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# STRICTURE AND STRUCTURE: THE SOCIAL AND CULTURAL CONTEXT OF PRO BONO WORK IN WALL STREET FIRMS

*Cynthia Fuchs Epstein\**

## INTRODUCTION

Today, the phenomenon of individuals and groups operationalizing their values is at the forefront of concern and interest. From those who destroyed the World Trade Center, to the firefighters, police, and civilian workers who volunteered their services, value-driven activity is dramatically evident. Of course, stressful times evoke action in the service of ideals that often are relegated to the background. Deborah Rhode's book, *In the Interests of Justice*,<sup>1</sup> written well before the events of September 11, 2001, asks lawyers to act on the values expressed by the leaders of the profession by, among other things, volunteering for pro bono work as a normal part of their professional lives. As we know, numbers of lawyers have offered to volunteer in these troubled times, but questions remain as to how widespread is the impulse and how lasting their commitment. Whatever the answers to those questions, which can only be answered some time from now, the basic questions that Rhode asks remain pertinent, such as whether there has been an erosion of a sense of social obligation and a widening of the distance between professional ideals and professional practice.<sup>2</sup>

Although a subset of lawyers has volunteered for public service, most do not. The legal profession, like other occupational communities, is bound by norms and practices that define it. It also reflects the norms and values of American society, which, although marked by a set of core values (such as equality), harbors many contradictory values, as Robert Lynd wrote more than five decades

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1. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

2. *Id.* at 1-2.

ago.<sup>3</sup> For example, Americans feel that individuals should work hard to achieve success as measured by the accumulation of wealth. Yet they also believe in the practice of mutual aid, of volunteerism, of helping those in need—the values of community.<sup>4</sup> Lawyers, individually and as professionals, also face such conflicting values.

For the past few decades, the accumulation of wealth by lawyers has been a major focus of many practitioners.<sup>5</sup> As Rhode reports, this is not unobserved, and contributes to the poor evaluation of lawyers in public opinion polls and to practitioners' disgruntled assessments of their own lives.<sup>6</sup> Yet, "doing good" has always been part of the profession's ethos. If not always practiced, it remains, as Rhode also writes, a subject of conferences, books, articles, and Bar Association reflection.<sup>7</sup> The "service ideal" is an intrinsic part of professional life, as many sociologists have observed,<sup>8</sup> and indeed, is a demarcation of work that has differentiated business from professional work. Not that professionals are charged to be oblivious to the enterprise of making money, but as Talcott Parsons pointed out, the single-minded focus on profit is self-defeating for attorneys, because the client and the public expect the lawyer also to be oriented toward some higher purpose, such as the rule of law, the common good, and the pursuit of justice.<sup>9</sup> Indeed, unlike the business world, where owners and boards of directors operate independently, the American Bar Association, which represents the legal profession, has declared a norm for the

3. See Robert S. Lynd, *Knowledge for What?: The Place of Social Science in American Culture* (Princeton Univ. Press 1970) (1939); Cynthia Fuchs Epstein, *Knowledge for What?*, 49 *J. Legal Educ.* 41 (1999).

4. See Everett Carl Ladd, *The Ladd Report* (1999). The Free Press Surveys report that the number of Americans who give their time to voluntary activities has gone up, and although young people volunteer less and give less money to charity, this probably represents a life cycle phase. See Alan Wolfe, *Bowling With Others*, *N.Y. Times*, Oct. 17, 1999, § 7 (Book Review), at 20 (reviewing Ladd, *supra*).

5. Rhode, *supra* note 1, at 31-38.

6. *Id.* at 25 (discussing the dissatisfactions of lawyers with their profession).

7. See, e.g., Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994); Rhode, *supra* note 1, at 17.

8. Eliot Friedson, *Professionalism Reborn: Theory, Prophecy and Policy* (1994); William J. Goode, *Community Within a Community: The Professions*, 22 *Am. Soc. Rev.* 194 (1957). Friedson, for example, writes:

[T]he consensus seems to be—paralleling the claims of the professions themselves—that professions recruit members who are devoted to serving others, create training programs which instill dedication to serve others, and organize work settings in such a way that altruistic and craftsmanlike work is assured by informal processes of collegial control.

