Introduction

Building a Practice with Pro Bono

Rule 6.1 of the ABA Model Rules of Professional Conduct, which was adopted or replicated by state bar ethics rules and urges lawyers to perform pro bono service, begins, “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” There are many reasons beyond an ethics rule for lawyers to perform pro bono service. Those reasons include moral and social imperatives, professional oaths, and identity. Professor Deborah Rhode’s empirical analysis of the reasons why lawyers perform pro bono placed personal satisfaction at the top of the list, followed by professional obligation, employer policy, employer encouragement, professional value, reputation, experience, client interaction, work control, politics, religion, and recognition. See Deborah L. Rhode, Pro bono in Principle and in Practice—Public Service and the Professions 131 (Stanford Univ. Press 2005). Her analysis suggests that the reasons we perform pro bono are complex and interrelated. Another study suggests that pro bono service derives not only from motivations but also from worldviews, experiences (including a lifelong practice of volunteering), and a sense of obligation. Deborah A. Schmedemann, Thorns and Roses: Lawyers Tell Their Pro Bono Stories (Carolina Academic Press 2010). The study shows pro bono service correlates to lawyer career satisfaction. See Nancy Levit & Douglas O. Linder, The Happy Lawyer: Making a Good Life in the Law 197 (Oxford Univ. Press 2010). Yet again, this book is not an argument for pro bono service.

Instead, this book is a practical guide to and resource for pro bono service. Promotion of pro bono service assumes
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lawyers know how, when, and where to do it but just need more urging. In fact, many lawyers are not so well equipped for some of the special challenges and opportunities pro bono offers. Indeed, Professor Rhode’s exhaustive study of pro bono service concluded that the profession should improve pro bono support structures. Her recommendations include more backup for inexperienced lawyers, more pro bono training, greater attention to intercultural skills, and more institutional accommodation. This book addresses those recommendations. In doing so, it refers to the American Bar Association Standing Committee on Pro Bono and Public Service’s Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means (herein after ABA Pro Bono Standard). Specifically, ABA Pro Bono Standard 2.3 urges that “A pro bono program should establish a design for the delivery of legal services which is tailored to local circumstances and which effectively and efficiently meets identified client need.” Likewise, ABA Pro Bono Standard 3.5-3, titled “Training and Support,” urges that “A pro bono program should provide training opportunities and support services to its volunteers.” This book shows how you can build and rebuild a practice through the knowledge, skills, and ethics learned from pro bono service.

Conventional wisdom is that a successful law practice requires just two ingredients: clients and the right kind of clients. There is nothing wrong with the conventional wisdom. Law practice does depend, first, on having clients to serve and, second, on having the right clients to serve. Yet, how do you interpret who is a “right” client? “Right” can certainly mean a client who pays your top hourly rate. It can also mean clients who are unable to afford your usual hourly rate but who can pay some fee—what some have called low bono. See Leslie C. Levin, Pro Bono and Low Bono in the Solo and Small Law Firm Context, in Robert Granfield & Lynd Mather, eds., Private Lawyers & the Public Interest 156, 159 (Oxford Univ. Press 2009). ABA Model Rule of Professional Conduct 6.1 urges not only free service to the indigent but also service at reduced fees. “Reduced fees” does not mean charging the going rate while treating the nonpaying client’s account receivable as uncollectible. ABA Pro Bono Standard 3.5-6, titled “Attorneys’ Fees Policy,” urges that “[a] pro bono program should establish and communicate to clients and volunteers a policy regarding the receipt of attorneys’ fees by program volunteers.” Your commitment to authentic low bono service means something not just to you and the profession but also to the client’s dignity. Another important distinction is that, although ethics rules like ABA Model Rule of Professional Conduct 7.1 prohibit solicitation of paying clients, presumably including low-paying clients, those rules generally do not prohibit soliciting pro bono clients.
Low bono aside, the “right” client can also mean nonpaying clients who respect and appreciate what you do for them, and who will recommend you to paying clients. For a variety of reasons and under a variety of circumstances this book explores, the “right” client can also mean clients who do not pay you, may not fully appreciate you (or have little by way of showing it), and have no one to whom they can refer you. The “right” client may mean one whose service expands your skills while earning you the reputation of an engaged and effective practitioner. “Right” service can also mean the intrinsic value of helping another even where, and perhaps especially where, there is no possible advantage to you. Pro bono clients can make critical differences in a law practice’s success, especially when one measures success in the broad terms of giving the legal profession and life their meaning, in addition to economic and other traditional measures.

