

LAW FIRM PRO BONO

REVISITING THE BUSINESS CASE FOR LAW FIRM PRO BONO

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“As businesses, we have a responsibility to society. . . . Let me be clear about this point[,] there is no conflict between delivering value to shareholders and helping solve bigger societal problems.”¹

“When we come out of this fog, this notion that companies need to stand for something—they need to be accountable for more than just the money they earn—is going to be profound.”²

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1. H. Lee Scott, Jr., Chairman and Former CEO of Wal-Mart, Remarks to the National Retail Federation (Jan. 12, 2009).

2. Jeffrey Immelt, Chairman and CEO of General Electric, Remarks at the Business for Social Responsibility Conference (Nov. 6, 2008).

I. INTRODUCTION

The world and the practice of law have changed significantly since the Pro Bono Institute (PBI) originally published *Making the Business Case for Pro Bono* in 2000.³ Many of the benefits of pro bono work (both the easily measureable ones and those less quantifiable) continue to validate a hard-nosed business rationale for pro bono and for institutional law firm engagement. Indeed, many of the arguments originally advanced in 2000 not only remain vibrant, but they have been adopted by other professions and organizations seeking to promote professional volunteerism, as this is one area where lawyers are proudly at the forefront.⁴

With the legal profession at a crossroads, and thanks to the timeliness of this symposium, now is a particularly appropriate time to revisit the themes that were first articulated in that seminal article. The severity and duration of the current economic recession and its impact on law firms' revenues, operations, and individuals has been profound and well-documented and analyzed. Reductions in force; smaller or no summer associate programs; smaller incoming classes of new associates, if any; deferral of starting dates and even rescissions of offers; salary freezes and rollbacks; limited recruiting schedules; changes in bonus policies and amounts; the end of lockstep compensation; greater scrutiny of budgets, including charitable giving amounts; travel restrictions; alternative billing arrangements with corporate clients; smaller classes of attorneys being promoted to partner; and the elimination of practice areas that are not considered "centers of excellence" all signal an economic downturn in the legal

3. ESTHER F. LARDENT, MAKING THE BUSINESS CASE FOR PRO BONO (Pro Bono Institute 2000). Established in 1996, PBI is a nonprofit organization that provides research, consultative services, analysis and assessment, publications, training, and inspiration to a broad array of legal audiences seeking to expand and enhance access to justice for the poor and disadvantaged and also promotes effective and productive partnerships between and among major law firms, in-house corporate legal departments, public interest organizations, and others. Consistent with its mandate, PBI focuses not only on promoting replication of well-established approaches, but also serves as a catalyst for new ideas and cutting-edge innovation. PBI administers a number of projects designed to enhance access to justice, including: the Law Firm Pro Bono Project[®]; Corporate Pro Bono; Second Acts[®]; Global Pro Bono; and the Public Interest Pro Bono Project. See The Pro Bono Institute, <http://www.probonoinst.org/> (last visited Aug. 2, 2010).

4. See, e.g., CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, CAPITALIZING ON VOLUNTEERS' SKILLS: VOLUNTEERING BY OCCUPATION IN AMERICA 4 (Sept. 2008), available at <http://www.volunteeringinamerica.gov/assets/resources/VolunteeringbyOccupation.pdf> (noting that "[t]he legal profession is a leading example of a field where its professionals use their skills when performing their volunteer activities").

economy that is unprecedented in our lifetime. At this time of upheaval, uncertainty, and anxiety, it is not yet clear how our legal institutions will emerge. Some traditional aspects of the business case for law firm pro bono may not seem particularly relevant at the moment and other aspects may need to be reworked or rethought for a changed economic climate. While some of the benefits of pro bono are relatively easy to quantify, others are not. While some pluses resulting from a firm culture that is supportive of pro bono will be immediately apparent, other beneficial results will become known only with the passage of time. Nevertheless, this is a ripe opportunity to pause and consider how pro bono could fit into the new legal landscape and benefit law firms and lawyers at all stages of their careers. Even if it may be premature to fully articulate the new business case for pro bono, we are in a position to take stock and re-examine the traditional arguments that are now a decade old.

Given the business pressures of law firm practice today, it is critical that pro bono supporters persuasively identify the aspects of pro bono work that, when appropriately structured and woven into the fabric of the firm, yield important benefits for the law firm and its attorneys, as well as for pro bono clients and the communities served. A firm's investments in pro bono can and will, in the long term, strengthen the institution itself, its ability to attract and serve its commercial clients, and make its professionals better (and perhaps even happier) lawyers. While it is generally accepted that the traditional view of pro bono programs as being a weak "add-on" that may distract from the firm's core functions is outdated, "[t]oday, observers from a variety of sectors propose that not only is corporate citizenship consistent with good business practice, it is in fact a business essential."⁵ In today's corporate world, however, it is not enough to simply believe in the perceived benefits of a pro bono program. Rather, it is increasingly imperative and valuable to be able to measure and to demonstrate how—and to what extent—these programs make a difference and have an impact.

II. THE "NEED"

In making the case for why lawyers—and law firms as institutions—should undertake pro bono work, supporters of pro bono service have traditionally focused on the compelling need for

5. STEVEN A. ROCHLIN & BRENDA CHRISTOFFER, MAKING THE BUSINESS CASE: DETERMINING THE VALUE OF CORPORATE COMMUNITY INVOLVEMENT 4 (The Center for Corporate Citizenship at Boston College 2000).

such assistance. Sadly, since the business case was first articulated in 2000, that need has not abated. Countless national, state, and local studies have detailed the appalling gap that persists between the millions who need, but are unable to afford or obtain, the specialized knowledge and skills of legal professionals to protect and vindicate basic human needs and fundamental rights versus the limited resources available to meet those needs. For example, The Legal Services Corporation (LSC) released a 2009 report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, which found that “for every [person] served by an LSC-funded legal aid program, at least one eligible person seeking help will be turned down,” equaling about *one million* people denied legal services.⁶ This new study updates and reaffirms the LSC’s earlier findings from 2005.⁷

The LSC used three methodologies to obtain data relied on in this report.⁸ First, from March to May 2009, the investigators surveyed 137 LSC programs, with 918 offices, to document the number of people seeking legal aid who could not be served due to lack of programmatic funding and resources.⁹ Besides the one million people being rejected due to lack of resources, this figure does not include people who were similarly turned away from non-LSC-funded programs and those who did not seek legal help at all; therefore, this number represents only a fraction of the level of unmet need and is significantly under-inclusive.¹⁰ Second, they relied on data provided by state legal needs studies, which numerous states conduct to ascertain the nature of their low-income residents’ legal problems and whether their legal needs are met.¹¹ Based on the findings from seven states (Alabama, Georgia, Nevada, New Jersey, Utah, Virginia, and Wisconsin), the report concluded that “low-income households experience a per-household average of legal needs ranging up to three legal needs per year” and “only a small fraction of the legal problems experienced by low-income people (less than one in five) is addressed with the assistance of a private or legal aid lawyer.”¹² Third, they

6. THE LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9, 12 (2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

7. *Id.* at 1.

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 9–10.

11. *Id.* at 13.

12. *Id.*

compared the number of legal aid lawyers to the number of private lawyers, per capita.¹³ The count of legal aid attorneys included attorneys in all programs providing civil legal help to low-income people, not just those in LSC programs.¹⁴ The count of private attorneys providing personal legal services to the general population was based on estimates obtained from the American Bar Association.¹⁵ The comparison found that “[n]ationally, on the average, there is one legal aid attorney (including those funded by *all* sources) available to serve 6,415 poor people. . . . In comparison, there is one private attorney providing personal legal services for every 429 people in the general population.”¹⁶

In Washington, D.C., a comprehensive study prepared in 2008—with the help of pro bono counsel—found, in part, that: (1) 97% of tenants who go to court as defendants over disputes with their landlords are not represented; (2) 98% of domestic violence victims are unrepresented (same figure for respondents); and (3) 98% of respondents were unrepresented in paternity and child support cases.¹⁷ And, on and on and on.¹⁸

III. THE “DUTY”

In addition to the pervasive need, other supporters of law firm pro bono focus on our ethical obligations—it is every lawyer’s fundamental responsibility to ensure equal access to justice. Embedded in this ethical imperative is the pivotal role pro bono plays

13. *Id.* at 19.

14. *Id.*

15. *Id.*

16. *Id.* at 22.

17. DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY 9 (2008) (prepared with pro bono assistance from DLA Piper LLP), available at <http://www.dcaccessjustice.org/files/CivilLegalNeedsReport.pdf>; see also DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION & D.C. CONSORTIUM OF LEGAL SERVICES PROVIDERS, RATIONING JUSTICE: THE EFFECT OF THE RECESSION ON ACCESS TO JUSTICE IN THE DISTRICT OF COLUMBIA 2 (2009).

18. These statistics and the pervasive and profound justice gap might make us wonder: Do pro bono efforts make a difference? While we cannot rely on the good intentions and efforts of pro bono lawyers alone to solve all of these problems, it is cynical to the extreme to conclude that they cannot play a significant role or have a positive impact. To that end, a great deal of attention and thought is now being paid on structuring pro bono engagements to ensure that they are effective and address systemic issues. Likewise, there is a relatively new effort to develop metrics to better assess the qualitative impact of pro bono work, rather than continuing to focus solely on quantitative measures. See, e.g., Esther F. Lardent, *Letter from Esther: Measuring the Quality and Impact of Pro Bono Service*, THE PRO BONO WIRE (Dec. 2009).

in maintaining the professionalism of the legal profession.¹⁹ As lawyers seeking to preserve the highest ideals of our profession, we must concern ourselves not only with the bottom line, but also with the greater public good. As Robert Katzmann has eloquently explained:

The fundamental basis of the lawyer's responsibility to ensure justice and to address the needs of those in society unable to pay can be understood by appreciating a simple proposition: access to minimal legal services is necessary for access to the legal system, and without access to the legal system, there is no equality before the law. The lawyer becomes the critical medium by which access to that legal system and the concomitant opportunity to secure justice is achieved.²⁰

A complex, adversarial system simply cannot function properly if all parties do not have access to competent legal services. That dynamic is at the heart of what makes the legal profession different from other professions.²¹

IV. THE "ECONOMICS"

Since pro bono matters do not, except in unusual circumstances,

19. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009) (establishing that a lawyer should have a goal of providing at least fifty hours of pro bono service each year); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1149 (1990) (stating that "a lawyer seeks to serve his clients and the public good, and these commitments are not seen as mutually exclusive"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 67 (1992) (advocating that a "lawyer has an ethical obligation to practice public interest law—to represent some poor clients; to advance some causes that he or she believes to be just"); Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, But Also The Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122, 2122 (1993) (agreeing with Judge Edwards that lawyers have an ethical obligation to engage in pro bono work and explaining that by doing pro bono work lawyers benefit both the public and themselves).

20. ROBERT A. KATZMANN, *Themes in Context, in THE LAW FIRM AND THE PUBLIC GOOD* 1, 5–7 (Robert A. Katzmann ed., 1995) ("A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.").

21. David Luban explains the difference between lawyers and other professionals and providers of goods and services:

[T]he lawyer's lucrative monopoly would not exist without the community and its state; the monopoly and indeed the product it monopolizes is an artifact of the community. The community has shaped the lawyer's retail product with her in mind; it has made the law to make the lawyer indispensable. The community, as a consequence, had the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose.

DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 286 (1988).

generate fees, it has been generally assumed that pro bono service is a financial drain on law firms and, as such, that it may create an economic disadvantage for firms that dedicate a significant amount of time to pro bono matters.²² Yet, those who claim that one has to choose between having a profitable law firm and one that performs significant and meaningful pro bono work are creating a false choice. In a groundbreaking study on the relationship between economic performance and pro bono activity at large law firms, Marc Galanter and Thomas Palay analyzed data on firm finances and pro bono scores of the nation's largest 100 law firms published in *The American Lawyer* between 1990 and 1993 to determine the connection between pro bono and law firm profitability.²³ While the sample of firms studied was relatively limited and the data suffered from a number of "defects," the numbers did "provide a revealing glimpse of patterns."²⁴

Galanter and Palay studied the relationship between law firm pro bono contributions and different measures of firm economic performance, such as "total numbers of lawyers, total number of partners, total numbers of associates, gross revenue, revenue per lawyer, profits per partner, the ratio of associates to partners, and the

22. The Pro Bono Institute Law Firm Pro Bono Challenge[®] encourages law firms to seek awards of attorneys' fees in appropriate pro bono cases as both a matter of public policy and as a source of funding for public interest organizations and "[f]irms that receive fees in such cases are strongly encouraged to contribute an appropriate portion of those fees." In handling these cases, law firms are acting as "private attorneys general" enforcing legal rights, promoting access to justice for those who would otherwise be unable to pursue their cases, and uncovering and deterring unlawful behavior. Seeking attorneys' fees on behalf of pro bono clients, like seeking damages or other forms of relief, increases the deterrence benefits of these cases by making defendants pay the full costs associated with their behavior. Moreover, the mere possibility of an award of attorneys' fees can be a useful tool during settlement negotiations; leverage that would be lost if such awards were known to be unavailable in pro bono matters. Responses to surveys conducted by PBI showed that, in practice, relatively few pro bono cases generated fee awards, and the bulk of the funds awarded were either donated to public interest organizations or retained to augment a firm's pro bono budget and capacity to handle additional pro bono matters. See THE PRO BONO INSTITUTE, LAW FIRM PRO BONO CHALLENGE: COMMENTARY TO STATEMENT OF PRINCIPLES 7 (2008), available at <http://www.probonoinst.org/challenge.text.php>.

23. MARC GALANTER & THOMAS PALAY, *Public Service Implications of Evolving Law Firm Size and Structure*, in THE LAW FIRM AND THE PUBLIC GOOD, 19, 41-46 (Robert A. Katzmann ed., 1995).

24. *Id.* at 41. The formula used by *The American Lawyer* to assess law firm pro bono programs is particularly suspect since it places a premium on the number of lawyers at a firm who contribute at least twenty hours of pro bono—a metric with no logical foundation and vulnerable to manipulation. There are firms whose pro bono "commitment" consists of an effort to rotate as many lawyers as possible through twenty hours of engagement, which is far from an ideal arrangement for either lawyers or pro bono clients.

firm's estimated profit margin."²⁵ They found that generally "the total number of hours of pro bono activity was most strongly associated with the size of the firm, the number of associates, and the firm's gross revenues."²⁶ Galanter and Palay concluded that "the data suggest that the larger the firm and the greater its gross revenues the more willing it will be to encourage or permit pro bono activity."²⁷ Unfortunately, no one has yet published an updated version of Galanter and Palay's original analysis.

