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"We're Not Running a Charity Here": Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs

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"WE'RE NOT RUNNING A CHARITY HERE": RETHINKING PUBLIC INTEREST LAWYERS' RELATIONSHIPS WITH BOTTOM-LINE-DRIVEN PRO BONO PROGRAMS

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I. INTRODUCTION

In a classic episode of "The Simpsons," chronically insensitive husband Homer Simpson presents his wife Marge with the gift of a bowling ball on her thirty-fourth birthday.[1] Marge, to put it mildly, does not appreciate the gift, and marital strife ensues. Why? On its face, the presentation of a bowling ball would not seem like an objectionable act. Lots of people like bowling; lots of people appreciate bowling balls as gifts. Perhaps Marge is merely high-maintenance, or unreasonably difficult to please. However, the reasons for her anger quickly become clear as events progress. As it turns out, Marge does not know how to bowl—but coincidentally, Homer loves bowling. In addition, the bowling ball in question *just so happens* to have been engraved with Homer's name and drilled to fit his fingers. Thus, the facts of the episode reveal that Marge Simpson has two perfectly legitimate reasons to object to the gift. First, it is clearly given from a position of self-interest, not altruism. Homer wants the bowling ball for himself, and has barely tried to hide his true motivation. Second, Homer's self-interested motivation in choosing Marge's birthday present has resulted in his presenting her with an inappropriate gift that clearly does not serve her needs.[2]

The current state of the relationship between large-firm pro bono programs and the public interest agencies with whom they partner calls to mind the "gift" of Marge's bowling ball. Firms' pro bono programs, although superficially designed to appear altruistically motivated, are often actually structured to serve bottom-line interests, such as associate recruitment, training and retention, and public relations. Where firms' decisions about pro bono are filtered through a lens of "bottom-line" motivations, the relationship between large firms and their public interest partners can become problematic for the public interest agencies. Pro bono

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[1] *The Simpsons*: *Life on the Fast Lane* (FOX television broadcast Mar. 18, 1990).

[2] Lest the reader think me (and Marge) unfairly suspicious of Homer's motivations, let me note that, prior to the bowling-ball incident, he had also presented Marge with the gifts of a tackle box and a Connie Chung calendar. *Id.*

coordinators pick and choose "sexy" cases or "easy" cases over cases that address the most acute needs of the target population; associates are pulled away from pro bono projects when paying work begins to pile up; public interest agencies invest significant time training and mentoring young associates in pro bono programs with little payback to the agency. Even the best-resourced, most elite national public interest groups report difficulties dealing with pro bono programs. In many ways, both subtle and obvious, bottom-line-motivated pro bono programs are to a public interest agency what a bowling ball is to Marge Simpson: the wrong gift, given for the wrong reason.

This Article examines the ways in which the bottom-line motivations of pro bono programs affect public interest agencies and attorneys. It then seeks to explore the question of how public interest agencies ought to cope with pro bono participation with partners whose bottom-line motivations threaten to damage the public interest agency.

Part II of this Article seeks to lay the groundwork for exploration of this topic by arriving at operating definitions of the terms "pro bono" and "public interest"—a more difficult endeavor than one might imagine. Part III explores how the legal profession's conception of the definition and role of "pro bono" work has evolved, from the simple concept of providing services for free to those who cannot afford it, to a formalized institution that is inextricably linked to the public interest bar and that—while still providing legal services for free—has been re-imagined to serve bottom-line motivations of large law firms. Part IV offers different ways in which the pro bono programs' bottom-line motivations have a detrimental effect on public interest agencies. Specifically, this Article suggests that bottom-line-motivated pro bono programs harm public interest partners by interfering with triage decisions, proliferating case management problems, and creating a drag on the efficiency of public interest agencies. As the former legal director of a small nonprofit, I offer anecdotes from my own practice that demonstrate these problems and further offer

an example of a new type of pro bono initiative that fits the bill of "bottom-line motivated."[3] Part V suggests two specific coping mechanisms public interest agencies could employ to offset the negative effects bottom-line-motivated pro bono programs have on agencies with whom they work.

II. DEFINING TERMS: "PRO BONO" AND "PUBLIC INTEREST"

Before exploring these issues in greater depth, two key terms, "pro bono" and "public interest," require clarification. Within the legal community, the casual meaning of "pro bono" is any legal service that an attorney renders for free to the client when the service is normally one for which that attorney would charge a fee.[4] Thus, the term "pro bono" generally excludes free legal services provided by an attorney through employment at a nonprofit or government entity, such as a Legal Aid attorney or public defender. Those attorneys are generally not thought of as providing "pro bono" services because the attorney would not normally charge for the service.

And yet, this is a deceptively simple definition, for in reality, the catch-all term "pro bono" masks a deep well of disagreement within the legal community as to what kind of work "counts" as pro bono and what does not. Should, for example, legal services performed without charge for the benefit of a comparatively wealthy nonprofit (such as a museum or orchestra) be considered pro bono?[5] Must a broader social goal underlie the

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[3] These anecdotes are meant only to be illustrative, and are not presented to the reader as data, or as proof that the problems I describe are endemic–although I personally believe them to be quite commonly experienced by public interest attorneys.

[4] *See* BLACK'S LAW DICTIONARY (9th ed. 2009) ("pro bono"–"being or involving uncompensated legal services performed especially for the public good.").

[5] *See, e.g.,* Spencer Rand, *A Poverty of Representation: The Attorney's Role to Advocate for the Powerless*, 13 TEX. WESLEYAN L. REV. 545, 556 (2007) (relating an interchange with an attorney who considered his assistance in

provision of the service? If so, must that goal necessarily be a classically "progressive" one (the uplift of a particular underclass, for example, or the eradication of poverty), or may the goal be politically conservative (for example, the promotion of explicitly religious teaching in public schools)?[6]

Taking into consideration the vagueness of the term, this Article will adopt the definition of "pro bono" that the large firms themselves are encouraged to adopt by the Pro Bono Institute's Pro Bono Challenge program.[7] The Challenge's definition, which is very broad and encompasses practically any possible activity that a lawyer might envision as "pro bono," is as follows:

> As used in this statement, the term "pro bono" refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of (i) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; (ii) the provision of legal assistance to individuals, groups, or

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incorporating a children's athletic league in a wealthy suburb to be within the definition of pro bono).

[6] *See, e.g.,* AUSTIN SARAT & STUART A. SCHEINGOLD,, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3, 100-01 (2004).

[7] The Pro Bono Institute is a small non-profit organization housed at the Georgetown University Law Center that seeks to find innovative ways to expand access to justice. It houses a Law Firm Pro Bono Project, the purpose of which is to expand pro bono participation at major law firms. The Law Firm Pro Bono Project in turn administers the Pro Bono Challenge Program, a series of "aspirational goals uniquely tailored to the resources and practice of major law firms." The Pro Bono Institute, *Law Firm Pro Bono Project*, PRO BONO INSTITUTE, http://www.probonoinst.org/projects/law-firm-pro-bono.html (last visited Mar. 7, 2011).

> organizations seeking to secure or protect civil rights, civil liberties or public rights; and (iii) the provision of legal assistance to charitable, religious, civic, community, governmental or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.[8]

Although this definition is comprehensive regarding the type of work that ought to "count" as pro bono, it does not fully address the complex and multifaceted ways in which pro bono cases arrive at firms, nor does it describe the relationships between firms and public interest partners. Firms may obtain pro bono cases through a variety of sources. Some may create ongoing relationships with public interest agencies that engage in a kind of work that interests the firm.[9] Others prefer to receive cases from a free-standing pro bono referral agency,[10] the referral arm of a legal aid agency,[11] or through a bar association.[12] Sometimes firms send

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[8] Law Firm Pro Bono Project, *Law Firm Pro Bono Challenge*, PRO BONO INSTITUTE 6 (2010), *available at* http://www.probonoinst.org/images/pdfs/law_firm_challenge_commentary.pdf [hereinafter *Challenge*].

[9] *See, e.g.*, Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1448 (2009) [hereinafter Rhode, *Rethinking*] (providing examples of law firms that mindfully structured pro bono partnerships based upon identified interests).

[10] *See, e.g.*, *About Philadelphia VIP*, PHILADELPHIA VIP, http://www.phillyvip.org/content/about-philadelphia-vip (last visited Mar. 7, 2011) (coordinating volunteers through one agency, which refers clients to volunteers).

[11] *See, e.g.*, *Volunteer Opportunities: Pro Bono*, LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, http://www.legalaiddc.org/volunteer/probono.html (last visited Mar. 7, 2011) (describing the pro bono referral program operated through the D.C. Legal Aid Society).

[12] *See, e.g.*, *Free Legal Services*, NEW HAMPSHIRE BAR ASSOCIATION, http://www.nhbar.org/for-the-public/free-legal-services.asp (last visited Mar. 7,

their young associates to pro bono fairs where public interest agencies, hosted by a large law firm, set up tables and compete for the attention of idealistic young attorneys.[13] And often, large firms will accept pro bono cases as a result of a public interest agency reaching out either to a pro bono coordinator or an attorney at the firm.

Just as the sources of pro bono cases may vary, the collaborative nature of the pro bono relationship is not always the same.[14] Some firms prefer to take pro bono cases as the only counsel on the case. In those situations, the case is referred to the firm, but any ongoing relationship with the agency that was the source of the case takes the form of informal technical assistance, and not a formalized co-counsel relationship.[15] In other situations, pro bono partners prefer a formalized co-counsel relationship, usually memorialized in a co-counsel agreement.[16] Even within that subset of pro bono cases, relationships between the public interest and firm attorney can vary. In some circumstances, there is a clear lead counsel relationship, in which either the firm attorney or public interest lawyer takes the lead in a case and the other attorney takes on a more limited role, circumscribed by that

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2011) (describing the pro bono referral program operated through the New Hampshire Bar Association).

[13] *See, e.g.*, *Pro Bono Week*, CHICAGO BAR ASSOCIATION, http://www.chicagobarfoundation.org/pro-bono-week (last visited Mar. 7, 2011) (promoting pro bono work through the Chicago Bar Association and legal community).

