Pro Bono Rising, But to What End?

By Robert Granfield and Lynn Mather

American lawyers have an obligation to provide legal services to those unable to pay. So says the ABA Model Rule 6.1 encouraging lawyers to provide 50 hours of legal services annually without fee or expectation of a fee. The latest national survey of lawyers conducted by the ABA Standing Committee on Pro Bono and Public Service reports 73 percent of attorneys provide some amount of pro bono to persons of limited means or to organizations for those persons. This figure represents nearly a 10 percent increase since 2004, the last time the survey was conducted. This trend is consistent with recent reports from the Pro Bono Institute and The American Lawyer, both of which have found an increase in total pro bono hours and higher numbers of attorneys doing pro bono.

While a rise in pro bono activity among lawyers is something to celebrate, particularly since the legal profession has not historically embraced pro bono in practice, such activity is unevenly distributed throughout the profession. Moreover, only 27 percent of all attorneys in the recent ABA survey provided the ideal of 50 or more hours of free service. In short, lawyers do some pro bono, but not enough. Further, law firms and solo practitioners are facing an uncertain economic environment that might further limit the amount of pro bono they provide for clients who cannot afford their services.

If we want to encourage lawyers to give of their time to increase access to justice — and surely we do — then we need to understand the conditions most likely to produce such behavior. To that end, we invited legal scholars and social scientists to assess the role of pro bono within the legal profession. The results of this multidisciplinary investigation, "Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession," just published by Oxford University Press, suggest the significance, yet also the complexity, of the seeming growth of pro bono legal services in the U.S.

The level of pro bono commitment among lawyers is now critically important for the provision of legal aid for civil law problems. Ever since the dramatic reduction in government funding and the restrictions imposed on legal services lawyers, the private bar has assumed greater responsibility for those unable to afford legal fees. In fact, pro bono now accounts for roughly one-third of all civil legal assistance for those of limited means. But current levels of pro bono work and government-funded legal aid do not meet today's legal needs. The Legal Services Corp. recently reported that half of those seeking legal help are turned away due to the lack of resources. Problems such as housing and foreclosures, unemployment, immigration, disability and health care, and family stress have all escalated at the same time that funding and interest income for legal aid have plummeted. How can the recent surge of professional public service among private lawyers be preserved and improved to promote access to justice for the wide number of cases that state-subsidized legal aid are unable to handle? Simply telling lawyers to be more generous is not sufficient.

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Historical and empirical research into the rise of pro bono points to the collective and institutional pressures that have profoundly influenced individual lawyers. In the 1980s and 1990s, large law firms grew exponentially, acquiring smaller practices and merging with other firms, generating ever-larger profits at the very same time that federal funding for legal aid was slashed. In response, the Law Firm Pro Bono Challenge arose to encourage large law firms to commit 3 percent to 5 percent of their billable hours to pro bono. The American Lawyer magazine began to rank firms not only on their profits but also on their pro bono practices. These trends intensified competition — for clients and in hiring. Pro bono opportunities helped firms in recruitment by offering a chance to engage in public interest work along with corporate work. Pro bono became institutionalized within large law firms through the growth of pro bono coordinators to manage, document, and oversee the legal work done for low-income clients and public causes. Coordinators facilitated the matching of legal need with individual lawyers within the firm, while also providing supervision and avoiding conflicts of interest within the firm.

Reports and debates within national and local bar organizations and within law schools also called attention to the need for lawyers to increase their work for the public good. In 1983, the ABA rejected a recommendation that would require 50 hours of pro bono from each lawyer, but nevertheless passed Model Rule 6.1 to at least encourage a level of commitment. New awards were created by bar associations and within firms to acknowledge the contributions of especially generous attorneys. In the last few decades, pro bono work has thus become systematically integrated into American legal profession, perhaps more now than any time in the past.

Most important, while the reasons behind the growth in pro bono may reflect ethical and altruistic concerns, they also clearly show the self-interested factors of firm rankings, public visibility, recruitment and training of new lawyers, and reputation. The rise in pro bono does not simply represent an increase in the desire to "do good" among lawyers.

This same combination of reasons operates today to explain which attorneys are most likely to provide pro bono legal services, of what kind and how much. Thus, rates of pro bono service are much higher for private lawyers (81 percent) than for government lawyers (30 percent) or in house counsel (43 percent), according to the latest ABA survey. Rates are also highest for the largest law firms and for solo practitioners, with lower rates of pro bono participation for small or medium sized firms.

Professions do not simply exude altruism as a normative condition of their occupational status. Rather, altruism among professionals is often a strategic activity that can serve the interests of those professionals and the organizations that employ them. For example, large firm partners support pro bono work through policies like allowances for billable hours; the individual lawyer engaged in pro bono in a large-firm loses no income as a result of her altruism, unlike the solo or small firm practitioner. Lawyers in large law firm contexts engage in pro bono often for litigation experience and a feeling of handling a case from start to finish. Pro bono does not mean the same for lawyers in firms of different sizes. Attorneys at small firms and solo practitioners, each of whom have fewer resources than big firms, often engage in pro bono to generate paying clients or even perform what is commonly referred to as "low bono", that is, legal services offered at a reduced rate. Some lawyers associated with law firms that pursue a political mission beyond their individual client, frequently reject the very nature of pro bono as incompatible with the firm's broad public interest purpose.

Pro bono legal work must be understood within the social, political, economic, and organizational realities within which it operates. Altruism is always a two-way street; both the giver and the receiver derive benefits from such action. However, if the goal is to be of service to those less fortunate, the achievement of this end will be severely compromised if the self-interested benefits of the lawyer trump the services provided. Thus, determining the significance of the rise of pro bono depends on where the bottom line lies; advancing the interests of the lawyer, the law firm, and the profession or those of needy citizens. Without prioritizing the latter and especially in light of the retraction of state-subsidized legal assistance, the potential of pro bono to advance justice will be greatly reduced.

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