

APPENDIX C

CONSTITUTIONAL AND STATUTORY ISSUES

The legal arguments lodged against the Committee's pro bono legal services plan may be categorized under three types of claims: 1) that the proposal is unconstitutional; 2) that the Court of Appeals lacks power to implement the plan; and 3) that in operation the plan will conflict with other laws or ethical precepts. Generally, these contentions were advanced without reference to the authorities and materials cited in our Preliminary Report and Appendix.¹ We have examined each of these legal arguments and find them unpersuasive. Indeed, although the plan is novel, the relevant authorities lend strong support to it.

A. *Constitutionality.*

1. The Thirteenth Amendment Claim

The legal objection most frequently raised was that required service by attorneys would constitute "involuntary servitude", in violation of the Thirteenth Amendment to the federal Constitution.² It is well established, however, that the Thirteenth Amendment does not prevent the government from compelling its citizens "to perform certain civic duties".³ It simply is not applicable to "a call for service made by one's government according to law to meet a public need".⁴ The judicial assignment of uncompensated counsel to represent indigent persons, which often involves a greater demand upon the time and schedules of individual lawyers than the plan recommended by the Committee, has withstood challenge under the Thir-

1. See, e.g., Shapiro, *The Enigma of The Lawyer's Duty to Serve*, 55 N.Y.U.L. Rev. 735 (1980); Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 Cardozo L. Rev. 255 (1981); Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 Columbia L. Rev. 366 (1981); Torres, *In Support of a Mandatory Public Service Obligation*, 29 Emory L.J. 987 (1980).

2. The Thirteenth Amendment provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const. amend. XIII (1).

3. *United States v. Kozminski*, 487 U.S. 2751, 2760 (1988).

4. *Heflin v. Sanford*, 142 F.2d 798, 799 (5th Cir. 1944); *Butler v. Perry*, 240 U.S. 328, 333 (1916). See *infra* note 6 and accompanying text.

teenth Amendment.⁵ Thus, the Committee's plan should readily survive such challenge.

The Supreme Court, in *Butler v. Perry*,⁶ rejected a Thirteenth Amendment challenge to a law requiring "every able bodied male person" between the ages of eighteen and forty-five to work without compensation on roads and bridges for six ten-hour days each year, or, alternatively, to pay a three dollar assessment or to find a substitute to perform the labor. Because the Committee's proposal applies to all members of the relevant population, requires only forty hours every two years, in contrast to the sixty hours per year required in *Butler*, and because the Committee's plan also permits alternate means of discharging the duty, the Committee is confident that the plan would be upheld against a Thirteenth Amendment challenge.⁷

Moreover, as the Supreme Court has observed, "in every case in which the Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction."⁸ Thus, involuntary servitude challenges to employment conditions fail when the complainant is free to quit the employment involved.⁹ In sum, although the claim of "involuntary servitude" was heard with surprising frequency by the Committee, it is not supported by legal authority.

5. *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("pro bono requirements do not constitute a taking").

6. 240 U.S. 328 (1916). The Thirteenth Amendment "certainly was not intended to interdict enforcement of those duties with individuals owe to the state, such as services in the army, militia, on the jury, etc." *Id.* at 333.

7. The Supreme Court rejected a Thirteenth Amendment challenge to judicial orders detaining a witness and requiring him to appear in judicial proceedings. *Hurtado v. United States*, 410 U.S. 578, 589, n.11 (1973). *Accord The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft); *O'Connor v. United States*, 415 F.2d 1110 (9th Cir. 1969) (alternative civilian service); *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1979) (environmental reports); *Bobilin v. Board of Educ.*, 403 F. Supp. 1095 (D. Hawaii 1975) (mandatory cafeteria duty for three hours per day, seven days a year, for public school pupils).

8. *United States v. Kozminski*, 487 U.S. 2751, 2759 (1988).