Nevertheless, we have additional and more current data from the Pro Bono Institute's Law Firm Pro Bono Challenge[®]. The Challenge, which was launched in 1993 and implemented in 1995, is a unique, aspirational pro bono standard. Developed by law firm leaders and corporate general counsel, the Challenge articulates a standard for one key segment of the legal profession—major law firms (firms with more than fifty attorneys).²⁸ It uses a progressive standard, which a firm selects—i.e., a target of either three or five percent of a firm's billable hours (equivalent to sixty or one hundred hours per attorney) that ties pro bono performance to firm productivity and profitability.²⁹ It "calls for an institutional commitment, rather than an individual lawyer goal, in recognition of the [reality] that the policies and practices of larger law firms are key to the ability and willingness of firm lawyers to undertake pro bono work."³⁰ The Challenge creates goals, "not only with respect to the amount of pro bono work to be undertaken, but also with regard to the structural and policy elements that are essential for the creation and maintenance of a pro bono-friendly firm culture."³¹ It includes an accountability mechanism and an outcome measurement through its annual reporting requirement.³²

By way of context, in 2008, a year in which the legal services industry began to strongly feel the impact of the recession, Challenge Signatory law firms contributed approximately five million hours of pro bono service, as defined relatively strictly by the Challenge, which

25. *Id.* at 43.

26. *Id.*

27. *Id.*

28. *See* The Pro Bono Institute, Law Firm Pro Bono Challenge, <http://www.probonoinst.org/challenge.php> (last visited Aug. 2, 2010).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* For additional background and history, *see* Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in *THE LAW FIRM AND THE PUBLIC GOOD* 59, 78–82 (Robert A. Katzmann ed., 1995).

represented a 13% increase over 2007.³³

With the assistance of Professor Ken Dau-Schmidt of the Indiana University Maurer School of Law, the Pro Bono Institute is conducting an empirical analysis of the Challenge over its life, from 1995 to 2006, which looks at overall trends, regional comparisons, and more, including how a firm's pro bono commitment and performance varies according to firm profitability. Using profitability data from *The American Lawyer*, preliminary results indicate that, consistent with the findings of the Galanter and Palay study discussed above, the most profitable firms have also dramatically increased their pro bono performance. As their profits have increased, so too has their pro bono performance: their pro bono hours are higher, they meet their Challenge goal, and they have higher attorney participation rates—although that differential was less dramatic. Even for pro bono supporters, these results may be surprising and encouraging.³⁴

In *The Economics of Pro Bono Work*, Jack Londen makes a compelling case for pro bono work as, at worse, a marginal expense for law firms.³⁵ When examined closely, even the most expansive law firm pro bono programs are either revenue neutral, or, potentially, even a revenue enhancer. Londen's argument, which is consistent with Galanter and Palay's research discussed above, is essentially three-fold: First, "the usual measure of the economic impact of *pro bono* work—the amount of revenue that the *pro bono* hours would have generated—is clearly not a valid measure" since "[i]t is simply inaccurate to assume that every hour of *pro bono* work would otherwise have been spent on billable work."³⁶ This flawed assumption is especially overblown in this climate with the general slowdown in billable work. Moreover, firms "rarely . . . decline attractive billable engagements because [their] lawyers are too busy (with *pro bono* work or otherwise)."³⁷ "Second, even when properly measured as a

33. As US Law Firms Shed Lawyers, Pro Bono Work is up, <http://www.jdjournal.com/2009/07/24/as-us-law-firms-shed-lawyers-pro-bono-work-is-up/> (last visited Aug. 2, 2010).

34. The numbers are equally encouraging when analyzed at the level of the individual lawyer and billable hours. PBI has worked with several firms that have "run the numbers" and compared billable hours for their lawyers with those lawyers' pro bono hours, and the results are remarkable and consistent. The lawyers with the highest billable hours also have the highest pro bono hours. See GALANTER & PALAY, *supra* note 23, at 41–43.

35. Jack Londen, *The Economics of Pro Bono Work*, 15 CHALLENGE SIGNATORIES UPDATE 1–4 (1997); see also Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 GEO. J. LEGAL ETHICS 925, 925–26 (1996).

36. Londen, *The Economics of Pro Bono Work*, *supra* note 35, at 1.

37. *Id.* at 2.

cost item rather than a revenue drain,” the true cost of a pro bono program “comprises a much smaller fraction of a firm’s budget than the superficial view suggests.”³⁸ “Third, the indirect effects of a *pro bono* program can have a positive impact on revenue—by attracting, retaining, and publicizing lawyers who become rainmakers in their paying work.”³⁹ In sum, “the negative economic effects of *pro bono* work are almost always exaggerated, and are usually considered in isolation from the positive effects.”⁴⁰ “Indeed, the positive economic effects of a strong *pro bono* program can result, long term, in enough additional revenue to offset much or all of a firm’s cost of doing *pro bono* work.”⁴¹

Although the costs associated with a pro bono program may be more easily quantifiable, the benefits, as we explore below, are equally real.⁴² These arguments echo the findings that chart the growing commitment of major corporations to volunteer and participate in community service programs. Corporations frequently report that they support volunteer efforts, not only because they view themselves as stakeholders in their communities, but also because they address important business goals, including attracting and keeping a quality workforce and improving their image and appeal with consumers of their goods and services.⁴³

38. *Id.* at 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. See Glenn Graner, *Pro Bono is Profitable: A CFO’s View*, LAW JOURNAL NEWSLETTERS: ACCOUNTING AND FINANCIAL PLANNING FOR LAW FIRMS, Apr. 2004, at 4–5, 8. Graner, a former CFO of what is now K&L Gates, argues that:

In the long run, a successfully administered pro bono program will have positive financial benefits for any law firm. Those financial benefits may not be easily quantifiable—e.g., how can one gauge the “newfound” profits generated by a great young lawyer who decides to stay at your firm—but for those firms committing to a long-term program, rewards will become fully evident over time.

Id. at 8.

43. See, e.g., LBG ASSOCS., CAN CORPORATE VOLUNTEERING SUPPORT THE BOTTOM LINE? THE CHALLENGE. THE OPPORTUNITY. THE CASE FOR INVESTMENT 6–8 (2005); THE CTR. FOR CORPORATE CITIZENSHIP AT BOSTON COLLEGE, THE STATE OF CORPORATE CITIZENSHIP IN THE U.S.: A VIEW FROM INSIDE 2003–2004 9–18 (2004).

V. THE “CLIENTS”

A. *Client Relationships*

As corporate clients routinely transfer business; aggressively bid out work; negotiate for reduced rates; pare down the list of firms with whom they work; refuse to pay for new associates to work on their matters; and closely scrutinize and question bills, law firm and corporate client relationships these days are fraught with tension and uncertainty.⁴⁴ As a buttress to these challenges, an increasing number of law firms jointly undertake pro bono work with the legal departments of corporate clients. Joint pro bono ventures offer an opportunity to interact socially and professionally with clients on matters of common concern outside the commercial arena.

Since firms, for the most part, are far more experienced in the substantive law and secondary issues involved in pro bono work, these joint ventures offer a subtle but effective opportunity for law firms to demonstrate their skills, capacities, and expertise. In addition, jointly sponsored clinics and other pro bono projects are opportunities for teamwork that can lead to closer personal and professional relationships.

Corporate Pro Bono (CPBO), an initiative developed and administered by PBI and the Association of Corporate Counsel, is a concrete embodiment of the growing participation in pro bono service among legal departments and their interest in the pro bono commitment of their outside counsel firms.⁴⁵ CPBO is designed to institutionalize pro bono at in-house corporate legal departments and to expand pro bono by in-house legal staff.⁴⁶ The trajectory of interest since its founding in 2000 has been remarkable. CPBO administers a Corporate Pro Bono ChallengeSM (a companion to the Law Firm Pro Bono Challenge), and in just a few short years since its launch in 2006, is closing in on 100 Signatories.⁴⁷ While it may seem counterintuitive, the level of interest in pro bono among legal departments has increased substantially during the past two years as departments

44. See, e.g., Association of Corporate Counsel Value Challenge, <http://www.acc.com/valuechallenge/> (last visited Aug. 2, 2010) (detailing the initiative to realign the legal business model).

45. See The Corporate Pro Bono Challenge, <http://www.cpbo.org/archive/news/news1388.pdf> (last visited Aug. 2, 2010) (stating the background and initiatives of the Corporate Pro Bono Challenge).

46. *Id.*

47. *Id.*

respond to the sharp spike in legal needs and as the in-house legal community recognizes that pro bono is feasible and beneficial for legal departments. Notably, many of the companies most hurt by the current economic downturn are not just continuing their pro bono efforts, they are expanding them. At a time when pricing and staff concerns are sources of friction between legal departments and their outside counsel, a shared commitment to pro bono can be a point of entry and an opportunity to team together, to feel good about working together, and to enhance the professionalism of all involved.

B. Business Development Asset

Increasingly, major corporations are viewing good corporate citizenship and strategic philanthropy as important elements of the culture of an effective institution and as solid business practice. Major law firms should take note of the heightened interest in good works among leading corporations. Indeed, clients are demonstrating that they care about pro bono by inquiring about a law firm's commitment to pro bono activities in "requests for proposals" for legal work. They are asking not only general questions about a firm's pro bono program, but also specific questions about the pro bono activities of the lawyers who will be billing time to their matters.⁴⁸

Cause branding and marketing is a relatively young research field. "A 1999 report issued by Cone, Inc. and the Roper survey research firm found, for example, that hundreds of corporations [were] increasingly committing substantial resources to good cause campaigns," which has been confirmed by subsequent studies.⁴⁹ This trend was due to businesses seeking to make a positive difference in the communities in which they locate their facilities and market their products. However, associating with good causes is also good for business, as research has proven. "In a survey of consumers, the Cone/Roper report found that two-thirds of the respondents reported that, if price and quality of a product are equal, they would switch to a brand or retailer associated with a good cause[, 61%] thought cause-related marketing should be a standard business practice, and 84[%] noted that they have a more positive image of companies that support

48. See, e.g., Michael Moline, *Better To Light A Candle . . .*, THE NAT'L LAW JOURNAL, Jan. 4, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437358372> (stating that "in-house counsel have begun requiring firms bidding for business to disclose their pro bono practices. This reflects . . . [a realization] that pro bono has become a moral and professional litmus test.").

49. LARDENT, *supra* note 3, at 12.

a cause they care about.”⁵⁰ The report further cited that companies now undertake “cause branding,” making a long-term commitment to causes that become part of the corporate identity and culture.⁵¹

More recent studies document that these views have strengthened since the research originated and endure despite the prolonged recession. By 2007, 83% of Americans believed that “companies have a responsibility to help support causes, and 92[%] acknowledge they have a more positive image of a company that supports a cause they care about.”⁵² In response to a survey conducted in 2008, more than 75% of the surveyed consumers indicated that companies “should still support social or environmental causes and non-profit organizations during an economic downturn.”⁵³ Likewise, in 2009 the Edelman Goodpurpose™ Consumer Study found that “in both harsh and rebounding economies, brands will continue to benefit from identifying and contributing to a positive social purpose that makes sense for their business.”⁵⁴ Nevertheless, a “brand purpose must be authentic and true to the core values of the brand itself, and brands must look beyond traditional corporate social responsibility programs in which they simply donate money to a good cause [as] 66[%] of people believe that it’s no longer enough for corporations to merely give money away, but that they must integrate good causes into their day-to-day business.”⁵⁵

50. *Id.* The number of Americans who are likely to switch from one brand to another (price and quality being about equal) if the other brand is associated with a good cause has been steadily increasing: according to a 2007 Cone survey 87%, up from 66%, would switch. CONE, INC., RESEARCH REPORT: 2007 CONE CAUSE EVOLUTION & ENVIRONMENTAL SURVEY 7 (2007), available at http://www.coneinc.com/stuff/contentmgr/files/0/a8880735bb2e2e894a949830055ad559/files/2007_cause_evolution_survey.pdf.

51. CONE INC., CONE/ROPER EXECUTIVE STUDY 2 (2000), available at <http://www.coneinc.com/research/archive.php>. A similar study found that corporate good citizenship was an important consideration. When respondents were asked what philanthropic activities were considered most impressive, the two top answers were “donating products and services” and “volunteering employees to help.” LARDENT, *supra* note 3, at 12; see also LBG ASSOCS., *supra* note 43, at 4.

52. Americans Scrutinize Business Practices in Deciding What to Buy, <http://coneinc.com/content1117> (last visited Aug. 2, 2010).

53. Jayne O’Donnell, *Despite Tough Times, Retailers Are Giving More to Charity*, USA TODAY, Dec. 24, 2008, at 1b.

54. Despite Prolonged Global Recession, An Increasing Number of People Are Spending on Brands That Have Social Purpose, <http://www.edelman.com/news/ShowOne.asp?ID=222> (last visited Aug. 2, 2010).

55. *Id.* at 2.

C. *Marketing the Firm*

In the current highly competitive environment, firms are increasingly focused on marketing their services to retain current clients and attract new ones. As with other firm functions discussed below, pro bono work can be a highly effective marketing tool. Unlike firm brochures, press releases, advertisements, and similar vehicles, pro bono-related publicity is less likely to be viewed as self-serving. Although law firms may consciously market stories about pro bono achievements, the very nature of the work involved makes the stories more credible. In addition, in many instances, publicity about a pro bono matter is generated by a public interest group involved in the matter or that attracts media interest on its own because of the nature of the issue involved. Such placements are inherently more credible than paid advertisements and testimonials.

Even the most interesting and important commercial work undertaken by law firms is unlikely to receive broad coverage and publicity beyond the legal media. Major pro bono matters, or smaller cases with great human interest, are far more likely to receive extensive coverage. Nearly 60% of corporate executives and 50% of community relations managers “believe that their support for volunteerism generates good public relations for their companies and enhances brand recognition.”⁵⁶ A strong majority of executives believe corporate citizenship improves the image and reputation of their company.⁵⁷

In restructuring to achieve greater efficiencies, productivity, and profitability, law firms look to the corporate world for examples of smart business practices to emulate. An analysis of the benefits of pro bono in the law firm context, as well as the greatly enhanced commitments by corporations to volunteerism, reinforces the argument that pro bono is not only right, it is good for business.