Do not underestimate the power of pro bono service to transform a law practice. Many lawyers sense they must respond to new demands for which they need new skills. Some lawyers are unemployed or underemployed. Most lawyers view law practice and the communities in which they practice as rapidly changing. Old clients, whether individual or corporate, are disappearing, and old networks no longer seem to produce as many new clients. Furthermore, old skills seem not to serve current clients. Economic cycles seem to have deepened and demographic trends accelerated, thereby affecting business, financial and insurance services, education, and government in ways that would, until recently, have been unimaginable. Law firms themselves merge, divide, disappear, and reorganize at an unsettling pace. Even courts are reorganizing. Law practice’s only constants are change and challenge.

At the same time, there seems to be growing, not dwindling, need for legal services. There have long been concerns that the poor are underrepresented. “Approximately 80 percent of their civil legal needs go unmet. And more than the poor need legal services. Do you think the world today is any less regulated and complex? Formerly simple consumer transactions, such as buying a home, now involve frightening complexities over disclosure of construction defects, environmental hazards, association restrictions, borrower finances, and loan conditions. Aging invokes not just estate planning responsibilities but insurance, financial, and long-term care issues prior generations simply did not face. Businesses encounter staggering governance, licensing, compliance, trade, employment, civil rights, workplace safety, wage-and-hour, and tax issues. Construction of any kind—commercial or residential—implicates a plethora of zoning, permitting, contracting, and finance issues. Simply owning and using a vehicle, building, or land (no less trying to rent, sell, or transfer it) carries
legal obligations related to licensing, inspection, maintenance, compliance, and taxation, not to mention civil liabilities. We live in a modern state so highly regulated one cannot move without raising legal implications. If there is another law practice constant in addition to change and challenge, then it is legal need.

The lawyer’s response is what it has always been: to find new ways to deliver meaningful legal service. In the past twenty-five years, research, drafting, practice management, communication, and presentation tools of law practice have changed enormously. With changes in the tools of practice, the work itself has changed. Lawyers carry it on at a different pace. They organize and track it differently, package and price it differently, and recruit and staff for it differently. Many lawyers have adapted to and, indeed, promoted and welcomed those changes. Others have not. What some law students fail to realize and too many lawyers forget is that law practice is essentially entrepreneurial. Earning a law degree and passing the bar are not like getting a health care or tradesperson’s license. Law jobs are not so standardized and fungible. Lawyers are members of specific networks and communities, each with its own preferences, conventions, and bases for relationship. Law firms and other organizations have increasingly seen inclusion and diversity as not simply social (moral) imperatives, but also as business (economic) imperatives. Think of pro bono service in the same way as having social (moral) and business (economic) imperatives.

Pro bono practice challenges lawyers to build new skills, use new tools, and form new relationships within new service communities. It does so with ready-made clients whom the lawyer obtains at no marketing cost—indeed, with a converse free-marketing benefit. The clients come or are sent to you, rather than you pursuing them, while judges, bar leaders, and community leaders laud and respect you for accepting them. The lawyer makes no promises or assurances other than basic competence and diligence in the representation to secure the professional relationship. Rules 1.1 and 1.3 of the ABA Model Rules of Professional Conduct require diligence and competence for all service, including pro bono service, as does ABA Pro Bono Standard 2.4, “Quality Assurance,” providing that “[a] pro bono program should strive to assure that all clients served through the program receive high quality legal services.”

With no fees earned or anticipated, the consideration is the meaningfulness of the professional relationship and service. What could be better? Well, yes, it might be better if the clients paid, except everything just mentioned would change. Removing the economic basis for interacting with a client and the other professionals, firms, courts, and other institutions who must deal with the client’s matter accentuates other skills. The
payment part of practice creates a set of behaviors and expectations that inevitably alter the practice itself—not for the worse, nor necessarily for the better. Money just alters it. It is critical lawyers learn to manage the economic basis for practice. Good feelings do not pay the rent. On the other hand, managing the paying part of practice can retard development of relationships, skills, and practices that can lead to more paying practice. The direct pursuit of money is often the worst way to get it. No one wants a lawyer who is only interested in fees.

Remove the economic question from your practice for just a portion of your day, and you may see longer-term opportunities and subsidiary reforms that will regenerate it. Citing survey, study, and several other sources in her 2005 study of pro bono, Pro Bono in Principle and in Practice (at 21), Professor Deborah Rhode concludes:

[a] strong commitment [to pro bono] is clearly not inconsistent with commercial success. A significant number of the nation’s most profitable firms have high participation levels. Some evidence suggests that, at least for large firms, pro bono participation is positively correlated with financial success.

Another survey of empirical data links client satisfaction with lawyers’ professionalism and personal conscience, including the moral sensitivity, professional identity, and interpersonal skills that pro bono promotes. See Neil W. Hamilton & Verna Monson, The Empirical Relationship of Professionalism to Effectiveness in the Practice of Law, 24 GEORGETOWN J. LEGAL ETHICS (Feb. 15, 2010). You may have happier paying clients if you have a strong sense of professionalism that includes pro bono.

