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Is Pro Bono Practice In Legal “Backwaters” Beyond The Scope of The Model Rules?

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Is Pro Bono Practice in Legal “Backwaters” Beyond the Scope of the Model Rules?

BARBARA GRAVES-POLLER*

CONTENTS

INTRODUCTION.....	2
I. UNDERSTANDING PRO BONO SERVICE IN CONTEXT.....	7
<i>A. Pro Bono as a Remedy for Insufficient Civil Legal Resources</i>	7
<i>B. Evolution of the Pro Bono Market</i>	9
II. MODEL RULE 6.1 AND THE EVOLUTION OF LEGAL CHARITY	14
<i>A. Voluntary Legal Service Before Model Rule 6.1</i>	14
<i>B. Pro Bono and Business Development</i>	16
<i>C. Existing Standards for Poverty Lawyers not Incorporated into Pro Bono Mandate</i>	20
III. SELF-REGULATION FAILURES IN THE PRO BONO MARKET.....	23
<i>A. Competence Defined by the Bottom Line</i>	23
<i>B. Developmental Pro Bono as a Remedy for Attorney Incompetence</i>	27
<i>C. Conflicts, Identity, and Case Selection</i>	30
<i>D. Cultural Homogeneity and Legal Services Triage</i>	33
<i>E. Pro Bono Supervision</i>	40
IV. CONTEMPORARY PRO BONO PRACTICE AND INADEQUACIES IN THE MODEL RULES	45
<i>A. Ambiguity in the Professional Conduct Rules</i>	45
<i>B. Model Rule 1.1 and the Challenge of Developmental Pro Bono</i>	47
<i>C. Model Rule 1.18 and Pro Bono Referral Practices</i>	50
<i>D. Model Rule 1.4 and Effective Communication with Pro Bono Clients</i>	53

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*E. The Need for Comprehensive, Pro Bono-Focused
Review of the Model Rules*..... 58

F. Ethical Ambiguities in Legal “Backwaters” 58

V. CONCLUSION 63

INTRODUCTION

Like the thousands of New Yorkers confronted with legal crises each year, “MC,” a low-income woman, needed representation in a divorce proceeding but could not afford to retain private counsel. She contacted a small, nonprofit legal organization for help. As New York’s Chief Justice, Jonathan Lippman, and other prominent pro bono advocates have erected a robust architecture for pro bono service, it is not surprising that the organization placed her case with a private sector lawyer. The attorney who ultimately agreed to represent MC on a pro bono basis was an associate at one of the country’s largest and most highly regarded law firms.

The firm handling MC’s case recently received the Litigation Department of the Year designation from The American Lawyer magazine. To its prospective, paying clients, this firm promises that it “can rapidly assemble a focused, integrated and efficient team to address all important aspects of a client’s problem and to handle numerous cases in multiple jurisdictions and forums.”¹ Yet, no such team was assembled to handle MC’s case. Instead, the firm assigned a junior associate to represent her. By all accounts, that novice attorney worked in isolation from her colleagues. She failed to consult with any seasoned litigators or negotiators when complications arose in the case. Moreover, her in-person interactions with MC reflected either obliviousness or indifference to her client’s concerns as a domestic violence survivor.²

Not only was MC’s attorney inexperienced, supervision practices within the pro bono firm and capacity building efforts within the bar inadequately prepared the attorney to zealously represent her client. The attorney failed to take many steps that would be considered

¹ *Litigation*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, <http://www.skadden.com/practice/litigation> (last visited Nov. 13, 2014).

² MC v. GC, 25 Misc.3d 217, 222 (N.Y. Sup. Ct. 2009).

routine in any litigation. She did not discuss legal standards relevant to the client's divorce and custody concerns. Instead, at the outset of their attorney-client relationship, MC's lawyer abandoned her in an office with instructions to fill out a number of documents, "describ[ing] what had happened in her marriage and why she was seeking a divorce."³ The attorney conceded that she would not conduct any independent legal analysis into the facts MC described but "that she would type up the information" and submit the signed documents to the court.⁴ The attorney allowed months to elapse without informing MC of material developments in the case. Eventually, when settlement negotiations deteriorated, the attorney pressured MC to waive certain rights to asset distribution and relocation. Her letter to MC stated, among other things:

Please be advised that I was not retained for a contested divorce, nor was I retained to advise you regarding relocation. Rather you originally retained me as pro bono counsel . . . I do not have the experience or the time to handle a lengthy relocation trial. However, once you obtain the divorce, if you do obtain it, you are free to hire whomever you wish, maybe even court appointed counsel, to litigate the relocation issue."⁵

Given her inability to afford alternative counsel, MC acquiesced to her husband's settlement demands, waiving her right to equitable distribution and relinquishing her right to relocate with the child without his consent or a court order.

These facts are drawn from the case, *MC v. GC*, one of the few reported cases that address unethical behavior by elite attorneys who perform direct legal service to poor individuals.⁶ Yet, the lack of

³ *Id.* at 220.

⁴ *Id.*

⁵ *Id.* at 223.

⁶ The pro bono attorney representing MC presented her client with an equitable distributions waiver, a preprinted form created by the nonprofit referring organization, without developing an informed understanding of marital property distribution rules or the impact of executing the waiver. When the client requested an explanation of the consequences of waiving her rights, the attorney said, "I told

reported decisions on misconduct by pro bono attorneys representing low-income clients is hardly indicative of quality of services provided to indigent clients. On the contrary, one recent survey showed that forty-seven percent of public interest law practitioners who refer pro bono cases to law firms reported having “moderate” or “extensive” problems with the services provided by private attorneys.⁷ Other public interest lawyers relate that with alarming frequency, pro bono attorneys appear to be inadequately equipped to provide competent representation and lack the cultural awareness to effectively serve diverse or challenging clients.⁸ Behind closed doors, many full-time public interest lawyers caution one another about pro bono attorneys who have missed critical filing deadlines or act with indifference to the needs of indigent litigants.

Even conscientious pro bono attorneys who possess the requisite skills sometimes forsake their pro bono clients when obligations to paying clients escalate. One nonprofit attorney lamented, “my own experience showed me time and time again that institutional commitments to pro bono work are often only as strong as the amount of non-billable time that exists in the life of the pro bono

her that by waiving that at this point, you know, if she wasn’t interested, if she waived her rights that she wouldn’t later be able to seek, go after them.” *MC*, 25 Misc.3d at 221. The attorney erroneously advised the client that if she voiced her desire to move out of state prior to finalizing the divorce, the client would be unsuccessful in seeking to relocate out-of-state with her child. Not only did the pro bono attorney fail to conduct the research and preparation required to meet Model Rule 1.1’s minimal competence standard, she did not associate or consult with an attorney of established competence to protect the client’s interests. N.Y. RULES OF PROF’L CONDUCT R. 1.1 cmt. 3 (2014). The New York Supreme Court concluded, “while the [client] had an attorney of record, she had no meaningful representation on financial issues and custody.” *MC*, 25 Misc.3d at 228. The *MC* court did not couch its opinion in terms of Model Rule 1.1, but it unambiguously concluded that the attorney in question failed to provide competent representation to her client. *Id.*

⁷ Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 102 (2013).

⁸ Leonore F. Carpenter, “*We’re Not Running a Charity Here*”: *Re-Thinking Public Interest Lawyers’ Relationships with Bottom-Line Driven Pro Bono Programs*, 29 BUFF. PUB. INT. L. J. 37, 69–70 (2011); Theodore O. Fillette III, *Thoughts on Better Practices for Pro Bono Legal Service for Clients of Legal Services Organizations*, 45 CLEARINGHOUSE REV. 116, 118 (2011).

attorney.”⁹ Instances of pro bono attorneys seeking to terminate representation of pro bono clients due to their work for paying clients are all too common.

While many private sector attorneys offer pro bono legal services that reflect the same level of diligence and skill characteristic of the work done on behalf of their paying clients, the egregious failures described in the *MC v. GC* case and those that occur in many unreported matters highlight the dangers of pro bono initiatives designed to bridge the “access to justice gap.” As used here, the term “justice gap” refers to the chasm between the need for legal representation in civil disputes and public interest attorneys available to serve poor and working class clients. Justice gap pro bono programs connect low-income individuals in need of legal assistance in matters such as eviction prevention, family disputes, and consumer debt collection cases with attorneys from large law firms that typically specialize in commercial litigation and corporate transactions.¹⁰ Though well intentioned, justice gap pro bono initiatives that succeed do so in spite of the impediments to ethical representation that pervade this method of legal service delivery. The market forces and “informal collegial control”¹¹ that shape attorney conduct in the for-profit setting are often absent within the world of pro bono service. Moreover, the ethics rules that should govern pro bono attorneys offer inadequate guidance to lawyers grappling with the unique concerns of pro bono lawyering practiced in a for-profit context.

⁹ Carpenter, *supra* note 8, at 64–65.

¹⁰ The term “justice gap” was repeatedly used by Chief Judge Jonathan Lippman of the New York Court of Appeals who championed amendments to attorney admission rules to require bar applicants to complete at least 50 hours of pro bono service as a condition of admission. *See generally* Lydia Chan, *New York’s New Rule: A Novel Approach to Closing the Access to Justice Gap*, 26 *GEO. J. LEGAL ETHICS* 597 (2013). As used here, “justice gap pro bono” does not encompass public interest class actions, law reform litigation, criminal defense, and free services provided to nonprofit institutions.

¹¹ For an overview of how informal collegial control combines with formal systems of ethics oversight in different practice settings, *see* Leslie C. Levin & Lynn Mather, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 3, 3–5 (Leslie C. Levin & Lynn Mather eds., 2012).

It may be tempting to conclude that the Model Rules and their state-level corollaries equally inform all attorney-client relationships, regardless of whether the client pays for services. However, that theoretically attractive conclusion is at odds with reality. In fact, many attorneys conceptualize pro bono work as a form of legal charity, unmoored from the moderating influence of ethics rules and practice norms with which they are most familiar. Furthermore, the Model Rules and their state law analogues favor indeterminate, highly subjective ethics norms over specific guidance on how rules should be applied in day-to-day practice. This approach may be sufficient when the professional identities of attorneys are aligned with those of their clients and practice-specific conventions supplement formal ethics rules. However, no robust system of ethical guidance governs pro bono lawyers who lack such support. When the ethics conventions with which pro bono attorneys are most familiar seem inapplicable, the Model Rules framework insufficiently instructs pro bono practice.

The purpose of this article is not to denigrate pro bono service. Each year, countless individuals who would otherwise proceed without legal help of any kind benefit from pro bono assistance; neither is it my aim to critique the “misaligned incentives” underlying legal volunteerism.¹² Those topics have been explored expertly by a number of experienced practitioners and legal scholars. It is also not my intention to malign individual attorneys who accept pro bono matters amidst the considerable pressure to serve paying clients. Rather, this article will first discuss the role of justice gap pro bono in meeting the civil legal needs of the poor. It will then address the ways in which the justice gap pro bono model of expanding civil legal services inadequately self-regulates attorney conduct. After turning attention to specific elements of the ABA’s Model Rules that inadequately address contemporary pro bono practice, I will suggest possible reasons for the Model Rules’ inattention to these issues and propose a few modest recommendations for incorporating guidance for pro bono attorneys into the existing ethical framework.

¹² Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2430 (2010).

I. UNDERSTANDING PRO BONO SERVICE IN CONTEXT

A. *Pro Bono as a Remedy for Insufficient Civil Legal Resources*

Fewer than twenty percent of the low-income people facing eviction, debt collection actions, divorce, and other legal crises involving necessities of life have access to legal counsel.”¹³ In fact, more than two million pro se litigants appear each year in New York courts alone.¹⁴ New York is not the only jurisdiction to experience a significant increase in the number of self-represented parties in recent years. In California, for example, approximately seventy-five percent of parties in divorce cases appear without attorneys.¹⁵ Even the federal courts have not escaped the growing “pro se phenomenon.”¹⁶ Nearly forty percent of all cases filed in federal court involve an unrepresented party.¹⁷

State courts of limited jurisdiction that handle housing, family, or low dollar figure disputes are intended to be accessible to self-represented litigants. However, pro se parties appearing in these forums often lack a basic understanding of the substantive claims and defenses relevant to their cases. They frequently struggle to satisfy basic procedural requirements to commence litigation or pursue discovery. In my current practice, I encounter many litigants whose otherwise meritorious claims were dismissed when set forth in pro se petitions due to the client’s inability to effectuate service of process or file necessary documents. Pro se litigants unfamiliar with basic court rules and the substantive law governing their dispute

¹³ Tom Lininger, *Deregulating Public Interest Law*, 88 TUL. L. REV. 727, 730 (2014); see also LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 14 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

¹⁴ Jonathan Lippman, *Law in the 21st Century: Enduring Traditions, Emerging Challenges*, Remarks at Law Day 2010 (May 3, 2010), available at <http://www.nycourts.gov/whatsnew/pdf/Law%20Day%202010.pdf>.

¹⁵ See generally Drew A. Swank, *The Pro Se Phenomenon*, 19 B.Y.U. J. PUB. L. 373, 376 (2005).

