

FULFILLING THE PROMISE OF BUSINESS LAW PRO BONO

James L. Baillie[†]

I.	INTRODUCTION	1544
II.	BUSINESS LAW PRO BONO CLIENTS	1544
	A. <i>Nonprofits</i>	1545
	B. <i>Microenterprises</i>	1546
III.	RECRUITING LAWYERS	1548
IV.	BUSINESS LAW PRO BONO PROGRAMS AND THEIR PARTNERS	1550
	A. <i>ABA Section of Business Law</i>	1551
	B. <i>Other Resources</i>	1554
V.	SUPPORTING DEVELOPMENTS	1556
	A. <i>Ethical Codes and Calls for Mandatory Pro Bono</i>	1556
	B. <i>ABA Law Firm Pro Bono Challenge</i>	1563
VI.	MEETING THE CHALLENGES	1563
	A. <i>Articulating the Vision</i>	1563
	B. <i>Developing Eligibility Standards</i>	1564
	C. <i>Avoiding Ideological Issues</i>	1567
	D. <i>Developing Resources</i>	1568
	E. <i>Addressing Law Firm Economics and Culture</i>	1570
	F. <i>Linking and Strengthening Business Law Pro Bono Programs</i>	1571
	G. <i>Collaborating With Others</i>	1573
VII.	CONCLUSION.....	1573

[†] James L. Baillie is a shareholder of Fredrikson & Byron, P.A. in Minneapolis. He is a former chair of the American Bar Association Standing Committee on Lawyers' Public Service Responsibility and is current chair of the Pro Bono Committee of the ABA's Section of Business Law. The author wishes to thank Allen Bromberger, Guy Lescault and Greg McConnell for helpful suggestions.

I. INTRODUCTION

Business law pro bono – legal services provided on a pro bono basis by business lawyers in aid of community economic development – is an idea whose time has come. Although it is not a new concept for business law pro bono services to be provided on an occasional basis, for the most part, the organized provision of these services is new. Recent years have seen a dramatic increase in the number of pro bono programs specifically devoted to providing business law services and, correspondingly, a dramatic increase in the amount and variety of those services by volunteer lawyers.¹

The promise of business law pro bono is enormous. While the amount of traditional, litigation pro bono services appears to have leveled off or even declined in recent years, the development of business law pro bono programs has the potential to dramatically increase the number of pro bono volunteers because it can draw upon that larger part of the profession who are not litigators and who resist participation in traditional pro bono programs. The types of services that are likely to be delivered by business lawyers are very different from traditional litigation-based pro bono services. These services can play an important role in community economic development and therefore offer long-term benefit not only for the individuals served directly, but also for our communities.

This article describes business law pro bono programs and traces their growth. The recent increases in the number of programs and the delivery of these services has been impressive but business law pro bono has the promise to be much more than it is now. This article will also describe the challenges that must be met before business law pro bono programs can fulfill that promise.

II. BUSINESS LAW PRO BONO CLIENTS

“Business law pro bono” is not, in this article, narrowly defined. It includes any legal services in the broad category of business law as contrasted with litigation. The clients of these business law services can be any persons or entities that need legal services on a pro bono basis.

1. For an article profiling a number of pro bono business lawyers and their clients and recognizing the new business law pro bono trend, see *Pro Bono; Public Service Steps Out of the Courtroom*, *The American Lawyer*, December 2000, at 73-87. The article features several local Dorsey & Whitney lawyers.

Often business law legal services are seen as part of community economic development. That is, the services to individuals and entities have the effect of assisting economic development in our poorest communities. The recipients of these services can, for the most part, be divided into two broad categories: nonprofits and microenterprises. The services can be provided to any person or organization that needs business law pro bono services, but most existing programs concentrate on clients in these two categories and this article will focus on them.

A. *Nonprofits*

Nonprofit corporations are a substantial and growing part of the economy. In 1998, there were 1.2 million “independent sector” (501(c)(3), 501(c)(4)), and religious congregations. For purposes of this article, the term “nonprofits” includes community organizations such as community development corporations (CDCs) and even governmental units. These nonprofits have a mission to improve their communities rather than to return a profit to investors. This altruistic mission, however, is not a sufficient reason for all nonprofits to receive free legal services. Some of these nonprofits have substantial budgets and should be expected to pay for legal services. But many of these nonprofits are very small. They have no funds available to pay for legal services; any money which they did spend on attorneys’ fees would significantly deplete the organization’s resources and would be to the substantial detriment of their missions. Whether through the assistance of lawyers sympathetic to their missions who are recruited directly by these nonprofits or through the organized programs that are the subject of this article, some of these small nonprofits receive pro bono legal services on business matters such as leases and contracts, employment issues, corporate and tax compliance. The value of these pro bono legal services has been estimated at \$25 million annually.²

For example, the Pro Bono Partnership located in Westchester

2. Press Release, Power of Attorney, Total \$1.1 Million In Grants Awarded To Five Organizations In First National Initiative To Expand Pro Bono Legal Services For Nonprofits (Apr. 12, 2001) (on file with James L. Baillie) [hereinafter Power of Attorney]. The Power of Attorney website can be found at <http://www.powerofattorney.org>. See Susan R. Jones, *Representing the Poor and Homeless: Innovations in Advocacy; Tackling Homelessness Through Economic Self-Sufficiency*, 19 St. Louis U. Pub. L. Rev. 385, 385-412 (2000).

County, New York; Fairfield County, Connecticut; Northern New Jersey; and elsewhere, matches lawyers on the legal staff of General Electric and other large corporations with nonprofits, such as Bridge House, an organization that helps mentally ill adults. These lawyers help nonprofits that work in areas such as health and human services, affordable housing and neighborhood revitalization.

Within the nonprofit category, a number of these clients are involved in homelessness and affordable housing projects. These clients are usually local governmental entities, community development corporations, and faith-based community organizations engaged in rehabilitating substandard housing or creating new low-income housing. For example, lawyers in the Washington, D.C., office of Latham & Watkins under the leadership of partner William Kelly, Jr. serve, in effect, as general counsel to the East of the River Development Corporation. Their work has included a \$9 million housing project and help with a retail center. The client was matched with the law firm by the Community Economic Development Project of the D. C. Bar Association.

Another example is Leonard Presberg, a young lawyer in a two-lawyer firm in Fayetteville, Georgia. He was connected by the Georgia ABC Program with Henry County Residential Housing, Inc., an embryonic community development corporation. It had received funding from HUD to build 60 new houses for low income families in rural Georgia, but had no funds of its own for the necessary legal services and had no idea how to proceed. Through Mr. Presberg's pro bono efforts, this housing is now under construction.

In this type of business pro bono, the clients are the nonprofits themselves. In addition, the volunteer lawyers may become involved in providing services to individual enterprises that are served by these nonprofits.

