A Lawyer's Duty to Ensure Access to Justice

By William McDowell and Usman M. Sheikh

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I – INTRODUCTION

There is a growing perception in contemporary society that while all Canadians are afforded equal rights and equal justice in theory, this may not be true in fact.

As a result of the complexity and increasingly high cost of accessing the justice system and obtaining legal services, many lower to middle income Canadians, it is said, are facing significant barriers which are precluding them from giving voice to and enforcing their legal rights. This reality, it is argued, threatens to render the fundamental principle of equality upon which our liberal democracy is founded illusory and ultimately hollow.

In this paper, we focus our critical sights on the role of lawyers in relation to the important problem of access to justice which we presently confront and, specifically, on the professional obligations of an advocate to help alleviate the problem. We begin by situating the

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discussion by considering first the extent of the access to justice problem facing citizens today. We then consider the arguments advanced to anchor a lawyer and the profession's obligation to ensure access to justice. We conclude by offering four principles which attempt to delineate the duty of an advocate to ensure access to justice and which, we believe, form part of the defining features of true legal professionalism.

II – THE PROBLEM OF ACCESS TO JUSTICE

Whether or not one accepts a "crisis" designation, one point remains relatively beyond debate: there is perceived to be significant cause for concern about access to justice in Ontario.

(a) Problems with Accessing the Civil Justice System

With respect to the civil justice system, the excessive costs, considerable complexity of the legal system and trial delay continue to be cited nationally and provincially as formidable barriers that prevent average Canadians from accessing the civil justice system.[2]

Although, to date, no formal study appears to have been conducted,[3] informed opinion and research suggest that these significant difficulties have resulted in an alarming increase in the number of self-represented litigants before the civil courts.[4] By some estimates, as many as two-thirds of individuals in society are unable to afford a lawyer for the purposes of resolving a legal dispute,[5] forcing such individuals, to encounter the law and their legal troubles starkly alone. As noted recently by the Honourable Coulter A Osborne, Q.C., in a report commissioned by the Ministry of the Attorney General for the purposes of reforming the civil justice system in Ontario (the "*Osborne Report*"):

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[2] Hon. Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings & Recommendations* (November 2007), online: The Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp> [hereinafter, "*The Osborne Report*"] at p. 1.

[3] *The Osborne Report*, *supra* note 2, at pp. 44 and 51 (noting that no formal study has been conducted on the number of unrepresented litigants, their socioeconomic profile, the nature of the legal problems they face and the gaps in serving them; recommending an independent needs assessment and also noting that the Ministry of the Attorney General appears to have begun the process of collecting relevant statistics)

[4] Canadian Judicial Council, "Statement of Principles on Self-represented Litigants and Accused Persons" (September 2006) online: <http://www.cjc-ccm.gc.ca/cmslib/general/Final-Statement-of-Principles-SRL.pdf.> at p. 3 [hereinafter, "*Judicial Council Statement of Principles*"]. See also related press release, "Canadian Judicial Council Issues Statements of Principles on Self-Represented Litigants and Accused Persons," (Chief Justice Beverley McLachlin noting that the "Council views the increasing numbers of self-represented persons who appear in the court system as a serious matter") at p. 1; *The Osborne Report*, *supra* note 2, at p. 44 (noting increasing reports of growing incidence of unrepresented litigants in Ontario's civil justice system and that the perception was shared by many lawyers, judges and court administrators who were consulted)

[5] See Ab Currie, "Justiciable Problems and Access to Justice," at p. 2, presented at the Osgoode Hall Legal Aid Roundtable (November 2007) online: <http://www.osgoode.yorku.ca/conferences/Legal_Aid_RT/Ab_Currie_Justiciable_Problems_Nov2007.pdf> (data suggesting that two-thirds of survey respondents did not receive assistance for the legal problems which they experienced). See also David W. Scott, Q.C., "Are Radical Solutions in Order? Affordable Legal Services & Access to Justice," prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism's *Tenth Colloquium on the Legal Profession* (18 March 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_scott.pdf> at p. 1 (noting that that there is force to the argument that perhaps two-thirds of individuals in society are unable to afford a lawyer if the purpose is to exhaust available remedies in the resolution of disputes) [hereinafter, "*Scott*"].

> As matters now stand, limited help is available to those with civil legal problems who cannot afford a lawyer. With the exception of a very few civil legal aid certificates, Legal Aid Ontario does not provide assistance to litigants with civil disputes before Ontario's courts. In 2004, the *Solicitors Act* was amended to permit contingency fee arrangements in Ontario. The contingency fee arrangement is used in almost all personal injury litigation. It has limited use in other litigation. The Law Society of Upper Canada, through the Lawyer Referral Service, will supply an applicant with the name of a lawyer who will provide up to a half hour free consultation in a specified area of the law. However, given the 30-minute time period, there are obvious limits on the benefits this commendable initiative may deliver.[6]

Within just a little over a decade in Ontario alone, the problem of access to the civil justice system has been the focus of no less than five major conferences and reports which have considered methods to reform and streamline the system in order to make it more accessible and affordable.[7]

The problem also continues to capture the attention of and provoke strong reactions from lawyers, judges and members of the public alike.[8] Indeed, recently, as result of what was perceived to be severe inadequacies in obtaining publicly funded legal assistance for civil-related matters and its fight "for more than a decade to expand civil legal aid services for those who do not have the means to access our legal system" which had "fallen on deaf ears," the Canadian Bar Association took the extraordinary step of launching a test case which attempted to establish a constitutional right to civil legal aid in Canada.[9]

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[6] *The Osborne Report*, *supra* note 2, at p. 44.

