro bono activities, provided that “payment of the standard legal fees would significantly deplete the organization’s economic resources or would otherwise be inappropriate.” *See* Maryland Report, *supra* note __, at 15-16.

¹⁶⁰ Both the Maryland and New York Reports included a category such as this in their definitions of pro bono activities. *See id.* At 15; New York Report, *supra* note __, at 1.

¹⁶¹ The approach taken by the ABA’s Model Rule 6.1, is to suggest that “substantial majority of the recommended 50 hours per year of pro bono legal services to be provided be provided either directly to persons of limited means, or to organizations designed primarily to address the needs of such persons. *See* Model Rule 6.1(a). However, the balance of recommended pro bono legal services may be provided by either: “1) delivery of legal services at no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate; 2) delivery of legal services at a substantially reduced fee to persons of limited means; or 3) participation in activities for improving the law, the legal system or the legal profession.” *Id.* at 6.1(b). Similarly, the New York Report included in its classification of pro bono service “activities relating to improving the administration of justice....” New York Report, *supra* note __, at 1.

Maryland Report, only half of those who did any pro bono service actually provided serviced directly to poor clients.¹⁶² Similarly, according to the New York study, 34% of those surveyed indicated that they had performed free legal services for poor persons in a civil matter.¹⁶³

The New York Report also polled lawyers who did not do any pro bono work regarding the reasons for that fact. The most frequently cited reason for not doing pro bono work was that the respondent was concerned that the work would demand more time and resources than the person could provide.¹⁶⁴ The second most frequently cited reason for not doing pro bono work was that the respondent did not have time to volunteer.¹⁶⁵ The next most frequently cited reason was the respondent's lack of expertise in legal areas involving poor persons.¹⁶⁶ The fourth reason given was that the respondent did not have the office support staff to perform pro bono legal work.¹⁶⁷ The fifth most frequently cited reason for respondents' failure to perform pro bono work was that the respondent did not have malpractice insurance or that the respondent's malpractice policy did not cover pro bono representation.¹⁶⁸ Indeed, 46% of the respondents gave this as a reason for their non-performance of pro bono work. Particularly given the overlap

¹⁶² Maryland Report, *supra* note ___, at 16.

¹⁶³ New York Report, *supra* note ___, at 8. Another 10% indicated that they had performed legal services for a poor person in a criminal matter. *Id.*

¹⁶⁴ *Id.* at 18. Approximately 62% of the respondents who did no pro bono work gave this response. *Id.*

¹⁶⁵ *Id.* Slightly less than 62% offered this response. *Id.*

¹⁶⁶ *Id.* Approximately 59% gave this response. *Id.*

¹⁶⁷ *Id.* Almost 56% responded in this matter. *Id.*

¹⁶⁸ *Id.*

between the first, second and fourth most frequently cited reasons for failure to perform pro bono work, it is quite evident that prospect of an uncovered malpractice settlement or award is one of the most prominent reasons why more pro bono legal work is not performed on behalf of indigent persons. Thus, it seems equally clear that allowing prospective liability waivers in pro bono cases would have at least some impact in increasing the amount of such services available.

Professor Deborah Rhode obtained similar results in a recent empirical study she conducted regarding lawyers' pro bono activities. Lack of malpractice insurance was one of the more highly rated (on a scale of 1-5) factors lawyers gave as limiting their participation in pro bono activities.¹⁶⁹ Moreover, the focus of Rhode's study likely caused an understatement of the impact of the threat of a non-conveyed malpractice judgment or settlement on attorneys' willingness to perform pro bono work. Rhode's study was based upon a sample that included three categories of lawyers. The first was the graduates from six elite law schools,¹⁷⁰ during the period of 1993 through 1997.¹⁷¹ The second included individuals or law firms that received the ABA award for outstanding pro bono service between 1993 and 2000.¹⁷² The third category included firms consistently listed by the *American Lawyer* during the period 1993-2000 as among the nation's top 100 firms in terms of gross revenue.¹⁷³ Without getting into the reasons

¹⁶⁹ See Rhode, *Pro Bono in Principle*, *supra* note ___, at 447-48.