VI. THE “PEOPLE”

Especially in this environment of changing structures for advancement and the relationship between partners and associates, career expectations of firm lawyers, and how work gets staffed and billed, pro bono can continue to do “double duty” to enhance a wide range of firm needs and goals. “Talent management” is a holistic

56. LBG ASSOCS., *supra* note 43, at 12.

57. THE CTR. FOR CORPORATE CITIZENSHIP AT BOSTON COLLEGE, *supra* note 43, at 11.

approach that integrates such functions as recruiting, orientation, retention, skills development, evaluation, compensation, and advancement.⁵⁸ Firms' commitments to talent management are demonstrated not only by providing extensive training and resources, but also by clearly communicating expectations and articulating clear professional development goals—from individual performance benchmarks to areas of future professional growth. These benchmarks describe the knowledge, skills (including interpersonal skills), and work experiences (including management, delegation, and the formation of client relationships) that lawyers at firms are expected to master at each stage of their professional development. In addition to outlining clear expectations, firms support their lawyers in obtaining these skills by, among other things, providing feedback and by offering mentoring and coaching. Increasingly, the objective and focus of this more holistic approach to defining and assessing associate performance is to focus associates and partners on creating value for clients and for the firm and on investing in an associate's career development.⁵⁹ Pro bono has a role to play in virtually every aspect of talent management at large law firms.

A. *Training and Professional Development*

It is well-established that pro bono can play a critical role in a lawyer's professional development, and it has become an added focus of significant attention in the current economic climate. Using carefully selected pro bono opportunities as a training vehicle enables law firms to provide a wide variety of high-quality skills training at a relatively low cost.⁶⁰ In addition, since younger lawyers are typically afforded greater autonomy in pro bono matters, they also offer

58. ORACLE, AN ORACLE WHITE PAPER: INTEGRATED TALENT MANAGEMENT: EXTENDING THE VALUE OF A STRATEGIC FRAMEWORK 8 (2008), *available at* <http://www.oracle.com/media/peoplesoft/en/pdf/whitepapers/integrated-talent-management-white-paper.pdf>.

59. See NAT'L INST. FOR TRIAL ADVOCACY, THE FUTURE OF LEGAL EDUCATION: A SKILLS CONTINUUM 7 (2009), *available at* http://www.nita.org/library/documents/PDF/Future_of_Legal_Education.pdf.

60. Deloitte regularly studies volunteerism and the potential of pro bono as a corporate professional development tool. A 2008 phone survey of 250 Fortune 500 human resource managers helps demonstrate the value of pro bono to companies: Ninety-one percent agreed that skills-based volunteering would add value to training and development programs, particularly as it relates to fostering business and leadership skills. Nearly 70% of training and development budgets were projected to remain flat or go down in the next year and all but 2% view pro bono as a low-cost solution. DELOITTE LLP, DELOITTE VOLUNTEER IMPACT SURVEY, 2-3 (2008), *available at* http://www.volunteercalgary.ab.ca/pdfs/deloitte_impact_2008.pdf.

meaningful work experience and accelerated professional development opportunities that benefit the individual attorney, the firm, and commercial clients.

Historically, large firms struggled to provide junior attorneys the opportunity to develop the skills and expertise needed to advance. The issues of skill development and proper “real world” training are getting a lot of focus these days—by legal educators and practitioners alike. We see that vividly in the law school setting with the importance of clinics and clinical training and an emphasis on “experiential learning.”⁶¹ Greater demands on partner time and the growing unwillingness of corporate clients to pay for associate training and apprenticeship have all but eliminated the informal “second chair” training and shadowing experiences enjoyed by associates in the past.⁶² Lack of effective training and professional development opportunities are directly responsible for unproductive or unsatisfactory performance that leads to excessive write-offs, partner frustration and inefficiency, low associate morale, client dissatisfaction, and costly turnover.

In addressing the skill sets necessary for large firm lawyers, in regards to business lawyers and litigators, it is apparent that many pro bono engagements offer the opportunity for in-depth, on-the-job skills training.⁶³ For example, the average landlord/tenant, public benefits,

61. A whitepaper prepared by the National Institute for Trial Advocacy acknowledges that legal academics and law firm leaders agree that new lawyers lack “the real world skills necessary to effectively” meet client needs. “Some of the missing skills include: ethics and professionalism; business acumen; leadership and management; client service and relations; financial/economic analysis; and business development.” The whitepaper offers suggestions for training new lawyers to be able to “hit the ground running,” including integrating pro bono into work allocation systems to better support training and experiential learning opportunities. NAT’L INST. FOR TRIAL ADVOCACY, *supra* note 59, at 2, 6, 8.

62. See, e.g., D.M. Levine, *Where Do Law Firms Go From Here?*, AM. LAWYER.COM, Dec. 4, 2009, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202436083093&slreturn=1&hbxlogin=1> (quoting Citigroup general counsel Michael Hefler who wants associates with concrete skills ready to perform at a top level and is “indifferent about whether they learn that at a law firm or in school, as long as I don’t have to pay for it”). But once associates have developed measurable skills, whether through pro bono work or otherwise, clients are generally willing to pay for them to work on their matters. See also Graner, *supra* note 42, at 5.

63. See AUSTIN G. ANDERSON & ARTHUR G. GREENE, THE EFFECTIVE ASSOCIATE TRAINING PROGRAM: IMPROVING FIRM PERFORMANCE, PROFITABILITY AND PROSPECTIVE PARTNERS 4 (1999) (identifying the basic skills that must be acquired by all successful lawyers, such as: interviewing, planning, problem analysis, investigation, research, recognizing and handling professional and ethical issues, statutory interpretation, client relations, client counseling, general advocacy, negotiation, trial advocacy, writing

or family law matter is likely to involve diagnosis, factual and legal research, discovery, witness preparation, statutory interpretation, negotiation, client counseling, drafting pleadings, trial preparation, trial advocacy, and, in some instances, appellate advocacy and brief preparation. Even the most routine transactional pro bono matters, such as securing 501(c)(3) status or reviewing a lease, offers training in interpretation of statutes and other controlling authorities, client counseling and diagnosis, presenting and weighing alternative solutions, and negotiation.

Not only are pro bono matters highly effective training tools, they offer, by their very nature, the opportunity for firm attorneys to exercise judgment and leadership skills far more independently and at an earlier stage than comparable work for commercial clients. There is frequently a gap between the level and type of work they are actually assigned and the experience and expertise they are required to demonstrate to advance in the firm. In pro bono matters, less experienced lawyers are actually able to try cases, to work personally with a client board of directors, and to handle appeals, albeit with appropriate supervision. In light of the role that pro bono engagements can play in providing excellent training opportunities, it is not surprising that a number of firms are strategically integrating their training and pro bono functions. Firms have hired seasoned law school clinicians/public interest lawyers to oversee both the firms' pro bono programs and clinical skill training efforts.⁶⁴ At other firms, the pro bono leadership works increasingly closely with the firm's training committee and staff, so that each facet of the firm's operations supports the other and staffing assignments can be made in strategic, thoughtful, and holistic ways.

The place of pro bono in the landscape of talent management is becoming more important—and visible—than ever. As more firms eliminate associate classes and lockstep in favor of “core competencies” and competency-based advancement,⁶⁵ pro bono becomes an even more critical tool. Core competencies are expressed in various articulations, such as “legal skills, citizenship, business skills, and clients,”⁶⁶ “quality of substantive work, quality of client

with clarity and precision, designing and drafting contracts and other documents, case management, time management, supervising others, diagnosing client's problems, dealing with difficult clients and opposing counsel, and counseling clients).

64. See, e.g., Marc Kadish, *To Do or Not to Do—Pro Bono Work in State Criminal Trial Courts*, SUPPLEMENT TO THE L.A. & S.F. DAILY J., Nov. 4, 2009, at 4.

65. See NAT'L INST. FOR TRIAL ADVOCACY, *supra* note 59, at 12–13.

66. Gina Passarella, *No Longer Marching in Lockstep: Reed Smith Adopts Associate*

service, efficiency, productivity, teamwork, collegiality, and other ‘citizenship’ factors,”⁶⁷ and “[p]rofessional [e]xcellence, [c]lient [i]mpact, [i]nterpersonal [e]ffectiveness, and [l]eadership.”⁶⁸ The goal of moving away from lockstep is “to improve associate development and align talent management with the needs of [firm] clients.”⁶⁹ In developing these new models for advancement and compensation, many firms are explicitly contemplating pro bono playing a critical role:

Pro [b]ono . . . provides our associates with opportunities to give back while building important skills. We will use [p]ro [b]ono assignments to provide associates at all [l]evels with early front-line opportunities that can accelerate their development. We will include a review of an associate’s [p]ro [b]ono contributions in our year-end . . . assessment.⁷⁰

A number of commentators, including participants in this symposium, have noted that, beyond the development of specific skills, pro bono work makes better lawyers overall. Lawyers engaged in such work have the opportunity to go beyond their immediate and narrow specialties and garner a broader sense of their communities and the world at large. Pro bono work offers opportunities for empathy and perspective (when a junior associate is feeling down about another fifty-state survey or massive document review, seeing how other folks live is a needed reality check). Surveys of major corporations consistently find that a growing number of corporations sponsor and encourage volunteer programs, in part, because of the benefits to the employees and the corporation. These companies reported that volunteer work promotes personal and professional

Advancement System Based on ‘Core Competencies’, THE LEGAL INTELLIGENCER, Oct. 28, 2009. Firms are experimenting with a variety of new structures and frameworks, including dropping lockstep compensation in favor of merit-based models, adopting formalized training programs for new associates in lieu of billable hours, and in lieu of placing deferred associates at outside public interest organizations, bringing them to the firm to be dedicated pro bono associates, allowing the firm to have more control over their training and supervision. While these trends are in their early stages, over the course of the months and years ahead, we will have a variety of these “live labs” to study.

67. WilmerHale Joins the Killing Lockstep Party, http://abovethelaw.com/2009/12/wilmerhale_joins_killing_lockstep.php (Dec. 15, 2009, 13:00 EST).

68. MEMORANDUM FROM DLA PIPER TO ALL ASSOCS. 2 (Jan. 2010), *available at* <http://abovethelaw.com/2009/12/08/DLA%20Piper%20Associate%20Compensation%20Model.pdf>.

69. Leigh Jones, *DLA Piper to Abandon Lockstep Under New Associate Compensation Plan*, THE NAT’L L. J., Dec. 9, 2009, <http://www.law.com/jsp/article.jsp?id=1202436180557>.

70. MEMORANDUM FROM DLA PIPER TO ALL ASSOCS., *supra* note 68, at 3.

growth and encourages characteristics that improve the quality of their work force, such as creativity, trust, teamwork, productivity, and persistence. These companies' commitment to volunteerism is real—it is increasingly recognized in performance reviews and incentive plans.⁷¹

Pro bono as a talent management tool is not just for “new” or junior attorneys. The benefits of pro bono to an individual lawyer, which can change over time, are experienced at all stages of a career. For example, senior lawyers need to develop expertise at project management, an area at which most lawyers do not naturally excel and for which there generally is a lack of formal training. Likewise, sophisticated pro bono opportunities let experienced lawyers break out of their routines and comfort zones, learn new things, take risks, and, in turn, make them better lawyers. Indeed, taking it even one step further, in 2005, PBI launched Second Acts[®]—second acts in the lives of lawyers approaching retirement age—an initiative designed to enhance access to justice for low-income and disadvantaged people and groups by leveraging the power of seasoned attorneys.⁷² PBI works with its core constituencies (major law firms, in-house legal departments, and public interest organizations) to develop, test, evaluate, and replicate a range of effective models that support the transition of experienced law firm attorneys who wish to pursue a second, volunteer career as public interest lawyers.⁷³ After a rigorous Request for Proposal process in 2008, PBI selected four pilot sites to implement innovative models that can be replicated and taken to scale after a period of analysis and assessment.⁷⁴

71. According to the 2005 Deloitte Volunteer IMPACT Survey:

- 86% of employees believe volunteering can have a positive impact on their careers.
- 93% agreed that volunteering offers the opportunity to enhance leadership skills.
- 89% agreed that volunteering helps enhance problem-solving skills.
- 88% agreed that volunteering helps enhance decision-making skills.
- 82% agreed that volunteering helps enhance negotiating skills.

DELOITTE LLP, DELOITTE VOLUNTEER IMPACT SURVEY 2–3 (2005).

72. Kenneth G. Dau-Schmidt, Esther F. Lardent, Reena N. Glazer & Kellen Ressmeyer, “Old and Making Hay:” *The Results of the Pro Bono Institute Firm Survey on the Viability of a “Second Acts” Program to Transition Attorneys to Retirement Through Pro Bono Work*, 7 CARDOZO PUB. L., POL’Y, & ETHICS J. 321, 330 (2008).

73. *Id.*

74. *Id.*

B. *Evaluation, Supervision, and Mentoring*

Like skills development, these key elements of talent management are even more critical as firms move away from lockstep toward a core competency approach, with an emphasis on qualitative analysis of skills. Indeed, the move away from lockstep to a merit or skills-based model brings about an additional focus on evaluation.⁷⁵ If compensation and advancement are going to be based on merit and that merit is assessed against articulated competencies, benchmarks, and performance criteria, then the evaluation system must be transparent, fair, and meaningful. Evaluation processes and systems must provide regular constructive feedback so lawyers know if they are on the road to success at their firms.

“Associates, in citing the causes of [their] dissatisfaction, often point, not only to the nature of the work assigned to them and the lack of opportunity for skills development, but also to the lack of feedback and oversight available to them from more senior firm attorneys.”⁷⁶ Firm leaders, have sought, with mixed results, “effective tools to evaluate, as early as possible, the aptitudes of associates and the means by which to institute credible supervision and mentoring programs.”⁷⁷ Pro bono work by its very nature “offers the opportunity for far more effective evaluation of the skills and maturity of . . . associates” and other firm attorneys.⁷⁸

“Evaluation based solely on [attorneys’] commercial practice will provide insight into some skills and abilities—such as drafting and a commitment to hard work—but [often] will not enable the firm to assess [their] communication skills, abilities as advocates and negotiators, maturity, [leadership, ability to supervise others, and] ability to work effectively with clients and to deal with opposing counsel, [experts,] judges, and juries.”⁷⁹

“For this reason, as well as to provide greater visibility to *pro bono* work, a number of law firms now explicitly include reviews of work undertaken in *pro bono* matters as a critical part of the evaluation

75. One firm characterized its new long-term talent management strategy as including “a more flexible career path structure, a *robust mentoring program*, and a competency-based approach to professional development.” WilmerHale Joins the Killing Lockstep Party, *supra* note 67 (emphasis added).

76. LARDENT, *supra* note 3, at 8.

77. *Id.*

78. *Id.* at 9.

