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SHOULD WE MANDATE DOING WELL BY DOING GOOD?

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Cover Page Footnote

B.A., LLB University of Pennsylvania. The author is a partner at Drinker Biddle & Reath, LLP where, of course, none of these observations apply. These remarks were inspired by the author's participation in the conference "Professional Challenges in Large Firm Practices," held on April 15, 2005, at Fordham University School of Law. Special thanks to Professor Bruce Green and the Stein Center for Law and Ethics at Fordham for their dedication to the ethics arena and thoughtful consideration of the important issues facing our profession.

SHOULD WE MANDATE DOING WELL BY DOING GOOD?

*Lawrence J. Fox**

I hold, right here in my hand, the legal profession's playbook. All on one sheet of paper—an insert to the *AmLaw* 100 issue of *The American Lawyer*¹—it is all summed up, revealed in a stark fashion, the profession's bragging rights and the profession's shame.

Consider the listed achievements, beginning with law firm revenue-per-lawyer. The American law firm has broken through a barrier not unlike a three-minute, thirty-second mile. And it did it as if it were not there. Currently, there are four law firms with revenues of \$1,000,000 per lawyer, and in the top 100 the revenue-per-lawyer averages \$650,000. Just think what it takes to break that barrier, to achieve these results. You not only have to be charging a lofty hourly rate across an entire law firm, but you have to be generating an unfathomable number of hours. Finally, you have to convince clients that your lawyers are entitled to exalted rates not for a brilliant inspiration or a breakthrough idea, but for 2,000 or 2,500 or 3,000 hours per year spent sifting documents, digesting depositions, and right-clicking in front of a computer screen. What an achievement!

Next, consider a second metric, the most important of them all. What are the profits-per-partner of the top 100 law firms in America? For thirty-two of them that number exceeds \$1,000,000. These are not the earnings of a couple of superstars or firm leaders, the greatest of the rainmakers. This figure represents is an average across of 100, 200, or in some cases, even 300 lawyers. An average! Undoubtedly, firms play some games in trying to report higher figures. They do not count dollar partners whose

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¹At the time this lecture was given on April 15, 2005, the most recent *AmLaw* 100 was from 2004. All statistics contained herein refer to *The AmLaw 100*, AM. LAW, July 2004.

incomes are lower. They also play with expenses. But even after these adjustments, the numbers are truly stunning. Where, I ask you, is it written that you can have a business where that many people make that much money each year? Yet that is the health and wealth of the great American law firm.

These statistics reflect real achievement. Moreover, I have no quarrel with well-paid lawyers. Indeed, I celebrate the economic success of this tier of the profession. I have been a happy beneficiary of this extraordinary turn of events. So what is the shame? You would think with such bounty, with such munificent wealth, with such financial achievement, the contribution of the lawyers at these firms—above all other lawyers in America—to pro bono services would also be measured by stratospheric statistics. They've got the talent, they've got the wherewithal, they've got the legions of lawyers, they could afford—each of these firm families—to have quite a few “priests.” But, alas, in spite of the rhetoric, the metrics for pro bono tell a far different tale. Only forty-five of the *AmLaw* 200, less than one-quarter of these great firms, achieved fifty hours of pro bono services per lawyer in the most recent year. Only twenty-seven, just a little over ten percent, of them had more than half of their lawyers undertake any pro bono services at all. The most committed firm in the bottom fifty had less than fifteen hours of pro bono per lawyer. And seventeen firms were so embarrassed by their pro bono commitment, they refused to share pro bono statistics with *The American Lawyer* at all, even though they proudly shared their income and revenue figures.

There are other apparent contradictions when examining the pro bono commitment of America's most financially successful firms. Look at some of the dismal statistics about the pro bono services offered by top law firms, and compare them with the literature these same firms send to law students; with the prominent pledges of commitments they make about their “commitment” to pro bono on their websites; and with the emphatic statements they undoubtedly make to inquiring law students about their fealty to their professional obligation to the poor.

A few examples will demonstrate the point. Just in the top five highest grossing law firms in America, an elite group indeed, we have three that rank either at or very near the one-hundred mark in pro bono commitment. Yet read what these firms say about their pro bono endeavors:

“All around the world [the firm's] lawyers and professionals embrace opportunities to help others through pro bono legal services, community leadership, charitable giving and public service.”

“As [the firm] moves into the 21st century, we do so with a renewed sense of commitment to the public good through pro bono service.”