[14] *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 42 (2004) [hereinafter Cummings, *Politics*] (providing examples of different modes of collaboration).

[15] *See id.* at 42 (describing the Volunteer Legal Services Program of the Bar Association of San Francisco as an example of a referral/technical assistance relationship).

[16] *See id.* at 46-48 (describing the co-counseling model of the Lawyers' Committee for Civil Rights Under Law).

attorney's specialized expertise in a certain aspect of the case, or by the limited resources of the public interest agency.[17]

The remainder of this Article will focus solely on pro bono arrangements that develop directly between an institutionalized pro bono program at a law firm and a public interest agency, usually resulting in a co-counsel relationship for the purpose of representation of a particular client. This Article contemplates relationships in which either the firm attorney or the public interest lawyer takes the lead. This Article does not distinguish between relationships that are initiated by the firm and those initiated by the public interest agency. Although a fascinating topic, the nature of relationships between firms and pro bono referral services or other sources of pro bono cases is beyond the scope of this Article.

The term "public interest," like "pro bono," contains a multitude of meanings. When the legal community makes reference to "public interest law," it generally means legal work that is performed for a particular disadvantaged group or political cause, usually at no charge to the client.[18] The "public interest lawyer" is thought to be one who works for a nonprofit, or sometimes a government entity.

But again, there is little agreement as to what "counts" as public interest law, and who "counts" as a public interest lawyer. Surely, an attorney working for a federally funded legal aid organization that focuses on providing routine legal services to the poor is a "public interest lawyer," but what about a so-called "cause lawyer" who litigates only impact cases in the service of law reform or certain political aims?[19] If a public defender is a public interest lawyer, then is a prosecutor? Is a lawyer who litigates impact cases a "public interest lawyer," or must one

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[17] *See id.* at 48 (describing the flexible approach of the ACLU of Southern California).

[18] *See* BLACK'S LAW DICTIONARY (9th ed. 2009) ("public interest–the general welfare of the public that warrants recognition and protection.").

[19] *See, e.g.,* SARAT & SCHEINGOLD,, *supra* note 7, at 3 (noting that while "cause lawyers" and "poverty lawyers" are generally both included under the "public interest" umbrella, some scholars take pains to make distinctions between the two).

provide direct legal services in order to qualify for the title? Clearly, this poses a definitional problem.

Unlike the term "pro bono," there is no working definition of "public interest" that is necessarily used as a ground rule in the transactions between pro bono attorneys and the nonprofit organizations with which they frequently partner. For the purposes of this Article, references to "public interest lawyer" will mean either "cause lawyer" or "poverty lawyer"—an attorney working in a nonprofit setting who engages in either impact litigation or direct legal services for the benefit of a particular disadvantaged group or cause. This Article does not include government lawyers in its definition of "public interest lawyer," not because their work is outside the public interest (whatever that means), but because the needs and working conditions of government lawyers and their relationships with private-sector pro bono programs are often quite different than those of attorneys working at nonprofits.[20]

III. THE EMERGENCE OF INSTITUTIONALIZED, BOTTOM-LINE-DRIVEN PRO BONO PROGRAMS

This Article proposes that the current incarnation of pro bono can harm public interest agencies with which it comes into contact. In order to understand how this is possible, it is necessary to first understand how modern-day pro bono programs came to be structured and motivated the way they are, and how they came to be inextricably linked to the realm of public interest law. This section will briefly sketch the history of pro bono, the way in which it came to be linked with public interest lawyering, and the

[20] There is another class of public interest lawyers whose sole occupation is in the recruitment, training, and mentoring of pro bono attorneys. These attorneys generally work for pro bono referral services. Although their work is vital to the modern-day pro bono system, they are not the focus of this Article because their relationship to pro bono attorneys is different than that of public interest attorneys employed at organizations that provide legal services to clients.

bottom-line-oriented lens through which large firms have apparently come to view their pro bono endeavors.

Earlier in our history, pro bono was a far simpler idea than it is today. It was initially thought of as an unanticipated extension of professional courtesy toward community members who could not afford the services of their local attorney,[21] or as part of a quasi-religious obligation to assist the poor.[22] Until the late nineteenth century there existed virtually no formal institutional scaffolding on which to construct expectations about pro bono services.[23]

The writing of nineteenth-century legal ethicist David Hoffman illustrates the prevailing view of pro bono during the time when legal ethics was in its infancy.[24] Hoffman's writing reflects a view of pro bono obligation as neither part of a grand scheme of social change nor a public relations gambit, but rather through the narrower lens of an attorney's ethical duty to an existing or prospective client. Hoffman's 1836 *Fifty Resolutions in Regard to Professional Deportment* [25] includes the following Resolution:

> XVIII. To my clients... I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or to be defended; and they shall receive a due portion of my services, cheerfully given.[26]

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[21] Cummings, *Politics*, *supra* note 15, at 8.

[22] Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 10 (1999).

[23] The Alabama State Bar promulgated the first state code of attorney ethics in 1887. Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 107 (2002).

[24] *Id.* at 103.

[25] *Id.* Maute characterizes this document as "the first serious effort to formulate principles of legal ethics for American lawyers." *Id.*

[26] *Id.* at 104 (*quoting* DAVID HOFFMAN, *Hoffman's Fifty Resolutions in Regard to Professional Deportment, in* A COURSE OF LEGAL STUDY 752 (2d ed. 1836), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS, app. E, at 342 (1953)).

Thus, the nineteenth century view of pro bono seemed to presume that pro bono's relevance would arise when an individual of the sort who would ordinarily become a regular, fee-paying client of the attorney could not pay the full expected fee. There was little sense in this conception of pro bono that the attorney ought to seek out non-paying clients, or that the attorney ought to practice outside his area of comfort in order to serve an indigent client, or that pro bono service ought to somehow serve a particular cause that would transcend the client's own case.[27] This limited, "reactive" view of pro bono would, however, radically change over the next century, as a number of social forces merged to recast pro bono as a complex institution meant to serve different masters for different reasons. For the reasons outlined below, the legal community's conceptualization of pro bono shifted from the simple, *ad hoc* provision of legal services without charge to an institutionalized program that, while it derives its client base from the public interest sphere, is actually structured to serve the business needs of the law firm.

The institutionalization of pro bono cannot be explained without first noting how the provision of legal services to the poor changed in the latter half of the nineteenth century through the innovation of the legal aid society. The first legal aid society was founded in New York City in 1876, under the auspices of the German Society of New York, which sought to protect New York's burgeoning population of German immigrants from exploitation at the hands of the dominant culture.[28] Cummings notes that the legal aid society "compartmentalized the bar's

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[27] Maute refers to this conception of pro bono as essentially "reactive." *Id.* Note that Maute considers the writing of Hoffman's contemporary George Sharswood to be *slightly* more "proactive" regarding the bar's obligation to serve the poor. However, Maute does not suggest that Sharswood's conception of pro bono is radically different than that of Hoffman, or that anything like the current pro bono model existed in the nineteenth century.

[28] *See generally, The History of the Legal Aid Society*, THE LEGAL AID SOCIETY http://www.legal-aid.org/en/las/aboutus/ ourhistory.aspx, (last visited Mar. 18, 2011) (providing background on New York City's legal aid work).

service obligation, assigning it to a cadre of full-time staff attorneys housed in separate offices," a service model that we currently take for granted but which was a true innovation in its day.[29] The idea of an agency devoted to serving the legal needs of the poor quickly caught on, and over the next several decades the concept of the legal aid society expanded dramatically, both in terms of geography and client population. Poor clients now had a choice—seek out services from a for-profit attorney who might provide the service for free, or look instead to the newer model of the legal aid society for help.

The for-profit and public interest bars became enmeshed in the provision of free services on an institutional level at least partly as a result of the bubble and burst of publicly funded civil legal aid in the middle to late twentieth century. During the 1960s, the Johnson administration's "War on Poverty" launched a massive increase in federal funding for civil legal aid programs.[30] Those programs were ambitious both in scope and in their goals, which were unapologetically progressive and aimed at eradicating poverty.[31] This new breed of poverty lawyer did not merely aim to assist the poor with legal problems; rather, many legal aid programs explicitly adopted the reformist agenda and tactics of the various social justice movements of the time.[32]

The aggressive law reform agenda of the 1960s and 1970s unleashed an equally fierce backlash during the Reagan era. This resulted in massive cuts to the federal legal aid program, both in terms of the available funding and the work in which federally funded agencies were permitted to engage.[33] The small-government, corporatist ideology driving the evisceration of the

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[29] Cummings, *Politics*, *supra* note 15, at 13.
[30] *Id.* at 15 n.75.
[31] *Id.* at 15.
[32] *Id.*
[33] Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L. J. 603, 620 (2009) [hereinafter Cummings & Rhode]; *See also* Cummings, *Politics*, *supra* note 15, at 22 (enumerating the many indignities inflicted upon recipients of federal Legal Services Corporation funding during the Reagan era).

federal legal aid program sought in part to replace professionalized poverty lawyers with volunteerism and contract work from the private sector, through an innovation called Private Attorney Involvement (PAI).[34] PAI, enshrined in the federal Legal Services Corporation[35] (LSC) regulations since the early Reagan era, requires LSC-funded legal aid offices to use 12.5% of their annual LSC funding to "encourage the involvement of private attorneys in the delivery of legal assistance to eligible clients through both pro bono and compensated mechanisms."[36]

Thus, PAI created a very real incentive for federally funded legal aid programs to involve private attorneys in the provision of legal services to the poor, since the federal regulations actually provide for penalties for noncompliance with the 12.5% goal.[37] LSC-funded agencies used PAI money to engage in the institutionalization of pro bono through a variety of delivery mechanisms, including local bar associations and nonprofit pro bono referral agencies, whose sole *raison d'etre* is matching pro bono cases with private attorneys.[38]

Changes in the structure of large law firms in the middle twentieth century positioned these firms as the most likely partners in the institutionalization of pro bono. Scott Cummings identifies the trend toward internally institutionalized pro bono as beginning in the 1960s and taking off in the 1990s, when pro bono

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[34] Public Welfare, 45 C.F.R. §1614.1 (2010).

