

Book Review

Robert Granfield and Lynn Mather, eds., *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession*. New York: Oxford University Press, 2009, pp. 352, \$75.00.

Reviewed by Mitchell A. Kamin

I lost a dear friend, and the pro bono world lost a hero, with the tragic passing of Michael Rothenberg earlier this year. Michael was executive director of New York Lawyers for the Public Interest (NYLPI), one of the country's most successful and innovative pro bono organizations.

Michael was an extremely able leader who followed and understood the latest and best practices and theories in his field. But he also was a pragmatist who truly cherished his non-profit's partnership with the private bar and understood the vital yet intangible elements of what motivates attorneys to provide free legal assistance to the poor. Though I am now a lawyer in private practice, for eight years I was one of Michael's counterparts, and ran a large pro bono non-profit legal organization, Bet Tzedek Legal Services in Los Angeles.

Every summer, Michael convened a group of legal non-profit CEOs to discuss the many challenges of our jobs. *Private Lawyers and the Public Interest* is a collection of essays that explores a question this group pondered frequently: Why do lawyers do pro bono?

As one would expect, the CEOs who gathered at this annual retreat had a deep, practical interest in this topic. Unlike some of our colleagues, however, Michael's and my interest was coupled with both a healthy irreverence and a bias against ivory tower legal analysis. For me, this bias went back to my law school days where I was puzzled by my professors' lack of actual experience practicing law. For Michael, it stemmed from his experience as a college student nearly expelled for his political activities. From what I understand, he persuaded the administration to let him stay only through an appropriate combination of charm and bare knuckled legal advocacy. It makes me feel better to think that I might be speaking for Michael as I review this book.

Given my practical yet biased orientation, I was encouraged by the book's jacket, heralding it as "essential reading for scholars, policymakers, and

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leaders of the profession who hope to expand access to legal services in a system characterized by massive inequality in representational resources.” The editors—sociologist Robert Granfield and political scientist Lynn Mather, both at the University of Buffalo, State University of New York—seemed to embrace this perspective, and undertook this project “with high hopes for the expansion of pro bono legal service by the private bar” (xi).

The book contains essays only from academics, though many have dedicated significant time to the study of pro bono. The essays are organized into four sections, with the first three presenting empirical research on “three general sets of influences” over lawyers’ decisions to engage in pro bono: law schools, market forces and morals (which they call “principled commitment to public service”). The fourth section “interrogate[s] the relationship between pro bono and access to justice,” and asks some tough and important questions about the state of pro bono, including whether it actually does the good things it is supposed to do.

None of this sounds too bad.

Regrettably, the book immediately gets off on the wrong foot in the “Introduction,” by suggesting a fundamental dichotomy between the academy and practitioners: “This book is premised on the assumption that an understanding of pro bono legal service requires empirical investigation, not rhetorical pieties and breast-beating calls for lawyers to be more generous” (12). A few pages later, the editors write that the book provides “a sobering balance to earnest pleas for greater altruism on the part of lawyers” (19). And, indeed, the essays in this collection rely almost exclusively on studies and empirical information rather than anecdotal or experiential perspectives. Although at least a couple of the contributors have some experience practicing law, their analyses are firmly rooted in an academic orientation and, unlike scholars such as Gerald Lopez, do not derive from their time in the trenches. From my perspective, this approach is too narrow.

The premise that there is a such a chasm between theory and practice ignores the remarkable evolution of pro bono over at least the past decade and minimizes the impact of those outside the academy who are largely responsible for this phenomenon.

In addition to all the things that motivate individual lawyers, the proliferation of pro bono may be due to the pre-2007 economy, the work of the Pro Bono Institute, the Am Law 100, corporate clients demanding more pro bono and greater diversity within the firms they hire, and greater competition for top-tier law school graduates. Whatever its causes, pro bono as a means of service delivery has become more ingrained than ever before. This is evidenced not only by an increase in the volume of pro bono service but also by its institutionalization at firms, corporations and NGOs alike. Many large, U.S.-based law firms have official pro bono programs, and a significant number have hired full-time attorneys to manage them. Importantly, this institutionalization seems to have weathered the post-2007 economy, as most

of these firms and companies have retained their commitment and, in many cases, recognized that scarce resources and increased need make it more important than ever. Pro bono at the Am Law 100 firms grew steadily through the downturn (decreasing only slightly in 2010 probably due to thinned associate ranks at large firms) with the firms providing between 4.45 and 4.84 million hours of free legal services annually during this period.

Thanks to this evolution, pro bono practitioners, while not often relying on empirical study and not often enough engaging in meaningful evaluation, have become quite sophisticated in analyzing the motivations and conditions that encourage private sector lawyers to volunteer. Pro bono professionals—including dedicated pro bono staff at non-profits like Marnie Berk at NYLPI, and their colleagues in law firms and in corporate law departments—understand there’s not one size that fits all when it comes to promoting pro bono: Some attorneys, and firms, respond best to market-based arguments including the benefits of pro bono to recruiting and training excellent and diverse young talent. In-house lawyers often want “one-off” experiences, as they’re unable to make the longer-term commitments required of impact litigation and complex transactions. Small firm and solo practitioners are often looking to be part of something bigger, and use pro bono to expand their networks while feeling good. And, yes, speaking of feeling good, some lawyers respond very well to appeals to the heart and stories about clients that make them cry (especially when raising money).

