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Managing Pro Bono: Doing Well by Doing Better

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Cover Page Footnote

* Professor of Law, UCLA School of Law. ** Ernest W. McFarland Professor of Law, Director, Center on the Legal Profession, Stanford Law School. We are indebted to Joe Doherty, Director of UCLA's Empirical Research Group, and Steven Boutcher, Research Fellow at Georgetown's Center for the Study of the Legal Profession, for their assistance with our research design and data analysis. We are also grateful to Amanda Packel, Executive Director of Stanford's Center on the Legal Profession, for her assistance in the research design and approval by our universities' institutional review boards. We also benefitted greatly from the thoughtful comments of Rick Abel, Joanne Martin, Lynn Mather, and Rebecca Sandefur. Finally, our deepest appreciation goes to Amanda Smith of Morgan, Lewis & Bockius and the Leadership Committee of the Association of Pro Bono Counsel for their helpful facilitation of our project.

MANAGING PRO BONO: DOING WELL BY DOING BETTER

*Scott L. Cummings**

*Deborah L. Rhode***

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INTRODUCTION

Is pro bono work “recession-proof”? That was the question *The American Lawyer* asked in its 2009 ranking of large-firm pro bono performance.¹ As the nation’s most profitable firms suffered their worst financial year since the early 1990s, they nonetheless managed to devote more hours than ever to public service. The average attorney at an Am Law 200 firm logged over sixty hours of pro bono contributions per year.² Contributions were also up among participants in the Pro Bono Institute’s Law Firm Pro Bono Challenge.³ This achievement reflected the firms’ response to increased demands for assistance, as well as their desire to provide meaningful opportunities for underemployed lawyers.

The trend also reflects pro bono’s changing institutional status. A growing number of firms have professionalized pro bono service by dedicating personnel to coordination and supervision.⁴ This institutional infrastructure serves as a bulwark against declining volunteerism, while also providing readily accessible—and institutionally legitimate—opportunities for attorneys with insufficient billable work.⁵ Such an infrastructure also gives firms additional flexibility in responding to changes in market conditions. In the current economic crisis, this flexibility has been most clearly on display as firms have helped to find placements for associates who deferred their start dates or accepted temporary furloughs into public interest and legal aid organizations while waiting for the market to rebound.⁶

This article explores the changing status of pro bono work by providing empirical data on its institutionalization in large firms. We chose to study this sector of practice for several reasons. Large firms play a central role in

1. David Bario, *Recession-Proof?*, AM. LAW., July 2009, at 53.

2. *Id.* at 53.

3. Hours increased by thirteen percent during 2008 among the 135 firms that committed to investing three to five percent of their billable hours toward pro bono work. See Karen Sloan, *Pro Bono Hours Rise at Major U.S. Law Firms*, NAT’L L.J., July 29, 2009, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202432603666>.

4. PRO BONO INST., LAW FIRM PRO BONO STAFFING AND SALARY SURVEY REPORT (2007); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 58–61 (2004); Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in 12 SOCIOLOGY OF CRIME, LAW AND DEVIANCE 145, 157–59 (Rebecca L. Sandefur ed., 2009); see also Daphne Eviatar, *Pro Bono Pros*, AM. LAW., July 2008, at 104. The institutionalization of pro bono programs is related to the broader bureaucratization of large law firms. See RICHARD L. ABEL, AMERICAN LAWYERS 10 (1989) (noting that “[t]he size, internal differentiation, and stratification of [firms] demands more bureaucratic structures”).

5. Bario, *supra* note 1, at 54 (“Now firms are more likely to see pro bono work as a way to take up slack when billables are down . . .”).

6. See ASS’N OF PRO BONO COUNSEL, CONSIDERATIONS FOR THE PLACEMENT OF LAW FIRM ATTORNEYS INTO PUBLIC INTEREST ORGANIZATIONS (2009), available at http://www.abanet.org/legalservices/probono/downturn/docs/apbco_considerations.pdf; PRO BONO INST., LAW FIRM ATTORNEYS DISPLACED BY THE ECONOMIC DOWNTURN: BEST PRACTICES AND GUIDANCE FOR EFFECTIVE PRO BONO ENGAGEMENT (2009), available at <http://www.probonoinst.org/pdfs/DisplacedAttorneys.pdf>.

the pro bono system because of their high volume of contributions, both in aggregate terms and relative to other sectors of the profession.⁷ Large firms also play a leadership role within the pro bono field, and generally have the most developed organizational structures.⁸ Because these firms have the greatest capacity to invest in professional staff, they also are the most accessible sources of systematic data on the institutionalization of pro bono efforts. And finally, despite their importance and the growing literature that they have attracted, we still know far too little about how large-firm pro bono programs operate in practice.⁹ What is their impact on the quantity and quality of services? What challenges do they face, particularly in times of economic stress?

To address these questions we draw on evidence from a survey of law firm pro bono programs, supplemented by data from *The American Lawyer* and the National Association of Law Placement (NALP) Employer Directory. Our survey targeted firms with designated personnel, whom we call *pro bono counsel*, responsible for overseeing the design, coordination, and evaluation of firm pro bono programs.¹⁰ The creation of pro bono counsel positions is, for the most part, a recent phenomenon and suggests a relatively high degree of commitment to effective public service initiatives. Our study provides the first systematic look at when and why pro bono

7. Steven Boucher reports that the total pro bono hours for firms in the Am Law 200 in 2005 was just over 3.75 million. Steven A. Boucher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 135, 144 (Robert Granfield & Lynn Mather eds., 2009) [hereinafter PRIVATE LAWYERS AND THE PUBLIC INTEREST]. *After the JD*, a longitudinal study of newly certified lawyers by the American Bar Foundation and NALP Foundation for Law Career Research and Education, reported that about half of total pro bono hours by private practice lawyers came from lawyers in firms with more than 250 attorneys. RONIT DINOVITZER ET AL., AM. BAR. FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 37 tbl.4.3 (2004); see also Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra*, at 95, 101.

8. Cf. Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 576–77 (2002) (discussing the emergence of in-house compliance specialists as another area of law firm organizational development).

9. For representative studies, see DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 137–53 (2005) [hereinafter RHODE, PRO BONO]; Boucher, *supra* note 7; Cummings, *supra* note 4; Robert Granfield & Lynn Mather, *Pro Bono, the Public Good, and the Legal Profession*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 7, at 1; Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435 (2009) [hereinafter Rhode, *Rethinking*]; Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79 (2007); Maria Twomey & John Corker, *Pro Bono at Work: Report on the Pro Bono Legal Work of 25 Large Australian Law Firms*, 11 LEGAL ETHICS 255 (2008).

10. Pro bono counsel is the term most prevalent among firms and most occupants of the position; it is also the term chosen by the Association of Pro Bono Counsel. The role, responsibilities, and other practice obligations that attach to this position vary across firms. See *infra* text accompanying notes 111–17.

counsel have been hired, what role they have played in guiding policy, and how they have affected the quantity and quality of pro bono contributions. In the process, we seek to identify best practices and help law firms learn from each other about how to maximize the effectiveness of their pro bono work.

The development of pro bono programs is a crucial factor in promoting professional service in good times—and protecting it in bad. The presence of an internal pro bono constituency helps to ensure that unpaid work remains a firm priority. Yet the assimilation of pro bono to large-firm goals may also transform its meaning and redirect its purposes. Law firms are, in the end, businesses. And although they are businesses with a professional mandate to give back, the organizational imperative to turn a profit inevitably shapes both the amount and nature of public service. Unpaid work serves pragmatic as well as altruistic objectives. It can enhance firms' recruitment, retention, rankings, and reputation, while offering individual lawyers crucial training and career development opportunities. How firms can best reconcile the multiple objectives of pro bono programs is the focus of this study.

This article proceeds in four parts. Part I explains our research design: the written survey and interviews with pro bono counsel that we completed in the summer of 2009. Part II describes the professional and economic forces driving the development of organized pro bono programs. Through longitudinal data on Am Law 200 firms, our study tracks the creation of pro bono counsel positions and their relationship to pro bono service. Part III summarizes key findings on the structure and evaluation of pro bono programs. Part IV then builds on these findings to explore the relationship of pro bono to law firm goals and professional responsibilities. We conclude with preliminary recommendations on how firms might enhance the quality of pro bono work—how they might *do well by doing better*.

I. RESEARCH DESIGN

Our study was designed to better understand the challenges facing large-firm pro bono programs and to identify best practices that might assist these programs in improving their performance. To that end, we developed a survey for pro bono counsel and e-mailed it to members of the Association of Pro Bono Counsel (APBCo), an organization formed in 2006 “[t]o support law firm pro bono counsel in enhancing their individual potential and performance.”¹¹ We then conducted follow-up interviews with all the counsel who completed the questionnaire and indicated a willingness to provide further information.

We chose this design for several reasons. Firms with pro bono counsel positions are likely to be those that have the most developed organizational structures, devote the most resources, and hire the most effective staff to

11. The Association of Pro Bono Counsel, <http://www.probonocounsel.org/about/> (last visited Mar. 17, 2010).

support pro bono participation. These firms are also leaders in the field and set the trends that others follow. Although we cannot generalize to large firms without pro bono counsel positions, we have no reason to believe that the challenges they face are different and every reason to believe that the firms we studied are leaders in meeting the challenges. Working through APBCo provided further benefits. Its leaders gave generously of their time in helping us refine the questionnaire and then distributed a letter to its members facilitating their involvement in the survey. Although there may be some firms with pro bono counsel that do not belong to APBCo, it is unlikely that they differ in any systematic way from those who participated in our survey.

After allowing members the opportunity to opt out of the sample (which none exercised), APBCo's Leadership Committee provided us with a membership list that we used to contact pro bono counsel. The list had 108 individuals from 80 law firms; some firms have more than one person managing their pro bono programs. Members fall into two categories. Lawyers who manage their firms' pro bono practice on a full-time basis are by definition eligible for membership in APBCo, while "[n]on-attorneys who currently manage a law firm pro bono practice on a full-time basis and attorneys who currently spend 50% or more of their time managing a law firm pro bono practice" are eligible for membership on a discretionary basis.¹² As a result, our survey was directed mainly to full-time counsel and excluded lawyers who chair their firms' pro bono committees but devote less than half of their time to such work. We also excluded counsel for foreign firms because we did not have a large enough number to permit meaningful generalizations. If firms had more than one member, we asked them to select one to respond to the questionnaire. That left a total of seventy-four firms. To test our intuition that the APBCo firms would closely match the broader universe of large firms with pro bono counsel, we compared the number of APBCo firms to the total number of firms in the 2009 Am Law 200 indicating that they employed full-time pro bono counsel and found a close correspondence.¹³

We e-mailed our questionnaire (attached as Appendix A) to APBCo members through a web-based survey system beginning in 2009 and followed up multiple times with those who had not responded.¹⁴ Our

12. The Association of Pro Bono Counsel, Membership, <http://www.probonocounsel.org/membership> (last visited Mar. 17, 2010).

13. To determine what percentage of Am Law 200 firms reported having a "full-time attorney in a dedicated pro bono coordination/oversight role," we consulted the Pro Bono Information section of each firm's Employer Information Page in the NALP Directory of Legal Employers, <http://www.nalpdirectory.com/index.asp> (search for a firm; then scroll down to its "Pro Bono Information"). We found that seventy-eight firms reported having a full-time lawyer as pro bono counsel. This figure was heavily weighted toward the top hundred firms, which had sixty-three of the seventy-eight positions.

14. The e-mail requesting participation in the survey described its goals and provided relevant human subject information; it assured members that their responses would remain confidential unless they agreed to have their identity revealed for reporting purposes.

questionnaire promised confidentiality but asked if counsel would be willing to provide additional information in an interview. Of the seventy-four U.S. firms that received the survey, fifty-six completed it, for a response rate of seventy-six percent. Of those, thirty were willing and available to be interviewed during August and September of 2009. These interviews aimed to probe more deeply into the main challenges facing pro bono programs, including evaluation of quality and the impact of the economic downturn.

We also gathered information on responding firms from data reported in the Am Law 200 and firm reports in the NALP Directory.¹⁵ Table 1 shows the characteristics of the responding firms.

Table 1: Respondent Characteristics

Characteristics	Number of Firms	% of Firms
<i>Size</i>		
0-100	2	3.57%
101-250	2	3.57%
251-500	9	16.07%
501-1000	28	50.00%
Over 1000	15	26.79%
<i>Region</i>		
New York City	11	19.64%
Washington D.C.	10	17.86%
Mid-Atlantic	10	17.86%
West Coast/Pacific Rim	10	17.86%
Midwest	8	14.29%
South and Southeast	4	7.14%
New England	2	3.57%
West and Southwest	1	1.79%
<i>Am Law Rank (revenue)</i>		
1-50	30	53.57%
51-100	17	30.36%
101-150	6	10.71%
Not ranked	3	5.36%
<i>Am Law Rank (pro bono)</i>		
1-50	29	51.79%
51-100	18	32.14%
101-150	6	10.71%
Not ranked	3	5.36%

Members were directed to the survey via an embedded web link. All of the respondents except one (who submitted an electronic copy via e-mail) provided answers online.

15. The directory publishes annual online reports from the firms in a section on "Pro Bono Information." This section provided information on the organization of firm programs for fifty-five of our responding firms.

As the table indicates, our respondents came primarily from large, elite law firms. Nearly all of the firms have more than 250 lawyers (ninety-three percent); over three-fourths (seventy-seven percent) have more than five hundred lawyers. The firms are highly ranked in the 2009 Am Law 200 survey. Over half fall within the top fifty on both the pro bono and revenue lists and over four-fifths fall within the top hundred of both lists. The firms are concentrated in the Northeast.¹⁶ A majority (n=33) are in New York City, Washington D.C., the Mid-Atlantic,¹⁷ and New England¹⁸—nearly two-fifths (37.5%) are in New York City and Washington D.C. alone. Approximately eighteen percent of the firms (n=10) are in the West Coast/Pacific Rim region and fourteen percent (n=8) in the Midwest.¹⁹ Less than ten percent of the firms fall within the South and Southeast and West and Southwest regions.²⁰

II. THE INSTITUTIONALIZATION OF PRO BONO PROGRAMS: CAUSES AND CONSEQUENCES

The institutionalization of pro bono work refers to the way it has become interwoven into the basic fabric of the profession, where it is governed by explicit rules, identifiable practices, and implicit norms promoting public service.²¹ Most U.S. lawyers now take pro bono for granted and see

16. We assigned firms a geographic region based on the city in which the primary U.S. office is located and the regional categories in the Am Law 200. For most firms, we used *The American Lawyer's* city designation. In those cases in which *The American Lawyer* did not associate a firm with a specific city, we looked at law firm profiles on Vault.com and, if necessary, firm websites to determine where the firm had its headquarters.

17. The Mid-Atlantic includes Delaware, Maryland, New Jersey, New York State (excluding New York City), Northern Virginia, and Pennsylvania. Rosemarie Clancy & John O'Connor, *A Guide to Our Methodology*, AM. LAW., May 2008, at 165.

18. New England includes Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. *Id.*

19. The West Coast/Pacific Rim region includes Alaska, California, Hawaii, Oregon, and Washington State. *Id.* The Midwest region includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. *Id.*

20. The South and Southeast region includes Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Southern Virginia, Tennessee, and West Virginia. *Id.* The West and Southwest region includes Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, and Wyoming. *Id.* Many of these firms have offices in multiple states. We did not collect office-by-office data and therefore cannot say how pro bono structure influences activity across jurisdictions. We know that at least some firms use a central coordinator for more than one office, while others have counsel in different cities. For example, DLA Piper, which is structured as a strategic alliance of firms, has five U.S. attorneys who manage pro bono programs on a full-time basis; each focuses on a different region of the country in addition to administering national projects. The firm has also recently hired one full-time and one part-time attorney to manage its international pro bono activities. E-mail from Anne Geraghty Helms, Pro Bono Counsel, DLA Piper, to Scott L. Cummings, Professor, UCLA School of Law (Sept. 11, 2009, 14:00:10 PDT) (on file with authors).

21. See generally Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983).

volunteer work as an expected part of legal practice. To facilitate lawyer volunteerism, the pro bono field has become increasingly professionalized. This trend raises two key questions. What has caused this institutionalization? And what impact has it had on the delivery of pro bono legal services?

The answers to both questions depend on practice settings.²² The meaning and objectives of pro bono work are different in large firms than in small firms and solo practices.²³ In large firms, unpaid work is generally viewed as public service, as well as a vehicle for recruitment and training.²⁴ In small firms, unpaid work more often is inadvertent (when clients fail to pay their fees) or a means to attract paying work.²⁵ Each of these arenas has developed an infrastructure to promote public service.²⁶ Yet large firms, because of their size and leadership role, have been the focus of bar initiatives and have, in turn, made the most significant internal investments in pro bono infrastructures.²⁷ Indeed, the process of institutionalization in large firms—reflected in the development of organized pro bono programs headed by pro bono counsel—has now become so widespread that *The American Lawyer* can label it “almost unremarkable.”²⁸

A. Causes

This movement toward institutionalization reflects both internal forces and external pressures. Four interlocking trends have been critical: growth patterns in large firms, inadequacies in government-supported legal services, bar initiatives to promote pro bono activity, and law firm rankings based on pro bono participation.

1. Transforming Private Legal Practice: The Growth of Large Firms

The dramatic growth of large firms over the last half-century laid the groundwork for an institutionalized structure of pro bono activity. In the late

22. See Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 *LAW & SOC'Y REV.* 113, 116 (2007).

23. Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST*, *supra* note 7, at 183, 183.

24. See Cummings, *supra* note 4, at 18, 110–11.

25. See Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 *HOFSTRA L. REV.* 699, 701 (2009); see also LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001); CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* (1996); Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 *LAW & SOC'Y REV.* 431 (1975).

26. Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Law Firm Context*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST*, *supra* note 7, at 155, 155–56.

27. An analogous institutionalization of pro bono work has occurred within legal services and public interest organizations, and is ripe for additional research. This development affects the volume and the type of cases routed to pro bono lawyers, and the evaluation of their work.

28. Bario, *supra* note 1.

1950s there were thirty-eight law firms with over fifty lawyers.²⁹ By 1990, over 600 firms had more than sixty lawyers and several had more than 1000.³⁰ Not only did large firms grow in number, they also grew in size through mergers, satellite offices, and aggressive entry-level and lateral hiring.³¹ In 1991, the average size of the Am Law 100 law firms was 375; by 2001, it was 621 and by 2008, 820.³² As the big firms grew bigger, they also grew more profitable. Between 1990 and 1999, Am Law 100 revenue-per-lawyer figures grew by forty-five percent while profits per partner increased by seventy percent.³³ Despite an economic downturn in the early 2000s, revenue per lawyer in the Am Law 100 firms rose by forty-six percent from 2000 to 2007, while profits per partner rose by seventy-one percent.³⁴ The 2008 recession caused only small declines in revenues per lawyer (one percent) and profits per partner (0.5%).³⁵ In short, compared with its predecessor two decades ago, the contemporary large law firm is more than double in size and revenues, and triple in profits.

This growth has had three important consequences for pro bono work. First, as firms grew bigger and more bureaucratic, it became harder to maintain decentralized systems with lawyer-initiated volunteer work, in part because of the difficulties it posed for tracking cases.³⁶ Such systems were ill suited to prevent potential conflicts of interest. And as large firms became increasingly organized around departments, specialties, and functional roles, the institutionalization of formal, centralized pro bono programs seemed less of a leap.³⁷ Second, firm growth created more revenue and “organizational slack,” which could be used to subsidize additional

29. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 46 (1991); see also ABEL, *supra* note 4, at 9.

30. See Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 629–30 (1994). The percentage of private practitioners working in big firms (over fifty lawyers) also increased, doubling from 7.3% in 1980 to 14.6% in 1988. See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 392 (1994).

31. See Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 9 (1999).

32. 2009 Am Law 200 Data (on file with authors); 2002 Am Law 200 Data (on file with authors); 1992 Am Law 200 Data (on file with authors).

33. Compare 2000 Am Law 200 Data (on file with authors), with 1991 Am Law 200 Data (on file with authors).

34. Compare 2008 Am Law 200 Data (on file with authors), with 2001 Am Law 200 Data (on file with authors).

35. Compare 2009 Am Law 200 Data, *supra* note 32, with 2008 Am Law 200 Data, *supra* note 34.

36. See Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689, 1695 (2002) (suggesting that a “laissez faire” approach to pro bono activity works against substantial commitment).

37. For a general overview of the transformation of large firms, see ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 172–80 (1988).

unpaid work.³⁸ Third, increases in size, particularly at the bottom of the firm pyramid, created new challenges for professional development. Large numbers of associates required opportunities for training and significant responsibility. Pro bono work was a way to provide them.

2. Decentering the State: The Inadequacy of Government-Supported Legal Aid

The rise of organized pro bono also has been linked to a rise in demand, due to constraints on federally funded legal aid. The reduction in legal aid accompanied broader political shifts from state to market as a way to distribute public goods.³⁹ The erosion in services for the poor reflected both reductions in federal funding and restrictions on advocacy. By 1996, congressional authorization for legal services had fallen to a level fifty percent below its peak in 1980.⁴⁰ That same year, Congress banned federally funded programs from engaging in a range of activities including litigation involving class actions, aliens, and attorney's fees.⁴¹ Legal services programs receiving any federal subsidies were also prohibited from using nonfederal funds to engage in any of the banned activities.⁴² Such limitations forced poverty lawyers to seek other revenue sources.⁴³ Despite successful efforts to diversify funding, the current civil legal aid system has remained chronically underfunded; it can meet less than one-fifth of the estimated needs of eligible low-income individuals.⁴⁴ And this system, even supplemented by the nation's impressive array of public interest legal organizations, can respond to only a small fraction of collective societal needs for representation in areas

38. Sandefur, *supra* note 9, at 93 (quoting RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM 37 (1963)).

39. See Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 7, at 295, 295–96.

40. See Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1222 (2002). Although federal funding in actual dollars has risen since then, as of 2008, it was still nearly fifty-three percent below what it was in 1980 when adjusted for inflation. ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009, at 13 (2009) [hereinafter HOUSEMAN, CIVIL LEGAL AID 2009], available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf>.

41. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), (11), (13), 110 Stat. 1321, 1321-53 to -55.

42. See BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 7 (2000), available at http://brennan.3cdn.net/3cbbeedd52806583b1_osm6blo8g.pdf.

43. Primary sources include grants from state and local governments, interest on lawyers' trust fund accounts, and private donors. See ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003, at 4 (2003), available at www.clasp.org/admin/site/publications/files/0153.pdf; Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 908 (2009).

44. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 1–4 (2d ed. 2007), available at <http://www.lsc.gov/justicegap.pdf>; Rhode, *supra* note 43, at 869.

such as civil rights, civil liberties, environmental justice, educational equity, and consumer health and safety.⁴⁵

America's pro bono system has evolved against this backdrop. In 1981, the Legal Services Corporation required that its grantees make a "substantial amount" of funds available for private attorney involvement.⁴⁶ This requirement encouraged the expansion of programs designed to recruit, train, and connect pro bono volunteers with low-income clients. In 1980, about ninety such programs existed.⁴⁷ Today there are approximately nine hundred.⁴⁸ They constitute a significant part of the nation's civil legal aid structure, accounting for between one-quarter and one-third of full-time equivalent lawyer staff.⁴⁹ Large-firm lawyers play an increasingly prominent role in this pro bono system overall and provide crucial representation in matters that federally supported programs are barred from accepting.

3. Professional Incentives: Carrots Without Sticks

The organized bar has actively promoted pro bono as a way to shore up gaps in legal aid and public interest representation. A primary focus has been on large firms, which have the resources, personnel, and prestige to make the most significant and visible contributions. The bar's strategy has involved carrots not sticks—that is, incentives not sanctions.