B. Microenterprises

The second broad category of business law pro bono clients, "microenterprises," describes very small businesses with no hope, at least in the short run, of being able to pay for basic legal services,³

3. Although this article uses microenterprise only to describe small business and not to apply a technical definition, the Association for Enterprise Opportunity

such as incorporation, review of leases, employee issues and the like. These small businesses include home-based day care, restaurants, service businesses and start-up enterprises. Usually when these businesses are the recipients of pro bono services, it is because the lawyers that provide the services have a larger goal of community economic development. These pro bono services are often targeted to the poorest communities, or to ethnic minority communities to help them successfully assimilate into the larger community.

As with nonprofits, drawing a line between clients who can and should pay for their legal services and those who should receive pro bono services is not easy. Often new businesses, even very small ones, can obtain legal services on a moderate fee basis, provided by lawyers who do this as part of their practice-building. As these businesses grow and prosper, it is hoped that they will need more legal services for which they will pay on a full-fee basis. Other new and small businesses, on the other hand, cannot afford to pay anything for those services and are not strong prospects for future full-fee legal services. They cannot receive legal services in the marketplace. These businesses need pro bono services, and when these services are targeted to communities in redevelopment, the community development process can benefit greatly. Many of the nonprofits described above are organized primarily to help these small businesses and may themselves be pro bono clients. Across the country, there are at least 700 programs that specifically devote themselves to providing technical assistance, mentoring and small loans to the smallest of businesses. Providing pro bono services to these microenterprise assistance programs is another way to assist the microenterprises themselves.

A leading local example is the Metropolitan Economic Development Association (MEDA) which was begun soon after riots in minority communities in 1968. This effort was organized by business leaders and John Stout, then a young lawyer at Fredrikson & Byron. When MEDA began to assist minority business owners, it

defines a microenterprise as a sole proprietorship, partnership or family business that has fewer than five employees, small enough to benefit from loans under \$35,000 and too small to access commercial banking services. *See What is Microenterprise?* at <http://www.microenterpriseworks.org/about/whatis.htm>. Another definition is a business comprised of one to five people with less than \$5,000 in start up capital. *See* Lewis D. Solomon, *Microenterprise: Human Reconstruction in America's Inner Cities*, 15 HARV. J. L. & PUB POL'Y 191, 192 (1992).

employed business mentoring and vendor programs but it also has provided business law pro bono services to some of its clients. More recently, the same firm has agreed to provide the legal services needed by the 37 Hispanic-owned businesses in the Mercado Central, a two-year-old Latin American marketplace in Minneapolis. In another example of pro bono assistance to a microenterprise, lawyers at Kilpatrick, Stockton in Atlanta provided intellectual property legal services to help women in a Georgia poverty community sew and sell dolls of color with individual names and identities.

III. RECRUITING LAWYERS

These business law services are to be contrasted with traditional legal and pro bono services which, for the most part, have been litigation-oriented. Legal aid offices and pro bono programs have historically focused most of their services on individuals who need help in court: people being evicted from their apartments, people who need representation in housing court; family members going through divorce or child custody or child protection issues in family or juvenile court; people entitled to benefits who need to use an administrative law or court procedure to receive those benefits; and people in danger of deportation. It is easy to see why these needs receive attention – the unrepresented individual in court is most visibly in need of legal services. Many of these people were unable to avoid being in court and they need the help of lawyers to be able to effectively assert rights granted to them by law. Serving these people helps validate our system of law and the basic principle of our justice system: “Equal Justice under Law” (the inscription over the west portico of the United States Supreme Court).

Helping these people helps serve another purpose, that of assisting in the administration of justice. Judges often become strong supporters of pro bono programs because pro se litigants generally slow the administration of justice and make it more difficult for the judges to dispense judgment with an even hand. The judicial system works best when judges can rely on representation by advocates for all sides. Individuals who need traditional litigation-based services of the type mentioned above have come to understand that there are lawyers who may be willing to provide help and many of them have found their way to the doors of legal aid offices and traditional pro bono programs.

The lawyers hired by legal aid offices and lawyers in private practice who have been successfully recruited by pro bono programs are for the most part litigators or lawyers willing to learn enough litigation skills to handle specific matters. Some of these legal aid traditional pro bono programs have provided business law help, but that has been by far the smaller part of their efforts.

Pro bono programs seeking more volunteers to help with their existing clients, especially in family law, have noted the resistance of business lawyers (also called “non-litigators” or “transactional attorneys”), especially lawyers on corporate legal staffs. Articles have been written, programs have been presented at conferences and experiments have been undertaken concerning recruiting, training and retaining “non-litigation” lawyers to provide family law and other traditional litigation services. There have been some successes. Some non-litigators have been pleased to broaden their legal skills and help with these clients and have become outstanding volunteers, but they are the minority. As early as the 1970s, corporate legal staffs began pro bono programs, often in partnership with local legal aid or pro bono programs. But after initial bursts of enthusiasm, many, if not most, of these programs have declined. Some of the programs disappeared altogether. Often legal aid lawyers and traditional pro bono programs have concluded that the costs to recruit and train transactional lawyers were greater than the benefits.

The reasons for this disappointing level of success are understandable. James Johnson, General Counsel of Proctor & Gamble, tells of handling a family law case, with assistance. But he concluded that the use of his services in this way was not cost effective and he decided not to do it again.⁴ Training the necessary lawyers, especially the most experienced senior and skilled business lawyers to work in these litigation areas, is very demanding. It often seemed better for these lawyers who believed in pro bono legal services to give money. Since then Mr. Johnson has become one of the leaders in establishing a new business law pro bono program in Ohio.

When pro bono programs that present these business lawyers a chance to use their own skills became available, many of the same lawyers who would not help with litigation-based pro bono became

4. James Johnson, Address to the Pro Bono Committee of the ABA Section of Business Law in Columbus, OH (Mar. 24, 2000).

much more enthusiastic volunteers. The business pro bono clients being served are not those who meet the classic descriptions of need. But underlying the business law need, these business lawyers see the basic human needs for food and housing and the ability to care for their families. Many have come to see these needs as *more* important and the benefits from pro bono services as more long lasting. Philosophically, for many of these lawyers, provision of these services is more satisfying. As planners, builders and counselors, these lawyers would rather work with community institutions and people struggling to participate in the market economy than with clients in trouble in court.

Inspiring business lawyers to help may not always be difficult, but matching them with clients is. The clients are not found at the traditional legal aid offices. Despite the fact that there is a large pool of needy pro bono clients – small nonprofits and microenterprises and a need for economic development generally – matching volunteer lawyers with appropriate clients is not an easy task. That requires the development of intermediaries, the business law pro bono programs, to link lawyers and clients. This is the greatest challenge.