At Bet Tzedek, we were able to harness some of the energy and resources brought about by the pro bono evolution. Though the agency had a long history of engaging pro bono volunteers, during my tenure we nearly tripled the amount of involvement and dramatically increased the impact of our pro bono program. We launched a sophisticated, national pro bono program in partnership with over 100 law firms and in-house law departments in 30 cities across North America. This project still exists today, has served more than 7,500 low-income Holocaust survivors and was recognized with the ABA’s Pro Bono Publico Award. Likewise, Michael and his colleagues at NYLPI created an incredibly successful pro bono clearing house and launched substantive initiatives in areas like disability rights, and access to healthcare.

All of these efforts involved the Bet Tzedek and NYLPI teams spending hours discussing the motivations of our volunteers in order to expand the scope of the project. At Bet Tzedek, we used cutting edge technology and engaged a major consulting firm (pro bono) to evaluate our first year efforts and advise on strategies to grow. We also collaborated closely with the firms and lawyers who were our volunteers, giving them a meaningful voice and stake in the project overall, and we benefitted from their expertise and resources.

Of course, this is not to say that the professionals know everything, and some of these essays offer insights that can and should be put into practice. The chapters on law school pro bono programs, for example, strongly suggest that schools do best when emphasizing pro bono’s relationship to the changing world. Perhaps this notion of “curricular integration” also can be

expanded for use with professionals who at times crave a context for their pro bono service. Like the William Mitchell College of Law program that Deborah Schmedemann describes in Chapter 4, integrating some educational component in a pro bono engagement could increase the satisfaction of the volunteers while also encouraging them to do it again.

Pro bono professionals must constantly resist the urge (and at times, pressure from firms and companies) to design programs merely to meet the needs and interests of the volunteers. Some of the essays acknowledge this tension between making an experience meaningful and manageable, and they also demonstrate how it complicates the experience of pro bono. Chapter 11, by James Clarke Gocker, considers private attorneys who volunteered in a court-based “Attorney of the Morning” program that paired attorneys with tenants facing eviction in Buffalo’s housing court. According to the author, the attorneys in this program felt “bounded by features of their workplace setting” (246) and “less than fully integrated in the moral, tactical and strategic calculations of the court” (247). In other words, their limited engagement with these clients and on the issues confronting them made them feel less than fully satisfied with this pro bono experience because they didn’t necessarily feel like part of the solution.

One obvious answer is for these lawyers to become full-time public interest attorneys. But is there a way, short of that, to enable pro bono volunteers to feel more connected to their work and their clients? Generally speaking, if the attorneys have limited time, it is hard to provide a deeply meaningful experience. That said, some clients and issues (like the low-income Holocaust survivors served by the Bet Tzedek’s national pro bono network) have more impact.

Deborah Rhode, in her chapter on “strategic philanthropy,” grapples with this question of meaning by asking whether pro bono is motivated by altruism or self-interest. She argues that law firms should move into strategic philanthropy in order to more effectively support a social change agenda. I think this goes a bit too far. Law firms are businesses not NGOs and, while they certainly can more effectively integrate corporate social responsibility into their business plans, they cannot supplant the organizations whose missions are expressly to make the world a better place. In fact, this argument feeds into one of the most dangerous trends that accompanied the rise of pro bono, namely the argument that pro bono can take the place of dedicated legal services and public interest organizations. Richard Abel, in the book’s final chapter, cautions that the rise in pro bono is directly related to the decline in state support for legal services. Private lawyers can’t replace groups like Bet Tzedek and NYLPI because there will always be an inherent conflict when the private sector does work for the poor. That doesn’t mean it can’t be done well, just that businesses are not equipped or designed to supplant the full-time social justice organizations.

Moreover, it is incorrect and somewhat demeaning to suggest that those working in the pro bono world rely on “breast beating” and “earnest pleas.”

They are sophisticated lawyers and managers who operate in and oversee increasingly large and sophisticated operations under continual financial pressure. They occupy high-visibility positions in their communities, often moving in and out of government and leadership roles in their local bars. They know how pro bono works and their reputations and that of their organizations attract resources from local firms and volunteer legal help from local practitioners. So why is their perspective not included in this book?

Yet, it is perhaps only fair at this point to recognize that it's not just academics who sometimes work in isolation. Legal services lawyers do it as well. Many would surely say they don't have the time to read a book like this because they're too busy helping clients. Interestingly, this is the same argument they often make when offered the opportunity to work with pro bono counsel: "I can do this myself much faster and better, and don't want to waste the time training some corporate lawyer to do my job."

So how do we bridge the gap between the academy and practice, much less the gap between lawyers in public interest and those in private practice? For one, we have to start a dialogue that includes all the stakeholders in pro bono (including the clients). And we have to focus on the right issues. What motivates lawyers to do pro bono is an interesting one, but to get everyone to the table it has to be broader and recognize pro bono for what it is—at minimum, a means for delivering services. When it works well, pro bono is a means to bring disparate people together around a common problem, goal or shared humanity. I agree with Abel's capstone essay in this respect: Lawyers, much less pro bono ones, are only one small part of an effective social change strategy. But a truly meaningful analysis of this question requires more perspectives on pro bono than are offered here. I think my friend Michael would agree.