This is the approach of the ABA's Model Rules of Professional Conduct. Rule 6.1 provides that every lawyer "should aspire to render at least (50) hours of pro bono publico legal services per year," and that a "substantial majority" should assist "persons of limited means" or organizations that help them.⁵⁰ Additional assistance should go to activities that improve the law, legal profession or legal system, or that support "civil rights, civil liberties

45. For information about the inadequate resources of public interest organizations, see generally Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008).

46. LEGAL SERVS. CORP., ADOPTION OF PRINCIPLES ON PRIVATE BAR INVOLVEMENT (1981), available at <http://www.lsc.gov/pdfs/1981-03.PDF>; see also Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 LAW & INEQ. 77, 87 (1994). Under the program, Legal Services Corporation grantees are required to use 12.5% of their federal funds to support private attorney involvement. 45 C.F.R. § 1614.2 (2009).

47. See MEREDITH MCBURNEY, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1 (2003), available at www.abanet.org/legalservices/probono/impact_reconfiguration.pdf; see also Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in THE LAW FIRM AND THE PUBLIC GOOD 59, 75 (Robert A. Katzmann ed., 1995) (putting the number of pro bono programs at about fifty).

48. The American Bar Association's current directory of pro bono programs lists approximately nine hundred groups; there are ninety-six in California and sixty-six in New York. American Bar Association, Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, Directory of Pro Bono Programs, <http://www.abanet.org/legalservices/probono/directory.html> (last visited Mar. 17, 2010).

49. Sandefur, *supra* note 9, at 102.

50. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009).

or public rights, or charitable, religious, civic, community, governmental and educational organizations” if payment of fees would “significantly deplete the organization’s economic resources or would be otherwise inappropriate.”⁵¹ By giving preference to low-income clients, the Rule seeks to channel pro bono work towards those who need help most and to discourage lawyers from claiming charitable credit for favors for friends, family, clients, and nonprofit organizations that could afford legal services.⁵²

To encourage compliance with this aspirational standard, the organized bar has relied most heavily on recruitment and recognition initiatives. The recruitment initiatives range from general calls for participation to narrowly targeted requests from prominent lawyers and judges.⁵³ The recognition-based initiatives focus on awards. The ABA Standing Committee on Pro Bono and Public Service sponsors an annual awards program to reward and encourage outstanding public service.⁵⁴ Most state and local bar associations also confer awards and feature them prominently in publications and annual meetings.⁵⁵

Finally, some state bars, supreme courts, and bar-supported nonprofit organizations have sought to promote pro bono through mandatory or voluntary reporting systems.⁵⁶ Reporting schemes operate both at firm-specific and state and local levels. With respect to firm initiatives, the most important effort is the Pro Bono Institute’s Law Firm Pro Bono Challenge, which asks roughly 135 participating firms to make pro bono contributions equivalent to three to five percent of their billable work. Although there are no sanctions for failure to meet the benchmarks, firms that make good on their commitments can report that fact in their recruitment and other public relations materials. For participants in the most recent Pro Bono Institute Challenge, slightly over half (fifty-five percent) reported reaching their targets.⁵⁷ At the state level, seven jurisdictions require lawyers to report their pro bono contributions and twelve have voluntary reporting systems.⁵⁸

51. *Id.*

52. For the frequency of pro bono contributions arising from lawyers’ personal relationships or desires to attract paying clients, see RHODE, PRO BONO, *supra* note 9, at 39, 148.

53. Sandefur, *supra* note 9, at 91–92.

54. See ABA Standing Comm. on Pro Bono & Pub. Serv., ABA Pro Bono Publico Award, <http://www.abanet.org/legalservices/probono/probonopublicoaward.html> (last visited Mar. 17, 2010).

55. For example, the California State Bar has organized an annual pro bono awards program to recognize outstanding volunteers. See State Bar of Cal., 2004 President’s Pro Bono Service Awards, *available at* <http://www.calbar.ca.gov/calbar/pdfs/awards/2004-Pres-Pro-Bono-Award.pdf>.

56. See Sandefur, *supra* note 9, at 92.

57. PRO BONO INST., REPORT ON THE 2008 PRO BONO INSTITUTE LAW FIRM PRO BONO CHALLENGE STATISTICS 5 (2009).

58. See ABA Standing Comm. on Pro Bono & Pub. Serv., State Reporting Policies, <http://www.abanet.org/legalservices/probono/reporting/pbreporting.cfm> (last visited Mar. 17, 2010) [hereinafter ABA State Reporting Policies]; see also The Fla. Bar, Pro Bono Publico (For the Good of the Public), <http://www.flabar.org/DIVCOM/PI/BIPS2001.nsf/0/a8e811c59073e9f68525669e004d21f6?OpenDocument> (last visited Mar. 17, 2010). For the

Compliance rates in mandatory jurisdictions have varied dramatically, from roughly thirty to ninety percent, while compliance rates have generally been much lower in voluntary jurisdictions.⁵⁹ In the two decades since Florida first enacted a reporting requirement in 1994, the number of lawyers providing pro bono assistance to the poor has increased by 35%, the number of hours has increased by 160%, and financial contributions have increased by 243%.⁶⁰ Whether voluntary reporting systems have had similar impact remains unclear. However, at the very least, such reporting systems have the potential to encourage pro bono work and to pressure firms into giving credit to lawyers who provide it. At the local level, many city and county bar associations have made pro bono a priority. For example, Chicago, New York, San Francisco, Los Angeles, and the District of Columbia all have events and projects that bring together law firms and nonprofit legal organizations to enhance pro bono activity.⁶¹

4. The Market for Talent: The Role of Rankings and Reputation

Professional initiatives have interacted with powerful market-based incentives for public service, particularly law firm rankings by major legal publications. Before the development of such rankings, relatively few large firms had programs designed to promote and monitor pro bono activity. In the early 1970s, a major study found fewer than twenty-five formal programs, and even fewer pro bono counsel positions of the type now common at large firms.⁶² An important impetus for the formation of these early programs was a desire to compete with public interest and legal services organizations, which were attracting graduates of elite law schools during a wave of progressive student activism.⁶³ A few leading firms in the regions most directly competitive with public interest organizations, especially Washington D.C. and New York, began establishing formal pro

states that have voluntary regimes, see ABA State Reporting Policies, *supra*; see also Kellie Isbell & Sarah Sawle, Current Development, Pro Bono Publico: *Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845 (2002).

59. See ABA State Reporting Policies, *supra* note 58.

60. STANDING COMM. ON PRO BONO LEGAL SERV., REPORT TO THE SUPREME COURT OF FLORIDA, THE FLORIDA BAR, AND THE FLORIDA BAR FOUNDATION ON THE VOLUNTARY PRO BONO ATTORNEY PLAN 3 (2006) [hereinafter FLORIDA PRO BONO REPORT].

61. For an example, see Chicago Bar Association, 2009 Pro Bono Week, http://www.chicagobar.org/AM/Template.cfm?Section=Pro_Bono_Week_2009&Template=/CM/ContentDisplay.cfm&ContentID=4849 (last visited Mar. 17, 2010).

62. The three most common institutional arrangements were as follows: "(a) a firm committee handled or reviewed intake of pro bono cases, and individual lawyers associated themselves with cases of interest; (b) the firm committed itself to release lawyers for full-time public interest work or maintained a separate office for legal aid work; and (c) individual lawyers determined their own amounts and types of public interest work and felt that the firm supported and encouraged pro bono work." JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 123–24 (1978).

63. *Id.* at 45–46; see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 278–79 (1976); F. RAYMOND MARKS ET AL., *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* 204–10 (1972).

bono programs. For example, Hogan & Hartson created a full-fledged public interest department with lawyers spending all of their time on pro bono work.⁶⁴ Covington & Burling created a “release-time” program that loaned full-time lawyers and support staff to a local legal services office.⁶⁵

The American Lawyer's 1994 decision to begin publicly ranking firms based on the depth and breadth of their pro bono performance dramatically altered firm behavior.⁶⁶ The emergence of law firm and law school pro bono efforts over the previous decade had led graduates to expect pro bono opportunities.⁶⁷ *The American Lawyer's* pro bono rankings offered a readily accessible and ostensibly objective method of evaluating those opportunities in particular firms. The rankings also provided an easy way for the entire legal community to identify high performers and “cellar dwellers.” The stakes escalated in 2003 when *The American Lawyer* began publishing its “A-List” of the top twenty firms based on a combined score, which incorporated a firm’s overall pro bono performance as an important factor (in addition to economic performance, associate satisfaction, and diversity measures).⁶⁸ *The American Lawyer's* pro bono rankings are based on two quantitative measures: the average number of pro bono hours per attorney and the percentage of firm attorneys who contribute at least twenty hours of pro bono work.⁶⁹ In defining what activities qualify, *The*

64. See Lardent, *supra* note 47, at 60.

65. See MARKS ET AL., *supra* note 63, at 114–16; see also Al Kamen & Ed Bruske, *Critics See Lawyers Losing Interest in Public-Service Cases*, WASH. POST, Dec. 27, 1983, at C1. Covington & Burling’s rotation program was initiated in 1969. See Cummings, *supra* note 4, at 36 n.203 (citing COVINGTON & BURLING, PUBLIC SERVICE ACTIVITIES 58 (2002)). Taking this model one step further, Baltimore-based Piper & Marbury established a branch office in a low-income community to provide pro bono services. See ALLAN ASHMAN, THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY’S NEIGHBORHOOD LAW OFFICE, at xiii (1972).

66. The urge to rank grew out of a broader movement to use objective indicators to promote better transparency and accountability across a range of public and private institutions. Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63, 64, 80 (2009). On the impact of rankings, see Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of the U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC’Y REV. 105 (2006); see also Hunter R. Clark, *How the U.S. News Rankings Affect American Legal Education*, 91 JUDICATURE 80 (2007); Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383 (2006); Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L.J. 791 (2008); Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229 (2006); Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25 (2006).

67. The development of law school pro bono programs beginning in the early 1980s reinforced graduate sensitivity to firm pro bono opportunities. See RHODE, PRO BONO, *supra* note 9, at 22.

68. *Methodology: How We Determine the A-List Scores*, AM. LAW., July 1, 2009, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202431721833>.

69. *Methodology: How We Compute Our Pro Bono Rankings*, AM. LAW., July 1, 2009, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202431509210>.

American Lawyer uses a standard developed by the Pro Bono Institute, which tracks the ABA Rule but excludes activities designed to improve the law or legal profession, such as service on bar committees. Part of the impetus for the ranking structure was to create a counterweight to the revenue-based rankings developed a decade earlier, now known as the Am Law 200.⁷⁰ The addition of pro bono information in the online version of the NALP Directory in 2006 and the incorporation of pro bono information in the Vault.com database on law firms reflected similar concerns, and added further pressure on firms to demonstrate their pro bono commitment.

As in other contexts, the movement to rank pro bono contributions produced a “Heisenberg effect”: the rankings changed the phenomenon they claimed to measure.⁷¹ By creating a highly visible and easily interpreted metric of law firm evaluation, this ranking structure established pro bono as an even more prominent factor in firm reputation and influenced the recruitment of associates. Moreover, by measuring only the quantity and extent of participation, rankings encouraged firms to focus on these goals, rather than on harder to assess outcome measures such as the quality or social impact of their work.

B. Consequences

1. Institutional: The Rise of Organized Pro Bono Programs

Beginning in the 1990s, the convergence of law firm growth with professional and market pressures produced a new wave of pro bono program development. These programs, many of which had begun to evolve in the late 1970s and 1980s, generally shared certain features, such as firmwide pro bono committees and formal policies regarding whether and how much pro bono counted toward billable hour requirements, bonus determinations, and promotion decisions.⁷² Some firms began to widen the scope of pro bono programs to include more externship and fellowship opportunities.⁷³

The major distinguishing feature of the new wave of institutionalization was the creation of managerial positions with responsibility to coordinate, monitor, and report pro bono activity. These positions were a rarity in the prerankings era. A 2008 *American Lawyer* article on “pro bono pros” noted that nearly one-half of the Am Law 200 firms had “at least one full-time pro

70. *The Am Law 50: America's Fifty Highest Grossing Firms*, AM. LAW., July/Aug. 1985, at 89.

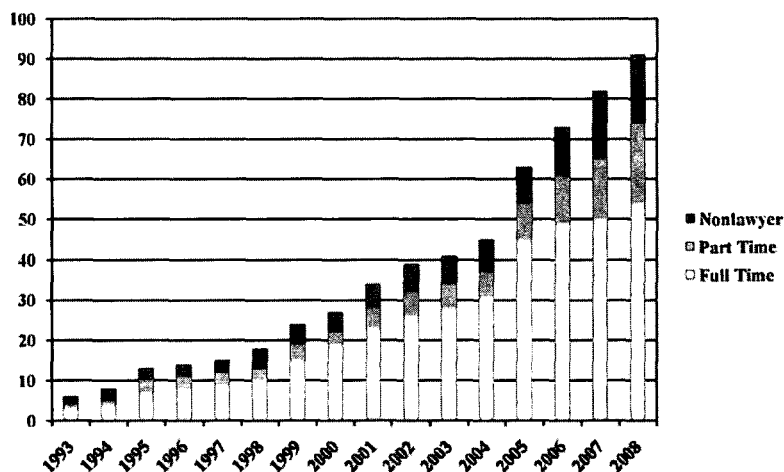
71. Sauder & Lancaster, *supra* note 66, at 130–31. Law school rankings compiled by *U.S. News & World Report* have led to well-documented gaming, with law school deans hiring back unemployed recent graduates to boost employment numbers or failing to report academic information for lower-performing incoming students enrolled in night programs. Morse Code: Inside the College Rankings, <http://www.usnews.com/blogs/college-rankings-blog/2009/05/18/what-happened-with-brooklyn-law-school.html> (May 18, 2009, 14:53 EST).

72. See RHODE, PRO BONO, *supra* note 9, at 137–39.

73. Cummings, *supra* note 4, at 77–78.

bono lawyer or coordinator,” compared to only “about a dozen” in 2000.⁷⁴ Similarly, ninety-six percent of the participants responding to a 2007 Pro Bono Institute survey reported such positions.⁷⁵ To gain a fuller understanding of the development of these positions, we asked all the firms that had appeared in *The American Lawyer* pro bono ranking since its inception (and still exist) to indicate when they established a pro bono counsel position.⁷⁶ Out of 236 firms, 127 responded, reporting a total of 91 positions in 2008.⁷⁷ The results appear in Figure 1 below.

Figure 1: Number of Pro Bono Counsel Positions (by Type), 1993–2008 (fiscal year)



Our findings confirm that the creation of pro bono counsel positions in large firms has occurred primarily within the past decade. In 1998, eighteen positions existed; in 2008, there were ninety-one. Over half (fifty-five percent, n=50) were created after the inauguration of *The American*

74. Eviatar, *supra* note 4, at 104. For earlier discussions of pro bono counsel in the legal trade press, see Terry Carter, *Building a Pro Bono Base: Dedicating Resources Proves To Be Good for Firms and Clients*, A.B.A. J., June 2003, at 30; Wendy R. Leibowitz, *Full-Time Do-Gooders a Rarity but on the Rise*, NAT'L L.J., Aug. 19, 1996, at B9.

75. Fifty-six of fifty-eight responding firms assigned one or more persons to oversee their pro bono programs. PRO BONO INST., *supra* note 4, at 4. A previous version of the survey, with a higher number of respondents, had found that there were ninety firms with such a position. Cummings, *supra* note 4, at 59 n.353 (citing PRO BONO INST., UPDATE ON THE 2001 LAW FIRM STAFFING SURVEY 1 (2003)).

76. We defined pro bono counsel according to the definition used to determine membership in APBCo. See *supra* note 12 and accompanying text.

77. In all, there were 271 firms in *The American Lawyer* pro bono ranking since its inception; 35 of those firms no longer exist due to merger or dissolution, leaving a total of 236. Of the 127 firms that responded, 49 stated that they had no pro bono counsel positions, leaving 78 firms with such positions during the period covered by the rankings. The number of positions reported (91) is greater than the number of firms (78) because some firms had more than one pro bono counsel position.

Lawyer's A-List in 2003.⁷⁸ Most pro bono counsel positions are now occupied by full-time lawyers (fifty-nine percent, n=54), with the remaining positions split between lawyers who devote part of their time (at least half) to pro bono coordination (n=20) and full-time nonlawyer administrators (n=17).

Multiple factors drove this trend. The development of pro bono counsel positions both reflected and reinforced the growing importance of public service within large firms. As the scale of firms and their contributions increased, it became more crucial to have someone playing a sustained coordinating and monitoring role. Membership on firm pro bono committees tended to rotate year-to-year and even the most active members understood their committee duties to be ancillary to their billable work.

Rankings also mattered. Pro bono participation became a positional good: reputation and recruitment partly depended on how firms stacked up against their competitors. Once some firms began hiring pro bono counsel, others felt pressure to do the same, both to maintain their position and to signal their commitment to public service. In effect, as *The American Lawyer* itself recognized, its rating structure “ratcheted up the pressure on firms to showcase their volunteer work” and encouraged the creation of pro bono positions as a way to do this more effectively.⁷⁹ As one pro bono counsel explained, when he took the job, “we had a whole [partnership] meeting on pro bono because the firm wanted to get on the ridiculous A-List. [Partners] knew that the reason they weren’t on it was . . . pro bono. I was hired to get us on the A-List. We made it [the next year] and since [then], there has been no utterance of the words ‘pro bono’ [at the partnership meetings].”⁸⁰ Regional competition also affected firm priorities. One counsel described its influence in Chicago. Although the firm had lawyers in other cities, pro bono “didn’t catch on [in those cities], but in Chicago the firm felt like it was getting behind the eight ball.”⁸¹

As rankings heightened the importance of pro bono contributions, firms needed better management. Someone was necessary to showcase their lawyers’ involvement through public relations work, such as websites, annual reports, brochures, and media outreach. Counsel also became critical in coordinating pro bono placements, supervising pro bono lawyers, collecting hourly data, and reporting it in conformity with *The American Lawyer* standards.⁸²

78. The A-List was first published in calendar year 2003 on the basis of data collected in fiscal year 2002. Aric Press, *The A-List*, AM. LAW., Sept. 2003, at 84. The pro bono data reported throughout the article is based on fiscal years.

79. Eviatar, *supra* note 4, at 106.

80. Interview 13 (Aug. 12, 2009).

81. Interview 27 (Sept. 2, 2009).

82. See Sauder & Espeland, *supra* note 66, at 64.

2. Systemic: The Social and Professional Impact of Pro Bono Practice

The institutionalization of pro bono through both external initiatives (bar and ranking efforts) and internal organization (including pro bono counsel) ultimately seeks to enhance public service by private lawyers. Yet the effect of institutionalization on outcomes is by no means self-evident. Some organizational structures may work well in promoting public service; others may have little or no effect. The latter problem is what experts label “loose coupling”: the formal adoption of rules in response to outside pressures may not be matched by the results that the rules are designed to promote.⁸³ Our inquiry here focuses on the effects of institutionalization on pro bono service.

a. *Economic Forces and Bar Responses*

It is impossible to precisely measure the total amount, growth, and social impact of pro bono activity across the entire U.S. legal profession. What is clear, however, is that volunteer contributions have become an increasingly important part of how legal assistance becomes available to the poor and to public interest organizations.⁸⁴ A 2009 study by the American Bar Association found that lawyers provided on average forty-one hours of pro bono service annually to low-income clients or organizations that serve them—up slightly from 2005.⁸⁵ Other research indicates that lawyers in large firms are the most likely to provide substantial assistance.⁸⁶

Evidence of the relationship between organizational structures and pro bono activity is still limited, but at least some data indicate that economic factors may be more influential than professional initiatives in promoting pro bono activity. Rebecca Sandefur’s study, in particular, found that states in which lawyers did better financially and felt under greater pressure from nonlawyer competitors had higher rates of pro bono participation.⁸⁷ By contrast, the pro bono standards in state ethical codes and diffusely targeted recruitment efforts were not correlated with greater pro bono participation.⁸⁸

83. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 341 (1977).

84. See Rhode, *supra* note 45, at 2070; Sandefur, *supra* note 9, at 85; see also ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 173 (2008) (noting that conservative public interest organizations also seek access to pro bono services).

85. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 1 (2009) [hereinafter ABA, SUPPORTING JUSTICE II], available at <http://www.abanet.org/legalservices/probono/report2.pdf>. This study reported pro bono data from 2008.

86. DINOVTZER ET AL., *supra* note 7, at 37 tbl.4.3.

87. Sandefur, *supra* note 9, at 98–100.

88. *Id.* at 100. Specifically targeted recruitment measures were, however, positively associated with pro bono participation. *Id.* Sandefur also found that reporting requirements had no influence, a finding inconsistent with other evidence suggesting that such requirements increase participation. In Florida, which instituted mandatory reporting in

b. *The Trajectory of Large-Firm Pro Bono Programs and the Significance of Pro Bono Counsel*

At the large-firm level, recent research on Am Law 200 firms shows that the total pro bono hours produced by such firms increased by nearly eighty percent between 1998 and 2005, while the per-lawyer average increased by five hours.⁸⁹ Since then, total pro bono hours have increased nearly fifty percent and the average hours per attorney has grown by ten hours.⁹⁰ Yet despite such increases, only about two-fifths of lawyers in the nation's two hundred most profitable firms have contributed at least twenty hours a year.⁹¹ Among those firms, economic performance is positively correlated with participation rates.⁹² Firms that "do well" generally are better at "doing good." It is, however, unclear whether a causal relationship exists, or whether the same factors that contribute to economic performance also encourage pro bono commitments.

How the creation of an organized pro bono program affects pro bono activity is also difficult to assess. The most financially successful firms tend to be the ones who can afford to establish a pro bono counsel position. But once they do, does it matter? Do firms with counsel do better than their peers on measurable factors, such as pro bono hours and participation rates? To explore that issue, our research compared historical data on the hiring of pro bono counsel with *The American Lawyer* rankings from fiscal years 1993 to 2008. The findings appear in Table 2.

1994, the annual average of pro bono service per lawyer increased a decade after the program started from twenty-five to forty-eight hours. FLORIDA PRO BONO REPORT, *supra* note 60, at 3.

89. Boutcher, *supra* note 7, at 145 & fig.7.2. Boutcher also notes that while the per-lawyer average has increased for the Am Law 200, it has increased more substantially (roughly fifteen hours) for the top one hundred, while the average for the bottom hundred firms actually declined. *Id.*

90. Total hours increased from 3,768,510 to 5,567,231; average hours grew from 38.25 to 48.77. The average hour-per-lawyer figure includes those firms that are in the ranking but did not report data and therefore are included as reporting 0 hours. If the average is taken based only on firms that reported data, the increase is 12 hours, from 40.48 in 2005 to 52.73 in 2008. Compare 2009 Am Law Pro Bono Survey (on file with authors), with 2006 Am Law Pro Bono Survey (on file with authors).

91. Aric Press, *In-House at The American Lawyer*, AM. LAW., July 2008, at 13.

92. See Boutcher, *supra* note 7, at 149 (finding that "firms that generate higher profits per partner do more pro bono, precisely because they can afford to do so," but higher firm revenues are negatively correlated with pro bono, suggesting that "[b]illable hours are in direct competition with pro bono hours"); see also Sandefur, *supra* note 9, at 98. For other discussions of the relationship between profitability and pro bono contributions, see Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 82-83 (1994); Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in *THE LAW FIRM AND THE PUBLIC GOOD* 19, 44 tbl.2-3, 45 tbl.2-4, 46 (Robert A. Katzmann ed., 1995).