¹⁶ *Id.*

¹⁷ *Id.* at 377.

compromise efficiency in these courts where judges already labor under heavy dockets.¹⁸

Leaders within the judiciary and other advocates seeking to bridge this gap between civil legal needs and available legal services have proposed a number of recommendations to expand available assistance to poor litigants. Nationwide, bar associations and scholars encourage legal services and low fee attorneys to offer “unbundled” or limited scope services to pro se litigants who cannot afford to retain counsel for full representation in civil cases.¹⁹ Others advocate for demystification and streamlining of procedures for unrepresented parties.²⁰ However, the dominant recommendation to address the unmet need for civil legal assistance is to expand pro bono service by private sector attorneys.²¹ Access to justice commissions from Hawaii to New York promote pro bono participation as a way to improve poor people’s access to legal

¹⁸ Judge Benita Pearson, a federal judge in Ohio, fears that without expanding the ranks of attorneys who offer full representation to low- and moderate-income litigants, the increase in pro se litigation will reduce courts to “a crawl.” Jack P. Sahl, *Real Metamorphosis or More of the Same: Navigating the Practice of Law in the Wake of Ethics 20/20—Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times*, 47 AKRON L. REV. 1, 28 (2014).

¹⁹ See generally Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453 (2011); Justice Fern Fisher-Brundveen & Rochele Klempnor, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L. J. 1107 (2002).

²⁰ Lauren Sudeall Lucas, *Deconstructing the Right to Counsel*, AM. CONST. SOC’Y FOR L. & POL’Y 11 (July 22, 2014), available at https://www.acslaw.org/sites/default/files/Lucas_-_Deconstructing_the_Right_to_Counsel.pdf; Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. FOR SOC. JUST. 1065, 1065 (2013).

²¹ Lininger, *supra* note 13, at 736. In his August 2013 address to the American Bar Association, Attorney General Eric Holder urged attendees to “answer the ABA’s call to contribute to this cause through pro bono service—and help realize the promise of equal justice for all.” Eric Holder, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>. The National Center for State Courts offers similarly enthusiastic support for pro bono expansion. See generally *Pro Bono and Volunteer Programs*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/microsites/access-to-justice/home/Topics/Pro-Bono-and-Volunteer-Programs.aspx> (last visited Nov. 24, 2014).

information and full representation in civil litigation.²² A number of jurisdictions have even proposed rule changes that would allow private attorneys not licensed in the state to perform pro bono services.²³ For example, New York recently expanded pro bono opportunities for non-lawyer advocates, law students, and in-house counsel not admitted to practice in an effort to bridge this gap.²⁴ The state also implemented mandatory pro bono reporting requirements, presumably to shame attorneys into increasing their pro bono service.²⁵

B. *Evolution of the Pro Bono Market*

The American approach to providing civil legal assistance to low-income litigants who cannot retain counsel can be analogized to “a three legged stool, resting on the work of three distinct groups of lawyers: i) those funded by the federal Legal Services Corporation,”²⁶ ii) full-time poverty lawyers who practice in

²² See *Access to Justice Room Attorneys Recognized*, HAW. STATE JUD. (Mar. 7, 2013), http://www.courts.state.hi.us/news_and_reports/featured_news/2013/03/pro_bono.html (last visited Nov. 24, 2014); *Task Force to Expand Civil Legal Services in NY*, N.Y. STATE UNIFIED CT. SYS., <https://www.nycourts.gov/ip/access-civil-legal-services/> (last visited Nov. 24, 2014).

²³ See, e.g., *Arkansas Access to Justice Commission Proposes Rule Change at the Mid Year Meeting*, ARK. LEGAL SERVS. P'SHIP (Jan. 7, 2011), <http://www.arlegalservices.org/node/573> (last visited Nov. 24, 2014).

²⁴ See 22 NYCRR § 522.8; see also Fern Fisher, *Moving Toward a More Perfect World: Achieving Equal Access to Justice Through a New Definition of Judicial Activism*, 17 CUNY L. REV. 285 (2015); Daniel C.W. Lang, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289, 300 (2011); Hon. Jonathan Lippman, *The State of the Judiciary 2014: Vision and Action in Our Modern Courts* (2014), available at <https://www.nycourts.gov/ctapps/soj2014.pdf>.

²⁵ Chan, *supra* note 10, at 599–600; see N.Y. COMP. CODES R. & REGS. 22, § 118.1(e)(14) (2013) (requiring that each attorney, as part of his or her biennial registration in New York, report (1) the number of hours that the registrant voluntarily spent providing legal services free of charge to poor and underserved clients, and (2) the amount of voluntary financial contributions the registrant made to organizations providing legal services to the poor and underserved during the previous biennial registration period).

²⁶ LSC is a congressionally-funded, grant-making entity created in 1974 “that responds to locally initiated proposals for providing civil legal services to the indigent.” Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and Market-Reliant*

nonprofit settings funded by philanthropic entities, private donations, and government grants independent of the LSC, and iii) volunteer attorneys from the private sector.²⁷ LSC-funded programs provide the bulk of legal representation to low-income individuals in civil matters. Annually, LSC distributes nearly \$350,000,000 to more than 130 legal services organizations across the country.²⁸ The level of pro bono participation in those LSC-funded organizations has steadily increased in recent years. Between 2011 and 2012, for example, the number of cases closed by pro bono attorneys grew by twelve percent. At current levels, the pro bono hours reported by LSC grant recipients amounts to nearly thirty percent of the hours served by all of the full-time, staff attorneys employed in LSC-funded programs.²⁹ Even non-LSC-affiliated nonprofits that receive funds from interest on lawyer trust accounts and other forms of funding must meticulously document and report every hour of pro bono assistance their clients receive by members of the private bar, another way to encourage nonprofits to incorporate pro bono volunteers into their legal services delivery systems.³⁰

The dramatic growth of pro bono programs during the 1990s occurred partly in response to federal divestment from the LSC during that same period.³¹ Many of the legal nonprofits that today refer clients for pro bono help are organizations with a Civil Rights era history of pursuing social justice on behalf of low-income people.³² One conservative reaction to the law reform and anti-poverty organizing work once central to the mission of these

Legal Aid, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 96 (Robert Granfield & Lynn Mather eds., 2009). In 2014, the LSC was responsible for distributing more than \$400 million in funds to nationwide grantees. *LSC FY 2014 Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/funding/lsc-fy-2014-funding> (last visited Nov. 13, 2014).

²⁷ Sandefur, *supra* note 26, at 95–96.

²⁸ *LSC 2013 Annual Report*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/2013-annual-report> (last visited Apr. 14, 2015).

²⁹ Sandefur, *supra* note 26, at 96.

³⁰ See New York IOLTA Grantee Activity Report.

³¹ Cummings & Sandefur, *supra* note 7.

³² Corey S. Shadameh, *Legal Services Lawyers: When Conceptions of Lawyering and Values Clash*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra* note 11, at 323–25.

organizations was the imposition of congressional restrictions on legal services funding. As conservative opposition to LSC's political positions mounted, LSC funding decreased precipitously, dropping fifty percent from 1980 to 2009.³³ By the late 1990s, LSC grantees faced a host of new restrictions on their work with the imposition of congressional restrictions on both the nature of the cases they could litigate and the types of individuals these organizations could serve.³⁴ Those restrictions also require "grantees [to] make a 'substantial amount' of funds available for [p]rivate [a]ttorney [i]nvolvement," money principally directed towards expanding pro bono volunteer capacity.³⁵ Nonprofit organizations that receive funding from the LSC must allocate twelve and a half percent of their federal grants to pro bono "joint ventures."³⁶ The number of formal, pro bono programs increased tenfold between 1980 and 1985 and then doubled again between 1985 and 2004.³⁷

While congressional control of LSC funding served as one factor driving the increase in pro bono activity, changes in the for-profit market for legal services exerted a powerful influence on the development of these programs. Elite firms in the major legal markets of Chicago, Los Angeles, New York City and Washington D.C. expanded significantly from the 1990s until the 2008 recession.³⁸ These firms increasingly concentrated their practices on more high-stakes litigation and specialized transactions on behalf of their corporate clients at the expense of assisting in a broad range of

³³ Scott L. Cummings, *The Future of Public Interest Law*, 33 U. ARK. LITTLE ROCK L. REV. 355, 363 (2011).

³⁴ See, e.g., Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-34, § 504(a), 110 Stat. 1321 (1996); see also Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 22 (2004) [hereinafter Cummings, *Politics*]. With the exception of some emergency assistance and help for certain victims of violence, LSC grantees are largely precluded from serving undocumented immigrants. See generally Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 674 (2011).

³⁵ Cummings, *supra* note 33, at 362.

³⁶ 45 C.F.R. § 1614.2 (2013).

³⁷ Cummings, *supra* note 33, at 362.

³⁸ See generally Albert Yoon, *Competition and the Evolution of Large Law Firms*, 63 DEPAUL L. REV. 697 (2014).

matters of varying size and complexity.³⁹ To staff these matters, elite firms recruited a proverbial army of relatively inexperienced attorneys that sometimes face periods of low activity on paying matters.⁴⁰ It is this pool of associates that periodically has surplus capacity to accept assignments that most frequently staff justice gap pro bono initiatives. Firms employing this staffing structure discovered the recruiting and retention potential of pro bono work. Over time, major-market firms embraced pro bono participation as a way to train novice associates without passing those costs along to their corporate clients.

The confluence of funding imperatives and structural changes in major legal markets resulted in elite members of the private bar dominating pro bono practice. In 1984, approximately forty percent of all pro bono hours served in organized pro bono programs were contributed by attorneys employed at firms of twenty or more lawyers.⁴¹ Today, urban law firms with more than one hundred attorneys provide the largest number of hours of free legal assistance to low-income clients and nonprofit organizations, even though large firm attorneys constitute less than twenty percent of all lawyers in private practice.⁴²

Justice gap pro bono programs based in elite law firms do more than simply link well-heeled attorneys with low-income individuals facing legal crises. At a macro level, they seek to remedy three related problems in the legal services market: the inability of law

³⁹ These practice-area changes shifted firms away from both their holistic counseling role, one that occasionally required generalist, “full service” practices, towards an increasingly specialized form of practice that leaves fewer opportunities to develop the skills commonly used by attorneys who represent individual clients. See David Wilkins, *Some Realism about Legal Realism*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT*, *supra* note 11, at 27–30.

⁴⁰ Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 *GEO. J. LEGAL ETHICS* 925, 925 (1996) (“A law firm employs the right-sized staff to handle all the billable work that it expects to attract, plus the other tasks including business development, firm administration and pro bono work. The firm also usually has some additional capacity before hitting the limit on hours that the firm’s lawyers are willing to work”); see also Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2448 (2010).

⁴¹ Sandefur, *supra* note 26, at 100.

⁴² ABA *STANDING COMM. ON PRO BONO & PUB. SERVS.*, *SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS* 5 (2013).

firms to properly train new associates at their clients' expense; the dissatisfaction of many young associates that leads to high rates of turnover; and the paucity of attorneys willing to handle matters for which little profit can be generated.⁴³ Given these objectives and the direct benefits that accrue to for-profit firms as a result of their participation in pro bono initiatives, it has become increasingly difficult to argue that justice gap lawyering is truly service provided in *pro bono publico*. Unlike the typical case in which the client is the primary beneficiary of legal services and the firm is rewarded with fees, the intended beneficiary of justice gap pro bono service are entities other than the client: the pro bono attorney whose skills are enhanced on a case that poses little or no financial risk to the firm; the firms that benefit from the improved recruitment and retention; and the corporate clients that receive higher quality legal services without incurring training costs.⁴⁴ Increasingly popular "pro bono joint ventures" between law firms and their corporate clients aim to serve law firms' business development goals.⁴⁵ While participants in these programs seek to "do good" by offering legal services, the objective of these programs is not simply to improve the efficient delivery of services to clients in crisis or expand the scope of high-quality services offered to indigent persons. Rather, their overarching objective is to forge more productive working relationships between in-house counsel offices and outside law firms for business development purposes.⁴⁶

⁴³ Drew A. Swank, *The Pro Se Phenomenon*, 19 *BYU J. PUB. L.* 373, 380 (2005).

⁴⁴ Roy S. Ginsburg, *Makes Cents: The Business Case for Pro Bono*, 62 *BENCH & B. MINN.* 1, 2 (2005), available at http://www.royginsburg.com/files/cle_article_3.pdf ("For attorneys in private practice, pro bono service can be strategically used for client development."); Reena N. Glazer, *Revisiting the Business Case for Law Firm Pro Bono*, 51 *S. TEX. L. REV.* 563, 586 (2010) ("[I]n troubled times, the role of pro bono in enhancing morale and creating a sense of calm, teamwork, and mutual respect and support is unparalleled.").

⁴⁵ Glazer, *supra* note 44, at 573.

⁴⁶ Ginsburg explained, "One never hears about lawyers turning away paying work because they were too busy doing pro bono service. Nevertheless, many find the time to make sure pro bono service is one of the things that 'get done.' Furthermore, it's worth questioning the assumption that attorneys who perform pro bono work make significant financial sacrifices. Last year, the American Lawyer magazine ranked the pro bono efforts of the nations' major law firms based on the average number of hours per lawyer and the percentage of lawyers who performed

II. MODEL RULE 6.1 AND THE EVOLUTION OF LEGAL CHARITY

A. *Voluntary Legal Service Before Model Rule 6.1*

When the ABA's House of Delegates passed a resolution in August 1975, "confirming the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services without fee, or at a substantially reduced fee, in . . . poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice,"⁴⁷ it did not differentiate between the elite law firms that would come to dominate the pro bono landscape and other practitioners in small and solo practices; nor did it distinguish between novice and experienced attorneys. *All* attorneys share the obligation to offer legal assistance for the public good. Thirteen years later, that resolution was formalized in Rule 6.1 of the Model Rules, which the overwhelming majority of States have adopted with some variations.⁴⁸ Under Model Rule 6.1, attorneys should dedicate fifty hours each year to pro bono work. Qualifying activities include providing legal advice or representation for free or at significantly reduced rates to "persons of limited means" and organizations that provide services to such individuals.⁴⁹

The ABA's 1975 resolution and subsequent rule change reflected a significant departure from historical conceptions of pro bono lawyering. Throughout most of America's legal history, attorneys dispensed "ad hoc and individualized" assistance as a form of

more than 20 hours of pro bono service per year. Of the ten firms ranked highest, all had very healthy profits per partner, most between \$500,000 and \$1 million or more." Ginsburg, *supra* note 44, at 2.

