

LAW AND LIBERTY

The “Pro Bono” Hoax: Part II

Mark Pulliam

November 8th, 2018

In the first installment of this series on pro bono work, I explained why the term “pro bono” is often an egregious misnomer. Large law firms (referred to in the industry as Big Law) routinely engage in progressive activism on a massive scale—often seeking to overturn or frustrate the enforcement of popular laws—while *claiming* to be serving the public good. In reality, the institutions of representative self-government—frequently the target of “pro bono” litigation—are usually the public’s true champions. The would-be “people’s lawyers” consistently oppose the very polity they purport to represent.

A minority of voters support open borders, amnesty for illegal immigrants, sanctuary cities, abortion-on-demand, abolition of the death penalty, made-up rights for the homeless and welfare recipients, hamstringing law enforcement, releasing captured terrorists from Guantanamo Bay, judicially-mandated tax increases to finance public education “reforms,” and a host of similar progressive causes, yet the “pro bono” docket is zealously committed to advocating this controversial agenda. Nevertheless, words have power—in this case the power to mask the truth. After all, how bad can something be if it is *invariably* described as “for the public good”? As Walter Olson noted in his insightful 2011 book, *Schools for Misrule*, among members of the legal culture “the consensus can be all the more tight and hermetic for going unacknowledged.”

The self-serving “pro bono” label thus serves a dual purpose: Within Big Law, it promotes the feel-good virtue-signaling that allows legal elites to reap huge profits while falsely posing as Atticus Finch, and externally it obscures the nature, extent, and consequences of the highly-ideological campaign being waged by the legal establishment. The pro bono banner is calculated to deceive, even as it exemplifies the legal profession’s vanity and arrogance.

Big Law and “Pro Bono”

As a Big Law veteran, I had no illusions about the left-wing goals being advanced in the name of *pro bono publico*, but in the course of researching “White Shoe Social Justice Warriors: The Pro Bono Racket” for my blog, *Misrule of Law*, I was dumbstruck to learn the sheer *magnitude* of the pro bono docket. Due to the explosive growth of Big Law in the past decade, 129 large law firms participating in the Pro Bono Institute’s (PBI) reporting protocols performed nearly *five million hours of pro bono work* in 2017 alone. Five million pro bono hours is the full-time equivalent (FTE) of a 2,500-lawyer law firm for *an entire year*. This represents an astounding increase of 311,000 hours from 2016, and a greater-than-three-fold increase since PBI’s inception in 1995. PBI reports that signatory firms have contributed *over 73 million pro bono hours* since 1995—an astonishing 36,500 lawyer-years in terms of FTE, averaging to the equivalent of almost 1,600 full-time lawyers annually during that period.

In 2016, law *students* contributed *at least* 2.2 million *additional* pro bono hours, mainly to activist causes.

The nation's largest firms—many of which have more than 1,000 lawyers apiece—are now contributing, on average, in excess of 100 pro bono hours per attorney *each year*. This is a veritable army of social justice warriors—supplementing the half billion dollars spent by the federally-funded Legal Services Corporation on legal aid each year. Not *all* of these donated hours were devoted to activist causes, of course, but as I reported in *Misrule of Law*, many of them were. Belying the purported ideal of legal aid for the poor, PBI's expansive definition of “pro bono” includes activities such as “legislative or administrative policy advocacy on behalf of a qualifying client or client group, [and] working with a community organization on an affordable housing project.” In other words, lobbying, rulemaking, and Alinsky-style community organizing are treated interchangeably with providing direct legal assistance to indigents—a farce.

As I describe in “White Shoe Social Justice Warriors,” much of Big Law's “pro bono” docket consists of impact litigation in partnership with openly-ideological organizations such as the discredited Southern Poverty Law Center, the far-left Center for Constitutional Rights (co-founded by activist William Kunstler), the ultra-liberal Lawyers' Committee for Civil Rights Under Law (which recently co-sponsored an initiative, called Change the Terms, to censor so-called “hate speech” on the Internet), and other activist groups. These groups do not represent the mainstream of public opinion, but a hyper-partisan fringe. CCR has honored notorious Palestinian advocate Linda Sarsour with its Radical Leadership Award, and has described the 2016 election of President Trump as “horrendous,” “illegitimate,” and “a dangerous slide into American fascism.” CCR touts its commitment to the Resistance, in 2017 re-naming its annual President's Reception the #NotMyPresident Reception.