Table 2: Effect of Hiring a Pro Bono Counsel (by Type) on *The American Lawyer* Pro Bono Score 2 Years Later

Variables	Pro Bono Score (1)	Pro Bono Score (2)	Pro Bono Score (3)	Pro Bono Score (4)
Independent Variables				
Full-Time Lawyer		6.142***		
		(1.835)		
Part-Time Lawyer			6.908**	
			(3.110)	
Full-Time Nonlawyer				1.172
				(4.156)
Controls				
Pro Bono Score	0.633***	0.097***	0.091***	0.094***
	(0.027)	(0.035)	(0.035)	(0.035)
Number of Lawyers	3.073**	5.246**	5.329**	5.426**
	(1.214)	(2.462)	(2.470)	(2.477)
Profits Per Partner	9.603***	17.423***	17.733***	17.763***
	(1.240)	(1.950)	(1.954)	(1.959)
Constant	-126.671***	-222.601***	-226.855***	-227.890***
	(14.435)	(17.366)	(17.356)	(17.411)
Observations	1021	1021	1021	1021
Number of id	109	109	109	109
Rho	0.119	0.738	0.739	0.737
Within R-square	0.173	0.294	0.289	0.285

Standard errors in parentheses

*** $p < 0.01$, ** $p < 0.05$

The table shows the relationship between three different types of pro bono counsel—a full-time lawyer position, a part-time (greater than fifty percent) lawyer position, and a full-time nonlawyer position—and a firm's Am Law pro bono score, lagged by two years, controlling for firm size and financial performance (measured by profits per partner). Firms that hired full-time lawyers as pro bono counsel saw their pro bono scores improve after two years on average by roughly six points more than those firms that did not hire such lawyers (either because the position was already occupied or remained vacant). Part-time lawyers had slightly more of an effect,

increasing the pro bono score by nearly seven points. Both relationships were statistically significant. By contrast, full-time nonlawyers had no statistically significant effect. Such correlations do not, of course, establish causation. The concerns that inspired creation of a counsel position could also have influenced firm culture in other ways that affected pro bono scores. Our data do not reveal other changes that might have accompanied the creation of a pro bono counsel position, such as changes in policies toward billable hour credit for pro bono work and expansion of opportunities for participation. Other research, including Deborah Rhode's empirical study, underscores the importance of such factors.⁹³ Still, it is plausible to assume that the appointment of a full- or part-time lawyer as pro bono counsel could have some effect if that person was skilled in identifying barriers to involvement and in finding cases that matched attorneys' skills and interests.

3. Quality?

Although external pressures created by rankings and bar initiatives have had an indisputably positive influence on the amount of law firm pro bono work, they have also had a less welcome effect on other, harder to measure characteristics of an effective program.⁹⁴ One concern is that the focus on "doing well" by the quantitative standards of *The American Lawyer* and Pro Bono Institute may deflect attention from "doing good" under a broader definition of the public interest.⁹⁵ While firms have strong incentives to "up their numbers," they lack corresponding rewards for monitoring quality or social impact.

Quality has multiple meanings that have distinct implications for different constituencies. From the perspective of individual clients, the term suggests effectiveness in handling their particular matter. Do their volunteer lawyers provide representation of the same efficiency, dedication, and competence that they offer paying clients? For large-firm lawyers, quality may in part be a function of skills training and partner supervision. Both pose challenges. In Rhode's 2008 study of leading public interest organizations, about three-fifths expressed concerns about the quality of pro bono assistance they received from private practitioners.⁹⁶ Although there have been some widely reported instances of inadequate supervision, it is unclear whether such failures reflect programmatic deficiencies or simply

93. See RHODE, PRO BONO, *supra* note 9.

94. By "quantity," we mean the number of pro bono hours and their distribution across firm attorneys. Such measures say nothing about the kind of matters in which hours are invested, which is part of what a more qualitative analysis would capture.

95. Rhode, *Rethinking*, *supra* note 9; Deborah Rhode, *For Whose Good?*, AM. LAW., July 2009, at 56.

96. Rhode, *supra* note 45, at 2071–72 (noting that fourteen percent experienced extensive problems, thirty-three percent experienced moderate problems, and eight percent experienced limited problems).

the kind of errors that occur in paid as well as unpaid matters.⁹⁷ From a systemic perspective, quality may imply cost-effectiveness in pursuit of the public interest. Of course, what constitutes the public interest and how best to measure social impact are themselves subject to dispute. But as research on strategic philanthropy makes clear, in a world of scarce resources, “donors . . . cannot afford to conflate good intentions with good results.”⁹⁸ Not everything that is contributed for the good of the public is equally effective in furthering its interests.

Firms, of course, care about both quantity and quality in connection with their charitable contributions. Indeed, “strategic” pro bono has become a new mantra.⁹⁹ One pro bono counsel described her program as “a lot like corporate philanthropy”: “You want to make a statement with what you’re giving away.”¹⁰⁰ Another emphasized impact: “I don’t mean to send attorneys on a pointless errand. You want them to be making a difference.”¹⁰¹ Firms also may view their charitable giving to legal aid and public interest groups as promoting quality at the systemic level. Yet the pressures generated by *The American Lawyer* rankings to “score well” in quantitative terms may divert focus from output measures that are not being ranked, such as individual client outcomes, the satisfaction of nonprofit organizations that refer clients or cooperate on cases, and the social impact of pro bono efforts.

Pro bono leaders have been sensitive to this concern and have recently begun to consider alternative metrics. One counsel in our survey reported, “California is presently undertaking some statewide planning initiatives that include a ‘best practices’ committee to evaluate options in this area. And [APBCo] is doing similar work on a national scale.”¹⁰² *The American Lawyer* editors have also initiated discussions about whether their focus on quantitative measurement has had adverse effects and how they might change the incentive structure to deemphasize sheer volume. But as the following discussion suggests, considerable progress remains to be made in securing quality, cost-effective services.

97. See, e.g., Noeleen G. Walder, *Failure To Supervise Pro Bono Attorney Dooms Divorce Pact*, N.Y. LAW., June 18, 2009, <http://www.nylj.com/nylawyer/probono/news/09/061809a.html> (discussing a New York case “granting a woman’s bid to void a settlement stipulation because her pro bono divorce attorney made serious errors and was inadequately supervised”).

98. Rhode, *Rethinking*, *supra* note 9, at 1452 (citing Paul Brest, *Strategic Philanthropy and Its Malcontents*, in MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 229, 247 (Deborah L. Rhode ed., 2006) [hereinafter MORAL LEADERSHIP]).

99. Eviatar, *supra* note 4, at 106.

100. *Id.* (quoting Miriam Buhl, pro bono counsel at Weil, Gotshal & Manges).

101. *Id.* (quoting Saralyn Cohen, pro bono counsel at Shearman & Sterling).

102. Survey Respondent 55.

III. DESIGN, COORDINATION, AND EVALUATION OF PRO BONO PROGRAMS

Our survey sought information in four general areas: (1) the design and organization of pro bono programs, (2) the nature and implementation of pro bono policies, (3) the evaluation of pro bono performance, and (4) the effect of the recession on pro bono commitments. As we were finalizing our questionnaire in early 2009, a growing number of large firms were implementing deferrals and furloughs in response to the economic downturn.¹⁰³ In some cases, incoming associates had the option to defer their start date, and those working at the firm had an option to take a temporary leave, all at partial pay. Many were encouraged or required to accept placements in a public interest legal organization.¹⁰⁴ Preliminary conversations with some pro bono counsel suggested that these placements, along with other forms of economic restructuring, could potentially affect pro bono programs. Accordingly, we included questions both in the survey and in our follow-up interviews to understand any long-term implications of these changes.

A. Organizational Structure

1. Governance

Firms fashion a variety of governance structures for their pro bono programs. To better understand their organization, we compiled information from the NALP Directory.¹⁰⁵ The directory had data for all but one of our surveyed firms (n=55).¹⁰⁶ Of those, nearly all of them (ninety-three percent, n=51) reported having pro bono committees. The most common governance structure (in one-third of firms, n=18) was to have a committee plus a full-time attorney coordinating pro bono activities.¹⁰⁷ The second most prevalent arrangement (in sixteen percent of firms, n=9) was to have a committee, full-time attorney, and nonattorney administrator.¹⁰⁸

103. See Susan Dominus, *\$80,000 for Year Off from Law? She'll Take It!*, N.Y. TIMES, Apr. 13, 2009, at A1; Karen Sloan, *Trying To Make Deferrals into Something Positive*, NAT'L L.J., Apr. 13, 2009, at 6.

104. Sloan, *supra* note 103; Debra Cassens Weiss, *Situations Wanted: Laid-Off Lawyers Seek Volunteer Work—and Get Rejected*, A.B.A. J., Mar. 16, 2009, http://www.abajournal.com/news/article/situations_wanted_laid_off_lawyers_seek_volunteer_work--and_get_rejected/.

105. The NALP Directory asks a firm whether it employs “one or more of the following structures to manage its pro bono program and to provide training and guidance to participating attorneys?” See NALP Directory of Legal Employers, *supra* note 13. Firms may choose any combination of “Full-time attorney in a dedicated pro bono coordination/oversight role” (full-time attorney), “An attorney who coordinates pro bono projects as an ancillary duty to other work” (part-time attorney), “Pro Bono Committee,” “Non-attorney administrator,” and “Other.” *Id.*

106. Accordingly, throughout the article, data gathered from the NALP Directory will be reported based on an n=55.

107. In three of these cases, the firm also had an additional pro bono position, either an assistant director of pro bono or a pro bono fellow.

108. In four of these cases, the firm also had additional support staff.

Another thirteen percent of firms (n=7) had a committee, full-time attorney, and part-time attorney.

Within these structures, the dominant method for setting policy—on issues such as billable hour credit, conflicts of interest, qualifying projects, and supervision requirements—was to rely on committee formulations, subject to approval by firm management. We asked firms to describe the policy-setting process for their pro bono programs. Those who responded (n=51) described interactions among pro bono counsel, committees, and firm management, with different power-sharing arrangements. In the most frequent pattern, characteristic of three-fifths of the firms (n=30), pro bono personnel (counsel plus committee members) would formulate, draft, and/or recommend policies to a firm-level management committee, which would have the ultimate approval authority. The remaining firms had slightly different arrangements. In seven firms, pro bono committees had jurisdiction over most policy changes, except major or extraordinary changes that required management approval. Three firms indicated that the pro bono committee had ultimate decisionmaking authority on pro bono issues. In eight firms, the pro bono and management committees shared responsibility for developing and approving pro bono policies.¹⁰⁹

Pro bono counsel also oversee the allocation of resources and the development of firm projects and priorities. These decisions obviously have a direct impact on the client communities that pro bono lawyers serve. For that reason, about three-quarters of survey respondents indicated that they consulted public interest or legal services groups in defining legal needs and training lawyers to meet them. Over half consulted nonprofit partners in identifying special firmwide projects. Only one-fourth of the firms, however, consulted outside groups in connection with setting pro bono priorities.

The responsibility for ensuring compliance with pro bono policies typically rests with both pro bono counsel and committees. Of the fifty-one firms responding to our survey question on pro bono compliance, roughly forty percent (n=20) indicated that these activities are shared jointly between counsel and committee, while thirty-five percent (n=18) indicated that counsel had ultimate compliance responsibility. Of the remaining firms, fourteen percent (n=7) stated that compliance obligations resided with the committee, while the rest largely reported arrangements in which firm management played a key compliance role. In general, compliance activities involved procedures for accepting pro bono matters, screening for

109. Within this group, one survey respondent described three different collaborative processes for developing pro bono policies distinguished by whether they were “executive-driven” (led by pro bono counsel), “committee-driven” (led by the pro bono committee), or “board-driven” (led by the firm’s management committee); executive-driven policy development was the most frequent type and board-driven the least frequent. Survey Respondent 55. A small number of firms had unique arrangements, including one in which the pro bono committee adopted protocols for practice, while the management committee established the associate billable hour credit for pro bono work. Survey Respondent 19.

conflicts of interest, and monitoring the time and costs associated with representation. The following description is typical:

The [pro bono counsel] is ultimately responsible for ensuring compliance with pro bono policies . . . by:

1. Reviewing and approving (or not) all intakes after ascertaining adherence to economic, risk-management, and staffing policies.
2. Reviewing monthly time reports on all pro bono matters to ensure adherence to client service, timekeeping, and expense policies; if necessary the [counsel] involves accounting managers, [pro bono committee] members, or practice group leaders to assist with reinforcing policies to certain time keepers.
3. Creating and monitoring budgets that track policy-driven goals. The [counsel] meets with the CEO and Executive Director on a bi-monthly basis and with the Board twice per year to communicate successes (or failures) relating to policies and practice goals. When necessary, the CEO, Board members, practice group leaders or [pro bono committee] members may communicate strategically with the Firm (or certain groups or individuals) to reinforce policies and goals.¹¹⁰

2. Pro Bono Counsel

As our earlier discussion noted, pro bono counsel have come to play an increasingly central role in the design and administration of law firm public service programs. The position varies across firms along lines that Table 3 reflects. Except in about a quarter of firms, which had pro bono partners, the program heads did not have equity in the firm. The most common arrangement, reported by almost half the responding firms, was a nonequity pro bono counsel position. Another fifth had pro bono coordinators (both lawyers and nonlawyers), and the two who answered “other” indicated that they were “Director of Pro Bono Activities and Litigation Training” and “Pro Bono Special Counsel,” which were also nonequity positions.¹¹¹

Table 3: Pro Bono Counsel Position

Position	Number	Percentage
Pro Bono Partner	16	28.57%
Pro Bono Counsel	26	46.43%
Pro Bono Coordinator (lawyer)	7	12.50%
Pro Bono Coordinator (nonlawyer)	5	8.93%
Other	2	3.57%
Total	56	100%

110. Survey Respondent 55.

111. Survey Respondent 22; Survey Respondent 47.

Women are overrepresented in public interest practice, and pro bono counsel positions reflect this pattern.¹¹² Our survey included three times as many women as men, as Table 4 indicates. However, gender does not predict status. For the highest position, pro bono partner, the same percentage of men and women (twenty-nine percent) hold the title.

Table 4: Gender of Managers by Position

Position	M	F
Pro Bono Partner	4 (29%)	12 (29%)
Pro Bono Counsel	6 (43%)	20 (48%)
Pro Bono Coordinator (lawyer)	2 (14%)	5 (12%)
Pro Bono Coordinator (nonlawyer)	0 (0%)	4 (10%)
Other	2 (14%)	1 (2%)
Total	14 (100%)	42 (100%)

The positions are demanding. Pro bono counsel generally work as hard as their practitioner colleagues. For pro bono counsel in our sample who provided information (n=53), the average time spent on all work activities, both pro bono and billable, was 2137 hours per year. Three respondents reported at least 3000 hours. Of this time, pro bono work accounted for ninety-two percent, which reflects our sample's high representation of full-time counsel. Of the time spent on pro bono, about three-quarters went to program coordination; the other quarter went to direct client representation.

Our findings, like prior research, indicate that the work of pro bono counsel falls into two general categories: external relations and internal coordination.¹¹³ With respect to external relations, counsel described two primary responsibilities. One involved relationships with nonprofit organizations that referred clients. Here, managers engaged in project development, which included "cultivating relationships with legal services providers, bringing to the firm appropriate pro bono opportunities, evaluating/screening those opportunities, soliciting opportunities from organizations and/or in relation to causes and issues of interest to firm attorneys."¹¹⁴ Thus, nearly three-fifths of the respondents (n=33) indicated

112. See Kenneth G. Dau-Schmidt et al., *Men and Women of the Bar: The Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 77-79 (2009). Women are also overrepresented in lower-status roles in the legal profession more broadly. KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 476-77 (5th ed. 2010).

113. Cummings, *supra* note 4, at 60-61 (describing pro bono counsel positions as involving interactions with organizations that refer pro bono clients, development and implementation of pro bono policies, oversight of pro bono participation, and evaluation of firm performance); Eviatar, *supra* note 4, at 106 (describing pro bono counsel as "matchmakers, meeting with firm lawyers to learn what interests them, collaborating with nonprofits to generate and maintain projects, coaxing firm lawyers to take them on, and ensuring the lawyers get sufficient training, support, and recognition for doing so").

114. Survey Respondent 27.

that they engaged in outreach to nonprofit legal groups and nearly half (n=27) said that they worked to identify and secure legal projects for the firm. Pro bono counsel also play a gatekeeping function. Not every referred case or nonprofit organization is a good fit for the firm; counsel must spend time screening matters or arranging in-house presentations by potential referral organizations. In our sample, two-thirds (n=40) reported that they were involved in case screening and intake. A small number also reported networking with other pro bono counsel and constituencies in the broader pro bono community (n=4), as well as coordinating projects with firm clients (n=4).

The other dimension of external relations dealt more directly with public relations, recruiting, and reporting. One-third of respondents (n=19) indicated that they engaged in external public relations and recruiting activities, such as marketing, creating brochures, and managing the firm's pro bono website. Reporting on pro bono activities to outside groups—such as bar associations, *The American Lawyer*, and NALP—was also an important activity. One lawyer characterized these responsibilities as follows: “prepare newsletter (produced three to four times each year), track pro bono hours, complete endless stream of surveys and requests for hours by legal services organizations for annual audits.”¹¹⁵

Internal pro bono coordination includes activities such as drafting policies, gauging lawyer interests, recruiting lawyers for cases, staffing cases, training junior lawyers, monitoring and supervising case progress, evaluating outcomes, and advocating for program priorities within the firm. Counsel engaged in all of these tasks, though some appeared more frequently in the survey responses. In addition to the client intake functions described above, an important area of responsibility involved tracking case progress and/or monitoring outcomes, a task reported by just over half of the respondents (n=29). Two-fifths of respondents (n=21) indicated that they spent time promoting pro bono to various internal constituencies. As one lawyer put it, “I am a cheerleader for pro bono in the firm.”¹¹⁶ This responsibility involves lobbying for resources and support, developing award events for firm lawyers, and coordinating activities with other firm departments, such as marketing and human resources. Training is also important: nearly forty percent of our survey participants (n=20) spent time facilitating such activities. Smaller numbers, about ten percent (n=6), also made efforts to determine lawyer interests in order to place cases. One counsel met with every attorney in the firm “to identify service opportunities that will match their individual professional development goals and personal interests to an identified client need.”¹¹⁷

115. Survey Respondent 23.

116. Survey Respondent 12.

117. Survey Respondent 55.

3. Signature Projects and Special Programs

Signature pro bono projects are a way for firms to concentrate resources on specific issue areas, build internal expertise, and enhance their reputation with potential recruits, the media, and the broader community. Nearly sixty percent of the firms in our survey (n=33) reported such a project. Of these, eleven projects focused on some aspect of immigration, particularly matters involving asylum, refugees, juveniles, and domestic violence. Eight focused on children's rights or family law (including domestic violence). Another four concentrated on economic development, particularly microenterprise; three on criminal defense/death penalty work; and two each on veterans' issues, human rights, education, and Holocaust survivors. Other firms reported having projects on HIV/AIDs, employee rights, the environment, and civil rights.

Responding firms also had different types of special pro bono programs. Nearly thirty percent (n=16) reported an in-house pro bono department. Almost half (n=27) had a rotation or fellowship program. Thirty percent (n=17) had a program to place deferred associates with public interest organizations. Some firms organized their pro bono program into substantive specialties. For instance, in one firm these included "Death Penalty, Asylum, SSI, Uncontested Divorces, Juvenile Rights, Family Court Clinic, Tax-Exempt Organizations, Microentrepreneurs, Criminal Appeals and Post-Release Supervision."¹¹⁸

B. Policies

1. Goals

As is evident from the varied roles of pro bono counsel, their programs have multiple, sometimes competing goals. To understand the relative significance of these objectives, our survey asked pro bono counsel to rank them on a scale of 0 to 5: 0 = "not a consideration," 1 = "least important," 2 = "somewhat important," 3 = "important," 4 = "very important," and 5 = "most important." The results appear in Table 5.

118. Survey Respondent 26.

Table 5: Objectives of Pro Bono Programs (N=56)

Objectives	Mean	CI Low*	CI Hi†	Responses
Providing individual legal services to underrepresented clients	4.40	4.20	4.61	52
Training	3.87	3.67	4.06	52
Making an impact on important social issues	3.75	3.44	4.06	52
Aiding recruitment and retention	3.48	3.21	3.75	52
Enhancing reputation and rankings	2.94	2.62	4.84	52
Satisfying paying clients	1.81	1.45	2.16	52

* CI Low = Confidence Interval Low

† CI Hi = Confidence Interval High

What stands out from this ranking are the most and least important factors. For counsel who run pro bono programs, the primary stated objective is what the term implies: serving the public good by assisting underrepresented groups. Making a social impact is also highly valued. Yet the programs also had major pragmatic goals. The most important was training associates, but aiding recruitment and retention, and enhancing reputation and rankings were also significant. The satisfaction of paying clients appeared not to be a major concern. Of the seven who listed "other" objectives, two mentioned "doing the right thing,"¹¹⁹ while the remainder cited "taking on hard issues that might not otherwise find representation,"¹²⁰ "fulfilling our ethical responsibilities as lawyers,"¹²¹ "filling justice gaps in service,"¹²² and "meeting associates' needs and interests in the public interest law sector."¹²³

2. Design

How did firm policies serve these goals? To provide a better sense of the formal policy architecture of pro bono programs, we start with data from the NALP Directory. Nearly every one of our responding firms in the NALP Directory (ninety-six percent, n=53) has a "formal pro bono policy that sets forth the organization's commitment to pro bono." The same percentage reported that "an attorney's commitment to pro bono activity [is] considered a favorable factor in advancement and compensation decisions"

119. Survey Respondent 7; Survey Respondent 8.

120. Survey Respondent 6.

121. Survey Respondent 52.

122. Survey Respondent 51.

123. Survey Respondent 16. The other respondent said that the question was hard to answer because "different groups in the firm would weight these factors differently." Survey Respondent 50.

and that attorneys receive “full-time support services” for pro bono work. Roughly eighty-five percent (n=48) reported that associates were provided “written evaluations of their work on pro bono matters.”

The NALP Directory data also indicates that law firms are fairly consistent in the way they define pro bono. There are two major definitions. One draws on Rule 6.1 of the ABA’s Model Rules of Professional Conduct, which, as noted earlier, establishes an aspirational standard of fifty hours a year, with a “substantial majority” going to “persons of limited means” or organizations that assist them.¹²⁴ The Pro Bono Institute’s definition for participants in its Law Firm Challenge is narrower and is the one that *The American Lawyer* uses in its pro bono rankings.¹²⁵ The key distinctions are that the Institute’s definition of pro bono does not include (1) the “delivery of legal services at . . . substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights,” (2) the “delivery of legal services at a substantially reduced fee to persons of limited means,” and (3) “participation in activities for improving the law, the legal system or the legal profession.”¹²⁶ The Institute’s definition serves to measure compliance with the Law Firm Pro Bono Challenge, which asks participants to contribute three or five percent of total billable hours.¹²⁷ Alternatively, the Institute allows firms to meet the Challenge by meeting a goal of either sixty or one hundred hours per attorney. According to the NALP data, slightly over half of our responding firms (n=29) followed the Challenge definition, while one-tenth (n=6) followed the ABA. One firm relied on its state bar’s interpretation of Model Rule 6.1. Roughly another fifth (n=12) developed their own definitions, some of which counted board and professional service as pro bono. Several counsel whose firms used the Challenge definition admitted to grappling with “close cases,” and one acknowledged using a broader standard internally in order to consider “access to justice” more generally.