Friedson, *supra*, at 123. Friedson goes on to observe, however, that "the notions of dedication to service and of craftsmanship are more usefully treated as elements of an ideology than as empirical characteristics of individual and collective professional behavior." *Id.* at 124.

9. Talcott Parsons, *The Professions and Social Structure*, in *Essays in Sociological Theory* 34 (1954). Of course, some clients see their attorneys as "hired guns," but this is not a professional ideal.

performance of at least fifty hours of pro bono work a year as a way of operationalizing the value of service.<sup>10</sup> Unfortunately, most lawyers disregard this standard. In fact, only a clearly committed minority actually engage in at least the suggested amount of pro bono work. How do we account for them?

Individuals' tendencies to look for consistency in behavior and character<sup>11</sup> often lead them to view lawyers as either being committed to public interest work or only oriented to pure profit maximization. However, lawyers, and the firms they work for, may successfully combine for-profit and pro bono work. But certainly one may construct a continuum that is based on the equation of practitioners' efforts toward public interest work and toward for-profit work. On the whole, Rhode, and others who sound the clarion call for a more actively compassionate profession, find that there has been considerable slippage over time toward the values of monetary gain and away from public service.<sup>12</sup>

Although some analysts locate the orientation toward public service in the moral structure of individuals, a sociological approach seeks to locate social factors that contribute to altruistic behavior, and to identify the common backgrounds and experiences of those who demonstrate it.<sup>13</sup> My own current research seeks to identify the factors that account for lawyers' choice of careers in the public interest sphere, and also the choice of lawyers in large private firms to do substantial pro bono work or to support the pro bono activity of those they supervise.

In this brief paper, I will note some very preliminary findings from the research on pro bono work done in large corporate firms—the arena in which rests the greatest orientation toward maximizing profit, and which incorporates the possibly contradictory values of public service and for-profit activity. Although only in its initial stages, the observations and perspectives that have come from interviews suggest that a number of structural and cultural factors contribute to, or deter, this behavior.

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10. In recent years, the business world has claimed an orientation to "corporate responsibility" and engaged in various activities, such as corporate philanthropy and sponsorship of cultural programming on not-for-profit radio and television stations.

11. See the work of the psychologist Leon Festinger showing how people tend to "strain toward consistency" in their judgments and values. *E.g.*, Leon Festinger, *Conflict, Decision, and Dissonance* (1964).

12. *See, e.g.*, Rhode, *supra* note 1, at 35-37.

13. Although it is difficult to define altruism, for the purpose of this paper, I shall describe it loosely as behavior that is generally oriented to public service or the public interest.

## I. FACTORS THAT CONTRIBUTE TO LAWYERS' CHOICES TO DO PRO BONO WORK

*Mobilizing events:* At this historic period, marked as it is by the recent tragedy of the attack on the World Trade Center in New York, the issue of a mobilizing event is uppermost in our consciousness, as we find that lawyers, individually and through their bar associations, have offered their services without charge to victims or their survivors.<sup>14</sup> This falls under a more general rubric that refers to the behavior of a cohort of individuals who, experiencing the same historic event, have engaged in altruistic behavior (such as the enrollment of young men in the armed forces after the attack on Pearl Harbor in 1941, or the civil rights marches led by Martin Luther King from Selma to Montgomery, Alabama).

*Charismatic leadership:* The service ideal constitutes part of the tradition of a number of firms. Often put in place by one or two charismatic leaders of a firm who experienced a mobilizing event, or who were imbued with a religious or philosophical orientation toward public service, or who internalized "the service ideal" of the legal profession as long as thirty to fifty years ago, the practice thus became a part of the culture of their firms. This tradition is institutionalized and operationalized by the designation of a lawyer who is placed in charge of organizing pro bono work. The commitment of such firms ranges from the assignment of a partner to be in charge of a pro bono program full-time, to a partner working part-time, an associate working full-time, or an attorney who is not on a partnership track.

Some firms institutionalize commitment to particular causes through their ongoing relationships with organizations that are devoted to serving those causes. They may then formally assign lawyers to work with these organizations on particular matters, or in some cases, serve as externs to them.