[35] The Legal Services Corporation is an independent, nonprofit 501(c)(3) corporation that was created by Congress in 1974 to distribute federal funds to legal aid providers throughout the nation. *What is LSC?* LEGAL SERVICES CORPORATION, http://www.lsc.gov/about/lsc.php (last visited Mar. 18, 2011).

[36] 45 C.F.R. §1614.2(a).

[37] *See id.* at § 1614.7 ("Failure to comply: (a) If a recipient fails to comply with the expenditure required by this part and if that recipient fails without good cause to seek a waiver during the term of the grant or contract, the Corporation shall withhold from the recipient's support payments an amount equal to the difference between the amount expended on PAI and twelve and one-half percent (12 1/2 %) of the recipient's basic field award.").

[38] Cummings, *Politics*, *supra* note 15, at 24.

opportunities began to find use as recruiting tools for quickly expanding law firms.[39] Firms began to create structures through which decisions could be made regarding which pro bono cases to take, cases accepted by the firm could be doled out to the appropriate attorneys, and pro bono participation could be tracked.[40] Many hired pro bono coordinators—full time, dedicated staffers whose entire job revolves around screening potential pro bono cases, routing them to appropriate attorneys, and shouldering primary responsibility for the firm's image as dispensers of legal largesse.[41] Thus, large law firms, with their far-superior resources and internally institutionalized pro bono delivery structure, became a natural partner for participation in pro bono cases.[42]

As a result of these historical forces, the American legal system now houses a highly formalized system of pro bono service provision, in which cases are systematically presented to public interest or pro bono referral agencies, vetted, and then moved down the pipeline to in-house pro bono programs. However, the output of this pro bono factory has not been as robust as one might expect. In fact, scholars and bar leaders seem deeply concerned that American attorneys as a class remain intransigently disinterested in providing services for free.[43] Thus, a cottage industry has sprung up around prodding, cajoling, and generally exhorting the private bar to give more of its time to those who cannot normally afford its services.

Legal ethicists have promulgated a variety of rationales for an obligation to perform pro bono service, engaging in a debate largely focused on whether pro bono ought to be mandatory or voluntary. Some scholars, focusing on the origin of lawyers'

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[39] *Id.* at 36-40.
[40] *Id.* at 39-40.
[41] *Id.* at 58.
[42] *Id.* at 55.
[43] *See, e.g.,* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 20 (2005) [hereinafter RHODE, PRINCIPLE] ("[I]n most jurisdictions, participation rates in pro bono activity, variously defined, range between 15% to 18% . . . . In short, the best available research finds that American lawyers average less than half an hour per week and under half a dollar per day in support of pro bono legal assistance.").

moral obligation to perform pro bono, have made the case that lawyers' monopoly on the provision of legal services ought to give rise to an ethical obligation to ensure that those services are made available to those who cannot pay market rate.[44] Others have focused on the need for greater access to justice among poor clients.[45] Such appeals seem generally consistent with the historical definition of pro bono service as a moral duty to serve those who are indigent but whose cause is worthy, and recall Hoffman's nineteenth-century vow to "never close my ear or heart because my client's means are low."[46]

Despite its best attempts to focus on moral aspiration, however, another theme runs through the literature on pro bono; namely, the ancillary benefits that will flow to law firms and attorneys that participate in pro bono endeavors. For example, Deborah Rhode enumerates specific benefits to the careers of attorneys who engage in pro bono work, including training, the amassing of contacts and reputation enhancement.[47] Rhode also notes an additional category of benefit accruing to legal employers who encourage and facilitate pro bono, and includes in that category such benefits as improved retention, recruitment, and enhancements to the reputation of the firm.[48] Notwithstanding these benefits, Rhode attempts to reinforce her view that these benefits ought not to become the *raison d'etre* for pro bono,

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[44] *See, e.g.,* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 282-89 (1988) (providing the monopoly rationale for the concept of mandatory pro bono).

[45] *Se generally,* RHODE, PRINCIPLE, *supra* note 44, at 26-29 (arguing that access to justice is a fundamental interest and is critical for the poor).

[46] Maute, *supra* note 24, at 104 (footnote omitted).

[47] Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L. J. 49, 58 (2005) [hereinafter Rhode, *Profits*]; *See also* Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers, in* PRIVATE LAWYERS AND THE PUBLIC INTEREST 115, 127-33 (Robert Granfield & Lynn Mather eds., 2009); Cummings, *Politics*, *supra* note 15, at 102-03.

[48] Rhode, *Profits*, *supra* note 48, at 60; *See also,* Cummings, *Politics*, *supra* note 15, at 33, 110-11.

asserting that "to justify pro bono involvement in solely instrumental terms may undermine its moral significance and distort charitable priorities."[49]

However, as one moves away from the scholarly realm toward publications meant for consumption by decision-makers in large law firms, direct appeals to these "bottom-line" motivations seem to edge out more principled reasons for engaging in pro bono activity. Endeavors such as the Pro Bono Institute's Law Firm Pro Bono Project, which is specifically geared toward increasing large-firm participation in pro bono activities,[50] emphasize the bottom-line benefits of pro bono service as a primary reason for pro bono participation.

For example, the Pro Bono Institute provides a thirteen-page publication (available for download) on its website, entitled *Making the Business Case for Pro Bono.*[51] Even the title of the piece, on its own, unambiguously telegraphs the message that the reader should be interested in knowing how pro bono serves the bottom line. The Introduction to the piece, however, reads a little like an apology for what will follow:

> In making the case for why lawyers—and legal institutions—should undertake *pro bono* work, supporters of *pro bono* service typically focus on the compelling need for such assistance. Countless national, state, and local studies have detailed the appalling gap that exists between the millions who need, but are unable to afford or obtain, the specialized knowledge and skills of legal professionals to protect and vindicate basic human

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[49] Rhode, *Profits*, *supra* note 48, at 61.

[50] *See* PRO BONO INSTITUTE, *supra* note 8 ("The Project's goal is to fully integrate pro bono into the practice, philosophy, and culture of firms so that larger law firms provide the institutional support, infrastructure, and encouragement essential to fostering a climate supportive of pro bono service and promoting partner and associate participation.")

[51] Esther F. Lardent, *Making the Business Case for Pro Bono,* THE PRO BONO INSTITUTE (2000), http://www.probonoinst.org/pdfs/businesscase.pdf.

> needs and fundamental rights versus the shockingly limited resources available to meet those needs.
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> Others focus on the ethical underpinnings of *pro bono* service—every lawyer's fundamental responsibility to ensure equal access to justice. Linked to this ethical imperative is the pivotal role played by *pro bono* in maintaining the professionalism of the legal profession. As lawyers seeking to preserve the highest ideals of our profession, we must concern ourselves not only with the bottom line, but also with the greater public good.
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> Given the profound changes in and enormous pressures of law firm practice today, however, it is essential that *pro bono* supporters, without abandoning the moral and ethical principles at the heart of *pro bono* service, can confidently identify those elements of *pro bono* practice that, when appropriately structured and integrated into the fabric of the firm, result in positive benefits for the law firm and its attorneys, as well as for the clients and communities served.[52]

Following that half-page acknowledgment that there are principled reasons to engage in pro bono, the next eleven or so pages of the document are devoted to making the following points: 1) pro bono does not decrease profitability; 2) pro bono is an effective recruitment tool; 3) pro bono is an effective retention tool; 4) pro bono provides valuable training opportunities; 5) pro bono provides meaningful opportunities to evaluate the skills of

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[52] *Id.* at 1.

younger attorneys; 6) pro bono enhances firm "morale and loyalty"; and 7) pro bono is an effective marketing tool.[53]

One might wonder if it is possible to simultaneously appeal to altruistic and materialistic motivations and find success in both appeals. And in fact, it appears that the large firms may not be grasping the shaded, complex message that materialistic concerns should be viewed as a beneficial by-product, but not a driver, of pro bono programs. Instead, they appear to have seized bottom-line motivations for pro bono with both hands.

This phenomenon is evidenced in a recent American Bar Foundation study of the Chicago legal services market, in which researchers interviewed a number of pro bono coordinators and other law firm participants in pro bono. This study paints a very stark picture of firm motivations.[54] Its interviewees appear to almost unanimously—and quite un-self-consciously—cite the bottom-line motivations for pro bono noted above as the primary or exclusive reason for firm participation in pro bono endeavors. According to one firm lawyer,

> Those of us who manage law firms know that the pro bono business is good business for large law firms. It's the value that it has to the law firms in terms of training young lawyers, improving the quality of life at the law firms, enhancing our institutional reputation in the communities where we practice law, and network with the clients and judges. There's tremendous value there that far outweighs any short term costs … We're not running a charity here. This is good business and it[sic]s essential business for large law firms. [55]

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[53] *Id.*at 2-11.

[54] *See* Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono, in* 12 ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW AND DEVIANCE 145, 145 (Rebecca L. Sandefur ed.,2009) [hereinafter Daniels & Martin].

[55] *Id.* at 153.

The authors of the Bar Foundation study report concluded, "[l]aw firms look at their investment in pro bono very pragmatically. Certainly, concerns about professional responsibility and ideas of equal justice (of doing "God's work") are important considerations, but these interests are clearly secondary for firms as business entities."[56] Thus, this study solidly supports the view that the modern large law firm is not engaging in pro bono principally out of moral obligation (arising from any one of a number of theorized ethical duties), but instead is involved in the practice due almost entirely to business considerations.

The American bar's conceptualization and execution of pro bono has changed dramatically over the course of the last century and a half. As pro bono has become increasingly institutionalized, common motivations for engaging in the practice seem to have drifted from simple altruism toward the poorer members of an existing client pool to a clear focus on business goals. The following section considers whether the motivations of modern pro bono programs matter, specifically whether those motivations result in programs that inadvertently harm the public interest bar.

