

September 12, 2015

SPECIAL REPORT

Big law already had a pro bono problem. Then the budget crisis happened.

By: CLAIRE BUSHEY



Photo by KENDALL KARMANIAN Mayer Brown's Joseph Callaghan, left, and Marc Kadish counsel a pro bono client involved in an international custody case.

A story from the last financial crisis illustrates the conflicts inherent in pro bono work at a big law firm—a nexus of pressures that continue today, when demand for volunteer services is more acute than ever.

In the midst of the downturn, the number of homeowners fighting foreclosures was soaring. And young lawyers at Chicago's Mayer Brown stood to gain valuable experience in chancery court representing them free of charge. There was just one problem: the law firm's paying clients.

Mayer Brown, like most of the country's large firms, represents big banks, including JPMorgan Chase, Citigroup and Bank of America. So representing homeowners trying to halt foreclosures raised the possibility of a direct conflict of interest if the law firm also represented a bank that held the mortgage. It presented an indirect conflict, too: What if the lawyers won decisions that hurt the banks in future cases?

Such conflicts are bound to arise when attorneys at law firms that generate millions in annual revenue perform work *pro bono publico*—for the public good. There is no question that asking lawyers at big firms to volunteer their services to the disadvantaged brings real good. But at the same time, tensions exist in the volunteer model, and not just because law firms typically make money through hourly billings. Other factors that influence big firms' pro bono programs are time pressures, the types of cases lawyers choose to take and—as Mayer Brown experienced with foreclosure cases—client conflicts.

Ultimately, the firm asked its banking clients to sign waivers to allow its associates to work on the cases, says Marc Kadish, Mayer Brown's director of pro bono. When it came to representing homeowners in negotiations, a few were willing. But all balked at litigation. In the end, smaller firms did the work, with Mayer Brown providing limited assistance. “We did try to resolve it, and it was just a difficult area,” Kadish says.

LOGGING PRO BONO HOURS AT CHICAGO'S 10 LARGEST FIRMS

Crain's asked the city's 10 largest firms for specifics about their pro bono work. All have written policies spelling out what counts as pro bono and how it is credited, but only two—Seyfarth Shaw and Katten Muchin Rosenman—were willing to make them available.

FIRM	AVERAGE PRO BONO HOURS PER ATTORNEY IN 2014	ATTORNEYS WITH MORE THAN 20 PRO BONO HOURS IN 2014	PRO BONO HOURS DEDICATED IN ILLINOIS TO LOW-INCOME CLIENTS	NUMBER OF ANNUAL PRO BONO HOURS THAT COUNT TOWARD ASSOCIATES' BILLABLE HOUR REQUIREMENT	IS PRO BONO WORK CONSIDERED WHEN DECIDING SALARIES, BONUSES AND PROMOTIONS?	WHICH AREAS OF LAW COMMANDED THE MOST PRO BONO HOURS AT THE FIRM?
Jenner & Block	138.5	85%	65%	Unlimited	Yes	Civil rights, criminal law, immigration
Kirkland & Ellis	62	72.3%	Declines to provide	Unlimited	Yes	Civil rights, nonprofit advice, immigration
McDermott Will & Emery	69.6	73.6%	Not available*	Unlimited	Yes	Wrongful convictions, human rights/trafficking, civil rights
Sidley Austin	62.8	48.2%	Not available*	Declines to provide	Yes	Death penalty, asylum, veterans benefits
Schiff Hardin	52.9	24%	5%	75 (waivers granted for more)	Yes	Does not break down pro bono hours by area of law
Winston & Strawn	52.8	69%	68%**	100	Yes	Prisoner civil rights, federal appeals, immigration
Mayer Brown	55	45%	Declines to provide	Unlimited	Yes***	Federal appeals, criminal law
Katten Muchin Rosenman	48.3	41.7%	Not available*	100 (waivers granted for more)	Yes	Asylum, civil rights, criminal
Baker & McKenzie	31	30%	Not available*	100	Yes	International/rule of law, children's rights
Seyfarth Shaw	28	32%	Not available*	60, 3 percent of billables for senior and staff attorneys	Yes	Counseling nonprofits, immigration, civil rights

*The Illinois Supreme Court requires attorneys to report annually the number of pro bono hours they perform. Some firms require lawyers to report this information individually, so they are unable to provide a firm total. **Winston & Strawn lumps together pro bono hours performed for low-income clients and hours performed for organizations that serve low-income clients. ***100 hours count toward bonuses automatically; a second 100 hours can count if approved by a practice leader. Source: Crain's reporting.

Another hurdle is the mismatch between the types of volunteer cases lawyers at big firms prefer to take on and the particular legal services poor people actually need. Low-income clients most often require help with family or consumer law, yet large firms generally favor cases that provide some mix of training opportunities for associates, business development and reputation-burnishing headlines.

Meanwhile, the Illinois budget crisis has only sharpened the need for volunteer lawyers, since it has thrown money for legal aid into limbo. Leslie Corbett, executive director of the Chicago-based Illinois Equal Justice Foundation, which appropriates state dollars for legal aid, says she's waiting to find out if the foundation will even make it into the budget.