9. *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972). "[T]here are duties such as work on highways which society may compel. But in general, the defense against oppressive hours, pay, working conditions or treatment is the right to change employers." *Pollock v. Williams*, 322 U.S. 4, 17-18 (1944). *Accord Ballentine v. Sugarman*, 74 Misc.2d 267, 271-72 (Sup. Ct. N.Y. Co. 1973), *aff'd*, 43 A.D.2d 815 (1st Dept. 1973) (public service work without pay required of public assistance recipient is not involuntary servitude because assistance can be refused and work rules avoided).

2. The "Taking Without Compensation" Claim

Critics also contend that the Committee plan would amount to a "taking" of lawyers' property for government use without compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 7 of the New York State Constitution. The argument is based upon holdings that a lawyer has a constitutionally protected property interest in seeking bar admission¹⁰, juxtaposed with holdings prohibiting the taking of real property interests without just compensation.¹¹

The argument is flawed for several reasons: The most basic argument against the plan is that "the Fifth Amendment does not require that the . . . Government pay for the performance of a duty it is already owed."¹² New York lawyers have no legitimate expectation of being excused from providing uncompensated services to the poor pursuant to judicial direction.¹³ Accordingly, the threshold "taking" of property, necessary to trigger scrutiny under the takings clause, is absent. Significantly, it has been held that the assignment of uncompensated counsel does not constitute a taking without compensation.¹⁴

10. *E.g., Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957).

11. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989).

12. *Hurtado v. United States*, 410 U.S. 578, 589 (1973). "The personal sacrifice involved [for a witness] is a part of the necessary contribution of the individual to the welfare of the public [citation omitted]." *Id.* Quoting Wigmore, the Court said: "[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or resent it should retire from the society of organized and civilized societies, and become a hermit. He who will live by society must let society live by him, when it require to . . ." *Hurtado*, 410 U.S. at 589, n.10 (quoting 8 Wigmore, *Evidence* § 2192, p. 722 (J. McNaughten rev. 1961)).

13. The "recent scholarship" cited in *Mallard v. U.S. District Court*, U.S. , 109 S.Ct. 1814, 1819, n.4 (1989) does not adequately address the situation in New York, where the courts have repeatedly stressed both their inherent and statutory power to assign uncompensated counsel, and the "concomitant duty" of lawyers to accept assignments. *E.g., Matter of Smiley*, 36 N.Y.2d 433, 369 N.Y.S.2d 93, 330 N.E.2d 53 (1975); *People ex rel Acritelli v. Groul*, 87 A.D. 193, 195-96, *affirmed on prevailing opinion below*, 177 N.Y. 587 (there has never been a time when the courts of New York lacked power to assign uncompensated counsel to represent the poor); *Medina v. Medina*, 109 A.D.2d 691, 487 N.Y.S.2d 23 (1st Dept. 1985). In addition to the inherent power of the court reaffirmed by all member of the *Smiley* court, statutes in New York State provided for assignment of counsel at least since 1801 (L.1801, c. 90 (21)), and since 1494 in England (II Hen. VII, c. 12). The current statute, N.Y. Civ. Prac. L. & R. 1102(a), is little different from the 1801 statute.

14. *United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965). *Dillon* was cited

A related argument, based upon a "regulatory taking" theory, is similarly unavailing. A regulatory taking occurs "when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . .'"¹⁵ In *Smiley*, the Court of Appeals alluded to the possibility of such constitutional implications if judicial assignment burdens became so extreme as to become "intolerable".¹⁶ The Committee plan could not possibly lead to that result. For example, if a matter becomes more involved than originally anticipated, credit for the time spent can be carried forward to future reporting periods, or allocated to satisfy the obligation of other lawyers in the firm. The Committee's proposal is reasonably calculated to enlist many more hands to lighten the burden, and to generate significant additional services to the poor from the state's more than 80,000 lawyers, without overburdening individual lawyers or any segment of the Bar, such as trial lawyers. The plan is quite flexible, and it allows for consideration of special circumstances and exceptions where justified. It cannot seriously be contended that the twenty-hour per year requirement—twenty three minutes per week—would deny lawyers "economically viable use"¹⁷ of their license to practice law, or that it will "not substantially advance legitimate State interests"¹⁸ in making increased access to the civil justice system available to the poor. Accordingly, the doctrine of regulatory takings is not a barrier to implementation of the plan.