79. *Id.*

process.”⁸⁰ “[T]he evaluation not only assesses the lawyers’ *pro bono* commitment as evidenced by the amount of *pro bono* work undertaken, but also uses that work to evaluate the attorneys’ legal skills, [client skills,] maturity, [leadership,] and judgment.”⁸¹

“Law firms, in response to associate concerns, [and now in response to changes in their own promotion and compensation systems,] have developed a variety of supervision and mentoring programs, designed to replace the informal mentoring and apprenticeship that often occurred spontaneously in the past when the pace of practice was less pressured” and law firms had different structures.⁸² “In putting these programs in place, however, many firms have discovered how difficult it is to establish a meaningful mentoring and supervision program.”⁸³ “Partners, already overcommitted to client work and firm administrative responsibilities, are sometimes unable or unwilling to devote sufficient time to their mentees.”⁸⁴ As firms move to merit-based systems, it is a special challenge to design and implement appropriate evaluation processes and systems. Giving meaningful feedback often requires partners to undergo training and have access to resources and support to make evaluations effective. “A number of firms, however, have successfully used a *pro bono* team or practice group approach to provide meaningful oversight and feedback from partners.”⁸⁵ “Partners who are involved in a *pro bono* team working on a specific case, project, or subject area are often deeply engaged in the matter and, therefore, far more likely to take the time to work closely with the junior members of the team.”⁸⁶

C. *Enhancing Collegiality, Morale, and Loyalty*

Large businesses frequently struggle to cultivate a sense of uniqueness and a commitment by individuals to the greater enterprise.⁸⁷ “Today’s . . . law firms are particularly prone to fragmentation and isolation, due to the pace of growth and change, their sheer size, the complexity of firm structure, including specialty [practice areas] and growing numbers of geographically distan[t and isolated] offices, unintended consequences of [advances in]

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

technology, and the [fragmentation] that often characterizes the way that law is practiced.”⁸⁸ There are unprecedented levels of fear and mistrust today in law firms, in this era of reductions in force and other “right sizing” moves.⁸⁹

Pro bono is often the “glue” that holds a firm together. Pro bono matters offer opportunities for lawyers—and other staff—who would otherwise hardly even know each other to meet people in different offices/departments/floors/practice groups to work together as a team towards a greater goal.⁹⁰ Pro bono offers unique opportunities for socialization, to work with law school friends, former summer associate buddies, firm alumni, or other kindred spirits who may be colleagues but who do not practice together or get to spend professional time together.

Pro bono accommodates both top down (assignments made through regular firm procedures and processes) and bottom up approaches and, therefore, offers the opportunity for individual lawyers to bring to the firm pro bono matters that they care about. Just as with business development involving commercial clients, there is a need for business development of pro bono work. The state of “passive professionalism” is no longer a route to success—with regards to paying work or pro bono work. In addition to providing an opportunity for law firm lawyers to follow their passion (compliant with conflicts checks and firm policies), pro bono offers them an opportunity to demonstrate initiative, entrepreneurial spirit, and leadership.⁹¹ Many attorneys simply find their pro bono work soul nurturing; a reminder of why they became lawyers in the first place resulting in positive feelings which carry over into their commercial work and general outlook.

Indeed, one reason why lawyers who do pro bono work are generally willing to spend more time on billable plus pro bono work

88. *Id.* at 9–10.

89. See Patricia Gillette, *The Message That Will Seal Law Firms' Doom: "It's Nothing Personal"*, THE AM. LAWYER, Dec. 9, 2009, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202436183596> (analyzing the “depersonalization” of mega-firms that “have traded their culture for currency” and advocating for a renewed focus on reconnecting and relationships).

90. Pro bono work not only benefits firm lawyers, there are myriad benefits—both to the firm, the individuals, and the pro bono clients, that are associated with the firm involving its nonlawyer staff in its pro bono program as well. See, e.g., Pro Bono Institute, *Broadening the Bench: Involving Nonlawyer Staff in Law Firm Pro Bono*, THE PRO BONO WIRE, Late Aug. 2009, at 3; see also Meredith Hobbs, *Legal Aid Organizations Call on Non-Lawyers for Help*, DAILY REPORT, Dec. 10, 2009.

91. Jack W. Londen, *The Case for Pro Bono Business Development*, SUPPLEMENT TO THE L.A. & S.F. DAILY J., Nov. 4, 2009, at 9.

than they would on billable work alone is because they feel a special and personal commitment to the pro bono work—in many instances, it is work they have specifically volunteered for based on their personal convictions and passions.⁹²

Pro bono recognition events, whether light-hearted or formal (or some combination of the two), offer firm-sponsored opportunities for social interaction, morale building, and good will. Victory memos, annual reports, and ceremonies instill a sense of pride and a public appreciation for the good work the firm, as an institution, is doing and for the quality of its people. The satisfaction and joy that co-workers (lawyers and staff alike) take in each other's accomplishments can be palpable. Firms have successfully used pro bono as “glue” to integrate new lawyers and staff, to help people get to know each other, and to encourage individuals to break out of their professional or structural silos.

D. Recruitment of New Attorneys and Partners

Hiring at a time of down-sizing may be the most unsettled aspect of the business case in the current economic climate and most in need of “tweaking” in the future. Nevertheless, we regularly see signs of people joining new law firms and mobility (whether by choice or by force) has become the rule among lawyers at all levels of seniority at larger law firms. Costs associated with the failure to retain effective and desired lawyers represent the single greatest nonproductive personnel expense incurred by law firms.⁹³ There's still a war for talent—firms want the people that they want, even if the numbers and head counts are depressed from the peak of the bubble.

Some observers have estimated that the cost of replacing one departing attorney, including inefficiencies due to transition and delay as well as the substantial costs associated with screening and hiring a new attorney and getting that attorney up to speed, can equal or even exceed the annual salary for that position. “[A]ccording to a study by Catalyst Consulting, the average ‘turnover cost’ to a firm of a lost associate is estimated to be \$315,000.”⁹⁴ Even in hard times, firms will

92. Londen, *The Economics of Pro Bono Work*, *supra* note 35, at 2.

93. Janice Mock, *The Benefits of Sabbaticals for Lawyers*, *THE RECORDER*, Nov. 18, 2009, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202435561759>.

94. Bob Tarantino: Keeping Them by Sending Them Away: Sabbaticals and Lawyer Retention, <http://www.cba.org/cba/practicelink/BWL/sabbaticals.aspx> (last visited Aug. 2, 2010). Even if that figure is high in the current economic climate and needs to be recalculated at a discount, the figure is still substantial.

continue to recruit the best possible new lawyers. When we see an economic recovery and the need for more lawyers, the “war for talent” will once again be reinvigorated, even if the “war” looks different. As firms begin to look more and more alike, what factors differentiate them? Quality of life issues, effective mentoring and supervision programs, and expanded pro bono opportunities often become the deciding factors in choosing among firms for top tier lawyers. For more senior attorneys, while business considerations undoubtedly play a larger role, firm values, culture, and the ability to do pro bono work can also be an important factor in selecting a firm.

Indeed, in troubled times, the role of pro bono in enhancing morale and creating a sense of calm, teamwork, and mutual respect and support is unparalleled.⁹⁵ Lawyers have long memories and potential new recruits and laterals have access to a great deal of information about firms. Although it may be a “buyer’s market” now, when the business cycle turns around, will the star associates be the first to leave if they are not happy? History indicates that those firms that are viewed as stable, humane places to work will enjoy a long-term competitive advantage.⁹⁶

The decision to leave a law firm, of course, is often based on many factors and in recent days may not be an affirmative decision made by the individual lawyer at all. For many lawyers, however, dissatisfaction with the atmosphere and workload at the firm and a sense of being an anonymous cog in a very large wheel are key elements of the determination to move elsewhere. A strong pro bono culture, as discussed above, can contribute greatly to a sense of the firm as a unique place, one that embraces the individuality of its lawyers and other employees, provides effective development, mentoring, and oversight, and fosters teamwork.

An article in the 2009 summer issue of the *Harvard Business Review* outlines the needs of Generation Y in the workplace and reaffirms the crucial role pro bono can play in a firm’s efforts to hire and retain the lawyers it most desires.⁹⁷ Generation Y, also known as Millennials or Echo Boomers, is the generation born between 1979

95. LBG ASSOCS., *supra* note 43, at 11 (“[Ninty-four] percent of companies surveyed believe employee volunteering provides a way to raise employee morale.”).

96. CONE INC., CONE/ROPER EXECUTIVE STUDY, *supra* note 51, at 2 (Eighty-two percent of corporations purposefully choose causes with the aim of being regarded as an “preferred employer”).

97. Sylvia Ann Hewlett, Laura Sherbin & Karen Sumberg, *How Gen Y & Boomers Will Reshape Your Agenda*, HARV. BUS. REV., July–Aug. 2009, at 73.

and the early 1990s.⁹⁸ Their expectations can be met by integrating pro bono as a core part of the professional lives for this generation. First, the majority of Millennials want their work to offer them a range of new experiences and challenges.⁹⁹ Pro bono service enables Generation Y professionals to diversify their experiences and challenges by serving a broader set of clients in ways that ask them to apply their talents in different environments. Second, 86% of respondents “say it’s important that their work make a positive impact in the world.”¹⁰⁰ Philanthropy and volunteerism alone do not meet this need because these initiatives are not utilizing professionals’ “work” to make those differences. Their work for their commercial clients may—or may not—meet this need. Pro bono is about utilizing your professional skills and doing work that makes a positive impact. Finally, working in teams is a top motivator for this generation.¹⁰¹ Granted, not all pro bono is done in teams, but many projects can be structured that way. As discussed above, pro bono work can often be done by teams of folks who have few other opportunities to work together and often there is more flexibility and individual control over staffing of pro bono matters than with commercial work. In short, creative staffing helps to build new relationships.

For partners, strong firm support for pro bono as a part of the day-to-day work of all lawyers at the firm, regardless of seniority or prominence, also reinforces their loyalty to the firm. For lawyers who have been in practice for some time and enjoy proficiency in a highly specialized area of the law, pro bono participation offers an opportunity to engage in the critical policy issues of our day or to serve individual clients—aspects of law practice that may not be available in their everyday practice. As confirmed by other symposium participants, nobody seriously suggests that pro bono is just for kids, or new lawyers!

In sum, to the extent pro bono fosters good will, positive attitudes, and personal satisfaction, in addition to skill and leadership development—even if those are more difficult to quantify—it impacts productivity, recruitment, and retention, which directly impact the law firm’s bottom line.¹⁰²

98. *Id.*

99. *Id.*

100. *Id.* at 74.

101. *Id.* at 73.

102. These values align closely with a new focus of law firm management: engagement. Engagement is the extent to which an employee (partner, associate, of counsel, professional staff) is willing to contribute their knowledge, skills,

VII. CONCLUDING THOUGHTS

To be sure, the current economic downturn is a time of anxiety and uncertainty for law firms, lawyers, and the legal community. But it is also a time of transformation and innovation, as both institutions and individuals adapt to the new landscape. All aspects of the profession, from the future of the billable hour to models of talent management, are fair game for re-thinking and reinvention, including pro bono at law firms.

We are also experiencing a pivotal moment and an opportunity for creating a renewed commitment to public service and equal justice. Through the current crisis, and our responses to it, like public interest placements for deferred associates and using pro bono as a way to manage lawyers who are underutilized for short periods of time or as part of compassionate and sensitive outplacement strategies, we may be able to create a generation of young lawyers more committed than ever to pro bono, while also reaffirming the notion that the practice of law is a noble profession.

Examining the benefits of pro bono to law firms and to individual lawyers against the backdrop of a greatly enhanced environment of corporate professional volunteerism reinforces and validates the view that pro bono is not only ethical and part of our professional obligations, but is also good for business and for ourselves. Originally, companies believed that giving back to their communities was simply “the right thing to do” (and many still hold to that belief). But over the years, a growing number of leaders have come to view pro bono as a key business imperative that if done strategically can generate important benefits to the firm, employees, commercial clients, and the community.

Carol Cone, a founder of “cause marketing,” believes that we are in a phase she calls “Goodness 3.0.”¹⁰³ “The first iteration, in the 1970s

abilities, and effort to help the firm succeed; that is, exhibiting high levels of commitment and enthusiasm to the stakeholders of the firm. In other words, engaged people are passionate and enthusiastic about the firm, they contribute new and creative ideas, and they are willing to go above and beyond for the firm, their clients, and their colleagues. . . . It’s time to measure how engaged people are with the firm. . . . Because their satisfaction impacts productivity and retention and their productivity directly impacts the bottom line.

Associate Engagement: The Next Wave in Talent Management?, <http://www.hildebrandt.com/blog/archive/2009/12/09/associate-engagement-the-next-wave-in-talent-management.aspx> (Dec. 9, 2009).

103. Stuart Elliott, *Advertising: For Causes, It’s a Tougher Sell*, N.Y. TIMES, Nov. 12, 2009, at F16.

and 1980s, involved brands and corporations ‘organized around social issues’ . . . [like] Ben & Jerry’s, Body Shop, Stonyfield Farm, and Tom’s of Maine.”¹⁰⁴ Next comes “[t]he Goodness 2.0 era,” which ran from the 1980s through quite recently, and its organizing principal was that “if you took a hard earned dollar out of the community, you had to give it back.”¹⁰⁵ “Its practitioners included Kenneth Cole, Levi Strauss, McDonald’s and Timberland.”¹⁰⁶ In fact, many of these are companies with legal departments that engage in pro bono. In the 3.0 era, “goodness is now required It’s no longer a nice-to-do, it’s a have-to-do.”¹⁰⁷ “Corporations have ‘suffered tremendously in the financial meltdown’ [according to Cone,] which brought a ‘recognition that social issues must be embedded in how they do business’—or they may no longer be around to do business at all.”¹⁰⁸

With a little imagination, Cone’s categories and timeline can be adapted and applied to major law firms. As in the corporate world, in many ways, pro bono has become mission critical to law firms, and that is very encouraging in an era that can seem quite discouraging. Success, however, should not engender complacency. As the traditional structures and methods of doing business at large law firms are changing, such as the traditional lockstep model of compensation and the traditional method of strictly billing by the hour, pro bono must adapt and change as well. This is an opportune moment to reflect and make adjustments to ensure that firm pro bono efforts are as inclusive, efficient, and impactful as possible. Likewise, there is gaining momentum for developing new concrete and meaningful metrics to go beyond attitudes, beliefs, and perceptions of pro bono programs to measure the impact of pro bono efforts: do attorneys and nonlawyer staff actually develop and use new professional and leadership skills; do they stay at their firms longer; do firms become more productive and profitable; are the pro bono clients being well-served; do communities become better places to live and work? When the dust settles, it will be intriguing to take stock once again and more comprehensively write the new business case for law firm pro bono.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

REVISITING THE BUSINESS CASE FOR LAW FIRM PRO BONO

REENA N. GLAZER*

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“As businesses, we have a responsibility to society. . . . Let me be clear about this point[,] there is no conflict between delivering value to shareholders and helping solve bigger societal problems.”¹

“When we come out of this fog, this notion that companies need to stand for something—they need to be accountable for more than just the money they earn—is going to be profound.”²

* Assistant Director of the Pro Bono Institute’s Law Firm Pro Bono Project. This Article is adapted from the keynote address that was delivered on November 20, 2009 at the 16th Annual Ethics Symposium, and both are the products of the ongoing, collaborative efforts of the Pro Bono Institute. We are grateful to the organizers of the symposium and to the *South Texas Law Review* for focusing on pro bono and for giving the Pro Bono Institute the opportunity to participate in this year’s symposium. Thanks to Russell Husen for his research assistance. © Copyright, Pro Bono Institute, 2010.

