

## Inviting Controversy “Pay To Play”



Greg McConnell

This magazine of course discusses our pro bono work. But occasionally, it also highlights controversial issues that arise in the pro bono arena. This is the second issue of *Pro Bono Update* in which we are “Inviting Controversy.” As set forth in my column on page 36, certain legal services organizations have begun a policy of requiring law firms to donate money to them for the privilege of receiving pro bono cases from them. Naturally, this has engendered significant debate among law firm pro bono directors. Greg McConnell, the Director of Public Interest Law at Winston & Strawn, and I have different points of view on this issue, and I thought it would be interesting to present them here. We invite comment.

*Marc: I'm aware of the distinctions between bribery and extortion and I have no problem with private bribery in this area, but I don't like to be extorted.*

Greg: I'm actually enthused by the fact that the pro bono marketplace has evolved in such a way that the pro bono agencies feel as if they have enough leverage to ask people for funding as a precondition of receiving opportunities — and also that they have the level of confidence in themselves and in their product to make that request.

*Marc: I don't like for someone to come to us and say that, as a condition of taking cases from them, we need to pay them a membership fee or pay to have the specific cases undertaken by the law firm.*

Greg: For decades we've asked the agencies to become more sophisticated, to apply business principles. And now they are. And part of that is they're becoming more business-like in how they seek donations from firms.

*Marc: I think it's great that public interest legal groups are becoming more sophisticated. And I have no problem with them becoming more sophisticated in the area of financial contributions. In a sense, this whole development is ironic because one of my jobs at the firm is to monitor our financial contributions to public interest legal groups. I've tried to develop a coherent policy to make this budget part of the operation of our pro bono program. Traditionally, financial contributions had little to do with the operation of a pro bono program. I believe we were one of the first firms to try to integrate the two programs.*

Greg: You are correct. You were one of the first firms, but what does that have to do with this controversy?

*Marc: “Pay to Play” gives the controversy a bad name. It's too narrow and misleading. I think the real question is: “How do you integrate a firm's pro bono policy with its financial contributions?”*

Greg: I understand your concerns about how some of this plays out, but I think it's also important to understand that we're really talking about a very limited number of agencies in a few markets, predominantly

New York and maybe DC, that provide business and transactional opportunities. Those organizations have more leverage than virtually any organization in the country because there is a high concentration of business attorneys in these markets and there are comparatively fewer appropriate opportunities for them — the competition is intense.

*But this then becomes an area where financial contributions can become part of a firm's overall pro bono policy. The firm may not take cases like this, but a financial contribution might enable the organization to hire another staff attorney who can handle these cases more efficiently than pro bono volunteer lawyers.*

Greg: Aren't you being elitist?

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*Marc: I hope not, but I don't only want to help poor people — I want to change things.*

Greg: Some people are now talking about collaborative partnerships rather than pay to play. What is your notion of an effective partnership?

Also, from what I have observed, there is no "pay to play" when it comes to serving the most basic, garden-variety legal needs of low income individuals. I have not observed any harm to this client segment because firms are backing away from representing their critical needs as a result of any objections they may have to how a provider agency has solicited them for funding.

*Marc: What I regard as a model of how things should work is our firm's relationship with the New York Lawyers for the Public Interest. I met Michael Rothenberg, their Executive Director. I was impressed with him and the work his organization is doing. We gave the organization a small donation. I brought him around to our New York office and introduced him to people. He eventually asked one of the younger partners to become a member of his board of directors. That partner is now secretary of their board, and our financial contribution to them is much greater, so we have established a collaborative partnership. There were no attempts at extortion. But it was understood that the closeness of the relationship would bespeak a financial contribution and that I have no problem with.*

*Marc: But part of the problem is that many times the firms are less interested in the cases that affect the day-to-day lives of poor people. If a more difficult or high-profile case or transactional project comes along, then the competition becomes intense. I think that organizations that do, for example, landlord-tenant cases are filling a real need. However, I would rather involve our real estate group in the creation of affordable housing through a group like the Corporation for Supportive Housing. The legal aid approach in this instance helps poor people but it does not change anything. It doesn't help build better housing in our poor communities.*

Greg: Well, perhaps Michael just exerted a little lighter touch with you but ultimately, had you not come forward with a financial

contribution, you may not have been receiving those opportunities. We really are talking about a matter of how folks approach their “pay to play” system.