[7] See, for example, [1] *Supplemental and Final Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, November 1996); [2] *Report of the Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, 2003); [3] *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report*, (9 March 2006) online: The Advocates' Society <http://www.advocates.ca/pdf/Final_Report.pdf>; [4] *Into the Future* Conference (May and December 2006) online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/publications/itf-en.php/>; [5] *The Osborne Report*, *supra* note 2. Other jurisdictions have also recently undertaken formal reviews of their civil justice systems as a result of access to justice concerns. In November 2006, for example, the Civil Justice Reform Working Group of British Columbia's Justice Review Task Force released its report, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006) online: BC Justice Review Task Force <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf> [hereinafter, "*BC Civil Justice Report*"]

[8] See, for example, G. Cohen, Editorial, "The time has come for civil justice reform" *Law Times* (17 July 2006); K. Makin, "Help lawyerless litigants, judges urged: McLachlin expresses concern about flood of people representing themselves in court" *The Globe & Mail* (13 December 2006); T. Tyler, "Ordinary citizens, unable to secure legal aid or pay punitive legal bills fight a 'David and Goliath' battle as they argue their own cases in court" *The Toronto Star* (7 March 2007); K. Makin, "Top judge sounds alarm on trial delays" *The Globe & Mail* (9 March 2007); B. Powell, "Justice summit to audit broken system; Public asked to join lawyers and judges in Ontario Bar Association talks" *The Toronto Star* (13 March 2007) D02; *Judicial Council Statement of Principles*, *supra* note 4.

[9] See Canadian Bar Association press release, "CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid," (20 June 2005) online: <http://www.cba.org/CBA/news/2005_Releases/2005-06-20_legalaid.aspx>. The Canadian Bar Association's challenge was dismissed by the British Columbia Supreme Court on the grounds that the Association did not merit public interest standing. It should be litigants, the court reasoned, not lawyers, who challenge the lack of access to justice. The decision was affirmed by the British Columbia Court of Appeal. Leave to appeal to the Supreme Court of Canada was recently denied. See *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015 (B.C.S.C.), aff'd, [2008] B.C.J. No. 350 (B.C.C.A.), leave to appeal ref'd, [2008] S.C.C.A. No. 185 (S.C.C.)

(b) Problems with Accessing Publicly Funded Legal Aid

Although widely perceived to be a social program of which Ontario citizens can be proud, Ontario's legal aid system also faces considerable access to justice challenges.

In a report recently prepared for the Ministry of the Attorney General on the legal aid system in Ontario (the "*Trebilcock Report*"),[10] Professor Michael Trebilcock notes "substantial challenges" facing the system. Among other things, these include a "sharply diminishing" percentage of the population who now qualify for those areas of law to which legal aid funding is available[11] (Professor Trebilcock notes that civil claims, by and large, are already virtually excluded from the purview of this system[12]), a steady downward trend in government funding,[13] together with hourly tariffs and salaries for lawyers participating in the legal aid certificate system, clinic lawyers and duty counsel which are seriously out of line with relevant market reference points which has resulted in an increasingly serious problem in recruitment and retention of qualified and experienced lawyers who are prepared to provide legal aid services.[14]

"In short," as the *Trebilcock Report* concludes, "on the demand side, a sharply diminishing percentage of the population qualify for legal aid, and on the supply side, a sharply diminishing number of lawyers are prepared to provide legal aid services."[15]

(c) Problems of Access for the Middle Class

The problem of access to justice, as many note, is particularly acute for the "working poor" and middle income Canadians. While the wealthy and large corporations have the means to pay and the very poor have access to legal aid in certain circumstances, it is often middle income Canadians who are the hardest hit. As some note, this class is often left with the very difficult choice that if they want access to justice, they must put a second mortgage on their home, use funds set aside for a child's education or for retirement, and must expose themselves to legal fees which can very well bankrupt a middle-class family.[16]

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[10] Professor Michael Trebilcock, *Report of the Legal Aid Review 2008* (July 2008) online: The Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> [hereinafter, "*The Trebilcock Report*"].

[11] *Ibid.*, at pp. 73 and 74 (data demonstrating significant gap between current eligibility criteria for legal aid and the criteria that would have presently prevailed had there been inflation adjustment from 1996).

[12] *Ibid*, at p. 76.

[13] *Ibid*, at p. 73 (noting that, on a per capita basis, funding for legal aid in Ontario has declined by 9 per cent in real (inflation-adjusted) terms from 1996 to 2006 (from $30.76 to $27.77)).