Most firms in our sample set annual pro bono goals in order to meet these benchmarks. Two-thirds (n=37) of firms reported that they set a firmwide minimum pro bono goal. These largely tracked the Pro Bono Institute and ABA Model Rule aspirations. Of those firms that indicated a numerical firmwide goal, nineteen listed three percent of billable hours, four listed five percent, two listed three to five percent, and one listed four percent. Firms also set targets for individual attorneys, which again tracked the Challenge and ABA standards, and may also reflect the importance of *The American Lawyer* rankings that report average hours per attorney per firm. Approximately three-quarters of the firms (n=43) reported that they had a

124. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2009).

125. Aric Press, *Drawing the Line*, AM. LAW., July 2007, at 119, 119.

126. Compare Pro Bono Institute, Law Firm Pro Bono Challenge, <http://www.probonoinst.org/challenge.text.php> (last visited Mar. 17, 2010), with MODEL RULES OF PROF’L CONDUCT R. 6.1.

127. Pro Bono Institute, *supra* note 126.

minimum goal per attorney. Of those, twelve listed sixty hours and fifteen listed fifty hours. Of the remaining firms that reported goals, one was higher than sixty hours and eight were less than fifty.¹²⁸ Of course, setting benchmarks does not ensure that they will be met, and we do not have figures on how many firms succeeded.

A crucial factor in determining performance is how firms treat pro bono hours relative to billable hours—and how unpaid work affects compensation and promotion decisions. Table 6 shows how firms that responded to our survey counted pro bono activity for different types of performance decisions.

Table 6: Counting Pro Bono Hours (N=56)

Count Toward:	% of All Respondents
Minimum billable hour requirements	70%
Lockstep compensation awards	30%
Bonus determinations	77%
Partnership draws	13%
Performance reviews	82%

In over four-fifths of firms (n=46), pro bono activity figured in performance reviews, and in over three-quarters (n=43) it counted toward bonus determinations. By contrast, very few reported that pro bono mattered in calculating partnership draws and not even one-third counted pro bono toward associate lockstep compensation (n=17). Seventy percent of the firms (n=39) indicated that they counted at least some hours toward minimum billable hour requirements. Of those that provided information about the number of hours, a third (six of eighteen firms) stated that all pro bono hours counted; another third (seven of eighteen firms) capped hours at various points (four capped at fifty hours, one at sixty, one at one hundred, and one at two hundred). Two firms imposed a limit with discretion to exceed it upon firm approval and one counted only pro bono hours over one hundred toward billable hours. The remaining two firms had vague standards. One counted a “certain number” without specifying how

128. Our survey also asked the firms if they set pro bono participation goals. Forty percent (n=22) indicated that they set goals for the percentage of firm attorneys who do pro bono work. Of those, eight had a goal of one hundred percent participation, another six chose between seventy and eighty percent, one put the goal at sixty-five percent, another at a “majority,” and the final firm stated, “We aim for at least 40% of our attorneys hitting the 50-hour standard—that’s the goal set by the D.C. Circuit’s Standing Committee on Pro Bono” (Survey Respondent 52).

many,¹²⁹ and the other counted all hours provided that they were matched by a “reasonable balance of fee-earning work.”¹³⁰

How firms treated attorney’s fees awards also varied. Under the Pro Bono Institute’s Law Firm Challenge, pro bono “refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice.”¹³¹ Accordingly, when firms accept cases that might generate attorney’s fees, whether or not the case “counts” as pro bono hinges on the firm’s initial intention. In practice, it is not unusual for firms to accept cases on a pro bono basis but later collect fees.¹³² The Institute “strongly encourage[s]” firms to donate such fees to the nonprofit organizations with which firms co-counsel,¹³³ and *The American Lawyer* requires (for the purposes of pro bono reporting) that in cases where fees are available, firms commit ex ante “to donate their fees to legal services organizations, to their own charitable foundations, or into an earmarked firm account to cover pro bono expenses.”¹³⁴

To provide fuller information about practices in this area, our survey asked counsel about their firms’ fee collection policies. The most common arrangement, reported by just over one-third of firms (thirty-six percent, n=20) was for firms to collect fees, take an amount to cover their costs (such as filing fees and expert witness fees), and then donate the rest. Another fifth of firms (twenty-one percent, n=12) reported collecting fees and donating the entire amount without taking out costs. Of the thirty-two firms that reported donating their fees, slightly over half (n=18) indicated that they gave priority to the nonprofit legal organization that referred the matter or served as co-counsel; others indicated that they donated to different public interest groups or contributed the fees to their firm’s own pro bono program. Fourteen percent of firms (n=8) reported evaluating fee issues on a case-by-case basis. As one explained, “We deal with these as they come. We do try to collect fees where they are available, but deal appropriately in the context of the particular case with legal services co-counsel if the fee recovery is limited. For example, if we have fronted all of

129. Survey Respondent 4.

130. Survey Respondent 11.

131. PRO BONO INST., WHAT COUNTS? A COMPILATION OF QUERIES AND ANSWERS 6 (2003), available at <http://www.probonoinst.org/pdfs/whatcounts.pdf>; see also Carlyn Kolker, *The Good Fight*, AM. LAW., July 2006, at 105; Amanda Bronstad, *Pro Bono Victories Trigger Fee Fights*, N.Y. LAW., Feb. 8, 2008, <http://www.nylj.com/nylawyer/probono/news/08/020808a.html>.

132. According to a 2007–2008 survey of law firms conducted by the Pro Bono Institute, fourteen percent of firms reported keeping all of the fees awarded in pro bono matters, while forty-five percent said that their firms retained a portion of the fees and donated the rest. Of those firms that retained some portion of the attorney’s fee awards, one-third said that the retained fees were placed in the firms’ general revenue, while the rest used the awards to fund pro bono programs and support charitable groups. PRO BONO INST., ATTORNEYS’ FEES AWARDS IN PRO BONO MATTERS 5 (2008).

133. *Id.* at 1.

134. Press, *supra* note 125.

the significant costs, that would make a difference.”¹³⁵ Of the remaining firms, sixteen percent (n=9) indicated that they “shared” fees with nonprofit legal partners and four percent (n=2) stated that they did not collect fees at all.

In terms of financing pro bono programs, most firms did not have a fixed pro bono budget. Of the thirty percent that did (n=17), its structure varied.¹³⁶ In some firms, the budget only covered administrative costs (such as support staff), while in others it covered all expenditures on pro bono matters apart from time (such as filing and expert witness fees). Only fourteen percent of surveyed firms (n=8) reported a budget reduction as a result of the economic downturn. Some described being subject to general constraints:

The pro bono department, just like nearly every department in the firm, has looked to reduce costs in particular areas. That said, there has been no drastic reduction of monetary support for pro bono at the firm. Most of the decreases have come in the areas of charitable donations rather than on our pro bono cases. Our administrative costs are a very small percentage of the pro bono budget.¹³⁷

Others mentioned that firms were cutting back on incidental expenses like conferences and travel. One firm reported a specific per capita decrease: “The pro bono budget is less than \$250 per lawyer. Changes result[ing] from the economic downturn will push this number into the \$150 per lawyer range.”¹³⁸

Firms’ charitable contributions also interact with pro bono activity. Some leaders of nonprofit groups have candidly acknowledged what is widely assumed: a firm’s charitable dollars follow its pro bono participation.¹³⁹ Our survey largely confirms this linkage. Two-thirds of our respondents (n=37) stated that, either as a formal policy or informal practice, their firms donated money to nonprofit legal organizations with which the firm partnered on pro bono activity. While some firms directed their charitable support exclusively to partner organizations, the more common practice was to weight donations more heavily to those groups. As one counsel put it, “Our donations tend to follow the work. We are more inclined to give to organizations that we have relationships with.”¹⁴⁰ Despite this linkage, some firms emphasized “we do not pay to play”—that is, give donations simply to ensure that nonprofit groups provide desirable

135. Survey Respondent 6.

136. Three additional firms stated that their firm “budgeted” for attorneys spending a certain portion of their time, between three and eight percent, on pro bono.

137. Survey Respondent 11.

138. Survey Respondent 15.

139. See Rhode, *supra* note 45, at 2074. Organizations also give preference to firms that contribute. See *id.*

140. Survey Respondent 50.

pro bono cases.¹⁴¹ According to one counsel, we “feel that practice is offensive. That said, we are far more likely to support financially a nonprofit that sends us good pro bono opportunities than a nonprofit that does not.”¹⁴² Nine firms reported that charitable contribution decisions were made on a case-by-case basis with pro bono relationships being a consideration, while four reported no link between pro bono collaborations and financial contributions. One firm stated that its pro bono relationship with a nonprofit group might actually be a negative factor on the theory that “we may already be providing substantial in-kind support.”¹⁴³

3. Implementation

Pro bono work comes to attorneys in various ways, and firms employ different methods for case approval. The default method of assignment is through pro bono counsel, who identify opportunities and disseminate information about them through various mechanisms, such as pro bono list serves, individual e-mails, and personal contacts. The NALP Directory reports that about seventy percent (n=39) of responding firms distribute cases through these centralized channels. Slightly over a third (n=20) also allowed individual lawyers to bring cases to the firm directly. About thirty percent (n=16) made clear that pro bono was a voluntary activity, but some also added that it could foster professional development. For example, one firm stated that “[l]awyers are encouraged to work on pro bono matters that align with their personal interests or expertise and that will provide them with professional development opportunities.” Although firms generally seek to make it easy for lawyers to volunteer, one firm required associates to submit a proposal to the Pro Bono Review Committee prior to undertaking pro bono work. That proposal needed to include

a description of the matter, the contribution such work will make to the community, an estimate of the time and expense commitment that such matter will require, and a description of how the matter will contribute to the individual’s development. The Pro Bono Review Committee will consider whether the project proposed fits within the firm’s definition of pro bono legal services.

In practice, pro bono committees typically have final authority to approve pro bono cases. Over three-fifths (n=35) of firms relied on the committee for approval. In almost half of those cases (n=15), the decision is made by the committee in consultation with the firm’s pro bono counsel. Some matters, however, may need to go “up the ladder” to firm management because they involve a potential conflict or raise political issues. In these cases, a matter may be reviewed up the chain of command, requiring

141. Survey Respondent 53; *cf.* Daniels & Martin, *supra* note 4, at 152 (quoting a pro bono partner in a major firm as stating, “I suspect that if [a law firm gives] that mightily, you might get the better cases”).

142. Survey Respondent 53.

143. Survey Respondent 34.

approval by counsel, the pro bono committee, and senior management, “depending on the matter’s sensitivity.”¹⁴⁴ To cast greater light on the selection process, we asked survey participants to rank the importance of various factors on a scale of zero to five. Table 7 reports the results.

Table 7: Factors Influencing Case Selection (N=56)

Factors	Mean	CI Low*	CI Hi†	Responses
The case is likely to provide good training for associates	3.92	3.72	4.12	52
The case involves an issue likely to appeal to firm associates	3.73	3.49	3.97	52
The case is referred by a nonprofit legal organization with which the firm desires to establish or maintain a good relationship	3.56	3.34	3.78	52
The case is not likely to strain the firm’s resource capacity	2.96	2.68	3.25	52
The case involves an issue favored by partners	2.76	2.44	3.09	51
The case is likely to result in good publicity for the firm	2.39	2.07	2.71	49
The case involves an issue favored by clients	1.86	1.47	2.25	51

* CI Low = Confidence Interval Low

† CI Hi = Confidence Interval High

For most firms, the key factors guiding case selection are opportunities for training and appeal to associates.¹⁴⁵ A desire to establish or maintain relationships with nonprofit referral organizations is also significant. Attracting publicity and accommodating clients play relatively minor roles. Of somewhat greater importance are the preferences of partners and budgetary constraints.

Certain cases are out of bounds because of actual or positional conflicts of interest. Positional conflicts involve matters that do not require disqualification under ethical rules, but are likely to offend existing or

144. Survey Respondent 53.

145. Case selection is also driven by a strong interest in selecting cases that will make a difference in people’s lives and have social impact. Our question assumed these factors to be important and focused on organizational considerations.

potential clients or otherwise preempt business development. Table 8 identifies the kinds of cases that surveyed firms reported most often pose conflicts of interest.

Table 8: Conflicts Areas (N=56)

Employment/Labor	25
Mortgage Foreclosure	8
Family and Estate Planning	6
Bankruptcy	4
Criminal	3
Insurance	2
Consumer	2
Personal Injury	2
Transactional	1
Special Education	1
Environment	1
Abortion	1

Within our sample, the greatest area of conflict involves employment and labor cases, which nearly half of the firms indicated that they could not accept. Large firms are reluctant to represent plaintiffs with employment and labor claims because they either defend employers in such matters or they do not want to help establish precedents that their clients might regard as unwelcome. When asked about the most significant challenge facing his pro bono program, one counsel identified “business conflicts. It’s not a big problem, but in the range of problems we encounter, it’s the biggest. There are certain kinds of cases we just don’t do—labor and employment mainly.”¹⁴⁶ For firms that represent financial institutions, common conflicts involve mortgage, bankruptcy, and consumer debt issues. Certain practice specialties can also preempt cases that are likely to jeopardize future business. For instance, a firm that represented local school districts avoided special education claims; a firm that represented clients in the oil industry did not take environmental cases. Other issues are considered too volatile or draining. One firm avoided “both sides of abortion-related disputes.”¹⁴⁷ Another counsel indicated that her firm was reluctant to take on family law matters because they “never end.”¹⁴⁸ Given associate turnover, there is a “serious risk that unless we control things tightly and narrow the scope [of representation]” family law cases would “fall[] through the cracks.”¹⁴⁹ Family court practice, she added “is really different

146. Interview 16 (Aug. 17, 2009).

147. Survey Respondent 53.

148. Interview 20 (Aug. 20, 2009).

149. *Id.*

than traditional civil courts. There are arcane rules . . . about representing minors. It is fraught. There are good reasons why firms are hesitant [to take on family cases]."¹⁵⁰

C. Reporting and Evaluation

1. Reporting

Given the size and prestige of the firms in our sample, it is unsurprising that nearly ninety percent (n=49) respond to inquiries from the major reporting entities: *The American Lawyer* and the Pro Bono Institute. Two-thirds also filed reports with a state or local bar. Nearly as many reported to other entities; most of these indicated that they provided information to NALP and Vault.com, and a smaller number also mentioned Volunteers of Legal Service of New York, which asks participating firms to make a Pro Bono Pledge of thirty hours per attorney,¹⁵¹ and the D.C. Circuit Committee on Pro Bono, which oversees the U.S. Court of Appeals for the D.C. Circuit's pro bono resolution calling for attorneys to contribute fifty hours per year of free legal services.¹⁵² Seven firms stated that they reported to the nonprofit legal groups with which they worked, and two reported their pro bono activity to some corporate clients.

2. Quality Control

The incentives firms face, particularly those created by rankings, push toward increasing hours. Within that framework, how do firms ensure that cases are appropriately handled? There are, to be sure, some pressures to avoid privileging quantity at the expense of quality. Internalized professional norms, the oversight of referring organizations, and the risks of ethical sanctions or malpractice liability make competence a relevant concern. But no systematic information exists about the effectiveness of these oversight mechanisms in practice.

To gain greater insight, we asked firms whether they used any systematic measures to monitor quality in pro bono representation, such as internal evaluations or case-tracking systems. Nearly half of respondents (n=27)

150. *Id.* Conflicts issues also make it difficult for large-firm attorneys to participate in pro bono drop-in centers and hotlines because on-the-spot screening is infeasible. To address that concern, a number of bars have adopted or are considering rules modeled on ABA Model Rule 6.5, which limits a lawyer's liability for conflicts to circumstances where the lawyer knows that a real or vicarious conflict exists. The Rule also limits conflicts imputed to a lawyer's firm as a result of the attorney's participation in a limited legal services program. See MODEL RULES OF PROF'L CONDUCT R. 6.5(b) (2009); see also *Limited Pro Bono Work Gets Easier with New Conflict of Interest Rule*, CAL. B.J., Sept. 2009, at 4, 14.

151. Volunteers of Legal Service, VOLS Pro Bono Pledge, <http://www.volsprobono.org/RTF1.cfm?pagename=NewPageName1> (last visited Mar. 17, 2010).

152. JUDICIAL CONFERENCE OF THE D.C. CIRCUIT, RESOLUTION ON PRO BONO LEGAL SERVICES (1998), available at [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%201998%20Resolution%20on%20Pro%20Bono%20Legal%20Services/\\$FILE/Pro%20Bono%20Resolution.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%201998%20Resolution%20on%20Pro%20Bono%20Legal%20Services/$FILE/Pro%20Bono%20Resolution.pdf).

reported that pro bono performance is part of individual lawyers' overall performance evaluations. The knowledge that pro bono work will matter in these reviews provides some incentive to maintain quality standards.

Another important check, reported by about one-quarter of responding firms (n=13), is partner supervision of all pro bono matters. One attorney whose firm had "a partner on every pro bono matter" saw it as a way to "make pro bono work the same as commercial work."¹⁵³ Yet, "[i]n reality, not every case goes that way."¹⁵⁴ Despite efforts to guarantee partner supervision, many counsel nonetheless conceded that "monitoring cases is a large challenge."¹⁵⁵ At times, it is simply difficult to get overcommitted partners to pay attention to unpaid matters under their supervision. As one counsel put it, "I strongly believe that most partners are not focused on pro bono, so someone else has to catch trips and falls."¹⁵⁶ For this counsel, the lack of partner oversight caused "a great deal of headaches. Getting more partner involvement is critical."¹⁵⁷ Supervision breaks down not simply because partners are "too busy," but also because associates may be too "intimidated" to ask for help.¹⁵⁸ Partner expertise can also be a problem. Although one counsel noted that "[e]very matter has a supervising partner," she acknowledged that "in some areas the associate knows more than the partner."¹⁵⁹

Firms take different steps to address the oversight issue. One firm had a new program putting "senior partners in a godparent role with senior associates. These godparents can provide general guidance on pro bono matters. This gives partners an ownership role even if they have limited time."¹⁶⁰ More commonly, pro bono counsel served a backstop function. As one counsel explained, "Ultimately, in theory, the billing partner for each matter should be responsible. In practice, that doesn't always happen so it is me who monitors. I don't have [a] formal monitoring program, but I follow up when I need to because I know what is going on."¹⁶¹ Another counsel described how the firm sent an annual request for status updates to all partners supervising pro bono cases. When the response was, "Is this my case?" That's when you intervene."¹⁶² To avoid cases falling through the cracks, another firm required three approvals to open pro bono cases: the first by the supervising partner, the second by the chair of the associate's practice group, and the third by pro bono counsel. Not only did this enhance oversight, it also served other goals. As counsel explained, "I track everything in all of our offices. I do that because I have a lot of priorities of

153. Interview 9 (Aug. 24, 2009).

154. Interview 21 (Sept. 1, 2009).

155. Interview 8 (Aug. 11, 2009).

156. Interview 13, *supra* note 80.

157. *Id.*

158. Interview 21, *supra* note 154.

159. Interview 8, *supra* note 155.

160. Interview 15 (Aug. 21, 2009).

161. Survey Respondent 24.

162. Interview 26 (Aug. 25, 2009).

my own. I like to make sure pro bono is spread out, matched with lawyers' interests and desire to develop practice skills."¹⁶³

Pro bono counsel also described a number of independent monitoring activities, such as regular meetings with pro bono attorneys and review of pro bono case budgets, hours, and progress. Troubleshooting client complaints and managing client—and lawyer—expectations was also part of the job:

If I think there's a quality issue, I get involved. . . . Sometimes clients just have unrealistic expectations of what can be achieved or how long it will take. . . . Sometimes lawyers can be unrealistic also. They think if it's an individual client, how complicated can it be? In fact: very complicated.¹⁶⁴

Another stated, "I've occasionally heard complaints about no follow up. A lawyer from a provider organization or a client will call and say, 'I can't get your attorney to get back to me' about the status of the case."¹⁶⁵ One counsel kept an eye out for trouble and coordinated with the firmwide quality assurance committee at the first sign:

When things don't go smoothly, [it is mostly because] the case has gone into an area where the lawyer doesn't know what to do—either substantively or with respect to client management—as when the client is taking more resources than the case merits. Many [clients have] mental health or emotional health issues. For those we have a quality assurance committee and we ask them what is the best way to proceed ethically.¹⁶⁶

Reassigning cases when lawyers left the firm was another important quality control issue. One counsel stressed the "whole risk management" issue that transitions presented:

With pro bono, even though we have a partner supervise every matter, . . . associates take a larger role . . . and supervision is much lighter. I'm on a list of people who get the Human Resources notice when someone leaves. I generate a list of pro bono matters billed to that attorney and I send a notice of each matter to the supervisor to be sure that it is covered. For separation agreements, it is written into the separation agreement that each attorney has to provide me with a list of pro bono matters and a transition plan. . . . If partners leave, there is a similar problem that the associate is running the case, but unsupervised.¹⁶⁷

As that comment suggests, monitoring time records is an important way for counsel to oversee pro bono representation. In our survey, roughly fifteen percent of firms (n=9) monitored pro bono cases through their general client-tracking systems. Such systems allow partners and pro bono counsel to track how much associates are billing to pro bono cases and to

163. Interview 22 (Sept. 2, 2009).

164. Interview 4 (Aug. 10, 2009).

165. Interview 5 (Aug. 19, 2009).

166. Interview 17 (Aug. 19, 2009).

167. Interview 20, *supra* note 148.

step in if there appears to be a distortion—too little or too much activity given the case status. In one firm, the “lawyer opening the case has to list the estimated hours the project will take. Monthly pre-bills are sent to the supervising lawyer to monitor the work being done on the case. . . . Some of the firm’s practice leaders, especially in the litigation area, independently monitor hours spent on cases.”¹⁶⁸ Several counsel reported such oversight: “I do look at collective pro bono hours [as well as a] detailed report of every lawyer, organized by practice group. If I see something that looks out of whack, then I’ll investigate, although that almost never happens.”¹⁶⁹ Being able to see if “something sticks out that looks like an issue,” such as “an attorney spending a huge percentage of time,” allowed one firm’s pro bono counsel to “feel in control.”¹⁷⁰

While other large-firm pro bono counsel questioned their ability to keep track of everything, smaller firms appeared to have an easier time.¹⁷¹ One pro bono counsel from a firm with fewer than one hundred lawyers found that it was

feasible for us to monitor cost effectiveness and quality informally. Every month I get two reports: pro bono by lawyer and by matter. Then I receive a third that compares pro bono to total firm billable hours. I can see which cases have been generating a lot of pro bono hours and check them against my own understanding of what is going on. . . . What helps is that I’m both a pro bono supervisor [on cases] and [overseeing pro bono administratively]. I’m on the team.¹⁷²

To improve oversight, firms sometimes relied on additional technology. About one-fifth of survey respondents (n=10) reported having some type of tracking system, like Pro Bono Manager, specifically designed for oversight of pro bono cases. Such a system enabled them to intervene if there were any red flags. One counsel described a system

that enables us to keep track of staffing, origination history, and past status updates of every matter, and to search in various ways, including source group and type of case. This is now interlinked with a computerized status update system, which is used three times a year to review the status update of every pro bono case in every office by the firm’s overall pro bono coordinator (me).¹⁷³

Such systems appeared useful for two primary reasons. First, the tracking system could run sophisticated searches to determine, for instance, “how many matters that are active haven’t been billed to in the last six months. This raises red flags.”¹⁷⁴ With such a report in hand, instead of trying to keep “5000 matters in my head,” pro bono counsel could use the updates to

168. Survey Respondent 22.

169. Interview 22, *supra* note 163.

170. Interview 25 (Aug. 25, 2009).

171. Interview 22, *supra* note 163.

172. Interview 28 (Aug. 13, 2009).

173. Survey Respondent 47.

174. Interview 13, *supra* note 80.

“try to nail down [cases] that I don’t have a precise finger on.”¹⁷⁵ In addition, tracking systems enabled counsel to program automatic requests for updates to attorneys working on pro bono cases. Such requests could be as fine-grained as necessary. One firm connected Pro Bono Manager to a survey that asked a series of detailed questions about cases, including what, if any, actions the lawyers had recently taken, whether they had “run into any snags, delays, or other problems,” whether they needed help, what actions they expected to take next, and whether any new parties were involved.¹⁷⁶ In addition to providing substantive guidance, this survey served an important signaling purpose: it conveyed that “big brother is watching [The lawyers know that] we check in and will wear them down to respond to status update requests.”¹⁷⁷ The system also helped to catch conflicts problems if new parties entered the case, and to provide information about innovative projects throughout the office that could be more broadly shared.¹⁷⁸

Other oversight mechanisms served similar purposes. A few firms (n=4) indicated that they conducted annual pro bono program evaluations that touched on the quality of representation, although they did not specify how such evaluations were done. Two firms reported imposing closer supervision when attorneys exceeded an hourly threshold for pro bono work. One “requires that all associates who have billed in excess of 125 hours on a case to meet with a partner and a pro bono administrator to review the case status, the training opportunities provided, staffing concerns, etc.”¹⁷⁹ In the other firm,

if a lawyer will exceed 60 pro bono hours, s/he must obtain approval from his/her supervisor, the chair of the local Pro Bono & Community Service Committee and me before moving forward as a means of ensuring the lawyer is providing efficient and effective counsel to our pro bono clients.¹⁸⁰

Although pro bono counsel framed such concerns in terms of quality, it seems likely that the impact on billable hours or concerns about meter running were also at issue.