IV. DOES BOTTOM-LINE-MOTIVATED PRO BONO HURT THE PUBLIC INTEREST BAR?

If pro bono has become overly connected to bottom-line interests, does it matter from a pragmatic standpoint? If one more client is served, should anyone care *why*? If the ultimate goal of pro bono is not the moral salvation of lawyers but the legal salvation of clients, does it matter whether the motivation of large firms derives from the ethics of altruism or from more worldly goals? This section offers the opinion that sometimes, different motivations lead to different results. And in the world of pro bono, a program designed to suit bottom-line needs may, in the service of

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[56] *Id.*

its own agenda, harm the public interest agencies with which it partners.[57]

Deborah Rhode recently completed a survey of public interest legal organizations, the results of which are published in her study of public interest agencies, *Public Interest Law: The Movement at Midlife*.[58] As part of that survey, Rhode questioned respondents regarding the success of their interactions with pro bono attorneys. She observed that, of those public interest agencies surveyed, "almost half reported extensive or moderate problems with quality in the pro bono work they obtained from outside firms."[59] Her survey thus gives us a good general starting point; all is not rosy in the interactions between pro bono attorneys and public interest lawyers.

Specifically, Rhode's survey participants alluded to a few distinct problems with the quality of pro bono services. One problem arose when firms declined to take certain types of cases, or "cherry-picked" certain cases over others.[60] Another was the sense among the survey respondents that pro bono partners did not commit promised time to pro bono endeavors, particularly when

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[57] The broader "do motives matter" debate in the pro bono context is not a new one. Deborah Rhode poses this very question in her 2005 book but does not direct her answer toward whether non-altruistic motivations have a deleterious impact on the public interest bar. PRINCIPLE, *supra* note 44, at 57. Rhode's 2009 article goes further in centralizing the tension between pragmatic and aspirational motivations for pro bono, worrying aloud that "lawyers' own pragmatic interests [in pro bono work] have marginalized more socially responsible considerations and resulted in inadequate evaluation, strategic planning, and accountability." *Rethinking*, *supra* note 10 at 1435. The article enumerates specific, negative ways in which a bottom-line-oriented pro bono program differs from one which is motivated by altruistic intentions. The article attempts to justify, in concrete terms, why there is something wrong with bottom-line-motivated pro bono. It alludes to, but does not squarely address, the effect of such programs upon the public interest agencies that provide necessary clients, mentoring, and training to the pro bono initiative.

[58] Deborah L. Rhode, *Public Interest Law: The Movement at Midlife,* 60 STAN. L. REV. 2027 (2008) [hereinafter Rhode, *Midlife*].

[59] Rhode, *Rethinking, supra* note 10, at 1442 (citing Rhode, *Midlife*, *supra* note 59, at 2071).

[60] Rhode, *Midlife*, *supra* note 59, at 2073.

paying work became more pressing.[61] A third problem was the inefficiency inherent in relying on inexperienced pro bono counsel, particularly where the nature of the case was such that almost no private firm attorney possessed the necessary expertise.[62]

I submit that, at their root, the problems identified in Rhode's survey are a direct result of the bottom-line-oriented motivations of the pro bono programs themselves. Furthermore, I suggest that the problems identified by Rhode's survey are not merely problematic in terms of their impact on the overall quality of legal services offered to the public, but are actually damaging to the public interest agencies who partner with pro bono. The following sections of this Article will examine the problems identified by Rhode's survey in greater depth, illustrate how those problems negatively impact the public interest bar, and show how the bottom-line motivations of firm pro bono programs create and exacerbate the identified problems.

A. Triage Conflict

Public interest lawyers face what has been evocatively described as an "ocean of legal need," [63] an endless supply of poor and disadvantaged clients whose legal needs cannot possibly be fully met by the scant resources available to public interest lawyers.[64] Deciding who can be served and who will have to go without—"triage"—becomes one of the most central, most defining strategic decisions a public interest agency can make.

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[61] *Id.* at 2072.

[62] *Id.* at 2071-72.

[63] Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2481 (1999).

[64] The Legal Services Corporation has concluded that, for each low-income person who obtains legal aid through an LSC-funded program, another is turned away. *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans,* LEGAL SERVICES CORPORATION (Sept. 2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf; *see generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004) (providing an analysis of legal assistance in America to the poor).

Every public interest agency has some threshold requirement for services that is obviously built into the agency's very identity.[65] Most of these threshold requirements are somehow tied to the identity of the client. Agencies subject to the strictures of LSC funding determine that income will be the first cutoff; the poor are their constituents.[66] Other agencies serve only certain identifiable groups, such as the disabled, the elderly, the homeless, or a particular minority. Others structure services differently, forming the identity of the agency around a particular area of need – protection from domestic violence, for example, or violations of civil liberties. But even after that first, most obvious "cut" is made, the need is usually still too great to fill.

Thus, even among the poor, the elderly, or the disabled, public interest agencies must create artificial sub-hierarchies of need in order to triage effectively.[67] Sometimes the second cut is made to favor one legal strategy over another; some agencies choose cases for their impact potential, while others focus on direct services to the largest number of clients possible. Others have a first-come, first-served policy. Others study the needs of the target community to determine which legal problems are most emergent and focus attention there. It is in this place—the complex, morally ambiguous depths of triage—that pro bono programs can pervert the process most insidiously through a phenomenon I will call "triage conflict."

Triage conflict arises when the case selection criteria of the public interest agency are directly challenged by another entity, whose reasons for selecting cases are completely different than those of the public interest agency. Triage conflict can arise

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[65] *See* Tremblay, *supra* note 64, at 2482.

[66] *See* 42 U.S.C. § 2996f(2)(B) (2010) (enabling the Legal Services Corporation to establish guidelines for client eligibility based on income considerations).

[67] The philosophy behind these kinds of deeper triage decisions differs widely. For example, there exists a very interesting debate regarding the degree to which constituent demand for certain services ought to influence triage decisions. Tremblay, *supra* note 64, at 2497; *but see* Justine A. Dunlap, *I Don't Want to Play God – A Response to Professor Tremblay*, 67 FORDHAM L. REV. 2601, (1999) (rejecting Tremblay's use of hierarchy for case selection).

between a public interest agency and a funder whose institutional priorities are, for whatever reason, skewed towards accepting cases and building programs that the public interest agency would not otherwise prioritize.[68] And triage conflict also frequently arises in the context of pro bono. Where pro bono seeks to impose its business agenda on a public interest program, the public interest program may make determinations about triage that it would not otherwise make, thus destabilizing the agency through misallocation of scarce human and capital resources. I offer an anecdote from my own practice that will hopefully serve to show how triage conflict arises, and the tensions it can create.

When I first became the legal director at a relatively new, very small LGBT-rights nonprofit, one of my first priorities was to improve and expand the agency's pro bono collaborations.[69] The agency had enjoyed several extremely helpful collaborations with local large-firm attorneys already, but most of those collaborations had emanated from outside the institutionalized pro bono channels. The attorneys with whom we had collaborated had tended to be high-powered partners at major firms. They had directly sought out the agency in order to work towards a goal to which they were personally committed within their area of expertise. Thus, the attorneys with whom we had worked in the past could set their own agendas and were unconstrained by the strictures of an institutionalized pro bono program and its usual cast of actors.

I had envisioned an expanded program, in which a greater number of lower-ranked associates who were not necessarily closely tied to LGBT causes could be matched with pro bono opportunities at our agency. In the spirit of that goal, I began

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[68] Cummings & Rhode, *supra* note 34, at 643.

[69] The agency, Equality Advocates Pennsylvania, provided legal services to lesbian, gay, bisexual and transgender (LGBT) Pennsylvanians in a variety of substantive areas. Although the agency engaged in impact work, it hosted a legal hotline that fielded about six hundred requests for assistance per year. The majority of its cases would fall under a "direct services" model. At the time I left the agency, it housed three attorneys and one full-time legal clinic manager.

making a concerted effort to attend events that would help me network with pro bono coordinators and large-firm attorneys. Things, I thought, were really going to take off.

I quickly learned that the realities of engaging with a large-scale, institutionalized pro bono program were more complicated, and in many ways more troubling, than I had previously imagined. One of my first clues came at a cocktail reception for summer public interest associates hosted by a large firm. At this event, I initiated a conversation with the pro bono coordinator of a large, elite firm with whom we had previously enjoyed only limited pro bono interactions.[70] I introduced myself and told her of my hope to engage in a pro bono collaboration with her firm. At first, her interest seemed piqued. She asked me to describe the kind of opportunities we could offer. Encouraged, I perkily explained that we had recently launched a project to advocate for LGBT victims of employment discrimination. Her countenance darkened. "Oh," she said ominously. "We would *never* take a plaintiff-side employment case. We represent a lot of major employers and that would really present a positional conflict for us."[71]

Momentarily undaunted, I explained that, because our office provided a variety of services to low-income LGBT clients, there would be plenty of less controversial work for a pro bono attorney. I suggested that the firm's attorneys might instead want to work on second-parent adoptions for poor LGBT people, so that non-biological parents of children could cement their legal relationships to the children they were raising. We had a lot of those cases, they were relatively simple, and the benefit to the client's family was immeasurable. The pro bono coordinator did

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[70] The identity of the pro bono coordinator and the firm are intentionally omitted.

[71] For an excellent analysis of how so-called "positional conflicts" create ethical tensions within firms and limit the effectiveness of pro bono programs, *see* Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998) (discussing the challenges to pro bono work when agencies take a position for one pro bono client in contrast to positions taken with previous clients); *see also* Cummings, *Politics*, *supra* note 15, at 116 (noting various conflicts law firms face when working with pro bono clients).

not seem encouraged. "That's not very sexy," she (correctly) noted with a frown. She bore the resigned look of someone who has just realized that the person standing before her would require a remedial explanation.