¹⁷⁰ The law schools whose graduates were surveyed were Yale, the Universities of Chicago and Pennsylvania, Tulane, Northwestern, and Fordham. *Id.* at 443.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

why Rhode constructed her survey sample as she did, it is quite obvious that the respondents to her survey were more likely to possess malpractice insurance coverage than the typical member of the bar,¹⁷⁴ and therefore, the absence of malpractice insurance would be likely to appear far less frequently as a reason for not doing pro bono work than it would among a more random sample of lawyers.

It is also worth focusing for a moment on the question of which lawyers perform the greatest amount of pro bono work. First, the vast majority of pro bono legal service is performed by lawyers who are employed in the private practice of law. According to the New York Report, 78% of attorneys who performed some pro bono service were engaged in private practice.¹⁷⁵ Moreover, among those in private practice who did engage in pro bono work, the vast majority are employed in small firms or solo practice. Again, according to the New York Report, approximately 2/3 of the lawyers who performed pro bono services were employed in law offices with 10 or fewer lawyers.¹⁷⁶ At the other end of the practice spectrum, it seems that a significant, though much lower percentage (17%) of the lawyers in very large firms (more than 200 lawyers) performed some pro bono service.¹⁷⁷ However, in between these ends of the spectrum, it appears

¹⁷⁴ See *infra* note __, and accompanying text.

¹⁷⁵ New York Report, *supra* note __, at Appendix C. Of course, many government lawyers are prohibited by the terms of their employment from engaging in practice on behalf of any non-governmental clients, including those who would be represented on a pro bono basis.

¹⁷⁶ Nearly 34% of the lawyers who performed pro bono services were solo practitioners, while approximately 32% of the lawyers who performed pro bono services were employed in firms with between two and ten lawyers. New York Report, *supra* note __, at Appendix C.

¹⁷⁷ *Id.* Deborah Rhode points out, however, that there is significant variance among large law firms in terms of their pro bono contributions. Rhode, *Pro Bono in Principle*, *supra* note __, at 430. According to her research, it seems that a disproportionate amount of the pro bono work

that lawyers in what would be characterized as mid-sized firms (between 10 and 200 lawyers), do significantly less pro bono work.¹⁷⁸

Perhaps it should not be surprising that the bulk of pro bono work is performed by lawyers in solo and small firm practice. After all, such practitioners are more likely to be engaged in the practice areas where most pro bono work is performed, than is the case with regard to large firm practitioners.¹⁷⁹ Indeed, opponents of mandatory pro bono work often object to calls for such requirements on grounds of the inefficiency to be created by requiring large firm lawyers to perform work in areas of law that they are unfamiliar with.¹⁸⁰ Proponents of mandatory pro bono sometimes respond to such objections by suggesting that such lawyers should be permitted to “buy out” their pro bono obligation by donating money to a legal services organization that does possess the requisite expertise in order to perform legal services adequately of the type that most pro bono clients need.¹⁸¹ In any event, the time and workload pressures associated with mid size and large firm practice may also help to explain why the bulk

performed by large firms is done by a relatively small number of firms with deep commitments to pro bono service. *Id.* On the other hand, only a small percentage of the nation’s largest and most prosperous firms do a significant amount of pro bono work. *Id.*

¹⁷⁸ According to the New York Report approximately 10% of the lawyers who performed any pro bono work were in firms of between 11 and 40 lawyers, 4% were in firms of between 41 and 100 lawyers, and 3% were in firms of between 101 and 200 lawyers. New York Report, *supra* note __, at Appendix C.

¹⁷⁹ In the Maryland Report, the area of law where the most pro bono service was performed was in the Family Law and Domestic Relations area. Maryland Report, *supra* note __, at 17 Table 13. In the New York Report, the area of law where the most pro bono service was performed was the landlord-tenant area. New York Report, *supra* note __, at 11 Table 4.

¹⁸⁰ See, e.g., Silver and Cross, *supra* note __, at 1484-85.

¹⁸¹ See *supra* note __ and accompanying text.

of pro bono services are provided by small firm and solo practitioners.