Some firms emphasized the importance of nonprofit legal partner organizations in ensuring quality representation. The nonprofit’s role focused on making sure that the clients were income-eligible and that their causes were meritorious. One counsel explained, “We rely on organizations to do legal issues screening for us so that we aren’t getting involved in a case and it has no merit at all.”¹⁸¹ According to another counsel, sharing the responsibility for client screening with the nonprofit partner “helps me

175. *Id.*

176. Interview 23 (Aug. 19, 2009).

177. *Id.*

178. *Id.*

179. Survey Respondent 4.

180. Survey Respondent 25.

181. Interview 17, *supra* note 166.

have a good sense of quality control. . . . I don't know what else I could do in terms of monitoring quality."¹⁸² Notably, none raised the possibility that nonprofit staff themselves might lack adequate information about lawyer performance, particularly when they refer, rather than co-counsel, cases. At least one counsel thought that emphasizing the nonprofit screening role often reflected an abdication of responsibility by firm lawyers who wanted only clients who were appreciative and easy to deal with: "Law firm attorneys tend to blame people before they look at themselves. Ultimately [the nonprofit] cannot screen clients that are difficult. Sometimes lawyers in firms bristle at difficult clients."¹⁸³ Another used lawyer complaints about clients as an opportunity to educate the lawyers about how to solve client-relations problems generally. "Younger [lawyers] say 'I think the client is lying.' I say, 'No, sit down, tell me what happened, this is what you need to ask, come back and talk to me.'"¹⁸⁴

Notably absent from these discussions about client management were any references to lawyers' cultural competence. Nor did the topic surface in descriptions of pro bono training programs. It may well be that some of the "difficulties" that lawyers attributed to the client may have also reflected their own difficulties in bridging differences of race, class, ethnicity, and gender.¹⁸⁵

3. Lawyer Satisfaction

Firms generally reported only modest efforts to evaluate lawyer satisfaction with their pro bono experiences.¹⁸⁶ About a quarter stated that their information was largely anecdotal, received through informal discussions. One counsel was

embarrassed to say that we haven't thought of . . . whether people are happy [with pro bono] I think that the fact that people come back and take cases [suggests their satisfaction], and anecdotally—[although] not every case is spectacular—across the board everyone is invested in their cases and clients. People say, "I was cynical about pro bono, and I didn't really want to do it, but, oh my god, it was the best experience."¹⁸⁷

At another firm, an informal channel for assessing lawyer satisfaction came through "monthly conference calls with [the chairs of] each office in North America," which counsel conceded was not a very "reliable" source of

182. Interview 18 (Aug. 17, 2009).

183. Interview 13, *supra* note 80.

184. Interview 21, *supra* note 154.

185. *See* sources cited *infra* note 409.

186. Little other information is available on attorney satisfaction with pro bono work. The 2009 ABA report on pro bono activity did not ask about attorney satisfaction directly, but did ask whether pro bono work was "[c]onsistent with the [a]ttorneys' [e]xpectations and [e]xpertise." ABA, SUPPORTING JUSTICE II, *supra* note 85, at 18. The ABA study found that "[a]cross settings, most attorneys (94%) reported that they performed tasks that were consistent with their expectations when accepting the engagement." *Id.*

187. Interview 21, *supra* note 154.

systematic information.¹⁸⁸ Of course, pro bono counsel do frequently hear about significant dissatisfaction directly from associates. According to one, the most frequent concern related to “lack of responsiveness” by the nonprofit organization.¹⁸⁹ “By far the largest level of complaints relate to ‘I’m not getting the support I need. Staff is not calling me back. I can’t answer the question.’ When that happens, I call . . . legal aid to push the staff attorney on their side.”¹⁹⁰

About a quarter of respondents (n=15) reported conducting surveys of lawyer satisfaction. These were designed both to gauge satisfaction with completed pro bono experiences and to identify substantive interests that would assist counsel in matching attorneys with future pro bono opportunities. Surveys also helped firms evaluate relationships with nonprofit partners. One counsel indicated that the surveys sometimes provided an “objective view of [nonprofit] partner organizations” that served as a check on his impressions: “[S]ometimes I am surprised about feedback about legal services attorneys. Sometimes I think nonprofit lawyers are good and the feedback is negative.”¹⁹¹ Another reported that in a survey, an “attorney may say that they had a bad experience with Nonprofit X, [because the case involved] an asylum applicant who was a convict. So [now I know that] this person likes immigration cases but wants to work with meritorious clients.”¹⁹²

In addition, some pro bono counsel found such surveys to be useful in identifying lawyers’ substantive preferences. As one put it, “Without a survey, I can target people, but it gives me sort of a hard copy document that [indicates what firm lawyers] have interest in.”¹⁹³ Surveys also helped align “skill sets.”¹⁹⁴ One counsel used survey information to compile a “database about the kinds of work that our attorneys like to do so we can continue [to meet their needs].”¹⁹⁵ This information prompted her to seek out cases in “areas that I wouldn’t have thought of by myself. . . . Working with Holocaust survivors is a good example.”¹⁹⁶ Another discovered lawyers interested in animal rights and appellate arguments: “So I’ve been working hard to develop those opportunities.”¹⁹⁷

Surveys were particularly helpful in gauging new associates’ interests. Toward this end, one firm distributed a form listing twenty-two categories of possible cases, along with opportunities to suggest other areas and provide additional comments.¹⁹⁸ Many counsel also used questionnaires for

188. Interview 27, *supra* note 81.

189. Interview 20, *supra* note 148.

190. *Id.*

191. Interview 13, *supra* note 80.

192. Interview 18, *supra* note 182.

193. Interview 13, *supra* note 80.

194. Interview 18, *supra* note 182.

195. *Id.*

196. *Id.*

197. Interview 24 (Aug. 24, 2009).

198. Interview 22, *supra* note 163.

summer associates or for attorneys in new branch offices who might have “different traditions” or preferences regarding pro bono participation.¹⁹⁹ In some cases, the survey was useful less to place cases than to “help convince management that [pro bono work] was important to people within the firm.”²⁰⁰

Other counsel, however, found that surveys could not substitute for knowledge gained from face-to-face relationships with firm attorneys:

- “I used to give a pro bono survey for incoming lawyers but am no longer doing it. . . . In the end, it didn’t prove valuable because the attorneys [interested in pro bono] identify themselves. If I need to know if someone is interested in an area, I go talk to them; if they have time on their hands, they call me and we talk about [pro bono opportunities].”²⁰¹
- “We still do surveys from time to time, but don’t insist. The main way we place cases is through e-mail, voicemail, or hallway. The survey had limitations—someone failed to indicate interest in the abstract, but may be interested in a certain fact situation received through e-mail.”²⁰²
- “We just started using a questionnaire . . . [but there was a] low response rate. . . . [So it] hasn’t worked yet. . . . [Instead] I try to stay socially in contact with all lawyers. We have weekly lunches. I make it a point to never miss those. I want to know personally all the lawyers who work here.”²⁰³

Other less common efforts to determine lawyer satisfaction included soliciting feedback during lawyer performance reviews, exit interviews, and case status reports. One pro bono counsel described seeking feedback from the firmwide associates committee, which she would ask, “[W]hat can we do better and what can we do differently?” That has identified problems in terms of inconsistencies—for example, with respect to how to open cases. . . . Sometimes we hear that a partner is discouraging associates from pro bono. That kind of feedback is helpful.”²⁰⁴ Another firm obtained information from online evaluations of “CLE programs developed by the Pro Bono Committee,” as well as through the annual evaluation of the Pro Bono Director, for which “the Pro Bono Committee solicits input from a sampling of attorneys.”²⁰⁵

4. Stakeholder Satisfaction

Fewer efforts were made to obtain feedback from nonprofit groups with which firms partnered or from pro bono clients. Only forty-five percent of

199. Interview 19 (Aug. 25, 2009).

200. Interview 11 (Aug. 21, 2009).

201. Interview 17, *supra* note 166.

202. Interview 23, *supra* note 176.

203. Interview 28, *supra* note 172.

204. Interview 19, *supra* note 199.

205. Survey Respondent 55.

respondents (n=25) reported efforts to evaluate the satisfaction of nonprofit partner organizations, and these all involved informal conversations or meetings with collaborating organizations. None used surveys or other systematic methods to assess the organizations' views on the quality of pro bono representation. The prevailing view was that informal channels were generally sufficient:

- "I'm in touch with [groups] frequently; I get feedback on quality. So I don't do it formally because I know it anecdotally."²⁰⁶
- "We are in constant communication with many legal services providers throughout the country. We have continual dialogue with more than thirty such providers, discussing our joint efforts, our relationship and our impact."²⁰⁷
- "There isn't any formal process that I follow with clients or nonprofits. . . . I talk to directors all the time, day in and day out. They know me well enough, if they are concerned about a case, they call me up."²⁰⁸
- "On a personal level, I don't usually reach out to see how things are going. If someone calls me, it is usually either to ask a question about something specific or to get advice or to praise."²⁰⁹

Some counsel spoke individually with staff at nonprofit groups to "go over each case, any . . . improvements, and problem areas."²¹⁰ Others received feedback through conversations at larger gatherings. One counsel recounted how she met once a month with a local "delivery of legal services committee," which was a "great way to get a heads up on brewing issues, the best two and a half hours I spend all month."²¹¹ Often, informal communications with nonprofit groups involved troubleshooting problematic cases or program procedures.²¹² One counsel described "gripe sessions" with nonprofit staff; after one conversation, the firm changed its process for checking conflicts of interest.²¹³ Another counsel similarly used critical comments about pro bono lawyers to change office policy. If nonprofit staff say, "'Here is the thing that went wrong,' I bring it back to our pro bono chairs . . . to make sure that it won't happen again."²¹⁴

Although acknowledging that nonprofit feedback was ad hoc, many respondents believed that their informal information channels were sufficient. The following comments reflect this sentiment:

206. Survey Respondent 24.

207. Survey Respondent 27.

208. Interview 22, *supra* note 163.

209. Interview 25, *supra* note 170.

210. Interview 23, *supra* note 176.

211. Interview 19, *supra* note 199.

212. Interview 24, *supra* note 197.

213. Interview 21, *supra* note 154.

214. Interview 27, *supra* note 81.

- “[W]e’d hear about it if there was dissatisfaction.”²¹⁵
- “We assume [the nonprofit organizations] wouldn’t keep referring cases if there were problems.”²¹⁶
- “[Y]ou know when you are doing a good job and when you are not. . . . I meet with program directors a lot. They will call me and tell me that one of our associates dropped the ball. I feel like I would know if they thought [our firm] didn’t do well.”²¹⁷
- “I don’t think that we are in the dark about whether they are happy with what we are doing. The fact that they keep calling is informal feedback. . . . Unless I hear otherwise, then we are confident that we are providing services that they should expect.”²¹⁸

One firm assumed that the “number of honors” their lawyers had received demonstrated the satisfaction among nonprofit groups.²¹⁹

Other counsel, however, acknowledged limitations in these methods. One regretted the lack of regular “interchange between coordinators and [nonprofit referral] groups. A lot of times coordinators meet by themselves and so do . . . groups.”²²⁰ Some counsel recognized that organizations dependent on firms for pro bono services and financial support might have difficulty being fully candid about performance issues. As one counsel noted,

I’ve had frank conversations with provider organizations, but they feel the need to be tactful on quality issues. It would be good to have more open discussions. I’d be grateful to hear if one of our attorneys didn’t step up, but I can see that [the nonprofit groups] would be reluctant to raise an issue that would ruin the relationship.²²¹

Client satisfaction received the least attention of all. Almost none of the survey respondents reported efforts to obtain feedback about client experiences beyond informal discussions with referring organizations, and only a fifth of respondents (n=12) made these efforts. One pro bono counsel defended this approach as consistent with the treatment of billable matters: “We don’t do anything formal with paying clients so it hasn’t occurred to us to do something different with non-paying clients.”²²² Other counsel felt that they had sufficient client interaction to get a “sense of feedback.”²²³ “If clients are unsatisfied, they will let you know.”²²⁴ Some suggested that information from referral groups served as a proxy for direct

215. Interview 2 (Aug. 18, 2009).

216. Interview 10 (Aug. 14, 2009).

217. Interview 18, *supra* note 182.

218. Interview 24, *supra* note 197.

219. Survey Respondent 48.

220. Interview 23, *supra* note 176.

221. Interview 5, *supra* note 165.

222. Interview 15, *supra* note 160.

223. Interview 13, *supra* note 80.

224. Interview 8, *supra* note 155.

information from clients. One counsel reported explicitly asking such groups' attorneys: "How did the client feel about the result?"²²⁵

Just over twelve percent of counsel (n=7) indicated that they received feedback by way of informal client comments, thank you notes, and flowers. One respondent cited e-mails in which clients asked, "[W]hat can we do to show how pleased we are?' I say, 'Write to the managing partner and cc me.' So they do that and we know."²²⁶ Another reported attorneys asking her to "look at this card that my client sent thanking me,' or 'look at this art work I received."²²⁷ Although this counsel normally did not contact clients directly "because of privacy," she occasionally followed up "where the lawyer didn't think the client was satisfied, but then I call the clients and they say that they were in fact satisfied."²²⁸

A few counsel indicated that they used positive case outcomes as a proxy for satisfaction. One acknowledged, "I haven't thought about clients. If they have a good outcome, they are happy. . . . [I]n most pro bono cases we get a good result. That is not the only way or best way to evaluate, but at least we know we are getting people what they are seeking."²²⁹

A small number of firms had implemented—or were planning to implement—more systematic efforts to evaluate client satisfaction. These efforts had varying degrees of formality. In one firm, "At the end of the case, we send a letter and have closing conversations with individual clients so we can find out if they are satisfied with the outcome."²³⁰ Another counsel reported contacting a randomly selected group of clients to obtain feedback.²³¹ A third firm was developing a client satisfaction survey to be included in closing letters. In creating the survey, pro bono counsel was struggling to develop the proper questions and procedure. She wanted to determine "how the representation received has impacted [the client's] life in a larger sense."²³² Her objective was not to create "a Nordstrom customer satisfaction survey, not to give gold stars but to find out do we make a difference."²³³ But the logistics were daunting: "What form should it be? Paper or electronic? What should we do when it comes back? What should we do with multilingual clients?"²³⁴ Another described the methodological "hurdles as enormous—many clients don't have addresses."²³⁵

A few participants raised questions about whether a systematic survey would yield useful information or have counterproductive consequences.

225. Interview 18, *supra* note 182.

226. Interview 22, *supra* note 163.

227. Interview 18, *supra* note 182.

228. *Id.*

229. Interview 21, *supra* note 154.

230. Interview 1 (Aug. 27, 2009).

231. Survey Respondent 24.

232. Interview 30 (Aug. 19, 2009).

233. *Id.*

234. *Id.*

235. Interview 20, *supra* note 148.

One counsel expressed concern “about contacting clients out of the blue—they would wonder who’s asking or why?”²³⁶ Others were skeptical that clients would know enough to make fair assessments of lawyer performance:

- “If an outcome isn’t what the client wants, that is not an indicator of poor services. . . . Can clients assess the quality of services? It is like us assessing the quality of doctors.”²³⁷
- “It is not clear clients could evaluate service in any worthwhile way. They don’t know what another lawyer could have accomplished.”²³⁸
- “[Polling clients is a] [h]ornet’s nest It would generate a lot of complaints that may not be fair. Sometimes clients have too high expectations. [Sometimes] successful pro bono is getting clients to recognize whether they have a meritorious claim. Victory is the least bad outcome.”²³⁹

5. Social Impact

The challenge of assessing the public benefit from pro bono service appeared even greater. No firms reported any systematic efforts to evaluate the social impact or cost-effectiveness of their work. Most relied on informal conversations with nonprofit partners and assessments by firm lawyers and pro bono counsel. As an illustration, one counsel described an annual pro bono retreat attended by the “pro bono leaders . . . from all the offices We lock ourselves in a room and talk about impact.”²⁴⁰ One counsel was convinced that the way her firm selected cases ensured social benefits:

We are fairly confident that our impact cases have broad applicability. We also think it is critical to bring individual cases where important rights are at issue. We identify areas of focus such as adoption and immigration. We decide on those based on what our nonprofit partners tell us and what our experience is.²⁴¹

Others relied on aggregate case outcomes as a measure of success. One described compiling results in order to gather support for an ABA pro bono award his firm was receiving: “When I saw the range of what we did across cases, it was impressive Putting together the supporting [data] lets you see social impact.”²⁴²

236. Interview 2, *supra* note 215.

237. Interview 26, *supra* note 162.

238. Interview 8, *supra* note 155.

239. Interview 20, *supra* note 148.

240. Interview 27, *supra* note 81.

241. Interview 2, *supra* note 215.

242. Interview 23, *supra* note 176.

6. The Challenge of Evaluation

Although many pro bono counsel were satisfied with their firms' quality control and evaluation efforts, a substantial number acknowledged the need to do more and were receptive to new ideas and best practices:

- “[W]e are convinced that we need to try to work more on quality control. . . . I personally have been too reliant on our lawyers blindly following advice of [referral organizations].”²⁴³
- “[We should] get more systematic feedback. We have good relations with nonprofits and frequent communication. It would be good to have some greater feedback from individual clients.”²⁴⁴
- “How to get the large firms working together to make a major difference . . . is a major objective for me and for other pro bono counsel.”²⁴⁵

As one counsel pointed out, feedback was especially critical in the pro bono context because, while paying clients may be able to vote with their feet, it is “harder for a pro bono client to find a replacement than it is for a paying client.”²⁴⁶

Yet even counsel who in principle acknowledged the value of assessment identified substantial problems in practice. One difficulty involved resources. As one counsel noted, “My daily challenge is how to get it all done. Finding matters for seven hundred attorneys doesn’t leave enough time to focus on the key issues.”²⁴⁷ Another echoed this concern: “Our program has grown 450% in 4 years. With such growth, simply keeping track of cases, . . . hours and outputs [is] challenge enough.”²⁴⁸

Other challenges involved the difficulty of defining program effectiveness. Counsel identified a number of potential problems with social impact metrics:

- “How do you measure success in a pro bono matter when the best result for the client is the ‘least bad option’ rather than a ‘win’?”²⁴⁹
- “It is very hard to measure impact. We are putting a lot of time/resources into the program and it is very difficult to articulate/measure goals beyond the number of hours—which I don’t think measure much of anything.”²⁵⁰
- “I don’t know if you can come up with an objective [measurement] . . .”²⁵¹

243. *Id.*

244. Interview 14 (Aug. 24, 2009).

245. Interview 5, *supra* note 165.

246. Interview 4, *supra* note 164.

247. Interview 5, *supra* note 165.

248. Survey Respondent 55.

249. Survey Respondent 42.

250. Survey Respondent 50.

251. Interview 11, *supra* note 200.

- “Is it the number of people helped? Is it one case that changes the law? Is it making sure that people do things more efficiently? . . . Should I emphasize 1000 band-aids or one systemic change case? I don’t know.”²⁵²
- “I don’t have an overall way of measuring except for numbers. [There are also] thank you letters, calls, happy clients, . . . awards here and there.”²⁵³

Although there was no agreement on how to assess program effectiveness, there was broad consensus that the current ranking system was inadequate. One counsel summarized this view: “The pro bono world would be much-improved if there were a way to measure client satisfaction, value, relationships with legal service providers, professional development, mentoring, training, and enhancement of intra-firm relationships rather than focus on raw hours.”²⁵⁴ Another agreed. Rankings drove her “nuts”: “It would be better if the bar gave opportunities to firms to showcase programs rather than pick winners and losers.”²⁵⁵ Although many acknowledged that *The American Lawyer* had done a good job of helping make pro bono “more important at large firms,”²⁵⁶ it had been counterproductive in other respects, particularly in its emphasis on “quantity over quality. If someone wants to manipulate [the numbers] and look good, they can by ginning up hours.”²⁵⁷ One counsel objected that the rankings rewarded “large glamorous cases” that required many hours, but whose impact was difficult to evaluate: How would firms know how much good was done by initiatives like “the truth and justice tribunals in Liberia”?²⁵⁸ Others criticized *The American Lawyer*’s reliance on the percentage of firm attorneys doing more than twenty hours of pro bono. The result, according to one counsel, was that some firms made that minimum contribution mandatory or “badger[ed]” reluctant lawyers into compliance even if “a lot of them do BS work [to get there].”²⁵⁹ Yet this counsel was still able to put the rankings in perspective, as part of the impetus for achieving broader social goals: “I would shoot myself if all I had to do was cater to the numbers. . . . I use my numbers as means to an end of making an impact.”²⁶⁰

Smaller firms appeared to have more flexibility concerning pro bono numbers because, as one counsel put it, “We are not subject to

252. Interview 26, *supra* note 162.

253. Interview 22, *supra* note 163.

254. Survey Respondent 15.

255. Interview 12 (Aug. 11, 2009).

256. Interview 11, *supra* note 200.

257. *Id.*

258. Interview 10, *supra* note 216.

259. Interview 13, *supra* note 80. In one example reinforcing concerns about the twenty-hour measure, the most recent pro bono survey by *The American Lawyer* listed one firm (Patterson Belknap Webb & Tyler) reporting that *more than* 100% of its lawyers did at least twenty hours of pro bono. See 2009 Am Law Pro Bono Survey, *supra* note 90.

260. Interview 13, *supra* note 80.

rankings The firm doesn't pressure me They trust me and let me take the reins."²⁶¹ But even firms that did not have to worry about *The American Lawyer* rankings were not necessarily oblivious to the metric that has come to define success in the pro bono world. One counsel admitted that, although her firm was not in the Am Law 200, she did "occasionally look to numbers" and once drafted a memo to the executive committee indicating "where we would fall on list. I determined we would be 75th out of 200."²⁶² Quantity can thus matter for internal as well as external validation.

