

Thorns and Roses

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Lawyers Tell Their Pro Bono Stories

Deborah A. Schmedemann

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Acknowledgments

This book is an anthology of lawyers' narratives of their pro bono work. It has been my privilege to collect and edit them. I am most immediately grateful, of course, to the lawyers who told their stories for this book. Their pro bono work is noteworthy; their willingness and ability to tell their stories for a book of this sort remarkable. I am deeply grateful as well to their clients whose stories are also told here. Together they have provided examples that will, I hope, serve to inspire readers to advance justice.

Many lawyers perform pro bono work through an organization. This book features a good number, such as the Children's Law Center, the Advocates for Human Rights, and the Minnesota Disability Law Center. For myself, I am especially indebted to the Appalachian Research and Defense Fund of eastern Kentucky, where I had the honor of volunteering for a year under the quiet and powerful mentorship of John Rosenberg, Steve Sanders, and Sue Prater. These organizations and their leaders deserve far more recognition than they receive for the roles they play in advancing justice.

This book is my major project as a participant in the Master Track Program in Creative Nonfiction at the Loft Literary Center, a stellar provider of education in writing in Minneapolis. I benefited greatly from every session with our gifted advisors, Elizabeth Jarrett Andrews and Cheri Register; every class (thanks especially to Nolan Zavoral); and every meeting with my lively cohort (Heidi, Mary Jane, Christy, and Rachel especially). Most of all, I deeply appreciate Cheri's careful, creative, and caring reading of the manuscript and our many stimulating conversations as the interviews became a book.

A tip of the hat to Studs Terkel (1912–2008), master story-collector whose *Working: People Talk About What They Do All Day and How They Feel About What They Do* (1974) gave me a model for this collection.

Many at William Mitchell College of Law, where I have been fortunate to teach for over a quarter-century, have supported this project in ways too numerous to count. Caldene Bonde merits a very special mention; she ably transcribed every word in this book (and many that did not make it in) and worked her

way through layers of less than crystal-clear edits. Her enjoyment in reading the stories helped me enjoy the project all the more.

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Introduction: A Special Responsibility for the Quality of Justice

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”

So states the preamble to the American Bar Association’s Model Rules of Professional Responsibility, on which state legal ethics codes are based. Those codes typically also have some version of Model Rule 6.1:

“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”

Although the issue has been fiercely debated for decades,¹ performing pro bono legal services is not an ethical requirement of American lawyers. Nonetheless, many lawyers perform some form of pro bono. According to a 2009 ABA report, nearly three out of four lawyers reported providing pro bono service encompassed in subdivision (a) above, one out of four reported performing fifty or more hours of subdivision (a) service, and one out of three reported performing some other form of pro bono.² This book is an attempt to capture a few of the many, many stories of American lawyers who fulfill their special responsibility for the quality of justice through pro bono work.

Some years ago, as part of an extended empirical study of pro bono,³ I talked with groups of lawyers from various practice settings and places in their careers about pro bono. I asked them about the types of pro bono that are most important for the legal system and the types of pro bono that are most important to them. I was struck by the wide range of their responses. When I went on to interview lawyers for this book, I sought a similarly wide range of stories. In the dozen chapters of this book, you will find stories about:

- representing an inmate on death row in his appeals in state and federal court;
- testifying before Congress about the need for more resources to address sexual violence in Indian Country;
- mediating disputes between returning National Guard and Reserve soldiers and their employers;
- assisting people in a transitional housing facility find stability in their next homes;
- litigating a products liability claim for a woman with cerebral palsy against the manufacturer of her defective wheelchair;

1. See Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 *Tulane Law Review* 91 (2002).

2. ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice II: A Report on the Pro Bono Work of America's Lawyers* (2009), available at abanet.org/legalservices/probono.

3. The research and some of the major results are summarized in Empirical Research.

- counseling small businesses and nonprofits;
- representing an Oromo man in his hearing before a federal immigration officer in his effort to be granted asylum in the United States;
- trying a police brutality case for a homeless man arrested for loitering;
- appealing a denial of disability benefits for a Cambodian refugee with post-traumatic stress disorder;
- representing a gay rights organization in its claim of discrimination against a newspaper, before a civil rights agency and in state court;
- giving voice to a deaf child in his quest to be adopted; and
- founding and running an organization that provides legal information to cancer patients and their families.

Taken together, the stories thus capture the wide range of legal pro bono activities—representing individuals in various tribunals, of course, but also providing a listening ear and some words of advice, assisting very small businesses and nonprofits, creating and coordinating legal support organizations, and issue activism. The stories also capture the issues in our society that demand the attention of pro bono lawyers, as the lawyers seek to provide a longer life, safety, work, housing, mobility, a country, dignity, minimal income, freedom of expression, family, and the comfort of legal knowledge to their clients.

Less obvious from the list of chapters is the range of narrators who tell their stories here. They are employed in law firms, corporations, government law offices, and academia. They are men and women; white, Native American, and African American; Lutheran, Catholic, Jewish, Muslim, and non-religious; gay and straight. They were born between 1944 and 1975. They were raised in various circumstances and places.