In light of the above-discussion, it is worth noting that it seems probable that small firm and solo practitioners are more likely to “go bare,”¹⁸² that is, practice without malpractice insurance coverage than their colleagues in larger firms.¹⁸³ Medium and large size firms are more likely to have the resources necessary to obtain malpractice insurance coverage. On the other hand, a greater percentage of small firm and solo practitioners may lack the resources necessary to obtain adequate coverage. Therefore, it seems that the lawyers most likely to be impacted positively by allowing liability waivers in pro bono cases are small firm and solo practitioners, who are the lawyers most likely to perform pro bono legal services in the first place.

Finally, a point along similar lines worth making is that one of the groups of lawyers that is least likely to perform pro bono services is retired or part time attorneys.¹⁸⁴ Perhaps, this result should be obvious. To the extent that lawyers are engaged in little or no practice, it should not be surprising that such lawyers do little pro bono legal work. On the other hand, other disciplines have successfully tapped the skills and experience of retired or part time workers to provide volunteer services to those still engaged in the field. An example that comes to mind is the Small Business Administration’s Service Corp of Retired Executives (SCORE),¹⁸⁵ which provides business advice to new entrepreneurs, particularly those who come from disadvantaged

¹⁸² See Debra Cassens Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 A.B.A. J. 82 (1987).

¹⁸³ See, e.g., *Bar Associations Propose New Rules to Regulate Vicarious Liability of Lawyers Practicing in Limited Liability Entities*, 16 Chicago Bar Ass’n Record 34, 37 (2002).

¹⁸⁴ See Maryland Report, *supra* note ___, at 20.

¹⁸⁵ See <<<http://www.score.org>>>, visited 9/17/04.

backgrounds. It also seems likely that retired and part time attorneys are less likely to have, or to be able to afford, malpractice insurance coverage than their colleagues engaged in full time practice. Therefore, allowing malpractice liability waivers in pro bono cases might also help to lure retired and part time lawyers to share some of their experience and expertise with those who need, but are unable to afford, legal representation.

V. Why the Arguments Against Liability Waivers Are Weaker in the Pro Bono Context

In the previous two sections, I argued in favor of both the value of pro bono legal representation, and the likelihood that allowing liability waivers would result in an increase in pro bono legal representation. Though in the second part of the article I argued that the foundations for the traditional prohibition against liability waivers are in fact weaker than they might appear at first blush, I argue in this section that those foundations are even weaker in the pro bono context than they are in the general private practice context. In Part II of this article, the primary justifications for restrictions on allowing malpractice liability waivers were discussed. These were first, that allowing such waivers tends to undermine competent legal practice, second, that prospective clients are unlikely to understand what it is they are giving up by agreeing to a waiver, and third, that public opinion of lawyers is likely to be adversely affected by allowing lawyers to accept malpractice waivers.¹⁸⁶ However, each of these negative consequences is likely to be lessened when comparing the pro bono context to the for profit practice context.

For example, it may be the case that when an attorney's primary motivation for taking on a particular case is profit, the prospect of a large malpractice judgment against the lawyer might

¹⁸⁶ See *supra* notes ___ - ___ and accompanying text.

indeed spur the lawyer to work harder on the case than he or she otherwise would have.¹⁸⁷

However, attorneys who agree to represent clients in pro bono cases clearly have a different motivation in engaging in the representation. As suggested above, reasons for which attorneys undertake pro bono representation include the psychic rewards that come from volunteer service.¹⁸⁸ Additionally, newer attorneys may gain valuable practice experience from having primary Responsibility for a pro bono case.¹⁸⁹ More experienced attorneys may learn how to practice in new areas of law through pro bono work.¹⁹⁰ All lawyers, through increased contacts with low income individuals, community groups, charitable organizations, and engagement in the sometimes high profile work that comes with pro bono representation, can “expand their perspectives, enhance their reputations, and attract paying clients.”¹⁹¹

Given all the reasons attorneys engage in, and benefits that flow from pro bono representation, it simply seems unlikely that attorneys will shirk their responsibilities to their pro bono clients. This seems particularly true given that pro bono representation is not mandatory anywhere in the U.S., and, as pointed out above, attorneys who do perform pro bono work are a self selected, and highly dedicated group.¹⁹² Certainly, more could be done to assure quality legal

¹⁸⁷ *But see supra* notes ___-___ and accompanying text for reasons to question this assertion.