In place of numbers, counsel suggested a range of alternatives for measuring the impact of pro bono. Some emphasized internal benchmarks, such as how well pro bono work promoted lawyer "skill development"²⁶³ or produced "tangible economic benefits" to the firm.²⁶⁴ In terms of external impact, respondents emphasized results, but were divided or ambivalent about what that meant. As one counsel put it, "saving a low-income client from eviction is a good outcome and easily measured; advising a client in a clinical setting that she will not be able to get her children back from foster care may or may not be a good outcome by the client's standard."²⁶⁵ Other respondents suggested alternative strategies for measuring and enhancing impact. One counsel argued that the public interest could be better served by redirecting pro bono resources away from litigation matters. In his view, transactional work had the potential to affect "hundreds of thousands of people, as opposed to few people we can help in litigation matters. . . . In microfinance, some of the clients who we've set up venture funds for, those clients are dispersing millions, they employ other people, [and] they end up being lenders. . . . It feels different and you don't have all the adversarial inefficiency and unpleasantness as in litigation."²⁶⁶

By contrast, some counsel believed that firm efforts to measure the effectiveness of pro bono programs were futile or counterproductive. As one put it, the "[p]roliferation of evaluations has distracted from actual work [More] useful [approaches] would be increased client, judicial and corporate pressure to do pro bono to drive home the business and public imperative."²⁶⁷ Another felt that outside expertise was necessary. "Lawyers are dumb! We need public policy, sociology people. We don't know how to do this."²⁶⁸ Nonetheless, she believed that pro bono counsel could contribute to the process of developing evaluation tools: counsel "brainstorming" with other experts could "come up with something good."²⁶⁹

261. Interview 18, *supra* note 182.

262. Interview 28, *supra* note 172.

263. Survey Respondent 19.

264. Survey Respondent 24.

265. Survey Respondent 19.

266. Interview 13, *supra* note 80.

267. Survey Respondent 39.

268. Interview 30, *supra* note 232.

269. *Id.*

D. *The New Economics of Pro Bono Work*

Law firm pro bono programs respond not only to internal economic concerns involving skill development and recruitment, but also to external economic forces concerning the market for lawyers' services. In the recent economic downturn, many large firms turned to temporary public interest placements as a way station for incoming or currently underemployed associates.²⁷⁰ By the summer of 2009, over fifty Am Law 200 firms were offering subsidies of between \$50,000 and \$80,000 for associates to spend a year working for nonprofits or government agencies.²⁷¹ Other firms provided stipends without conditioning them on public interest placements. At firms sampled by *The American Lawyer*, between a third and a half of incoming 2009 hires had taken the option to defer, at a cost as high as \$3 million per firm.²⁷² As a result, pro bono counsel have become involved in finding adequate placements, and APBCo has developed standards to guide the process.²⁷³ Our survey provides the first systematic information available about how such initiatives have functioned and how they—and the downturn more generally—have affected law firms' pro bono programs.

1. Short-Term Impacts

a. *Organizational Commitments and Priorities*

For most survey participants, the economic downturn had not significantly affected their work. Among those who had experienced some impact (n=21), the main change was that they were spending time coordinating the placements of deferred attorneys. Seven counsel reported that they were busier dealing with demand for pro bono cases due to a decline in paying matters; three noted the additional burdens of transferring cases from attorneys who had lost jobs in the recession. Another three noted that they were focusing additional attention on generating pro bono opportunities that provided training for associates.

In general, however, the downturn seemed not to have significantly affected law school support for pro bono programs. Most counsel reported no impact on their programs. However, one change, reported by five firms, was a greater reluctance to take on large, expensive cases. As one counsel noted, “[W]e are less likely to take on major litigation that will require a large number of attorneys and significant expenditures.”²⁷⁴ Another counsel similarly acknowledged that “we may not be as quick to sign on as chief check writer when we co-counsel with existing legal service

270. See Dominus, *supra* note 103; Jonathan D. Glater, *The Lawyer Squeeze: Layoffs and Closings in a Field Thought To Resist Downturns*, N.Y. TIMES, Nov. 12, 2008, at B1; Weiss, *supra* note 104.

271. Rachel Breitman, *Time Well Spent*, AM. LAW., July 2009, at 15, 15.

272. *Id.*

273. ASS'N OF PRO BONO COUNSEL, *supra* note 6; see also PRO BONO INST., *supra* note 6.

274. Survey Respondent 4.

providers.”²⁷⁵ In addition, one counsel mentioned various types of “belt-tightening,” which included “cutting back on things like T-shirt[s] and awards, having coffee instead of lunch with clients, screening prospective class actions and other high-expense cases extra carefully.”²⁷⁶ Pro bono staffing was generally stable, although five firms reported some changes.²⁷⁷

b. *Placement of Deferred and Furloughed Associates*

Seventeen firms responded that they had programs to place furloughed or deferred associates with public interest organizations, although fewer provided detailed information on their implementation. The only five firms that had figures available reported placing a total of between twenty-six and sixty-five associates. The primary impetus for the placements was economic. Each deferred associate is estimated to save the firm between \$60,000 and \$100,000 because the salaries and support for these junior lawyers would exceed the profit they generate at current billing rates.²⁷⁸ In addition, deferral gives firms a way to quickly restock their associate ranks with minimal transaction costs once the worst of the recession passes.

Training was another important reason for the placements. As surveyed counsel noted, providing pro bono opportunities enables lawyers to “continue to build their skill sets” while also meeting urgent legal needs of vulnerable groups.²⁷⁹ One counsel summed it up this way: “The firm is pleased to be able to contribute to the public good through its attorneys involved in the placement program. The program also provides a way to develop attorney skills and manage firm resources.”²⁸⁰ A related objective was to find placements that would help to position associates within the firm upon their return. For litigators, pro bono counsel would look for opportunities with “courtroom time. For transactional lawyers, we look for large nonprofits with sophisticated legal departments. Our firm is looking at the back end of this. Otherwise what is the benefit? We want these people to come be lawyers here.”²⁸¹

Programs varied in formality and in the degree of support they offered in identifying placements. At one end of the spectrum were six firms that proactively searched for opportunities. In these firms, counsel contacted public interest organizations, screened jobs to determine their training potential, and assisted associates in submitting applications and selecting

275. Survey Respondent 26.

276. Survey Respondent 7.

277. One indicated the likely loss of a pro bono fellow, Survey Respondent 24; a second said that planned additions were indefinitely put on hold, Survey Respondent 29; a third had experienced one layoff, Survey Respondent 37; and a fourth reported that pro bono personnel were being asked to do some non-pro bono work, Survey Respondent 39. One firm reported increasing staff by turning a senior associate into a Pro Bono Associate. Survey Respondent 47.

278. Breitman, *supra* note 271, at 15.

279. Survey Respondent 25.

280. Survey Respondent 47.

281. Interview 20, *supra* note 148.

organizations that fit their interests. One firm identified placements from which associates could choose; the others generally compiled a list but also allowed associates to propose alternatives. This work often absorbed a considerable amount of program resources. As one counsel reported,

We have devoted an extremely large amount of administrative time to our effort to find Fellowship placements for our 65 deferred first year attorneys. We surveyed them [regarding] their interests and preferences, we solicited over 300 job descriptions from public interest organizations who agreed to serve as hosts, we set up an extranet for the Fellows where they can review those job descriptions, and we provided one on one counseling to each of them.²⁸²

Another six firms were less proactive. For instance, in one firm, lawyers were allowed to “decide on their own where they wish to go, and [also to] contact public interest groups about possible placements with them.”²⁸³ Although the “firm [did] elicit expressions of potential interest from public interest groups, and post[ed] them on our intranet,” it did not “make value judgments about placements.”²⁸⁴ Similarly, another firm stated that it was providing options to lawyers “based on their interests.”²⁸⁵ Still another was “making available links to existing clearinghouses.”²⁸⁶ Overall, four firms required firm approval of placements before associates could begin. One allowed deferred associates to apply for the firm’s preexisting public interest fellowship and another created a new fellowship program specifically for incoming associates, who selected their own position in consultation with firm lawyers.

Whether associates were treated as firm employees while on leave also varied, and had significant implications in terms of tax, malpractice, conflicts of interest, and the ability to count work as pro bono activity. Although APBCo had developed a document that highlighted the relevant employment law issues, many counsel felt that they lacked ready-made models and, as one put it, were “making something up out of whole cloth.”²⁸⁷ When asked about the employment status of placed attorneys, six firms indicated that they were treating these attorneys as employees of the firm, two were treating them as employees of the placement organization, and one was classifying them as volunteers. Another four had not taken a position. In terms of pro bono hours, two firms intended to count all hours of on-leave attorneys as part of the firms’ pro bono service (one of these firms counted the placed attorneys as firm employees, while the other counted them as employees of the placement organization). Seven firms were planning to count none of the placement hours as pro bono, two had not yet taken a position, and three would be counting hours spent on

282. Survey Respondent 42.

283. Survey Respondent 47.

284. *Id.*

285. Survey Respondent 17.

286. Survey Respondent 29.

287. Interview 20, *supra* note 148.

service, rather than on administrative and training activities. Nine firms were not planning to run conflicts checks for attorneys on leave on the theory that “they are not employees,” a position taken “in large measure to avoid conflict issues.”²⁸⁸ Of course, as one counsel acknowledged, when attorneys returned, “the firm will run a standard conflicts check.”²⁸⁹ Where placed attorneys were treated as firm employees, the firms indicated that they would consider pro bono cases like any other matter for conflicts purposes. Two firms also reported conducting a general conflicts check in connection with evaluating placement organizations.

The terms of the placements also varied. Seven firms reported that the placements were for one year; three set shorter periods, two left the duration to the lawyer and the placement organization, and another indicated that the time period would be determined by the firm “on a case-by-case basis.” Of the firms with one-year programs that reported stipend amounts (n=6), the average yearly pay was \$62,500. Of the two firms with less than one-year leaves reporting stipend amounts, one was paying \$15,000 for a “short” placement period and the other \$7,000 a month.

Despite these generous stipends, friction could arise if public interest organizations felt pressure to accept associates whose training, supervision, and administrative expenses would exceed what groups could effectively supply. Those concerns have begun to surface publicly in some press accounts of the “mixed blessings” of deferral programs.²⁹⁰ Pro bono counsel at O’Melveny & Myers has noted that “there are a lot of hard dollar costs associate[d] with “free” lawyers: malpractice insurance, health insurance, computers, office space, support staff. At a time when legal aid organizations are very financially challenged, it’s tough to come up with \$5000 to \$10,000 for a “free” attorney.”²⁹¹ Some firms in our survey were sensitive to these costs, but the overall impact remained unclear. Firms generally ceded training responsibilities to the placement organizations (since associate training was one of the core reasons for the placements), although one invited attorneys on loan to “participate in all firm-offered CLE programs,”²⁹² while another mentioned the possibility that a local bar organization would assist with training.²⁹³ Eight surveyed firms reported that they would pay for at least some portion of health care costs.²⁹⁴ A few firms covered miscellaneous expenses such as malpractice insurance, bar

288. Survey Respondent 39.

289. Survey Respondent 47.

290. David Marcus, *Mixed Blessings*, DEAL, July 17, 2009, <http://www.thedeal.com/newsweekly/features/mixed-blessings.php>.

291. *Id.* (quoting David Lash, pro bono counsel at O’Melveny & Myers LLP in Los Angeles).

292. Survey Respondent 47.

293. Survey Respondent 22.

294. Five firms were paying full health benefits (Survey Respondents 7, 11, 22, 23, 29); one paid a \$5500 stipend to cover healthcare costs (Survey Respondent 39); one would pay “COBRA expenses for current associates” (Survey Respondent 47) and another would “negotiate payment of benefits with the organization” (Survey Respondent 48).

fees, relocation costs, and student loans.²⁹⁵ Only one firm reported assuming “all costs associated with placed attorneys.”²⁹⁶

An additional tension can arise in nonprofit organizations that have experienced their own waves of layoffs. Some public interest leaders cannot help but feel that if firms were motivated primarily by a desire to advance the public good, they would be helping to subsidize the nonprofit lawyers who had to be let go during the downturn, not pushing to place their own untrained associates.²⁹⁷ It remains to be seen whether firms, bar associations, and law schools can work together in effectively addressing those frustrations and defraying some of the costs of temporary placements.

2. Long-Term Implications

The long-term implications of the recession for pro bono work are less clear, but our study revealed some interesting themes and, in a few cases, programmatic changes that could have enduring effects.

a. *Holding the Line*

One important theme involved the impact of the downturn on public service commitments. Although the survey evidence did not reflect dramatic changes in overall pro bono staffing and organization, some counsel felt challenged in holding the line on participation. Maintaining widespread participation was one concern:

- “[We need to make sure] that people don’t shy away from this work in order to meet their billable hour targets. Upper-level management is continually reminding lawyers that they are all expected to do pro bono work as part of their professional responsibilities—and that the firm’s commitment doesn’t falter in difficult economic times. . . . This is where the rubber hits the road.”²⁹⁸
- “My major challenge is overcoming the assumption that . . . we can’t afford pro bono any more. My challenge is convincing them that we can.”²⁹⁹

295. Only one firm reported paying administrative costs of the placement organizations (Survey Respondent 23), and none were subsidizing office space. Four were paying for malpractice insurance (Survey Respondents 11, 22, 23, 29), while two reported relying on placement organizations to do so (Survey Respondents 39, 48). Six paid bar fees (Survey Respondents 11, 22, 24, 39, 42, 47), two paid relocation costs (Survey Respondents 11, 42), one subsidized vacation time (Survey Respondent 11), and another paid for student loans up to \$1000 a month (Survey Respondent 47).

296. Survey Respondent 2.

297. This view has been expressed to the authors privately on a variety of occasions. It also may be true, however, that some public interest groups have used the downturn as an opportunity to lay off some of their least effective staff, knowing that they could replace them on a short-term basis through pro bono placements.

298. Interview 1, *supra* note 230.

299. Interview 22, *supra* note 163.

- “I believe that once the dust fully settles, we will see fewer firms offering unlimited billable hour credit for pro bono work.”³⁰⁰

A related concern was how policies on conflicts of interest might affect provision of services to those most affected by the recession. On issues like foreclosures, “The greatest challenges include finding a mechanism through which law firms are able to represent pro bono clients . . . which [is] currently limited due to conflict issues, and ensuring that we continue to make a significant impact on low-income communities as their legal needs increase as a result of the economic crisis.”³⁰¹

b. *Organizational Slack and Firm Signals*

As a result of the recession, most firms faced issues of “organizational slack”—too many attorneys for too little work. The creation of this “excess capacity,” as many respondents termed it,³⁰² produced two primary responses, which cut in different directions for pro bono participation. During the first wave of the slowdown in 2008, many firms initially decided to reallocate associates rather than to reduce excess capacity, an approach consistent with deferral policies. The objective was to avoid the problems of the dot-com era, when firms overreacted with layoffs, incurring all the associated morale and reputational costs, and then found themselves without sufficient lawyers when the market recovered faster than anticipated. To avoid replicating these problems, firms typically responded by encouraging underemployed attorneys to take on pro bono work, which accounted for the reported increase in pro bono hours among firms in the *The American Lawyer’s* 2009 ranking.³⁰³ In many ways, this was a marriage of convenience: a way to allow firms to retain talent, promote skills development, and respond to growing legal needs. Both sides of the pro bono market—supply and demand—were up, and firms responded by increasing participation firmwide and within departments especially hard hit by the recession:

- “We are seeing more [pro bono] work because we are now making it easier for people to find cases that they want to handle.”³⁰⁴
- “In the short term, the recession has been positive in terms of increasing [pro bono] participation.”³⁰⁵
- “Opportunities have been occurring for the past year or more as underutilized attorneys at large law firms have turned to pro bono work to keep busy.”³⁰⁶

300. Survey Respondent 3.

301. Survey Respondent 25.

302. See Interview 9, *supra* note 153; Interview 11, *supra* note 200; Interview 21, *supra* note 154; Interview 26, *supra* note 162; Interview 29 (Aug. 31, 2009).

303. See Bario, *supra* note 1.

304. Interview 3 (Aug. 12, 2009).

305. Interview 2, *supra* note 215.

306. Survey Respondent 39.

- “We have more corporate lawyers and more partners available to help with bankruptcy and nonprofit work.”³⁰⁷

However, as the recession deepened in 2009 and firms increasingly resorted to layoffs, counsel reported that pro bono work often suffered; excess capacity dried up, leaders became more concerned with economic imperatives, and associates felt a heightened sense of vulnerability.³⁰⁸ In some firms, those associates who had invested heavily in pro bono to “keep busy” the year before appeared to be among the first to be laid off. At one of these firms, which reported a recent decline in pro bono hours of nearly ten percent, “[a]ssociates are kind of freaked out. . . . [H]aving seen people get fired who didn’t have billable hours [has created] a concern that ‘I need to stay available [for billable work].’”³⁰⁹ This fear did not seem unfounded. The same pro bono counsel reported that at his firm “last year, the top ten associates who left as excess capacity averaged 280 pro bono hours.”³¹⁰ Other counsel described similar concerns. “At the junior level, it’s the fear.”³¹¹ Associates believe that they “can’t be seen doing pro bono,”³¹² or might be “next on the block.”³¹³ “Remain[ing] available” for billable work has become an important consideration for associates trying to hold onto their jobs.³¹⁴ Many were becoming “wary of long-term commitments”³¹⁵ and starting to back off pro bono cases that might “signal that they are not doing enough other work.”³¹⁶

At these firms, the consequence was a dip in pro bono hours. One counsel described a common frustration:

I’ve hit a wall at my firm. It is not an easy path to placing things. It may be because we are at capacity, or people have gotten lazy, leaving at 5:30. Some want to keep an open schedule, want to keep their job, or maybe are looking for another job. It doesn’t create a warm climate for pro bono work.³¹⁷

Others who had not yet experienced a decline in participation were anticipating it soon—a trend that would be consistent with broader social patterns of volunteering.³¹⁸ An additional difficulty at some firms resulted from increased attrition. As firms “had to absorb cases that were being handled by lawyers who were laid off,” they had to become more cautious

307. Interview 5, *supra* note 165.

308. See, e.g., Interview 29, *supra* note 302.

309. *Id.*

310. *Id.*

311. Interview 15, *supra* note 160.

312. Interview 13, *supra* note 80.

313. Interview 30, *supra* note 232.

314. Interview 10, *supra* note 216.

315. Interview 1, *supra* note 230.

316. Interview 12, *supra* note 255.

317. Interview 13, *supra* note 80.

318. A May 2009 survey by the National Conference on Citizenship found that almost three-quarters of Americans reported devoting less time to volunteering and other civic activities, such as providing food and shelter to those in need. Stephanie Strom, *Volunteering Has Waned in Recession, Report Says*, N.Y. TIMES, Aug. 27, 2009, at A12.

about accepting new matters.³¹⁹ Some firms, like their associates, were trying to remain “flexible” and to plan their pro bono activities in anticipation of a future uptick in billable work. As one counsel put it, “We need to be sure that if the economy turns around, we can handle all the unpaid matters effectively.”³²⁰ Turnover also compounded concerns about quality: “There is so much more movement . . . it makes me crazy. . . . I am not worried about the pro bono commitment, but about coming and going. I am worried about dropping something, . . . about being negligent.”³²¹

Reductions in the number of incoming associates also presented challenges. One pro bono counsel’s concern centered on the fact that “we have no associates coming in the fall!”³²² Her firm’s increased focus on lateral hires did not serve pro bono goals because transferring lawyers often came into the firm with an “inborn disbelief” about the value of pro bono.³²³ Another counsel similarly noted that “a lot of our pro bono has resulted from new summer projects or getting [junior associates’] help on existing ones.”³²⁴ With the combination of deferrals, uncertainties about class sizes, and reductions in future summer programs and first-year hiring, this counsel felt challenges in “try[ing] to keep up momentum.”³²⁵

Looking forward, it is not clear how changing associate attitudes, perceptions of economic insecurity, and reduced associate ranks will affect pro bono participation. Much may depend on how firm leadership responds to anxieties about the impact of pro bono work on career opportunities. In one firm, the responses had been effective: “People have come back to their senses and realized that what we say we mean.”³²⁶ Another counsel reported that she had used “pressure on pro bono from some quarters” to mobilize the pro bono committee to request a “strong supportive statement from the managing partner, which we got.”³²⁷ Although some pro bono counsel were optimistic that “we can emerge stronger as a result” of the crisis,³²⁸ others were much less sure. One of the more pessimistic survey respondents believed that “[i]n the shifting economic paradigm, . . . firms will reconsider the role that pro bono should play in every attorney’s practice,” moving it further to the margins in order to focus on the bottom line.³²⁹

319. Interview 14, *supra* note 244.

320. Interview 9, *supra* note 153.

321. Interview 29, *supra* note 302.

322. Interview 30, *supra* note 232.

323. *Id.*

324. Interview 23, *supra* note 176.

325. *Id.*

326. Interview 30, *supra* note 232.

327. Interview 17, *supra* note 166.

328. Interview 1, *supra* note 230.

329. Survey Respondent 3.

c. Resources

In addition to general worries about pro bono participation, some counsel expressed more specific concerns about the impact of the recession on program resources. Both the short- and long-term pictures were mixed. As we reported earlier, some firms indicated no push back on costs—“nobody says stop spending money on pro bono.”³³⁰ But others reported a “big trend” toward paring back on “large, expensive litigation, such as death penalty and large discrimination class actions,” both because of the fear of the time commitment and the concern for managing costs.³³¹ As one counsel noted, “There are always attitudes that pro bono is only a cost. . . . When times get tough and people get nervous, those concerns get louder.”³³² Some firms that had ramped up pro bono engagements during the early phase of the downturn were caught shorthanded as more downsizing occurred. This created a mismatch between supply and demand that made firms extremely sensitive to taking on new resource-intensive matters. One counsel compared the situation to an “aneurism, which is taking a while to work its way through the system.”³³³ Although she did not “know [how long that will last],” she acknowledged that unlike “two years ago [when] we were very actively seeking out high impact pro bono, now we are spending more time managing what we have on board and making sure that those clients are being served effectively.”³³⁴ Another counsel acknowledged, “I can’t pay hard costs. I could take on forty social security representations, but I can’t take on a big death penalty case.”³³⁵

Although some counsel viewed recent cutbacks as a necessary short-term corrective, others suggested that they might be a more enduring legacy of the downturn. Part of the disagreement centered on how long the avoidance of expensive cases would last. Some expressed confidence that the reluctance was “not a long term issue.”³³⁶ Others suggested more lasting adjustments. One counsel predicted that it “will be harder for firms to bankroll major pieces of public interest litigation,” but suggested that they might “start partnering together to make costs more digestible,” splitting “expert and deposition fees, and working better with providers.”³³⁷ Another proposed getting the “ABA to come up with a new idea” to promote easier cost recovery by firms.³³⁸

330. Interview 13, *supra* note 80.

331. Interview 20, *supra* note 148.

332. Interview 17, *supra* note 166.

333. Interview 30, *supra* note 232.

334. *Id.*

335. Interview 20, *supra* note 148.

336. Interview 24, *supra* note 197; *accord* Interview 20, *supra* note 148.

337. Interview 26, *supra* note 162.

338. Interview 18, *supra* note 182.

d. *The Uncertain Impact of Deferrals and Furloughs*

Participants in our survey generally agreed that public interest placements for incoming or underemployed associates were a short-term phenomenon. But questions remained about “how some of this experimentation [will turn] out.”³³⁹ “Are deferred associates going to come back? . . . [A]re they going to have an impact” on the pro bono culture of the firm?³⁴⁰

In general, counsel saw benefits from seeding the firm with associates who have had meaningful public interest experiences. Counsel saw temporary placements as opportunities to reinforce commitment to pro bono work and to build a constituency for its support within the firm. A stint in public service could make associates “more likely to think of it as a natural part of their practice.”³⁴¹ These lawyers could “at the very least be mentors to other lawyers here and . . . continue to do, as part of our pro bono program, the types of work they did during [their placement] year.”³⁴² Counsel were eager to take advantage of the knowledge accumulated during the year away from the firm: “My hope is that I have all these [associates] with areas of expertise [who] will come back knowing what it is to be a [public interest] advocate, [and who will] . . . continue to have deeper connections with groups that they went to work with.”³⁴³

Other counsel hoped that the placements would influence associate attitudes concerning not only pro bono practice, but also professional life more broadly. At a minimum, the experience might “put to rest” the notion that “public interest lawyers are lazy and not effective.”³⁴⁴ It might also reduce “feelings of entitlement” and provide skills that would give associates a competitive career advantage.³⁴⁵ As one counsel put it, “If I see two kids coming back—one who worked for a public interest agency [and one who did not]—I will be more inclined to the one who has done the public interest work. To those who didn’t, [we might] say, ‘Why would you come here? If you come and there is no work, what have you gained for us and the world?’”³⁴⁶

The placement of deferred associates could also affect long-term relationships between large firms and their nonprofit legal partners. Although most counsel stressed positive benefits through increased contacts and expertise, a few sounded notes of caution. One counsel noted that these “new points of contact between the public interest and private bar community . . . could be a disaster.”³⁴⁷ “If those [placed] lawyers walk in

339. Interview 2, *supra* note 215.

340. Interview 29, *supra* note 302.

341. Interview 1, *supra* note 230.

342. Survey Respondent 47.

343. Interview 26, *supra* note 162; *accord* Interview 2, *supra* note 215.

344. Interview 13, *supra* note 80.

345. *Id.*

346. Interview 11, *supra* note 200.

347. Interview 27, *supra* note 81.

and say, ‘You are so lucky to have me,’ we could ruin relationships for a long time.”³⁴⁸ Conversely, “[i]f A+ law students go back to firms [after their placements] and those law firms have the sense that their quality has decreased, that could be disastrous as well” in terms of ongoing support for pro bono work.³⁴⁹

e. Programmatic Shifts

Although in most firms, the recent economic downturn appeared to involve only short-term restructuring, a few reported longer-term programmatic changes. For example, one firm imposed a one hundred-hour cap on the amount of pro bono time that would count toward billable requirements. According to counsel, “that put a chill on participation. . . . Now if you have impact litigation, the firm will rotate associates so they won’t be penalized. Some people who are leaving the firm are blaming their pro bono work.”³⁵⁰ Another firm more dramatically reconfigured its program for first- and second-year associates. At this firm, new lawyers will divide their 1800 annual hours evenly between billable work, pro bono work, and training, which will include attending trial advocacy courses, shadowing partners at meetings and depositions, and spending time with major clients’ in-house counsel.³⁵¹ Although this new program was not directly precipitated by the recession, current economic conditions have reinforced its appeal. Corporate clients are increasingly reluctant to pay for junior associate work on cases because they add insufficient value.³⁵²

IV. PRO BONO IN PRACTICE: POWER, PROFESSIONALISM, AND THE POSSIBILITY OF REFORM

The rise of organized pro bono programs raises important questions about the evolving relationship between public service, professional ethics, and the economic imperatives of large-firm practice. One objective of our study was to illuminate these broader issues and to understand the influence that pro bono leaders have on pro bono outcomes.