[14] *Ibid*, at p. 73. See also Cristin Schmitz, "Number of Legal Aid Lawyers Plummets," *The Lawyers Weekly* 28:32 (22 February 2008) (noting shrinking number and further plunge of 10 percent of private-sector lawyers doing legal aid work); Geoff Kirbyson, "Recruiting for pro bono: Why is it such a challenge?" *The Lawyers Weekly* 26:12 (21 July 2006).

[15] *Ibid.*, p. 74.

[16] Chief Justice Beverley McLachlin, Supreme Court of Canada, "The Challenges We Face," Remarks presented at the Empire Club of Canada (8 March 2007) <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>; Mr. Justice J.C. Major, Supreme Court of Canada, "Lawyers' Obligation to Provide Legal Services," (1994-1995) 33 *Alta. L. Rev.* 719 at p. 725 [hereinafter, "*Major*"].

The irony which the "working poor" and middle income Canadians face is clear. They confront a legal system for which they are the "financial underwriters" and are expected to support through their tax dollars yet which they themselves experience major financial problems in accessing and which, as a result of their ineligibility for legal aid, may actually make them worse off than the poor.[17]

III – THE OBLIGATIONS OF LAWYERS AND THE LEGAL PROFESSION TO ENSURE ACCESS TO JUSTICE

It has often been suggested that lawyers, individually and as a profession, have a special duty to attempt to ameliorate the problem of access to justice and to help close the gap between those who can afford access to the justice system and those who cannot.

(a) The Historical Argument

Some trace the obligation to the very inception of the profession, arguing that the duty and tradition of the profession as a "helping profession," to assist those who require legal services but cannot afford them, is intrinsic to and is as old as the profession itself.

In his seminal article, "Legal Aid for the Poor and the Professionalization of Law in the Middle Ages," historian James A. Brundage notes that, while legal aid for the poor and disadvantaged was until 1250 A.D. primarily viewed as a concern for the church, it was civil advocates in the middle of the 13th Century (who were then beginning to emerge as an identifiable profession), who began to assume responsibility for providing legal assistance to indigent litigants at the same time as canonical legislators began to restrict the kinds of legal claims that were justiciable in ecclesiastical courts on behalf of the poor and disadvantaged.[18] The assumption of this responsibility by lawyers at the same time as the practice of law was beginning to take shape was, as Professor Brundage argues, no coincidence:

> It is not coincidental, I would argue, that the period in which the lawyers began to bear a major share of the responsibility for furnishing legal aid to the poor and disadvantaged was also the period in which those same lawyers commenced to define themselves as members of a profession. Like physicians, who likewise began in this period to identify themselves as professionals, rather than simply as practitioners, medieval lawyers regarded it as one mark of their superiority to other craftsmen that they furnished their specialized skills to economically and socially disadvantaged persons without compensation. Providing the benefits of expert skill and knowledge for those to whom a profit economy would deny them was from the beginning an integral characteristic of professional status.[19]

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[17] *The Trebilcock Report*, *supra* note 10, at pp. 75-78; *Major*, *supra* note 16, at p. 725.

[18] James A. Brundage, "Legal Aid for the Poor and the Professionalization of Law in the Middle Ages," (1988) 9 *J. Leg. Hist.* 169 at p. 175.

[19] *Ibid.*, at p. 175. See also Robert P. Lawry, *The Central Moral Tradition of Lawyering*, (1990) 19 *Hofstra L. Rev.* 311 at p. 362 (moral tradition justifying pro bono obligation); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, (1990) 49 *Md. L. Rev.* 18 at pp. 32-48 (noting that, as the private bar developed, duty to represent the poor became partly the responsibility of the bar) [hereinafter, "*Millemann*"] and Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives* (1981) 2 *Cardozo L. Rev.* 255 [hereinafter, "*Rosenfeld*"].

Indeed, as one jurist maintains, this historical fact is "more than a mere accident of history" and serves to show that the concept of service *pro bono publico* is not only what distinguishes the practice of law as a profession but is also "at the very core of the [legal] profession" and, indeed, "the premise upon which the profession is founded."[20]

(b) The Monopoly or Quid Pro Quo Argument

Others argue that the obligation on the part of lawyers and the legal profession arises as a "quid pro quo" or in return for the state-licensed monopoly that lawyers have over legal work. If the legal profession's monopoly and success in restricting lay competition in the provision of legal services is part of the reason for which prices for services are beyond the reach of many Canadians, it follows, it is argued, that the legal profession also bears some responsibility for ensuring that representation is reasonably available to all. As Professor Allan Hutchinson argues, this obligation clearly arises as a result of the social contract between the state and legal profession which granted the latter its monopoly:

> …a clear part of the compact between the state and the legal profession is that it can have a monopoly only if it assumes some moral obligation for ensuring that legal representation is reasonably available to all. Without such a responsibility, the profession would be a crude cartel that existed simply to limit the supply of legal services, inflate prices, and create market dislocations.[21]

Many further argue that if the legal profession and lawyers fail to honour this obligation, and the practice of law is reduced to nothing more than a business, not only will the public's perception that lawyers play a special and unique role in Canadian society be threatened, but, like any other business, so to will the profession's monopoly and its privilege of self-regulation.[22] As Mr. Justice J. C. Major, for example, warned over a decade ago:

