



MAKING THE BUSINESS CASE FOR PRO BONO

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INTRODUCTION

In making the case for why lawyers – and legal institutions – should undertake *pro bono* work, supporters of *pro bono* service typically focus on the compelling need for such assistance. Countless national, state, and local studies have detailed the appalling gap that exists between the millions who need, but are unable to afford or obtain, the specialized knowledge and skills of legal professionals to protect and vindicate basic human needs and fundamental rights versus the shockingly limited resources available to meet those needs.

Others focus on the ethical underpinnings of *pro bono* service – every lawyer’s fundamental responsibility to ensure equal access to justice. Linked to this ethical imperative is the pivotal role played by *pro bono* in maintaining the professionalism of the legal profession. As lawyers seeking to preserve the highest ideals of our profession, we must concern ourselves not only with the bottom line, but also with the greater public good.

Given the profound changes in and enormous pressures of law firm practice today, however, it is essential that *pro bono* supporters, without abandoning the moral and ethical principles at the heart of *pro bono* service, can confidently identify those elements of *pro bono* practice that, when appropriately structured and integrated into the fabric of the firm, result in positive benefits for the law firm and its attorneys, as well as for the clients and communities served. These benefits support a hard-headed business rationale for *pro bono* work and for institutional law firm support for that work. While some of the benefits are relatively easy to quantify, others are not. While some pluses resulting from a firm culture that is supportive of *pro bono* will be immediately apparent, other beneficial results will become known only with the passage of time. This brief monograph is designed to outline the means by which an investment in *pro bono* can and will, in the long term, strengthen the firm’s ability to attract and serve its commercial clients.

PRO BONO AND PROFITABILITY

In a 1995 study of the relationship between economic performance and *pro bono* activity at large law firms, Marc Galanter and Thomas Palay, professors of law at the University of Wisconsin Law School, used data on firm finances and *pro bono* scores of the nation's largest 100 law firms published in *The American Lawyer* between 1990 and 1993 to analyze the connection between these two measures. While the sample of firms studied was relatively limited (involving 59 law firms for whom complete information on both measures was available for all four years), the study results are notable. Galanter and Palay found that:

- *Pro bono* at these high-producing firms increased substantially between 1990 and 1993. Total *pro bono* hours increased 45 percent, while average hours per attorney increased almost one-third (31 percent). The number of attorneys at major law firms reporting twenty or more hours of *pro bono* time increased by almost 60 percent over the period of the study, and the percentage of attorneys at the firms reporting twenty hours or more increased by 34 percent.
- In looking at the intersect between law firm *pro bono* activity and measures of economic performance and growth, including gross revenues, profits per partner, and estimated profit margin, the authors found that “the data suggest that the larger the firm and the greater its gross revenues the more willing it will be to encourage or permit *pro bono* activity.”
- The relationships between changes in *pro bono* activity from 1990 to 1993 and changes in the [firms' economic] performance data over the same period were positively correlated, though not strongly.

Unfortunately, Galanter and Palay have not produced an updated version of their analysis (the Law Firm Pro Bono Project would enthusiastically welcome volunteers with statistical expertise

to undertake a comparable analysis of more current data on *pro bono* and profitability as well as a longitudinal study of major law firm performance on both measures). However, even a cursory examination of information included in 1998 firm performance, as reported in the July, 1999 issue of *The American Lawyer* appears to reaffirm the conclusions of the Galanter/Palay study.

According to that information, lawyers at the nation's most profitable and largest law firms, on average, donated 40.8 hours of *pro bono* service during the past year. And the approximately 90 law firms on the AmLaw 100 list that reported their *pro bono* hours, in total, contributed almost 1.6 million hours of *pro bono* time or the equivalent of almost 900 full-time advocates.

Even for *pro bono* supporters, the results of the Galanter/Palay study may be surprising. Since *pro bono* matters do not, except in unusual circumstances, generate fees, it has been generally assumed that *pro bono* service is a financial drain on law firms and, as such, that it may create an economic disadvantage for firms that are high *pro bono* producers. In his seminal 1997 article on the economics of *pro bono* work, which is attached, Jack Londen of Morrison & Foerster makes a compelling case for *pro bono* work as, at worse, a marginal expense for law firms. More typically, he argues, even the strongest and most expansive law firm *pro bono* programs are either revenue neutral, or, potentially, even a revenue enhancer. Londen's argument, which is consistent with the Galanter/Palay research, is three-fold:

- The customary measure of the economic impact of *pro bono* work – the amount of revenue that the *pro bono* hours would have generated – is not a valid measure;
- Even when properly measured as a cost item rather than a revenue drain, the true cost of a *pro bono* program comprises a much smaller fraction of a firm's budget than a superficial analysis might suggest; and
- The indirect effects of a *pro bono* program can have a positive impact on revenue by enhancing and supporting firm goals and activities that create a competitive edge for law firms.