It is also true that pro bono programs alone will not satisfy the unmet legal needs of the low income and poor. Professor Rhode concludes in Pro Bono in Principle and in Practice that pro bono legal services “would come nowhere close” to eliminating the problems of the underserved. The most accurate view of pro bono is that it is a stimulus to meaningful and necessary reform of the way the profession delivers legal services. Lawyers have vast resources. Lawyers provide approximately $200 billion annually in legal services within the United States. See Michael Downey, Introduction to Law Practice 71 n.49 (ABA Law Practice Management Section 2010), citing United States Census Bureau, Legal Services 2002. Assuming a modest $100-per-hour value, every lawyer who works fifty, forty-hour weeks produces an annual $200,000 in legal services. To take one state as an example, Michigan’s 30,000 active lawyers thus generate an annual six billion dollars in legal services. Assuming a modest $20,000 in capital for each active Michigan lawyer, those lawyers draw collectively on $600 million in productive assets. Those figures suggest the vast amount of the avail-
able legal resources. Every tiny additional fraction of daily law practice devoted to the low income and poor vastly increases the available legal services well beyond what pro bono contributions can accomplish.

It is a big deal for a pro bono program to contribute $1 million in legal services. The State Bar of Michigan feted Ford Motor Corporation (at a time when it had annual earnings in the billions and was one of the world’s most profitable corporations) for contributing $100,000 in pro bono services. The corporation deserved the honor. Yet, if Michigan’s lawyers devoted just one percent more of their practices to serving the poor, then they would annually provide an additional $60 million dollars in legal services, which is 500 times Ford’s contribution. If the roughly one million lawyers in the United States devoted an additional one percent of their legal services to the low income and poor, then they would annually provide an additional $2 billion in legal services. By contrast, the entire federal Legal Services Corporation distribution nationwide to all grantees in 2005 was about $331 million—a figure exceeded only somewhat by grants from state and local sources. See Rebecca L. Sandefur, Lawyers’ Pro Bono Service and Market-Reliant Legal Aid, in Robert Granfield & Lynn Mather, eds., Private Lawyers & the Public Interest 96 (Oxford Univ. Press 2009). The same study estimates the value of the entire annual contribution of lawyer pro bono services as somewhere between $246 million and $624 million, a relative drop in the bucket compared to the $200 billion in annual legal services in the United States. Id at 97–98.

The point is that civil legal services in the United States, including pro bono services, rely on a market for which the supply is primarily in the hands of lawyers and the firms that employ them. Lawyers know it. The Granfield and Mather text found studies showing that lawyer revenue and perceived threats from other professions were the primary factors explaining state-to-state differences in pro bono service. Id at 105–06. The market for legal services influences pro bono service, as does the way in which lawyers perceive that market. The influence, though, may not be what you expect. According to the Granfield and Mather text, the more revenue lawyers receive and competition they perceive, the more, not the less, they provide pro bono service. Id at 106–07. Lawyers know pro bono is a practice builder. Thus, the better pro bono programs should be the ones that broaden, deepen, and improve the lawyer’s daily practice while serving the more broadly defined interests of the firms that employ them. See Luz E. Herrera, Rethinking Private Attorney Involvement Through a “Low Bono” Lens, 43 Loy. L.A. L. Rev. 1 (Fall 2009).

Serving pro bono clients can build or rebuild a law practice in at least four ways. First, it introduces you to new communities from which other clients may come. Second, it gives you a reputation for good works set-
ting you apart with important constituents. Third, it helps you develop new knowledge and skills at lower investment and risk. Fourth, it lends meaning to your practice. In the end, you should find yourself busier with paying clients because of your pro bono practice. What you will also find is that all of your practice becomes more meaningful. Can you put a price on that kind of success? Ask lawyers whether they would rather have one more billable hour or substantially greater satisfaction in practice each day, and most lawyers will take the latter. Pro bono practice is the surest route to work satisfaction at a time when lawyers need it. The best pro bono program is the one the profession no longer needs because it transformed the practices of the participating lawyers.

Consider an example. In representing an estate over the wrongful death of an airline passenger, I worked with a very fine lawyer whose marketing materials indicated he takes nothing but major cases. His mission was to help families who had suffered catastrophic loss. He had perhaps eight cases at any one time, when sole practitioners in civil litigation often have upwards of fifty cases. It was a fine mission and he had met with evident financial success. What, though, of all the families suffering smaller losses? What would a mission look like if it were solely to help, not only in the large cases but also in the small? I am sure the lawyer helped in small matters, too. Think of Abraham Lincoln. He represented major corporate interests (railroads, for instance) in the later years of his practice, but is legendary, he also had room for the small. There is room in every law practice for the large and small cases, including the highly remunerative, the moderately remunerative, and the nonremunerative.