⁴⁷ JAYNE B. TYRRELL, *THE LAW FIRM PRO BONO MANUAL* 2 (1989).

⁴⁸ *Id.* For a description of how Florida, Illinois, Indiana, Michigan, and Washington have approached Rule 6.1, see Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J. L. & PUB. POL'Y 571, 609 (2011).

⁴⁹ It is important to note that Rule 6.1 does not, in fact, obligate attorneys to provide free legal help for the poor. Rather, lawyers may satisfy Rule 6.1 by participating in "legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means" as well as "activities that improve the law, the legal system or the legal profession." MODEL RULES OF PROF'L CONDUCT R. 6.1, cmts. 2–3, 8 (2012).

“professional charity.”⁵⁰ Traditionally, individual attorneys who provided “pro bono service” performed work within their regular area of practice and simply forgave legal bills that a client was unable to pay. As Judith Maute described in her discussion of pro bono regulation, nineteenth century conceptions of attorney professional conduct reflected a “reactive” approach to practice and suggested that attorneys should not turn away poor clients who solicited legal advice.⁵¹ The Code of Ethics adopted by the Alabama State Bar in 1887 recommended that lawyers make downward fee adjustments and waive fees for certain poor clients but “[s]tate[d] no expectation that all lawyers would engage in some work for the public good.”⁵² Indeed, Canon 12 of the ABA’s Canons of Professional Ethics, adopted in 1908, simply advised that an individual’s “poverty” or status as a widow or orphan *could* justify the extension of special professional considerations such as free legal assistance.⁵³ The ABA’s Code of Professional Responsibility, precursor to the Model Rules, similarly explained that “[t]he 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 the lawyer.”⁵⁴

Before the modern pro bono era, litigators interested in a particular cause frequently offered free representation to an individual defendant or social activist who was unable to pay for services due to the compelling nature of the matter at issue. The example of one of New York’s most esteemed law firms, Cravath, Swaine & Moore LLP, illustrates this historical pro bono model. In 1803, one of Cravath’s founding partners “defended the first Native American tried for the murder of a white man in the State of New York” and another “represented a recently released ex-convict

⁵⁰ Cummings, *Politics*, *supra* note 34, at 6.

⁵¹ Judith Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities from Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 98–100 (2002).

⁵² *Id.* at 109.

⁵³ David J. Dreyer, *Culture, Structure, and Pro Bono Practice*, 33 J. LEGAL PROF. 185, 193–94 (2009). For a more detailed discussion of the Canons of Professional Ethics, see Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999).

⁵⁴ ABA MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1980).

accused of stealing six cents worth of fabric.”⁵⁵ In the 1820s, the firm accepted two other pro bono matters that helped to establish the insanity defense in criminal proceedings.⁵⁶ Later, during the Progressive Era, social justice and law reform organizations like the NAACP and the National Consumer League routinely “relied on outside lawyers, recruited from the upper echelons of the bar” to handle test cases on a pro bono basis.⁵⁷

These and countless other examples of nineteenth and early twentieth century pro bono activity reveal a conception of pro bono service “as an unanticipated extension of professional courtesy toward community members who could not afford” counsel or something akin to a “quasi-religious obligation to assist the poor.”⁵⁸ The pro bono attorneys chose to represent nonpaying clients, and forego billing on other matters, because of the attorneys’ personal investments in matters, not as a formal ethical imperative. Of particular note, history’s pro bono attorneys, like Cravath’s founding partners and Progressive Era advocates, were already experienced practitioners when they represented clients on a pro bono basis. Their uncompensated representation of impecunious individuals was never intended to fill gaps in their substantive knowledge of the law; nor did those attorneys anticipate that their pro bono case handling could correct deficiencies in the legal market as a whole.

B. *Pro Bono and Business Development*

Justice gap pro bono initiatives at elite law firms complicate the concept of pro bono service by divorcing pro bono legal assistance from the notion of financial sacrifice for the public good. Attorneys like the Cravath partners and Progressive Era advocates referenced above offered pro bono services at the expense of their for-profit practice. Such is a reasonable price for the profession’s monopoly on the ability to provide legal services.⁵⁹ Today’s pro bono initiatives, on the other hand, are designed to *increase* firm

⁵⁵ *Philosophy: A Proud History*, CRAVATH, SWAINE & MOORE LLP, <http://www.cravath.com/proudhistorical/> (last visited Nov. 13, 2014).

⁵⁶ *Id.*

⁵⁷ Susan Carle, *Re-Envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 AM. U. J. GEND. SOC. POL’Y & L. 81, 93 (2001).

⁵⁸ Carpenter, *supra* note 8, at 46.

⁵⁹ Maute, *supra* note 51, at 138 n.273.

profitability, not displace work on paying matters. The highly leveraged structure of large, major market law firms has not only allowed these firms to successfully exploit inequalities in the legal system to generate high profits, it facilitates legal “volunteerism” by associates who periodically experience reduced workloads on paying matters.⁶⁰ In contrast, small firm and solo practitioners, attorneys who may have more experience working with individual clients than their large firm counterparts, typically lack the excess staffing and related profit margins that support large firm pro bono involvement.⁶¹ Furthermore, associates at large firms provide direct services to indigent clients while receiving a salary not reduced by their hours spent in pro bono service.⁶² Accordingly, the current firm-focused pro bono model disproportionately benefits the highest earners within the legal market who, by taking advantage of the pyramid-like structure of law firms that can afford to “donate” time.⁶³ While the transformation of pro bono service as an

⁶⁰ Referencing principles of game theory, Tom Spahn concluded that pro bono service can “improv[e] the firm’s tendency toward creating innovative solutions to complex problems in its billable work” by “allowing the firm to explore the legal strategic landscape—learning new skills, experimenting with new research tools, and sharing abilities across various attorney groups.” Tom Spahn, *Law Firms Competing on the “Edge of Chaos”: Pro Bono’s Role in a Winning Competitive Strategy*, 35 U. HAW. L. REV. 345, 382 (2013); see also Londen, *supra* note 40, at 925 (concluding that large firms employ sufficient associates “to handle all the billable work that it expects to attract, plus the other tasks including business development, firm administration and pro bono work. The firm also usually has some additional capacity before hitting the limit on hours that the firm’s lawyers are willing to work.”); John R. Maley, *Pro Bono in Law Firms*, in BUILDING A PRO BONO PRACTICE GROUP: LEADING LAWYERS ON SERVING THE COMMUNITY’S LEGAL NEEDS, Astapore, 2013 WL 2728923, at *6 (2013) (“Theoretically, lost billable revenue would be a cost of pro bono work, but in practice we have not experienced that; pro bono work tends to come from other non-billable lawyer time (social, leisure, etc[.]).”); DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 177 (2005).

⁶¹ Londen, *supra* note 40, at 925 (“For smaller firms, the unavailability of particular lawyers is likely to cost the firm billable matters.”).

⁶² Sandefur, *supra* note 26, at 101–02.

⁶³ It should come as no surprise that the revolt against New York State’s mandatory pro bono reporting requirements is being led by attorneys from smaller firms located outside of New York City. See Joel Stashenko, *State Bar to Hire Counsel Over New Pro Bono Rule*, N.Y. L. J., Feb. 3, 2014 (“a former state bar president and House of Delegates member [] said a fifty-hour pro bono goal would

affirmative duty may have increased the number of attorneys serving poor clients, situating free legal services within this business paradigm creates tensions not remedied in the Model Rules or other sources of generally applicable professional guidance.

Shortly after the ABA adopted Rule 6.1 on pro bono service, it published a manual for law firms, particularly large firms, to promote the creation of formal pro bono programs. Therein, the ABA advised firms that pro bono programs confer numerous benefits upon large firms and their associates. It argued that representation of poor clients can “develop valuable legal skills” in inexperienced lawyers, “improve[] associate morale,” and “diminish associate turnover.”⁶⁴ The ABA’s guide recommended that law firms establish pro bono committees and appoint pro bono coordinators to serve as intermediaries between referring legal services organizations and firm associates.⁶⁵ Firms generally applied these principles when developing their pro bono infrastructure.⁶⁶ Notably, though, the ABA’s early blueprint for large firm pro bono practices remained silent about steps firms should take to guarantee that pro bono clients receive high quality representation or address ethical concerns inherent in these programs. Aside from its admonition that junior associates be appropriately supervised, the ABA offered no input on how to ensure pro bono attorney competence or sensitize associates to the needs of low-income individuals from diverse communities.⁶⁷

While the ABA’s Standing Committee on Public Service continues to play a leading role in pro bono institutionalization, the Washington, DC-based nonprofit, Pro Bono Institute (“PBI”), has assumed a leadership role in establishing standards for pro bono projects in large law firms and corporate counsel offices across the country.⁶⁸ Through its periodic training and annual events, PBI

impose a burden on solo and small firm practitioners which made up two-thirds of the state’s legal profession.”).

⁶⁴ TYRRELL, *supra* note 47, at 3.

⁶⁵ *Id.* at 8.

⁶⁶ Cummings, *Politics*, *supra* note 34, at 5.

⁶⁷ TYRRELL, *supra* note 47, at 4.

⁶⁸ PBI is a member organization organized around several projects, all of which provide technical assistance to law firms and/or corporate legal departments interested in handling pro bono cases. Esther Lardent, PBI’s president, has had a long professional relationship with the ABA. See Nikki LaCrosse, *The Life and*

educates law firms on how to establish economically feasible pro bono initiatives. PBI's training materials advise law firms on how to structure their in-house pro bono committees, establish pro bono ventures with corporate clients and control the costs of pro bono engagements.⁶⁹ PBI also instructs law firms and corporate counsel departments to conceptualize pro bono opportunities as tools for companies to improve associate retention, boost morale and "stimulate and satisfy experienced and knowledgeable staff."⁷⁰ PBI has noted a growing trend toward the development of joint pro bono ventures between and among legal departments and their outside counsel that "enable[] outside counsel to gain a better understanding of the client legal department so they can better respond to its commercial needs."⁷¹ Absent from their offerings are training materials on how firms can effectively monitor the outcomes of pro bono representation or assess associates' ability to communicate effectively with diverse clients.

Notably, PBI's publications do not stress adherence to any set of ethics rules for the purpose of protecting pro bono clients. Rather, the scant ethical guidance it provides to firms focus primarily on limiting firms' liability exposure in connection with pro bono matters.⁷² For example, PBI's Pro Bono Ethics Handbook contains a chapter on associate supervision. It admonishes that firm attorneys handling pro bono matters "are often inexperienced and unable to provide competent representation," but offers no technical support or practical recommendations for overcoming these deficiencies.⁷³

Career of Esther Lardent, LAW CROSSING, <http://www.lawcrossing.com/article/1263/Esther-LardentPresident-and-CEO-of-the-Pro-Bono-Institute-Washington-DCAAdjunct-Professor-of-Law-at-Georgetown-UniversityFulbright-Fellow/#> (last visited Nov. 24, 2014).

⁶⁹ See generally *Law Firm Pro Bono Project Resource Clearinghouse*, PRO BONO INSTITUTE, <http://www.probonoinst.org/clearinghouse> (last visited Nov. 24, 2014).

⁷⁰ Esther F. Lardent, *The Business Case for In-House Pro Bono* (2012), available at <http://www.cpbo.org/wp-content/uploads/2012/03/The-Business-Case-for-In-House-Pro-Bono.pdf>.

⁷¹ *Id.*

⁷² See generally *Ethical Issues*, PRO BONO INSTITUTE, <http://www.probonoinst.org/clearinghouse/category/ethical-issues/> (last visited Nov. 13, 2014).

⁷³ Kit A. Pierson, *Pro Bono Ethics Handbooks: Ethical Duty to Supervise Lawyers in Pro Bono Matters*, PRO BONO INSTITUTE at 4–7 (2010).

After noting differences in vicarious liability standards across jurisdictions, PBI simply advises supervisors to provide “reasonably competent” supervision and “actively ensure” their subordinates’ ethical compliance.⁷⁴ This recommendation does not establish sufficiently clear practice norms for the community of pro bono attorneys.

C. *Existing Standards for Poverty Lawyers not Incorporated into Pro Bono Mandate*

As a general matter, the Model Rules avoid matters of cultural competence and client-centered lawyering. It is surprising, then, to note that the ABA *has* adopted detailed technical guidance for attorneys who represent low-income clients, including persons with diverse linguistic and cultural attributes. Over the years, it promulgated standards and repeatedly revised guidelines for nonprofit entities that provide civil legal assistance and operators of pro bono programs, the first and second legs of the “three legged stool” of civil legal service delivery for poor individuals. These exacting principles that the ABA addresses to full-time poverty lawyers outline best practices when profit is not an issue.

In 1961, more than a decade before passing the first resolution on voluntary pro bono service, the ABA adopted its first set of standards for the operation of civil legal aid programs for the poor, such as those funded by the LSC.⁷⁵ With input from the National Legal Aid and Defender Association and other attorneys engaged in full-time nonprofit work, the Civil Legal Aid Standards set forth objective, client-centered guidelines for the provision of culturally competent representation. “[R]esponsiveness to the needs of low-income communities and of clients who are served,” “achieving results,” and treating persons with dignity and respect are core objectives outlined in the Civil Legal Aid Standards, along with the goals of facilitating “access to justice,” providing “high quality and effective assistance,” and ensuring “zealous representation of client

⁷⁴ *Id.* at 4, 6–7.