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[20] *Major*, *supra* note 16, at p. 721

[21] Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (2nd ed.) (Toronto: Irwin Law Inc., 2006) at p. 85. See also *Scott*, *supra* note 5, at p. 2 (noting that a "strong case" can be made that the profession's monopoly imposes a responsibility upon the profession to temper the processes which have given rise to the high cost of legal services, not only to ensure access, but to justify the profession's role in the social order of things); the Honourable Justice Eleanore A. Cronk, "Professionalism and Barriers to Justice," Keynote address prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism's *Fourth Colloquium on the Legal Profession* (3 March 2005) online: <http://www.lsuc.on.ca/media/fourthcolloquiumkeynoteaddress.pdf> at pp. 8-9 (noting "rare monopoly" which imposes upon lawyers a duty of service to the public and the obligation to challenge and eradicate existing barriers to justice) [hereinafter, "*Cronk*"]; *Millemann*, *supra* note 19, at pp. 18, 73-75 (describing obligation of lawyers in return for monopoly status of profession); Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico," (2008) 46 *Osgoode Hall L.J.* 131 at p. 140 (noting internalization of *pro bono* service ethic by legal profession for the privileges enjoyed by its members) [hereinafter, "*Sossin*"]

[22] *Cronk*, *supra* note 21, at p. 23 ("If the practice of law is reduced to a business, like any other business, the privilege of self-regulation is threatened"); Earl Cherniak, Q.C., "Professionalism at the Crossroads," prepared for The Advocates' Society Fall Convention (November 2003) ("…when we say law is a business, what we mean is that a law firm must be run like a business, but the practice of law is a profession, because if it is only a business, there is no justification for the monopoly that we have in the practice of law, and no reason to continue to call ourselves professionals"); *Scott*, *supra* note at 5, at p. 2 ("… if our governing body fails to confront this problem of access, it should at least consider the prospect that some other institution in society, inspired by government action, may do it for us").

> … unless lawyers act quickly to ensure that these requirements are met, their position as members of a self-regulated profession with a virtual monopoly is in serious danger of becoming something else… The absence of access to legal services, for whatever reason, creates a vacuum in the marketplace and, like nature, the marketplace abhors a vacuum. If the legal profession does not move to fill it, we can be certain that someone or something else will. When this happens, a large potential market will be lost, but more significantly, the profession will undergo changes. If the profession does not act to solve these problems – specifically, the cost of legal services – solutions to the detriment of the profession will be imposed… Is it so difficult to see governments moving family law to some family services department of the government? Most provinces have moved to no-fault insurance. It is easy to conceive of tort law disappearing into an administrative process.[23]

(c) The Rule of Law Argument

Others anchor a lawyer's duty to ensure access to justice based upon the unique position in which lawyers stand in relation to democracy, the rule of law and the legal system, in general.

As some proponents argue, access to the justice system in Canada is a problem which strikes at the very heart of the rule of law, our adversarial system and the egalitarian values of a democratic society. If the rule of law and partisan advocacy is considered to be based on laws that are knowable and consistently enforced such that individuals are able to avail themselves of the law in order arrive at a sound and informed disposition of controversies, then it is threatened if individuals do not have the tools to access the system that administer those laws.[24] Moreover, if egalitarian values of a democracy require equal treatment and access to justice by all, then it is similarly threatened if the poor cannot understand or meet the case against them and cannot give voice to their legal rights.[25]

As the "handmaidens of democracy," "guardians of the rule of law," and key stakeholders within the adversarial system, it is incumbent upon lawyers and the legal profession, it is argued, to assist in addressing the access to justice problem.[26]

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[23] *Major*, *supra* note at 16, at pp. 720 and 728

[24] *The Trebilcock Report*, "Access to Justice and the Rule of Law," *supra* note 10, at pp. 61-62. See also *Report of the Joint Conference on Professional Responsibility of the Association of American Law Schools and American Bar Association* (1958) (noting that adversarial adjudication can neither be effective nor fair where only one side is represented by counsel and that, where contribution lacking by unrepresented litigants, the partisan position permitted to the advocate loses its reason for being) [hereinafter, "*Joint Conference on Professional Responsibility*"].

[25] *Sossin*, supra note 21, pp. 131-132 and 139-140. See also *Scott*, *supra* note 5, at p. 3 (noting that access to courts and the right to have disputes resolved by an impartial trier is implicit in our constitutional imperatives); *Major*, *supra* note 16, at p. 722 (noting that equal access to the justice system is fundamental to the efficient functioning of a democratic society and that, without equal access, we are simply paying lip service to the principle of equal justice).

