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## **STRUGGLING WITH THE ECONOMICS OF A LAW PRACTICE DOES PRO BONO (STILL) MAKE SENSE?**

### **Introduction**

We meet here at a time when most of us, whether sole-practitioners in Continental Europe or partners in the large Western law firms, are being pummeled financially. The past year has been one of the most difficult on record.

Let me begin with what should be obvious: because of this financial turmoil, the face of law practice – at least for the bigger firms – is going to change in very fundamental ways. A few cling to the hope this has all been just a bump in the road. The rest of us believe we are on a new road altogether. Competition will be even fiercer, budgets will be slashed and reordered, practice mixes will change, big firms will become fewer and less big, and, at the end of the day, lawyers may simply make less money. For those who survive the economic crisis, new paradigms are needed. In short, the law business – Big Law anyway – is in the process of reinventing itself.

Against this backdrop, the usual discussion of economic impediments to pro bono takes on an even greater significance. For some, the question cuts to the core of their financial viability. For others, pro bono will become even more a matter of how much and what kind. The old business case will have to be tested.

My remarks this afternoon will briefly review the arguments that have, until recently anyway, overcome some of the perceived economic impediments to pro bono. Along the way, I will offer my own thoughts on why—in some fashion at least-- those arguments continue to make sense. What follows may be most relevant to the bigger international firms. That after all is my background and my experience. Still, I believe there may be much here for everyone, no matter the size or geography of your practice.

### **Shifting Ground**

Giving away our stock in trade – our skills and our training – has always seemed counterintuitive in a free market world. After all, we have invested time and money in large sums to become

lawyers, and we all want a return on that investment.<sup>1</sup> Most law practices – large, medium, or small – exist to recover that investment, and then some.

In the last decade, a growing body of legal scholarship began making the business case for pro bono; proposing it actually as a way to boost profit.<sup>2</sup> Once a matter of social responsibility, pro bono quickly became a business strategy. The ground shifted, as law firms around world decided doing good could also mean doing well. The cliché became a guiding principle.

Before we test this business case in the new economic environment, it is worth visiting a few of the challenges that law firms face at the outset in providing pro bono services. They all have economic consequences, and finding good answers becomes even more important today.

### **Threshold Challenges**

Conflicts of interest are just as difficult to deal with in the pro bono world as in the other. Ethical rules of practice usually resolve the conflict – at least if it is direct and immediate – by requiring that a lawyer refuse the competing interest, whether or not you are being paid. Sometimes, you just have to walk away from pro bono clients.

The tougher questions come up when the competing interests aren't direct and immediate, where, for example, representing a pro bono client against the interests of big industry (or the state for that matter) jeopardizes your chances of ever doing business with that industry. "Reputational conflicts," they are called. As more and more companies (and even governments) took up the banner of social responsibility themselves, those risks were gradually becoming less worrisome.<sup>3</sup> Will this now change? I don't know. But at least one fear is that as the focus shifts more sharply to the revenue side, law firms will be more reluctant to take on anything that clouds their reputation in the eyes of paying clients.<sup>4</sup>

Another basic challenge has always been how to pay the expenses of a pro bono client. You may be willing to donate your time and talent. But it is a different equation entirely if you have to come out of pocket to pay your client's legal costs. On occasion in the past, law firms have been willing to eat those expenses. That won't necessarily be the case now. Pro bono budgets are

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<sup>1</sup> A 2003 American Bar Association report found that most law school graduates in the U.S. carry a debt burden of more than \$80,000. It takes more than \$1,000 a month to pay that back over a reasonable term. The numbers now are almost certainly worse

<sup>2</sup> See, for example, the widely-referenced monograph published several years ago by the Pro Bono Institute: "Making the Business Case for Pro Bono", by Esther F. Lardent, available at [www.probonoinst.org](http://www.probonoinst.org).