IV. BUSINESS LAW PRO BONO PROGRAMS AND THEIR PARTNERS

Individual lawyers have provided business law pro bono services since long before the rise of organized programs but, with just a few exceptions, programs principally devoted to this task are a relatively recent phenomenon. Because clients needing these business law services are not easily identified, the lack of these programs has dramatically reduced the amount of business law pro bono services being provided.

The most notable early business law pro bono program is the Lawyers Alliance for New York was formed in 1969 to match volunteer lawyers with nonprofits that are working to improve the quality of life in low-income neighborhoods in New York City. Since then, Lawyers Alliance, which has attorneys on its staff but depends heavily on volunteers, has provided business law and transactional legal services with a value of more than \$100 million. Among the other pioneers, the Community Economic Development Law Program of the Chicago Lawyers' Committee for Civil Rights under Law, which was formed in 1985, helps with housing projects and small business startups, and assists in starting community development corporations and setting up job training

programs. In Indianapolis, the Community Organizations Legal Assistance Project, Inc. (COLAP) facilitates pro bono legal services and technical assistance to local nonprofits serving low income neighborhoods. In Boston, the Lawyers Clearinghouse on Affordable Housing and Homeless, which was formed in 1988, emphasizes housing, homelessness and community economic development.

This is not to say that the traditional pro bono programs completely ignored business law. Among other examples, one of the first pro bono programs in the country, the Volunteer Lawyer Network in Minneapolis, has had a nonprofit panel since the early 1970s. The Volunteer Legal Services Program of the Bar Association of San Francisco had a nonprofit panel in place by 1987, and in 1994 formed a Community Economic Development unit. Public Counsel in Los Angeles, the country's largest pro bono program has had a community economic development unit for some time.⁵

A. *ABA Section of Business Law*

Until recently, with the exception of the Lawyers Alliance, these efforts, whether in separate programs or within traditional pro bono programs, have been modest. In 1993, the Business Law Section of the American Bar Association formed its own pro bono committee chaired by Jack Martin, General Counsel for Ford Motor Company, and Maury Poscover, a member of the Section Council and later Section Chair. The Committee was formed in part in response to the letter of Joseph Mullaney, General Counsel of Gillette Company who wrote:

I believe that there will be no significant change in this situation unless lawyers, such as those involved in our Section and on our Committees, recognize the need and their responsibility and respond. Pro bono service has to become as much a part of our substantive efforts as corporate law, tax law, real estate law and all of the other

5. There are other business law programs not mentioned elsewhere in this article. At one time the author listed all of those programs in the footnote, but the list is growing rapidly and attempting to list them all risks offending some programs that might be unintentionally omitted. For the most current list, look to the ABC Manual, which is updated quarterly. In addition, at least 20 law schools, including William Mitchell College of Law, listed in the ABC Manual described later in this article, have clinical programs directed at business law representation. For the other law school programs see the ABC Manual.

aspects of law that form part of our business law practice. I could not help but believe as I heard discussions at the Council meeting of the ALI proposals, that if one half of the intelligence, effort and energy involved in that effort had been directed towards the problem of homelessness, for example, we would be one half way towards resolving the legal aspects of that problem.

I believe that our Section, one of the largest and most respected units of the ABA, should take a leadership role in its effort. Just as our Section and its Committees and Task Forces have distinguished themselves in various other areas, I am sure that our Section could act with equal distinction and provide an example to the other Sections and units of the ABA.⁶

The pro bono program of the Business Law Section is called A Business Commitment (ABC). Initially, ABC served as a national clearinghouse matching individual requests for business law pro bono services with local lawyers willing to provide those services. However, the Pro Bono Committee responsible for ABC recognized early that for the most part, matches should be made at the local level and thus gradually shifted its emphasis to helping lead a national effort to encourage the development of local business law pro bono programs. With a grant of \$100,000 from the Ford Foundation in 1998, ABC was able to help initiate two large demonstration projects: the Community Economic Development Pro Bono Project, under the supervision of the DC Bar Association in Washington, D.C., and the Georgia ABC Project under the supervision of the State Bar of Georgia and the Georgia Legal Services Program. In addition, the committee was able to give assistance to developing programs in Detroit⁷ and St. Louis.⁸ By

6. James L. Baillie, *Bankruptcy Lawyers, Bankruptcy Judges and Public Service*, materials presented at the National Conference of Bankruptcy Judges in Orlando, Florida (Oct. 1993).

7. Community Legal Resources is a joint project of Michigan Legal Services and the Pro Bono Committee of the Business Law Section of the American Bar Association. It began linking non-profit community organizations with volunteer attorneys in real estate tax, business and other transactional areas of law in 1998 and thus far has provided over \$500,000 of free legal services in 175 separate matters. It has a full-time executive director and a full-time program manager.

8. Professional Housing Resources, Inc, a joint venture of the Bar Association of Metropolitan St. Louis, Legal Services of Eastern Missouri, the St. Louis University School of Law and the Regional Housing and Community Development Alliance has been providing assistance to non-profits involved in improving neighborhoods and creating affordable housing since 1995.

1999, the programs in the District of Columbia and Georgia were fully functional and they were formally evaluated. The Business Law Section then produced the *ABC Manual: Starting and Operating a Business Law Pro Bono Project*.⁹ The *ABC Manual* draws heavily on the experiences in those four programs and also to some extent from the programs in New York and Chicago to describe how such programs can be started in other communities. The *ABC Manual* is updated quarterly, most recently January 1, 2002, adding new information about new programs as they are started. The number of programs has doubled in the two years since the initial publication in the Spring of 2000.

The committee devotes a part of each meeting to exploring the provision of business law services in the community in which it meets or to showcasing existing or new programs for the membership of its committee and the leadership of the Section. In one recent meeting, for example, the Section focused on the newly developed program in Ohio and heard from its leader, James Johnson, general counsel of Proctor & Gamble. At another meeting, representatives of a number of supporting programs described later in this article such as Power of Attorney, probono.net, and others were introduced. In the Spring of 2001, representatives of programs in various early stages of development in Texas, the Tampa Bay area, Washington state, and in Philadelphia described their early efforts to begin programs.¹⁰ At the 2001 ABA Annual Meeting in Chicago, the Chicago programs were introduced.

The Section also operates a list serve with more than 150 participants to allow program administrators and others involved in the business law pro bono programs to hold a continuing national dialog and, since 1996, the Section has recognized outstanding examples of business law pro bono services by individuals and law firms or corporate law departments through its National Public

9. *The ABC Manual: Starting and Operating a Business Law Pro Bono Project*, A Business Commitment, a partnership between the American Bar Association Section of Business Law Pro Bono Committee and the National Legal Aid and Defender Association (2000), available at <http://www.abanet.org/buslaw/probono/abc/abc.pdf>. The pro bono activities of the Section of Business Law are updated at <http://abanet.org/buslaw/probono/home.html>.