Our Rulers, the Lawyers

What is the motivation for Big Law's embrace of this radical agenda—volunteering to serve as a de facto adjunct to the ACLU, or, even worse, the National Lawyers Guild? As Judge Dennis Jacobs has pointed out, lawyers and judges both benefit when the legal system gains power. By weaponizing phony altruism in order to engorge its own influence, most “pro bono” litigation is calculated to undermine democratic rule—disempowering ordinary citizens. A clique of elite lawyers striving to function as America's ruling class override decisions of elected officials through lawfare. Walter Olson succinctly describes the pernicious effects of activist “public interest” litigation: “conventional politics itself begins to atrophy, and a new road to power in society opens up.” [1]

Inspired by consumer-crusader Ralph Nader [2] and the civil rights movement, the legal culture became politicized during the 1960s and 70s, and remains one of the Left's most influential platforms. My fellow *Law and Liberty* contributor, John McGinnis frequently points out the leftist domination of legal academia (*e.g.*, here, here, and here), but the same is true of the judiciary, the organized bar (not just the American Bar Association, but also state and local bar groups) and large law firms.

Some may wonder why law firms are willing to sacrifice additional profitability by giving away five percent (or more) of their lawyers' billable hours on pro bono work. There are several explanations. By donating a large amount—and the “correct” type—of pro bono time, law firms

are rewarded with favorable recognition by the legal establishment (awards, flattering publicity, etc.) that translates into valuable goodwill from a recruiting, marketing, and branding perspective.

Less obviously, extensive pro bono opportunities—along with astronomical starting salaries—are viewed as an essential perk by the elite law school graduates that large law firms rely upon to staff the bottom tier of their pyramidal business model. Due to withering attrition in the associate ranks, the highly-leveraged firms that comprise Big Law are continually recruiting fresh associates from a finite pool of qualified candidates. Unlike the upwardly-mobile young barristers of the past, who saw Wall Street firms as a portal to Brahmin status, many of today’s law graduates—the product of progressive indoctrination in college and law school—view Big Law practice as mere drudgery and, paradoxically, tend to disdain commerce. Being able to moonlight as a social justice warrior through “pro bono” work is an increasingly-important inducement.

Big Law, Big Business, and Their “Pro Bono” Baby

The counter-intuitive twist is that Big Law might not be forgoing profitability after all. To a surprising degree, the corporate clientele of Big Law (mostly publicly-traded Fortune 500 companies) supports the ideological agenda of the “pro bono” docket and implicitly is willing to subsidize it by paying higher hourly rates than the market would bear if 100 percent of Big Law’s billable hours were remunerative. (Since law firm overhead is a fixed cost, giving away billable hours would reduce law firms’ profitability *unless* paying clients in effect allowed a higher hourly rate for the paying work to adjust for the “donated” pro bono time.) Many corporations, employing large in-house legal departments, have gotten in on the act—engaging in pro bono themselves, encouraging their outside law firms to do so, and even sponsoring it with corporate donations.

This is supremely ironic, since the “public interest” legal movement that animates the pro bono docket began as *anti-corporate* activism. Yet, Big Business, already heavily invested in diversity policies, also increasingly supports Big Law’s social justice agenda. It has gone largely unnoticed that in-house corporate legal departments are becoming politicized, with many requiring outside law firms to meet rigid “diversity goals”—actually racial and gender quotas—both firm-wide and in legal teams assigned to the companies’ work. Moreover, Microsoft recently decreed that its vendors and suppliers, including the law firms with which it does business, must provide paid family leave to their employees—*even though this would increase Microsoft’s own costs*. These progressive impulses transparently elevate ideological fashion over the interests of corporate shareholders.

Yet the PBI’s board includes a representative of the Clorox Company, and its corporate advisory board includes blue chip companies such as Microsoft, 3M, Hewlett Packard, General Electric, Verizon, Aetna, and Bank of America. The list of companies supporting PBI activities as “sponsors” include Hertz, ExxonMobil, GlaxoSmithKline, Intel, AT&T, PepsiCo, United Airlines, Amazon, Walmart, American Express, Merck & Co., and many others. Home Depot and Qualcomm have representatives on the board of the highly-politicized Lawyers’ Committee for Civil Rights Under Law. What conceivable benefit do these companies’ shareholders derive from corporate-subsidized pro bono litigation? Fighting for “social justice” is not within the purview of publicly-traded companies’ mission.

What accounts for the curious alliance between Big Business and Big Law to pursue a progressive agenda under the false banner of “pro bono”? The common element, as Walter Olson suggests, is a “cleverly disguised” bid for power by elites estranged from “Main Street opinion.” [3] Corporations and lawyers have long played an active role in the nation’s political life, even as the ideological direction of this involvement—once, but no longer, primarily conservative—has shifted over time. In a free society, there is nothing inherently wrong with such political advocacy. However, honesty and transparency require candor, and the appropriate arena for policymaking is generally the political process (elections and legislation), not litigation that is by design “hidden, unaccountable, and irresponsible.” [4]

By devoting massive resources toward effecting social change through the courts, risibly claiming to be acting in “the public interest,” much of the pro bono docket amounts to a fraud. If law firms wish to influence public policy through litigation, they should be transparent about their goals, and either disclose their political agenda or allocate their “pro bono” resources in a non-ideological and bi-partisan manner. Until then, “pro bono” will not truly be in the public interest.