The narrators share one trait with me: living and practicing in Minnesota. This, of course, facilitated the in-person interviews that became the stories printed here and also provided me an easier understanding of their context. Although the stories thus should not be seen as a representative national sample of pro bono work, they nonetheless provide a compelling glimpse into the needs of one area's vulnerable citizens and the response of that area's committed lawyers.

All of the stories are told substantially in the narrator's own words. One (*Basketball*) was written by the narrator. The others were told to me in interviews, transcribed, slightly shaped and edited, reviewed by the narrators, and then filled out with the materials presented in italics. For confidentiality, many narrators' and nearly all of the clients' names are pseudonyms.

Through the many hours of working with the stories and discussing them with people who have nurtured this project for two years, several themes came to light. They are reflected in the arcs of each story, the images I have chosen as the story titles, and the questions that follow each story.

Rule 6.1 did not drive the narrators to perform pro bono. Rather, they learned to serve others as they were growing up from their parents' teachings or, more often, examples. Some ground their commitment to service in their religious beliefs. Some have past experiences akin to the challenges their clients face, whether poverty or limited resources, sexual abuse, military service, a different cultural background, discrimination, a false accusation, or watching a loved one struggle with cancer.

These beliefs and experiences provided the narrators with empathy. By "empathy," I mean an ability to imagine what it would be like to be in the client's situation, to understand its positive and negative aspects, to share some of the feelings the client expresses—and yet maintain some separation, not lose one's bearings. Empathy permits the lawyer to assert, with authenticity, a willingness to help.⁴

This empathy saw the narrators through one challenge of pro bono work—stepping outside one's usual practice setting. In most of the stories, the lawyers were operating in an unfamiliar setting, whether Congress, a courthouse in Alabama, a hearing room at the airport, or a city civil rights agency. For most, the legal rules were new and the procedures foreign. The narrators faced uncertainty, a definite risk of making mistakes, and the very real possibility of looking inexperienced. Most lawyers desperately dislike these things. The narrators' commitment to serve and the satisfaction of the work, along with their core legal skills, got them through.

Their empathy also saw them through the most difficult challenge of pro bono work—connecting in a meaningful way with one's client. This is not an easy thing to do. As with any case, the pro bono lawyer must learn enough about the client's situation to provide well-informed representation, by gaining the client's trust, investigating the client's specific problem thoroughly, and coming to know about the client's world. The problems of pro bono clients may be deeply difficult; learning about them may be heart-rending and haunting. The pro bono lawyer must be willing to learn about these lives.

And then the lawyer must maintain a certain distance, respect the boundary that permits objective and ethical legal representation. In legal ethics, that

4. The concept of empathy is complicated. For a more in-depth discussion, see Stephen Ellmann et al., *Lawyers and Clients: Critical Issues in Interviewing and Counseling* 18–71 (2009).

boundary is functionally defined—the lawyer is to provide only *legal* assistance. This is difficult to do when the client needs much more and, in some cases, the lawyer could provide more.

Finally, not surprisingly, the lawyers became personally and emotionally invested in their work. Although not all of the narrators said it, one gets a sense from the stories that pro bono work is more emotionally charged than the lawyers' regular work. The stakes are more fundamental for the client. For the lawyer, success is more exhilarating; failure is more deeply disappointing. And the stakes go beyond the immediate representation. One cannot help but reflect on the broader issues—on the injustice—the client's situation reveals. As rewarding as it can be to know one is making a contribution, it can be deeply vexing to realize there is no clear solution to the broader problem and that one's efforts, although valuable, are of limited effect.

The title for this book, *Thorns and Roses*, is a reflection activity. When my husband went on service trips with the youth of our church, they would reflect at the end of each day on what was painful or troubling (the thorns) and what was beautiful or gratifying (the roses). Thorns are, of course, a part of a rose. My hope is that you find the thorns and the roses in every story.

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Empirical Research

Beginning in 2005, I conducted a program of empirical research involving over 1,000 law students and lawyers, who participated in small conversation groups and filled out various surveys. This research was conducted through William Mitchell College of Law and with the collaboration of the Minnesota Justice Foundation, which very ably provides pro bono programs for all four Minnesota law schools, and the Minnesota Center for Survey Research. The research was supported by a grant from the Minnesota Office of Higher Education. The results are reported in four papers:

- *Priming for Pro Bono Publico: Inculcating a Norm of Public Service in New Lawyers*, in Robert Granfield & Lynn Mather (eds.), *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Oxford Univ. Press 2009);
- *Pro Bono Publico as a Conscience Good*, 35 Wm. Mitchell L. Rev. 977 (2009);
- *Priming for Pro Bono: The Impact of Law School on Pro Bono Participation in Practice*, in A. Sabitha (ed.), *Public Interest and Law: Theory and Practice* (Icfa Univ. Press 2008); and
- *Create a Magnet: Using Empirical Studies to Draw Lawyers to Pro Bono Service*, 10(2) Dialogue 1 (spring 2006) (with Steven B. Scudder).