10. The Ohio Legal Assistance Foundation, Community Counsel of the Bay Area Legal Services (a program begun earlier but now being revitalized) and Texas C-Bar. The programs in Washington state and Philadelphia are in the planning stages.

Service Awards.

B. Other Resources

The growth and maturation of business law pro bono programs has been greatly assisted by the formation of Power of Attorney (POA). With the assistance of a significant grant, Allen Bromberger, former director of the Lawyers Alliance for New York, established an organization with the mission of expanding the availability of pro bono services to the nonprofit sector. Over a several-year period, POA has issued grants for planning and then expanding existing programs. In April 2001, it awarded \$1.1 million for the expansion of the programs in San Francisco, Los Angeles, Chicago, Detroit and Washington, D.C. POA has also taken on the role of sponsoring national meetings bringing together representatives of the established programs to discuss common issues.¹¹ The first formal meeting of this type was held in December 1999. At the start, for the most part, the participants did not know each other and did not know of each other's programs. Through bi-annual meetings, this group has begun to develop projects of mutual assistance.

Another pro bono effort that is becoming significant and likely to become even more so is probono.net. Originally a New York City-based program, this organization provides separate web pages for different areas of pro bono practice. In addition to forms, news and the like, the pages are used for case placement. This program has recently grown to include Minnesota, San Francisco and Rochester, New York. Probono.net is beginning to develop pages of national interest, including a page on community economic development. Working in conjunction with the Business Law Section and its Business Bankruptcy Committee, Probono.net is developing a national page on bankruptcy pro bono representation.¹²

The ABA Center for Pro Bono provides support for pro bono programs – including traditional programs – and supports the Equal Justice Conference (formerly known as the Pro Bono Conference), which brings together administrators and others interested in pro bono programs of all kinds. Over the years, the conference has held panel discussions addressed to involving

11. Power of Attorney, *supra* note 2.

12. <http://www.probono.net> and <http://www.probono.net/bankruptcy>.

business lawyers. It also maintains an extensive set of materials to support pro bono programs of all kinds, including business law pro bono.¹³

The American Corporate Counsel Association (ACCA), with the assistance of the Pro Bono Institute (which also administers the Law firm Pro Bono Challenge described elsewhere in this article), has recently established a web site to support pro bono by corporate counsel.¹⁴ The site provides information about pro bono opportunities for corporate lawyers and provides technical assistance to address corporate counsel concerns about time commitments, the response of employees and malpractice claims and insurance. It addresses concerns about lack of expertise in litigation matters, in part, with information about business law pro bono. CorporateProBono.Org is working on a Model Partnership Project to feature pro bono partners models designed to link corporate counsel with law firms or pro bono projects. Some of these projects will involve business law pro bono. It is launching the effort in Chicago, where the Public Interest Law Instructive (PILI) has begun such partnership arrangements. Over the long term, support from corporate counsel for business law pro bono programs will be increasingly important.

Another resource is the National Economic Development & Law Center located in Oakland, California, which was formed in 1969. It is involved in public interest law and planning with respect to community economic development.¹⁵

Parallel to these developments in business law pro bono, specialized pro bono programs have been developed in the area of bankruptcy pro bono. Bankruptcy lawyers, for the most part, consider themselves business lawyers although many of the services that they provide are litigation-oriented. In 1992, Minnesota developed the country's first specialized bankruptcy pro bono program. That program focused on representing defendants in adversary proceedings. At about the same time, the Consumer Bankruptcy Advocacy Project (CBAP) was developed in Philadelphia to provide bankruptcy services, including the filing of bankruptcy cases. In addition, the bankruptcy bar in South Carolina has been very supportive of pro bono programs over the

13. <http://www.abaprobono.org>.

14. <http://www.corporateprobono.org>. The web site has received more than 700,000 hits since its launch in October 2000.

15. <http://www.nedlc.org>.

years. Following the establishment of these programs, bankruptcy pro bono programs began to form in other areas and efforts have been made to encourage further development of these programs. One notable effort was the development of a manual, originally published in 1994 and updated in 1999, to provide information for the development of local bankruptcy pro bono programs.¹⁶ This effort has involved the Litigation Section of the American Bar Association but is currently led primarily by the Business Bankruptcy Committee of the ABA Section of Business Law.

V. SUPPORTING DEVELOPMENTS

A number of developments in the law and the legal profession have had the effect of indirectly providing additional impetus to business law pro bono programs. Among these have been revisions of ethical codes and, especially, the adoption of Model Rule 6.1. Calls for mandatory pro bono service, the development of law firm pro bono programs and the ABA's Pro Bono Challenge have also contributed to the momentum.

A. *Ethical Codes and Calls for Mandatory Pro Bono*¹⁷

The first written code of lawyer ethics in America was adopted by the Alabama State Bar Association in 1887.¹⁸ It included this rule: "A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in some instances, and sometimes not at all."¹⁹ The American Bar Association's first Canons of Professional Ethics, adopted in 1908, did not contain such a rule but did provide: "it should never be forgotten that the profession is a branch of the

16. ABA Section of Business Law and ABA Section of Litigation, *How to Begin a Pro Bono Program in Your Bankruptcy Court: A Starter Kit for Lawyers and Judges* (2d. ed. 1999) [hereinafter *Starter Kit*], available at http://abanet.org/buslaw/probono/bank_kit.html. It can also be found at <http://www.probono.net/bankruptcy>.

17. This portion of this article is drawn substantially from an article previously written by the author, James L. Baillie and Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education*, 13 *Law & Ineq.* 51, 51 (1994). Sources for the content are found there. Special credit should be given to Dennis A. Kaufman, *Pro Bono: The Evolution of a Professional Ethic*, PBI Exchange (1992).

18. ABA Comm. on Code of Prof'l Ethics, 31 *A.B.A. Rep.* 676, 676 (1907).

19. *Id.* at 708 n.54 (quoting Ala. Code § 48).

administration of justice and not merely a money-getting trade.”²⁰

In 1969, the ABA adopted the Model Code of Professional Responsibility. This code contains *Canons*, which articulate standards of professional conduct. These standards are “aspirational in nature and represent the objectives toward which every member of the profession should strive,” and also include *Disciplinary Rules*, which “state the minimum conduct below which no lawyer can fall without being subject to the disciplinary conduct, and *Ethical Considerations*.”²¹

Ethical Consideration 2-25 provides:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.²²

In 1977 the ABA established the Commission of Evaluation of Professional Standards, chaired by Robert Kutak. By that time, the Bar Association of the City of New York had issued a report recommending that all lawyers should be *obligated* to perform pro bono as a minimum standard of conduct.