1. H. Lee Scott, Jr., Chairman and Former CEO of Wal-Mart, Remarks to the National Retail Federation (Jan. 12, 2009).

2. Jeffrey Immelt, Chairman and CEO of General Electric, Remarks at the Business for Social Responsibility Conference (Nov. 6, 2008).

I. INTRODUCTION

The world and the practice of law have changed significantly since the Pro Bono Institute (PBI) originally published *Making the Business Case for Pro Bono* in 2000.³ Many of the benefits of pro bono work (both the easily measureable ones and those less quantifiable) continue to validate a hard-nosed business rationale for pro bono and for institutional law firm engagement. Indeed, many of the arguments originally advanced in 2000 not only remain vibrant, but they have been adopted by other professions and organizations seeking to promote professional volunteerism, as this is one area where lawyers are proudly at the forefront.⁴

With the legal profession at a crossroads, and thanks to the timeliness of this symposium, now is a particularly appropriate time to revisit the themes that were first articulated in that seminal article. The severity and duration of the current economic recession and its impact on law firms' revenues, operations, and individuals has been profound and well-documented and analyzed. Reductions in force; smaller or no summer associate programs; smaller incoming classes of new associates, if any; deferral of starting dates and even rescissions of offers; salary freezes and rollbacks; limited recruiting schedules; changes in bonus policies and amounts; the end of lockstep compensation; greater scrutiny of budgets, including charitable giving amounts; travel restrictions; alternative billing arrangements with corporate clients; smaller classes of attorneys being promoted to partner; and the elimination of practice areas that are not considered "centers of excellence" all signal an economic downturn in the legal

3. ESTHER F. LARDENT, MAKING THE BUSINESS CASE FOR PRO BONO (Pro Bono Institute 2000). Established in 1996, PBI is a nonprofit organization that provides research, consultative services, analysis and assessment, publications, training, and inspiration to a broad array of legal audiences seeking to expand and enhance access to justice for the poor and disadvantaged and also promotes effective and productive partnerships between and among major law firms, in-house corporate legal departments, public interest organizations, and others. Consistent with its mandate, PBI focuses not only on promoting replication of well-established approaches, but also serves as a catalyst for new ideas and cutting-edge innovation. PBI administers a number of projects designed to enhance access to justice, including: the Law Firm Pro Bono Project[®]; Corporate Pro Bono; Second Acts[®]; Global Pro Bono; and the Public Interest Pro Bono Project. See The Pro Bono Institute, <http://www.probonoinst.org/> (last visited Aug. 2, 2010).

4. See, e.g., CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, CAPITALIZING ON VOLUNTEERS' SKILLS: VOLUNTEERING BY OCCUPATION IN AMERICA 4 (Sept. 2008), available at <http://www.volunteeringinamerica.gov/assets/resources/VolunteeringbyOccupation.pdf> (noting that "[t]he legal profession is a leading example of a field where its professionals use their skills when performing their volunteer activities").

economy that is unprecedented in our lifetime. At this time of upheaval, uncertainty, and anxiety, it is not yet clear how our legal institutions will emerge. Some traditional aspects of the business case for law firm pro bono may not seem particularly relevant at the moment and other aspects may need to be reworked or rethought for a changed economic climate. While some of the benefits of pro bono are relatively easy to quantify, others are not. While some pluses resulting from a firm culture that is supportive of pro bono will be immediately apparent, other beneficial results will become known only with the passage of time. Nevertheless, this is a ripe opportunity to pause and consider how pro bono could fit into the new legal landscape and benefit law firms and lawyers at all stages of their careers. Even if it may be premature to fully articulate the new business case for pro bono, we are in a position to take stock and re-examine the traditional arguments that are now a decade old.

Given the business pressures of law firm practice today, it is critical that pro bono supporters persuasively identify the aspects of pro bono work that, when appropriately structured and woven into the fabric of the firm, yield important benefits for the law firm and its attorneys, as well as for pro bono clients and the communities served. A firm's investments in pro bono can and will, in the long term, strengthen the institution itself, its ability to attract and serve its commercial clients, and make its professionals better (and perhaps even happier) lawyers. While it is generally accepted that the traditional view of pro bono programs as being a weak "add-on" that may distract from the firm's core functions is outdated, "[t]oday, observers from a variety of sectors propose that not only is corporate citizenship consistent with good business practice, it is in fact a business essential."⁵ In today's corporate world, however, it is not enough to simply believe in the perceived benefits of a pro bono program. Rather, it is increasingly imperative and valuable to be able to measure and to demonstrate how—and to what extent—these programs make a difference and have an impact.

II. THE "NEED"

In making the case for why lawyers—and law firms as institutions—should undertake pro bono work, supporters of pro bono service have traditionally focused on the compelling need for

5. STEVEN A. ROCHLIN & BRENDA CHRISTOFFER, MAKING THE BUSINESS CASE: DETERMINING THE VALUE OF CORPORATE COMMUNITY INVOLVEMENT 4 (The Center for Corporate Citizenship at Boston College 2000).

such assistance. Sadly, since the business case was first articulated in 2000, that need has not abated. Countless national, state, and local studies have detailed the appalling gap that persists between the millions who need, but are unable to afford or obtain, the specialized knowledge and skills of legal professionals to protect and vindicate basic human needs and fundamental rights versus the limited resources available to meet those needs. For example, The Legal Services Corporation (LSC) released a 2009 report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, which found that “for every [person] served by an LSC-funded legal aid program, at least one eligible person seeking help will be turned down,” equaling about *one million* people denied legal services.⁶ This new study updates and reaffirms the LSC’s earlier findings from 2005.⁷

The LSC used three methodologies to obtain data relied on in this report.⁸ First, from March to May 2009, the investigators surveyed 137 LSC programs, with 918 offices, to document the number of people seeking legal aid who could not be served due to lack of programmatic funding and resources.⁹ Besides the one million people being rejected due to lack of resources, this figure does not include people who were similarly turned away from non-LSC-funded programs and those who did not seek legal help at all; therefore, this number represents only a fraction of the level of unmet need and is significantly under-inclusive.¹⁰ Second, they relied on data provided by state legal needs studies, which numerous states conduct to ascertain the nature of their low-income residents’ legal problems and whether their legal needs are met.¹¹ Based on the findings from seven states (Alabama, Georgia, Nevada, New Jersey, Utah, Virginia, and Wisconsin), the report concluded that “low-income households experience a per-household average of legal needs ranging up to three legal needs per year” and “only a small fraction of the legal problems experienced by low-income people (less than one in five) is addressed with the assistance of a private or legal aid lawyer.”¹² Third, they

6. THE LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9, 12 (2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

7. *Id.* at 1.

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 9–10.

11. *Id.* at 13.

12. *Id.*

compared the number of legal aid lawyers to the number of private lawyers, per capita.¹³ The count of legal aid attorneys included attorneys in all programs providing civil legal help to low-income people, not just those in LSC programs.¹⁴ The count of private attorneys providing personal legal services to the general population was based on estimates obtained from the American Bar Association.¹⁵ The comparison found that “[n]ationally, on the average, there is one legal aid attorney (including those funded by *all* sources) available to serve 6,415 poor people. . . . In comparison, there is one private attorney providing personal legal services for every 429 people in the general population.”¹⁶

In Washington, D.C., a comprehensive study prepared in 2008—with the help of pro bono counsel—found, in part, that: (1) 97% of tenants who go to court as defendants over disputes with their landlords are not represented; (2) 98% of domestic violence victims are unrepresented (same figure for respondents); and (3) 98% of respondents were unrepresented in paternity and child support cases.¹⁷ And, on and on and on.¹⁸

III. THE “DUTY”

In addition to the pervasive need, other supporters of law firm pro bono focus on our ethical obligations—it is every lawyer’s fundamental responsibility to ensure equal access to justice. Embedded in this ethical imperative is the pivotal role pro bono plays

13. *Id.* at 19.

14. *Id.*

15. *Id.*

16. *Id.* at 22.

17. DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY 9 (2008) (prepared with pro bono assistance from DLA Piper LLP), available at <http://www.dcaccessjustice.org/files/CivilLegalNeedsReport.pdf>; see also DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION & D.C. CONSORTIUM OF LEGAL SERVICES PROVIDERS, RATIONING JUSTICE: THE EFFECT OF THE RECESSION ON ACCESS TO JUSTICE IN THE DISTRICT OF COLUMBIA 2 (2009).

18. These statistics and the pervasive and profound justice gap might make us wonder: Do pro bono efforts make a difference? While we cannot rely on the good intentions and efforts of pro bono lawyers alone to solve all of these problems, it is cynical to the extreme to conclude that they cannot play a significant role or have a positive impact. To that end, a great deal of attention and thought is now being paid on structuring pro bono engagements to ensure that they are effective and address systemic issues. Likewise, there is a relatively new effort to develop metrics to better assess the qualitative impact of pro bono work, rather than continuing to focus solely on quantitative measures. See, e.g., Esther F. Lardent, *Letter from Esther: Measuring the Quality and Impact of Pro Bono Service*, THE PRO BONO WIRE (Dec. 2009).

in maintaining the professionalism of the legal profession.¹⁹ As lawyers seeking to preserve the highest ideals of our profession, we must concern ourselves not only with the bottom line, but also with the greater public good. As Robert Katzmann has eloquently explained:

The fundamental basis of the lawyer's responsibility to ensure justice and to address the needs of those in society unable to pay can be understood by appreciating a simple proposition: access to minimal legal services is necessary for access to the legal system, and without access to the legal system, there is no equality before the law. The lawyer becomes the critical medium by which access to that legal system and the concomitant opportunity to secure justice is achieved.²⁰

A complex, adversarial system simply cannot function properly if all parties do not have access to competent legal services. That dynamic is at the heart of what makes the legal profession different from other professions.²¹

IV. THE "ECONOMICS"

Since pro bono matters do not, except in unusual circumstances,

19. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009) (establishing that a lawyer should have a goal of providing at least fifty hours of pro bono service each year); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1149 (1990) (stating that "a lawyer seeks to serve his clients and the public good, and these commitments are not seen as mutually exclusive"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 67 (1992) (advocating that a "lawyer has an ethical obligation to practice public interest law—to represent some poor clients; to advance some causes that he or she believes to be just"); Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, But Also The Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122, 2122 (1993) (agreeing with Judge Edwards that lawyers have an ethical obligation to engage in pro bono work and explaining that by doing pro bono work lawyers benefit both the public and themselves).

20. ROBERT A. KATZMANN, *Themes in Context, in THE LAW FIRM AND THE PUBLIC GOOD* 1, 5–7 (Robert A. Katzmann ed., 1995) ("A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.").

21. David Luban explains the difference between lawyers and other professionals and providers of goods and services:

[T]he lawyer's lucrative monopoly would not exist without the community and its state; the monopoly and indeed the product it monopolizes is an artifact of the community. The community has shaped the lawyer's retail product with her in mind; it has made the law to make the lawyer indispensable. The community, as a consequence, had the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose.

DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 286 (1988).

generate fees, it has been generally assumed that pro bono service is a financial drain on law firms and, as such, that it may create an economic disadvantage for firms that dedicate a significant amount of time to pro bono matters.²² Yet, those who claim that one has to choose between having a profitable law firm and one that performs significant and meaningful pro bono work are creating a false choice. In a groundbreaking study on the relationship between economic performance and pro bono activity at large law firms, Marc Galanter and Thomas Palay analyzed data on firm finances and pro bono scores of the nation's largest 100 law firms published in *The American Lawyer* between 1990 and 1993 to determine the connection between pro bono and law firm profitability.²³ While the sample of firms studied was relatively limited and the data suffered from a number of "defects," the numbers did "provide a revealing glimpse of patterns."²⁴

Galanter and Palay studied the relationship between law firm pro bono contributions and different measures of firm economic performance, such as "total numbers of lawyers, total number of partners, total numbers of associates, gross revenue, revenue per lawyer, profits per partner, the ratio of associates to partners, and the

22. The Pro Bono Institute Law Firm Pro Bono Challenge[®] encourages law firms to seek awards of attorneys' fees in appropriate pro bono cases as both a matter of public policy and as a source of funding for public interest organizations and "[f]irms that receive fees in such cases are strongly encouraged to contribute an appropriate portion of those fees." In handling these cases, law firms are acting as "private attorneys general" enforcing legal rights, promoting access to justice for those who would otherwise be unable to pursue their cases, and uncovering and deterring unlawful behavior. Seeking attorneys' fees on behalf of pro bono clients, like seeking damages or other forms of relief, increases the deterrence benefits of these cases by making defendants pay the full costs associated with their behavior. Moreover, the mere possibility of an award of attorneys' fees can be a useful tool during settlement negotiations; leverage that would be lost if such awards were known to be unavailable in pro bono matters. Responses to surveys conducted by PBI showed that, in practice, relatively few pro bono cases generated fee awards, and the bulk of the funds awarded were either donated to public interest organizations or retained to augment a firm's pro bono budget and capacity to handle additional pro bono matters. See THE PRO BONO INSTITUTE, LAW FIRM PRO BONO CHALLENGE: COMMENTARY TO STATEMENT OF PRINCIPLES 7 (2008), available at <http://www.probonoinst.org/challenge.text.php>.

23. MARC GALANTER & THOMAS PALAY, *Public Service Implications of Evolving Law Firm Size and Structure*, in THE LAW FIRM AND THE PUBLIC GOOD, 19, 41-46 (Robert A. Katzmann ed., 1995).

24. *Id.* at 41. The formula used by *The American Lawyer* to assess law firm pro bono programs is particularly suspect since it places a premium on the number of lawyers at a firm who contribute at least twenty hours of pro bono—a metric with no logical foundation and vulnerable to manipulation. There are firms whose pro bono "commitment" consists of an effort to rotate as many lawyers as possible through twenty hours of engagement, which is far from an ideal arrangement for either lawyers or pro bono clients.

firm's estimated profit margin."²⁵ They found that generally "the total number of hours of pro bono activity was most strongly associated with the size of the firm, the number of associates, and the firm's gross revenues."²⁶ Galanter and Palay concluded that "the data suggest that the larger the firm and the greater its gross revenues the more willing it will be to encourage or permit pro bono activity."²⁷ Unfortunately, no one has yet published an updated version of Galanter and Palay's original analysis.