Londen's arguments echo the findings of a 1991 study that charted the growing commitment of major corporations to volunteer and community service programs. Corporations, in that study, reported that they support volunteer efforts, not only because they view themselves as stakeholders in their communities, but also because they address important business goals, including attracting and keeping a quality workforce and improving their image and appeal with consumers of their goods and services.

USING PRO BONO TO SUPPORT CRITICAL FIRM GOALS AND ACTIVITIES

When properly planned and structured, law firm *pro bono* work can do double duty, enhancing a wide range of important firm goals and functions. These include:

1. Recruitment of New Associates and Laterals

In an environment in which the competition for legal talent – including recent law school graduates, mid-level associates, and partners – is fierce, firms that support effective *pro bono* programs enjoy a competitive advantage with many potential new firm attorneys. Although there have been no national surveys to date of changes in law school/young lawyer attitudes, anecdotal information and related developments, such as the increase in law school public service projects and the growth of fellowship and rotation programs, confirm the heightened interest in *pro bono* among the younger generation of attorneys. As firm hikes in compensation for new associates are quickly matched by other firms, factors other than pay – including quality of life issues, effective mentoring and supervision programs, and expanded *pro bono* opportunities – often become the deciding factors in choosing among firms for top tier lawyers. For more senior attorneys, while business considerations undoubtedly play a larger role, the ability to do *pro bono* work can also be an important factor in selecting a firm.

2. Retention of Productive Partners and Associates

Mobility has become the rule among lawyers at all levels of seniority at larger law firms. A recent survey reported that, on average, 18% of associates at major law firms left their firms for other employment during the past year. Some firms lost 40% of their associates to other firms or employers during that period. Costs associated with the failure to retain effective lawyers represent the single greatest nonproductive personnel expense incurred by law firms. Some observers have estimated that the cost of replacing one departing attorney – including inefficiencies due to transition and delay as well as the substantial costs associated with screening and hiring a new attorney and getting that attorney up to speed – can equal or even exceed the annual salary for that position. Some qualities – rapport with clients, highly specialized expertise – are virtually irreplaceable at any price.

The decision to leave a law firm, of course, is often based on many factors. For many lawyers, however, dissatisfaction with the atmosphere and workload at the firm and a sense of being an anonymous cog in a very large wheel are key elements of the determination to move elsewhere. A strong *pro bono* culture, as discussed below, can contribute greatly to a sense of the firm as a unique place, one that embraces the individuality of its partners and employees, provides effective mentoring and oversight, and stimulates teamwork in support of the needs of the larger community. New York's Shearman & Sterling has recognized this by including paid leave to undertake full-time *pro bono* work as one of the longevity incentives it provides to senior associates.

For partners, strong firm support for *pro bono* as a part of the day-to-day work of all lawyers at the firm, regardless of seniority or prominence, also reinforces their loyalty to the firm. For lawyers who have been in practice for some time and enjoy proficiency in a highly specialized area of the law, *pro bono* participation offers an opportunity to engage in the critical policy issues of our day or to serve individual clients – aspects of law practice that may not be available in their everyday practice.

3. Training and Professional Development

One of the chief complaints expressed by many junior attorneys in larger law firms is the lack of opportunity to develop the skills and expertise needed to advance in the firms. Greater demands on partner time and the growing unwillingness of corporate clients to pay for associate training and apprenticeship have all but eliminated the informal “second chair” training experiences enjoyed by associates in the past. In “The Effective Associate Training Program: Improving Firm Performance, Profitability and Prospective Partners,” published by the American Bar Association Standing Committee on Continuing Education of the Bar, lack of effective training and professional development opportunities are identified as directly responsible for unproductive or unsatisfactory performance that leads to excessive write-offs, partner frustration and inefficiency, low associate morale, client dissatisfaction, and costly turnover.

Using carefully selected *pro bono* opportunities as a training vehicle will enable law firms to provide a wide variety of high-quality skills training at a very low cost. In addition, since younger lawyers are typically afforded greater autonomy in *pro bono* matters, they also offer meaningful work experience and accelerated professional development opportunities that benefit both the individual attorney and the firm.

