

## What Counts As Pro Bono/Public Service? One View.

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Teresa Bryant recently asked: “What counts as pro bono?”, which I broaden to: “What counts as pro bono/public service?” I believe the definition should include not only volunteer work, but credit-bearing work (in-house and externship) and paid work (during the summer and school year). Within those categories, however, we should limit the settings to those involving legal work for the benefit of “persons of limited means.”

My conclusions flow from the analysis in my recent law review article, discussing more generally the filling of gaps in our teaching of skills and values.<sup>1</sup> Here, as elsewhere, we should prioritize our goals and develop a coherent program that considers the entire law school operation. Only then should we choose the label of “public service,” “*pro bono*,” or some combination, based on the programmatic goals.

My answer to “What counts as pro bono/public service?” flows from my belief that *Pursuing Equal Justice* is the primary gap to fill. That the AALS adopted this theme for the 2000-2001 academic year attests to the hole that exists at most schools. As always, however, context matters. I agree with Teresa Bryant that the “ultimate choice of what ‘counts’... will remain with the school.” Yet, the choices should reflect the gaps to be filled and the prioritized goals. A different design will result for schools that are sufficiently filling the gap of *Pursuing Equal Justice*, or choosing other goals.

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<sup>1</sup>Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLIN.L.REV. 109 (2001).

To further the goal of *Pursuing Equal Justice*, what counts as *pro bono*/public service work should not be limited to volunteer, extra-curricular work. First, a coherent program for *Pursuing Equal Justice* should coordinate the various operations at the law school, rather than separate them.<sup>2</sup> Including both credit-bearing and paid work under the same umbrella as volunteer work enhances coordination, increasing the overall effectiveness of the pieces.

Second, the goal is legal education. Whether the primary goal is to teach skills for *pro bono* work or values that enlighten students as to the need for such work, the training will be enhanced the more time the students dedicate to the work. Volunteer efforts typically involve fewer hours than clinical work or summer jobs. Steering students toward work involving a greater time commitment enhances their education in this area. With a coherent program involving all the pieces, the volunteer work supplements other programs.

Third, the greater the time commitment from students, the better the service will be to clients. Assuming similar settings, a program of more hours will yield more service. Scarce supervisory resources, whether in-house or off-site, will be more effectively utilized. Pushing students toward experiences of a greater time commitment enhances both education and service.

Fourth, a purely voluntary program will be marginalized at most schools. Students draw conclusions regarding law and legal education from the packaging at the law school. Required courses are perceived as most important. Voluntary, extracurricular programs will be the least highly valued. A definition including credit-bearing work and paid work allows public service initiatives to be recognized as having curricular and employment components.

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<sup>2</sup>*See id.* at 162-168.

Finally, I agree with Lucie White that the traditional *pro bono* model, relying on volunteer work, creates unsatisfactory results for clients, lawyers and communities.<sup>3</sup> Limiting *pro bono*/public service to volunteer programs perpetuates a flawed system.

These concerns outweigh the argument that the goal of imbuing a habit of volunteering would be undercut if credit-bearing or paid work counted. Moreover, that argument bears closer examination. The reason to imbue habits of volunteering is to increase the likelihood that students will volunteer once they graduate. We should instead ask: “What law school experiences are most likely to lead graduates to perform *pro bono*/public service work?”

Even if the goal is to increase the likelihood that graduates perform volunteer work, whether volunteer programs during law school are more effective than credit-bearing or mandatory ones is unclear. Schools with mandatory *pro bono* programs assert that their students are now more likely to perform *pro bono* work after law school.<sup>4</sup> Data from my law school suggests a similar impact for students who performed credit-bearing work when the placement involves the representation of the poor.<sup>5</sup>

It may seem incongruous that I also argue that we only count certain settings within the categories of volunteer, credit-bearing and paid work. This position results from the process of

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<sup>3</sup>Lucie White, *Pro Bono or Partnership? Rethinking Lawyers' Public Service Obligations for a New Millennium*, 50 J. LEGAL EDUC. 134 (2000).

<sup>4</sup>See, e.g., LEARNING TO SERVE: THE FINDINGS AND PROPOSALS OF THE AALS COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES, 32 (October, 1999); Caroline Durham, *Law Schools Making a Difference: An Examination of Public Service Requirements*, 13 L. & INEQ. 39, 49 (1994).

<sup>5</sup>See Engler, *supra* note 1, at 137.

identifying gaps in our skills and values instruction and developing coherent programs to fill those gaps. An enormous gap typically remains in educating students regarding the provision of legal services to persons of limited means. *Pro bono*/public service programs should fill that gap. A program organized around the legal needs of persons of limited means is best designed to do so. Beyond furthering the goal of *Pursuing Equal Justice*, such a program reinforces the service component of clinical programs at a time when the increased emphasis on skills training may be undercutting the overall message of service that originally characterized most clinical programs.

Both goals are undercut through the expansion of approved settings. Law schools are about legal education. As the MacCrate Report reminds us, “public service” and “*pro bono*” are components of the fundamental lawyering value of “Striving to Promote Justice, Fairness, and Morality.”<sup>6</sup> Recognizing work that could be done by those outside the profession, such as serving at soup kitchens, undercuts the notion that there is something special about the practice of law that involves serving the public.

Even a definition that recognizes a wide array of voluntary legal work misses the mark. Practicing lawyers often object to *pro bono* programs due to their own lack of training in matters involving the representation of the poor. Using the language of the MacCrate Report, the fundamental lawyering values include that of “Contributing to the Profession’s Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot

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<sup>6</sup>AMERICAN BAR ASSOCIATION SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, 213-215 (Value 2)(1992)

Afford to Pay for Them.”<sup>7</sup> Where our curricula fail to devote sufficient attention to teaching this value, a public service/*pro bono* program can help fill the gap.

The focus on “persons of limited means” also allows schools to reference the ABA’s *Pro Bono* rule, Model Rule 6.1. This bolsters instruction regarding the existence and meaning of the ethical rules, while providing relevant training to prepare students to practice under the rules. The reference also counters the ivory tower image: rather than insist on our own definitions, we acknowledge battles that have been waged outside the academy. Finally, the reference to Model Rule 6.1 helps answer the question whether only individual client representation is permitted, since Rule 6.1(a)(2) includes legal services for certain organizations as well.

Even the goal of fostering an orientation to *pro bono* work after law school is furthered by limiting the settings. At my law school, 73% of clinical students placed in legal services settings reported that the work made them “more likely” to do *pro bono* work. Only 31% of students in government settings and 31% of students in private settings answered the same way. This data reinforces my experience that performing legal work for persons of limited means opens students’ eyes to the issue of unmet legal needs.

Finally, although I believe that all lawyers should perform *pro bono* work, and that law schools should prepare them to do so, I am skeptical of mandatory law school programs limited to work without compensation. At best, the failure to include other work undercuts the potential for a coordinated approach involving other programs at the law school. At worst, the program diverts resources from other parts of the law school that might better serve the underlying goals

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<sup>7</sup>*Id.* (Value 2.2).

of the public service/*pro bono* program. The mandatory component likely necessitates a broad array of settings, both due to the availability of placements and the resistance from various law school factions. This compromise in turn weakens the effectiveness of the program for the reasons I have explained. My preferred solution to the mandatory *pro bono* dilemma is to establish a public service program requiring all students to provide legal services directly or indirectly to persons of limited means, whether through credit-bearing, paid or volunteer experiences.