

WORKSHOP 3A: AIMING HIGH: GOALS, TARGETS, DEFINITIONS

RECOGNISING THE CONDITIONAL NATURE OF PRO BONO MOTIVATION: AVOIDING 'ASPIRATIONAL' COMPULSION AND DEVELOPING AN APPROPRIATE PRO BONO ETHIC IN NEW LAWYERS

Adrian Evans¹

Abstract: *This paper discusses the implications of the author's research into the values of legal practitioners and law students for the motivation behind pro bono work. As part of the Australian Lawyers' Values Study conducted between 2001 and 2003 by the author, a hypothetical offer of a public interest pro bono matter was made to survey respondents (700 individuals). Respondents were only marginally excited by pro bono as compared to their interest in their future careers. Considering the survey responses and a broader context of legal professional issues, the profession is best served by maintaining a voluntary pro bono ethic. Although containing some merit, aspirational targets may cause the Federal government to abrogate its responsibility to provide adequately funded legal aid. Furthermore, an aspirational approach should be avoided due to difficulties in defining pro bono, the implications for the quality of legal services and a perceived detrimental impact on firms. In addition, aspirational targets are not likely to stimulate a greater identification with appropriate legal professional values in the profession. However, for law students and junior practitioners (i.e. during Articles of Clerkship or their equivalent and for 1-2 years postadmission), aspirational targets develop a greater awareness of professionalism and provide practical benefits.*

Introduction

The profession is best served by maintaining a voluntary pro bono ethic considering the spectrum of legal professional issues and current research into the values of legal practitioners and law students. There is a tendency to replace the term 'mandatory' with 'aspirational' as the preferred approach to pro bono. Although some writers suggest that the two terms denote different concepts, the dichotomy is unconvincing. Although containing some merit, 'aspirational' targets may still encourage any Federal government to abrogate its responsibility to provide adequately funded legal aid and undermine the already 'soft' motivation to provide *pro bono* services to the community. However, for the

¹ Associate Professor, Faculty of Law, Monash University. I gratefully acknowledge research assistance and work on drafts of this commentary provided by Simon Miller, Faculty of Law, Monash University.

very different group of law students and junior practitioners' (those undertaking their pre-admission year), it is appropriate to mandate pro bono in order to develop a greater awareness of professionalism and provide practical benefits.

Legal aid funding

Considerable concern surrounds the level of funding for Commonwealth funding for legal aid². Currently, the Federal government will only provide funding for specific Commonwealth law matters as opposed to state or territory matters³. These funding constraints and the many disadvantaged Australians who need assistance place lawyers under a significant moral responsibility. Although defending the rights of society's most vulnerable is a key focus of pro bono activity, an aspirational approach will effectively burden private lawyers with a greater share of the legal needs of society's disadvantaged. Consequently, aspirational targets could undermine professional goodwill, souring practitioner attitudes to the justice system.

Definitional difficulties

The difficulties in establishing a universally accepted definition of 'pro bono' legal services⁴ also mitigate against the installation of an aspirational target. Currently, some lawyers consider work done for legal aid as pro bono because of the low level of remuneration, while others would also include matters in which they have substantially reduced, but not

² Law Council of Australia, "South Pacific Islands Regional Conference – Country Report: Australia,, February 2002, pg 6.

³ Ibid.

⁴ Anderson, Jill & Renouf, Gordon, "Legal Services 'for the public good',,, 28 *Alternative Law Journal* 1 (February 2003), pp13-17 at pg 14.

waived, their fees⁵. An aspirational target on the basis of a less than precise definition of pro bono opens the possibility that practitioners may begin to perform legal services for those neither representing the public good nor organisations working for disadvantaged groups. Consequently, the purpose of pro bono providing a key source of legal assistance for the disadvantaged may be defeated.

Quality of legal services

There are arguments for aspirational targets. Thus, via a firm-wide institutional commitment, an aspirational target could reduce the perception that pro bono work is less significant than billable work. The quality of pro bono legal services may therefore improve. Moreover, such an approach may rectify the tendency of smaller firms to view pro bono work as a series of *ad hoc* decisions to provide advice or undertake litigation, creating streamlined processes for managing pro bono work.⁶ In addition, a firm driven initiative for pro bono is more likely to publicly demonstrate the profession's ethic of service within the community than the less institutionalised efforts of committed individuals.