Let me ask you this, Marc, I have heard some firms get worked up about the idea of “pay to play” — and it always struck me that they were upset, in part, because they no longer have leverage over these small nonprofits. I think their protests are as much about bruised feelings as principled objections to “paying” for the privilege of representing a client on a pro bono basis. Do you get this sense?

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Marc Kadish

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*Marc: I agree that it's a question of how people approach “pay to play.” Where I draw the line is when an organization that we have never worked with approaches me and says they want to work with us but the “entrance fee” is money in exchange for the work. We've built no working relationship — be it time or money — so I'm not going to be interested in establishing a relationship.*

*But regarding your question about bruised feelings — I don't think it's feelings, I think it's quid pro quo. If we've established a working relationship, then I don't want to see case or project opportunities disappear in 60 seconds — BUT, another solution is to develop expertise in an area and hope the group will work with you so you can make a*

*thoughtful decision before undertaking the opportunity, or expect that the other pro bono coordinators might defer to your skills and suggest that your firm might do a better job in this area. For example, if a firm has developed an “LWOP Project” (Life Without Parole for juvenile offenders) I am going to defer to their expertise, and suggest that they coordinate, handle or lead the work in this area.*

Greg: I think you are being generous ... But let's discuss the flip side of pay to play. The part of this that we're leaving unspoken is the fact that there are a number of agencies that are working very diligently to tee up wonderful opportunities for the law firm community that are well processed — by that I mean are easy to get into, easy to get out of — which I know you value highly and I value highly. There are many firms that take those opportunities and don't contribute much money at all to those agencies.

Those firms are advancing their pro bono programs. They're providing opportunities for young lawyers. But they're not really supporting the means by which they're obtaining those cases. I find that to be more objectionable than I do the agencies that are definitive about their expectations of financial support in exchange for receiving those opportunities.

*Marc: That's true. We depend on the public interest groups to help us establish a policy for acceptance of cases. I always say to people who contact me through the internet or through the telephone, “I'm sorry, we do not accept cold calls. We only accept cases that come from organizations with which we have a pre-existing relationship or an occasional voluntary court appointment.” We depend on*

*them to “vet” the case for both appropriateness of the matter, that it’s a good pro bono matter, and that the person or cause that’s getting the assistance is worthy of it and that’s fine. I think we do need to take that into account.*

*I suppose you and I could discuss this all day long and I’m not sure how much disagreement there would be any longer. I was wondering if you have any closing thoughts.*

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*“Agencies need to ... understand that firms are willing to pay for well-positioned, well-prepared opportunities.”*

Greg McConnell

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Greg: Two points. First, agencies need to continue embracing as an opportunity the increasingly high, increasingly competitive demand for pro bono work, and understand that firms are willing to pay for well-positioned, well-prepared opportunities. Agencies should use that as an incentive to either develop or better identify existing opportunities that firms can easily attach themselves to — not just the hot, high-profile cases, but opportunities that are replicable, that are manageable and that firms can absorb in large quantities. The payoff is likely to be increased contributions from firms. Second, as pro bono agencies are making their interests more explicit to the firms and their financial requests more specific, they need to approach that in a way that the firms also enter into a meaningful relationship with them, as opposed to some sort of price tag, which I think many firms

will find off-putting and may really increase the likelihood that many firms won’t engage in that relationship.

*Marc: My final thoughts would be, first, as with many other things, this whole area is getting much more complicated. When you and I first became directors of pro bono activities, it was simply, “Okay, we’ll take a landlord/tenant case or we’re going to take an uncontested divorce.” But the whole system, and the kinds of projects we all look for, are increasingly more sophisticated. Pro bono programs have become almost the same as law firm practice areas. We face the same complexities and difficulties as those practices, and that has really changed the face of law firm pro bono programs.*

*Second, I would say that where possible, the pro bono director or coordinator should have some say where the financial contributions of the firm are given. This way, you can support quality legal services organizations even when you aren’t able to assist them by taking many cases, and you can make the financial contributions part of your overall pro bono policy.*

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*“Pro bono programs have become almost the same as law firm practice areas.”*

Marc Kadish

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*Finally, these should be collaborative partnerships and relationships as opposed to simply extortion. ♦*