"Look," she began. "Our associates would find those sorts of cases boring. What we're looking for are cases that we can put in our newsletter, like Guantanamo cases, or death penalty cases. Or asylum. Do you have any asylum cases?" I did not, and the conversation ended awkwardly with the exchange of business cards that we both knew would end up in the bottom of a drawer, unused.[72]

In the situation I describe above, the call was an easy one to make since my office did not have any of the kinds of cases for which the pro bono coordinator was hunting. Consider the moral and managerial quandary that would have arisen if, contrary to what really happened, I had just received a call from a potential asylum client. Normally, our office would without hesitation refer the potential client to one of the national groups with specific expertise in LGBT asylum claims. But had I really wanted to build my agency's relationship with the pro bono coordinator, I could have been tempted to take the asylum case, figuring that, with the resources and clout of the large firm on our side, we would "learn as we went," and that ultimately, everyone would win. The client would not need to know that we had never taken a case of that nature before, *if* we did everything right.

The problems with that scenario are myriad. Had I taken the case, my attention would have been diverted toward asylum and away from the two greatest identified areas of need of our client population—family law and employment discrimination. I would have spent a great deal of time and energy on a case that would have meshed very poorly with the agency's existing human and capital resources. Supervision of other cases would have

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[72] *See* Daniels & Martin, *supra* note 55, at 152 (illustrating that this exchange is reflective of a common attitude toward pro bono among firm attorneys, and not merely the result of a cocktail-fueled misunderstanding).

suffered as a result. And in the end, the client would have received services from attorneys far less schooled in asylum law than that client would otherwise have received had we referred the case as usual. All of these harms would have befallen my office because of triage conflict; the pro bono program would have allowed its own bottom line interests to dictate case selection priorities and the public interest agency would have capitulated.

When Rhode's survey participants talk about their frustration with pro bono programs that "cherry-pick"[73] cases, they may be expressing the tension that results from triage conflict. Some agencies will resist capitulating to pro bono program's triage hierarchy. Others—perhaps those agencies possessing fewer resources and little confidence—may, in the face of this sort of pressure, make decisions that will ultimately subvert the public interest agency's institutional health.

B. Case Management

Bottom-line-oriented pro bono programs can also damage public interest programs through a weak or nonexistent commitment to follow-through, which could undermine the public interest program's ability to manage cases efficiently and appropriately. Public interest lawyers often seek out pro bono co-counsel arrangements specifically because they cannot manage large cases alone.[74] Most public interest agencies operate from a place of scarcity unimaginable to the average large-firm attorney. Frequently, entire legal departments lack support staff. In addition, budgets for litigation costs such as court reporters for depositions, legal research database access, expert witness fees, and reproduction and filing fees are often anemic or nonexistent. Thus, a large-firm pro bono attorney can provide not only another body on a case, but also an entrée into the resources of the firm, which can seem like Aladdin's cave of treasure to a public interest

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[73] *See* Rhode, *Midlife*, *supra* note 59, at 2073.

[74] Cummings, *Politics*, *supra* note 15, at 48-49 (providing the example of the ACLU of Southern California's use of large firm pro bono counsel to manage class-action litigation).

attorney acculturated to a world in which having one's own stapler can be viewed as an enviable luxury.

When public interest staffers make decisions about case selection, they do so with an acute awareness of the limits of their own resources and will frequently turn down even the most promising cases if they cannot find pro bono help. Once it locates a pro bono partner, the public interest agency becomes entirely dependent upon the partner for case support that the agency could never provide on its own. Thus, an uncomfortable situation may arise in which the public interest attorney assigned to the case may not be able to execute her duty of zealous representation if the pro bono partner fails to fulfill its commitments. When pro bono partners abandon a case, their actions immediately create a case management problem for the public interest firm. How will the public interest agency manage the case ethically and effectively when its lifeline to resources (and possibly expertise) has been severed?

It seems reasonable to expect that pro bono partners would take into consideration the tenuous position experienced by the public interest bar in such a situation, and accordingly take great pains to diligently execute their responsibilities. And yet, Rhode's study shows that, from the public interest perspective, pro bono attorneys do not always behave with such diligence.[75] Instead, Rhode's survey participants complained that "firms . . . 'want to do pro bono work in theory but in practice, don't want to make the commitment,'" and that firms "look for 'training and opportunities for bored associates, but don't want to give them the time . . . when other paid work comes up.'"[76]

In my practice, I have personally experienced several instances where the pro bono partner, usually a junior associate, suddenly became unavailable at a critical juncture in the case. In most situations, the reason was that a paying client's case had

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[75] Rhode, *Midlife*, *supra* note 59, at 2072 (footnote omitted).
[76] *Id.* (citation omitted).

suddenly become active or the associate had just been assigned to a paying client's project. This circumstance would usually result in my office scrambling to take on unexpected pieces of a project or attempting to locate new pro bono counsel. Thus, my own experience showed me time and time again that institutional commitments to pro bono work are often only as strong as the amount of non-billable time that exists in the life of the pro bono attorney. As a result, I learned to expect the unexpected in a pro bono relationship, and be prepared to suddenly have a *lot* more work to do than I had originally planned.

The case management problems that arise when public interest lawyers partner with bottom-line-motivated pro bono programs are real but they have until now presented themselves in rather sporadic fashion. Variables include the overall commitment of the firm to the pro bono enterprise, the political power of the pro bono attorney within the firm and the ebb and flow of the business cycle. Recently, however, firms have rolled out a new innovation in pro bono service delivery that both underscores the bottom-line-oriented nature of many pro bono programs and introduces the potential to drastically worsen the case management problems already experienced by public interest agencies when their pro bono partners disappear. That innovation, the "public interest deferral" program, arose directly from the recent recession and concomitant collapse in the market for legal services.

After a period of unprecedented growth, the recent economic crisis has devastated the market for the kind of corporate-focused legal services that are the bread and butter of the large firms. Such firms have experienced serious contractions in the amount of work available, resulting in massive layoffs, and sometimes the collapse of entire firms.[77] Many of these recently-downsized firms were caught in a serious recruiting dilemma because large corporate firms have generally been structured according to what has been described as a "pyramid model," through which profits are maximized by the hiring of huge

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[77] *See The Layoff List*, AmericanLawyer.com (May 19, 2010), http://www.law.com/jsp/tal/PubArticleTAL.jsp?

numbers of young associates.[78] Although large firms have since cut back dramatically on hiring, many found themselves saddled with a full pipeline of Class of 2009 law graduates to whom offers had already been extended, but for whom there was essentially no work.[79]

Many firms responded to the influx of now-unusable new blood by asking these newly minted associates to defer their start dates, sometimes by a year or more. Firms often offered a portion of the associate's promised starting salary in exchange, essentially, for a promise not to go anywhere else.[80] The hope was that the deferred associate could be attached to the firm and yet dormant until he or she was needed.

Some firm leaders decided, rather than leaving the deferred associate with nothing to do, they would lend out their deferred hires to public interest agencies at some lower portion of their yearly salary. Pro bono advocates such as the Pro Bono Institute extolled the virtues of such programs, with the expected mix of appeals to both altruistic and bottom-line motivations.[81] This

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[78] Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market,* 59 J. LEGAL EDUC. 598, 600 (2010).

[79] *See* Press Release, Nat'l Ass'n for Law Placement, Entry-Level Recruiting Volumes Plunge, Some Start Dates Deferred (Mar. 2, 2010), *available at* http://www.nalp.org/uploads/2010_Perspectives_on_Fall_2009_Press_Release.pdf.

[80] *See, e.g.*, Karen Sloan, *Delay of Game: More Incoming Associates are Put on Hold,* NAT'L L.J., Mar. 23, 2009, at 1 (providing examples and commentary on job deferrals for recent law school graduates); Gina Passarella, *K and L Gates, Morgan Lewis Slash Attorney and Staff Positions: Morgan Delays First-Year Start Date By One Year*, THE LEGAL INTELLIGENCER, Mar. 10, 2009, at 1, 10 (describing firms' attempts to delay associates' start dates - sometimes by a year or more).

[81] Pro Bono Wire, *Turning Deferred Associate Start Dates Into a Pro Bono Opportunity*, PRO BONO INSTITUTE, (Oct. 2010), http://pbi.informz.net/admin31/content/template.asp? [hereinafter *Deferred*] ("[Y]oung attorneys would then join the firm with skills and professional confidence that they would not have otherwise developed during this interim period. . . . In addition to being an asset

idea—the "public interest deferral"—appears to have caught on quite quickly, and in some geographic areas, such as New York City, hastily organized into a sort of ad-hoc, city-wide pro bono corps.[82]

While it is certainly possible that the public interest deferral scheme is, to a limited degree, motivated by altruism, its essential nature and structure strongly reflects bottom-line motivations. After all, the entire point of the temporary nature of the deferral is that while the attorney has nothing better to do, public interest work is fine, but eventually, the deferral will end and the associate will go back to fulfilling his or her original purpose—generating profits for the firm. The very fact that these sorts of one-year deferrals did not exist at most firms prior to the cratering of the market for corporate legal services shows that the driver here is not altruism, but rather the firms' bottom-line interests.

The intentionally temporary nature of the deferred associate's position begs an obvious question regarding the future case management capabilities of the public interest agency.[83]

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to the participating attorneys and firms, these programs are also a significant benefit for understaffed legal assistance programs, providing them with an additional full-time equivalent lawyer.").

[82] *See Report on the Deferred Associate Law Extern Support Program*, CITY BAR JUSTICE CENTER (Mar. 2010), http://www.nylj.com/nylawyer/adgifs/decisions/030810report.pdf.

