

A PRO BONO REQUIREMENT FOR FACULTY MEMBERS

*Erwin Chemerinsky**

Many law schools, including Loyola Law School, Los Angeles, impose a community service requirement for law students as a condition for graduation.¹ Students are required to spend a specified number of hours doing pro bono work in order to receive their diploma. Indeed, many high school and colleges mandate that students do volunteer work. Such programs are motivated by the belief that students will make important contributions with their work and, perhaps more significantly, that participation will instill a habit of doing volunteer work.

To my knowledge, though, no law school requires its faculty members to do pro bono work as part of their professional obligations. My sense is that most law schools are supportive of faculty pro bono work, but leave it entirely up to individual faculty members to decide if that is how they want to spend their time. Law schools generally evaluate faculty members—for promotion, tenure, and merit raises—based on their scholarly writings and teaching. Work done as a lawyer—whether as a paid consultant or attorney, or as a volunteer—is rarely the concern of the law schools unless it gets in the way of the faculty member’s other responsibilities.

In this Article, I argue that all law school faculty members should be required to do pro bono work as an integral part of their professional duties. I suggest that the American Association of Law Schools (“AALS”) adopt a specific policy requiring that law schools insist that every faculty member spend a specified amount of time

* Alston and Bird Professor of Law, Duke Law School. I am grateful for all of the support that I received for my pro bono work in my 21 years at the University of Southern California Law School and for the support I already have received during my short time at Duke Law School.

1. See, e.g., Loyola Law School, Pro Bono Requirement, at <http://www.lls.edu/community/probono.html> (describing Loyola Law School’s pro bono requirement for graduation) [hereinafter Loyola Law School].

each year doing pro bono work. In the absence of an AALS mandate, law schools, on their own, should adopt such a requirement for their faculties. Each law school, of course, could decide that as part of evaluating faculty members—for promotion, tenure, and merit salary raises—the amount and nature of pro bono work should be considered.

Part I presents the case for requiring faculty members to do pro bono work. Part II considers the objections to such proposals. On reflection, these objections—faculty members are not qualified to do legal work because it is unduly paternalistic to force adults to do charity work—are identical to those made against student community service requirements. Finally, Part III discusses the details of the proposal, including how many hours should be required, how pro bono work should be defined, and how the requirement should be implemented.

I am not naive enough to believe that my proposal will be adopted by the AALS or law schools any time soon. No one likes to be regulated, and law professors in particular are fiercely independent. Hopefully, this Article will at least induce debate and force examination of how to better engage law professors in using their talents to help those who need it.

I. WHY A PRO BONO REQUIREMENT FOR FACULTY MEMBERS

Over 20 years ago, the Commission drafting what became the American Bar Association's ("ABA") Model Rules of Professional Conduct, proposed requiring all attorneys to do forty hours of pro bono work a year.² This was vehemently opposed by the bar and ultimately not included as a requirement.³ Opponents argued that such a mandate violated personal freedom and was unduly paternalistic.⁴ As a result of the strong opposition, Model Rule 6.1 simply says that "[a] lawyer should aspire to render at least (50) hours of pro bono publico services per year."⁵ Since the vast

2. MODEL RULES OF PROF'L CONDUCT R. 9.1 (Draft Aug. 1979).

3. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 701 n.147 (1989).

4. *Id.*

5. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003).

majority of law professors are lawyers, this aspirational rule applies to law faculty members as well.