“The firm has a long tradition of providing pro bono services. The firm’s pro bono policy strongly encourages all attorneys to devote time to pro bono legal matters, including legal assistance to the poor and to the charitable, community or other organizations that serve the indigent, who would otherwise be unable to afford legal representation.”²

How can it be that so many firms talk the talk but do not walk the walk? How can such an impoverished pro bono program exist amidst the prosperity these firms so proudly share with *The American Lawyer*?

It is, quite simply, that prosperity and competition have created an environment that makes it less likely that firms will take a leadership role on legal services for the downtrodden. While their absolute profitability statistics look wonderful, for all but one of these firms, there is some firm ahead of them, and for most there are dozens. It is the relative standing of one firm over another that creates the dynamic. Those at the top of the food chain have the pressure to stay there because then they can hire lateral practices from those below. Those at the bottom, to keep their “underappreciated” top producers, must move up the profits-per-partner food chain to enhance their chances of retaining those colleagues with a wandering eye, and to snare new top producers as well. Unfortunately, it is not a surprise that a casualty of the brave new world of large firm economics is pro bono, a frill to which lip service can be paid, but no real commitment can be made if billable hours are to be enhanced. Even if there are lawyers in these firms truly dedicated to the cause, the resentment they face—whether spoken or simply thought—from those who have their eyes on the economic goals is palpable.

If we cannot harvest more pro bono work at the richest, most fertile firms in America, how can we ever expect to achieve what the preamble to our rules of professional conduct holds out as our obligation? How can we continue to proclaim that, “A lawyer should be mindful of . . . the fact that the poor . . . cannot afford adequate legal assistance. . . . Therefore all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice”?³

The answer, I believe, is mandatory pro bono. I know this is not a popular idea. It is not pro bono if it is mandated; lawyers should give from the heart, the critics say. It is involuntary servitude to force lawyers to give their time and thus violates the Thirteenth Amendment of the Constitution.

2. These are real quotes on file with the author. Since this article is designed to encourage pro-bono, no purpose would be served, in the author’s view, by identifying the firms whose quotes are so instructive.

³ MODEL RULES OF PROF’L CONDUCT Preamble 6 (2005).

Still others assert that these lawyers wouldn't be qualified to do the work and their resentment at being forced to do pro bono would only further diminish the quality of the services provided.

These arguments are time-honored and not without merit but they are not all that persuasive. First, there are many lawyers—particularly at large law firms—who would love to be “forced” to do pro bono, because in their present practice setting they face hostility at the idea from those who “count the beans” and calculate one more pro bono hour as the equivalent of one less billable hour. Second, if we lawyers want to maintain our monopoly on legal services, we clearly have an obligation individually to meet the legal needs of the poor. Who else will do it? Third, the argument that these lawyers are unqualified to do pro bono work is disingenuous. Do any of these same lawyers, those who are so quick to feign lack of capability when importuned to undertake pro bono, ever turn down paying clients for the same reason? Of course not. Moreover, there are excellent training programs available to provide any competent lawyer with the necessary tools to enter the rewarding world of representing children in foster care or social security appellants or tenants about to be evicted or whatever matter these lawyers might take on for the otherwise unrepresented. Finally, even the most hardened lawyer would see resentment evaporate as soon as the lawyer was charged with representing a live human being in need. The concept of mandatory pro bono may generate resentment, but the encounters that lawyers have with clients—appreciative clients, who are in real need—would surely cure that problem.

We are proud of our rules of professional conduct. We believe they reflect what makes us special, not in the sense of entitlement, but in terms of our responsibilities. And every one of our rules speaks in mandatory terms. They tell lawyers what they shall do, with one exception. The only rule that is written in terms of “may” is Rule 6.1, the pro bono rule. One could argue, I suppose, that this would be okay if the profession were delivering in response to this hortatory command. But the profession is not delivering, even at its most highfalutin levels. Therefore, we should change the “should” to “shall” and mandate that lawyers provide the necessary services.

How we do it raises a catalogue of interesting questions. Should lawyers be able to buy out of the obligation, as prospective soldiers did in the Civil War? Should law firms be permitted to fulfill the obligations of individual lawyers collectively; for example, by having two hundred lawyers in a firm provide 10,000 hours of pro bono, allocated among them as they see fit? And what really counts as pro bono service? Such issues must be resolved once pro bono service is required. But those are details that can be worked out. First, we must establish the principle and now is the time to do it.

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