[83] Although beyond the scope of this particular discussion, the public interest deferral program may also harm public interest attorneys in a variety of ways beyond the case management problem. For example, in some instances, furloughed attorneys are being sent to nonprofits that have also experienced contractions of staff and services as a result of the recession. In these situations, the work of deferred associates is sometimes being explicitly used to replace laid-off public interest staff attorneys. Petra Pasternak, *Public Interest Shops Announce Cuts, Furloughs*, THE RECORDER, May 11, 2009. In 2009, both the Lawyers' Committee for Civil Rights of the San Francisco Bay Area and the Volunteer Legal Services Program of the Bar Association of San Francisco experienced significant staff cuts, including layoffs and forced furloughs, and were "shift[ing] some of the work to law school graduates who have had their start dates deferred by Big Law firms." *Id.* In this way, the deferral program, with its source of free labor, can actually undercut the career opportunities of public interest attorneys.

What happens to the deferred attorney's cases when that attorney is once again raptured back to the world of for-profit law?

This is a question that raises both macro-level and micro-level concerns. On the macro level, public interest agencies, as well as their funders, are extremely conscious of the fact that new projects and new staff quickly create dependence upon those services within the target community. The reputation of the agency can be irrevocably tarnished, and the impact of new programs can dissipate, if sustainability is not considered at the outset of any new public interest project. Once programs are launched, they quickly reach capacity and new programs that are not sustained tend to erode both the confidence of the target population and funders of the public interest agency.[84] If deferred associates are used to create entirely new programs, or even to add an attorney to an existing program, the effect may well be to expand capacity beyond that which is sustainable once the deferred associate is called back. This eventuality may result in an ultimate re-contraction of the program, and cause detrimental reputational effect among both the target population and potential and current funders of the agency.

In addition to potentially undermining traditionally held sustainability concerns, the public interest deferral program may also create more mundane, micro-level case management problems. When a deferred attorney leaves, something has to happen to the cases he or she leaves unfinished. There are three possible courses of action here. The first course of action is that the firm does not allow the deferred associate to take any of her public interest agency cases with her when she returns, and her entire caseload is essentially dumped on the staff attorneys at the agency. This situation poses an ethical hazard for the public

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[84] This is why public interest fellowship programs like Equal Justice Works specifically prioritize public interest projects that "create lasting institutions or programs." *See Eligibility and Criteria*, EQUAL JUSTICE WORKS, http://www.equaljusticeworks.org/programs/fellowships/criteria (last visited Mar. 7, 2011).

interest agency. Depending upon the wording of the representation or co-counsel agreement, a managing attorney or legal director of a public interest agency may find herself or himself scrambling to re-assign numerous cases under threat of potential malpractice.[85]

The second course of action is that the deferred associate *is* allowed to take her entire caseload along with her. Although this would avoid an enormous case management problem at the public interest agency, it is unlikely that the firm would allow this, since the very purpose of calling back the associate is to start working on paying-client projects.[86]

The third possibility is a more nuanced compromise, where the deferred associate carefully winds down cases over time, or perhaps is assigned only projects that do not involve direct representation. Such a compromise, however, might never have been thought out by either the firm or the public interest agency; while some deferral programs appear to have been created as a result of very specific negotiations between individual public interest agencies and pro bono partners, others seem to have been designed far less mindfully.

In 2009, the Pro Bono Institute, in an admirable attempt to bring order to the new reality of deferred associate management, promulgated a set of best practices for firms trying to place deferred associates.[87] This document does an excellent job of setting out general ground rules for these new partnerships and is particularly focused on helping firm attorneys understand how the

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[85] Ostensibly, public interest agencies might be able to ameliorate this threat by designing representation agreements that link the client only to the deferred attorney and that attorney's firm, and not to the public interest agency. This would sidestep any obligation for public interest regular staff to step in and take over cases for the deferred attorney.

[86] Although outside the scope of this Article, there are potentially serious problems involved with allowing deferred associates to take cases with them when they depart, mainly centered around the question of whether anyone works at the firm who has the expertise to supervise those attorneys in the kind of work they performed for the public interest agency.

[87] *Law Firm Attorneys Displaced by the Economic Downturn: Best Practices and Guidance for Effective Pro Bono Engagement*, PRO BONO INSTITUTE (2009), http://*www.probonoinst.org/pdfs/DisplacedAttorneys.pdf.*

deferred associate model impacts the human and capital resources of a public interest agency. However, its section on how to avoid large-scale, potentially calamitous case management problems when deferred associates are called back to their firms is very short on detail, making little more than a general statement that "[i]t would be unrealistic to think that at the time associates leave their host organizations and (re)join their firms, all of their ongoing matters will have been resolved. Firms should develop a plan for handling open matters and contemplate that associates would be bringing with them to the firm a number of active pro bono matters."[88]

Thus, the public interest deferral program provides a fairly comprehensive illustration of the numerous ways in which a pro bono program that is structured to meet bottom-line needs can negatively affect the case management capability of the public interest partner. Assuming the economy recovers in the near future, it will be fascinating (and possibly troubling) to see how these issues reach resolution as associates are called back to for-profit law.

C. Efficiency

It is natural to assume that pro bono increases the overall efficiency of public interest offices by serving additional clients in a given period of time. However, this may not always be the case. Rhode's survey participants, for example, expressed real frustration with the *inefficiency* of their pro bono collaborations.[89] There appeared to be two major threads of complaint. The first thread was, as interpreted by Rhode, the fact that "[f]or some organizations, the highly specialized nature of their work made it inefficient to rely on inexperienced counsel, and few pro bono attorneys had the relevant skill sets."[90] The second thread seemed to be less about the lack of expertise in a particular area of

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[88] *Id.* at 18.
[89] *See* Rhode, *Midlife*, *supra* note 59, at 2071-72.
[90] *Id.*

substantive law, and more about the fact that the pro bono lawyers were simply very inexperienced. Rhode quoted one survey participant as complaining about having to "train a junior associate in how to take a deposition." [91]

Why is this the case? Is inefficiency simply an unavoidable byproduct of the pro bono relationship? I submit that it is a byproduct not of the relationship itself but rather of the bottom-line motivations of large firm pro bono programs. As I demonstrate below, those motivations compel pro bono programs to *maximize* the amount of time spent on cases and *minimize* the level of expertise of attorneys assigned to pro bono projects. This creates an overall drag on the efficiency of public interest offices by requiring public interest lawyers to spend disproportionately large amounts of time training unskilled associates, in exchange for work that is performed far more slowly and inefficiently than would otherwise be performed by the public interest agency alone.

In an ideal pro bono world, a firm would always send its most qualified attorneys to a pro bono project. Pro bono litigation, for example, would be handled by senior associate or partner litigators, even where the litigation itself would not necessarily be the most complex. The obvious efficiency advantages to such a system are myriad. A more experienced attorney is likely to perform more work more quickly, while at the same time being less prone to technical errors or strategic blunders. A more experienced attorney would also place less of a training and supervision burden on the shoulders of an already-overworked public interest managing attorney or legal director, leaving that attorney's time free to perform other work.[92] A more experienced attorney would likely also be able to get up to speed more quickly on those highly specialized matters that are usually strictly the province of the public interest bar.

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[91] *Id.* at 2072.

[92] In fact, using experienced attorneys for pro bono matters frequently provides an important learning experience and mentorship for the public interest attorney partner, who frequently receives less formal training than his or her law firm counterpart.

Sadly, large firms are not encouraged to follow this model of pro bono. In fact, they are largely encouraged to follow the *opposite* model, wherein firms send their least-experienced staff to pro bono projects. Two major motivations exist for a firm prioritizing pro bono among its least-experienced staff. First, pro bono is expressly sold to large firms as a kind of free training for unseasoned attorneys.[93] This makes good business sense, due to the cost-free nature of the training offered through pro bono (as opposed to CLE), combined with the relatively low rate at which these attorneys' time can be billed.

Second, when large firms are publicly ranked in terms of their pro bono participation, the ranking considers only *hours* spent on pro bono, and not outcomes, number of clients served, or any other measurement of success.[94] In other words, one attorney working for sixty hours on a single case that the attorney ultimately loses in spectacular fashion is worth more to the American Lawyer ("AmLaw") ranking than that same attorney working for twenty hours on two different cases, one of which she wins and one of which settles amicably. Thus, the pro bono ranking model itself may create a *disincentive* for firms motivated by the bottom line to send anyone but newer, cheaper, and less efficient attorneys to pro bono matters.

However well this model serves private firms' motivations to obtain free training for new associates and rise in the AmLaw rankings, the efficiency of the public interest bar suffers as a result. When public interest attorneys partner with very inexperienced pro

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[93] *See Deferred, supra* note 81 ("Pro bono is one of the most effective and least costly means of providing skills training and professional development.").

[94] *American Lawyer*, which ranks large law firms' pro bono performance, creates its "Am Law Pro Bono 100" based on an aggregate "pro bono score." According to *American Lawyer*, "[h]alf of the score comes from the average pro bono hours per lawyer; the other half represents the percentage of lawyers who perform more than 20 hours of pro bono work." *The Am Law Pro Bono 100: Going in Deep*, AMERICANLAWYER.COM, http://www.law.com/jsp/tal/probono.jsp (last visited Mar. 19, 2011).

bono attorneys, the public interest attorney must spend an inordinate amount of time training the pro bono attorney. Similarly, the public interest attorney must closely supervise the work of the pro bono attorney to ensure that the work is performed competently, which takes a great deal of time. Of course, this is all part of the *design* of many pro bono programs, but it has the immediate effect of pulling the public interest partner away from other work for the express purpose of providing valuable but cost-free training to young associates.

Although inefficiency may be rewarded from the big firm perspective, it is absolutely deadly to the public interest lawyer and his or her agency. There are two important reasons why this is the case. First of all, it is a well-accepted truism that almost every public interest agency faces a client population whose size vastly outstrips the resources available to the agency.[95] Second, unlike large law firms, public interest agencies are frequently beholden to multiple funders who operate from an outcome-driven perspective.[96] Whether a foundation, a fellowship program, or a government agency, major funders of public interest endeavors almost universally require the submission of post-funding reports, which specifically document what was done with the donated funds during a grant period.[97] For funders of public interest agencies, the benchmark for success is volume of clients served and, to a lesser

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[95] LEGAL SERVICES CORPORATION, *supra* note 65, at 9.