[26] See, for example, Raj Anand and Steven Nicoletta, "Fostering Pro Bono Service in the Legal Profession: Challenges Facing the Pro Bono Ethic," prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism's *Ninth Colloquium on the Legal Profession* (19 October 2007) online: <http://www.lsuc.on.ca/media/ninth_colloquium_ pro_ bono_services.pdf > at pp. 4-5 [hereinafter, "*Anand and Nicoletta*"]; *Sossin*, *supra* note 21, at p. 132; *Judicial Council Statement of Principles*, *supra* note 4, at p. 1 (noting responsibility of bar to ensure that self-represented persons are provided with fair access and equal treatment by the court); *Joint Conference on Professional Responsibility*, *supra* note 24 (noting that moral position of the advocate is

This argument, as well as the abovementioned Monopoly argument, find some resonance within the Law Society of Upper Canada's *Rules of Professional Conduct*.[27] Rule 1.03(1) ("Standards of the Legal Profession"), for example, recognizes the "special responsibilities" owed by lawyers and the legal profession due to "the important role [a lawyer] plays in a free and democratic society and in the administration of justice" as well as "by virtue of the privileges afforded the legal profession."[28]

(d) The Professional Pride Argument

Finally, some switch the locus of concern from indigent and other disadvantaged persons to lawyers themselves and note the benefits to lawyers, legal employers and the profession generally when efforts are made by legal practitioners to improve access to justice.

Pro bono service, it is argued, may: provide training, contacts, trial experience, and leadership opportunities for young lawyers; help lawyers develop new areas of expertise, enhance their reputations and allow them to demonstrate marketable skills; provide lawyers with a sense of personal satisfaction by working for the public good; enhance the reputation of the profession by demonstrating that lawyers are driven by more than simply the bottom line; attract young lawyers and law students to law firms that perform pro bono work; and provide benefits to legal employers by enhancing job retention, workplace morale and, by extension, job performance.[29]

(e) The Counter-Arguments

While we believe that the abovementioned arguments are compelling and do support a special duty on the part of lawyers to ensure access to justice, we do note that arguments supporting the professional obligation are not without their critics. Some question the argument from tradition, suggesting instead that history is equivocal at best with respect to a lawyer's duty to serve the public interest.[30] Others note that access to justice is a societal responsibility and

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at stake and clear moral obligation of the profession to assist); Timothy P. Terrell & James H. Wildman, "Rethinking 'Professionalism,'" (1992) 41 *Emory L.J.* 403 at pp. 422-23 (arguing that special position of law in society dictates special obligations for the legal profession)

[27] *Rules of Professional Conduct*, Law Society of Upper Canada, online: <http://www.lsuc.on.ca/media/rpc.pdf> [hereinafter, "*LSUC Rules*"].

[28] Rule 1.03(1) ("Standards of the Legal Profession"). See also the Commentary to Rule 4.06 ("The Lawyer and the Administration of Justice") (noting that a lawyer's responsibilities are greater than those of a private citizen and that the admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered and impartial system).

[29] Deborah L. Rhode, *Pro Bono in Principle and in Practice: Public Service and the Professions* (Stanford: Stanford University Press, 2005) at pp. 29-31; *Anand and Nicoletta*, *supra* note 26, at pp. 5-6; The Honourable Roy McMurtry, "The Legal Profession and Public Service," Keynote address prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism's *Third Colloquium on the Legal Profession* (October 2004) online: <http://www.lsuc.on.ca/media/third_colloquium_mcmurtry.pdf> at p. 3 ("… I have come to believe that any lawyer's career that does not include a significant component of public service could ultimately lead to a real degree of dissatisfaction") [hereinafter, "*McMurtry*"].

[30] See, for example, Zino I. Macaluso, *That's O.K., This One's On Me: A Discussion of the Responsibilities and Duties Owed by the Profession to Do Pro Bono Publico Work*, (1992) 26 *Univ. Brt. Colum. L. Rev.* 65 at p. 67 (noting that historical accounts on lawyers' pro bono duties are divided); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, (1980) 55 *N.Y.U. L. Rev.* 735 and p. 789 (asserting that tradition and history show no *pro*

that it would be unjust to find a duty on the part of lawyers to subsidize the collective obligation of society as a whole.[31] Still others note the special circumstances affecting younger advocates who face the "tyranny of billable hours regimes"[32] as well as the limited resources of sole practitioners,[33] suggesting that a broad professional obligation to engage in *pro bono publico* may be unrealistic and would have the potential to disproportionately affect some legal professionals more than others.

Noting that the issue is not without controversy, Justice Ian Binnie of the Supreme Court of Canada recently stated that, "[m]any of us were astonished when in late 1996, the benchers of the Law Society of Upper Canada seriously debated whether the profession's powers of self-government should be exercised in the interest of the public or in the interest of the profession…".[34] As he further noted, however, "fortunately, in the end, the proponents of the public interest prevailed."[35]

IV – PRINCIPLES OF PROFESSIONALISM

While the ethical obligation of a lawyer to ensure access to justice is difficult to deny,[36] what does the duty entail? In this section we set out four principles of professionalism which attempt to delineate the duty. In establishing the principles, we are guided, in the first instance, by an advocate's existing professional obligations contained within the Law Society of Upper Canada's *Rules of Professional Conduct* (the "*Rules*"). We supplement these obligations, in appropriate cases, with what are admittedly aspirational considerations, in order to provide further guidance for advocates and to also represent the objectives toward which every member of the profession should strive.