*Commitment:* The partners who are involved in such work tend to have backgrounds that orient them to public service work. Some were inspired in the 1960s by the civil rights movement and went into law to use it as a tool for social justice (and somehow found their way into corporate law). Others were oriented to public service because they were inspired by (or immersed in) a religious upbringing.

*General encouragement and support of partners:* In firms with committed partners, associates interested in doing pro bono work find encouragement for this practice. Some firms have formal programs that have been institutionalized, and a few even encourage this work by assigning summer associates to pro bono cases.

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14. See Diana B. Henriques, *Lawyers Offer Free Advice in Tapping Federal Fund*, N.Y. Times, Oct. 15, 2001, at B11 (discussing the Association of Trial Lawyers of America's creation of Trial Lawyers Care).

## II. FACTORS THAT MOTIVATE FIRMS TO ENCOURAGE PRO BONO WORK

Although, as stated above, individuals in firms may be oriented to working on pro bono cases, it would be difficult unless they received not only the moral support of their firms, but also the ability to draw on firm resources. Other firm members may indeed share the values of the lawyers who volunteer to work pro bono and support their efforts, even though they do not volunteer themselves. But firm support may also be granted for reasons that are not altruistic. (Of course, like all motivations, there may be some mix of noble and self-serving reasons for engaging in a task for the common good.)

The following are some of the structural conditions for such work that might be regarded as rational and self-interested on the part of firms:

*Public relations:* Pro bono work generates good public relations that a firm may use to recruit new attorneys and attract new clients. A glance at glossy firm brochures or firm websites often reveal a focus on this work.<sup>15</sup> The work is described in some detail. Thus, it is regarded as in a firm's self-interest to make this public. Furthermore, because of the public knowledge created by rankings of firms by *The American Lawyer* and the Pro Bono Institute, firms' activity or inactivity is highly visible.<sup>16</sup>

*Economic benefit:* Firms may hope to make money indirectly through pro bono work as a marketing and networking tool. Both individual lawyers and firms gain access to new and larger networks that may be useful in business when they do pro bono work. For example, by serving on boards of non-profit organizations, they may make contacts with potential clients. They can also pitch for-profit services to pro bono clients.

Clients may encourage firms to engage in pro bono work that may have some indirect benefit to their financial interests. For example,

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15. See, e.g., Arnold & Porter, at [http://www.aporter.com/d\\_index.cfm](http://www.aporter.com/d_index.cfm) (last visited Dec. 26, 2001) (including "Public Service" activities on front page of website, and detailing most recent activities); Cadwalader, Wickersham & Taft, at [http://www.cadwalader.com/flash\\_scrollbar/html/firm/publicservice.html](http://www.cadwalader.com/flash_scrollbar/html/firm/publicservice.html) (last visited Dec. 26, 2001) (noting, in particular, firm services available for victims of World Trade Center attack); Skadden, Arps, Slate, Meagher & Flom, at [http://www.skadden.com/community\\_Public\\_main\\_community.html](http://www.skadden.com/community_Public_main_community.html) (last visited Jan. 30, 2002) (listing organizations supported by firm and supervising partner or of counsel involved with each). Skadden also funds the well-known Skadden Fellowship Foundation, which "awards 25 fellowships per year to graduating law students and outgoing judicial clerks. Fellows provide legal services to the poor, elderly, homeless and disabled, as well as those deprived of their human rights or civil rights." Skadden Fellowship Program, at <http://www.skadden.com/communityFellowship.ihtml> (last visited Jan. 30, 2002).

16. For *The American Lawyer* rankings, see The 2001 Am Law 100 Pro Bono Rankings, available at <http://www.law.com/special/professionals/amlaw/amlaw100/july01/ProBono.html>.

one of our informants notes that some firms have done legal work related to the cleaning of toxic waste sites, because banking clients are interested in the increased value of properties and the possibilities of new investments on those sites. Up until about five years ago, firms shied away from environmental pro bono work, because real estate departments objected to conflicts of interest, immediate and potential.

Firms can also make money by doing pro bono work. Although firms often donate services—both lawyers' time and their own resources—without recompense, for cases decided in their favor, firms and the lawyers working on the cases can get large fees.

*Experience:* Pro bono work can provide young attorneys with valuable experience they might not get in the course of ordinary work on the firm's cases. For example, young attorneys may learn litigation and case management skills. Senior attorneys often do not wish to spend the time training young associates, and regard the pro bono activity (usually under the supervision of a senior public interest lawyer) as a distinct benefit to the firm.