The ABA publication cited above identifies basic skills that must be acquired by all successful lawyers. These include:

- Interviewing
- Planning
- Problem analysis
- Investigation
- Research
- Recognizing and handling professional and ethical issues
- Statutory interpretation (and textual interpretation generally)

- Client relations
- Client counseling
- General advocacy
- Negotiation
- Trial advocacy
- Writing with clarity and precision
- Designing and drafting contracts and other legal documents
- Case management
- Time management
- Diagnosing the client's problem
- Dealing with difficult clients
- Counseling clients

In addressing the skill sets necessary for large firm lawyers, both business lawyers and litigators, it is apparent that many *pro bono* engagements offer the opportunity for in-depth, on-the-job skills training. For example, the average landlord/tenant matter is likely to involve diagnosis, factual and legal research, discovery, witness preparation, statutory interpretation, negotiation, client counseling, drafting pleadings, trial preparation, and trial advocacy, and, in some instances, appellate advocacy and brief preparation. Even the most mundane of transactional *pro bono* matters – securing 501(c)(3) status or reviewing a lease – offers training in interpretation of statutes and other controlling authorities, client counseling and diagnosis, presenting and weighing alternative solutions, negotiation, etc.

Not only are *pro bono* matters highly effective training tools, they offer, by their very nature, the opportunity for firm attorneys to exercise skills and judgment far more independently and at an earlier stage than comparable work for commercial clients. Many associates report dissatisfaction with the gap between the level and type of work they are actually assigned and the experience and expertise they are required to demonstrate to advance in the firm. In *pro bono* matters, younger

lawyers are actually able to try cases, to work personally with a client board of directors, and to handle appeals, albeit with appropriate supervision.

In light of the role that *pro bono* engagements can play in providing excellent training opportunities, it is not surprising that a number of firms are consciously integrating their training and *pro bono* functions. Chicago's Mayer Brown & Platt, for example, recently hired a seasoned law school clinician/public interest lawyer to oversee both the firm's *pro bono* program and its clinical skill training efforts. At other firms, the *pro bono* leadership works closely with the firm's training committee and staff, so that each facet of the firm's operations supports the other.

A number of commentators have noted that, beyond the development of specific skills, *pro bono* work makes better lawyers overall. Lawyers engaged in such work have the opportunity to go beyond their immediate and narrow specialties and garner a broader sense of this society and how it works – or doesn't work. A 1991 survey of almost 200 major corporations found that a growing number of corporations sponsor and encourage volunteer programs, in part, because of the benefits to the employees and the corporation. These companies reported that volunteer work promotes personal and professional growth, encourages characteristics that improve the quality of their work force, such as creativity, trust, teamwork, productivity, and persistence. These companies' commitment to voluntarism is real – it is increasingly recognized in performance reviews and incentive plans.

4. Evaluation, Supervision and Mentoring

Associates, in citing the causes of dissatisfaction, often point, not only to the nature of the work assigned to them and the lack of opportunity for skills development, but also to the lack of feedback and oversight available to them from more senior firm attorneys. Firm leaders, in turn, have sought, with some frustration, effective tools to evaluate, as early as possible, the aptitudes of associates and the means by which to establish truly meaningful supervision and mentoring programs.

Because of the nature of *pro bono* work, it offers the opportunity for far more effective evaluation of the skills and maturity of young associates. Evaluation based solely on associates' commercial practice will provide insight into some skills and abilities – such as drafting and a commitment to hard work – but will not enable the firm to assess the associates' communication skills, abilities as advocates and negotiators, maturity, ability to work effectively with clients and to deal with opposing counsel, judges, and juries. For this reason, as well as to provide greater visibility to *pro bono* work, a number of law firms now explicitly include reviews of work undertaken in *pro bono* matters as a critical part of the evaluation process. That is, the evaluation not only assesses the lawyers' *pro bono* commitment as evidenced by the amount of *pro bono* work undertaken, but also uses that work to evaluate the attorneys' legal skills, maturity, and judgment.

Law firms, in response to associate concerns, have developed a variety of supervision and mentoring programs, designed to replace the informal mentoring and apprenticeship that often occurred spontaneously in the past when the pace of practice was less pressured. In putting these programs in place, however, many firms have discovered how difficult it is to establish a meaningful mentoring and supervision program. Partners, already overcommitted to client work and non-client firm administrative tasks, are sometimes unable or unwilling to devote sufficient time to their mentees. A number of firms, however, have successfully used a *pro bono* team or practice group approach to provide meaningful oversight and feedback from partners. Partners who are involved in a *pro bono* team working on a specific case, matter, or project are engaged in the matter and, therefore, far more likely to take the time to work closely with the junior members of the team.