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bono requirement); *Sossin*, *supra* note 21, at p. 149 (noting reticence on the part of Canadian law societies to define the nature or scope of pro bono activity required of lawyers in professional rules of conduct)

[31] See, for example, B. George Ballman, *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?* (1994), 7 *Geo. J. Legal Ethics* 1139 at 1150 and 1156 (pointing out that the legal profession is singled out for societal responsibility); Steven Lubet and Cathryn Stewart, "A 'Public Assets' Theory of Lawyers' Pro Bono Obligations," (1997) 145 *U. Penn. L.R.* 1245 at p. 1254 (arguing that lawyers should not have an obligation to solve the access to justice problem simply because they can and arguments from necessity must fail).

[32] *McMurtry*, *supra* note 29, at p. 10 (noting that the ability to offer pro bono services has become more difficult by the "tyranny of the billable hours regimes").

[33] *The Osborne Report*, *supra* note 2, at p. 47 (noting that "not all Ontario lawyers can afford to take on pro bono files. It is a financial reality that the larger Toronto firms can better afford to offer pro bono services… As one lawyer from a smaller Ontario community said: 'I already do a lot of pro bono work. It's called my accounts receivable.'").

[34] The Honourable Mr. Justice Ian Binnie, Supreme Court of Canada, "The Boom in the Law Business," 65 *The Advocate* 39 (1 January 2007) at p. 49, noting the adoption of the "Role Statement" for the Law Society of Upper Canada. The Role Statement was originally adopted on October 27, 1994 and reconsidered by Convocation on November 15, 1996.

[35] *Ibid.*, p. 49

[36] Indeed, we note that the definition of professionalism developed and endorsed by the Law Society of Upper Canada's Working Group on the Definition of Professionalism, notes that "service to the public good" is a key element and building block of legal professionalism. See Jim Varro and Paul Perell, "Elements of Professionalism," prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism's *Third Colloquium on the Legal Profession* (endorsed October 2001; revised December 2001 and June 2002) online: <http://www.lsuc.on.ca/media/third_colloquium_jim_varro.pdf> at pp. 1, 7-8 [hereinafter, "*Varro and Perell*"].

(a) Counsel Should Provide Pro Bono Services

Principle 1:	*Counsel should provide pro bono services for those unable to pay and who would otherwise be deprived of adequate legal advice or representation. An advocate should strive to contribute at least 50 hours or 3% of billings per year on a pro bono basis.*

First, and we believe perhaps most importantly, every advocate has a professional responsibility and should provide pro bono legal services to those who are unable to pay. For years, as noted above, leaders of the legal profession have stressed the need for lawyers to contribute their time and energy to the needs of the underserved and disadvantaged.[37] The responsibility, we note, is also reflected in the existing *Rules*. The Commentary to Rule 2.08(1) ("Reasonable Fees and Disbursements) of the *Rules*, for examples, provides that:

> It is in keeping with the best traditions of the legal profession to provide services pro bono… where there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. A lawyer should provide public interest legal services… to persons of limited means.

We clarify the expectation by further noting that, in rendering pro bono services, every advocate should strive to render at least 50 hours or 3% of billings of pro bono publico legal services per year. Mindful of the firestorms provoked in the United States with attempts to impose mandatory pro bono service and hour requirements upon lawyers[38] and the limitations of The Advocates Society to even do so,[39] the requirements are deliberately precatory in nature, yet, we note, do represent an objective towards which every member of the profession should aspire. Similar requirements have been endorsed and adopted by the American Bar Association (the "ABA") in the ABA's Model Rule 6.1 (50 hours per year)[40] and, more recently, by the Canadian

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[37] See, most recently, *The Osborne Report*, *supra* note 2, at p. ix ("Bar associations and civil litigators should continue to implement and offer pro bono services and programs where possible").

[38] See, for example, Roger C. Cramton, *Mandatory Pro Bono*, (1991) 19 *Hofstra L. Rev.* 1113 at p. 1115 (proposals "divided the bar"); Esther Lardent, *The Uncertain Future of Attorney Volunteerism: Pro Bono*, (1993) 56 *Tex. B.J.* 166 at p. 170 ("strong opposition" of Bar to any mandate); Justin L. Vigdor, *Pro Bono Service: Mandatory or Voluntary?* (May, 1990) *N.Y. State B.J.* 32 at p. 33 ("intense," even "strident" responses to Committee recommendation of forty hour obligation).

[39] Whether or not a certain level of pro bono involvement should be a condition of bar membership is an issue to be considered and determined by the Law Society of Upper Canada. We note that opinions are already divided – see *Scott*, *supra* note 5, at p. 2 (suggesting that access to justice may be ameliorated with a condition of licensing which required a fixed percentage of professional time to be devoted to reduced fee services); *The Osborne Report*, *supra* note 2, at p. 47 (noting that mandatory pro bono quotas would have a chilling effect on the spirit of volunteerism which appears to be growing among the bar); *BC Civil Justice Report*, *supra* note 7, at p. 9 (noting that mandatory requirements are not necessary at this time).