Nevertheless, we have additional and more current data from the Pro Bono Institute's Law Firm Pro Bono Challenge[®]. The Challenge, which was launched in 1993 and implemented in 1995, is a unique, aspirational pro bono standard. Developed by law firm leaders and corporate general counsel, the Challenge articulates a standard for one key segment of the legal profession—major law firms (firms with more than fifty attorneys).²⁸ It uses a progressive standard, which a firm selects—i.e., a target of either three or five percent of a firm's billable hours (equivalent to sixty or one hundred hours per attorney) that ties pro bono performance to firm productivity and profitability.²⁹ It "calls for an institutional commitment, rather than an individual lawyer goal, in recognition of the [reality] that the policies and practices of larger law firms are key to the ability and willingness of firm lawyers to undertake pro bono work."³⁰ The Challenge creates goals, "not only with respect to the amount of pro bono work to be undertaken, but also with regard to the structural and policy elements that are essential for the creation and maintenance of a pro bono-friendly firm culture."³¹ It includes an accountability mechanism and an outcome measurement through its annual reporting requirement.³²

By way of context, in 2008, a year in which the legal services industry began to strongly feel the impact of the recession, Challenge Signatory law firms contributed approximately five million hours of pro bono service, as defined relatively strictly by the Challenge, which

25. *Id.* at 43.

26. *Id.*

27. *Id.*

28. *See* The Pro Bono Institute, Law Firm Pro Bono Challenge, <http://www.probonoinst.org/challenge.php> (last visited Aug. 2, 2010).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* For additional background and history, *see* Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in *THE LAW FIRM AND THE PUBLIC GOOD* 59, 78–82 (Robert A. Katzmann ed., 1995).

represented a 13% increase over 2007.³³

With the assistance of Professor Ken Dau-Schmidt of the Indiana University Maurer School of Law, the Pro Bono Institute is conducting an empirical analysis of the Challenge over its life, from 1995 to 2006, which looks at overall trends, regional comparisons, and more, including how a firm's pro bono commitment and performance varies according to firm profitability. Using profitability data from *The American Lawyer*, preliminary results indicate that, consistent with the findings of the Galanter and Palay study discussed above, the most profitable firms have also dramatically increased their pro bono performance. As their profits have increased, so too has their pro bono performance: their pro bono hours are higher, they meet their Challenge goal, and they have higher attorney participation rates—although that differential was less dramatic. Even for pro bono supporters, these results may be surprising and encouraging.³⁴

In *The Economics of Pro Bono Work*, Jack Londen makes a compelling case for pro bono work as, at worse, a marginal expense for law firms.³⁵ When examined closely, even the most expansive law firm pro bono programs are either revenue neutral, or, potentially, even a revenue enhancer. Londen's argument, which is consistent with Galanter and Palay's research discussed above, is essentially three-fold: First, "the usual measure of the economic impact of *pro bono* work—the amount of revenue that the *pro bono* hours would have generated—is clearly not a valid measure" since "[i]t is simply inaccurate to assume that every hour of *pro bono* work would otherwise have been spent on billable work."³⁶ This flawed assumption is especially overblown in this climate with the general slowdown in billable work. Moreover, firms "rarely . . . decline attractive billable engagements because [their] lawyers are too busy (with *pro bono* work or otherwise)."³⁷ "Second, even when properly measured as a

33. As US Law Firms Shed Lawyers, Pro Bono Work is up, <http://www.jdjournal.com/2009/07/24/as-us-law-firms-shed-lawyers-pro-bono-work-is-up/> (last visited Aug. 2, 2010).

34. The numbers are equally encouraging when analyzed at the level of the individual lawyer and billable hours. PBI has worked with several firms that have "run the numbers" and compared billable hours for their lawyers with those lawyers' pro bono hours, and the results are remarkable and consistent. The lawyers with the highest billable hours also have the highest pro bono hours. See GALANTER & PALAY, *supra* note 23, at 41–43.

35. Jack Londen, *The Economics of Pro Bono Work*, 15 CHALLENGE SIGNATORIES UPDATE 1–4 (1997); see also Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 GEO. J. LEGAL ETHICS 925, 925–26 (1996).

36. Londen, *The Economics of Pro Bono Work*, *supra* note 35, at 1.

37. *Id.* at 2.

cost item rather than a revenue drain,” the true cost of a pro bono program “comprises a much smaller fraction of a firm’s budget than the superficial view suggests.”³⁸ “Third, the indirect effects of a *pro bono* program can have a positive impact on revenue—by attracting, retaining, and publicizing lawyers who become rainmakers in their paying work.”³⁹ In sum, “the negative economic effects of *pro bono* work are almost always exaggerated, and are usually considered in isolation from the positive effects.”⁴⁰ “Indeed, the positive economic effects of a strong *pro bono* program can result, long term, in enough additional revenue to offset much or all of a firm’s cost of doing *pro bono* work.”⁴¹

Although the costs associated with a pro bono program may be more easily quantifiable, the benefits, as we explore below, are equally real.⁴² These arguments echo the findings that chart the growing commitment of major corporations to volunteer and participate in community service programs. Corporations frequently report that they support volunteer efforts, not only because they view themselves as stakeholders in their communities, but also because they address important business goals, including attracting and keeping a quality workforce and improving their image and appeal with consumers of their goods and services.⁴³

38. *Id.* at 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. See Glenn Graner, *Pro Bono is Profitable: A CFO’s View*, LAW JOURNAL NEWSLETTERS: ACCOUNTING AND FINANCIAL PLANNING FOR LAW FIRMS, Apr. 2004, at 4–5, 8. Graner, a former CFO of what is now K&L Gates, argues that:

In the long run, a successfully administered pro bono program will have positive financial benefits for any law firm. Those financial benefits may not be easily quantifiable—e.g., how can one gauge the “newfound” profits generated by a great young lawyer who decides to stay at your firm—but for those firms committing to a long-term program, rewards will become fully evident over time.

Id. at 8.

43. See, e.g., LBG ASSOCS., CAN CORPORATE VOLUNTEERING SUPPORT THE BOTTOM LINE? THE CHALLENGE. THE OPPORTUNITY. THE CASE FOR INVESTMENT 6–8 (2005); THE CTR. FOR CORPORATE CITIZENSHIP AT BOSTON COLLEGE, THE STATE OF CORPORATE CITIZENSHIP IN THE U.S.: A VIEW FROM INSIDE 2003–2004 9–18 (2004).

V. THE “CLIENTS”

A. *Client Relationships*

As corporate clients routinely transfer business; aggressively bid out work; negotiate for reduced rates; pare down the list of firms with whom they work; refuse to pay for new associates to work on their matters; and closely scrutinize and question bills, law firm and corporate client relationships these days are fraught with tension and uncertainty.⁴⁴ As a buttress to these challenges, an increasing number of law firms jointly undertake pro bono work with the legal departments of corporate clients. Joint pro bono ventures offer an opportunity to interact socially and professionally with clients on matters of common concern outside the commercial arena.

Since firms, for the most part, are far more experienced in the substantive law and secondary issues involved in pro bono work, these joint ventures offer a subtle but effective opportunity for law firms to demonstrate their skills, capacities, and expertise. In addition, jointly sponsored clinics and other pro bono projects are opportunities for teamwork that can lead to closer personal and professional relationships.

Corporate Pro Bono (CPBO), an initiative developed and administered by PBI and the Association of Corporate Counsel, is a concrete embodiment of the growing participation in pro bono service among legal departments and their interest in the pro bono commitment of their outside counsel firms.⁴⁵ CPBO is designed to institutionalize pro bono at in-house corporate legal departments and to expand pro bono by in-house legal staff.⁴⁶ The trajectory of interest since its founding in 2000 has been remarkable. CPBO administers a Corporate Pro Bono ChallengeSM (a companion to the Law Firm Pro Bono Challenge), and in just a few short years since its launch in 2006, is closing in on 100 Signatories.⁴⁷ While it may seem counterintuitive, the level of interest in pro bono among legal departments has increased substantially during the past two years as departments

44. See, e.g., Association of Corporate Counsel Value Challenge, <http://www.acc.com/valuechallenge/> (last visited Aug. 2, 2010) (detailing the initiative to realign the legal business model).

45. See The Corporate Pro Bono Challenge, <http://www.cpbo.org/archive/news/news1388.pdf> (last visited Aug. 2, 2010) (stating the background and initiatives of the Corporate Pro Bono Challenge).

46. *Id.*

47. *Id.*

respond to the sharp spike in legal needs and as the in-house legal community recognizes that pro bono is feasible and beneficial for legal departments. Notably, many of the companies most hurt by the current economic downturn are not just continuing their pro bono efforts, they are expanding them. At a time when pricing and staff concerns are sources of friction between legal departments and their outside counsel, a shared commitment to pro bono can be a point of entry and an opportunity to team together, to feel good about working together, and to enhance the professionalism of all involved.

B. Business Development Asset

Increasingly, major corporations are viewing good corporate citizenship and strategic philanthropy as important elements of the culture of an effective institution and as solid business practice. Major law firms should take note of the heightened interest in good works among leading corporations. Indeed, clients are demonstrating that they care about pro bono by inquiring about a law firm's commitment to pro bono activities in "requests for proposals" for legal work. They are asking not only general questions about a firm's pro bono program, but also specific questions about the pro bono activities of the lawyers who will be billing time to their matters.⁴⁸

Cause branding and marketing is a relatively young research field. "A 1999 report issued by Cone, Inc. and the Roper survey research firm found, for example, that hundreds of corporations [were] increasingly committing substantial resources to good cause campaigns," which has been confirmed by subsequent studies.⁴⁹ This trend was due to businesses seeking to make a positive difference in the communities in which they locate their facilities and market their products. However, associating with good causes is also good for business, as research has proven. "In a survey of consumers, the Cone/Roper report found that two-thirds of the respondents reported that, if price and quality of a product are equal, they would switch to a brand or retailer associated with a good cause[, 61%] thought cause-related marketing should be a standard business practice, and 84[%] noted that they have a more positive image of companies that support

48. See, e.g., Michael Moline, *Better To Light A Candle . . .*, THE NAT'L LAW JOURNAL, Jan. 4, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437358372> (stating that "in-house counsel have begun requiring firms bidding for business to disclose their pro bono practices. This reflects . . . [a realization] that pro bono has become a moral and professional litmus test.").

49. LARDENT, *supra* note 3, at 12.

a cause they care about.”⁵⁰ The report further cited that companies now undertake “cause branding,” making a long-term commitment to causes that become part of the corporate identity and culture.⁵¹

More recent studies document that these views have strengthened since the research originated and endure despite the prolonged recession. By 2007, 83% of Americans believed that “companies have a responsibility to help support causes, and 92[%] acknowledge they have a more positive image of a company that supports a cause they care about.”⁵² In response to a survey conducted in 2008, more than 75% of the surveyed consumers indicated that companies “should still support social or environmental causes and non-profit organizations during an economic downturn.”⁵³ Likewise, in 2009 the Edelman Goodpurpose™ Consumer Study found that “in both harsh and rebounding economies, brands will continue to benefit from identifying and contributing to a positive social purpose that makes sense for their business.”⁵⁴ Nevertheless, a “brand purpose must be authentic and true to the core values of the brand itself, and brands must look beyond traditional corporate social responsibility programs in which they simply donate money to a good cause [as] 66[%] of people believe that it’s no longer enough for corporations to merely give money away, but that they must integrate good causes into their day-to-day business.”⁵⁵

50. *Id.* The number of Americans who are likely to switch from one brand to another (price and quality being about equal) if the other brand is associated with a good cause has been steadily increasing: according to a 2007 Cone survey 87%, up from 66%, would switch. CONE, INC., RESEARCH REPORT: 2007 CONE CAUSE EVOLUTION & ENVIRONMENTAL SURVEY 7 (2007), available at http://www.coneinc.com/stuff/contentmgr/files/0/a8880735bb2e2e894a949830055ad559/files/2007_cause_evolution_survey.pdf.

51. CONE INC., CONE/ROPER EXECUTIVE STUDY 2 (2000), available at <http://www.coneinc.com/research/archive.php>. A similar study found that corporate good citizenship was an important consideration. When respondents were asked what philanthropic activities were considered most impressive, the two top answers were “donating products and services” and “volunteering employees to help.” LARDENT, *supra* note 3, at 12; see also LBG ASSOCS., *supra* note 43, at 4.

52. Americans Scrutinize Business Practices in Deciding What to Buy, <http://coneinc.com/content1117> (last visited Aug. 2, 2010).

53. Jayne O’Donnell, *Despite Tough Times, Retailers Are Giving More to Charity*, USA TODAY, Dec. 24, 2008, at 1b.

54. Despite Prolonged Global Recession, An Increasing Number of People Are Spending on Brands That Have Social Purpose, <http://www.edelman.com/news/ShowOne.asp?ID=222> (last visited Aug. 2, 2010).

55. *Id.* at 2.

C. *Marketing the Firm*

In the current highly competitive environment, firms are increasingly focused on marketing their services to retain current clients and attract new ones. As with other firm functions discussed below, pro bono work can be a highly effective marketing tool. Unlike firm brochures, press releases, advertisements, and similar vehicles, pro bono-related publicity is less likely to be viewed as self-serving. Although law firms may consciously market stories about pro bono achievements, the very nature of the work involved makes the stories more credible. In addition, in many instances, publicity about a pro bono matter is generated by a public interest group involved in the matter or that attracts media interest on its own because of the nature of the issue involved. Such placements are inherently more credible than paid advertisements and testimonials.

Even the most interesting and important commercial work undertaken by law firms is unlikely to receive broad coverage and publicity beyond the legal media. Major pro bono matters, or smaller cases with great human interest, are far more likely to receive extensive coverage. Nearly 60% of corporate executives and 50% of community relations managers “believe that their support for volunteerism generates good public relations for their companies and enhances brand recognition.”⁵⁶ A strong majority of executives believe corporate citizenship improves the image and reputation of their company.⁵⁷

In restructuring to achieve greater efficiencies, productivity, and profitability, law firms look to the corporate world for examples of smart business practices to emulate. An analysis of the benefits of pro bono in the law firm context, as well as the greatly enhanced commitments by corporations to volunteerism, reinforces the argument that pro bono is not only right, it is good for business.