5. Enhancing Firm Morale and Loyalty

All large institutions struggle to achieve a sense of uniqueness and a commitment by individuals to the larger whole. Today's major law firms are particularly prone to fragmentation and isolation, due to the pace of growth and change, their sheer size, the complexity of firm structure, including specialty units and growing numbers of geographically distanced offices, unintended

consequences of technology, and the isolation that often characterizes the way that law is practiced. *Pro bono*, however, can be the glue that holds the firm together. *Pro bono* matters offer the opportunity for lawyers – and other staff – who would otherwise hardly even know each other – to work together as a team for a greater good. Firm-sponsored clinics and *pro bono* recognition events, whether humorous or formal, offer opportunities for social interaction and good will. Victory memos and annual reports instill a sense of pride and an appreciation for the difference that the firm, as an institution, is making and for the quality of its people.

6. Marketing the Firm

In the current highly competitive environment, firms are increasingly focused on marketing their services to retain current clients and attract new ones. Firms are expanding their marketing staff, hiring public relations firms, and committing substantial resources to advertising and to “branding” that differentiates their firm. As with other firm functions, *pro bono* work can be a highly effective marketing tool. Bill McBride, managing partner of Holland & Knight, one of the nation’s fastest-growing law firms, has noted that every dollar his firm spends on *pro bono* generates ten times its value in good publicity and heightened visibility for the firm. *Pro bono* is an effective marketing tools for several reasons:

a. Greater Credibility

Unlike firm brochures, press releases, advertisements, and similar vehicles, *pro bono*-related publicity is less likely to be viewed as self-serving. Even though law firms may consciously place stories about *pro bono* achievements, the very nature of the work involved makes the stories more credible. In addition, in many instances, publicity about a *pro bono* matter is generated by a public interest group involved by the matter or attracts media interest because of the issue involved. Such placements are viewed as inherently more credible than paid advertisements.

b. Greater Visibility

Even the most interesting and important commercial work undertaken by law firms is unlikely to receive broad coverage and publicity beyond the legal media. Major *pro bono* matters, or smaller cases with great human interest, are far more likely to receive extensive coverage. Holland & Knight, for example, received highly favorable and extensive coverage of its work in the *Rosewood* case, including a glowing front page, above the fold, article in the *Wall Street Journal* and *People*. Hogan & Hartson, similarly, received a great deal of play in the media concerning its representation of African-American plaintiffs alleging that Denny's restaurants had discriminated against them. In both instances, the firms undertook these time-consuming, controversial cases because it was the right thing to do. However, their creative, successful lawyering became a front-page story. In addition, *pro bono* contacts can become business contacts.

c. Improved Client Relationships

An increasing number of law firms jointly undertake *pro bono* work in conjunction with the legal departments of corporate clients. Some corporate client relationships these days are fraught with tension and uncertainty, as clients transfer business, aggressively bid work out, negotiate for reduced rates, pare down the list of firms with whom they work, and closely scrutinize and question bills. Joint *pro bono* ventures offer an opportunity to interact socially and professionally with clients on matters of common concern outside the commercial arena. Since firms, for the most part, are far more experienced in the substantive law and venues involved in *pro bono* work, these joint ventures offer a subtle but effective opportunity for law firms to demonstrate their skills and capacities. In addition, jointly sponsored clinics and clients are an opportunity for teamwork that can lead to closer personal and professional relationships.

d. Good Deeds as a Business Generation Tool

Increasingly, major corporations are viewing good corporate citizenship and strategic philanthropy as important elements of the culture of an effective institution **and** as solid business

practice. Major law firms, which may be among the largest institutional employers in their communities, should take note of the increased interest in good works among leading corporations.

A 1999 report issued by Cone, Inc. and the Roper survey research firm found, for example, that hundreds of corporations are increasingly committing substantial resources to good cause campaigns. They are doing so because they seek to make a positive difference in the communities in which they locate their facilities and market their products. However, these corporations are also doing so because research has determined that association with good causes is good for business. In a survey of consumers, the Cone/Roper report found that two-thirds of the respondents reported that, if price and quality of a product are equal, they would switch to a brand or retailer associated with a good cause. Sixty-one percent thought cause-related marketing should be a standard business practice, and 84 percent noted that they have a more positive image of companies that support a cause they care about. The report further cited that companies now undertake “cause branding,” making a long-term commitment to causes that become part of the corporate identity and culture.

A similar 1999 study prepared for Hill and Knowlton by Yankelovitch Partners also found that corporate good citizenship was an important consideration. When those respondents were asked what philanthropic activities were considered most impressive, the two top answers were “donating products and services” and “volunteering employees to help.”

In restructuring to achieve greater efficiencies, productivity, and profitability, larger law firms have often looked to the corporate community for examples of good business practices. An analysis of the benefits of *pro bono* in the law firm context, as well as the greatly enhanced commitments by corporations to voluntarism, reinforces the argument that *pro bono* is not only right, it is, indeed, good for business.

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