with approval by the Supreme Court in *Hurtado*, *supra*. In *Menin v. Menin*, 79 Misc.2d 285, 359 N.Y.S.2d 721 (Sup. Ct. Westchester Co. 1974), *aff'd*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (2d Dept. 1975), Judge Gagliardi held that provision of counsel in divorce cases through assignments would violate the constitutional rights of assigned attorneys. *Menin*, sometimes cited by opponents of the Committee plan, was affirmed by the Appellate Division on other grounds, under the constraint of *Smiley*. Subsequently, the Supreme Court, Westchester County, held that an assignment did not violate the rights of the assigned attorney. *Matter of Farrell*, 127 Misc.2d 350, 351, 486 N.Y.S.2d 130, 131 (Sup. Ct. Westchester Co. 1985). Judge Gagliardi testified to the Committee concerning the system of uncompensated matrimonial assignments upheld in *Farrell*, and spoke in support of a mandatory service obligation.

15. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 107, 544 N.Y.S.2d 542, 548, 542 N.E.2d 1059, 1065 (1989) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

16. *Matter of Smiley*, 36 N.Y.2d 433, 441, 369 N.Y.S.2d 93 (1975). *Accord*, *Matter of Farrell*, 127 Misc.2d 350, 351, 486 N.Y.S.2d 130, 131 (Sup. Ct. Westchester Co. 1985); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984).

17. *Seawall Assocs. v. City of New York*, 74 N.Y.2d at 107, 544 N.Y.S.2d at 548, 542 N.E.2d at 1065 (1989).

18. *Id.*

3. Substantive Due Process and Equal Protection

Substantive due process and equal protection claims against the plan also fail. Lawyers in New York have no legitimate expectation that they will not be called upon by the court to fulfill their historic duty to provide uncompensated services to the poor. A lawyer becomes a member of the bar "for something more than private gain. He [becomes] an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice."¹⁹ The argument that lawyers are being singled out in ways that other professions or occupations are not is unavailing. Whether other professions have similar obligations is irrelevant, so long as the rule has a rational relation to a legitimate governmental purpose.²⁰ The plan is not arbitrary. Rather, it is an efficient mechanism for providing increased services to the poor, and it is reasonably related to the goal of providing access to the civil justice system for the poor.

B. Power of the Court to Adopt the Proposed Plan

The legal challenge under state law asserts that the Court of Appeals lacks authority under the New York Constitution and applicable statutes to implement a mandatory pro bono legal services plan, as the Committee proposes, by judicial rule. But the Committee is satisfied that there exists a sufficient framework of authority under which to promulgate a pro bono legal services requirement. The text of the Committee's Report, Part II.D., sets forth a constitutional and statutory basis for implementation of the plan through a four-fold regulatory process that would be effectuated by the Chief Judge, the Appellate Divisions of the Supreme Court, the Chief Administrator, and the Court of Appeals.²¹ Briefly, under authority of the New

19. *In re Snyder*, 472 U.S. 634, 644 (1985) (quoting, *People es rel. Karkin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928)).

20. E.g., *Dandridge v. Williams*, 397 U.S. 471 (1971); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Without diminishing the importance of other professions and occupations, the instrumental role of law in securing the rights of the poor under law in our society cannot be dismissed. E.g., *Goldberg v. Kelley*, 397 U.S. 254 (1969) (due process in welfare benefit determinations); *McCain v. Koch*, 70 N.Y.2d 109 (1988) (emergency housing); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976) (child custody); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (medical care); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (food); *Orozco v. Sobol*, 703 F.Supp. 1113 (S.D.N.Y. 1989) (education); *Svendson v. Smith Moving and Storage Company*, 54 N.Y.2d 122 (1981) (consumer rights).