<sup>3</sup> My own firm gives all its partners a chance to challenge every pro bono matter proposed. And we sometimes have lively conversations within the family about work that, for example, might alienate a paying client one of our colleagues would like to represent some day. Until recently, those conversations were becoming easier; and the same, more relaxed attitude was being reported by pro bono coordinators in other firms. Will this change?

<sup>4</sup> A corollary problem is sometimes as acute: pro bono programs are often constrained by the need to stay below the radar of governments not particularly friendly to social advocacy. Without intending to pick on any particular country—and I will admit to similar challenges in my own—no firm, for example, in China wants to be too visible these days in its human rights activity.

being pared way back, along with all the others. Clients with substantial cases will be asked to pay their own expenses; some will be able, some will not. Fortunately, there are a number of organizations – both local and international – that are taking on the funding of significant pro bono matters.<sup>5</sup> Those organizations, themselves struggling, will be under increasing pressure.

Finally, let's mention a problem often overlooked. Paying clients have an incentive for managing their legal work efficiently. They don't always do it, but they usually pay the price in higher legal fees. On the other hand pro bono clients, usually for lack of experience rather than lack of incentive, are often more difficult to manage. As a lawyer, it may take you more time (and lost economic opportunity) to move them from A to B. Work still needs to be done in this area, but it is encouraging that a number of organizations are developing programs specifically designed to help pro bono clients know better how to help their lawyers get the job done.<sup>6</sup> This kind of education has important economic value to the lawyers who take the cases.

That being said, we need to turn to the bottom line question, itself; the one a law business needs to have answered under any circumstances. Does pro bono really make economic sense in the first place? The business case usually put forward in response includes a number of key elements. And it is these that will be under the microscope in the new economic environment.

## **Training and CLE**

The business case for pro bono suggests that it provides training and continuing education to lawyers, making them better at what they do and able to do more.<sup>7</sup> And during the downturn, pro bono has been invaluable in providing new and different work experiences to young lawyers.<sup>8</sup>

It is difficult to imagine that training and education will be any less important in the future than now. The more experience a lawyer gathers, the better and more productive that lawyer usually becomes. There may be fewer lawyers in the law firms, but training will be as critical as ever. A carefully designed pro bono program will, I think, remain for management a cost-effective way to provide that training.

## **Recruiting and Keeping Lawyers.**

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<sup>5</sup> These range from the international institutions such as the World Bank, to global NGO's such as the International Senior Lawyers Project ([www.islp.org](http://www.islp.org)), to local churches and charities. ISLP, for example, has been instrumental in funding expenses for a very substantial, multi-year program to assist the Government of Liberia in law reform and concession restructuring projects. My firm is an enthusiastic pro bono participant in that program.

<sup>6</sup> The Public Interest Law Initiative ([www.pili.org](http://www.pili.org)), as one example, provides this kind of mentoring assistance to the pro bono clients it matches with lawyers through its clearinghouse operation. It is a key element of PILI's pro bono work and is an important consideration for the lawyers who agree to participate.

<sup>7</sup> Estimates at many large U.S. firms put the cost of internal and external lawyer training at more than \$1,000,000 a year.

<sup>8</sup> Big Law, finding itself with too many lawyers, is paying underutilized associates (usually at reduced, but still significant salaries) to accept temporary assignments with public service organizations. The hope is they will return with new and enhanced skills. How that works out is yet to be seen.

The business case for pro bono also highlights its role in attracting and keeping good lawyers--not just new lawyers but experienced and productive practitioners as well. The best and the brightest, so the argument goes, look not only for financial return but also for job satisfaction; and a strong pro bono culture is an important element of a satisfying work environment.<sup>9</sup> Big Law has always spent enormous amounts of money in recruiting lawyers and loses enormous amounts of money when lawyers leave or are head-hunted away.<sup>10</sup> If a pro bono program can make a firm even marginally more attractive to a socially-minded lawyer, there is real economic value.