⁷⁵ ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR (2002), available at http://www.americanbar.org/content/dam/aba/migrated/legal services/downloads/sc_laid/civilstandards.authcheckdam.pdf.

interests.”⁷⁶ The Civil Legal Aid Standards also require nonprofit attorneys to offer “culturally competent” representation, defined as “the capacity to provide effective legal assistance that is grounded in an awareness of and sensitivity to the diverse cultures in the provider’s service area . . . having the capacity to interact effectively and to understand how the cultural mores and the circumstances of the persons from diverse communities affect their interaction with the provider and its practitioners and govern their reaction to their legal problems and to the process for resolving them.”⁷⁷ Attorneys covered by the Civil Legal Aid Standards must understand and respond to the diversity of their clients and target communities to provide effective representation. Beyond that, organizations providing civil legal assistance to indigent litigants are supposed to reflect the diversity of their client population.⁷⁸ The goal of these staff diversity efforts is to create a legal team that is “well-qualified and competent, sensitive to low-income persons and their legal needs, and committed to providing high quality legal services.”⁷⁹

These objectives are consistent with much of the legal scholarship on cultural competence that explores how ethnic, linguistic, and socioeconomic differences among individuals and between attorneys and their clients may impact the provision of legal services.⁸⁰ The Civil Legal Aid Standards rightly recognize that attorneys who lack cultural competence have difficulty forming relationships of trust and communicating effectively with their clients. The Civil Legal Aid Standards also note that a provider’s insensitivity to client cultural values of clients might discourage others from within the client’s community from seeking legal assistance.⁸¹

⁷⁶ ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID, iii–iv (2006) [hereinafter CIVIL LEGAL AID STANDARDS], available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_aba_civillegalaidstds2007.authcheckdam.pdf.

⁷⁷ *Id.* at 56–57.

⁷⁸ ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID, STANDARD 2.7 (2006).

⁷⁹ *Id.* at STANDARD 6.1.

⁸⁰ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 41–42 (2001).

⁸¹ CIVIL LEGAL AID STANDARDS, *supra* note 76, at 64.

In addition to the Civil Legal Aid Standards, the ABA introduced guidelines for pro bono program administrators at nonprofit organizations. The Pro Bono Standards, adopted in February 1996 and revised most recently in 2013, offer much of the same guidance regarding attorney competence and client-centered representation set forth in the Civil Legal Aid Standards. In contrast to the highly subjective standard of competence stated in Model Rule 1.1, the Pro Bono Standards also establish objective and precise measures of case handling success. They require practitioners to “strive to achieve meaningful and lasting results responsive to clients’ needs and objectives,” including the goals of “client self-sufficiency and empowerment” and law reform on behalf of disadvantaged persons.⁸² These standards also mandate that pro bono administrators at nonprofit organizations ensure their attorney volunteers’ cultural competence and sensitivity to clients.⁸³ In August 2013, the ABA’s House of Delegates revised its Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means to address the lack of guidance regarding “formal pro bono programs” without revising its existing approach to articulating practice standards.

Nevertheless, the Pro Bono Standards were not intended to revise Model Rule 6.1. They establish guidelines for nonprofit administrators, legal services attorneys, and board members of organizations responsible for referring low-income individual to pro bono attorneys. Conspicuously absent from this list are the private sector law firms and associates retained to represent pro bono clients. In fact, the drafters confirmed that the Pro Bono Standards were “not intended to create any mandatory requirements or minimum standards for performance.”⁸⁴ These guidelines only address the nonprofit organizations that establish formal pro bono service

⁸² ABA STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS, STANDARD 2.16 (2013), *available at* <http://www.americanbar.org/content/dam/aba/images/news/PDF/109.pdf>.

⁸³ *Id.* at STANDARD 4.3.

⁸⁴ ABA STANDING COMMITTEE ON PRO BONO SERVICES, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS, 2 (1996), *available at* <http://apps.americanbar.org/legalservices/probono/standards.html>.

programs, not law firm attorneys who occasionally handle referred matters on a pro bono basis.⁸⁵

III. SELF-REGULATION FAILURES IN THE PRO BONO MARKET

A. *Competence Defined by the Bottom Line*

In most cases, “the economics of practice and workplace controls explain a good deal of the ethical behavior” and professional conduct norms that attorneys apply to their work.⁸⁶ Pro bono proponents assume that large firms apply the same ingenuity and tenacity extended in support of corporate advocacy to the cases they handle for indigent persons. In so doing, they ignore the many practical restraints that consign justice gap representations to a lower standard of professional conduct.

Firms attract paying clients by promising to provide high quality performance and positive outcomes. Major law firms highlight their ability to coordinate interdisciplinary teams, quickly conduct legal research on novel, complex issues, and provide reliable advice to clients.⁸⁷ For example, the prominent law firm, Jones Day,

⁸⁵ *Id.* at 8.

⁸⁶ Shadamiah, *supra* note 32, at 368.

⁸⁷ On its website, for example, Cravath notes that it is “frequently retained by defendants confronted with major new lawsuits or stunned by massive judgments” and that its litigators represent clients “before administrative agencies and regulatory authorities and in virtually every other type of proceeding.” *Litigation*, CRAVATH, SWAINE, & MOORE LLP, <http://www.cravath.com/practices/litigation/> (last visited Nov. 24, 2014). Sullivan & Cromwell LLP states that its lawyers form seamlessly integrated teams across relevant practices areas and are prepared to handle any related or follow-on matters that arise in the course of litigation. *Litigation: Overview*, SULLIVAN & CROMWELL LLP, <http://www.sullcrom.com/Litigation-Practices/> (last visited Nov. 24, 2014). Latham and Watkins LLP describes its attorneys as being “capable of providing clients with immediate, high-quality legal expertise anywhere in the world.” *Litigation*, LATHAM AND WATKINS LLP, <http://www.lw.com/practices/Litigation> (last visited Nov. 24, 2014). Similarly, Hogan Lovells states that it maintains a “highly collaborative culture” and assembles diverse teams both within the firm and “in the wider community.” *About Us: Overview*, HOGAN LOVELLS, <http://www.hoganlovells.com/aboutus/overview/> (last visited Nov. 24, 2014). Morrison & Foerster boasts that “[c]reative thinking, and a passion for practical solutions, inform all [the firm’s] work.” *Practices*, MORRISON & FOERSTER, <http://www.mofo.com/services/> (last visited Nov. 24, 2014).

explained, “[o]ver the long term, the quality of client service offered by a firm determines its growth and success.”⁸⁸ While this may be true in the case of corporate clients that have a multitude of legal service providers from which to choose, indigent clients and nonprofit referral agencies have no way to directly impact a firm’s profitability, the primary mechanism for imbuing Model Rule 1.1 with real meaning and client-directed safeguards.⁸⁹

At the institutional level, law firms have no economic incentive for regulating the quality of the pro bono service that their attorneys provide to indigent clients. Pro bono matters do not determine law firms’ staffing needs, and profits-per-partner are not contingent upon outcomes in pro bono matters.⁹⁰ When LSC reports and law firm rankings published by *The American Lawyer* magazine assign a market value to law firm pro bono work, these estimates merely reflect the hourly rate normally charged by the law firm for the attorneys who worked on the matter. They are not correlated to the outcomes obtained for pro bono clients.⁹¹ Low-income persons who cannot afford to retain lawyers during a legal crisis are incapable of screening prospective counsel and exceedingly unlikely to retain counsel to pursue malpractice claims against their pro bono attorneys. Cash-strapped legal services organizations that are dependent upon law firms for the provision of in-kind support and financial contributions are poorly positioned to offer negative

⁸⁸ *Why Do These Differences Produce Better Client Service?*, JONES DAY, <http://www.jonesday.com/principlesandvalues/clientsservices/> (last visited Nov. 24, 2014).

⁸⁹ Legal market observers estimate “that a typical corporation is working with 47 law firms at any given point, and even an average middle-market company is working with eight.” Marlis Silver Sweeney, *47: That’s How Many Law Firms a Typical Company Uses*, CORPORATE COUNSEL, <http://www.corpcounsel.com/id=1202650829523/47%3A-That%27s-How-Many-Law-Firms-a-Typical-Company-Uses#ixzz2yvuJm8FP> (last visited Nov. 24, 2014).

⁹⁰ Londen, *supra* note 40, at 925 (“A law firm employs the right-sized staff to handle all the billable work that it expects to attract, plus the other tasks including business development, firm administration and pro bono work. The firm also usually has some additional capacity before hitting the limit on hours that the firm’s lawyers are willing to work.”); See Maley, *supra* note 58, at 6 (“Theoretically, lost billable revenue would be a cost of pro bono work, but in practice we have not experienced that; pro bono work tends to come from other non-billable lawyer time (social, leisure, etc.).”).

⁹¹ Sandefur, *supra* note 26, at 97.

feedback about their referred clients' experiences.⁹² In fact, nonprofit organizations possess very little information about the track record of the law firms to which they refer clients or the training of individual attorneys assigned to the matter.⁹³ Moreover, it is hard to imagine that institutional clients decide whether to retain a particular firm on a billable matter based on unpublicized outcomes achieved in justice gap pro bono cases.⁹⁴

Moreover, the few reported cases that discuss attorney misconduct in the pro bono context suggest that even egregious ethical misconduct in the pro bono context will not result in court-imposed sanctions. In *MC v. GC*, for example, the New York Supreme Court concluded that the attorney failed to effectively communicate basic legal concepts, subjected the client to duress, and

⁹² See generally Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 L. & SOC. INQUIRY 62 (2014).

⁹³ In my work at a nonprofit law firm, I have noted that public interest attorneys involved in direct legal services work often lack a basic understanding of law firm structure and do not appreciate the significant distinctions that exist among large law firms. For example, they are unaware of which firms have larger litigation departments and which firms are more focused on transactional practices. Given the hyper stratification of the legal profession, even with the same geographic location, lifelong legal services attorneys often fail to appreciate differences among specialty practices and often refer to "firms" as an undifferentiated monolith. In this context, it is highly unlikely that legal services organizations would have the information required to carefully and accurately assess which firms are best suited to handle particular types of matters. Even if the nonprofit attorneys had time and inclination to learn about law firm practices, firms themselves do not publicize their pro bono failures in a way that would empower nonprofits in the pro bono referral process.

⁹⁴ Furthermore, pro bono assignments involve one-time engagements with clients. The framers of the Model Rules well understood that attorneys are more likely to behave ethically when they have long-term relationships with the individuals to whom they provide services. See MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 5. However, the ephemeral nature of the pro bono attorney-client relationship and the lack of accountability undermine pro bono attorneys' incentives to invest in improving the quality of services. Not surprisingly, firms implement few, if any, quality control measures to gauge the effectiveness of their pro bono services. Cummings & Sandefur, *supra* note 7, at 101. Most follow the example of PBI's pro bono assessment guide, which simply takes an inventory of "pro bono efforts" and policies, not outcomes or client satisfaction. *Law Firm Pro Bono Self-Assessment Guide*, PRO BONO INSTITUTE (2002).

provided testimony that the court found to be “not reliable.”⁹⁵ Yet, remarkably, the court did not order the law firm to pay sanctions for attorney misconduct. Beyond that, the judge shielded the individual attorney from professional embarrassment by excluding her name from the opinion.⁹⁶

Another case, *Maples v. Thomas*, offers a chilling example of how attorneys who mishandle even the most grave and consequential pro bono matters may do so with impunity. In *Maples*, the Supreme Court grappled with the question of whether a death row inmate who had been abandoned by the attorneys who agreed to represent him on a pro bono basis would be denied an opportunity to file a writ of habeas corpus.⁹⁷ Two associates from the law firm of Sullivan & Cromwell LLP agreed to represent Mr. Maples in connection with his post-conviction appeal.⁹⁸ These attorneys filed the client’s petition for relief, arguing that the client had been denied effective assistance of counsel at both the guilt and penalty phases of his trial.⁹⁹ Thereafter, the attorneys left the firm without communicating the news of their departure to their client.¹⁰⁰ The attorneys also failed to seek the Alabama court’s permission to withdraw from the representation.¹⁰¹ After the attorneys left the firm, the Alabama trial court mailed copies of the order denying the client’s petition to his attorneys at the law firm. Because the attorneys were no longer employed by the firm, the documents “were not forwarded to another Sullivan & Cromwell attorney. Instead, a mailroom employee sent the unopened envelopes back to the court.”¹⁰² Shortly thereafter, the client’s time to file a notice of appeal of that decision expired, leaving him with no other options to challenge his death sentence.¹⁰³ The Supreme Court’s decision contains nothing to suggest that the law firm was required to pay any sanctions for its failures.

⁹⁵ *MC v. GC*, 25 Misc.3d 217, 219 (N.Y. Sup. Ct. 2009).

⁹⁶ *Id.* at 218 n.2.

⁹⁷ *Maples v. Thomas*, 132 S.Ct. 912, 914 (2012).

⁹⁸ *Id.*

⁹⁹ *Id.* at 916.

¹⁰⁰ *Id.* at 919.

¹⁰¹ *Id.*

¹⁰² *Maples*, 132 S.Ct. at 920.