With legal aid organizations stretched thin by a combination of fewer public dollars and rising demand, how law firms resolve the tension between their own good and that of the public is critical. Deborah Rhode, a professor at Stanford Law School who has studied pro bono programs, says firms operate on the assumption that any such work “is by definition for the public good,” regardless of whether it addresses society's most pressing legal needs.

“The business case for pro bono has pretty thoroughly taken hold, especially in large law firms, and we're still in danger of losing the 'publico' from the ideal,” she says.

At small firms, pro bono work means living ‘on less’

For solo practitioners and small law firms, pro bono work means weighing the heart against the bottom line.



ELLEN DOUGLASS

Ellen Douglass practices probate litigation and elder law from a Loop office staffed by an associate and an assistant. On top of the demands of running an \$80-hour-a-week practice (she bills \$275 an hour—a standard rate in probate court), she manages a legal clinic for Chicago Volunteer Legal Services and takes probate cases pro bono.

Unlike at a big firm, where organizational slack means some lawyers can pile on volunteer hours without hurting profits, anytime that Douglass spends on pro bono cases is time she isn't generating revenue. That falls straight to the bottom line. She roughly tracks her pro bono hours so she knows when it's time to stop taking free cases and focus on ones that pay the bills.

“You have to know when to be able to say no,” she says. “But I don't like to let them down hard.”

Lawyers in firms with more than 100 attorneys logged 77.7 pro bono hours in one year, the highest total among firms grouped by size, according to a 2013 report by the American Bar Association. The next highest? At 62.7 hours, solo practitioners, who do so without “the institutionalized support, resources and infrastructure that large firms have,” says a 2012 report from Legal Services Corp., the nation's largest funder of legal aid. “Yet small and solo-firm practitioners are the mainstays of many (legal aid) programs.”



JILL METZ

For a lawyer at a small firm, part of that commitment is “you decide you can live on less,” says Jill Metz, who heads an Edgewater firm that specializes in family law for same-sex couples. Metz, who employs four lawyers and one assistant, says that her volunteering has made her useful contacts within organizations like the American Civil Liberties Union that later lead to referrals for new business.

Some lawyers say they simply feel freer to do pro bono work when accountable to no one but themselves. Steven Bashaw heads a real estate and foreclosure practice in Lisle, and he defends some foreclosure cases pro bono while training other lawyers to do the same work. His pro bono work was limited when he was a partner at McBride Baker & Coles, a Chicago firm that merged with Holland & Knight in 2002. Conflicts of interest prevented him from representing certain clients. So did the money-oriented culture of large law firms. Bashaw used to “sneak around” to do his volunteering.

“You have got to make a certain amount of money if you want to retain your status,” he says. “You want to be a partner, you have to carry your share of the burden. . . . I wouldn’t stand around the coffee machine talking about my pro bono; it’s sort of like talking about your crazy brother at the mental institution.”

However, these days, despite the financial impact, he takes as many pro bono cases as he wants. Because, as he says, “the only person who takes me out to the back woodpile and gives me a spanking if I’m not making enough money is me, and I’m notoriously easy on myself.”

Claire Bushey

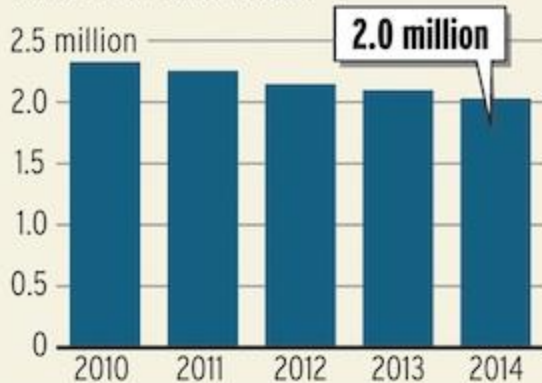
In its rules for professional conduct, the American Bar Association says lawyers should aspire to perform at least **50 hours of pro bono** work each year, with a “substantial majority” of those hours dedicated to “persons of limited means.” Unlike in criminal cases, Americans are not appointed a lawyer in civil legal proceedings. So legal aid organizations shoulder the burden of representing the poor in everything from immigration cases to custody battles.

But funding for legal aid is shrinking nationwide. Congress' annual appropriation for Washington, D.C.-based Legal Services Corp., the country's largest single funder of legal aid organizations, dropped almost 19 percent between 2010 and 2013, to \$341 million. The second-largest sources of dollars are state legislatures. In Illinois, funding plummeted 60 percent between 2009 and 2014, to \$1.4 million. During that time, the state's legal aid providers went from serving 74,000 clients to 20,000, according to the Illinois Equal Justice Foundation.

DWINDLING HOURS

A third of Illinois lawyers provided pro bono services in 2014. Total hours has decreased almost 13 percent since 2010.