[96] *See* Cummings & Rhode, *supra* note 34, at 620. Cummings and Rhode note the shift from federal public interest funding to diverse sources of private foundation funding, which carries additional fundraising burdens. The authors also note that reliance on such sources of funding may further warp organizational priorities, as public interest agencies strive to structure their services to draw support from funders. *Id.*

[97] Funders are often themselves accountable to a higher power, which wants to know how well the funder is supervising the grant program, and how well it is acting as a steward of what is frequently taxpayer money. Recently, for example, LSC came under fire from the federal Government Accountability Office in a report that accused LSC of lax supervision of its grant program. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-540, LEGAL SERVICES CORPORATION: IMPROVEMENTS NEEDED IN CONTROLS OVER GRANT AWARDS AND GRANTEE PROGRAM EFFECTIVENESS (2010) (discussing the improvements that LSC needs to make).

but increasing extent, the outcome of cases.[98] Thus, while AmLaw drives large firms towards inefficiency in the execution of pro bono by rewarding more hours spent, regardless of outcomes or volume served, grantors drive public interest agencies in the opposite direction towards volume served and outcomes.

One might object to this characterization of the problem by pointing out that this kind of situation makes sense when a higher volume of pro bono assistance is assumed. For example, it would be highly inefficient to create training materials and a supervision program for a single attorney working on a single matter, but the efficiency problem would be solved if the public interest partner created a training program that would be used for many attorneys on many matters, or for a few attorneys who would work on many matters over time. Theoretically, this may be true. In practice, however, there is little guarantee that the investment in training and supervision will ever result in increased efficiency at the public interest office.

I offer another anecdote from practice to illustrate this point. While acting as legal director of the above-mentioned nonprofit, I received an e-mail from a young, inexperienced contract attorney at a major law firm. She and two colleagues were experiencing a temporary lull in their workloads and wished to assist my agency on pro bono matters. Naturally, I was excited. This was akin to manna from heaven, since the addition of three attorneys amounted to a doubling of my legal staff. Understanding that these lawyers were relatively new to law practice and had been spending their careers largely engaged in document review, I

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[98] For example, a major funder of public interest activity in Pennsylvania is the Pennsylvania Interest on Lawyers' Trust Account (PA-IOLTA) Board, which disseminated $36 million in funds between 2004-2008. PA-IOLTA has specific requirements for reporting both volumes and outcome, reflected in its annual report, Pennsylvania Interest on Lawyers' Trust Accounts. *Results of the Pennsylvania Access to Justice Act: Executive Summary of the Five-Year Report on the Filing –Fee Surcharge Law, FY 2004-2008*, PENNSYLVANIA LEGAL AID NETWORK, INC., (Feb. 2009), http://www.paiolta.org/AJAReport/summary.pdf.

recognized that their skill sets would be somewhat limited and set about determining which tasks the three lawyers could learn and execute most efficiently.

Ultimately, I determined that I would train this set of lawyers in the relatively low-skill, high-volume area of name changes. In recent years, our office had been inundated with requests from transgender individuals seeking legal name changes.[99] Name changes seemed like a perfect introduction to lawyering with actual clients, since the process would involve a simple client interview, fact-gathering, filing of a relatively standard petition, accumulation of various documents such as judgment searches and a final appearance in court where there was no contested hearing. I imagined ultimately deploying a fleet of inexperienced attorneys who, with a little patience and hand-holding, would ultimately be able to provide critical help to a high volume of individuals who had a real and pressing need for service.

Excited, I committed the better part of several work days to the production of training materials for this new endeavor. I put together a manual, a set of model pleadings and various checklists. I scheduled and personally led a training session for the three attorneys. When the training session was concluded, I sent the team their first client, assuming that one of the attorneys would start on that client and the other two would wait for the next name change intake.

But a strange thing happened. Somehow, the pro bono coordinator at the attorneys' firm decided that it would be best to

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[99] Transgender individuals frequently find themselves saddled with birth names that are incongruous with their gender presentation (i.e. a person of male appearance named "Shirley"). Transgender individuals often face discrimination, harassment, and even violence when forced to present identity documentation that bears a gender-incongruous name, so name changes are a critical need. *See generally The Mazzoni Center Guide to Changing Your Name and Identity Documents in Pennsylvania 2010 Edition*, THE MAZZONI CENTER, (2010) http://mazzonicenter.org/sites/72.27.231.119/files/ma_resources/Changing%20Your%20Name_Legal%20Doc_Sept%202010.pdf (providing detailed steps and what to expect when changing one's name).

assign *all three* of the attorneys to that single name change. I did not object because—out of a shameful combination of confusion and cowardice—I didn't think I really had the power to do so. Consequently, all three attorneys interviewed the client, had regular meetings to discuss the progress of the name change, and they all helped prepare the case. As far as I am aware, all three may well have attended the hearing. Contrary to my intention, I had apparently created the single most over-lawyered name change case in the history of Pennsylvania civil procedure: a veritable masterpiece of inefficiency.

Theoretically, this first case could have been an anomaly, a sort of training-wheels case, after which each of the contract attorneys would begin to fly solo and my agency would begin to see a payoff in its significant resource investment. However, while all three attorneys expressed great enthusiasm, our collective good intentions ultimately manifested virtually nothing as none of the three attorneys ever took another name change case; one quit the firm, and the remaining two were assigned new projects that quickly eradicated the spare time they had previously enjoyed.

This anecdote is intended to illustrate a few points. First, the behavior of large law firms in pro bono transactions frequently appears to be geared toward maximizing training opportunities for inexperienced attorneys, even at the expense of the public interest agencies' efficiency. Second, public interest agencies cannot count on large-firm pro bono programs to provide sufficient pro bono assistance to ensure the recoupment of training costs. Thus, unless a large firm pro bono program is especially mindful about balancing its own goals with that of the public interest partner, it can inadvertently cause injury to the efficiency of the public interest office with which it partners.

In sum, the American legal establishment has, for quite a long while, attempted to walk a very fine line. In attempting to boost embarrassingly low levels of pro bono participation, bar leaders have both extolled the moral virtues of pro bono participation while simultaneously appealing to firms' baser

instincts. It seems that firms have mainly absorbed the more worldly justifications for pro bono, structuring many programs specifically to serve the firm's business needs. It is time for the bar to recognize the uncomfortable fact that not only are the motivations of those programs expressed in the manner in which they function, but in fact the ways these motivations are expressed can actually damage public interest partners in the exercise of pro bono.

V. OFFSETTING HARMS CAUSED BY BOTTOM-LINE MOTIVATIONS

Let us assume that pro bono programs that are motivated by the bottom line can and do harm the public interest agencies with which they partner. What then? This section seeks to answer this question by noting that public interest attorneys do, in fact, possess the necessary power to effectively resist harmful pro bono collaborations. The section goes on to suggest two specific strategies through which public interest lawyers could alter the terms of pro bono collaborations to minimize the harms caused by the bottom-line motivations of pro bono programs.

A. Conceptualizing Public Interest Lawyers as Empowered to Resist

As a threshold matter, it is critical to recognize that public interest lawyers do have power in the pro bono transaction, and thus may seriously consider whether they wish to demand alteration to the terms of some pro bono alliances. Despite the superficial power imbalances inherent in the pro bono relationship,[100] the fact remains that the machinery of pro bono is entirely reliant on public interest agencies for access to clients. The reason for this is quite simple—poor, disadvantaged people do not call enormous law firms looking for assistance. The lobbies of the various branch offices of our nations' largest law firms do not

[100] Specifically, I am referring to the differential in the amount of human and capital resources, salaries, and political power at the disposal of the firm, as opposed to the public interest agency.

usually teem with migrant workers suffering from poor working conditions, or with low-income tenants needing assistance with eviction matters. Instead, as Cummings observes, "[f]or this collaborative network [the current pro bono system] to succeed, it is critical that there are organizations external to law firms that operate to connect firm lawyers with pro bono clients."[101]

The pro bono system relies upon the public interest bar, not just to supply an undifferentiated mass of potential cases, but to use its expertise to interview and screen such potential clients before the large firm signs on as counsel or co-counsel. Even where the firm obtains clients through a pro bono referral agency, that agency has either received the case through a public interest agency or its own in-house public interest attorneys have screened the case for suitability for referral.[102] Because large firm pro bono programs are, in this way, heavily dependent upon the public interest bar, public interest attorneys actually have plenty of leverage in the pro bono transaction. Although public interest firms certainly cannot force for-profit institutions such as law firms to align their motivations with something other than pecuniary gain, they can make some reasonable demands that can help offset the harmful effects that those motivations can have on participating public interest programs.

B. Strategically Making Demands to Offset Harm

To offset the harms caused by the bottom-line motivations of a firm's pro bono program, a public interest agency can make specific demands, which will be discussed herein. Specifically, this Article suggests that: 1) public interest attorneys demand that pro bono partners assist in the development of needs assessments to determine the greatest areas of legal need in the community; and

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[101] Cummings, *Politics*, *supra* note 15, at 42.

[102] *See id.* at 72 (describing how many large firms are highly reliant on trusted public interest agencies to screen cases for acceptability, considering some cases "pre-approved" depending upon the reliability of the source organization).

2) in the distribution of pro bono assignments, public interest attorneys consider explicitly favoring firms who donate money directly to the agency. There are undoubtedly numerous other suggestions that could work as well as or better than those set forth below; public interest attorneys are encouraged to use these suggestions as an illustrative list, not an exhaustive one.

1. Using a Needs Assessment to Enforce Triage Boundaries

As noted above, public interest organizations may be inadvertently harmed when the bottom-line-motivated triage priorities of a pro bono program are allowed to influence the triage systems of the public interest agency. Clearly, the public interest agency bears responsibility for ensuring that its own priorities do not become skewed. But how can this best be accomplished in the face of pushback from pro bono programs that want certain cases for reasons having nothing to do with the client population?