¹⁰³ *Id.*

B. Developmental Pro Bono as a Remedy for Attorney Incompetence

The Model Rules' approach to defining attorney competence makes enforcement of this ethical norm particularly difficult in the pro bono context. Rule 1.1's drafters premised their explanatory comments on the belief that attorneys will both possess and be willing to employ generalist legal skills on behalf of clients, ideas inconsistent with current practice trends. The comment explains:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting are required in all legal problems.¹⁰⁴

Yet, these are the practical skills that new attorneys assigned to pro bono matters as a matter of professional development are unlikely to possess.¹⁰⁵

One recent New York case offers a rare glimpse into the degree of preparation that new attorneys at elite law firms, the practitioners most likely to handle "justice gap" pro bono cases, require to competently handle relatively straightforward matters. The law firm of Mayer Brown LLP assigned a junior litigation associate to a pro bono matter¹⁰⁶ involving a landlord's refusal to return a \$6,400

¹⁰⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2012).

¹⁰⁵ Ann Marie Cavazos, *Next Phase Pedagogy Reform for the Twenty-First Century Legal Education: Delivering Competent Lawyers for a Consumer-Driven Market*, 45 CONN. L. REV. 1113, 1116 (concluding "[t]oday, law schools are ineffective in their preparation of law students who are ineffectual in their ability to be able to 'hit the ground running' to practice law").

¹⁰⁶ See *Thomas Clozel and Chine Labbe v. Hasan Jalasi and Azra Jalisi*, No. 11227/12, at 2 (N.Y. Civ. Ct. N.Y. County Jan. 14, 2014), available at <http://nylawyer.nylj.com/adgifs/decisions14/011614nervo.pdf>. Although the client does not appear to have been referred as part of a justice gap pro bono initiative, the court noted, "counsel is not even billing its client for legal services." *Id.*

security deposit.¹⁰⁷ The court rejected Mayer Brown's claim for attorney's fees authorized under the relevant statute because it believed the associate's billing for researching "procedural rules," analyzing "pleading requirements," and "becoming familiar with basic court procedures that an attorney is presumed to know" was inappropriate.¹⁰⁸ The court explained:

To demand compensation for two hours of professional or non-professional time over three days to accomplish this essentially ministerial task, asserting it required researching, drafting, conversing, conferring and discussing of some sort, the court finds unbelievable.¹⁰⁹

It is not the associate's billing but rather, the judge's misconception about new attorney skills that appears incredible. This judge, like the framers of Model Rule 1.1, presumed that an attorney admitted to practice will possess basic knowledge that is neither stressed in the law school curriculum nor required as a condition of admission to the bar. In contrast, the ABA's Code of Professional Responsibility, predecessor to the Model Rules, clearly distinguished between standards required for admission to practice and attorney competence.¹¹⁰ Yet without violating Model Rule 1.1, pro bono initiatives place urgent legal matters in the hands of newly admitted law firm associates with few of these generalist skills.

The term "developmental pro bono" refers to the practice of strategically assigning law firm associates to perform free legal work as a way of advancing the attorneys' skills and facilitating performance evaluations by more senior members of the law firm.¹¹¹ The pro bono attorney in that case continues to receive a salary and sharpens his or her skills without having to answer to a paying client for any missteps or erroneous judgments made over the course of the

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *Id.* at 2-4, 6.

¹⁰⁹ *Id.* at 5-6.

¹¹⁰ See ABA MODEL CODE OF PROF'L RESPONSIBILITY, EC 6-3 (1983).

¹¹¹ *Talent Management Trends: Law Firm Core Competencies and Pro Bono*, PRO BONO INSTITUTE (2011), available at <http://pbi.informz.net/admin31/content/template.asp?ps=15375&sid=15375&brandid=4063&ptid=1053&uid=0&mi=1465561> (subscription required).

representation. Any benefit conferred upon the client as part of this capacity-building effort is almost incidental.

In many instances, firms use justice gap pro bono projects as a way to develop young associates' generalist skills. This "developmental pro bono" model arguably advances access to justice objectives if firms limit these assignments to associates who receive sufficient supervision. That is, firms that strategically accept pro bono matters for associate development purposes should only do so when more experienced practitioners are actively engaged in the representation to ensure the more junior attorney's compliance with his or her ethical duty to provide competent and diligent representation. However, firms do not consistently deploy developmental pro bono initiatives in this manner. Developmental pro bono work often functions to enhance skills among firms' least experienced attorneys who lack adequate supervision.¹¹²

¹¹² Law school graduates who immediately join large firms after graduation and receive pro bono assignments upon arrival are not required to demonstrate practical expertise in any area to gain admission to the bar. See Robert Rubinson, *Professional Identity as Advocacy*, 31 MISS. C. L. REV. 7, 14–15 (2012) (contrasting the bar exam's emphasis on assessing applicant's "superficial familiarity" with the "classic roster of first year classes" with "board certifications in medicine" that require prospective doctors to demonstrate expertise in various areas). Some legal education reformers have concluded that "[e]ven by the end of the third year of law school, most law students do not have a realistic understanding of what most lawyers do." Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 81 (2012). In better economic times for the legal industry, institutional clients remained loyal to their law firm advisors, and firms easily passed along the costs of training novice associates to their clients without fear of being supplanted by a more efficient competitor. Patrick J. Schiltz explained, "[i]n the days of loyal clients and lackadaisical monitoring of legal expenses, time that a senior lawyer spent serving as a mentor, and time that a junior lawyer spent being mentored, could be charged to a client." *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 743 (1998). A recent New York Times article noted that prior to the Great Recession and resulting contraction in legal markets, "clients have essentially underwritten the training of new lawyers, paying as much as \$300 an hour for the time of associates learning on the job." David Segal, *What They Don't Teach in Law School: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0. Today, firms concerned about having their bills scrutinized by clients who may take their business elsewhere need an alternative training model for their new attorneys.

Elite law firms tend to view pro bono cases as opportunities for junior attorneys to obtain generalist skills that will ultimately serve commercial clients who are unwilling to finance new attorney training and endure inevitable attorney errors.¹¹³ In fact, many law firms discourage more experienced attorneys, the practitioners most likely to possess the generalist skills, from undertaking pro bono work.¹¹⁴ Particularly in this context, Model Rule 1.1's approach to defining competence without reference to outcomes or objective standards renders pro bono clients vulnerable to inexperienced attorney errors. Novice attorneys assigned to developmental pro bono matters may receive less support precisely because decision makers view this charitable volunteering as an opportunity for the young attorney's professional growth and satisfaction, not legal work of consequence to the firm's bottom line. As such, many attorneys involved in developmental pro bono work are poorly equipped to provide services that meet the minimum standards of competence or other ethical requirements.

C. *Conflicts, Identity, and Case Selection*

Not only do business imperatives and assignment practices work against ensuring attorney competence in pro bono cases, many law firms reject entire categories of public interest litigation in which their attorneys already possess significant experience. Most practitioners recognize that encouraging attorneys to accept pro bono matters within their for-profit practice area generally improves attorney competence and increases case handling efficiency.¹¹⁵ Yet,

¹¹³ *Controlling the "Costs" of Law Firm Pro Bono Work*, PRO BONO INSTITUTE (2010), <http://pbi.informz.net/admin31/content/template.asp?sid=7302&ptid=619&brandid=4063&uid=0&mi=652219>.

¹¹⁴ Many junior associates have no experience speaking directly with clients. While in recent years firms have increasingly turned towards outsourcing such discovery-related tasks, junior associates still enjoy few opportunities to develop their client interviewing and oral advocacy skills relative to their public interest counterparts who generally conduct client intake and courtroom advocacy from their first days on the job. Carpenter, *supra* note 8, at 72; Rhode, *supra* note 60, at 142.

¹¹⁵ Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1414 (1998).

many firms reject cases in these areas based on their misperception that such matters present a “positional conflict” for the firm.

A genuine positional conflict involves representation of “two unrelated clients in litigation before a court or administrative agency on opposing sides of the same legal issue.”¹¹⁶ Given the nature of elite firm practice, it is unlikely that many referred pro bono matters could place a firm in a true positional conflict. Few prestigious law firms directly represent landlords in low-income neighborhoods or individual restaurant owners who violate minimum wage laws, for example. In contrast, more liberally defined “business conflicts,” or the perception that prospective institutional clients will be less likely to hire the firm because of pro bono advocacy on behalf of certain poor people, are much more likely to surface.¹¹⁷ As Norman Spaulding suggests, an attorney’s perception of his or her client’s interests is inextricably linked with the attorney’s self-perception. Attorneys who experience a particularly close alignment with their clients’ business perspectives have “thick positional identities.” These lawyers may be unwilling to accept pro bono work inconsistent with the clients’ interests “out of fear that it may alienate their paying clients,” even when the matter presents no direct conflict under the Model Rules.¹¹⁸

Many pro bono advocates accept this conflation of business interests and “positional conflicts.” Not surprisingly, given pro bono’s relationship with law firms’ for-profit goals, many pro bono proponents fail to question the expansive definition of conflicts applied in the pro bono context. PBI, for example, cautions law firms to avoid accepting pro bono cases that might present “issue conflicts” wherein the firm could be asked to “argue a legal theory which may not be in the best interest of a corporate client,”¹¹⁹ an

¹¹⁶ John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 464–65 (1993).

¹¹⁷ According to Sandefur, “law firms select pro bono projects with an eye to avoiding those that might antagonize existing or potential clients.” Sandefur, *supra* note 26, at 103. See also Rubinson, *supra* note 112, at 33 (“[M]any large firms shy away from offending larger potentials or actual organizational clients, and thus do not take on, for example, civil rights employment cases or environmental cases.”).

¹¹⁸ Spaulding, *supra* note 115, at 1418.

¹¹⁹ *Working Effectively with Pro Bono Programs: Tips for Large Law Firms*, PRO BONO INSTITUTE 2 (2008).

approach that goes well beyond the requirements to avoid a conflict under Model Rules 1.7–1.10.

Corporate attorneys with thick positional identities dominate elite law firms. In the for-profit context, this approach ensures that attorneys within the firm zealously advocate on behalf of their clients. In the pro bono context, elite firms' alignment with powerful institutional clients may work to the detriment of access to justice imperatives. Nearly half of all of the nation's largest law firms categorically refuse to accept plaintiff-side employment and labor cases and rarely engage in consumer and environmental pro bono work; nor do they readily accept civil rights matters that could offend paying clients, even when attorneys in those firms have extensive experience in the relevant subject matter or procedural rules.¹²⁰

Both existing and potential corporate clients exert significant pressure on law firm attorneys to accept pro bono matters outside of their areas of expertise. This decreases the efficiency in pro bono work and increases the likelihood that novice attorneys who rely on their firms' internal resources will receive insufficient support for quality control.¹²¹ Thus, the actual and potential financial interests of paying clients impact the interpretation of conflict rules in the pro bono context. By influencing case selection, the business interests of future clients increase the probability that pro bono work will not be performed with the same resources and informal collegial control that define the firm's standard practice. Model Rule 6.1 imposes no countervailing duty on private sector attorneys to interpret conflicts more narrowly to facilitate access to justice—even when doing so might improve the quality of pro bono service.

¹²⁰ Cummings & Sandefur, *supra* note 7, at 97.

¹²¹ Spaulding, *supra* note 115, at 1420 (“[P]aying clients (in many instances without even speaking a word on the subject) have a great deal of authority to determine which public interest cases and pro bono clients are legitimate. Paying clients thus help define the line between popular and unpopular clients of limited means. . . . That some clients in the latter category have politically controversial or morally charged legal problems is especially troubling, since it is the pro bono representation of just these kinds of clients that, at least rhetorically, undergirds the profession’s monopoly status.”).

D. *Cultural Homogeneity and Legal Services Triage*

Class, cultural, and linguistic differences between attorneys and their clients can erect barriers to effective representation.¹²² The academic literature on cultural competence in legal service makes clear that ethnic, linguistic, and socioeconomic differences among individuals and between attorneys and their clients may impact the provision of legal services.¹²³ However, the lack of diversity within elite law firms impacts justice gap pro bono work long before the first attorney-client encounter. Just as with “positional conflicts,” cultural preferences and exclusionary practices rooted in cultural difference shape case screening and client referrals in ways that hinder pro bono’s access to justice objectives.

Model Rule 1.2 states that “[l]egal representation should not be denied to people who are unable to afford legal services.”¹²⁴ Yet, the impulse to provide an enjoyable experience for the pro bono attorney frequently results in case selection practices flatly inconsistent with Model Rule 1.2’s access to justice objective. Many pro bono attorneys express a desire to work with “deserving clients.”¹²⁵ On its face, the term “deserving” could mean nothing more than that the individual should have access to counsel; that is, every person experiencing a legal crisis *deserves* legal assistance. In practice, however, the term “deserving” often functions as a code word signifying clients whose characteristics do not offend prevailing

¹²² See generally Deborah Archer, *There is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a “Post-Racial” Society*, 4 COLUM. J. RACE & L. 55, 68–71 (2013); Annette Wong, *A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic and Cultural Differences*, 21 S. CAL. REV. L. & SOC. JUST. 431 (2014).

¹²³ Bryant, *supra* note 80, at 41–42.

¹²⁴ MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 5.