The ABA and the AALS, both of which accredit law schools, have acted to encourage pro bono work by law students. In 1996, the ABA changed its accreditation requirements for law schools to provide that each law school “should encourage its students to participate in pro bono activities and provide opportunities for them to do so.”⁶

In 1997, AALS created a Commission on Pro Bono and Public Service Opportunities in Law Schools.⁷ The Commission’s report led to the creation of an official AALS section on Pro Bono and Public Service Activities in Law Schools. The AALS has sections on virtually every subject area taught in law schools and faculty members join the sections that pertain to their interests.⁸ The AALS also created a Pro Bono Project which assists law schools in creating and implementing their own programs.⁹

Several law schools have created mandatory pro bono requirements for students as a graduation requirement. Tulane was the first school to do this in 1987,¹⁰ and several other law schools, such as the University of Pennsylvania and Loyola Los School, Los Angeles, have adopted such requirements.¹¹ The vast majority of law schools, though, have programs to help facilitate pro bono work by students but do not mandate it.¹²

But no law school, to my knowledge, has a requirement that its faculty perform pro bono work. I have been enormously fortunate that my law school has been very supportive of the pro bono work that I have engaged in. There have been two deans in my 21 years at U.S.C., Scott Bice and Matthew Spitzer, both of whom have been

6. STANDARDS FOR APPROVAL OF LAW SCHOOL & INTERPRETATIONS standard 302(e) (amended 2003).

7. See AALS Commission on Pro Bono and Public Service Opportunities, *Learning to Serve*, at <http://www.aals.org/probono/report2.html> (last visited Feb. 23, 2004).

8. See AALS Home, AALS Sections, at <http://www.aals.org/sections/index.html> (last visited Feb. 23, 2004).

9. AALS, *The Project*, at <http://www.aals.org/probono/project2.html> (last visited Feb. 23, 2004).

10. *A Handbook on Law School Pro Bono Programs*, THE AALS PRO BONO PROJECT, June 2001, at 7. [hereinafter THE AALS PRO BONO PROJECT]

11. *Id.*; see also Loyola Law School, *supra* note 1.

12. THE AALS PRO BONO PROJECT, *supra* note 10, at 13.

extraordinary in support of my work, even when it has produced angry opposition from some alumni and others. Last year, for instance, I was co-counsel in a lawsuit on behalf of Guantanamo detainees¹³ and it led to a very large volume of hate mail. But never, for an instant, have I felt anything but unwavering support from my deans.

That said, my sense in most law schools is that a faculty member's pro bono work is looked on about the same as if he or she likes to hike on weekends. If that's how the person wants to spend his or her time, fine, but it plays little, if any, role in the faculty member's evaluation. This needs to change.

Why a pro bono requirement for faculty members? First, faculty members, like all lawyers, have a social obligation to use their talents to help improve society. A traditional argument for mandatory pro bono work is that attorneys are given a monopoly in the provision of legal services and therefore have a duty to help alleviate the harms resulting from this. Lawyers should aid individuals and causes that cannot obtain legal representation who might be able to do so if non-lawyers were able to provide services.¹⁴ Moreover, I believe that all in society, especially those who are particularly fortunate, have the duty to help those who are less well off. It is hard to imagine a group that is more fortunate than law professors. Also, I doubt anyone would deny that law professors, as a group, possess enormous talent and ability. Mandatory pro bono work for faculty members thus has the potential for improving the legal system and society. Law faculty members can use their tremendous knowledge and ability to do important work that otherwise might not get done.

Second, faculty members doing pro bono work provide role models for law students. I begin with the premise that it is desirable for law students and lawyers to do pro bono work. Few, if any, would deny this, though whether there should be a requirement for pro bono work is far more controversial. The conduct of faculty members, in doing or not doing pro bono work, sends an implicit

13. The lawsuit challenged the detention of hundreds of detainees who were captured in Afghanistan and are still being held at the U.S. naval base at Guantanamo Bay in Cuba. See *Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D. Cal. 2002) *aff'd*, 310 F.3d 1153 (9th Cir. 2002).

14. *E.g.*, Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415, 2419 (1999).

message to students. If students see little pro bono work by faculty members, the message is conveyed that it is customary for busy and talented lawyers to spend their time on things other than public service. But if law students see faculty members engaged in pro bono work, the obvious message is that this is something that lawyers are supposed to be doing. Moreover, pro bono work by faculty members provides a role model for the profession. Being a law professor is a highly prestigious and often a very visible position. If law professors are openly engaged in pro bono work, that might encourage more attorneys to do so.