A. The Role of Pro Bono Counsel

1. Mediating Pro Bono Constituencies

As our findings make clear, the quantity and quality of pro bono services within large law firms reflects the competing interests of multiple stakeholders: partners, associates, and pro bono counsel inside the firms, and nonprofit legal groups and their clients on the outside. Pro bono

348. *Id.*

349. *Id.*

350. Interview 15, *supra* note 160.

351. Interview 21, *supra* note 154.

352. *Id.*

counsel play a pivotal role in balancing these demands. One counsel put it this way: “There’s a massive supply and massive demand for pro bono. I am one of the people who is a conduit.”³⁵³ Within the firms, counsel respond to managerial priorities and associate preferences, while lobbying for cases and causes they believe will best serve community interests. Outside the firms, counsel identify and screen opportunities, promote their programs, evaluate requests from nonprofit groups for money and manpower, and troubleshoot problems in case management. As in many negotiations, the stakeholders are not equally situated in bargaining leverage, and the outcomes reflect complicated power dynamics.³⁵⁴ In the discussion that follows, we examine the major implications of this process of “managing” pro bono.

a. *Internal Formality, External Informality*

Pro bono counsels’ overall approach to monitoring and evaluation reflects a divergence between internal operations and external interactions. Inside law firms, quality control is relatively formal. The vast majority of firms have standardized mechanisms in place to track cases and lawyer performance: rigorous conflicts screening standards, annual performance evaluations, partner and pro bono counsel supervision, and case-tracking systems. Although these mechanisms sometimes break down in practice, firms have put considerable effort into their development and implementation. Relatively speaking, firms do well in tracking cases, counting pro bono hours, and monitoring expenses. These functions all relate quite strongly to firm interests in maintaining basic quality standards, minimizing liability exposure, performing well in outside ranking schemes, and reducing costs.

Although lawyer satisfaction with pro bono programming receives less attention, it is still more systematically assessed than client and nonprofit partners’ satisfaction, and other measures of social impact. One reason is convenience. Pro bono counsel can readily interact with firm lawyers and rely on already established strategies for monitoring performance and discontent. As noted earlier, about a quarter of our surveyed counsel used some type of lawyer satisfaction survey to help ensure a good fit between preferences, skill development, and pro bono opportunities, as well as to identify any chronic sources of dissatisfaction. Most other counsel have found other less formal ways of monitoring those issues. In effect, pro bono programs operate with a *customer service* orientation toward lawyers within the firm.

By contrast, the approach to outside stakeholders reflects more of a *case management* model. An important way that pro bono counsel receive information about the experiences of nonprofit partners and clients is by fixing problems that come up in the course of representation. One counsel

353. Interview 4, *supra* note 164.

354. See Daniels & Martin, *supra* note 4, at 149–51.

summed up this responsibility. “I present myself as the mediator. If clients have trouble with anyone in the firm, [I tell them to] call me, don’t let it fester. It is not tattle taling. They need to tell me so I can address it internally.”³⁵⁵ Another saw her role as providing a channel for raising problems when it “might be hard for a client or organization to approach the attorney [directly].”³⁵⁶ For example, if an associate does not respond to repeated calls, the client can contact the referring organization, which, in turn, can contact pro bono counsel. “It gives both the client and legal services organization an opportunity to have third-party facilitation.”³⁵⁷

This troubleshooting role is crucial, but also necessarily reactive, and insufficient if clients and nonprofit partners are reluctant to complain. This approach can reveal problems in times of stress, but it does not give a full picture of the adequacy of representation. Conversely, although some firms relied on thank you notes and awards as proxies for effective performance, these indices tend to provide information at the extreme positive end of the satisfaction scale. Yet no firms had formal mechanisms for gauging nonprofit satisfaction. Nor did any firms engage in systematic analysis of the cost effectiveness and social impact of their efforts. Counsel did, to be sure, have legitimate concerns about formalizing outside evaluation, such as lack of clear metrics, resources, and expertise. Yet the discrepancy between internal and external approaches to evaluation may also reflect a decision to prioritize the interests of the more influential stakeholders: the lawyers themselves.

b. *The Priority of Lawyer Preferences*

Lawyer preferences also influence pro bono programs through case selection.³⁵⁸ Although firms receive potential opportunities from nonprofit organizations based on client need, our survey data suggest that key considerations in selecting matters are whether a case is likely to appeal to firm associates and provide good training.³⁵⁹ The pro bono counsel whom we interviewed confirmed that “trying to find the perfect case” was a major part of their role.³⁶⁰ They made efforts to learn “what people are interested in and match that with what is happening on the ground.”³⁶¹ This motivation drove many of the efforts to poll lawyers and summer associates about their preferences. As one counsel noted, “We spend time on the front end” finding out about the interests of likely recruits so that assignments

355. Interview 13, *supra* note 80.

356. Interview 20, *supra* note 148.

357. *Id.*

358. See Daniels & Martin, *supra* note 4, at 150 (“Those dispensing resources are likely to be interested in supporting particular areas of legal need and not just legal needs in general.”).

359. Counsel identified opportunities for training and appeal to associates as two of the most important in pro bono case selection. See *supra* tbl.7 and accompanying text.

360. Interview 21, *supra* note 154.

361. Interview 13, *supra* note 80.

can “be teed-up when they come.”³⁶² The job was easiest when lawyers expressed clear substantive preferences, such as “I’m really interested in animal rights.”³⁶³ Somewhat greater challenges involved corporate lawyers who wanted matters squarely within their expertise. “I get questions like ‘I’m a communications regulation lawyer. What could I do at the FCC?’”³⁶⁴ Even for summer associates, case selection was often “driven by what they want and not necessarily by what is easiest to get their hands on.”³⁶⁵

Although most pro bono counsel seemed to accept the necessity of matching cases to lawyer interests, a few expressed frustration. Some found it difficult to focus attorneys on “responding to community needs” rather than just their own preferences.³⁶⁶ As one noted, “There are areas where I know that there is a huge legal need . . . but I can’t get lawyers to sign on. Homeless issues—it is difficult to sell those matters. . . . People are scared of working with homeless, mentally ill clients.”³⁶⁷ For some of these counsel, their role involved efforts to reshape, not simply respond to, lawyer interests: “Pro bono counsel should remain public interest lawyers—focused on social justice, not just financial resources or the quality of life of their firm. They have to be more mission based than firm-goal based.”³⁶⁸ From this perspective, privileging lawyer preferences in developing case dockets gets the priorities backward. The “relationship between the public interest and private bar can’t be ‘We are so grateful.’ It should be collaborative, the leader should be the public interest [groups] . . . and we firms [should be] honored to play on their team.”³⁶⁹

This does not suggest that all firms do is match cases to lawyer preferences. To the contrary, pro bono counsel invest heavily in systemic projects to address the justice gap and thus carefully consider the way that their firms’ legal resources can be leveraged for the public good. In one example, APBCo has instituted a program called “Responding to the Crisis” to promote best practices among firms to support legal services and public interest groups dealing with clients on the front lines of the economic crisis.³⁷⁰ However, what our survey suggests is that, within the context of trying to “do good,” counsel must closely attend to the interests of their immediate lawyer constituency.

362. Interview 30, *supra* note 232.

363. Interview 22, *supra* note 163.

364. Interview 4, *supra* note 164.

365. Interview 30, *supra* note 232.

366. Interview 16, *supra* note 146.

367. Interview 20, *supra* note 148.

368. Interview 27, *supra* note 81.

369. *Id.*

370. E-mail from Amanda D. Smith, Partner, Morgan, Lewis & Bockius LLP, to Scott L. Cummings, Professor, UCLA School of Law (Jan. 22, 2010, 11:49 PST) (on file with authors) (describing APBCo’s Responding to the Crisis initiative).

c. Internal Advocacy

Although pro bono counsel aspired to pursue social justice, they also recognized the realities of their position, which at times required internal lobbying for pro bono work in terms of economic self-interest. One pro bono counsel described how he promoted the idea that pro bono was a “win-win-win”: the firm benefitted through enhanced recruitment, retention, and client relations; lawyers benefitted through professional development; and clients benefitted from receiving free services.³⁷¹

I know that I have to keep telling [that] story I’m always coming up with new ways to do that. . . . I nominate our lawyers for awards. That makes them feel good and makes the firm look good. . . . You can’t be idealistic. Can’t be purist. . . . I try to pull at people’s heart strings—I’m shameless about that.³⁷²

Another counsel noted that “defending your role” often took priority.³⁷³

Then you can strategically decide when to push the limits and let some people down. Today, I sent a memo to let the pro bono committee know what I’ve been up to for the last few months. If you want to keep this on people’s minds when they are getting crushed, if you want to push the limits, you have to make sure that they see the value that you bring.³⁷⁴

To promote pro bono participation within the firm, counsel resorted to various strategies. One described his strategy of pressuring a senior partner to do pro bono work. “She is known as really tough, hard. She bills 2600 hours per year I said it would be meaningful for other people if she did pro bono work. . . . She sent an e-mail to associates that read: ‘Hell has frozen over. I’m going to do pro bono and so should you.’”³⁷⁵ Another counsel directly approached lawyers who had “no instinct” to do public service.³⁷⁶ “I say, ‘You don’t want to be caught being the person who doesn’t do what they are supposed to.’”³⁷⁷

2. Pro Bono Counsel as a Career Strategy

Pro bono positions provide a new opportunity for lawyers to do public interest work at private sector wages.³⁷⁸ Who gets these positions? And why? In some cases, they are ways for firms to retain talented lawyers who no longer want a commercial practice, at least full time. In others, they

371. Interview 22, *supra* note 163.

372. *Id.*

373. Interview 27, *supra* note 81.

374. *Id.*

375. Interview 29, *supra* note 302.

376. Interview 27, *supra* note 81.

377. *Id.*

378. For analyses of the relation between pro bono service and careers, see Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 7, at 115, 127; David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 2–3 (2004).

offer lawyers who are in public service a chance to pursue its goals from a more comfortable vantage point.

To expand our understanding of the paths to pro bono counsel, we asked our sampled attorneys what their position was immediately prior to assuming their current role. Although the numbers are too small to permit conclusive generalizations, the patterns are suggestive of typical career trajectories. For pro bono partners, the most common route is “up the ladder” through normal promotion processes within the firm. Over one-third of pro bono partners (n=6) had been full equity partners focused on billable practice. Close to another third (n=5) held associate positions, either in their current firm or a similar one. Lawyer coordinators come from the most diverse backgrounds, typically outside the firm.

For those with an official “counsel” title, which is the most common position (n=26), one track is through promotion from within the firm; about a third of our respondents (n=8) came up through the associate ranks. The other more common route, accounting for about two-thirds of “counsel” respondents (n=17), is from outside the firm. Of these individuals, six were staff lawyers or executive directors in legal nonprofit legal organizations.³⁷⁹ Two were law school clinical professors. Other “counsel” took various routes, including one from solo practice, one from international work (although she previously had been an associate at her same firm), and one from a counsel position in another firm.

Because of the relatively recent creation of pro bono counsel positions, those in our sample were largely (though not exclusively) the first individuals to hold the position, which allowed us to ask how the positions were developed. In some firms, the impetus came from leaders who saw the need for a more structured pro bono program. In these cases, counsel received their jobs after formal application processes. One counsel described her position as the result of two events: the presence of lawyers in her firm who had come from public defender work and “wanted to keep in touch with poor clients” and the D.C. Circuit pro bono resolution.³⁸⁰ “A civic-minded partner said to the executive committee, ‘This is an obligation,’ and the executive committee took it seriously.”³⁸¹ The firm brought her in from a government position to run the program part-time because size and economic considerations cut against offering a full-time position to a lawyer accustomed to the pay scales of private practice.³⁸²

Yet many counsel described more dynamic, entrepreneurial processes in which they proposed their positions to firm management. The processes varied somewhat, but typically involved individuals with preexisting ties to the firm, which gave them credibility with decision makers. One pro bono counsel had been a summer associate who came to the firm knowing that

379. Two were executive directors of legal nonprofit legal groups (Survey Respondents 7, 14) and two had worked for the ABA (Survey Respondents 29, 31).

380. Interview 28, *supra* note 172.

381. *Id.*

382. *See id.*

she “wanted to do public interest law” but who got “side-tracked” by her focus on “paying off loans.”³⁸³ After starting work, “I realized that I didn’t want to work for corporate clients but different constituencies. Instead of just leaving—I love the attorneys here—I thought what if I did this instead?”³⁸⁴ When the summer was over, she “studied what the big east coast firms were doing” and “put together a proposal to be pro bono counsel.”³⁸⁵ Her timing was fortunate. The firm had recently lost a lawyer who had been active in the pro bono program and was interested in providing a more structured approach. It was the right fit for her: “I felt I could help more people by staying here and doing public interest law instead of going to a nonprofit because I would have more resources”³⁸⁶

Another pattern was for associates who did not want to pursue partnership to propose pro bono counsel positions as an alternative. One lawyer who left the partnership track kept in touch with her former firm, which

started pursuing me to come back. [The partner] said I could do whatever I wanted to do. I said that I only wanted to do good in the world so the partner told me to figure out how to do good here. I did some research, saw other firms had this [counsel position], *The American Lawyer* had this survey, and [the firm] had a tradition of pro bono service. I saw the mismatch between number and commitment, so I put together a proposed job description and they bought it.³⁸⁷

Not every entrepreneurial lawyer came from inside the firm. One made the transition after leaving a law school clinical teaching position and contacting law firms for references. A firm that was considering creating a position asked if she was interested. “I said this is what I’d like it to look like. I spent four months designing the position” and was ultimately hired.³⁸⁸ Another counsel was an executive director at a large public interest organization that had connections with a firm’s managing partner through its pro bono activities. When she decided she wanted to make the switch to the firm, she “sent them this proposal that showed how it could save them money. It didn’t make sense to have a partner [managing the program]. They saw it as a way to keep track in a more systematic fashion—to ensure things didn’t fall through the cracks.”³⁸⁹ It helped that she “knew what it was like to be on the other side in terms of being a provider.”³⁹⁰

383. Interview 18, *supra* note 182.

384. *Id.*

385. *Id.*

386. *Id.*

387. Interview 30, *supra* note 232.

388. Interview 27, *supra* note 81.

389. Interview 24, *supra* note 197.

390. *Id.*

In addressing broader questions about the role of pro bono counsel, some survey respondents expressed concerns about arrangements that could undercut their internal power and also undermine the legitimacy of the position in the broader law firm community. For example, one pro bono counsel believed that having “timekeeper” status was critical.³⁹¹ Her hours had to count in ways analogous to partnership-track attorneys in order to ensure her own credibility.³⁹² This status was important not just in terms of her influence within the firm, but also for the broader message it sent about the importance of the position in law firms generally.

The role of pro bono counsel is a brand new point of contact, and we are only as good as the weakest link. If someone is acting like a secretary, she is hurting everyone in the entire job. That person’s law firm talks to others and says, “We have a girl who does that.” Then firms think there is no reason [pro bono counsel] has to be a lawyer who thinks about social justice issues. It can be done on the cheap, not at a first class level. . . . Firms will say, “Look . . . they are doing it better because they are getting recognition taking the easy road.”³⁹³

B. *The Functional Relationship of Pro Bono to the Firm*

1. Pro Bono and Training

One view of pro bono work casts it as an expression of professional responsibility: a way for private lawyers to serve the public while pursuing the goals of commercial practice. In this sense, the commitment to social justice stands less as a check on commercialism than a supplement to it; pro bono work occupies a sphere distinct from lawyers’ daily corporate practice.³⁹⁴ The institutionalization of pro bono programs, however, has blurred the line between paid and nonpaid work; the training, recruitment, and reputational functions of pro bono service are increasingly integrated into the economic framework of large law firms.³⁹⁵ Nowhere is this more evident than in the growing linkages between large-firm pro bono and career development programs.³⁹⁶ The formality of this linkage between pro bono and training varied, but its importance was clearly apparent in virtually all firms.

At the most formal end of the spectrum was the firm, described above, that had revamped its first- and second-year associate program to require a substantial pro bono commitment linked to skills development.³⁹⁷ To

391. Interview 27, *supra* note 81.

392. *Id.*

393. *Id.*

394. Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 420 (2001).

395. See Dinovitzer & Garth, *supra* note 378, at 115 (referring to pro bono as a possible strategy of “demand creation” for law firms).

396. See Daniels & Martin, *supra* note 4, at 154–55.

397. See *supra* note 351 and accompanying text.

enhance its training function, the associate program was being restructured to run like a law school clinic, taught by pro bono counsel in conjunction with another firm lawyer whose background was in clinical teaching. Firm lawyers were selecting pro bono cases not only for their social impact but also for their pedagogical value in enhancing the “skills we want [associates] to get.”³⁹⁸ Examples were asylum, criminal, and social security cases. These generally offered opportunities for “client contact, interviewing, investigating, research, drafting briefs, and drafting affidavits. We hope [lawyers] acquire interviewing, research and writing, investigation, some possible negotiation, and softer skills like client interviewing and developing a case strategy. This is in addition to helping people who desperately need it.”³⁹⁹ Of particular value were cases that had a “high likelihood of . . . going to trial.”⁴⁰⁰ In response to the downturn, the same firm had also given one-year pro bono fellowships to a small number of law school graduates with the goal of helping them find permanent positions. “We encourage them to get a job. If they get one, they leave. In the meantime, they are getting skills, which [they can] use to get a job.”⁴⁰¹ Another firm described plans to launch a misdemeanor criminal program in connection with the local public defender’s office. The impetus was to support criminal defense work while providing courtroom experiences for its attorneys that did not take “a lot of time.”⁴⁰²

In less formal ways, other firms were using pro bono cases as training vehicles. As one counsel described this objective, “We match [pro bono cases] for three purposes: first, to provide as much free legal services as possible; second, [to ensure] that lawyers’ interests match; and third, to match lawyers’ professional development goals. . . . I want to maximize interest in developing skills and align it with pro bono work.”⁴⁰³

The economic crisis had prompted a number of firms to forge closer links between pro bono and training, which some counsel saw as a “long-term positive impact. The synergies between pro bono and professional development have been strengthened. The pressures from business clients not to pay for first- and second-year associates may help in making pro bono more attractive as a training vehicle.”⁴⁰⁴ One counsel predicted that pro bono service would “grow to be more specifically tailored to individual professional development needs” and others expressed a similar view about the importance of pro bono for professional training. One firm facing economic hardships sent a message to lawyers to “do something that will develop their professional skills, not just wait for cases that respond to their passions. To the extent [our pro bono program] can provide those career

398. Interview 21, *supra* note 154.

399. *Id.*

400. *Id.*

401. *Id.*

402. Interview 11, *supra* note 200.

403. Interview 22, *supra* note 163.

404. Interview 14, *supra* note 244.

development experiences, it's a way to move our substantive goals along."⁴⁰⁵ Another firm described using the training dimension of pro bono to prevent criticism from practice leaders of associates "padding" pro bono hours: "Since pro bono is supposed to be combination of training and [service], if someone has to do research on federal jurisdiction in a pro bono case, that is a legitimate way of learning."⁴⁰⁶

The incentive to mesh pro bono work with training goals was particularly noticeable in firms that had taken associates off of lockstep compensation tracks. In the new model, pay reflects the acquisition of core competencies that can be achieved through pro bono cases. The result, as one counsel described it, was that "I get someone saying, 'I was told in my review before I can move up a tier I need to do X. Do you have a pro bono case where I can do X?' I find a pro bono case for them to get X."⁴⁰⁷

Yet the use of pro bono to provide basic skills training is not without costs. Particularly if firms rely on understaffed nonprofit organizations to shoulder much of the training burden, the resource tradeoffs could affect the provision of important services. A number of public interest leaders in Rhode's 2008 study raised this concern. While they were willing to provide volunteers with the necessary background in substantive law, they could not afford to "train a junior associate in how to take a deposition."⁴⁰⁸ Putting lawyers on the front lines of legal services provision without adequate training—either in substantive legal issues or "cultural competence" in dealing with clients from diverse backgrounds⁴⁰⁹—can have negative consequences for the very groups that firms are attempting to serve.

