High-Visibility Pro Bono Litigation: *Finding the Right Balance*

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In recent widely reported comments to the Rochester, N.Y., chapter of the Federalist Society Lawyers Division, the Honorable Dennis G. Jacobs, Chief Judge of the 2nd U.S. Circuit Court of Appeals, questioned whether high-visibility pro bono "impact" litigation undertaken by large law firms was actually in the public interest.

Jacobs' speech, titled, "Pro Bono for Fun and Profit," questioned the motives of large law firms that undertake well-funded and well-staffed litigation against the government or attempt to espouse a particular political or social position:

"My point, in a nutshell, is that much of what we call legal work for the public interest is essentially self-serving: lawyers use public interest litigation to promote their own agendas, social and political — and (on a wider plane) to promote the power and the role of the legal profession itself. Lawyers and firms use pro bono litigation for training and experience. Big law firms use public interest litigation to assist their recruiting — to confer glamour on their work, and to give solace to overworked law associates. ... When we do work of this kind, a lot of people would see it as doing well while doing pro bono."

Not surprisingly, Jacobs' remarks created a firestorm of debate within the pro bono community, at large law firms and among judges and leaders of the bar. One judge, Chief Judge Boyce F. Martin Jr. of the 6th U.S. Circuit Court of Appeals, responded with the following quote in the Nov. 24 edition of the *National Law Journal*:

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"[I] cannot recognize among the cases before us the lawyers that Jacobs accuses of abdicating their responsibilities to clients to advance their own social agendas. Indeed, I am immensely grateful for the efforts of lawyers who represent very real clients in a variety of difficult cases — including in the broader 'impact' litigation that Jacobs decries. In my view, the value of such representation cannot be overstated when litigation of an individual's claim exposes systemic violations of the law. Regardless of the legal issue, the presence of experienced and qualified counsel lends stability and order to the proceedings before us."

Which judge is correct, Jacobs or Martin? In all honesty, the answer may be both.

Jacobs, in his fierce criticism of pro bono "impact" litigation, focuses almost solely on the motivations that drive law firms to engage in such litigation, including the opportunity for positive publicity, training associates and benefits to a firm's recruiting efforts. While he does not mention it specifically, Jacobs implies that large law firms may also derive a perceived benefit from increased pro bono hours resulting from labor-intensive pro bono litigation because publications including *The American Lawyer* and *The Legal Intelligencer* now publish and rank law firms' pro bono hours.

However, in fixating almost solely on the motives of law firms that engage in pro bono work, Jacobs ignores the rights of clients to choose their own counsel and also ignores the benefits to the client and the legal system of having top quality, well-prepared counsel present a case, regardless of the client's ability to pay. Presumably, he would have no complaint about such litigation if the client was willing to pay for it. In that case, at least one possible motive of the law firm, to make a profit, would be obvious and acceptable to Jacobs.

Martin, on the other hand, completely ignores the motives that law firms have to engage in pro bono "impact" litigation, and focuses almost solely on the positive benefits to the legal system by having high-quality counsel present a case, regardless of the client's ability to pay. In doing so, Martin fails to directly address some of the observations made by Jacobs.

Regardless of whether Jacobs was justified in his criticism, he correctly detected a trend. Today, law firms are increasingly willing to accept and handle high-visibility pro bono litigation that only a few years ago would have been thought of as too "controversial."

Pennsylvania law firms continue to follow this trend, bringing significant publicity to those involved — from representing Guantánamo Bay detainees, to attacking the Dover Board of Education's "intelligent design" curriculum, to challenging the Hazleton Illegal Immigration Relief Act, to representing death row inmates.

The benefits derived from handling high profile pro bono litigation come at a cost, however, that neither Jacobs nor Martin discusses. There are many issues firms must balance when considering handling high visibility pro bono litigation, including the following:

- How much attorney time is the law firm willing to devote to such litigation?

Large pro bono litigation requires a substantial financial commitment because of lost billable attorney and paralegal time. Even if some or all of the professional hours are recoverable under civil rights statutes permitting the award of fees to successful litigants, some firms forego submitting fee petitions in such cases or elect to donate any fees recovered to nonprofit legal services organizations. No firm that agrees to take on significant pro bono litigation does so with the idea that the case will make money.

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• How will the firm deal with compensation and promotions for attorneys and paralegals who have devoted hundreds of hours to pro bono cases?

Presumably, attorneys and paralegals volunteer for such cases at their firm's request, and would not do so if they considered it a bad career move. Moreover, if those who participate in large pro bono cases were treated unfairly at compensation or promotion time, then it would be difficult for a firm to recruit attorneys or paralegals for future pro bono cases.

Some firms have dealt with this issue, in part, by eliminating the "cap" on how many pro bono hours are given hourly billable credit, subject, of course, to careful monitoring of attorney and paralegal hours as the case proceeds.

• How will the firm manage publicity?

High-visibility pro bono litigation can generate intense publicity and media interest. Oftentimes, nationally televised news programs ask firm management and lawyers working on such cases to comment on the litigation. Editorials may appear in the print media, radio talk show hosts may receive on-air calls about the case and bloggers may comment endlessly on the subject.

Law firms must have a mechanism in place from day one to manage such publicity, to help shape the public debate and to respond as necessary to media outlets. Decisions must be made about who will be authorized to speak for the firm and what can be said, consistent with applicable rules of professional conduct and to the client's wishes and interests.

Additionally, since such cases are often at the "flash point" of current events with strongly held beliefs on all sides of the issue, even among the firm's lawyers, a firm cannot assume all publicity surrounding the case will be positive. Consequently, the designated spokesperson must make it clear that the firm's representation of its client does not signify an endorsement of the client's position.

• How will other clients' concerns be addressed?

One major concern of any firm contemplating involvement with high visibility pro bono litigation will be the possibility of negative client reaction, and how it will be addressed. There is no single approach to this issue because every client is different. Nonetheless, if the experience of the many large law firms that participated in the defense of Guantánamo Bay detainees is any guide, it is possible to weather potentially negative client reaction.

Clients come to law firms for a variety of reasons, including the specific expertise of the firm and because of personal relationships between the lawyer and the client that have been cemented over time. These bonds are not easily broken because of a firm's involvement in a single, controversial pro bono case. Clients generally recognize that representation does not imply endorsement, that lawyers have a professional obligation to participate in pro bono work and that there is an overall benefit to the legal system in such participation, as Martin articulated.

• How can participation in the case benefit the firm's overall marketing, training, retention and recruitment efforts?

Jacobs is correct in saying that high visibility pro bono cases can benefit recruitment, training, retention and marketing efforts, and firms should be prepared to maximize benefits from such cases. After all, this will be the only "compensation" that the firm is likely to receive.

The spirited debate triggered by Jacobs' comments is healthy for our profession. Remember, law firms take on pro bono cases for the same reasons they take on paying clients. No one questions the motives of a lawyer who accepts a paying client, so why should a different standard apply to a lawyer who accepts a case without expecting a fee? •