TOTAL PRO BONO HOURS



Source: Attorney Registration & Disciplinary Commission Annual Report of 2014

That struggle is one of several factors that have driven the adoption of volunteer services at large firms, according to a [2010 study](#) authored by Rhode and UCLA law professor Scott Cummings. Among the other reasons: the growth of firms and the need to train all those new, young associates. Between 1990 and 2008, the average size of the country's 100 largest law firms surged to 820 lawyers from 375. That growth meant more revenue poured into firms, making it possible to hire full-time directors to formalize and oversee pro bono initiatives.

Then there have been increasing reputational pressures. In 1993, the [Pro Bono Institute](#), a Washington, D.C., nonprofit, challenged firms to perform pro bono hours equal to at least 3 percent of their billable hours. A year later, influential New York-based trade journal the American Lawyer began ranking firms based on the number of hours lawyers donated, fanning competition.

But the programs that resulted often did as much to serve the law firms as they did low-income clients. As Rhode and Cummings wrote in their study, "The organizational imperative to turn a profit inevitably shapes both the amount and nature of public service."

This tension is most obvious in the types of pro bono work "big law" attorneys undertake. The largest legal aid provider in metropolitan Chicago, [LAF](#) (formerly the Legal Assistance Foundation), serves 40,000 clients annually through the efforts of 65 staff attorneys and some 600 pro bono lawyers from myriad firms. Certain kinds of cases are easy to place, says Katherine Shank, LAF's director of volunteer services. Immigration cases can provide a gripping narrative. Employment cases move

slowly and require few court appearances. Legal clinics are popular for their limited time commitment.

Far harder to farm out are family law, consumer or housing cases. “It definitely is a challenge to create a sufficient number of projects that are useful to our clients that fit with the volunteer availability of big-firm lawyers,” Shank says.

“We don't do big cases,” says Margaret Benson, executive director of **Chicago Volunteer Legal Services**. About half of Benson's cases are family law—men and women who need help getting a divorce, custody or guardianship. They also handle evictions, bankruptcies and foreclosures. Routine legal work doesn't bring publicity, unlike the news coverage that accompanies major civil rights cases or death penalty appeals. “These firms don't want to take average cases,” she says. “There's no benefit.”

And while law firms use pro bono work to train their new associates—a trend that has accelerated as corporations balk at paying for them to learn on the job—they want to steer associates toward certain types of experience, whether that's taking depositions or arguing in court, Benson says. Her cases tend to settle, making them a less appealing training ground. They can be wrenching, too—ask anyone who ever has been involved in a custody dispute. As **Kadish** puts it, “I never have had a lawyer in 16 years say to me at Mayer Brown, 'I really want to do pro bono work in the area of marital law.'”

(Benson says she credits Mayer Brown because, unlike many of its peers, the firm acknowledges how it uses pro bono to further its goals. It helps that Kadish believes in donating money to legal aid when a firm doesn't donate time.)

The work can have the added benefit of cementing ties to corporate clients. Mayer Brown attorneys worked with lawyers at Dallas-based AT&T to draft wills for police and firefighters. To develop a website to advise women facing **forced marriages**, Mayer Brown lawyers paired off with their opposite number in Peoria-based Caterpillar's law department. (Cat's law department handles a wide range of pro bono matters, and promoting women's welfare is a stated priority for the corporation's charitable arm.) “It aids in building future relationships,” Kadish says.

How a firm accounts for pro bono hours also affects enthusiasm for volunteer work. Most firms require that associates bill about 2,000 hours each year. **Jonathan Baum**, pro bono director at Chicago-based Katten Muchin Rosenman, says associates there can count 100 pro bono hours toward their total, then request a waiver to cover more if necessary. The associates pushed for the 100-hour threshold because they wanted a safe harbor, to know the number of hours they could work without hurting their chances for promotion, he says. He's skeptical of firms that say they award unlimited credit.

“In the economics of a law firm, whatever a policy may say, at some point there's going to be a certain number of hours of pro bono that are going to keep you from doing the amount or quality of billable that it takes to advance in the firm, because there's only 24 hours in the day,” Baum says.

Partners can override a firm's policy, too. Law firms are less monolithic than they seem, says Benson of Chicago Volunteer Legal Services. "Some partners will say, 'The firm says you can do 50 hours a year, but in my department if you do that, it's going to count against you,' " she says. "Big firms have policies, but it has to trickle down to various practice groups."

Those situations are rare, says Allegra Nethery, a board member of the Association of Pro Bono Counsel and pro bono partner at Seyfarth Shaw in Chicago. In more than eight years at Seyfarth, it has occurred only twice. In both cases, Nethery, who reports directly to firm management, told the partner it was unacceptable.

The New York-based Association of Pro Bono Counsel tries hard to match what firms want to do with what legal aid organizations need, she says. In Chicago, the group started a **series of clinics** to help people with criminal records file for certificates of good conduct to make it easier for them to find jobs.

There's another important reason for affluent lawyers to represent poor clients, legal aid and pro bono advocates say. The experience brings them face to face with the "justice gap," creating empathy in a way only familiarity can, says Bob Glaves, executive director of the **Chicago Bar Foundation**. They are exposed to a world they don't generally see. They see the crowded courtrooms with the barking bailiffs and peremptory clerks. They see how the system works for people who can't afford lawyers.