In the face of potential triage conflict, public interest agencies should make better use of legal needs assessments to create a baseline for the pro bono relationship. A "legal needs assessment" is a systematized study of a particular target population that is designed to reveal the greatest areas of unmet legal need. A well-designed, well-executed needs assessment provides authoritative scaffolding upon which a triage system is built, and may go a long way toward persuading a pro bono partner that the needs of the community require a different approach to triage than that currently favored by the pro bono partner.

Standard 2.1 of The American Bar Association's [ABA] Standards for the Provision of Civil Legal Aid states that "[a] provider should interact with low income individuals and groups serving low income communities to identify compelling legal needs and should implement plans to address those needs most effectively."[103] The Comments to that Standard specifically cite the importance of needs assessments in the process of determining how best to serve low-income communities, noting that "[m]ore

[103] ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID §2.1 (2006).

formal assessments can also establish a baseline regarding the relative importance attached by individuals in the low income community to recurring legal problems."[104]

The American Bar Association's Standards for Pro Bono Programs mirrors the position expressed in the Standards for the Provision of Civil Legal Aid, explicitly encouraging pro bono providers to utilize needs assessments to determine program priorities. The Comments to Standard 2.1 note that "unless legal needs are identified, a program will have no basis upon which to determine the types of legal problems it should address." [105] Thus, on at least a theoretical basis, there exist solid rationales behind both firms and public interest agencies prioritizing a formalized assessment of legal needs.

The problem is that needs assessments are not easily planned or executed. Needs assessments take a great deal of human and financial capital, and are best designed by social science researchers who understand survey methodology. This means that, for all but the largest LSC-funded statewide legal aid networks, the completion of well-planned, well-executed legal needs assessments may be out of reach. Without access to a definitive needs assessment, smaller public interest agencies are forced to rely on less reliable means of ascertaining client need, such as using statistics from their existing cases to ascertain the most pressing legal problems.[106] Agencies in this position may find themselves doing a poor job of enforcing their triage priorities because the agencies themselves do not have access to an

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[104] *Id.* at §2.1 cmt.

[105] ABA STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVS. TO PERSS. OF LIMITED MEANS §2.1 cmt. (1996) [hereinafter, ABA CIVIL PRO BONO].

[106] Although a common metric for discerning legal need, the use of existing case data can be a suspect measure of need, since it tends to create a self-perpetuating cycle. The agency may emphasize outreach to populations with problems that mirror its existing client population, and then use the resulting case data as evidence that the legal problems for which it provides services are the most commonly experienced within the client community.

authoritative finding on what the needs are of its client population. Where conviction on this matter is shaky, it is too easy for the legal director simply to shrug and figure that, in order to get in the good graces of the pro bono coordinator, it might be okay to dig up a "sexy" case that the agency has no business taking on, or prioritizing the needs of a feel-good client over a cranky one, or a wrinkle-free case over one with some obvious complicating factors.

I suggest that, where a public interest agency has not completed a needs assessment due to lack of resources, pro bono partners be explicitly required to provide funding to perform such an assessment where one has not been executed. The firm and public interest agency would then agree to rely upon the findings of the needs assessment to dictate pro bono priorities. Interestingly, the ABA Standards for Pro Bono Programs currently do not contemplate such an arrangement, suggesting instead that the pro bono program could conduct its own needs assessment or rely on one already executed.[107]

Such an arrangement would help the public interest agency immeasurably, and would also help the pro bono partner understand, on a less abstract level, what the actual needs of the community are and to have a sense of ownership over the process of uncovering those needs. The needs assessment would then act as a fact-finding mechanism, teaching tool, and ultimately as a neutral arbiter between the triage priorities of the public interest agency and the pro bono law firm.

All of this, of course, assumes the public interest agency will have the courage to put the entire collaboration at risk if the pro bono firm refuses to contribute to the needs assessment (or if the firm does not honor the neutral findings of a completed needs assessment). If only certain agencies begin to demand contributions towards needs assessments and strict adherence to their findings, then it is entirely possible that bottom-line-motivated pro bono programs will simply forum-shop for a more ethically flexible pro bono partner who will meet the firm's needs for sexy,

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[107] ABA CIVIL PRO BONO, *supra* note 106.

easy, or noncontroversial cases that provide maximum training opportunities at minimum cost.

2. Requiring Direct Monetary Contributions in Exchange for Client Access

Another more controversial strategy of public interest self-protection is to give preference for the best pro bono assignments to firms that make significant donations to the public interest agency in order to offset the overhead costs of recruiting, training and mentoring the pro bono attorney.

Although some pro bono relationships may cost the public interest agency very little, others are quite expensive. The starkest example of such an expensive relationship is the deferred associate model.[108] In the circumstance of a deferred associate, the associate's salary may be paid by the firm, but, unless the public interest agency has explicitly bargained for more, the overhead expenses—which can include employee benefits as well as infrastructural costs such as office space, computer, licensure fees, and bar association dues and which may total thousands of dollars—may not be covered. Even where the monetary expenses are not so evident, subtler effects of the pro bono relationship still drain resources, particularly time spent by the supervising attorney.

It is true that in many instances the entire purpose of the pro bono arrangement is to gain access to the resources of the law firm. And, in truth, the law firm does spend money—sometimes a great deal of money—on pro bono litigation. But that money is almost always directed at the costs of litigation in the form of filing fees, document preparation, expert witness fees, and other associated costs. And even though some firms donate generously to the public interest agencies with whom they partner, there is rarely a formalized or even acknowledged relationship between the donation and the real cost of the pro bono relationship to the agency.

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[108] *See supra* Section IV.B.

Rhode notes that a few public interest agencies have already moved in the direction of a "pay-to-play" model.[109] And in fact, the Pro Bono Institute suggests that it is entirely appropriate for public interest agencies to request monetary donations to offset injuries to efficiency.[110] These agencies' actions have provoked some negative reactions from the private bar, which is evident in the "comments" sections of various legal blogs. (Interestingly, much of the negative reaction seems to originate from a fundamental misunderstanding; namely, that the benefit from pro bono service flows to the *agency* rather than the *client*, so the agency is essentially double-dipping by demanding payment for supporting the pro bono project.)[111] It may be worthwhile,

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[109] Rhode, *Midlife*, *supra* note 59, at 2074 (citing Ashby Jones, *Law Firms Willing to Pay to Work for Nothing*, WALL ST. J., June 19, 2007).

[110] According to a publication of the Pro Bono Institute that seeks to give guidance to public interest firms seeking pro bono partners, "*Pro bono* opportunities, if structured correctly, provide significant benefits to the volunteer attorney and the firm that employs her or him. *Pro bono* matters often offer excellent opportunities for training, skills development, and professional development, but at a substantial cost for providers who develop training materials and mentor and supervise *pro bono* counsel. For providers, of course, *pro bono*, though low in cost, is not free, diverting staff and financial resources from other activities. It is entirely appropriate, as a result, that law firms that have access to strong and well-constructed *pro bono* programs, be asked to provide financial support as well as volunteer resources." *Leveraging Larger Firm Resources*, PRO BONO INSTITUTE (1998), http://www.probonoinst.org/pdfs/leveragingresources.pdf.

[111] *See* above, Comment to *Some Law Firms Pay Well to Do Good*, WSJ BLOGS: LAW BLOG, (June 19, 2007, 2:33 PM), http:/blogs.wsj.com/law/2007/06/19/some-law-firms-pay-well-to-do-good-discuss/tab/comments ("If I'm a managing partner, I'd say thanks, but no thanks. We believe that the contribution of our time and legal services, for free, is an ample contribution. Sorry you don't see it similarly."); *see also* Shameful, Comment to *Some Law Firms Pay Well to Do Good*, WSJ BLOGS: LAW BLOG, (June 20, 2007, 4:34 PM), http:/blogs.wsj.com/law/2007/06/19/some-law-firms-pay-well-to-do-good-discuss/tab/comments ("I think this practice is shameful. It is bad enough that biglaw remains interested in pro bono activity largely as a marketing tool. The fact that the pro bono organizations are increasingly in this arrangement makes it worse. These organizations should be happy to get the free help, without extorting fees."); Anonymous, Comment to *Some Law Firms Pay Well to Do Good*, WSJ BLOGS: LAW BLOG, (June 20, 2007, 11:52 AM),

however, for the public interest bar to weather such criticisms in the pursuit of appropriate remuneration for the many benefits of the pro bono relationship that flow directly to the firm.

VI. CONCLUSION

The relationship between the private bar and public interest attorneys can be enriching for participants and lifesaving for clients. For public interest attorneys at small nonprofits with no real institutionalized training program, interactions with skilled and ethical pro bono attorneys can provide much-needed professional mentorship. For under-resourced public interest agencies, pro bono collaborations can provide a way into cases that would otherwise utterly overwhelm those offices.

However, positive pro bono collaborations are only really possible when the pro bono partner is not *solely* motivated by the bottom line. The staff of a public interest agency may, at some point in the agency's life cycle, realize that the agency has unwittingly partnered with a pro bono program that is designed as a recruiting tool that will promise far more than it ever intends to deliver. The agency may find itself enmeshed with a pro bono program that serves solely as a warehouse for deferred associates during tough economic times, or a pro bono program that is treated by the firm solely as a source of "feel-good" stories carefully crafted to attract clients and project a hollow image of stewardship. Where public interest lawyers find themselves entangled with such programs, they must be constantly on the lookout for looming

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http:/blogs.wsj.com/law/2007/06/19/some-law-firms-pay-well-to-do-good-discuss/tab/ ("This is nuts. I am offering to volunteer extremely valuable time and on top of that, these so called "public interest" organization[s] want[ ] a kickback to enable me to provide free service to them. Who are they kidding. Doesn't sound like they are so needy or deserving if people compete to give them free services. What a scam. Pro Bono for these orgs is a racket. They will never get a minute of my time or one penny.").

injury to triage priorities, case management crises, and erosion of efficiency. When these problems present themselves, the public interest lawyers should feel empowered to require that the pro bono partner take reasonable steps to ensure that the public interest agency and its attorneys are not harmed in the transaction.