VI. THE “PEOPLE”

Especially in this environment of changing structures for advancement and the relationship between partners and associates, career expectations of firm lawyers, and how work gets staffed and billed, pro bono can continue to do “double duty” to enhance a wide range of firm needs and goals. “Talent management” is a holistic

56. LBG ASSOCS., *supra* note 43, at 12.

57. THE CTR. FOR CORPORATE CITIZENSHIP AT BOSTON COLLEGE, *supra* note 43, at 11.

approach that integrates such functions as recruiting, orientation, retention, skills development, evaluation, compensation, and advancement.⁵⁸ Firms' commitments to talent management are demonstrated not only by providing extensive training and resources, but also by clearly communicating expectations and articulating clear professional development goals—from individual performance benchmarks to areas of future professional growth. These benchmarks describe the knowledge, skills (including interpersonal skills), and work experiences (including management, delegation, and the formation of client relationships) that lawyers at firms are expected to master at each stage of their professional development. In addition to outlining clear expectations, firms support their lawyers in obtaining these skills by, among other things, providing feedback and by offering mentoring and coaching. Increasingly, the objective and focus of this more holistic approach to defining and assessing associate performance is to focus associates and partners on creating value for clients and for the firm and on investing in an associate's career development.⁵⁹ Pro bono has a role to play in virtually every aspect of talent management at large law firms.

A. *Training and Professional Development*

It is well-established that pro bono can play a critical role in a lawyer's professional development, and it has become an added focus of significant attention in the current economic climate. Using carefully selected pro bono opportunities as a training vehicle enables law firms to provide a wide variety of high-quality skills training at a relatively low cost.⁶⁰ In addition, since younger lawyers are typically afforded greater autonomy in pro bono matters, they also offer

58. ORACLE, AN ORACLE WHITE PAPER: INTEGRATED TALENT MANAGEMENT: EXTENDING THE VALUE OF A STRATEGIC FRAMEWORK 8 (2008), available at <http://www.oracle.com/media/peoplesoft/en/pdf/whitepapers/integrated-talent-management-white-paper.pdf>.

59. See NAT'L INST. FOR TRIAL ADVOCACY, THE FUTURE OF LEGAL EDUCATION: A SKILLS CONTINUUM 7 (2009), available at http://www.nita.org/library/documents/PDF/Future_of_Legal_Education.pdf.

60. Deloitte regularly studies volunteerism and the potential of pro bono as a corporate professional development tool. A 2008 phone survey of 250 Fortune 500 human resource managers helps demonstrate the value of pro bono to companies: Ninety-one percent agreed that skills-based volunteering would add value to training and development programs, particularly as it relates to fostering business and leadership skills. Nearly 70% of training and development budgets were projected to remain flat or go down in the next year and all but 2% view pro bono as a low-cost solution. DELOITTE LLP, DELOITTE VOLUNTEER IMPACT SURVEY, 2-3 (2008), available at http://www.volunteercalgary.ab.ca/pdfs/deloitte_impact_2008.pdf.

meaningful work experience and accelerated professional development opportunities that benefit the individual attorney, the firm, and commercial clients.

Historically, large firms struggled to provide junior attorneys the opportunity to develop the skills and expertise needed to advance. The issues of skill development and proper “real world” training are getting a lot of focus these days—by legal educators and practitioners alike. We see that vividly in the law school setting with the importance of clinics and clinical training and an emphasis on “experiential learning.”⁶¹ Greater demands on partner time and the growing unwillingness of corporate clients to pay for associate training and apprenticeship have all but eliminated the informal “second chair” training and shadowing experiences enjoyed by associates in the past.⁶² Lack of effective training and professional development opportunities are directly responsible for unproductive or unsatisfactory performance that leads to excessive write-offs, partner frustration and inefficiency, low associate morale, client dissatisfaction, and costly turnover.

In addressing the skill sets necessary for large firm lawyers, in regards to business lawyers and litigators, it is apparent that many pro bono engagements offer the opportunity for in-depth, on-the-job skills training.⁶³ For example, the average landlord/tenant, public benefits,

61. A whitepaper prepared by the National Institute for Trial Advocacy acknowledges that legal academics and law firm leaders agree that new lawyers lack “the real world skills necessary to effectively” meet client needs. “Some of the missing skills include: ethics and professionalism; business acumen; leadership and management; client service and relations; financial/economic analysis; and business development.” The whitepaper offers suggestions for training new lawyers to be able to “hit the ground running,” including integrating pro bono into work allocation systems to better support training and experiential learning opportunities. NAT’L INST. FOR TRIAL ADVOCACY, *supra* note 59, at 2, 6, 8.

62. See, e.g., D.M. Levine, *Where Do Law Firms Go From Here?*, AM. LAWYER.COM, Dec. 4, 2009, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202436083093&slreturn=1&hbxlogin=1> (quoting Citigroup general counsel Michael Hefler who wants associates with concrete skills ready to perform at a top level and is “indifferent about whether they learn that at a law firm or in school, as long as I don’t have to pay for it”). But once associates have developed measurable skills, whether through pro bono work or otherwise, clients are generally willing to pay for them to work on their matters. See also Graner, *supra* note 42, at 5.

63. See AUSTIN G. ANDERSON & ARTHUR G. GREENE, THE EFFECTIVE ASSOCIATE TRAINING PROGRAM: IMPROVING FIRM PERFORMANCE, PROFITABILITY AND PROSPECTIVE PARTNERS 4 (1999) (identifying the basic skills that must be acquired by all successful lawyers, such as: interviewing, planning, problem analysis, investigation, research, recognizing and handling professional and ethical issues, statutory interpretation, client relations, client counseling, general advocacy, negotiation, trial advocacy, writing

or family law matter is likely to involve diagnosis, factual and legal research, discovery, witness preparation, statutory interpretation, negotiation, client counseling, drafting pleadings, trial preparation, trial advocacy, and, in some instances, appellate advocacy and brief preparation. Even the most routine transactional pro bono matters, such as securing 501(c)(3) status or reviewing a lease, offers training in interpretation of statutes and other controlling authorities, client counseling and diagnosis, presenting and weighing alternative solutions, and negotiation.

Not only are pro bono matters highly effective training tools, they offer, by their very nature, the opportunity for firm attorneys to exercise judgment and leadership skills far more independently and at an earlier stage than comparable work for commercial clients. There is frequently a gap between the level and type of work they are actually assigned and the experience and expertise they are required to demonstrate to advance in the firm. In pro bono matters, less experienced lawyers are actually able to try cases, to work personally with a client board of directors, and to handle appeals, albeit with appropriate supervision. In light of the role that pro bono engagements can play in providing excellent training opportunities, it is not surprising that a number of firms are strategically integrating their training and pro bono functions. Firms have hired seasoned law school clinicians/public interest lawyers to oversee both the firms' pro bono programs and clinical skill training efforts.⁶⁴ At other firms, the pro bono leadership works increasingly closely with the firm's training committee and staff, so that each facet of the firm's operations supports the other and staffing assignments can be made in strategic, thoughtful, and holistic ways.

The place of pro bono in the landscape of talent management is becoming more important—and visible—than ever. As more firms eliminate associate classes and lockstep in favor of “core competencies” and competency-based advancement,⁶⁵ pro bono becomes an even more critical tool. Core competencies are expressed in various articulations, such as “legal skills, citizenship, business skills, and clients,”⁶⁶ “quality of substantive work, quality of client

with clarity and precision, designing and drafting contracts and other documents, case management, time management, supervising others, diagnosing client's problems, dealing with difficult clients and opposing counsel, and counseling clients).

64. See, e.g., Marc Kadish, *To Do or Not to Do—Pro Bono Work in State Criminal Trial Courts*, SUPPLEMENT TO THE L.A. & S.F. DAILY J., Nov. 4, 2009, at 4.

65. See NAT'L INST. FOR TRIAL ADVOCACY, *supra* note 59, at 12–13.

66. Gina Passarella, *No Longer Marching in Lockstep: Reed Smith Adopts Associate*

service, efficiency, productivity, teamwork, collegiality, and other ‘citizenship’ factors,”⁶⁷ and “[p]rofessional [e]xcellence, [c]lient [i]mpact, [i]nterpersonal [e]ffectiveness, and [l]eadership.”⁶⁸ The goal of moving away from lockstep is “to improve associate development and align talent management with the needs of [firm] clients.”⁶⁹ In developing these new models for advancement and compensation, many firms are explicitly contemplating pro bono playing a critical role:

Pro [b]ono . . . provides our associates with opportunities to give back while building important skills. We will use [p]ro [b]ono assignments to provide associates at all [l]evels with early front-line opportunities that can accelerate their development. We will include a review of an associate’s [p]ro [b]ono contributions in our year-end . . . assessment.⁷⁰

A number of commentators, including participants in this symposium, have noted that, beyond the development of specific skills, pro bono work makes better lawyers overall. Lawyers engaged in such work have the opportunity to go beyond their immediate and narrow specialties and garner a broader sense of their communities and the world at large. Pro bono work offers opportunities for empathy and perspective (when a junior associate is feeling down about another fifty-state survey or massive document review, seeing how other folks live is a needed reality check). Surveys of major corporations consistently find that a growing number of corporations sponsor and encourage volunteer programs, in part, because of the benefits to the employees and the corporation. These companies reported that volunteer work promotes personal and professional

Advancement System Based on ‘Core Competencies’, THE LEGAL INTELLIGENCER, Oct. 28, 2009. Firms are experimenting with a variety of new structures and frameworks, including dropping lockstep compensation in favor of merit-based models, adopting formalized training programs for new associates in lieu of billable hours, and in lieu of placing deferred associates at outside public interest organizations, bringing them to the firm to be dedicated pro bono associates, allowing the firm to have more control over their training and supervision. While these trends are in their early stages, over the course of the months and years ahead, we will have a variety of these “live labs” to study.

67. WilmerHale Joins the Killing Lockstep Party, http://abovethelaw.com/2009/12/wilmerhale_joins_killing_lockstep.php (Dec. 15, 2009, 13:00 EST).

68. MEMORANDUM FROM DLA PIPER TO ALL ASSOCS. 2 (Jan. 2010), *available at* <http://abovethelaw.com/2009/12/08/DLA%20Piper%20Associate%20Compensation%20Model.pdf>.

69. Leigh Jones, *DLA Piper to Abandon Lockstep Under New Associate Compensation Plan*, THE NAT’L L. J., Dec. 9, 2009, <http://www.law.com/jsp/article.jsp?id=1202436180557>.

70. MEMORANDUM FROM DLA PIPER TO ALL ASSOCS., *supra* note 68, at 3.

growth and encourages characteristics that improve the quality of their work force, such as creativity, trust, teamwork, productivity, and persistence. These companies' commitment to volunteerism is real—it is increasingly recognized in performance reviews and incentive plans.⁷¹

Pro bono as a talent management tool is not just for “new” or junior attorneys. The benefits of pro bono to an individual lawyer, which can change over time, are experienced at all stages of a career. For example, senior lawyers need to develop expertise at project management, an area at which most lawyers do not naturally excel and for which there generally is a lack of formal training. Likewise, sophisticated pro bono opportunities let experienced lawyers break out of their routines and comfort zones, learn new things, take risks, and, in turn, make them better lawyers. Indeed, taking it even one step further, in 2005, PBI launched Second Acts[®]—second acts in the lives of lawyers approaching retirement age—an initiative designed to enhance access to justice for low-income and disadvantaged people and groups by leveraging the power of seasoned attorneys.⁷² PBI works with its core constituencies (major law firms, in-house legal departments, and public interest organizations) to develop, test, evaluate, and replicate a range of effective models that support the transition of experienced law firm attorneys who wish to pursue a second, volunteer career as public interest lawyers.⁷³ After a rigorous Request for Proposal process in 2008, PBI selected four pilot sites to implement innovative models that can be replicated and taken to scale after a period of analysis and assessment.⁷⁴

71. According to the 2005 Deloitte Volunteer IMPACT Survey:

- 86% of employees believe volunteering can have a positive impact on their careers.
- 93% agreed that volunteering offers the opportunity to enhance leadership skills.
- 89% agreed that volunteering helps enhance problem-solving skills.
- 88% agreed that volunteering helps enhance decision-making skills.
- 82% agreed that volunteering helps enhance negotiating skills.

DELOITTE LLP, DELOITTE VOLUNTEER IMPACT SURVEY 2–3 (2005).

72. Kenneth G. Dau-Schmidt, Esther F. Lardent, Reena N. Glazer & Kellen Ressmeyer, “Old and Making Hay:” *The Results of the Pro Bono Institute Firm Survey on the Viability of a “Second Acts” Program to Transition Attorneys to Retirement Through Pro Bono Work*, 7 CARDOZO PUB. L., POL’Y, & ETHICS J. 321, 330 (2008).

73. *Id.*

74. *Id.*

B. Evaluation, Supervision, and Mentoring

Like skills development, these key elements of talent management are even more critical as firms move away from lockstep toward a core competency approach, with an emphasis on qualitative analysis of skills. Indeed, the move away from lockstep to a merit or skills-based model brings about an additional focus on evaluation.⁷⁵ If compensation and advancement are going to be based on merit and that merit is assessed against articulated competencies, benchmarks, and performance criteria, then the evaluation system must be transparent, fair, and meaningful. Evaluation processes and systems must provide regular constructive feedback so lawyers know if they are on the road to success at their firms.

“Associates, in citing the causes of [their] dissatisfaction, often point, not only to the nature of the work assigned to them and the lack of opportunity for skills development, but also to the lack of feedback and oversight available to them from more senior firm attorneys.”⁷⁶ Firm leaders, have sought, with mixed results, “effective tools to evaluate, as early as possible, the aptitudes of associates and the means by which to institute credible supervision and mentoring programs.”⁷⁷ Pro bono work by its very nature “offers the opportunity for far more effective evaluation of the skills and maturity of . . . associates” and other firm attorneys.⁷⁸

“Evaluation based solely on [attorneys’] commercial practice will provide insight into some skills and abilities—such as drafting and a commitment to hard work—but [often] will not enable the firm to assess [their] communication skills, abilities as advocates and negotiators, maturity, [leadership, ability to supervise others, and] ability to work effectively with clients and to deal with opposing counsel, [experts,] judges, and juries.”⁷⁹

“For this reason, as well as to provide greater visibility to *pro bono* work, a number of law firms now explicitly include reviews of work undertaken in *pro bono* matters as a critical part of the evaluation

75. One firm characterized its new long-term talent management strategy as including “a more flexible career path structure, a robust mentoring program, and a competency-based approach to professional development.” WilmerHale Joins the Killing Lockstep Party, *supra* note 67 (emphasis added).

76. LARDENT, *supra* note 3, at 8.

77. *Id.*

78. *Id.* at 9.