Third, I have no doubt that faculty involvement in pro bono projects will enhance the education of students. There are countless ways in which I have been able to integrate pro bono work with teaching. For example, I often have found ways to have my students directly involved in my pro bono projects. From 1997–1999, I served as Chair of the Elected Los Angeles Charter Reform Commission, which proposed a new Charter for the city that voters adopted in June 1999.¹⁵ I ran for election to this fifteen person Commission and served a two year unpaid term. Under California law, a city's Charter functions much like a Constitution; it creates the institutions of city government, divides power among them, defines the procedure for governance, and even protects rights of individuals. As chair of the Charter Reform Commission, I was able to use over a dozen students in staff and support roles, and was able to hire a former student as a full-time lawyer on the Commission's staff.

Additionally, research assistants have helped me with every case that I have handled and I try to involve them in all aspects of the case: strategy sessions with other lawyers, research, editing, participating in moots, and attending the oral argument. Last year, I argued a case in the United States Supreme Court, *Lockyer v. Andrade*.¹⁶ The trial court sentenced my client, Leandro Andrade, to an indeterminate life sentence with no possibility of parole for fifty years for shoplifting \$153 worth of videotapes.¹⁷ On March 5, 2003, the Supreme Court, in a 5-4 decision, reversed the Ninth Circuit

15. See Melissa Payton, *Chermerinsky on Charter Reform: An Academic Approach to Politics*, 17 USC CHRON. (Oct. 6, 1997) at <http://www.usc.edu/uscnews/story.php?id=3056>.

16. 538 U.S. 63 (2003).

17. *Id.* at 68.

decision and held that Andrade was not entitled to habeas corpus relief.¹⁸ Both of my research assistants who worked on the brief came to D.C. to watch me argue in the Supreme Court. At another occasion, in the fall of 2003, I argued a civil rights case in the Seventh Circuit and brought my research assistant with me to Chicago to be at the oral argument.

In addition to involving my research students with pro bono work, I have also found ways of involving larger numbers of students in pro bono projects. In the fall of 2001, I had an oral argument scheduled in the Ninth Circuit at the exact time that I was scheduled to teach Civil Procedure to first year students. I rescheduled class for the morning, but told the students that they were welcome to come watch the argument in Pasadena, a short drive from the law school. Over three-quarters of the class came and many later commented on it as a positive experience; if nothing else, I think that as first year students they enjoyed watching the judges grill their teacher. On another occasion, in the fall of 2002, I organized moot courts for my Supreme Court argument at both Duke University, where I was then a visiting professor, and at U.S.C. At each school, an overflow of students stayed to listen to the critique and to the suggestions for how to improve the argument.

Furthermore, my teaching of doctrinal material is immeasurably aided by what I have learned doing pro bono work. Frequently, my examples come from cases that I have handled. Last semester, I taught Federal Courts and found that I could illustrate most of the topics in the course with some case that I had argued and lost. My work on the Los Angeles Charter changed and enhanced my understanding of constitutions, and I sometimes find it is a useful example as to the meaning and purpose of constitution-like documents.

I have no doubt that the pro bono work I do greatly enhances my teaching and my scholarship. If nothing else, my work as a lawyer has greatly enhanced my ability to relate the material in every class to what my students will be doing as lawyers.

Few are likely to deny that pro bono work by faculty members is a good thing. But why make it mandatory? A requirement that faculty members perform pro bono work conveys the message that

18. *Id.* at 75.

such public service is an integral and not an incidental part of a professor's professional duties. Faculty members are required to teach and write and serve on law school committees.¹⁹ Until pro bono work is included in this list, the message to faculty members will always be that such efforts are unimportant and of minimal concern to the law school. The result is that many, if not most, faculty members will engage in little pro bono work. Requiring pro bono work by faculty members would change the way in which it is regarded and surely would dramatically increase the number of faculty members engaged in such public service.