However, my stronger intuition is that an aspirational target for practising lawyers will diminish the quality of legal services. Private practitioners may look to evade their pro bono responsibilities or grudgingly fulfil the minimum requirement rather than contribute willingly to enhancing access to justice. Conversely, an aspirational goal may be perceived as obstructing the obligations of firms to existing fee paying clients, or as diverting resources away from attracting more billable work. The quality of legal services also decrease as pro bono work flows to less experienced practitioners, or practitioners

⁵ Australian Law Reform Commission, Discussion Paper 62: "Review of the Federal Justice System,, para 6.40.

⁶ Note 3 at pg 14.

without the specialisation required for the work. In addition, practitioners may not necessarily exercise all due skill and care in order to fulfil an aspirational goal defined in terms of hours performed per practitioner.

Consequently, as aspirational targets are progressively institutionalised, the quality of services provided to pro bono recipients may well be reduced in comparison to fee paying clients. Although committed to an aspirational goal, smaller firms may not be sufficiently resourced to actively nurture an internal pro bono culture, for instance, by the appointment of a pro bono coordinator.

Compliance Costs of Aspirational Targets

An aspirational target would place an unfair burden on smaller and medium sized firms, who are already undertaking disproportionately more pro bono work than large firms measured on the basis of average hours per lawyer per year: for these practitioners, “pro bono work is not usually a matter of choice. Rather it is done on a daily basis”⁷.

There appears a difficulty in quantifying pro bono work because few law firms keep the necessary statistics⁸, nor sufficient records about the amount of pro bono work done by practitioners⁹. Consequently, although, as discussed above, a mandatory scheme may streamline pro bono work, it also creates greater administrative demands causing increased compliance costs to firms.

⁷ Gawler, M., “Pro Bono in the Suburbs and the Country”, Paper given at the First National Pro Bono Conference, August 2000, cited in Victorian Parliament Law Reform Committee, *Review of Legal Services in Regional and Rural Victoria*, May 2001, p273.

⁸ Voluntas Pro Bono Secretariat, “Building a pro bono culture”, (1999) 73 (6) *Law Institute Journal*, p 9.

⁹ Gratton N, *Pro bono survey report*, Voluntas, Melbourne, June 1999, 8.

The potential compliance costs of an aspirational approach are also increased for larger firms if compelled to train practitioners in areas of expertise with which they are unfamiliar. For instance, whilst many smaller firms have expertise in criminal and family law representing areas of substantial pro bono demand, larger firms generally do not¹⁰. Aspirational pro bono targets increase the likelihood of larger firms perceiving ‘commercial conflicts of interest’, should the pro bono work involve an administrative or contract law matter. The prospect of repercussions for securing future government legal work has already tended to dissuade larger firms from taking on pro bono administrative law matters¹¹.

Moreover, there appear substantial difficulties in ensuring compliance with aspirational targets. The reported requirement that, for example, Florida lawyers are required to report each year their pro bono service, their contribution to a legal services provider, or alternatively, the fact that they neither provided services nor contributed same, would be likely to encounter cultural resistance in Australia.¹²

¹⁰ Note 3 at pg 15

¹¹ Ibid.

¹² Note 4 at para 6.46. A further issue affecting practitioners is whether non-compliance with an aspirational pro bono target would be sanctioned, and by whom. Imposing sanctions on professionals or firms who fail to perform a prescribed target of pro bono work, would seem unnecessarily draconian, and risk prejudicing professional goodwill.

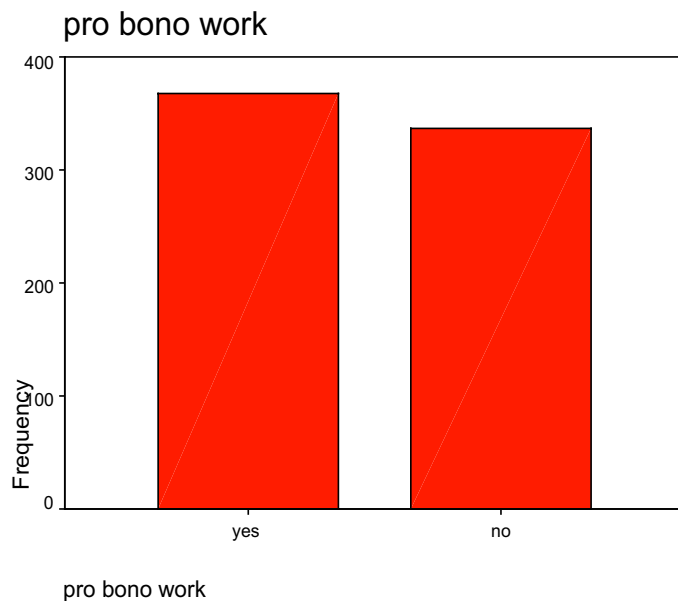
Legal professional values

The following study appeared in a series of hypothetical scenarios confronting a group of 700 final year Australian law students.¹³ The answer to the question appears in chart form below the scenario:

Scenario: You are a new solicitor working in a large commercial law firm. A voluntary public-interest organisation approaches you to work on a prominent test case about conditions in refugee detention centres. Your interest in this area is well known. The work would be *pro bono* and very high profile for you personally but of little interest to your firm. The matter requires a lot of time and work. Your senior partner however wants you to increase your billable hours for the firm. The firm does not usually do any *pro bono* work but there is no actual policy against it. Your time is currently so limited you could only realistically do one or the other. Question: **Would you agree to work on the public interest case?**

¹³ Adrian Evans and Josephine Palermo, 'Australian Law Students Perceptions of Their Values: Interim Results in the First Year-2001- of a Three Year Empirical Assessment', 5 *Legal Ethics* 1&2, 103-129

Responses to 2001 Quantitative Survey



Aspirational targets will not necessarily stimulate a greater degree of altruism, considered a hallmark of professionalism¹⁴, or reinforce the legal professional values of lawyers undertaking pro bono work. In fact, because motivation to undertake pro bono work is not overwhelming (see figure above), an aspirational goal may be counter-productive in an ethical sense, causing lawyers to perceive the work as burdensome. Burdensome work reduces productivity, encourages ethical-corner-cutting and promotes less satisfactory outcomes compared to those for of fee-paying clients.

Nevertheless, mandatory pro bono for law students and junior practitioners, promotes pro bono opportunities among impressionable future lawyers and increases whatever chances there may be that they will wish to persist with a pro bono culture when faced with budget targets.

¹⁴ Eg A Kronman, "Professionalism,, (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 89

Mandatory Pro Bono for Law Students and Junior Practitioners

Mandatory pro bono is more likely to foster a commitment in law students and junior practitioners to pro bono service throughout their legal career. Although relatively inexperienced, the greater idealism and enthusiasm of law students and junior practitioners working under supervision guarantees quality legal services for the recipients of pro bono work. For law students, practical exposure to pro bono work would undoubtedly complement the theoretical legal ethics training undertaken by them in the final stages of their degree. Law students and junior practitioners experiences of pro bono are more likely to generate a more robust pro bono culture within the profession.

Mandatory law student pro bono may assist in removing a powerful perception among law students that purely commercial work defines the (post) modern lawyer - whether they want a commercial career or not - and that new lawyers who seek exposure to public interest work will be forced to depart from commercial firms. These perceptions, which emerge from focus groups conducted within the Australian Lawyers' Values Study,¹⁵ are illustrated below:

“That’s one thing and I think if something like that came up and this solicitor is as interested as they appear to be in refugee work and the firm could not accommodate any involvement, then they’d have to make a choice about whether they want to stay at the firm or whether they want to work in the high profile public interest case. It’s hard because I don’t relate to this person very well but if I had made the wrong choice and gone to a large commercial firm that didn’t do pro bono work and I was really interested in it, then I would probably leave the firm and do the test case” (B, 12 November 2002).

¹⁵ These quotations, to appear in a forthcoming publication of *Legal Ethics*, are representative of first-year graduates views. See Note 12 for the interim report on the wider study.

“ I mean, it’s hard for me to say what to do. If it was me, I’d just quit and go to somewhere like Legal Aid” (K, 6 November 2002).

“Yeah, I’d quit. I mean, if it’s such a great case and if you really love the work, then that’s going to be furthering your career more than working for the law firm”. (D, 12 November 2002).

“...And I would probably go where the work was in this instance of my passion being this sort of case and I’m in a commercial practice which is not really where I want to end up, so here is this opportunity to take the step to where I personally want to end up” (C, 12 November 2002).

Conclusion

The arguments in favour of an aspirational approach to pro bono merit change in the provision of pro bono services only where law students and junior practitioners are concerned. Responses to the Australian Lawyers’ Values Study do not reflect an overwhelming commitment of law students and junior practitioners to pro bono work, however, the Focus Group responses indicate a strong underlying interest in pro bono. Mandatory pro bono for law students and junior practitioners is more likely to transform this demonstrable interest into broad based pro bono participation amongst those emerging in the profession. A voluntary pro bono ethic should be retained for the profession in general.

The goodwill; the satisfaction that comes from giving without receiving a financial pay-off; the opportunity to ‘put in’ to the community for its own sake - all of the values upon which the already substantial proportion of pro bono work is based - must not be jeopardized.