*Recruitment appeal:* Firm managers find that having a vigorous pro bono program appeals to potential recruits from law schools. It gives the recruit a sense that the people he or she would be working with have good values and that they are people with breadth and depth. This appeal was prominent at the height of the anti-Vietnam War and civil rights movements of the later 1960s and 1970s (as Carroll Seron reminds us in her article in this issue)<sup>17</sup> when firms competed for graduates of elite law schools who were dedicated to responding to issues of social justice. Recruits may again find such social indicators important in response to the many economic and personal problems created by the terrorist attack on September 11, 2001.

### III. FACTORS THAT MITIGATE AGAINST PRO BONO WORK

Many lawyers in firms oppose "too much" pro bono activity in their firms, because they feel it is impractical and has drawbacks for the firm's economic health. They are apt to resist requests to do pro bono work. These are the reasons that they give, or which I and my research staff have observed:

*Time issues:* In an occupational environment in which competence and commitment are measured in terms of billable hours to a client,<sup>18</sup> attorneys are fearful of working on cases that do not result in profit to the firm. Furthermore, certain potential pro bono cases may have too high an opportunity cost—taking lawyers away from for-profit activity. Firms might therefore support the kind of pro bono work

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17. Carroll Seron, *Is "In the Interests of Justice" in the Interests of Lawyers?: A Question of Power and Politics*, 70 *Fordham L. Rev.* 1849, 1852 (2002).

18. See Cynthia Fuchs Epstein et al., *The Part-Time Paradox: Time Norms, Professional Life, Family, and Gender* (1999).

that is accomplished within a finite time period (such as, for individuals) rather than those cases that are complicated and have no defined time parameters.

*Commitment issues:* Attorneys who wish to be on an active partnership track may find that “too much” pro bono work is regarded as an indicator that the lawyer is not interested in the *main* work of the firm, and therefore, ought to be considered off-track.

*Conflicts of interest:* There are considerable restrictions on the types of pro bono work that may be taken on by lawyers in a large firm. For one thing, pro bono matters must not compete with the firm’s clients’ interests. If a firm has a tobacco company for a client, for example, pro bono activity on behalf of a person suing a tobacco company would be considered a conflict of interest, as would activity for the preservation of park lands if real estate clients are involved. Cases involving affirmative action or discrimination could easily be regarded as problematic for corporate clients, as could abortion rights cases when large church organizations are clients. This restricts the kinds of cases that a public-spirited attorney can assume.

*Laissez faire attitudes toward pro bono work:* At many firms, there are no rules or expectations that lawyers should do pro bono work, and thus it falls on individuals to volunteer to do it. Individual partners may be interested in doing it, and may invite associates in their practice group to participate, but it is not a clear obligation. Therefore, the option to work on pro bono cases creates more problems of balance and decision-making than would a clear-cut policy at the firm.

*Law firm culture:* As previously noted, the culture of a firm may encourage pro bono work, but it can also discourage it. Where a firm lacks a committed partner, or the management committee of the firm feels that, as one respondent put it, “a firm exists to make money,” pro bono work will be discouraged. Similarly, in some firms, lawyers “bad-mouth” the pro bono program and express fears that associates will “abuse it.” Some of the lawyers who oppose pro bono work note that, given the high rates of pay, associates should be engaged in activities that they can bill for. Opposition also comes from firm lawyers who feel that pro bono work should not be a “hands on” obligation of the firm, but rather that people requiring legal assistance should be helped some other way. For example, some of these lawyers give money to public interest institutions, such as Legal Aid or the NAACP Legal Defense Fund (“LDF”). Some lawyers believe aid to the poor should come through taxing and public spending.

#### IV. WHO DOES PRO BONO?

What are the background characteristics and other attributes of lawyers who engage in pro bono work? These general patterns are starting to appear:



*Protection from vulnerability:* Among the leaders of the firm and those who head departments, they tend to be people who have secure positions in a firm, bring in business or otherwise contribute to the high profile reputation of the firm, and thus are able to pursue pro bono work without fear of adverse repercussions.