II. THE OBJECTIONS TO MANDATORY PRO BONO WORK BY FACULTY MEMBERS

I have no doubt that my proposal for mandatory pro bono work by faculty members will be vehemently opposed. I envision several objections. First, many will object at the compulsion; they will applaud pro bono work by faculty members, but oppose making it a professional requirement. Harvard Law Professor Charles Fried, in opposing a mandatory pro bono requirement for law students, made this argument:

I agree with the premise that public service is an important part of a lawyer's professional life but we have no right to compel our students to conform to our idea of law Although significant public service is the right choice, it must be a free choice. Volunteerism under the lash is 'voluntary' only in the Orwellian sense that it is unpaid. This is the volunteerism of the Cuban cane fields.²⁰

As applied to faculty members, though, this argument overstates the objection to mandatory pro bono work. Faculty members are already required to teach, to write, and to serve on committees.²¹ For untenured faculty members, performance in these areas is the basis

19. See Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 785 (1996); Jon H. Sylvester & Anthony J. Pagano, *It's Not Just A Job, It's An Adventure*, 34 U. TOL. L. REV. 165, 176 (2002) (discussing the qualities of an "ideal" law faculty member).

20. Francesco R. Barbera, *Yard Work: Harvard Law Revives Mandatory Pro Bono Debate*, ABA JOURNAL, May 2000.

21. See *infra* note 22.

for promotion and tenure decisions.²² For tenured faculty members, assuming some sort of merit pay system, these are the grounds for evaluation. I am simply arguing that pro bono service should be added to this list as a basic part of a faculty member's duties. Professor Fried would not argue that forcing a faculty member to serve on a school's admissions committee or curriculum committee is analogous to being compelled to work in Cuban sugar fields.²³ Accordingly, including pro bono work among a faculty member's duties is no more objectionable.

A second objection to mandatory pro bono work by faculty members is that they are not qualified to engage in such efforts. When I present my idea to faculty members and to lawyers, one of the first objections is that some faculty members lack any practical experience. I find it hard to believe, though, that a person teaching law cannot find some area in which he or she is competent to practice. But if this is true, then it becomes an even more compelling argument for requiring law professors to engage in pro bono work so as to gain that experience. I would think that there is a way for every faculty member, regardless of his or her field, to find some way to do pro bono work. For example, tax professors can provide volunteer tax assistance for those who need such services; while business law and contracts professors can help small companies with their legal needs. Virtually any faculty member can accept an appointment from a court of appeals to brief and argue a case.

There may be a more practical problem with faculty members doing pro bono work: many are not admitted to the bar in the state where they are teaching. There is, though, an easy solution to this: state bars should admit faculty members who are admitted to practice law in other states. Many states already do this, admitting faculty members as a courtesy.²⁴ All states should do this and can

22. See Jeffrey A. Miron, *The Economics of the Tenure System*, THE LIBRARY OF ECONOMICS AND LIBERTY (Sept. 24, 2001), available at <http://www.econlib.org/library/columns/microtenure.html>; see also, Matasar, *supra* note 19, at 785.

23. See Barbera, *supra* note 20, at 26.

24. But see *Information and Commentary on the Multijurisdictional Practice of Law*, at <http://www.crossingthebar.com/CA-Admission.html#> (last edited Jan. 5, 2004) ("California does not have a rule authorizing the admission of law school faculty members to the practice of law in California without examination.").

accompany admission with the requirement that the law professor provide a specified number of hours of pro bono work.

Third, some object to mandatory pro bono requirements on the ground that they do not provide effective assistance to those who need it. Professors Charles Silver and Frank Cross argued generally against mandatory pro bono requirements and contended that “[p]ro bono efforts divert legal services . . . to consumers who are unable or unwilling to pay market rates It would be more efficient to transfer cash from lawyers to the poor while leaving the market for legal services undisturbed.”²⁵ This argument, though, is based on a number of unsupported assumptions. Professors Silver and Cross focus exclusively on pro bono work as legal services for the poor.²⁶ In reality, pro bono projects are likely to include volunteer work for causes that otherwise are not represented, ranging from environmental protection to safeguarding human rights.