2. Pro Bono and Rainmaking

A less prominent, although still significant objective, of some firms was to use pro bono activity to attract fee-generating work. On a small scale, firms collaborated with commercial clients in volunteer programs that were aligned with corporate charitable programs in order to reinforce client relationships. One counsel described the creation of a program providing free wills for first responders in emergencies that she developed partly to foster relationships with corporate clients who wanted to directly participate in pro bono projects. "I've pushed [the program] because it is . . . a good

405. Interview 10, *supra* note 216.

406. Interview 11, *supra* note 200.

407. Interview 21, *supra* note 154.

408. Rhode, *supra* note 45, at 2072 (quoting Mitch Kamin, Director of Bet Tzedek).

409. For the importance of cultural competence training, see Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, 87 MICH. B.J. 38 (2008); Nelson P. Miller et al., *Equality as Talisman: Getting Beyond Bias to Cultural Competence as a Professional Skill*, 25 T.M. COOLEY L. REV. 99 (2008); Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43 (2009); Mayia Thao & Mona Tawatao, *Developing Cultural Competence in Legal Services Practice*, 38 CLEARINGHOUSE REV. 244 (2004).

clinic-in-a-box we can do with corporate clients.”⁴¹⁰ Another firm was more ambitious. It was launching a new transactional initiative designed to address “development issues primarily in the third world,” which also had fee-generating potential.⁴¹¹ As counsel noted, “There is a synergy between pro bono and paying work that can be better combined. So we can expand the reach of pro bono and capitalize . . . by reaching out to groups that could pay fees. . . . There was a recognition by partners, that you could potentially make money while doing good.”⁴¹²

Yet here again, the linkage of public service with pragmatic objectives could come at a price. Much corporate philanthropy has been subject to criticism for its focus on business rather than charitable objectives.⁴¹³ To the extent that law firms replicate this strategy, the risk is that the public interest may be eclipsed by professional priorities.

3. Pro Bono and Efficiency

The rainmaking potential of pro bono programs also has an economic flip side focused on cost reduction. It wastes time and money to have an associate start from scratch in researching particular substantive issues if others in the firm have expertise that can help jumpstart a case. From an efficiency standpoint, pro bono programs benefit from focusing in areas where the firm already has strengths. One counsel suggested that this type of thinking represented “pro bono 2.0”—a world “where firms aren’t just passive consumers of pro bono cases generated by nonprofits, but rather this network of coordinators working cooperatively to develop new programs specifically targeted toward legal needs where firms practice.”⁴¹⁴

In an attempt to realize such economies of scale, a small number of firms had reorganized their pro bono activities into “practice groups” “along the same model as ‘billable’ practice groups.”⁴¹⁵ The goal, as one counsel described it, was to “build up expertise and economies of scale in certain areas [in order to] most efficiently and effectively deliver legal services.”⁴¹⁶ Her firm had created several practice groups—in areas like landlord-tenant law, domestic violence, child advocacy, small business development, and public benefits—each co-chaired by a partner and associate. The “idea really is to run pro bono like a paying practice—to develop economies of scale, develop really good supervision by partners who have expertise in poverty law subject areas, and have at least one partner [overseeing the practice group] for continuity.”⁴¹⁷ As it turned out, some areas, like the

410. Interview 19, *supra* note 199.

411. Interview 13, *supra* note 80.

412. *Id.*

413. See Deborah L. Rhode, *Introduction: Where Is the Leadership in Moral Leadership?*, in *MORAL LEADERSHIP*, *supra* note 98, at 1, 20.

414. Interview 20, *supra* note 148.

415. Survey Respondent 50.

416. *Id.*

417. Interview 26, *supra* note 162.

landlord-tenant practice group, worked “more efficiently” than the others because they enabled attorneys to acquire deep expertise in both substance and procedure.⁴¹⁸ Another counsel described a similar practice group framework, which enabled the firm to “take more cases over time because we aren’t redeveloping the wheel.”⁴¹⁹ In addition, that firm also sought to create greater efficiency in its pro bono delivery system through new projects with “shorter time commitments” that would appeal to more lawyers.⁴²⁰ To this end, it launched a court-based mediation program in landlord-tenant court in which transactional attorneys served as settlement masters in appeals. The goal was to create a win-win situation for both clients and lawyers. The clients would get quicker and fairer results, and hard-to-place transactional attorneys would get valuable pro bono experience. As counsel summarized the program,

I’m trying to get as much assistance to poor people as possible. I’m also trying to get our lawyers to do as much pro bono as possible and get them the right training and skills. I can sell the mediator program when we are busy. It will take thirty to forty hours spread over a year. I can sell that much better than a death penalty case of one hundred hours. It works better with changing time dynamics in the firm. I’m being realistic.⁴²¹

Despite these efforts, concerns surfaced about the overall cost-effectiveness of pro bono work. One counsel was particularly candid: “I think there is a crushing lack of efficiency and strategic design in what we and other law firms are doing around pro bono. . . . The amount of money spent on me and my job [without having] a more coordinated effort—God forbid across offices—is tremendous.”⁴²² The criticisms were not just directed toward firms. “The way [nonprofit groups] run pro bono projects—just selling you on a client and getting you to the next one [is like] drinking from a fire hose.”⁴²³

C. Changing Incentives

If the predominant objective of pro bono work is, as its definition implies, to promote the *public* good, then the current structure of large-firm programs is not always suited to that end. As the findings of our survey make clear, much of the problem lies with misaligned incentives. Among the most powerful influences on pro bono priorities are ranking systems, particularly those in *The American Lawyer*, which reward firms for quantity, not quality or cost-effectiveness. A related difficulty involves the

418. *Id.*

419. Interview 22, *supra* note 163. The practice areas were similar to the first: “[W]e have a homeless advocacy project and a tangled title practice group We also have a child advocacy practice group, . . . an immigrant DV practice group, and a landlord tenant practice group.” *Id.*

420. *Id.*

421. *Id.*

422. Interview 27, *supra* note 81.

423. *Id.*

power differentials between stakeholders. Those managing pro bono programs need to be most responsive to firm leaders and associates, whose priorities often involve training, reputation, and career development rather than social impact. Incentives are much weaker for assessing satisfaction among nonprofit partners and clients. Many programs operate on the assumption that any unpaid service is itself a valuable social contribution, which need not be monitored unless someone actually complains. Yet this reactive approach is better suited to commercial practice, where dissatisfied clients can vote with their feet, than to charitable settings where recipients of aid may lack the knowledge or sense of entitlement to express concerns. The institutionalization of pro bono in large firms has many virtues, but it has not yet met the challenges of ensuring quality, cost-effectiveness, and social impact.

How best to address these challenges is a topic worthy of extended analysis and experimentation, and one beyond the scope of this study.⁴²⁴ But we close with a few preliminary thoughts deserving of further consideration.

One possibility is to devise alternative systems of evaluating pro bono service. A noteworthy model comes from Equal Justice Works, a nonprofit group that focuses on promoting public interest legal careers. Since 2005, it has published a “Guide to Law Schools” that seeks to fill “a void in existing commercial law school rankings” by compiling extensive data on issues related to public service.⁴²⁵ By avoiding a single overall rating, and creating tables for comparison on multiple characteristics, the Guide attempts to facilitate more informed decision making by law school applicants.⁴²⁶ And by giving schools greater incentives to compete on all these dimensions, it seeks to prompt a “race to the top” in public interest and pro bono programs. In this respect, the Guide provides a counterweight to the *U.S. News & World Report* law school rankings, which are problematic in ways analogous to *The American Lawyer* law firm rankings. Both systems assign a single score based on arbitrary weightings of a partial list of characteristics, which generally undervalue quality of output.⁴²⁷

Another alternative ranking approach comes from the student-run group, Building a Better Legal Profession (BBLP), founded at Stanford Law School in 2007 and committed to promoting “market-based workplace

424. For an overview, see Rhode, *Rethinking*, *supra* note 9.

425. Equal Justice Works, Equal Justice Works Guide to Law Schools: FAQ, <http://www.equaljusticeworks.org/communities/lawschools/guide/faq> (last visited Mar. 17, 2010). These data include “the availability of clinical and externship programs, financial aid and loan repayment assistance programs, [and] the number of staff members dedicated to public service programs.” *Id.*

426. *See id.*

427. For the distortions caused by such rankings, see DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE (2006); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE (2000); Clark, *supra* note 66; Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 13–14 (2007); Colin Diver, *Is There Life After Rankings?*, ATLANTIC, Nov. 2005, at 136.

reforms in large private law firms.”⁴²⁸ One of the group’s primary objectives is to counteract the Am Law 200, which makes economic performance the key measure of success. BBLP’s alternative publicizes firms’ self-reported data on billable hours, pro bono participation, and “demographic diversity” in order to encourage graduates to “exercise their market power and engage only with the firms that demonstrate a genuine commitment to these issues.”⁴²⁹ With respect to pro bono commitments, the group’s approach is limited by its reliance on information reported by firms to NALP that focuses on quantity rather than quality.⁴³⁰ What is instructive for our purposes is not the substance of the survey but its underlying premise: the need to create additional, readily accessible sources of data on law firm performance related to social justice.

What might an alternative structure for evaluating pro bono work include? Our findings suggest criteria such as the following:

- *Evaluation Mechanisms*: What systems are in place to track the quality and results of assistance? What efforts does the firm make to assess stakeholder satisfaction, cost-effectiveness, and social impact?
- *Policies*: How does the firm treat pro bono work in compensation and advancement decisions? How much unpaid work counts toward billable hour requirements?
- *Types of Cases*: What is the distribution of pro bono cases and the ratio between social impact and individual services? How does the firm select projects and set priorities? Does it make systematic efforts to assess community needs and consult stakeholder groups?
- *Resources and Fees*: What is the firm’s financial commitment to its pro bono work per lawyer? How does it handle awards of attorney’s fees in pro bono cases?

We do not underestimate the challenges in devising and implementing such a comprehensive evaluation framework. This information would need to be standardized across firms to facilitate comparison, and some mechanisms would be necessary to monitor compliance. Measures of social impact would have to be developed. It seems unlikely that any publication such as *The American Lawyer* would assume these challenges, although it might well be willing to aid the process by demanding some information or publicizing results from other surveys. So too, while some state courts and bar associations might be sympathetic partners in efforts to improve pro bono programs, they would face daunting political difficulties

428. Building a Better Legal Profession, About Us, <http://www.betterlegalprofession.org/mission.php> (last visited Mar. 17, 2010).

429. *Id.*

430. BUILDING A BETTER LEGAL PROFESSION, HOW WE DID THIS (2009), available at http://www.betterlegalprofession.org/pdf/howwedidthis_2009.pdf.

in instituting any mandatory reporting structure and securing consistency across state lines.

A more modest way station to these ends would be to build on the existing efforts of organizations like APBCo, the ABA Center on Professional Responsibility, and the Pro Bono Institute in developing best practices and creating incentives for firms to pledge compliance. These organizations could also partner with researchers, strategic philanthropists, and public interest organizations to develop metrics of effectiveness and the social return on investment.⁴³¹ Criteria to consider are whether the programs are meeting needs that experts or client constituencies consider most compelling. How many individuals are the programs assisting in relation to expenditures? How satisfied are nonprofit referring organizations and a representative sample of clients? If the work involves public policy initiatives or impact litigation, has it achieved any long-term legal or political payoffs? Have the projects helped to raise public understanding or empower clients? Has the assistance filled gaps in coverage or brought some special expertise to the table? What are the other uses of lawyers' time? Could they find better ways to address the sources rather than the symptoms of the problems?

Working collaboratively, leaders of the pro bono community could help develop standards and showcase firms that have been most successful in promoting quality and social impact. Awards and funding could be available to support innovation. Clients and students could join collective efforts that would pressure firms to adopt best practices. Some government and corporate counsel offices here and abroad already have begun considering pro bono records in allocating legal work.⁴³² If more stakeholders joined a coordinated campaign, involving a broad spectrum of the legal market, the result might be a significant difference in law firm priorities.

Finally, more attention should center on enlisting pro bono lawyers in broader social justice initiatives. Private charity is no substitute for a full-service system of delivering legal services to underrepresented constituencies.⁴³³ Law firm lawyers, however committed, generally lack the time, expertise, resources, and freedom from conflicts of interest necessary to ensure adequate access to justice. Other nations that are less reliant on pro bono contributions do a better job in making services

431. For an assessment of the difficulty of finding metrics in many philanthropic areas, see PETER FRUMKIN, *STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY* 55 (2006); Brest, *supra* note 98, at 237; Bruce Sievers, *Ethics and Philanthropy*, in *MORAL LEADERSHIP*, *supra* note 98, at 249, 253; Jon Gertner, *For Good, Measure*, N.Y. TIMES MAG., Mar. 9, 2008, at 62, 74.

432. See RHODE, *PRO BONO*, *supra* note 9, at 167–69; Wilkins, *supra* note 378, at 83–84.

433. See JEANNE CHARN & RICHARD ZORZA, *THE BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVS. PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS* (2005), available at <http://www.garybellow.org/Text.pdf>; HOUSEMAN, *CIVIL LEGAL AID 2009*, *supra* note 40; Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35 (2007); Rhode, *supra* note 43.

accessible through governmental programs, legal insurance, and nonlawyer experts.⁴³⁴ Our nation's private bar needs to become more active in the struggle for policies that will make legal rights a reality for those who need them most.

CONCLUSION

Economic recessions often reveal deeper difficulties as well as new opportunities in the delivery of professional services. The current downturn is no exception. Although its long-term implications are by no means clear, the recession has highlighted both the fragility and flexibility of large-firm pro bono programs. On the one hand, it has reinforced the lesson that a system based on private charity is liable to suffer during times of economic hardship. On the other, it has shown that those firms with the deepest investments in pro bono programs may avoid the worst of the crisis and even seize the opportunity to increase pro bono participation and support for nonprofit organizations in times of greatest need. The challenge now is to build upon current structures to protect recent gains, respond to economic constraints, and enhance the effectiveness and accountability of representation.

Toward this end, our study has aimed to highlight changes in the form and function of pro bono work as it has become institutionalized and to address its major challenges. This trend has had substantial benefits in focusing firm attention and resources on access to justice. The rise of pro bono counsel positions has produced a new constituency committed to promoting public service. The result in terms of pro bono participation has been impressive.

Yet the economic integration of pro bono service in large firms has not come without costs. The focus on training, recruitment, and reputation has shaped case selection in ways that often privilege professional over public interests. Particularly in times of economic stress, the more that lawyers see pro bono work in instrumental terms—what can charity do for them—the more readily they may give it up when the personal benefits seem less clear.

Yet, as we have documented, other forces are pushing in the opposite direction. The urgency of social need and the personal satisfaction that comes from meeting it will persist. For many lawyers, developing and using their skills in the service of social justice is one of the most satisfying aspects of professional life. These attorneys now have increasing support within firms to translate their highest aspirations into daily practice. The challenge now is to realize those aspirations by enlisting leaders of the pro bono community in systematic efforts to improve the effectiveness of

434. See DEBORAH L. RHODE, ACCESS TO JUSTICE 74, 89 (2004); see also Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83 (2000).

assistance. Our goal should be ensuring that lawyers are not only doing good, but also doing better.

APPENDIX A

PRO BONO SURVEY

Part I: Organization of Pro Bono Program

1. What is your position in the firm?
 - a. Pro Bono Partner
 - b. Pro Bono Counsel
 - c. Pro Bono Coordinator (lawyer)
 - d. Pro Bono Coordinator (nonlawyer)
 - e. Other:
2. Approximately how many hours do you work per year on all your work (pro bono and billable) for the firm?
3. Approximately what percentage of your time do you devote to pro bono (as opposed to billable) activities?
4. Of the time you devote to pro bono activities, approximately what percentage do you devote to representing pro bono clients versus coordinating your firm's pro bono program? Total must sum to 100%.
 - a. Representing pro bono clients:
 - b. Coordinating firm's pro bono program:
5. Please describe your main responsibilities as they relate to pro bono coordination and indicate any changes in your responsibilities brought about by the economic downturn.
6. Please indicate any changes in the overall staffing or organization of your firm's pro bono program brought about (or anticipated) in response to the economic downturn.
7. Does your firm currently have any of the following pro bono programs? Select all that apply and provide a brief description of the programs in the space that follows (the space does not have a word limit). If any of the programs were initiated in response to the recent economic downturn, please indicate when and why the programs were started.
 - a. Signature pro bono project. Please describe:
 - b. In-house pro bono department. Please describe:
 - c. Rotation or fellowship program. Please describe:
 - d. Placement with public interest organization as a mechanism of deferred employment, furlough, or layoff. Please describe.

- e. Other programs. Please describe:

Part II: Pro Bono Goals and Policies

8. Who is responsible for setting pro bono policies in your firm?
- Management committee
 - Pro bono committee
 - Individual lawyers. Please explain:
 - Other:
9. Please describe the process by which pro bono policies are set in your firm.
10. Who is responsible for ensuring compliance with your firm's pro bono policies and how is compliance monitored and enforced?
11. On a scale of 0 to 5, how would you rate the importance of the following objectives in your pro bono program?

Not a Consideration		Most Important			
0	1	2	3	4	5

- ___ Enhancing reputation and rankings
- ___ Aiding recruitment and retention
- ___ Training
- ___ Providing individual legal services to underrepresented clients
- ___ Making an impact on important social issues
- ___ Satisfying paying clients
- ___ Other:

12. In selecting pro bono cases, how would you rate, on a scale of 0 to 5, the importance of the following factors?

Not a Consideration		Most Important			
0	1	2	3	4	5

- ___ The case involves an issue likely to appeal to firm associates
- ___ The case involves an issue favored by partners
- ___ The case involves an issue favored by clients
- ___ The case is referred by a nonprofit legal organization with which the firm desires to establish or maintain a good relationship
- ___ The case is likely to result in good publicity for the firm

- f. ____ The case is likely to provide good training for associates
 - g. ____ The case is not likely to strain the firm's resource capacity
 - h. ____ Other:
13. Does your firm consult with public interest or legal services groups in any of the following areas? Please select all that apply and describe the nature of the consultation.
- a. Setting firm pro bono priorities:
 - b. Defining areas of legal need:
 - c. Identifying special firmwide project:
 - d. Training lawyers on pro bono matters:
 - e. Other:
14. Does your firm count pro bono hours with respect to any of the following measures? Please select all that apply and describe any relevant criteria in the space that follows. If any of these measures have changed in response to the economic downturn, please describe the change.
- a. Minimum billable hour requirements
 - b. Lockstep compensation awards
 - c. Bonus determinations
 - d. Partnership draws
 - e. Performance reviews
 - f. Minimum pro bono requirements
15. Does your firm have an annual budget for pro bono matters? Please describe how your budget is set and estimate its total amount per lawyer in the firm. Indicate any changes in the budget resulting from the economic downturn.
16. Does your firm set any of the following annual numerical pro bono goals for your domestic offices? Please select all that apply and specify amounts in the space provided. You may also indicate any changes caused by the economic downturn.
- a. Total pro bono hours firmwide
 - b. Pro bono hours per attorney
 - c. Percentage of firm attorneys who do pro bono
 - d. Other:
17. Are there any specific areas (e.g., labor, environment, etc.) in which your firm will not accept pro bono cases? Please explain what the areas are and why the firm does not accept pro bono cases within them.

18. What are your firm's policies regarding fee collection in pro bono cases and sharing fees with nonprofit legal organizations with which you co-counsel?
19. What role does donating money to nonprofit legal organizations play in your pro bono program? For instance, does providing pro bono assistance to an organization reduce, increase, or not impact your firm's direct monetary giving to that organization?

Part III: Reporting and Measuring Pro Bono

20. To what outside organizations or publications does your firm report pro bono hours? Please select all that apply.
 - a. The American Lawyer
 - b. Pro Bono Law Firm Challenge
 - c. State or Local Bar Associations. Please specify:
 - d. Other:
 - e. No one
21. Please describe any systematic efforts to evaluate your pro bono program in terms of lawyer satisfaction.
22. Please describe any systematic efforts to evaluate your pro bono program in terms of the satisfaction of individual clients or the broader client community.
23. Please describe any systematic efforts to evaluate your pro bono program in terms of the satisfaction of the nonprofit legal organizations with which you partner.
24. Please describe any systematic efforts to evaluate the social impact of your pro bono program.
25. Please describe any systematic measures that your firm uses to monitor quality in pro bono matters, such as internal performance evaluations or case tracking systems.
26. Has your firm initiated any new efforts to evaluate its pro bono programs in response to the economic crisis? If yes, please describe.
27. What are the greatest challenges that you have faced in evaluating your firm's pro bono program and how have you tried to address them?

28. Are there any changes in the way that pro bono is measured and evaluated that you would like to see? Please describe any tools or models of evaluation that you think would be particularly useful.

Part IV: Placement into Public Interest Organizations in Response to Recession

Please answer the following questions only if your firm is instituting a program to place lawyers in public interest organizations as a mechanism of deferred employment, furlough, or layoff.

29. What is the process for coordinating the placement of firm attorneys in public interest organizations? For example, how do lawyers select placement organizations and what is the process for firm approval? How have you consulted with public interest organizations in devising the program?
30. Under which of the following arrangements will placed attorneys be employed? If you select more than one answer, please indicate the criteria by which your firm decides how to designate the employment status of placed attorneys in any given case.
- a. Placed attorney is an employee of the law firm
 - b. Placed attorney is an employee of the placement organization
 - c. Placed attorney is self-employed
 - d. Placed attorney is employed under another arrangement
31. What are the following costs associated with employing placed attorneys and who pays for them? If the costs are shared, please indicate what the sharing arrangement is and how much your firm contributes.
- a. Salary:
 - b. Health benefits:
 - c. Administrative costs:
 - d. Office space:
 - e. Malpractice insurance:
 - f. Extraordinary expenses (e.g., travel, training, bar dues, etc.):
 - g. Vacation:
 - h. Other:
32. How are placed attorneys treated by your firm for conflict of interest purposes?
33. How long are placed attorneys committed to remain at placement organizations and who has the power to hire, discipline, and fire placed attorneys?

34. How does your firm count the placed attorneys' hours for pro bono reporting purposes?
- Counts all placement hours
 - Counts no placement hours
 - Counts some placement hours. Indicate what percentage of hours are counted:
35. What, if any, training is provided to the placed attorney? By whom?
36. What are the firm's goals in placing attorneys at public interest organizations and how will your law firm monitor and evaluate the success of the placements?
37. What are the greatest challenges and opportunities that you see for pro bono programs in the current economic climate?

Part V: Conclusion

38. Is there anything else you would like to add about pro bono that has not been covered?

All of your responses to this survey will remain confidential. However, if you are willing to volunteer to be identified in our project or have your comments attributed to you, please provide your name and firm affiliation below. This is completely optional.

Your Name: _____

Your Firm Name: _____

If you are you willing to speak with the authors of this study in a follow-up interview, please click on "yes" below. Your participation in any follow-up interview is completely optional.

Yes

No

Follow-Up Questions

Please select the job that you held immediately prior to taking on the position of coordinating your firm's pro bono activities.

- Law firm partner in your current firm
- Law firm partner in another firm
- Law firm associate in your current firm
- Law firm associate in another firm

- e. Lawyer in nonprofit legal organization
- f. Prosecutor
- g. Public defender
- h. Lawyer for government agency
- i. Clinical professor in law school
- j. Nonlawyer in nonprofit organization
- k. Other:

Does your firm have one of the following positions:	Answer: yes/no	When was that position created?	Has there been any period during which that position was vacant?
1. Lawyer who manages pro bono practice on full-time basis			
2. Lawyer who spends > 50% but < 100% of time managing pro bono practice			
3. Nonlawyer who manages pro bono practice on a full-time basis			