¹²⁵ Cummings & Sandefur, *supra* note 7, at 104. The ABA’s Military Pro Bono Project advises individuals who refer cases to the association, “[w]e will be counting on you to refer only the most meritorious and deserving clients.” 2013 Winter Newsletter: *Military Attorneys* (Feb. 28, 2013), http://www.militaryprobono.org/news/article.466487-ABA_Military_Pro_Bono_Project_2013_Winter_Newsletter_Military_Attorneys (last visited Nov. 24, 2014).

social norms within the law firm or who might negatively reflect upon a firm's image.¹²⁶

Pro bono advocates often ignore the impact that poverty-related prejudices can have on attorneys' willingness to work with poor people in crisis. As Michelle Jacobs explained, perceptions of whether particular impoverished individuals are "viewed as being 'undeserving' or 'unworthy' extend to providers of legal services" and influence the quality and scope of assistance provided to poor clients.¹²⁷ Jacobs' limited empirical research on the degree to which the definition of "zealous" advocacy was tied to conceptions of social worth revealed, among other things, that law students varied their decisions to assist clients based on the client's racial and class characteristics.¹²⁸ She also found that students' assessment of "equality" as a guiding principle varied considerably depending on the ethnicity of the student.¹²⁹ Since bar applicants need not undergo cultural competency or anti-bias training as a condition of their admission to practice, it is unlikely that law students' attitudes towards serving hyper-marginalized individuals will radically transform once they become law firm associates assigned to pro bono matters.¹³⁰

The cultural landscape of elite law firms is poorly equipped to counter this bias and prepare pro bono attorneys for the diversity issues that arise in justice gap pro bono work. On the contrary, it reflects recruiting and retention practices designed to ensure that the associates, partners and corporate clients share a common culture. Attorneys who are ethnic minorities and lawyers raised in low socioeconomic backgrounds seldom attain positions of authority within elite law firms.¹³¹ White attorneys constitute ninety-eight

¹²⁶ Generally speaking, attorneys tend to prefer pro bono clients who more closely resemble their paying clientele. Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2448 (2010).

¹²⁷ Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 *HOW. L. J.* 257, 263 (2001).

¹²⁸ *See id.* at 269–75.

¹²⁹ *Id.* at 279–80 (noting "[w]hen the students of color were removed from the [] sample, equality's ranking plummeted dramatically").

¹³⁰ *Id.* at 272–73.

¹³¹ Todd A. Berger, *Jimmy Carter's "Malaise" Speech, Social Desirability Bias, and the Yuppie Nuremberg Defense: the Real Reason Why Law Students Say They Want to Practice Public Interest Law, Yet So Few Actually Do*, 22 *KAN. J. L. &*

percent of the partners in the nation's top one hundred law firms.¹³² Moreover, the attorneys who practice in these firms are drawn overwhelmingly from the pool of graduates from highly ranked law schools. Students at these institutions are twenty-four times more likely to have been raised in families at the top ten percent of earnings than in middle and lower income brackets.¹³³ This lack of economic diversity within the elite sectors of the legal community exists even among the relatively few African-American and Latino attorneys who enter top tier law schools and elite firms.¹³⁴ Such statistics paint an exceedingly grim picture of the true racial and socioeconomic homogeneity at law firms that are the most likely to accept justice gap pro bono cases.¹³⁵

PUB. POL'Y 139, 158 (2012) (African American and Latino attorneys are significantly underrepresented in elite, for-profit law practice); Symposium, *Tales of Diversity: Lawyers' Narratives of Racial Equity in Private Firms*, 31 L. & SOC. INQUIRY 831 (2006); Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947 (2011); Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 68 (2011); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1045–46 (2011); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1080 (2011); see also Rubinson, *supra* note 112, at 34–35 (law firms emphasize “the crucial importance of graduating from an elite law school (and thus being ‘the best and the brightest’)” as a “measure of the prestige accorded to [their] lawyers”); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity is Good for Business”: the Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

¹³² Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2087 (2005).

¹³³ Richard H. Sander, *Class in American Legal Education*, 88 DENV. UNIV. L. R. 631, 637 (2011).

¹³⁴ *Id.* at 647.

¹³⁵ The proponents of justice gap pro bono initiatives share the same elite status as the attorneys who often handle these cases. The Association of Pro Bono Counsel is a group composed exclusively of attorneys and administrative staff from major law firms. Membership in the Association of Pro Bono Counsel is limited to “[a]ttorneys who currently manage a law firm pro bono practice on a full-time basis.” See *Membership*, ASSOCIATION OF PRO BONO COUNSEL, <http://www.apbco.org/about/membership/> (last visited Nov. 13, 2014). Similarly, the Pro Bono Institute's fulltime staff, composed primarily of attorneys who hail from major law firms, is governed by law firm and corporate counsel advisory

The class and cultural tensions that can arise while representing indigent people often discomfit pro bono attorneys.¹³⁶ This sector of the bar seldom has extensive first-hand exposure to the conditions of intergenerational poverty, identity-based discrimination, and systemic disadvantage commonly experienced by low-income, civil litigants. Often the conditions of deep poverty common in justice gap lawyering test these attorneys' desires to help a "deserving" client. Theodore Fillette III, the Senior Managing Attorney of Legal Aid of North Carolina referred to this phenomenon the "Cinderella expectation syndrome" and explained:

[S]ome volunteers have little experience with generationally poor persons and imagine that their pro bono clients are idyllic Cinderella prototypes who are industrious, polite, modest, grateful, and the victims of an evil stepmother or some equivalent villain. In my view, all of the Cinderella clients are represented by Perry Mason or Matlock, leaving us with real clients who are burdened with economic and cultural disadvantages.¹³⁷

This perception of individual crises divorced from systemic disadvantage is consistent with the notion that individuals who are hard-working or dedicated to raising a family in an honorable way, or honest, cooperative, or the like should receive some reward for their individual character when legal services organizations allocate resources.¹³⁸ Many pro bono coordinators and attorneys share their perspective and prefer a "good" pro bono experience that consists of representing an appreciative and cooperative client with a single legal problem who has no criminal background, mental health concerns, or substance abuse history.

boards. Legal services attorneys and poverty law practitioners are largely absent from both institutions.

¹³⁶ As Jacob explained, "The lack of sufficient economic resources can inject a constant level of instability and chaos into a client's life. This may be overwhelming to a lawyer, and [it] may even inhibit the lawyer's ability to understand how or why the client's situation does not materially improve after the lawyering interaction." Jacobs, *supra* note 127, at 269.

¹³⁷ Fillette, *supra* note 8, at 122.

¹³⁸ Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2495 (1999).

In conceiving of the ideal, morale-boosting case, few pro bono attorneys envision engaging in strained conversations with hyper-marginalized individuals.¹³⁹ Based on my first-hand experience as an associate at a large, major market law firm, this is a feeling with which I am somewhat sympathetic. Exacting billable hour requirements, job insecurity, and a lack of personal autonomy create enormous stress for law firm associates. Consequently, the prospect of working with a client who may present a maze of legal problems and can appear to be uncooperative, unable to arrive at appointments on time, or complicit in their own crises is understandably unattractive. To avoid this potential discomfort, some pro bono attorneys and coordinators simply refuse to serve the most vulnerable clients in need of civil legal assistance. In so doing, elite law firms' pro bono participation can distort a nonprofit legal services organization's case handling priorities by reshaping the way nonprofit organizations select and refer pro bono cases.

Leonore Carpenter, an experienced nonprofit attorney, referred to law firms' distortion of nonprofit legal services agendas as "triage conflict."¹⁴⁰ Carpenter cautioned, "[t]riage conflict arises when the case selection criteria of the public interest agency are directly challenged by another entity" and when "pro bono seeks to impose its business agenda on a public interest program" thereby destabilizing the nonprofit's mission by forcing a "misallocation of scarce human capital resources."¹⁴¹ In justice gap pro bono initiatives, nonprofit attorneys who conduct community outreach and case screening constitute the primary human resources subject to law firm misappropriation.

¹³⁹ Moreover, evidence suggests that many people find cross-cultural communications to be stressful. Bryant, *supra* note 80, at 59 ("[I]ntercultural learning is often stressful precisely because it is change-oriented.").

¹⁴⁰ Carpenter, *supra* note 8, at 57.

¹⁴¹ *Id.* at 58–59. Carpenter goes on to describe one of her personal experiences as legal director of a small nonprofit organization in which she felt pressured to accommodate a law firm pro bono interest for "sexy" cases that were inconsistent with her organization's priorities. *Id.* at 60. Sandefur described how one formal pro bono program organized to provide assistance with divorce proceedings was reconstituted to address "consumer counseling . . . not in response to an assessment of local legal need, but because the founders realized that 'different religious values'" among the pro bono attorneys staffing the project made the program unappealing. Sandefur, *supra* note 26, at 100.

Carpenter's notion of "triage conflict" extends the discussion sparked by Paul Tremblay's seminal article on "weighted triage" among poor clients. Therein, Tremblay described appropriate and impermissible case selection criteria available to legal services attorneys who face an overwhelming demand for services.¹⁴² Among the principles legal services attorneys may ethically consider are: the degree to which attorney intervention will make a meaningful difference in the outcome of the dispute, conservation of scarce institutional resources, the goal of maximizing the collective benefit to the client community, prioritization of the "most serious" legal matters, and preference for cases in which the attorney is likely to achieve a favorable outcome over the long term instead of matters in which the attorney can only obtain short term relief.¹⁴³ One impermissible factor to consider is a client's perceived "social worth."¹⁴⁴ Tremblay explained that if such perceptions were applied in the triage context, "then clients deemed more deserving as the result of some personal qualities or character would warrant some privilege in the selection process."¹⁴⁵

Triage conflict in the justice gap pro bono context misdirects a nonprofit organization's case selection criteria by causing legal aid attorneys to favor poor clients with high "social worth" when referring matters to pro bono attorneys. Some law firms straightforwardly inform nonprofit referral organizations that their attorneys are not interested in handling certain categories of individuals such as clients with criminal or substance abuse histories, for example. Other firms do not categorically reject clients but simply decline to accept pro bono matters in which the client falls short of the "Cinderella" expectations alluded to above. Nonprofit organizations may respond to this reality by advising their staff to "select the most sympathetic clients available," offering "the most meritorious claims to volunteers" and "not refer[ing] clients with mental difficulties."¹⁴⁶ The unfortunate effect of this approach

¹⁴² Tremblay, *supra* note 138, at 2489–98.

¹⁴³ *Id.* at 2490–93.

¹⁴⁴ *Id.* at 2495–96.

¹⁴⁵ *Id.* at 2495.

¹⁴⁶ Fillette, *supra* note 8, at 118. Fillette went on to explain how the paralegal at his organization "carefully screens potential clients and declines to refer 'difficult' personalities." *Id.* at 121.

to pro bono work is that referring legal services organizations feel pressured to skim off easy clients (for example, speakers of standard English who are meticulous and punctual) and easy cases (for example, uncomplicated matters with a high likelihood of success) for their pro bono partners. This violates Model Rule 1.2 and contravenes the principles articulated in both the Civil Legal Aid and Pro Bono Standards. These rule violations are not simply ideological concerns. They have the practical effect of concentrating cases and clients that require more robust advocacy resources within nonprofits instead of expanding the pool of attorneys available to the entire target population. Ostensibly, justice gap pro bono exists to increase the resources available to low-income persons in crisis. Since, in many respects, pro bono service enhances the legitimacy of the profession as a whole, it is deeply troubling that attorneys' lack of cultural competence frequently undermines this goal.¹⁴⁷

Triage conflict is inconsistent with Pro Bono Standard 2.1 which requires legal services providers to "identify the most compelling needs of the low-income community" they serve.¹⁴⁸ However, this is yet another area in which law firms are poorly positioned to regulate their ability to facilitate access to justice for poor people. It also represents another lost opportunity for the ethics rules to set clearer boundaries for whether and how a client's perceived social worth should enter the case selection process. The ABA acknowledged that "most pro bono committees consider . . . the client" when deciding whether to accept a prospective pro bono matter.¹⁴⁹ Yet,

¹⁴⁷ Spaulding, *supra* note 115, at 1421.

¹⁴⁸ Most poverty law organizations aim to reach the most vulnerable members of their client communities, those who are least able to self-advocate. Investing resources into creating "feel good" opportunities for pro bono attorneys runs counter to the objective of prioritizing services for the most vulnerable members of the community. Yet, "[r]elatively few firms engage in any systematic assessment of community needs or of the most cost-effective use of resources. Seldom do they even survey their own membership about giving priorities or attempt to monitor the satisfaction of clients or the social impact of particular initiatives. . . . The result is often a mismatch between public needs, partner priorities and associate satisfaction." Symposium, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 *FORDHAM L. REV.* 1435, 1445 (2009).

¹⁴⁹ TYRRELL, *supra* note 47, at 9.

neither the committee's report on Model Rule 6.1 implementation or subsequent commentary on the rules identify which client characteristics would be acceptable to consider when deciding whether to accept a case and which would be ethically impermissible to take into consideration.¹⁵⁰ Moreover, Model Rule 6.1 fails to cite either the Civil Legal Aid or Pro Bono Standards 2.1 as guiding principles for pro bono attorneys.

It is true that amending the Model Rules would not alter the demographics of elite law firms or automatically develop cultural competence among the young attorneys who are often assigned to work with pro bono clients. Indeed, the existing Model Rules have not curbed many undesirable practices that disadvantage paying clients. Nevertheless, the ABA's choice to omit references to the Civil Legal Aid and Pro Bono Standards from Model 6.1 leaves nonprofit organizations and pro bono firms with little guidance on appropriate (and inappropriate) methods of pro bono case selection to counter existing biases against clients whose "social worth" is perceived to be low.