A 1979 preliminary draft of the Kutak Commission also contained a mandatory pro bono provision and would have required lawyers to serve forty hours per year. The first published

20. *Id.*

21. Model Code of Prof'l Resp. pmb. (1979) (emphasis added).

22. *Id.* at EC 2-25.

draft, however, removed that language and inserted: "A lawyer shall make an annual report concerning such service to an appropriate regulatory authority."²³ In a journal article, Robert Kutak asserted:

The thrust of a mandatory *pro bono* obligation is not to compel charity, but to provide needed services that only lawyers can give. Those who would oppose a mandatory obligation to serve the poor and their communities should come forward with alternative proposals which will address the continuing crisis of unserved legal needs as directly and effectively as would *pro bono* service.²⁴

The next draft dropped the reporting requirement and substituted "should" for "shall."²⁵ The new Model Rules of Professional Conduct were ultimately adopted in 1983. The Preamble of the Model Rules provides in part:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . [A] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.²⁶

Model Rule 6.1, until modified in 1993, read:

Rule 6.1 PRO BONO PUBLIC SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.²⁷

But calls for mandatory *pro bono* continued, although they clearly reflected the viewpoint of the minority of the bar. Mandatory *pro bono* exists only in limited degrees in a few jurisdictions such as El Paso, Texas; Orange County, Florida; and Westchester County, New York and does not affect all of the lawyers

23. Kaufman, *supra* note 17, at 15.

24. Robert J. Kutak, *Pro Bono Service: Should It Be Mandatory?*, 37 N.L.A.D.A. Briefcase 90, 91 (1980).

25. Scott Slonim, *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A.J. 33 (1981).

26. Model Rules of Prof'l Conduct pmb1 (1984).

27. Model Rules of Prof'l Conduct R. 6.1 (1984).

in those jurisdictions. However, mandatory pro bono has been seriously proposed either by the chief justice of the highest court, by a bar association or a committee of a bar association, or by legislation in at least the following six states: New York, Texas, North Dakota, Hawaii, Maryland, and Connecticut. New Jersey has adopted what might be described as a form of mandatory pro bono. In Florida, an alternative approach, which includes mandatory reporting but not mandatory service, has been adopted.²⁸

In New York, the Chief Judge of the Court of Appeals formed a special committee named the Committee to Improve the Availability of Legal Services. In its final report in April 1990, that Committee recommended a 20 hour pro bono annual requirement for all members of the bar. At the request of the New York Bar Association Special Committee to Review the Proposed Plan for Mandatory Pro Bono, consideration of the recommendation was postponed for two years and then again for another year to give the bar a chance to increase its pro bono work voluntarily. A committee to monitor the response was created and statistical baselines and program reports have been submitted.

In *Madden v. Debran*,²⁹ the New Jersey Supreme Court ruled that attorneys were subject to assignment to represent parties in municipal court cases. However, the court indicated that attorneys providing other pro bono services would be excepted from that requirement. Those exceptions have been spelled out in a series of memoranda or notices to the bar from the Supreme Court of New Jersey.³⁰

In Florida, a special bar committee petitioned the Florida Supreme Court to establish a number of new pro bono rules. The sponsors have referred to this approach as comprehensive pro bono. The 1990 decision *In re Amendments to Rules Regulating the Florida Bar*³¹ is a landmark. It established the following rule:

28. See *Starter Kit*, *supra* note 16, at 38-39 (providing more details on this topic).

29. 601 A.2d 211 (N.J. 1992).

30. The most recent of these is dated February 26, 2001 and is available at <http://www.judiciary.state.nj.us/notices/n010220b.htm>.

31. 573 So. 2d 800 (Fla. 1990). See also *In re Amend. To Rules Regulating The Fla. Bar – 1-3.1(a) And Rules of Judicial Administration – 2.065 (Legal Aid)*, 598 So. 2d 41 (Fla. 1992); *Amend. To Rules Regulating The Fla. Bar – 1-1.3(a) And Rules of Judicial Administration – 2.065 (Legal Aid)*, 630 So. 2d 501 (Fla. 1993). It is interesting to note that in the 1992 decision that actually adopted the many specific rules, including mandatory reporting, of the seven judges, two dissented in

We hold that every lawyer of this state who is a member of The Florida Bar has an obligation to represent the poor when called upon by the courts and that each lawyer has agreed to that commitment when admitted to the practice law in this state. Pro bono is a part of a lawyer's public responsibility as an officer of the court.³²

The court established an *expectation* of 20 hours per year or a contribution of \$350. Service or monetary contributions are not mandatory but annual reporting is mandatory. Implementing the 1990 decision required changes in the rules regulating the practice of law in Florida. Those were addressed in hearings and in decisions in 1992 and 1993.

Arguments that mandatory service violates the Thirteenth Amendment (involuntary servitude) or the Fifth and Fourteenth Amendments (taking without compensation) have been rejected by the courts.³³

In *Mallard v. U.S. District Court for the Southern District of Iowa*³⁴, the United States Supreme Court declined to address this issue when confronted with a challenge to a statutory court appointment. The court determined that the applicable statute did not mandate acceptance of the case but added:

We emphasize that our decision today is limited to interpreting section 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to section 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve.³⁵

In this context, Model Rule 6.1 was revised by the American

part because they would not have imposed mandatory reporting and two other judges dissented in part because they would have gone further and imposed mandatory pro bono. *In Re Amendments to Rules*, 589 So. 2d at 44-45.

32. *In re Amend. To Rules*, 573 So. 2d at 806.

33. *Butler v. Perry*, 240 U.S. 328 (1916); *Hurtado v. United States*, 410 U.S. 578 (1973).

34. 490 U.S. 296 (1989).

35. *Id.* at 309.

Bar Association House of Delegates in February, 1993. The change was initiated by the ABA Standing Committee on Lawyers' Public Service Responsibility (SCLPSR), now known as the Standing Committee on Pro Bono and Public Service. For some time SCLPSR had been studying and discussing calls for mandatory pro bono. SCLPSR decided not to recommend mandatory pro bono; rather, it decided to recommend strengthening Rule 6.1, while maintaining it as an aspirational rule.

SCLPSR proposed a rule that continued the essence of the prior rules but made the statement more specific and insistent than before. SCLPSR hoped that by drawing attention to the rule and by making clear that the obligation was real and immediate, although aspirational, more lawyers would provide services to those unable to pay for legal services.

Following a spirited debate, the modification was adopted. The new rule reads (with underlining of sections most pertinent to business law pro bono):

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee *to*:

(1) persons of limited means; or

(2) *charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and*

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking *to* secure or protect civil rights, civil liberties or public rights, or *charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;*

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

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

In addition, a lawyer should voluntarily contribute financial support to organizations³⁶ that provide legal services to persons of limited means.