Lawyers packed the tiny courtroom in the huge courthouse serving the large metropolitan area, as was the case for any civil motion docket other than during a blizzard or between Christmas and New Year’s. Just then, the double doors at the back of the courtroom swung sharply open, almost spanking a couple of waiting lawyers in the back. The nationally famous plaintiff’s lawyer who had won strings of multi-million dollar cases stood there in his resplendent suit, framed by the courtroom doors that his outstretched arms held wide open. He held the posture just long enough to ensure that every eye in the courtroom turned to him, his widespread arms looking like he was about to grant the assembled his benediction. The famous lawyer held nothing. Someone might have been carrying his bag, but if so, his presence was so commanding that the carrier was not evident. The sea of practitioners then parted as he walked straight to the bench. The judge, smiling warmly at his chutzpah (this was state, not federal, court), com-
plied by immediately calling his case. The dismayed lawyer who was right then arguing a different case and motion, and whom the judge nearly cut off in mid-sentence, meekly slunk back. Yet despite the famous lawyer’s flamboyance and reputation for handling the biggest of cases, his argument immediately made it clear that he was advocating the pro bono cause of a poor homeowner who had suffered an unjust tax-lien foreclosure. The overmatched assistant attorney general on the other side had nothing. In what seemed like seconds, the motion was over with the case dismissed. The famous lawyer exited, only now deigning to acknowledge the greetings and congratulations of professional acquaintances here and there. The judge returned to the interrupted lawyer whose mouth still seemed to be hanging open in wonder at what had just happened.

Pro bono practice emphasizes a set of skills, practices, and attitudes that work just as well but are not always so evident in paying practice. Those skills begin with working dependably and effectively with other professionals and their organizations and institutions while focusing on the client and work. As strange as it seems, one of the first skills a lawyer learns in paying practice is how to serve other lawyers. If a new lawyer joins an existing law firm, then he or she must know how to seek, receive, and execute the work in a way that satisfies the partners and senior associates who assign that work. If instead the new lawyer starts a solo practice, then that new lawyer may depend in part on referrals from established lawyers. In either case—law firm or solo—understanding the needs and expectations of other lawyers for collaborative, shared, or referred work is critical to many lawyers’ practices. Lawyers must interact effectively with other lawyers and professionals to complete legal work. Pro bono practice accentuates that skill to interact. When the other lawyer knows your interaction is only for the sake of the client’s work with no consideration of fees, your relationship with the other lawyer refocuses on the effective execution of the work.

Lawyers must also interact effectively with the firms, courts, and other institutions on which resolution of their clients’ matters depends. If a lawyer does not work well with judges, court staff, regulatory agencies, and other government and social service officials, then the lawyer is going to find it harder to serve clients. Lawyers understand why institutions behave in the manner in which they do—whether their protocols are to manage dockets, ensure the integrity of records, maintain confidences, or serve other institutional needs. Lawyers respect those needs by following institutional protocols. Your relationship with those institutions changes when your work is pro bono. Many judges, court staff, and agencies will
accommodate lawyers who are serving pro bono in small ways to make the lawyer’s pro bono work more efficient. A judge may waive hearing or oral argument on routine motions or issue a scheduling order without requiring a perfunctory appearance. A judicial secretary may advance the hearing of a pro bono matter to first on a motion docket, saving the lawyer hours of waiting time. An agency official may accept a teleconference rather than in-person hearing. Your interaction with institution officials can change your relationship to those institutions, not only on the pro bono matter but also in the future.

Lawyers must also interact effectively with clients. Clients are diverse, and their cognitive and cultural preferences variable. It is not simply that their educations vary widely. I have worked for wealthy clients who did not have a high school education. Education aside, the way in which they think, plan, and prefer to relate also varies widely. Paying practices tend to limit the range of clients to certain demographics. There can still be great variation within those demographics. Pro bono service draws more consistently on a wider spectrum of interaction skills. You will find individuals with a Ph.D. in the homeless mission. Yet, you will also find individuals there who have little or no education, have language barriers, and cannot practice consultative cognitive skills. Pro bono clients may also prefer forms of relationship that seem more or less formal, and more or less cognizant of a lawyer’s skill, role, and authority, than one ordinarily encounters in paying practice. Pro bono service challenges and extends a lawyer’s interpersonal and intercultural skills.

The following chapters of Part I address each of those interaction skills with lawyers, institutions, and clients. If you are confident that you already possess those skills, then do not feel that you need to read these chapters. Even if you do already have these skills, you may still find something in them that confirms or draws upon your experience and that may serve you well.