¹⁸⁸ *See supra* notes ___-___ and accompanying text. *See also* Rhode, *Pro Bono in Principle*, *supra* note ___, at 431.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See supra* notes ___-___ and accompanying text.

representation for pro bono clients. Law firms could assure that members who perform pro bono work receive full credit toward billable hour requirements and other criteria for promotion within the firm.¹⁹³ Local bar associations, legal services providers and others who regularly provide legal services to low income clients could provide more in the way of training, back up, and support for attorneys who perform pro bono services.¹⁹⁴ Nonetheless, even in the absence of such reforms, the suggestion that pro bono attorneys will not properly serve their clients in the absence of a legal malpractice claim seems overblown.

A second reason offered for the need for the ban on prospective malpractice waivers is that clients will not be fully aware of what they are forfeiting when they agree to waive such liability prospectively. However, there are certainly steps that could be taken to help to bring such understanding to clients should liability waivers be permitted in pro bono cases. For example, attorneys could be required to disclose to prospective clients the potential costs and benefits of a prospective liability waiver in a particular case, and informed consent of the client could be required in order for a waiver to be deemed valid.¹⁹⁵ Additionally, the disclosure and informed consent requirements could include the necessity of a writing,¹⁹⁶ just as many states presently require certain written disclosures, as well as the client's written assent, to certain type of contingent fee arrangements.¹⁹⁷ Finally, a cooling off period could be adopted such that

¹⁹³ Rhode, *Pro Bono Principle*, *supra* note ___, at 458.

¹⁹⁴ *Id.* at 463.

¹⁹⁵ See MODEL RULES OF PROFESSIONAL CONDUCT 1.0(c) and cmts. 6 & 7.

¹⁹⁶ See Gross, *supra* note ___, at 804.

¹⁹⁷ See Cal. Bus. & Prof. Code Ann. Sec. 6147; R. Reg. Fla. Bar 1.5.

agreements to waive malpractice liability would either not go into effect for a certain period of time, or could be cancelled at the client's election during that period, as is presently the case with regard to certain door-to-door sales contracts.¹⁹⁸

Given arguments that prospective clients may be uninformed regarding what they are giving up in prospectively waiving malpractice liability, it is worth discussing the fact that prospective pro bono clients may in fact be giving up much less than prospective paying clients in otherwise similar circumstances. This may be the case for a couple of reasons. First, it appears that the prevalence of legal malpractice claims is greater in areas of law where clients typically pay for legal services, and is lesser in areas of the law where pro bono representation is most common. According to the American Bar Association's most recent survey of legal malpractice claims in America,¹⁹⁹ the most prevalent area for malpractice claims is plaintiff's personal injury law. Indeed, approximately one quarter of all legal malpractice claims fell within the area of plaintiff's personal injury law.²⁰⁰ When defense of personal injury claims is added in,

¹⁹⁸ See Gross, *supra* note ___, at 804-05.

¹⁹⁹ See ABA Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims: 1996-1999 (2001) (hereinafter "Malpractice Profile 1996-1999"). This was the most recent of three comprehensive studies by the ABA regarding legal malpractice. *Id.* at 1. See also ABA Standing Committee on Lawyers Professional Liability, Legal Malpractice Claims in the 1990s (1996) and ABA Standing Committee on Lawyers Professional Liability, Report of the National Legal Malpractice Data Center (1989). Though there is some controversy regarding the ABA's methodology in conducting these studies, see Manual R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 Vanderbilt L. Rev. 1657, 1669 (1994), the studies remain the most comprehensive collection of data regarding legal malpractice in America to date.

²⁰⁰ Malpractice Profile 1996-1999, at 5.

nearly 30% of all malpractice claims are accounted for.²⁰¹ However, due to the widespread acceptance of the contingent fee system in personal injury cases, and the fact that personal injury defendants are almost always able to afford counsel, pro bono representation is extremely rare in personal injury cases. Indeed, in the Maryland Report, Personal Injury law came in 17th in terms of areas where lawyers who performed pro bono services did their work, with only 1.4% of the respondents who performed pro bono work reporting in that area.²⁰² And personal injury law did not even make the list of areas where attorneys perform pro bono work in the New York Report.²⁰³ Looking at the issue from the other side, the most prevalent area for pro bono representation according to the New York Report was landlord-tenant law.²⁰⁴ However, landlord-tenant law is not even treated as a separate category for malpractice claims in the ABA's study.²⁰⁵

The other areas of law where malpractice claims are most prevalent, after personal injury

²⁰¹ According to the ABA, 4.1% of malpractice claims fall in the area of personal injury defense. *Id.*

²⁰² Maryland Report, *supra* note ___, at Appendix A, A-3.