21. See Final Report, pp. 88-91 [19 HOFSTRA L. REV. 755, 817-19 (1991)] and accom-

York Constitution, article 6, section 28 and Judiciary Law section 211, the Chief Judge can promulgate new standards and administrative policies to facilitate expeditious and fair treatment of the civil cases of indigents in the New York courts. The Chief Judge has power to administer the practice of law in the Courts, and this power is "complete."²² Furthermore, lawyers admitted to practice in New York can be compelled to assist in the overall administration of justice in the courts pursuant to standards set by the Court of Appeals under Judiciary Law section 53. That section would provide the authority for the Court of Appeals to promulgate a regulation compelling attorneys admitted to practice to consent to provide the required minimum standard of pro bono services as a condition of admission to practice.

It was contended, however, that Article 17 of the State Constitution vests the power to provide aid to the poor solely in the Legislature, and that legislation therefore would be necessary to adopt the rule proposed by the Committee. This argument, as well as the argument that the plan constitutes a tax which must be legislated under Article XVI, Section 1 of the State Constitution, ignores the inherent common law power of the Court to require members of the bar to provide uncompensated counsel to the poor, the judiciary's power to regulate the practice of law by all attorneys, and the obligation of the judiciary, as a coequal branch of government, to maintain access to the justice system for the poor. This inherent power was recognized by all members of the Court in *Smiley*²³. Furthermore, the argument does not address the point that the service to the poor is not a duty owed by the lawyer to others, but a duty owed to the court, as a condition of admission to the Bar, to aid in the proper administration of justice.²⁴

Some argued that the only proper course is for courts to assign counsel on an ad hoc basis, in individual cases in judicial proceedings

panying notes.

22. *Corkum v. Bartlett*, 46 N.Y.2d 424, 429, 414 N.Y.S.2d 98, 100 (1979).

23. *Matter of Smiley*, 36 N.Y.2d 433, 439-42; 444-45, (Jones, J., dissenting); 449-455 (Fuchsberg, J. dissenting).

24. "The duty to defend the indigent without charge is not a personal duty in the conventional sense of an obligation owed by one man to another Rather, the duty is owed to the Court, and it is the Court's call that he is obliged to answer. The duty is to assist the Court in the business before it. The duty thus is an incident of the license to practice law, and the power to deal with it must therefore repose in the branch of government charged with responsibility for the terms and conditions of the right to practice." *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (N.J. 1966).

only, under Article 11 of the New York Civil Practice Laws and Rules. The Committee proposal recognizes the modern reality that many lawyers do not regularly appear in the courts where the cases of poor persons are heard; that courtroom assignments may be disruptive to the schedules of lawyers, particularly those who are unfamiliar with the subject matter of a case; that ad hoc assignments may contribute to congestion of court calendars, when assigned counsel require adjournments; and that assignments may not address the needs of the poor in the administrative proceedings, where adjudications sometimes affect the lives of the poor in drastic ways.

The judiciary is not limited to addressing the crisis only by assigning counsel without compensation in judicial proceedings.²⁵ It also possesses ample inherent power to establish conditions upon the practice of law, and to regulate the conduct of attorneys, to assure meaningful access to justice for those who are unable to afford the cost of counsel.²⁶ As recently stated by Justice Blackmun, in a case arising from a lawyers' "boycott" of judicial assignments:

[T]he courts and legislature . . . had the power to terminate the boycott at any time by requiring any or all members of the District Bar . . . to represent indigent defendants *pro bono*. Attorneys are not merely participants in a competitive market for legal services; they are officers of the court. Their duty to serve the public by representing indigent defendants is not only a matter of conscience, but is also enforceable by the government's power to order such representation, either as a condition of practicing law . . . , or on pain of contempt.²⁷

25. It must be conceded that judges, in making assignments under N.Y. Civ. Prac. L & R. 1102, properly could consider the amount of pro bono service for the poor performed by a lawyer in administrative proceedings or in other ways, and could even out the burden by assigning another lawyer who had provided less service. The end result, that lawyers would discharge their duty to assist the poor in a variety of ways, could be the same, but the Committee plan is administratively more convenient because it avoids formal motion practice under Article 11, and lawyers are better able to schedule and prepare for their pro bono work.