One basic issue that surrounded the discussion of Model Rule 6.1 concerned the distinction between legal services and community services. Prior Rule 6.1 as well as Ethical Consideration 2-25, had been based upon the provision of *legal* services. That concept was continued in revised Model Rule 6.1 with the words “legal services” in the first sentence of the rule. Nevertheless, the subject continues to cause some confusion for those who do not read the words carefully, or who do not know the history. It is clear that Rule 6.1 and all of its predecessors apply only to the provision of legal services. While it is admirable for lawyers to serve their community in a variety of ways, community service stems from a more general obligation of all citizens and not solely from lawyers. In contrast, part of the basis for imposing a service rule on lawyers comes from the fact that lawyers have specific skills and training and have a monopoly on the right to provide legal services. This gives rise to something resembling a “common carrier” relationship to the community. The training and the traditions of the legal profession, and the oath which lawyers take when they enter the profession, obligate them to provide *legal* services. Therefore, it is appropriate to have a public service requirement for legal services as an ethical rule for the legal profession.

Perhaps the most distinctive quality of Rule 6.1 is to add a recommended number of hours of pro bono service – 50 hours per year. This was meant to make the rule more concrete and cause lawyers to strive to meet that standard. A second distinctive quality is the hierarchy of legal services. The (a) category is considered to be more fundamental because services to persons of limited means are more fundamentally related to the concept of equal justice. A third distinctive quality, most pertinent to this article, is that the rule spells out, in the underlined language, some of the types of business law pro bono services. Services to persons of limited means certainly include business law pro bono services to microenterprises. But the underlined language clearly is directed to business law pro bono services to nonprofits.

36. Model Rules of Prof'l Conduct R. 6.1 (1993) (emphasis added).

B. ABA Law Firm Pro Bono Challenge

On April 30, 1993 the ABA announced the Law Firm Pro Bono Challenge. The Law Firm Pro Bono Project focuses on the nation's 500 largest law firms (then approximately 60 lawyers or more). Those firms have issued a firm-to-firm challenge to adopt a statement of principles, which includes establishing a written pro bono policy involving a majority of both partners and associates in pro bono work, and committing either 3% or 5% of the firm's billable hours to pro bono service.

Approximately 155 firms are members of the Challenge and many others who did not join have similar programs with similar aspirations. In Minnesota 11 of the 13 firms in this large firm category signed on for the challenge. Adoption of such goals has had a dramatic effect on the culture of many of these firms. Making pro bono service a firm-wide goal has encouraged broad participation and indeed at least one local firm, Lindquist & Vennum, was able to get every lawyer to provide some service.

Because in nearly every firm business lawyers outnumber litigation lawyers, usually by two-to-one or three-to-one ratios, meeting these goals has required involving business lawyers. As earlier described, many of them balk at handling litigation and so these firms have begun to actively seek out business law projects for their lawyers. Sometimes these firms have found their own new business law pro bono clients, making arrangements with local community agencies. Other firms have actively supported and drawn upon the business law pro bono programs described in this article.

VI. MEETING THE CHALLENGES

As stated in the introduction, business law pro bono is an idea whose time has come. The number of new programs and new volunteers is impressive. But business law pro bono still remains more of a potential than a realization. Business law pro bono programs must successfully meet many challenges before their promise can be fulfilled.

A. Articulating the Vision

Supporters of traditional pro bono are able to present powerful images and arguments that resonate with the most fundamental beliefs of lawyers and most Americans. These images

present an individual in court unable to effectively protect her legal rights. They remind us of the essential role of lawyers in the court system. The arguments also call upon us to validate and support our judicial system. They point out the monopoly lawyers enjoy and the obligations that should go with that monopoly. And, finally, they remind us of our vision of a society with equal justice under the law.

To fulfill the promise of business law pro bono, its supporters need to present different images and arguments and to articulate a different vision. They need to describe communities in poverty and individuals struggling to meet the basic needs for food and shelter for themselves and their families. They need to remind the public of the historical role of lawyers not just as advocates before tribunals, but also as counselors in their communities. The monopoly of lawyers in business law is not quite as clear as it is in litigation (particularly in these days of multi-disciplinary practices), but lawyers still assert a monopoly and lawyers have been given special training. If the legal profession wishes to continue to assert a monopoly, or at least the primary role of lawyers in areas of business practice, the legal profession needs to accept the obligations that go with that monopoly. The role of lawyers in assisting community development is as important as the role of lawyers in the dispute resolution litigation process. Community development will lead to jobs, dignity, self-sufficiency and ultimately full participation in our society for the ultimate beneficiaries of those services. We need to be reminded of a vision of equal opportunity for all. Leading our society toward a realization of that vision is an important role for our profession and one that will enhance our profession.

B. Developing Eligibility Standards

In traditional legal aid and pro bono programs, services are provided only to individual clients who are financially eligible. Federally funded legal aid programs, which comprise the great majority of staffed legal aid programs throughout the country, are required to strictly follow stringent client income eligibility standards. In most circumstances eligibility is limited to individuals with incomes below 125% of the federal poverty guidelines, with allowance under some limited circumstances to 175% of the

guidelines.³⁷ Many pro bono programs are administered by these legal aid programs and thus are required to follow the same guidelines. Legal aid programs and pro bono programs that do not receive federal funding, but instead rely on funding from state and local governments and private contributions, may not be required to follow those guidelines but will normally follow similar income guidelines for individuals.

When legal aid began its period of explosive growth in the late 1960s and 1970s, there was some hostility from the organized bar, partly because these programs were considered to be potential competitors of lawyers trying to make a living by serving the same clients. Such hostilities have largely subsided and in most places the organized bar is strongly supportive of the local legal aid and pro bono programs. One principal reason for the easing of that hostility was the experience of the private bar with the operations of legal aid and pro bono programs under those guidelines.

As business law pro bono programs begin a period of expansion, these issues are beginning to arise again. Lawyers will ask whether these new programs are in competition with the private practice of law. Fulfilling the promise of business law pro bono requires addressing that issue and successfully resolving it for two reasons. First, pro bono programs depend on lawyers, law firms and the organized bar for volunteers for direct funding and for support in obtaining other funding. Second, given the limitations on the number of volunteers and the funds available, it is necessary that those resources be delivered efficiently.³⁸

At this early stage in their development, most of the business law pro bono programs operate without articulated eligibility standards. So far, there does not seem to be a significant amount of resistance from the bar. That may be in part because of the goodwill generated by the resolution similar issues in the 60s and 70s by the traditional legal aid and pro bono programs.

In addition, because the programs are mostly at an early developmental stage, they are still evolving and experimenting with the types of clients to be served. It may be best not to create rules that restrict this experimentation. Business law pro bono programs

37. 45 CFR § 1611.3

38. The most comprehensive study of legal needs is detailed in reports issued by the ABA Consortium on Legal Services and the Public. The reports are entitled *Legal Needs and Civil Justice: A Survey of Americans* (1994) and *Agenda for Access: The American People and Civil Justice* (1996).

will learn a great deal about the different kinds of clients and the ways of delivering pro bono services. Programs and the law firms and individual lawyers that work with them are not required to follow the eligibility standards that govern legal services to individuals both because the clients are not individuals and because those programs are not generally subject to the limitations that come with federal funding. Therefore, the needs and goals of the programs, law firms and lawyers should control and a variety of possible standards might emerge. Flexibility should be a hallmark and standards should leave room for decisions based on individual clients and projects.