E. Pro Bono Supervision

In theory, the large firm pro bono model effectively functions precisely because such institutions aggregate resources, wisdom and supervisory capacity to facilitate the work of junior attorneys. In reality, however, junior attorneys frequently handle pro bono cases with little or no supervision. This is particularly unsettling since junior associates no longer receive the training and mentoring on paying matters that once characterized law firm practice and might

¹⁵⁰ The comments to Model Rule 6.2 on accepting appointments state that lawyers fulfill their voluntary pro bono obligations by "accepting a fair share of unpopular matters or indigent or unpopular clients." MODEL RULES OF PROF'L CONDUCT R. 6.2, cmt. 1. The rule advises against refusing appointments simply because the client's "character or cause" is "repugnant" to the appointed attorney. The Model Code's Ethical Considerations went further than the Model Rules in defining how client "unpopularity" should impact case acceptance. Ethical Consideration 2-29 included court appointments and "bar association" referrals within the rule on accepting appointments. It distinguished between an attorney's "personal feelings" and "community attitudes" that may be repugnant," stating that the community norms for social work should not be a reason for rejecting a particular client or case. ABA MODEL CODE OF PROF'L RESPONSIBILITY, EC 2-29.

otherwise inform their pro bono work.¹⁵¹ Some ethics commentators have argued that in the years following the adoption of the Model Rules, firms have experienced a significant decline in informal mentoring.¹⁵² This decline, coupled with an increased pressure to bill for paid client work results in junior associates at firms being less capable of independently analyzing the ethical dilemmas that arise in day-to-day practice.¹⁵³

Previous iterations of the ethics rules offered more particularized guidance on supervision than what today's junior associates encounter in the Model Rules. Canon 6 of the Model Code, for example, included an affirmative obligation to provide guidance into an attorney's ethical considerations.¹⁵⁴ In contrast, Model Rules 5.1 and 5.2 regarding the responsibilities of supervising attorneys principally address liability for professional misconduct, and impose no affirmative obligation on senior lawyers to develop junior attorneys' competence. In like manner, they do not specify the type of active participation and oversight will satisfy the "association" requirement of Rule 1.1. In fact, Rule 5.1 leaves open the possibility that even a partner "in charge of a matter" lacks "supervisory authority" sufficient to confer responsibility for the rule infractions of subordinates. Rule 5.2 merely discusses the circumstances under which a junior attorney may be absolved of her responsibility for actions undertaken at the behest of a supervisor. Neither rule imposes an affirmative obligation on inexperienced attorneys to seek out supervisory input to ensure that clients, including nonpaying ones, receive competent services. Within the law firm pro bono

¹⁵¹ Bruce A. Green, *Professional Challenges in Large Firm Practice*, 33 *FORDHAM URB. L. J.* 7, 13–15 (2005).

¹⁵² See, e.g., Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 *STETSON L. REV.* 305, 311–12 (1998) (noting that in the "fast-paced, billable-hours-conscious . . . world of today . . . there is no formal or informal mentoring mechanism" to help the new lawyer).

¹⁵³ Margaret Raymond, *The Professionalization of Ethics*, 33 *FORDHAM URB. L. J.* 153, 161 (2005); see Green, *supra* note 151, at 15–16.

¹⁵⁴ See ABA MODEL CODE OF PROF'L RESPONSIBILITY, EC 6-2 (1983) ("A lawyer . . . has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him.").

context, senior associates and partners are the attorneys most likely to possess the generalist skills needed to represent clients competently. Yet, firms often fail to engage experienced practitioners in pro bono matters, even in a supervisory capacity, due, among other things, to the misperception that partners' highly specialized skills are inapplicable to the pro bono representation.

Attorney specialization is nothing new, but its impact on pro bono supervision is something that the Model Rules do not address and pro bono proponents fail to apprehend. Today, attorneys at preeminent law firms are not simply litigators and transactional practitioners. Law "office practice" narrowly tailored to offer business advice to corporate clients surpassed courtroom advocacy as the preeminent form of legal work among the elite members of the bar by the early twentieth century.¹⁵⁵ By the 1930s, legal scholars had already begun to criticize the impact of business specialization and the lure of corporate practice on the ability of the legal market to serve "the poor man's case."¹⁵⁶ The dramatic expansion of large law firms that occurred in the late twentieth century significantly increased the need for business lawyers to specialize their services to increase job security and marketability.¹⁵⁷ Their firms expect them, from an increasingly early moment in their careers to become experts in, for example, the use of asset backed securities in structured finance or defense counsel in securities litigation. That specialization requires a high degree of focus on the problems of a particular industry and encourages attorneys to see themselves as agents of that sector's legal interests. As a consequence, associates often overlook the general lawyering expertise of partners or consider it to be inapplicable to the "specialized" legal issues presented in the pro bono case. Moreover, the pro bono clients themselves—indigent litigants with low dollar-figure claims—are

¹⁵⁵ See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1022, 1038 (1994).

¹⁵⁶ *Id.*

¹⁵⁷ Timothy Hia, *Que Sera, Sera? The Future of Specialization in Large Law Firms*, COLUM. BUS. L. REV. 541, 551 (2002) ("From the 1970s to the 1990s, large law firms in major U.S. cities experienced a phenomenal spate of personnel growth—between 1975 and 1985 alone, the fifty largest U.S. firms each more than doubled in size. In 1988, the largest firm in the country had 962 lawyers. By 2000, however, six national firms had personnel counts that exceeded that number.").

individuals so dissimilar from the firm's corporate clientele that their legal issues appear entire foreign to the partner. This misperception, coupled with the Model Rules' lack of readily actionable advice regarding pro bono supervision harms the practice of public interest law in distinct yet intersecting ways.¹⁵⁸

The ABA acknowledged shortly after adopting Model Rule 6.1 that without robust supervisory protocols in place, "the pressure of other [paying] work is more likely to lead to the improper discharge of obligations to pro bono clients."¹⁵⁹ *Maples v. Thomas*,¹⁶⁰ discussed in Section III-A, *supra*, provides a startling example of how pro bono supervision failures can cause serious harm to indigent clients. While media coverage of the case has fixated on the so-called "mailroom mix up" that resulted in return of a copy of the Alabama court's decision to the state clerk's office,¹⁶¹ that focus obscures the multiple ways in which the firm lacked adequate systems of supervision for pro bono work. As a preliminary matter, the firm allowed two junior associates to leave the firm without reassigning their pro bono case. The large firm approach to staffing corporate matters makes such egregious failures in communication and case oversight unlikely to occur, irrespective of any professional conduct rules. However, without a profit motive, image enhancement potential or legal malpractice threat defining their practice norms, firms have little incentive to supervise pro bono matters in a way that protects against associate error.¹⁶² The

¹⁵⁸ Matthew Paul Crouch, *In the Aftermath: Responsibility and Professionalism in the Wake of Disaster*, 65 S.C. L. REV. 465, 482–83 (2013) (citing Wiley A. Branton, Symposium, *Katrina and the Rule of Law in the Time of Crisis: Natural Disasters and the Rule of Law: Professional Responsibility in Crisis*, 51 HOW. L. J. 677, 728 (2008); see also Cummings and Sandefur, *supra* note 7, at 102–03 (citing survey responses in which attorneys believed that "in some areas the [relatively inexperienced] associate knows more than the partner" with significantly greater knowledge of general lawyering skills and ethical obligations).

¹⁵⁹ Tyrrell, *supra* note 47, at 11.

¹⁶⁰ *Maples v. Thomas*, 132 S.Ct. 912, 914 (2012).

¹⁶¹ See, e.g., Adam Liptik, *Justices Rule for Inmate After Mailroom Mix-up*, N.Y. TIMES (Jan. 19, 2012), available at http://www.nytimes.com/2012/01/19/us/cory-r-maples-must-be-given-second-chance-after-mailroom-mix-up-justices-rule.html?_r=0.

¹⁶² Putting aside the case handling failures that nearly cost Mr. Maples his capital appeal, the law firm's violation of the duty of loyalty is perhaps a more shocking ethical failure. After the firm discovered its errors the firm created a conflict of

stunning lack of supervision and other ethical duties on display in *Maples* is likely to arise in major law firms only when attorneys serve clients on a pro bono basis. The ethics rules should, but do not, advise against this foreseeable reality.

Public interest organizations devote considerable resources to micromanaging referred pro bono cases in the absence of law firm supervision, often at the expense of the nonprofits' case handling capacity.¹⁶³ Pro bono attorneys frequently conceive of the referring public interest attorneys as both supervisors and sources of logistical support, notwithstanding the existing supervisory structures within their law firms.¹⁶⁴ In the same vein, associates who view their pro bono engagements primarily as sources of professional development often rely on nonprofit staff to offer detailed input into their case handling, even in the absence of a co-counseling agreement.¹⁶⁵ The hours that nonprofit attorneys spend providing "support" to pro bono lawyers can exceed the time they would have spent handling the case themselves. From an ethics perspective, these ongoing requests for help lay bare the law firms' noncompliance with the Model Rules' supervision guidelines. Nevertheless, nonprofit attorneys who compete for much needed pro bono assistance may feel compelled to closely supervise pro bono attorneys as a way to attract volunteers. In so doing, their supervision of law firm associates, outside of the co-counseling context, encourages firms to violate Model Rules 5.1

interest between itself and Mr. Maples by "not ced[ing] Maples' representation to a new attorney" due to its "interest in avoiding damage to its own reputation." *Maples*, 132 S.Ct. at 925 n.8.

¹⁶³ Carpenter, *supra* note 8, at 71.

¹⁶⁴ In my own experience, associates who become busy on paying client matters frequently ask to "give back" a referred client to nonprofit organizations, even after the firm has executed a retainer agreement with that individual. In one immigration case my organization referred to a major New York City law firm, the two associates assigned to represent the client admitted that they were unable to give the case "the attention it deserves" in light of the client's limited English proficiency. They then asked if the attorneys who screened the matter could "step in" since their billable work had become more demanding. This perception of joint supervision was also present in the *MC v. GC*, a New York divorce case. *MC v. GC*, 25 Misc.3d 217, 218 nn.2-3 (N.Y. Sup. Ct. 2009).

¹⁶⁵ The LSC's Pro Bono Task Force found that pro bono attorneys require, among other things, "a commitment that there is someone at the legal aid organization they can call for advice and encouragement." PRO BONO REPORT, *supra* note 28, at 5.

and 5.2 and functions as a disincentive for firms to improve their pro bono case oversight. Both pro bono programs and clients suffer as a consequence.

IV. CONTEMPORARY PRO BONO PRACTICE AND INADEQUACIES IN THE MODEL RULES

A. *Ambiguity in the Professional Conduct Rules*

Since law firms themselves have no market-based rationale for policing the quality of services provided to pro bono clients, the Model Rules of Professional Conduct should assume an even greater role in regulating attorney behavior in this area. Nevertheless, the ABA has not reformed the Model Rules to provide sufficient guidance on how lawyers in private practice should navigate the complexities of pro bono service. As discussed more fully in Section II-C, *supra*, the ABA has promulgated standards to guide the work of nonprofit administrators and full-time poverty lawyers. However, those standards expressly exclude law firms, leaving those attorneys on their own to decide how, if at all, the existing Model Rules apply to the pro bono work they perform.

The explanatory comments that follow Rule 6.1 do not require attorneys to offer the same scope or caliber of service that they would normally provide to paying clients. Commentary to Rule 6.2 comes closest to providing guidance to pro bono attorneys regarding their ethical obligations to nonpaying clients. It says:

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.¹⁶⁶

That Model Rule 6.1's commentary does not expressly include pro bono clients among those entitled to equal application of the Rules is

¹⁶⁶ MODEL RULES OF PROF'L CONDUCT R. 6.2, cmt. 3 (2012).

particularly striking given the structures that exist to protect clients who are appointed counsel and subject to Rule 6.2's guidelines.

Typically, assigned counsel programs administered through courts and bar associations impose experience requirements and performance standards on attorneys that far exceed the "competence" defined under Model Rule 1.1. For example, federal statutes specify the level of experience required for private attorneys to serve indigent criminal defendants through the Criminal Justice Act program.¹⁶⁷ California's appellate defense panel rules require panel applicants to demonstrate that they have "sufficient experience, knowledge and skill to perform the requisite tasks with a minimum amount of assistance from the administrator."¹⁶⁸ Appointed attorneys must also submit "recent writing samples" that evince his or her "strong research and writing skills, including demonstrating the ability to analyze facts; recognize, analyze, research, organize and argue issues; use persuasive analogies and distinctions in citing precedent; and communicate clearly and concisely."¹⁶⁹ In New York, individual attorneys who participate in assigned counsel programs are required to describe, among other qualifications, how their advocacy in at least one case "produced a beneficial result that was outside the norm for that particular type of case" as a condition of recertifying their appointment eligibility.¹⁷⁰ Similarly, the Juvenile Court panel overseen by the Chicago Bar Association requires program applicants to identify, *inter alia*, details about the attorney's trial and appellate experience, the names of three attorneys experienced in the relevant practice area who can serve as references,

¹⁶⁷ See 18 U.S.C. § 3599(b) ("If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years [sic] experience in the actual trial of felony prosecutions in that court.").

¹⁶⁸ *Criteria for Placement on a Court of Appeal Indigent Defense Panel*, JUDICIAL COUNCIL OF CALIFORNIA (2012), available at [http://www.courts.ca.gov/documents/placement-criteria-coadefense\(1\).pdf](http://www.courts.ca.gov/documents/placement-criteria-coadefense(1).pdf).

¹⁶⁹ *Id.*

¹⁷⁰ *Application for Recertification to the Criminal/Supreme Court Panel*, NEW YORK STATE UNIFIED COURT SYSTEM (Feb. 15, 2014 6:45 PM), available at <http://www.courts.state.ny.us/courts/ad1/Committees&Programs/18B/index.shtml> (follow link to "Recertification Application").

and information about the attorney's language skills.¹⁷¹ This approach is consistent with that of assigned counsel projects in Massachusetts, Florida, and other jurisdictions.¹⁷² In contrast, most pro bono initiatives accept volunteers without imposing any experience-related restrictions on participation. While appointed counsel programs generally exist to guarantee due process rights not present in many justice gap pro bono cases, there is no legal basis for subjecting clients facing urgent matters such as those involving imminent eviction, debt collection actions, and child custody disputes to a lesser standard of professional conduct.