Moreover, Professors Silver and Cross assume that there is a choice between giving money to the poor and providing them legal services.²⁷ But no one is creating such a choice. Pro bono requirements provide legal services that otherwise would not be there. The amount of money going to the poor is not more or less than it would be without a faculty pro bono requirement.

III. IMPLEMENTING A MANDATORY PRO BONO REQUIREMENT

First, law schools should impose a requirement that every faculty member perform pro bono work. Although any quantification is arbitrary, I recommend that the initial ABA proposal be followed: faculty members should be required to provide at least fifty hours a year of pro bono work.²⁸ Individual law school faculties could immediately impose such a requirement on themselves. Nationally, the ABA and the AALS could insist on this requirement as a condition for accreditation and require reporting concerning compliance as part of the re-accreditation process.

Second, evaluation of faculty members for promotion, tenure, and merit salary raises should include consideration of pro bono

25. Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1482 (2000).

26. *See id.* at 1477–78.

27. *Id.* at 1478.

28. *See supra* note 5 and accompanying text.

work. Faculty members, like other individuals, respond to incentives and positive ones should be created for doing pro bono work. Virtually all law schools, as part of their promotion and tenure process, consider a faculty member's teaching, writing, and institutional service.²⁹ Likewise, most law schools require faculty members to annually report their teaching, writing, and service as part of yearly merit pay evaluations. A faculty member's pro bono efforts should be considered as well.

Third, schools should provide resources to help faculty members carry out pro bono work, including money to pay for costs, such as the printing of briefs, travel, and the like. Of particular importance, schools should pay for student research assistants for faculty pro bono projects.

Fourth, law schools should work with legal services and public interest agencies in their areas to identify pro bono projects to involve their students and teachers. My sense is that many faculty members would like to do more pro bono work, but do not know how. Partnerships can be created to develop such projects and to facilitate faculty involvement.

Throughout this Article, I have used the phrase "pro bono" work without defining it. At the very least, "pro bono" work refers to unpaid legal services.³⁰ A law professor who is paid for his or her efforts is not doing pro bono work.³¹ Moreover, the work must be for causes or clients that otherwise would not have legal representation. This work might be serving the poor or it might be working for a cause that otherwise would lack representation. The work could be done for political organizations and causes of any ideology. Ultimately, I favor a common sense approach to defining what counts as pro bono work and leaving enforcement to each school to decide for itself.

Proposals for mandatory pro bono work by lawyers generally have a provision that allows an individual attorney to make a monetary contribution instead of doing legal work. On one hand,

29. See Miron, *supra* note 22.

30. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003).

31. There are, though, many federal and state laws which accord successful plaintiffs, such as in civil rights cases, attorneys' fees. The fact that the law professor might get attorneys' fees if successful should not preclude the efforts from being considered pro bono work.

that would virtually allow a professor the chance to opt out of pro bono work, while still providing a contribution, in years when the individual simply does not have time. On the other hand, the benefits of pro bono work, especially in providing a role model for students and enriching the faculty member's teaching, are not gained when a monetary contribution is made.

My solution would be a compromise: a faculty member could make a monetary contribution in lieu of doing pro bono work, but for no more than two years in any five year period. This compromise would accommodate those professors who for a period of time needed relief from the requirement. But it would ensure that overall, most faculty members would do some pro bono work every year.

IV. CONCLUSION

Many faculty members throughout the country spend an enormous amount of time doing pro bono work, handling cases, serving on boards of directors of public interest groups, working on legislation, and advising non-profits. I certainly do not mean to suggest that such behavior by law professors is rare. But I also believe that too few professors are engaged in significant pro bono work. This deficiency deprives society of the benefits of legal work by a very talented group and sends a message to both students and the profession that it is perfectly acceptable for busy individuals to forego pro bono work.

This situation needs to change. At the very least, law professors should be encouraged to engage in pro bono work. Even better, law schools and organizations accrediting law schools should require this change to take place.