It is beyond the scope of this article to attempt to draft eligibility standards. It may be helpful, however, to look at Rule 6.1 as a starting point. First, note that in (a)(2), services directly to “charitable, religious, civic, community, governmental and educational organizations” are considered to be pro bono if the services are designed primarily to address the needs of persons of limited means.³⁹ In the (b)(1) standard, service may be provided directly to organizations “seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes.” The rule goes on to provide that this is appropriately pro bono “where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.”⁴⁰

To the extent that organizations seek to develop specific standards, three factors, however, should be considered by all programs.

(1) The budget of the nonprofit organization or the revenue of the microenterprise service. This is a portion of the standard articulated in Rule 6.1. [In theory, nonprofits with large budgets or business enterprises, which have grown should make provisions in their budgets for legal services. However, those budgets often have relatively small amounts of unrestricted funds and the largest part of their funding is restricted to use for “hard” costs. That should be taken into consideration. Ultimately the question is, could the client obtain services in the marketplace? Standards may need to be

39. Model Rules of Prof'l Conduct R. 6.1(a)(2) (1993).

40. *Id.* Rule 6.1(b)(1) (emphasis added).

flexible in this respect so that the providers and volunteers are not precluded from taking on the projects that can have the most impact and are the most attractive pro bono projects.

(2) The potential impact of the project. There is a limited supply of volunteers and funding. Programs need to make a cost/benefit analysis for every expenditure concerning both volunteer and funding resources. They need to work with clients that are most likely to make a significant positive impact on their communities and whose missions appeal to the programs and volunteers. Again, flexibility should be built into any standard.

(3) The likelihood of successful partnership between client and lawyer. The program needs to assess whether the client's project will be successful and whether the client and the lawyer will be satisfied in the end. Pro bono matches should not be made if the client has other problems that will prevent success even if assisted by a lawyer. The program will also need to address whether the legal work is appropriate for the skills of the volunteer group.

In any event, it is clear that appropriate standards should differ from the simple income standards used for individuals, that care should be used in developing standards, that different standards may be appropriate for different locales and different circumstances, and that flexibility be retained while at the same time reassuring the practicing bar that good judgment is being applied in the selection of pro bono cases.

C. Avoiding Ideological Issues

"What counts?" This question is asked all too frequently both by friends of pro bono services and by those who are less supportive. What should be counted as pro bono service? Sometimes the real question is: "How are the things that I prefer to do valued in this system?" When the Law Firm Challenge was established, representatives of many of the large law firms seriously discussed the definition of pro bono service that would be counted toward the goal. The decision was to adopt a relatively narrow definition that excluded many kinds of things that were traditionally regarded as pro bono activities. The proponents of the narrow definition feared that using a broad definition would give rise to criticism of the law firms' commitment to servicing the most important legal needs. On the other hand, those who supported a broader definition of pro bono felt so strongly that some firms with existing, distinguished pro bono programs refused

to join the Challenge rather than have some of their activities (such as service on the boards of local aid organizations) excluded.

Rule 6.1 itself was adopted by the ABA House of Delegates in a very close vote. A major factor in that close vote was that some champions of pro bono argued against the rule because of its more specific definition of pro bono and because of the two tiers of pro bono service. Business law pro bono programs need to avoid being caught in a debate on the same question.

The definition of pro bono service could become very important if mandatory pro bono is adopted and is of some importance now in places where there is mandatory reporting, as in Florida. But as things stand now, and are likely to be for the indefinite future, this definition of pro bono should not limit the development of business law pro bono programs. Lawyers who are genuinely interested in pursuing some particular kind of business law service should be left to define pro bono service for themselves. For example, as to the distinction between community service (services that we should all provide as members of the community) and pro bono service (services we perform using our lawyering skills), lawyers should feel free to pursue a variety of activities. Lawyers should be able to cross and re-cross that line without stopping to ask how the activities would be classified. Individuals who want to pursue and support causes that are aligned with their own interests (at any point along the political spectrum, for example) should be able to do so and receive credit for their work as long as they do it with a genuine sense of public service.

D. Developing Resources

As business law pro bono grows, its presence will be welcomed by many, but for others it will be a source of concern because of the potential competition for volunteers and funding for volunteers. This concern is understandable. Legal aid and pro bono programs and community development organizations have developed over time and have established their own areas of responsibility, their own sources of volunteers and their own sources of funding. Even now, the tensions among those existing programs are significant in some communities. The entry of new business law pro bono programs could be seen as threats to a hard won equilibrium.

It may seem a surprise that as new business law pro bono programs are developed, there is a great diversity in the way they are organized and operated. Some of them are a part of existing

legal aid programs. Some of them are a part of existing traditional pro bono programs and some are altogether new organizations. The source of this diversity is not just the different view points and interests of the people who have been developing each local program. Often the diversity of structures represents different ways of adapting to existing local institutions.

In part, these conflicts can be avoided by attempts by business law pro bono programs to recruit different volunteers. The argument can be made that the lawyers who volunteer for the new business law pro bono programs are lawyers who were not already involved and would not otherwise have become involved. But recruiters for business law pro bono programs have to recognize and allow for continuing efforts of traditional pro bono programs to recruit business lawyers for traditional litigation matters, particularly in the area of family law.

Conflicts are also avoided if these new programs can look to different funding sources. For example, contributions can come from corporations interested in the community development or willing to provide money in support of the interests and activities of their own employees. Banks with Community Reinvestment Act requirements and other community institutions can be another source of funding. Government grants and tax credits can be new sources of funding. Finally, business law pro bono programs may need to enter into joint agreements addressing shared administration, recruiting, and fundraising with traditional legal aid and pro bono programs in ways that potentially increase the share of the pie for each of them. Whatever the sources, adequate funding is essential. Most of the business pro bono programs are underfunded and understaffed. One of the greatest challenges is to find the funding for the programs.

These concerns are being addressed in most states through state-based access to justice planning. In these plans, it is important that the question be asked what needs of low-income clients are not being adequately met by the existing system. The next question should be how to meet those needs. These critical questions must be addressed at the outset. Usually one important unmet need will be legal services for community development and organizing some form of business law pro bono program will be the way to meet that need.