Private Lawyers and the Public Interest, edited by Robert Granfield and Lynn Mather, is essential reading for an in-depth understanding of legal pro bono.

Our major survey involved 420 new lawyers. We not only inquired about their thoughts and experiences but also about their actual performance of pro bono in two years, differentiating between access pro bono and civic pro bono. Roughly speaking, access pro bono was defined as representing individuals of limited means, and civic pro bono was defined as representing organizations that serve the public interest and efforts to improve the legal profession. We statistically correlated the new lawyers' thoughts and experiences to participation in pro bono. Note that a correlation shows parallelism (X and Y occur together), not always causation (X causes Y).

The additional surveys involved first-year law students, mid-level law students, and experienced lawyers. We did not obtain participation data from these groups, so we cannot report correlations. However, their responses provide interesting insights into various ways of thinking about pro bono.

From these surveys, as well as the social science literature regarding volunteering on which the surveys relied, we developed the following MOVE model of why lawyers participate in pro bono. That is, the decision to participate in pro bono derives from motivations, obligation, views, and experience.

Motivations

Of the six motivations for volunteering, the three weightiest motivations were:

- values—doing something for a cause, principle, or group that matters to me;
- enhancement—helping me feel better about myself; and
- understanding—allowing me to gain a new perspective on things.

Law students saw values in terms of groups, more so than causes or principles. While groups continue to matter, as lawyers become more experienced, principles become more significant.

Less weighty motivations were:

- career—helping me succeed in my career;
- social—aligning me with others with whom I am close; and
- protective—helping me with my personal problems.

Among new lawyers, the values, understanding, career, and social motivations correlated with performance of pro bono. That is, lawyers who rated these motivations highly performed more pro bono than lawyers who did not.

Obligation

A conundrum exists in the literature on volunteering: Requiring a reluctant person to serve reduces the impulse to serve when the requirement passes. An incentive to serve may draw some reluctant people to serve (the price effect)—but it may also dilute the impulse to serve among those who are intrinsically motivated to do so (the crowding-out effect).

This relates to the issue of whether to require pro bono, in law school or in practice. Law students responded to the differences between the following stances:

a requirement to serve, a requirement to report any service performed (in force in a small number of states), and a purely aspirational rule (by far the dominant model). That is, the stronger the rule, the more likely they were to serve.

One view of volunteering is that it is not really voluntary but rather a response to social pressure; the vast majority of volunteering is in response to someone's request. For law students, the nature of the invitation matters, with a friend's and a firm partner's in-person invitations markedly more influential than a letter from the bar association president and state supreme court chief justice.

Views

Among the new lawyers, self-identified liberals performed more pro bono than self-identified conservatives. New lawyers who attributed poverty to social causes participated more in access pro bono than lawyers who attributed poverty to individual causes. New lawyers who believed that social problems are best solved through institutional change, versus individual change, performed more pro bono, especially access pro bono. (Interestingly, and unfortunately, a smaller percentage of new lawyers than law students adhered to the social-causes and social-solution views.)

One explanation for this pattern of responses is the just-world hypothesis. Most people tend to denigrate those in need by seeing them as lazy or otherwise less worthy. This derogation reduces the impulse to help. Seeing an early pro bono client in these terms may reduce the likelihood of doing more pro bono.

Experiences

Among the new lawyers, not surprisingly, being raised to do volunteer work correlated with performing access pro bono. New lawyers who saw themselves as similar to their pro bono clients performed more access pro bono, while lawyers who saw little similarity performed more civic pro bono.

William Mitchell has a voluntary public service program, which includes special recognition for fifty hours of service. Participation in that program correlated with performing pro bono during early practice years as follows:

- Fifty-hour participation correlated with combined, especially civic, pro bono.
- Any amount of volunteering correlated with combined, especially civic, pro bono.

- Participation in a pro bono placement involving courtroom representation correlated with combined, especially civic, pro bono.
- Participation in discussion of broad social issues correlated with access pro bono.
- Reflection on one's reaction correlated with civic pro bono.
- Taking a clinic course correlated with access pro bono.

The new lawyers provided a variety of insights into their views of their pro bono work. The similarity between new lawyers' regular work and pro bono work varied: 31% identified the two as not at all similar, 21% a little bit, 24% somewhat, 24% to a great extent. The most commonly listed emotions felt when performing pro bono work were satisfaction (19%) and frustration (14%); the most common attitudes towards clients were empathy (30%) and frustration (13%). Two-thirds felt these emotions and attitudes intensely. Their pro bono work was more satisfying than regular work in terms of the work's connection to broader social issues and the amount of autonomy and responsibility (but not intrinsic interest or recognition).

For experienced lawyers, the likelihood of taking a second case was greater when the first case was straightforward and the lawyer won it.

Finally—and this result is one of the most consistent across all studies—employer support correlated with performing pro bono, especially access pro bono, for new lawyers.