Retrenchment is the order of the day for big law firms. But even so they are keeping a close eye on their workforce. No one wants to revisit history – for example, when the dot.com bubble burst – by paying an enormous price to retool afterward. And firms seem to be fighting to reinforce the message to key staff that the firm's values and commitment to social responsibility are unwavering.<sup>11</sup>

What does the future hold? Clearly, recruitment of new lawyers is not a particular problem right now. There are far too many honors graduates chasing far too few jobs. But the large firms continue to compete for graduates at the top and for leading lateral candidates – there is a flight to quality. This may well be a hallmark of the new landscape. And here, as ever, a firm culture that features something more than a pursuit of profit will have a competitive advantage.

## **Marketing and Business Development**

This, I think, will prove to be the most sustainable piece of the pro bono business case. In recent years, the bigger firms – and in many cases the not so big firms – have been trolling for clients by offering high-profile pro bono services to their community.<sup>12</sup>

The rankings by which law firms are judged (at least among themselves) now take "pro bono scores" as an important measure of a firm's standing. How many lawyers contribute how many pro bono hours is critical.<sup>13</sup> Law firms become known to potential clients based on these profiles; they are an important marketing tool.

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<sup>9</sup> There is good anecdotal evidence, and it is logical, that the current downturn, with its stories of scandals and greed, may in fact spawn a generation of lawyers whose social conscience is as prominent as its profit motive.

<sup>10</sup> The cost of replacing lawyers runs well into six figures for Big Law

<sup>11</sup> The pro bono deferral/secundment programs referenced in footnote 8 reflect this concern. See, also, "Pro Bono Increasingly Seen as an Investment, Not a Cost" by Michael Moline, published in the National Law Journal on January 5, 2009" and reprinted on the Pro Bono Wire ([www.probonoinst.org](http://www.probonoinst.org)).

<sup>12</sup> It is not unknown either that pro bono clients sometimes themselves become good paying clients. Ask any pro bono coordinator about this.

<sup>13</sup> See, for example, the law firm rankings published regularly by the "American Lawyer". The big American firms eagerly await those results.

Few of us who seek work with governments around the world have not been asked to describe the nature and extent of our community service as part of a pitch. And increasingly in recent years, corporate clients are also asking the same question.

As Corporate Social Responsibility becomes more central to the business of the paying clients, law firms that seek their instruction find value in offering pro bono partnerships. Shared values are an important element in any relationship, and the attorney-client relationship is no exception. Working with companies on their CSR projects (or in harmony with the charitable interests of their decision makers<sup>14</sup>) gives lawyers a chance to demonstrate their skills and to introduce their colleagues; it provides an opportunity to enrich a relationship that someday may prove valuable financially.<sup>15</sup>

Where, then, does this leave us?

### **A (Guarded) Prediction**

I will take an educated guess. Training and retaining lawyers, providing a satisfying workplace, and keeping a high marketing profile will remain an important part of law firm economics. The bigger firms—although there may be fewer of them—will continue to their pro bono activity in one form or another. We may be more selective and more cost conscious, pro bono programs may be restructured a bit, but the fundamental commitment won't change.

The problem for the smaller firms and individual lawyers is more difficult. The economics of pro bono for this segment of the legal profession have always been more problematic. Gains were being made; these lawyers were turning up the level of their pro bono activity. But this will be difficult to sustain in this new economy. No matter how socially conscious the lawyers, the financial disincentives are greater now than ever before.

And so, the momentum behind the organized pro bono efforts of the past ten years, much of it internally generated by the legal community itself, will continue to need a push. More than ever, the non-profit community and the professional associations – the International Bar Association among them – will have to take up the cry and keep up the pressure. The legal profession, in the difficult days ahead, will be looking for new models, new motivation, and renewed challenge.

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<sup>14</sup> It never hurts to take up the charitable cause of a corporate CEO, whether or not his or her company is involved.

<sup>15</sup> "Putting the Values in Value: Using Pro Bono Partnerships to Enhance Inside/Outside Counsel Relationships," an interesting virtual seminar panel on the topic, is available (for a fee) on the West Legal Ed site ([www.westlegaled.com](http://www.westlegaled.com)).