²⁰³ New York Report, *supra* note ___, at 11.

²⁰⁴ Approximately 23% of those who performed pro bono legal service handled at least one matter in the landlord-tenant area. *Id.*

²⁰⁵ Malpractice Profile 1996-1999, at 5. The general category of real estate law did provide the second highest prevalence of malpractice claims according to the ABA's survey, at nearly 17% of all claims. *Id.* However, it is not clear whether this category included landlord-tenant claims at all, and even if it did, it included many other aspects of real estate sales and conveyancing as well. *Id.* at 23.

and real estate law, are family law, estate, trust and probate law, and corporate law.²⁰⁶ And while it is true that there is some overlap between these categories and areas of the law where pro bono representation is most common,²⁰⁷ this leads to the second reason why pro bono clients may give up less when prospectively waiving recovery for malpractice liability than paying clients do. Of course, one of the elements of recovery for legal malpractice is proof of damages.²⁰⁸ And, even though attorney malpractice may have devastating effects on persons of limited means in the areas of family law, real estate law, or corporate law, such persons are less likely to have as much at stake *financially* in these cases as persons who can afford to hire private counsel. This fact is likely to limit the amount of recovery that could be had for legal malpractice in many pro bono cases, thus limiting the potential recovery that is foregone by agreeing to a prospective malpractice liability waiver. In any event, the limits on what is given up when a pro bono client agrees to a malpractice liability waiver may tip the scales in favor of the benefit in increased availability of pro bono representation that may occur if such waivers are permitted.

A third reason commonly given for the prohibition on prospective liability waivers is that such waivers are likely to engender further disdain of lawyers among the general public. However, this is unlikely to be the case if prospective liability waivers are permitted in pro bono cases only. The most common critique offered of lawyers by members of the public is that

²⁰⁶ *Id.* at 23. According to the survey, approximately 10% of malpractice claims fall in the area of family law, and nearly 9% such claims fall in the areas of estate, trust and probate law, and corporate law, respectively. *Id.*

²⁰⁷ See Maryland Report, *supra* note __, at Appendix A, A-3; New York Report, *supra* note __, at 11.

²⁰⁸ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000).

lawyers are greedy.²⁰⁹ However, that complaint cannot be made in regard to efforts to increase the amount of pro bono representation. Indeed, any negative impressions created by allowing prospective liability waivers in a narrow category of cases is likely to be more than outweighed by the increased public esteem created by an increase in the amount of pro bono service rendered by attorneys.

VI. Conclusion

Numerous studies continue to support the view that the overwhelming majority of the legal needs of poor persons go unserved by attorneys. Likewise, there is widespread agreement that an overall strategy to provide for better meeting the legal needs of poor persons should include efforts to increase pro bono legal services in the form of direct representation of poor clients by attorneys. And while there are many impediments to increasing the delivery of pro bono legal services by attorneys, one relatively easily removed impediment is the current ban on prospective malpractice liability waivers in such cases. The foregoing paper argued both that the historical foundations for the profession's general limits on such waivers are weaker than the prevalence of such limits would suggest, and that the risks imposed by allowing such waivers are less than currently presumed. Whether, in the face of these arguments, the general limits on such waivers in the fee for service context should be maintained is a question for another day.

However, in light of both the desirability of increasing pro bono legal representation for poor persons and the fact that the risks imposed by liability waivers are even less in the pro bono context than in the fee for service context, the current ban on prospective liability waivers should be eliminated in the pro bono context. Provided that the safeguards alluded to in Part V of this

²⁰⁹ See *supra* note ___, and accompanying text.

paper are adopted, attorneys and clients should be permitted freely to agree that in exchange for the provision of free legal representation, the prospective client will forego any claim for malpractice liability against the attorney arising from the pro bono representation.