79. *Id.*

process.”⁸⁰ “[T]he evaluation not only assesses the lawyers’ *pro bono* commitment as evidenced by the amount of *pro bono* work undertaken, but also uses that work to evaluate the attorneys’ legal skills, [client skills,] maturity, [leadership,] and judgment.”⁸¹

“Law firms, in response to associate concerns, [and now in response to changes in their own promotion and compensation systems,] have developed a variety of supervision and mentoring programs, designed to replace the informal mentoring and apprenticeship that often occurred spontaneously in the past when the pace of practice was less pressured” and law firms had different structures.⁸² “In putting these programs in place, however, many firms have discovered how difficult it is to establish a meaningful mentoring and supervision program.”⁸³ “Partners, already overcommitted to client work and firm administrative responsibilities, are sometimes unable or unwilling to devote sufficient time to their mentees.”⁸⁴ As firms move to merit-based systems, it is a special challenge to design and implement appropriate evaluation processes and systems. Giving meaningful feedback often requires partners to undergo training and have access to resources and support to make evaluations effective. “A number of firms, however, have successfully used a *pro bono* team or practice group approach to provide meaningful oversight and feedback from partners.”⁸⁵ “Partners who are involved in a *pro bono* team working on a specific case, project, or subject area are often deeply engaged in the matter and, therefore, far more likely to take the time to work closely with the junior members of the team.”⁸⁶

C. *Enhancing Collegiality, Morale, and Loyalty*

Large businesses frequently struggle to cultivate a sense of uniqueness and a commitment by individuals to the greater enterprise.⁸⁷ “Today’s . . . law firms are particularly prone to fragmentation and isolation, due to the pace of growth and change, their sheer size, the complexity of firm structure, including specialty [practice areas] and growing numbers of geographically distan[t and isolated] offices, unintended consequences of [advances in]

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

technology, and the [fragmentation] that often characterizes the way that law is practiced.”⁸⁸ There are unprecedented levels of fear and mistrust today in law firms, in this era of reductions in force and other “right sizing” moves.⁸⁹

Pro bono is often the “glue” that holds a firm together. Pro bono matters offer opportunities for lawyers—and other staff—who would otherwise hardly even know each other to meet people in different offices/departments/floors/practice groups to work together as a team towards a greater goal.⁹⁰ Pro bono offers unique opportunities for socialization, to work with law school friends, former summer associate buddies, firm alumni, or other kindred spirits who may be colleagues but who do not practice together or get to spend professional time together.

Pro bono accommodates both top down (assignments made through regular firm procedures and processes) and bottom up approaches and, therefore, offers the opportunity for individual lawyers to bring to the firm pro bono matters that they care about. Just as with business development involving commercial clients, there is a need for business development of pro bono work. The state of “passive professionalism” is no longer a route to success—with regards to paying work or pro bono work. In addition to providing an opportunity for law firm lawyers to follow their passion (compliant with conflicts checks and firm policies), pro bono offers them an opportunity to demonstrate initiative, entrepreneurial spirit, and leadership.⁹¹ Many attorneys simply find their pro bono work soul nurturing; a reminder of why they became lawyers in the first place resulting in positive feelings which carry over into their commercial work and general outlook.

Indeed, one reason why lawyers who do pro bono work are generally willing to spend more time on billable plus pro bono work

88. *Id.* at 9–10.

89. See Patricia Gillette, *The Message That Will Seal Law Firms' Doom: "It's Nothing Personal"*, THE AM. LAWYER, Dec. 9, 2009, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202436183596> (analyzing the “depersonalization” of mega-firms that “have traded their culture for currency” and advocating for a renewed focus on reconnecting and relationships).

90. Pro bono work not only benefits firm lawyers, there are myriad benefits—both to the firm, the individuals, and the pro bono clients, that are associated with the firm involving its nonlawyer staff in its pro bono program as well. See, e.g., Pro Bono Institute, *Broadening the Bench: Involving Nonlawyer Staff in Law Firm Pro Bono*, THE PRO BONO WIRE, Late Aug. 2009, at 3; see also Meredith Hobbs, *Legal Aid Organizations Call on Non-Lawyers for Help*, DAILY REPORT, Dec. 10, 2009.

91. Jack W. Londen, *The Case for Pro Bono Business Development*, SUPPLEMENT TO THE L.A. & S.F. DAILY J., Nov. 4, 2009, at 9.

than they would on billable work alone is because they feel a special and personal commitment to the pro bono work—in many instances, it is work they have specifically volunteered for based on their personal convictions and passions.⁹²

Pro bono recognition events, whether light-hearted or formal (or some combination of the two), offer firm-sponsored opportunities for social interaction, morale building, and good will. Victory memos, annual reports, and ceremonies instill a sense of pride and a public appreciation for the good work the firm, as an institution, is doing and for the quality of its people. The satisfaction and joy that co-workers (lawyers and staff alike) take in each other's accomplishments can be palpable. Firms have successfully used pro bono as “glue” to integrate new lawyers and staff, to help people get to know each other, and to encourage individuals to break out of their professional or structural silos.

D. Recruitment of New Attorneys and Partners

Hiring at a time of down-sizing may be the most unsettled aspect of the business case in the current economic climate and most in need of “tweaking” in the future. Nevertheless, we regularly see signs of people joining new law firms and mobility (whether by choice or by force) has become the rule among lawyers at all levels of seniority at larger law firms. Costs associated with the failure to retain effective and desired lawyers represent the single greatest nonproductive personnel expense incurred by law firms.⁹³ There's still a war for talent—firms want the people that they want, even if the numbers and head counts are depressed from the peak of the bubble.

Some observers have estimated that the cost of replacing one departing attorney, including inefficiencies due to transition and delay as well as the substantial costs associated with screening and hiring a new attorney and getting that attorney up to speed, can equal or even exceed the annual salary for that position. “[A]ccording to a study by Catalyst Consulting, the average ‘turnover cost’ to a firm of a lost associate is estimated to be \$315,000.”⁹⁴ Even in hard times, firms will

92. Londen, *The Economics of Pro Bono Work*, *supra* note 35, at 2.

93. Janice Mock, *The Benefits of Sabbaticals for Lawyers*, *THE RECORDER*, Nov. 18, 2009, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202435561759>.

94. Bob Tarantino: Keeping Them by Sending Them Away: Sabbaticals and Lawyer Retention, <http://www.cba.org/cba/practicelink/BWL/sabbaticals.aspx> (last visited Aug. 2, 2010). Even if that figure is high in the current economic climate and needs to be recalculated at a discount, the figure is still substantial.

continue to recruit the best possible new lawyers. When we see an economic recovery and the need for more lawyers, the “war for talent” will once again be reinvigorated, even if the “war” looks different. As firms begin to look more and more alike, what factors differentiate them? Quality of life issues, effective mentoring and supervision programs, and expanded pro bono opportunities often become the deciding factors in choosing among firms for top tier lawyers. For more senior attorneys, while business considerations undoubtedly play a larger role, firm values, culture, and the ability to do pro bono work can also be an important factor in selecting a firm.

Indeed, in troubled times, the role of pro bono in enhancing morale and creating a sense of calm, teamwork, and mutual respect and support is unparalleled.⁹⁵ Lawyers have long memories and potential new recruits and laterals have access to a great deal of information about firms. Although it may be a “buyer’s market” now, when the business cycle turns around, will the star associates be the first to leave if they are not happy? History indicates that those firms that are viewed as stable, humane places to work will enjoy a long-term competitive advantage.⁹⁶

The decision to leave a law firm, of course, is often based on many factors and in recent days may not be an affirmative decision made by the individual lawyer at all. For many lawyers, however, dissatisfaction with the atmosphere and workload at the firm and a sense of being an anonymous cog in a very large wheel are key elements of the determination to move elsewhere. A strong pro bono culture, as discussed above, can contribute greatly to a sense of the firm as a unique place, one that embraces the individuality of its lawyers and other employees, provides effective development, mentoring, and oversight, and fosters teamwork.

An article in the 2009 summer issue of the *Harvard Business Review* outlines the needs of Generation Y in the workplace and reaffirms the crucial role pro bono can play in a firm’s efforts to hire and retain the lawyers it most desires.⁹⁷ Generation Y, also known as Millennials or Echo Boomers, is the generation born between 1979

95. LBG ASSOCS., *supra* note 43, at 11 (“[Ninty-four] percent of companies surveyed believe employee volunteering provides a way to raise employee morale.”).

96. CONE INC., CONE/ROPER EXECUTIVE STUDY, *supra* note 51, at 2 (Eighty-two percent of corporations purposefully choose causes with the aim of being regarded as an “preferred employer”).

97. Sylvia Ann Hewlett, Laura Sherbin & Karen Sumberg, *How Gen Y & Boomers Will Reshape Your Agenda*, HARV. BUS. REV., July–Aug. 2009, at 73.

and the early 1990s.⁹⁸ Their expectations can be met by integrating pro bono as a core part of the professional lives for this generation. First, the majority of Millennials want their work to offer them a range of new experiences and challenges.⁹⁹ Pro bono service enables Generation Y professionals to diversify their experiences and challenges by serving a broader set of clients in ways that ask them to apply their talents in different environments. Second, 86% of respondents “say it’s important that their work make a positive impact in the world.”¹⁰⁰ Philanthropy and volunteerism alone do not meet this need because these initiatives are not utilizing professionals’ “work” to make those differences. Their work for their commercial clients may—or may not—meet this need. Pro bono is about utilizing your professional skills and doing work that makes a positive impact. Finally, working in teams is a top motivator for this generation.¹⁰¹ Granted, not all pro bono is done in teams, but many projects can be structured that way. As discussed above, pro bono work can often be done by teams of folks who have few other opportunities to work together and often there is more flexibility and individual control over staffing of pro bono matters than with commercial work. In short, creative staffing helps to build new relationships.

For partners, strong firm support for pro bono as a part of the day-to-day work of all lawyers at the firm, regardless of seniority or prominence, also reinforces their loyalty to the firm. For lawyers who have been in practice for some time and enjoy proficiency in a highly specialized area of the law, pro bono participation offers an opportunity to engage in the critical policy issues of our day or to serve individual clients—aspects of law practice that may not be available in their everyday practice. As confirmed by other symposium participants, nobody seriously suggests that pro bono is just for kids, or new lawyers!

In sum, to the extent pro bono fosters good will, positive attitudes, and personal satisfaction, in addition to skill and leadership development—even if those are more difficult to quantify—it impacts productivity, recruitment, and retention, which directly impact the law firm’s bottom line.¹⁰²

98. *Id.*

99. *Id.*

100. *Id.* at 74.

101. *Id.* at 73.

102. These values align closely with a new focus of law firm management: engagement. Engagement is the extent to which an employee (partner, associate, of counsel, professional staff) is willing to contribute their knowledge, skills,

VII. CONCLUDING THOUGHTS

To be sure, the current economic downturn is a time of anxiety and uncertainty for law firms, lawyers, and the legal community. But it is also a time of transformation and innovation, as both institutions and individuals adapt to the new landscape. All aspects of the profession, from the future of the billable hour to models of talent management, are fair game for re-thinking and reinvention, including pro bono at law firms.

We are also experiencing a pivotal moment and an opportunity for creating a renewed commitment to public service and equal justice. Through the current crisis, and our responses to it, like public interest placements for deferred associates and using pro bono as a way to manage lawyers who are underutilized for short periods of time or as part of compassionate and sensitive outplacement strategies, we may be able to create a generation of young lawyers more committed than ever to pro bono, while also reaffirming the notion that the practice of law is a noble profession.

Examining the benefits of pro bono to law firms and to individual lawyers against the backdrop of a greatly enhanced environment of corporate professional volunteerism reinforces and validates the view that pro bono is not only ethical and part of our professional obligations, but is also good for business and for ourselves. Originally, companies believed that giving back to their communities was simply “the right thing to do” (and many still hold to that belief). But over the years, a growing number of leaders have come to view pro bono as a key business imperative that if done strategically can generate important benefits to the firm, employees, commercial clients, and the community.

Carol Cone, a founder of “cause marketing,” believes that we are in a phase she calls “Goodness 3.0.”¹⁰³ “The first iteration, in the 1970s

abilities, and effort to help the firm succeed; that is, exhibiting high levels of commitment and enthusiasm to the stakeholders of the firm. In other words, engaged people are passionate and enthusiastic about the firm, they contribute new and creative ideas, and they are willing to go above and beyond for the firm, their clients, and their colleagues. . . . It’s time to measure how engaged people are with the firm. . . . Because their satisfaction impacts productivity and retention and their productivity directly impacts the bottom line.

Associate Engagement: The Next Wave in Talent Management?, <http://www.hildebrandt.com/blog/archive/2009/12/09/associate-engagement-the-next-wave-in-talent-management.aspx> (Dec. 9, 2009).

103. Stuart Elliott, *Advertising: For Causes, It’s a Tougher Sell*, N.Y. TIMES, Nov. 12, 2009, at F16.

and 1980s, involved brands and corporations ‘organized around social issues’ . . . [like] Ben & Jerry’s, Body Shop, Stonyfield Farm, and Tom’s of Maine.”¹⁰⁴ Next comes “[t]he Goodness 2.0 era,” which ran from the 1980s through quite recently, and its organizing principal was that “if you took a hard earned dollar out of the community, you had to give it back.”¹⁰⁵ “Its practitioners included Kenneth Cole, Levi Strauss, McDonald’s and Timberland.”¹⁰⁶ In fact, many of these are companies with legal departments that engage in pro bono. In the 3.0 era, “goodness is now required It’s no longer a nice-to-do, it’s a have-to-do.”¹⁰⁷ “Corporations have ‘suffered tremendously in the financial meltdown’ [according to Cone,] which brought a ‘recognition that social issues must be embedded in how they do business’—or they may no longer be around to do business at all.”¹⁰⁸

With a little imagination, Cone’s categories and timeline can be adapted and applied to major law firms. As in the corporate world, in many ways, pro bono has become mission critical to law firms, and that is very encouraging in an era that can seem quite discouraging. Success, however, should not engender complacency. As the traditional structures and methods of doing business at large law firms are changing, such as the traditional lockstep model of compensation and the traditional method of strictly billing by the hour, pro bono must adapt and change as well. This is an opportune moment to reflect and make adjustments to ensure that firm pro bono efforts are as inclusive, efficient, and impactful as possible. Likewise, there is gaining momentum for developing new concrete and meaningful metrics to go beyond attitudes, beliefs, and perceptions of pro bono programs to measure the impact of pro bono efforts: do attorneys and nonlawyer staff actually develop and use new professional and leadership skills; do they stay at their firms longer; do firms become more productive and profitable; are the pro bono clients being well-served; do communities become better places to live and work? When the dust settles, it will be intriguing to take stock once again and more comprehensively write the new business case for law firm pro bono.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*