26. The judiciary comprehensively regulates the admission of lawyers to practice, their conduct, and their periodic registration and reporting. Rule of the Court of Appeals, 22 NYCRR Part 520 (Standards for bar admission); 22 NYCRR Part 118 (Registration of attorneys); 22 NYCRR Part 80, 80.3(6)(c) (Administrative Delegations of the Chief Judge, Appellate Division to supervise assignment of counsel and regulate practice of law). Rules of the Appellate Division, 22 NYCRR Part 603 (1st Dept. Conduct of Attorneys, 22 NYCRR Part 691 (Second Department, Conduct of Attorneys); 22 NYCRR Part 806 (Third Department, Conduct of Attorneys); 22 NYCRR Part 1022 (Fourth Department, Rules Relating to Attorneys).

27. *Federal Trade Commission v. Superior Court Trial Lawyers Association*, ___ U.S.

The United States Supreme Court, on two occasions in recent years, has implicitly recognized the power of the highest courts of New Hampshire and Virginia to require members of the bar, as a condition of their admission to practice, to provide legal assistance to the poor.²⁸

Accordingly, the method of implementation recommended by the Committee in Part II.D. of the Final Report is appropriate.

C. *Claims of Conflict With Other Laws and Professional Ethics*

1. Government lawyers

Some government lawyers contended that the plan would violate agency rules against outside practice of law or laws against the use of government resources for private purposes. Some public agency policies that the Committee examined, however, made provision for limited outside practice without compensation, with supervisory approval. Significantly, the federal government has an Executive Order encouraging its attorneys to provide pro bono service.²⁹ Upon adoption of the Committee plan, it would be incumbent upon lawyers who head government law offices to relax any perceived impediment in their rules in order to allow attorneys to discharge their obligations. Moreover, in the hypothetical instance of a government lawyer or law secretary to a judge who might be completely barred from representing a client, the Committee plan's flexibility still allows the attorney to discharge the obligation in numerous other ways, such as training volunteer lawyers, or working to improve the laws that affect the poor and their access to legal assistance.

2. The Competence Issue

Some claimed that the requirement of competent representation would be an obstacle to effectuation of the plan, because of the unfamiliarity of many lawyers with the laws that affect the poor. Lack of

_____, 110 S.Ct. 768 (1990) (Blackmun, J., concurring in part and dissenting in part).

28. "A 'nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985)). The Supreme Court has not yet decided whether United States District Courts possess inherent power to require member of the federal bar to provide assistance to the poor. *Mallard v. United States District Court*, ____ U.S. ____, 109 S.Ct. 1814 (1989)).

29. The Federal Legal Council "shall promote . . . the facilitation of the personal donation of pro bono legal services by federal attorneys." Exec. Ord. No. 12146, 44 Fed. Reg. 42657 (July 18, 1979).

experience, however, is not grounds for relief of assigned counsel, because "[t]he Court of Appeals assumes that all the registered lawyers in this state are available for assignment either in the Appellate Courts or in the Trial Courts."³⁰ Nothing in the Committee plan requires lawyers to perform work outside the limits of their competence, and some critics simply failed to understand the flexibility with which the obligation may be discharged. Because of the flexibility in the Committee plan, and in contrast to appointments, lawyers will have ample time to learn more about a particular area of practice where help is needed by the poor, such as housing or matrimonial law, and can avail themselves of a training or continuing education program, or associate with a legal services or volunteer program or with other lawyers who can aid in legal representation of the poor.

Conclusion

The Committee's mandatory pro bono legal services plan is constitutional under the Thirteenth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article 1, Section 7 of the New York Constitution. The New York Court of Appeals has the power to implement the plan, and the plan does not conflict with other laws or ethical considerations. Therefore, there is no legal impediment to adoption of the Committee plan.

30. *People v. Maybusher*, 24 A.D.2d 765, 263 N.Y.S.2d 625, 626 (2d Dept. 1965) (citing, *Peole v. Wineski*, 15 N.Y.2d 392, 398, 259 N.Y.S.2d 413, 417 (1965)).