E. Addressing Law Firm Economics and Culture

In the largest law firms, pro bono participation has decreased in recent years. The American Lawyer annual survey of the 100 largest law firms reports a reduction of one-third in pro bono hours from 1992 through 2000.⁴¹ The decline was attributed to \$165,000 a year junior associate salaries and clients who demand instant gratification. The current chair of the ABA Standing Committee on Pro Bono and Public Service, Robert Weiner, notes that it is ironic that recent salary increases may increase the gap between legal needs of the poor and the resources devoted to serving them because one might think that prosperity would breed generosity. But firms offset the increased expenses by raising per hour targets and even where pro bono hours are credited, associates have felt a pressure to produce more remunerative work.⁴²

It is not clear if the same decline in pro bono service in the 100 largest firms is reflected across the profession because such information is not gathered. Smaller firms may not be as susceptible to the same pressures as large firms. The availability of new types of pro bono programs, such as those discussed in the article, may provide new vehicles for volunteering that were not otherwise available to them but were already available to larger firms. Nor is it clear that the decline will continue. Mr. Wiener believes that as competition in those large firms returns to an equilibrium the firms will compete with each other by responding to law student wishes to do pro bono work.⁴³

In any event, these economic pressures represent a challenge to all pro bono programs and perhaps especially to new programs which will depend on new pro bono participation. There are a number of traditional responses to the perceived conflict between law practice economics and pro bono work. Pro bono can be important for recruiting law students who want the opportunity to do pro bono work, although that appeal does not work for all students.⁴⁴ Pro bono programs can be valuable for training young associates. Public service activities, especially in the business area, may be valuable in making contacts or strengthening contacts in business communities and for lawyers in firms, with corporate

41. Aric Press, *Where Did the Time Go?*, American Lawyer, July 2001, at 97.

42. Robert N. Weiner, *From the Chair*, Dialogue, at 17-18 (Fall 2000), available at http://abanet.org/legalservices/dialogue/00fall/dial_00fallprobono.html.

43. *Id.* at 18.

44. Karen Hall, *Corporate Crusaders*, American Lawyer, December 2000, at 79.

counsel with whom they partner on these projects. These and other traditional approaches should be reassessed when business law pro bono is part of the law firm's program.⁴⁵ It can even be argued, as the author has elsewhere, that pro bono programs can help a law firm be profitable.⁴⁶ The American Lawyer survey described earlier states there is not a causal relationship between more pro bono and more profits. Nevertheless there does seem to be a correlation. Of the 24 firms that met the Model Rule 6.1 standard of 50 hours per year in 2000, 19 increased profits at the same time. Of the 15 firms that suffered decreases in income in 2000, 8 reduced their pro bono hours.⁴⁷

More significantly, the American Lawyer article shows a huge disparity among firms as to their pro bono participation. This is a reflection of differences in firm "culture". That question of culture – the attitude toward public service – is equally applicable to smaller firms and even to sole practitioners. The figures gathered by the Pro Bono Challenge may be instructive. The Pro Bono Institute which administrates the program states that, even during the decline in pro bono by large firms generally, the most active large firms – those that accepted the challenge – increased their pro bono hours between 1998 and 1999 from 1.8 million hours to 2.0 million hours.⁴⁸ The challenge for business law pro bono is to find ways to affect the culture. It is hard to have a fully supportive culture if the great majority of the pro bono work is litigation based. Business lawyers will not be active supporters of pro bono programs if they themselves are not involved. Business law pro bono has the potential to dramatically affect the culture of large and small law firms and sole practitioners as they are drawn into work that truly personally interests them and when they see the bricks and mortar of their projects in their communities.

F. Linking and Strengthening Business Law Pro Bono Programs

Most traditional pro bono programs have a long history and

45. For a more thorough discussion of many of these issues, see *The Law Firm and the Public Good* (Robert A. Katzmann ed., Brookings Institute) (1995).

46. James L. Baillie, *Pro bono defined; It Helps the Bottom Line - Really*, *Business Law Today*, (Jan./Feb. 1997) at 50-51.

47. Press, *supra* note 41.

48. E-mail from Ester Lardent, President, Pro Bono Institute, to James L. Baillie, Shareholder, Fredrickson & Byron (July 29, 2001, at 6:33 p.m.) (on file with James L. Baillie).

are mature institutions. The programs that started in the 60's and early 70's started alone with little connection with each other. With the development of the ABA's support of these programs beginning in a major way in 1981 through the Pro Bono Committee⁴⁹ and the Center for Pro Bono, these traditional pro bono programs and the many more that started in the 1980s have had technical support and annual national conferences. The conferences provide educational tracks for new program directors and advanced tracks for experienced program directors. There is even a national association for the staff professionals.⁵⁰ These programs have been able to learn from each other. In 1996, the Pro Bono Committee promulgated the *Standards For Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means* which contains a comprehensive set of guidelines for the operation of pro bono programs.⁵¹

While a few of the new business law programs have been part of an existing pro bono program and therefore have the advantages of experienced coordinators, most business law pro bono programs have developed locally, essentially as indigenous programs, outside of the world of traditional pro bono. It is striking, for example, how few of those programs make use of, or even know about, the *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means*.

One of the major challenges for developing the potential business law pro bono is to link these new programs with each other as well as with the traditional pro bono programs. This requires that the program administrators get to know each other, share information, accumulate the experience of these programs and disseminate information for the benefit of all of the programs. Through the efforts of Power of Attorney and the assistance of Pro Bono Committee of the ABA Business Law Section that process has begun with semi-annual meetings of coordinators, the ABC manual and the list serve. There is informal consulting and formal peer assistance by POA, the staff of ABC and the ABA Center for Pro

49. Originally, the Special Committee on Lawyers Public Service Responsibility, then the Standing Committee on Lawyers Public Service Responsibility and more recently the Standing Committee on Pro Bono and Public Service.

50. The National Association of Pro Bono Coordinators (NAPCO).

51. ABA, *Standards For Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means* (Feb. 1996), available at <http://www.abanet.org/legalservices/pbpages/pbstandards.html>.

Bono. Remaining for the future is the development of data as to how these programs implement solutions to common problems, development of forms, dissemination of substantive law information and development of “best practices” supplementary to the *Standards* manual.

G. Collaborating With Others

Nonprofits and microenterprise businesses also need the assistance of professionals other than lawyers. Accountants and other financial advisors can help set up financial systems and provide guidance on maintaining them. Nonprofits often need guidance on personnel matters beyond the scope of assistance usually provided by lawyers. Fundraising, planning and marketing assistance could be provided by others. Clients encountering financial problems could use assistance from the crisis managers and consultants from the turnaround industry. These collaborations are common with fee-paying clients but few business law pro bono programs have been able to arrange these collaborations regularly for their pro bono clients.

VII. CONCLUSION

Success in meeting these challenges will define the rate at which the business law pro bono programs are founded, volunteers recruited and the valuable pro bono legal services delivered in aid of community economic development. Success in meeting these challenges will lead to fulfilling the promise of business law pro bono.