*People with a low stake in the firm:* Younger people who think they will not make partner are eager to use their years in a large firm to pay off debts and then move on to other kinds of law careers. Some such attorneys volunteer for pro bono work because of a commitment to the service ideal, while others simply desire more interesting work during their tenure at the firm.

*Lawyers with a high capacity to work long hours:* Some attorneys have the interest and capacity to add pro bono hours to otherwise workaholic schedules, so that their for-profit billable hours do not suffer as a result.

*Lawyers who can manipulate their hours:* Many lawyers actually "time" their pro bono involvement to coincide with projected, or actual, lulls in their billable work, and thus are not forced to tack on many extra hours to get their (paid) work done. Because many firms allow a certain number of pro bono hours to count toward billable time, those who are working less can still meet billable hours requirements through their pro bono work, though most have workloads that allow them to meet, and often exceed, billable hours minimums without the pro bono time added on.

*Pleasing committed partners:* Firms with senior partners who have demonstrated a high commitment to pro bono work develop a keen tradition of sending lawyers into the public arena. Lawyers in these firms would be acting against the firm's culture if they showed disdain for pro bono work. Thus, they participate in pro bono programs to please those partners.

*Desire for more interesting work:* Many young lawyers are bored by the normal for-profit work of the firm. Some lawyers, for example, claim they are "turned off" at the prospect of one giant corporation suing another giant corporation because neither one can be viewed as being "in the right." They therefore view pro bono work as an opportunity for more interesting work.

*Change in for-profit client needs:* The vicissitudes of client needs sometimes lead to reduced demand for a lawyer's specialty. When this occurs, some combination of a lawyer's interest and the firm's assessment that the lawyer is not needed to perform another firm function can result in participation in pro bono work. One informant told us that his specialty "had dried up" at his firm, and that he was asked to take over the pro bono assignment position in his firm.

*General "lifestyle" considerations:* Some lawyers have an interest in pursuing a public interest career, but, because of issues related to debt, status, inability to find public interest work, or other lifestyle

considerations, choose to work in firms. These lawyers remain committed to using their skills and training in some way to help others.

*Desire for diversified work:* Many lawyers who always intended to work in a corporate setting think that it is too limiting as a singular activity in their lives. They seek out pro bono work to increase the variety of their work load. Some of these lawyers may have some residual orientation toward “doing good” from their youth, or may have acquired it through later influences.

*Personal satisfaction:* We found that more lawyers tend to choose pro bono work because it makes them feel good about themselves rather than because they were imbued with a professional ideal of service.

### CONCLUSION

There are multiple factors involved in the choice to do or support pro bono work. Firm culture, firm investment, cohort pressure, and the structure of the firm all interconnect with individuals’ orientations, which may come from similar sources, a generalized orientation toward doing good as a religious or social conviction, a network of like-minded colleagues, or simply a desire to impress a dedicated superior.

To some extent, we find these factors produce particular orientations toward pro bono work. In our first analysis, they appear to produce fewer attorneys devoted to “changing the system,” and more with a reconfigured orientation toward individuals regarded as the deserving poor. As many Americans feel today, giving time to help a person one can see and hear is often more appealing than giving time to some abstract set of principles or to “changing the system,” although laudable work has been done by firms in protecting basic rights of citizens. Service to a “deserving” poor person who has an immigration or housing problem is charitable, but it is behavior clearly within the system. Those who help individuals usually confront few issues that can be regarded as threatening to large firms’ clients. These cases have more distinct boundaries (they do not drag on for years) and do not draw excessively on firm resources. Even if lawyers do not make money on these cases, they do evoke the gratitude of people in need.

However, pro bono work in firms reflects public views of what social problems demand attention, and what should be done about them. For example, some firms are now dedicated to helping develop economic empowerment zones. Not only does this activity address larger social problems than helping particular individuals, but firms also have experience and expertise to offer. It is a new form of “changing the system,” although all may not agree. It is also perceived as being potentially beneficial for business.

Thus, we see that individuals and firms engage in pro bono activities for multiple reasons, some of them altruistic, some of benefit to them, and many a mixture of both. In response to Deborah Rhode's call for an increased commitment to pro bono work, this is a first attempt to lay out the structural and cultural factors that must be recognized to answer her challenge.