[40] *ABA Model Rule 6.1 ("Voluntary Pro Bono Publico Service")*, American Bar Association, online: <http://www.abanet.org/legalservices/probono/rule61.html> (Model Rule 6.1 calling for lawyers to aspire to render at least 50 hours of pro bono publico legal services per year) [hereinafter, "*Model Rule 6.1*"].

Bar Association (the "CBA") in the CBA Pro Bono Committee's Founding Resolution (50 hours or 3% of billings per year).[41]

We recognize that practical difficulties may arise for advocates practicing in corporate or government settings. A taxpayer paying his own counsel might well object to government counsel being deployed against her *pro bono*.[42]

In assisting advocates towards fulfilling their pro bono responsibilities, we also endorse the ABA's Model Rule 6.1 ("Voluntary Pro Bono Publico") which, among other things, offers further guidance on the diverse breadth of recipients who may be beneficiaries of a lawyer's pro bono services and which also emphasizes, in paragraph (b)(1), the plight of middle income citizens, by noting that an advocate should also provide pro bono services to those whose incomes and financial resources place them above limited means yet whose resources would be depleted if they were required to bear the standard costs of civil litigation alone. Model Rule 6.1 states, in part, as follows:

> In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or 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.[43]

Finally, in assisting advocates towards fulfilling these responsibilities, we also note recent jurisprudence which has confirmed the availability, in appropriate cases, of cost awards to

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[41] *Pro Bono Working Group Report*, Resolution 03-04-M (February 2003), Canadian Bar Association, online: Canadian Bar Association <http://www.cba.org/cba/resolutions/2003res/03-04-M.aspx> (founding resolution calling for each member of the legal profession to strive to contribute 50 hours or 3% of billings per year on a pro bono basis).

[42] We note, however, the creation of a task force by the Ministry of the Attorney General of Ontario in 2004 to consider ways in which government lawyers could engage in pro bono activities. See Ministry of the Attorney General, News Release, "New and Innovative Programs to Increase Access to Justice" (16 November 2006), online: <http://www.attorneygeneral. jus.gov.on.ca/english/news/2006/20061116-probono.asp>.

[43] *Model Rule 6.1*, *supra* note 40.

pro bono counsel for successful litigation, even in private actions that do not involve public law, the *Canadian Charter of Rights and Freedoms* or similar issues of general public importance.[44] We share the anticipation of the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, [2006] O.J. No. 4248, which expects that such a holding would help "promote[…] access to justice by enabling and encouraging more lawyers to volunteer to work pro bono in deserving cases."[45]

(b) Counsel Should Consider Alternative Measures to Decrease the Costs of Litigation

Principle 2:	*Counsel should consider alternative measures to decrease the costs of litigation for those with limited means, including a reduction in fees, alternative dispute resolution (ADR) and innovative billing structures.*

Where legal services cannot be offered on a *pro bono* basis, every advocate should nevertheless be required to consider alternative measures to decrease the costs of litigation for those with limited means, including, where appropriate, a reduction in fees, alternative dispute resolution (ADR) and innovative billing structures.

The existing *Rules*, we note, already touch upon many of these principles. The Commentary to Rule 2.08(1) ("Reasonable Fees and Disbursements"), for example, provides that members of the legal profession should "reduce or waive a fee where there is hardship or poverty or the client would otherwise be deprived of adequate legal advice or representation."

The *Rules*, eminent jurists, and senior counsel alike have also encouraged lawyers to consider alternative methods in order to make legal assistance more affordable to the disadvantaged. Rule 2.02(2) and (3) ("Encouraging Compromise and Settlement"), for example, requires a lawyer to consider the use of alternative dispute resolution (ADR) for every legal dispute and to advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis. (We are, it goes without saying, mindful that "it takes two to tango" – all parties to a dispute must agree to ADR measures.) We also note and encourage the use of innovative billing structures – such as contingency, flat fees and sliding scale fees – by more lawyers, as well as limited retainer services (or the so-called "unbundling of legal services")[46] which have been approved and are increasingly employed by lawyers as methods to temper the impact of self-representation.[47]

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[44] See, for example, *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, [2006] O.J. No. 4248 (Ont. C.A.) at paras. 34 - 35 (no prohibition on an award of costs in favour of pro bono counsel in appropriate cases).

[45] *Ibid.*, para. 35.

[46] *Scott*, *supra* note 5, at p. 3 (explaining that, "unbundling," otherwise known as "limited retainer" services, are those in which the self-represented client engages a lawyer on a fee-for-services basis wherein the engagement is limited to a particular service in the litigation process, i.e., arguing an important motion or conducting an aspect of discoveries without being retained to conduct the entire proceeding with the usual consequence in terms of expense).

[47] *Judicial Council Statement of Principles*, *supra* note 4, at p. 9 ("Members of the Bar are expected to participate in designing and delivering … programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers); *The Osborne Report*, *supra* note 2, at p. 52 (encouraging Ontario lawyers to consider new and innovative billing methods that promote access to justice); *Major*, *supra* note 16, at p. 726 (calling for "modified pro bono work" in which lawyers agree to be

(c) Counsel Should Support the Profession's Efforts to Make Legal Services Available to Persons of Limited Means

Principle 3:	*Counsel should support or contribute to organizations, initiatives and other efforts on the part of the profession intended to improve access to justice and make legal services available to persons of limited means.*

As reflected in the *Rules*[48] and noted by other commentators,[49] it is also incumbent upon all lawyers to support and contribute to the organizations, initiatives and other efforts on the part of the profession which are directed towards improving access to justice and making legal services available to persons of limited means.

To date, the profession has engaged in several notable efforts to which support has and can be offered and of which the profession can be proud. Some of these organizations and initiatives include: Pro Bono Law Ontario (PBLO), Pro Bono Students Canada (PBSC), the Ontario Justice Education Network (OJEN), the Client Service Centre (CSC), as well as the Volunteer Lawyers Services (VLS).

As noted in the Commentary to Rule 3.01("Making Services Available"), a lawyer may also assist by participating in the Legal Aid Plan and the Lawyer Referral Service programs and by engaging in programmes of public information, education or advice concerning legal matters. To this end, we note the recent recommendations of the *Osborne* and *Trebilcock Reports* for the development of advice centres, legal advice hotlines, as well as the establishment of better online and telephone legal information resources in the most needed areas of law (such as family, domestic violence, criminal, immigration/refugee, landlord/tenant, consumer and human rights), in order to improve access to justice in the civil justice and legal aid systems.[50]

(d) Counsel Should Be Aware of their Special Professional Obligations When Dealing with Unrepresented Individuals

Principle 4:	*Counsel should be aware of their special professional obligations when dealing with self-represented parties.*

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compensated at lesser rates for those who have some means but not enough to pay standard legal fees); *Scott*, *supra* note 5, at p. 3 (endorsing unbundling of legal services); *BC Civil Justice Report*, *supra* note 7, at pp. 7 and 43 (endorsing unbundling of legal services); see also "Limited Retainers: Professionalism and Practice," *Report of the Unbundling of Legal Services Task Force*, Law Society of British Columbia, (4 April 2008) online: <http://www.lawsociety.bc.ca/publications_forms/report-committees/ docs/LimitedRetainers_2008.pdf>

[48] See, for example, the Commentary to Rule 2.08(1) ("Reasonable Fees and Disbursements") ("A lawyer … should support organizations that provide services to persons of limited means") and Rule 1.03(1) ("Standards of the Legal Profession") ("a lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions")

[49] *Judicial Council Statement of Principles*, *supra* note 4, at p. 9 (noting that members of the Bar are expected to participate in designing and delivering legal aid programs and *pro bono* representation to persons who would otherwise be self-represented); *The Osborne Report*, *supra* note 2, at p. 52 ("Bar associations and civil litigators should continue to implement and offer pro bono services and programs where possible")

[50] *The Osborne Report*, *supra* note 2, at pp. 48-52; *The Trebilcock Report*, *supra* note 10, at pp. 87-99.

Finally, all lawyers have a special professional responsibility to adjust their behaviour accordingly when dealing with individuals who are forced to face the legal system alone. Among other things, lawyers should and, as recently noted by the Canadian Judicial Council, are expected to be respectful towards self-represented persons and, to the extent possible, also avoid the use of complex legal language.[51]

When dealing with unrepresented parties, lawyers should also be particularly guided by their obligations under the *Rules*, which may have a higher expectation and standard of adherence when dealing with a self-represented party. Such Rules include Rule 6.03 ("Responsibility to Lawyers and Others – Courtesy and Good Faith") which, among other things, prohibits lawyers from using sharp practice to take advantage of or acting without fair warning upon slips, irregularities, or mistakes on the part of the unrepresented litigant and which also requires lawyers to agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of their own client.

V – CONCLUSION

There is a growing perception that lawyers have forsaken their professional roots and see law more as a business than a calling.[52] This paper has sought to demonstrate that the ethical standard of the profession has and continues to require lawyers to be concerned not only with the immediate and narrow relationship between the lawyer and client, but with the wider issue of the place of the profession in society and its corresponding obligation to that society as a whole.

That obligation, we have argued, includes a duty on the part of all advocates to ensure access to justice. The defining features of that duty were expressed in four principles which are, we believe, hallmarks of true legal professionalism and must be objectives towards every member of our profession should strive.

> **Principle 1:** *Counsel should provide pro bono services for those unable to pay and who would otherwise be deprived of adequate legal advice or representation. An advocate should strive to contribute at least 50 hours or 3% of billings per year on a pro bono basis.*
>
> **Principle 2:** *Counsel should consider alternative measures to decrease the costs of litigation for those with limited means, including a reduction in fees, alternative dispute resolution (ADR) and innovative billing structures.*
>
> **Principle 3:** *Counsel should support or contribute to organizations, initiatives and other efforts on the part of the profession intended to improve access to justice and make legal services available to persons of limited means.*
>
> **Principle 4:** *Counsel should be aware of their special professional obligations when dealing with self-represented parties.*

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[51] *Judicial Council Statement of Principles*, *supra* note 4, at p. 9.
[52] *Varro and Perell*, *supra* note 36, at p. 1.