B. Model Rule 1.1 and the Challenge of Developmental Pro Bono

By placing it at the beginning of the Model Rules, the rule framers established competence as the bedrock of an attorney's ethical obligations. The professional duty to provide competent representation first appeared in the ABA's Model Code in 1970.¹⁷³ Many, but not all, of the aspirational statements set forth in Canon 6 of the Model Code's Ethical Considerations were incorporated into Model Rule 1.1. For example, Ethical Consideration 6-2 noted the importance of "training younger associates" and included "the giving of sound guidance" as part of an attorney's duty to provide and promote competent service.¹⁷⁴ Canon 6's explanatory notes made clear that a client had "a right to expect that the lawyer will have devoted his time and energies to . . . know where to look for the

¹⁷¹ *Juvenile Court Bar Attorney Application*, CHICAGO BAR ASSOCIATION (2010), available at

https://www.chicagobar.org/AM/NavigationMenu/Services/LRSRegistration/Applications/Juvenile_Court_Application.pdf.

¹⁷² *Committee for Public Counsel Services Assigned Counsel Manual Policies and Procedure*, Ch. 3, MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES (2014), available at

http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2014/MANUALChap3-Revised%201-15-14.pdf; see, e.g., *Court-Appointed Counsel*, THE EIGHTH JUDICIAL CIRCUIT OF FLORIDA, <http://www.circuit8.org/court-appointed-counsel> (last visited Nov. 24, 2014).

¹⁷³ Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers*, 61 TEMP. L. REV. 1211, 1218 (1988).

¹⁷⁴ See ABA MODEL CODE OF PROF'L RESPONSIBILITY, EC 6-2.

answers” to the client’s problems and “to know how to advise to the best of his legal talents and sensibilities.”¹⁷⁵ The notes to Canon 6 also cited the New York case of *Degen v. Steinbrink*¹⁷⁶ in which the court affirmed, “[i]f the attorney is not competent to skillfully and properly perform the work, he should not undertake the service.”¹⁷⁷

The ABA’s Model Rules mandate competent representation, but they do so without referencing outcomes or attorney work product quality; nor do they underscore the rights of clients that were included in Canon 6 of the Model Code. The lack of objective criteria in the Model Rules’ articulation of ethical values increases the likelihood that ethical norms will be applied in a more context-specific fashion. In the case of law firm pro bono service, the decision not to include more specific measures of the knowledge, preparation, and thoroughness required to provide competent service inadequately instructs novice attorneys, especially those who practice without robust supervision.¹⁷⁸

Rule 1.1 requires attorneys to possess “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation without identifying any end result of those “reasonably necessary” actions.”¹⁷⁹ The comments to Model Rule 1.1 focus exclusively on an attorney’s subjective assessment of competence and his or her individual perceptions of adequate preparation. They state: “A lawyer can provide adequate representation in a wholly novel field through necessary study.”¹⁸⁰ Nevertheless, without some reference to the desired outcome of the representation, the comment leaves attorneys with little practical guidance with which to assess “adequacy” of services or “necessary” preparation. Nothing in Rule 1.1 limits attorney competence to the knowledge and skill possessed at the moment an attorney accepts a new matter, an omission that facilitates assignment of developmental

¹⁷⁵ ABA MODEL CODE OF PROF’L RESPONSIBILITY, CANON 6 n.1.

¹⁷⁶ *Degen v. Steinbrink*, 195 N.Y.S. 810, 814 (1922), *aff’d mem.*, 142 N.E. 328 (1923).

¹⁷⁷ MODEL CODE OF PROF’L RESPONSIBILITY, CANON 6 n.3.

¹⁷⁸ Even outside of the pro bono context, the Model Rules’ generality and vagueness undermine their ability to improve attorney conduct, absent a compelling business rationale for enforcing high quality standards. *See Schiltz, supra* note 112, at 714.

¹⁷⁹ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012).

¹⁸⁰ *Id.* at R. 1.1 cmt. 2.

pro bono matters to attorneys who lack basic training and preparation.¹⁸¹ Attorneys with few generalist skills are left to define for themselves what amounts to “reasonably necessary” knowledge and “reasonable preparation” to handle the case competently.¹⁸²

Some critics of the Model Rules have noted that how “a lawyer performs is not regarded as relevant to the lawyer’s competence.”¹⁸³ This is certainly true in the pro bono context.¹⁸⁴ Under a strict reading of Rule 1.1, an attorney need not possess knowledge and skill sufficient to make violation of other ethics rules or court requirements unlikely. Likewise, the attorney has no affirmative obligation to possess knowledge and skill sufficient to guarantee a reasonable chance of success at trial. The Model Rules provide few objective indicators of what passes for “zeal” in the context of client advocacy.¹⁸⁵ For the reasons discussed in Section II-B, *supra*, this lack of guidance is largely irrelevant in the work of elite law firms where well-heeled clients who pay exorbitant fees can rightly expect competition for their business. Pro bono clients at the mercy of free legal services providers wield no equivalent power to defend against attorney incompetence.

Furthermore, an inexperienced practitioner could interpret some of Model Rule 1.1’s commentary to suggest that pro bono matters are, by their nature, subject to lower standards for knowledge and preparation than cases typically handled by private law firms. The explanatory comments state that the “required attention and preparation” for an attorney to meet the competence standard “are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity or consequence.”¹⁸⁶ Attorneys in elite firms routinely handle cross-border transactions and multimillion-dollar disputes. For them, justice gap pro bono will rarely appear to

¹⁸¹ Christopher Sabis & Daniel Weibert, *Understanding the “Knowledge” Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. OF LEGAL ETHICS 915, 918–19 (2002).

¹⁸² MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 4 (2012).

¹⁸³ Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers*, 61 TEMP. L. REV., 1211, 1221 (1988).

¹⁸⁴ Cf. Danielle R. Cover, *Pro Bono Grievances*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 375, 404–14 (2014).

¹⁸⁵ Spaulding, *supra* note 115, at 1427.

¹⁸⁶ MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 5 (2012).

present “major” litigation issues or matters of great financial consequence. This is particularly true when the attorney handling the pro bono matter has had few, if any, opportunities to witness the cascading disasters that flow from a denial of government benefits, eviction or other legal crises that arise in the lives of civil legal aid clients. The Rule’s suggestion that matters of lesser complexity may be subject to a reduced standard of competence is especially problematic in light of the negative attitudes towards poor clients addressed by Jacobs and others.¹⁸⁷

The ABA recently reviewed the Model Rules, including Rule 1.1, to evaluate whether changes in the profession necessitated a clarification of “competent” service. Nevertheless, the Ethics 20/20 Commission’s revisions to Model Rule 1.1 add little clarity to how attorneys can objectively assess competence in pro bono representation or otherwise. The amended commentary states that attorneys “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” to comply with Model Rule 1.1.¹⁸⁸ The rule revisions also address legal outsourcing, including “nonfirm lawyers” within the scope of Rule 1.1. The Ethics 20/20 revisions failed to incorporate client-centered, objective measures of attorney competence that could assist attorneys in evaluating their professional conduct when competition for profit and the malpractice threat do not otherwise define competent service.

C. *Model Rule 1.18 and Pro Bono Referral Practices*

The justice gap pro bono model significantly alters the contours of attorney-client relationships by including multiple intermediaries—nonprofit referring organizations and non-practicing, pro bono coordinators—into the case selection, conflicts checking and engagement initiation processes. Nonprofit organizations typically serve as the first point of contact for prospective, pro bono clients. Law firms with formal pro bono programs generally do not solicit their own indigent clients, even though Model Rule 7.3 would

¹⁸⁷ Jacobs, *supra* note 127, at 264–65, 267–75.

¹⁸⁸ ABA COMM’N ON ETHICS 20/20, ABA RESOLUTION 105C, 1, 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf.

permit them to do so.¹⁸⁹ Instead, these firms typically rely on the staff of nonprofit organizations to conduct community outreach, meet with prospective clients, and “screen” individual cases for placement suitability before referring clients to pro bono coordinators within the firm. The pro bono coordinator reviews the matter, distributes information about the prospective case with attorneys at her firm and, if successful in her placement efforts, initiates a conflicts check. Coordinators may occasionally reach out to firms in search of a pro bono opportunity that will satisfy an associate’s personal or professional development interests.

Pro bono coordinators aim to connect associates with pro bono cases that will not interfere with the associate’s obligations on billable matters and will result in overall associate satisfaction. To achieve these objectives, coordinators may ask the nonprofit organization’s “screeners” to disclose additional facts about the matter beyond what is required to check for potential conflicts. In my experience as a law firm associate assigned to pro bono matters and a public interest attorney who has placed hundreds of pro bono cases with law firms, I have observed that the coordinator’s goal is generally to assess the complexity of the case and desirability of working with a specific client. The coordinator and pro bono attorney may ask the prospective client to undertake additional steps as a condition of securing pro bono representation. In adoption cases, for example, pro bono coordinators may agree to accept a referred case only if the prospective adoptive parent procures extrajudicial consents from the child’s biological parents to avoid contested matters or lengthy due diligence searches. When assessing public benefits claims, coordinators may inquire about a prospective pro bono client’s prior criminal or substance abuse history regardless of the legal arguments at stake. Coordinators may also probe the merits

¹⁸⁹ MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2012) provides, “[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” Comment 5 makes clear that this restriction “is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.” *Id.* at R. 7.3 cmt. 5.

of particular claims and defenses to avoid exposing associates to litigation in which the associate is unlikely to prevail. Even after the firm accepts the representation, nonprofit attorneys often act as an intermediary, at least in the preliminary stages of the relationship between the indigent client and pro bono law firm.

This case selection and referral arrangement fundamentally restructures the relationships among the attorneys and prospective clients contemplated by Rule 1.18 of the Model Rules. Model Rule 1.18 was adopted to protect prospective clients by making pre-retention communications confidential and addresses limitations on pre-retention disclosures required for conflicts purposes.¹⁹⁰ Model Rule 1.18 had no counterpart in the Model Code and was included by the Ethics 2000 Commission “in response to the Commission’s concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship” that were inadequately addressed in other Model Rules.¹⁹¹ The most recent revisions to Rule 1.18, adopted in 2012 in conjunction with the Ethics 20/20 review, overlook the growing importance of pro bono work in legal services delivery for the poor. Those amendments primarily address changes that expand the methods through which prospective clients contact lawyers. Tellingly, those provisions are crafted to protect attorneys from being forced into a relationship as a result of unilateral communications from prospective clients and individuals seeking to disqualify counsel.¹⁹²

While Model Rule 1.18 was drafted to address client vulnerabilities and confidentiality concerns, nothing in it establishes boundaries on the nature and scope of information that pro bono attorneys can gather on prospective pro bono clients; nor does it suggest any consequences for pre-retention conduct in the pro bono

¹⁹⁰ *Id.* at R. 1.18 cmt. 3 (describing how information revealed during preliminary communications will be used “to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake”).

¹⁹¹ ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2005).

¹⁹² ABA COMM’N ON ETHICS 20/20, ABA RESOLUTION 105B, 1, 2 (2012), available at

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf.

context. If, for example, a pro bono client obtains documents at a law firm's behest as a condition of securing representation, the question of whether the client reasonably can conclude that an attorney-client relationship exists after he or she secures the requested material remains unresolved in the rule. The rule also fails to address the nonprofit organization's concern that by acting as an intermediary between the client and pro bono firm during these stages of the relationship, the client may justifiably presume that the nonprofit attorneys are actually her lawyers, regardless of the referral arrangement that the nonprofit and law firm have established. Nothing in Model Rule 1.18's explanatory comments resolves these practical concerns. Likewise, Model Rule 1.2 regarding the allocation of authority between client and lawyers provides that attorneys "shall abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client as to the means by which they are to be pursued."¹⁹³ However, it is often the pro bono coordinator and an attorney from the referring non-profit legal organization who negotiates over the scope of service the law firm will provide on a pro bono basis, without any input from the pro bono client.

D. Model Rule 1.4 and Effective Communication with Pro Bono Clients

Some critics of the Model Rules maintain that the rules ignore and exclude 'outsider' clients, low-income or minority individuals who constitute the bulk of the pro bono clients referred for free legal services at major law firms.¹⁹⁴ Others have argued that the

¹⁹³ MODEL RULES OF PROF'L CONDUCT R. 1.2 (2012).

¹⁹⁴ In describing the Model Rules' failure to account for non-normative family relationships when addressing confidentiality and communication with unrepresented parties, Carolyn Grose explained, "because they are written in the language of individual rights and autonomy, and conflict and adversity, all of these rules ignore the possibility of connections among multiple 'parties,' the complexity of familial and domestic arrangements, and the nuances of communication and problem-solving across interests and values. This particular regime of truth—the system of ethical regulation—operates by failing to recognize, let alone appreciate, the different sets of values, priorities, customs, and relationship structures of 'outsider' clients." Carolyn Grose, "Once Upon a Time, In a Land, Far, Far Away . . ." *Lawyers and Clients Telling Stories about Ethics*

sociocultural understandings that inform the Model Rules are inconsistent with many aspects of practice outside of the elite law firm context where clients frequently lack understanding of legal norms due to “different linguistic and cultural understandings.”¹⁹⁵ I propose that the Model Rules, particularly Model Rule 1.4 on communication, offer little practical guidance for pro bono attorneys who share limited common understanding with their clients and that lack of instruction hinders pro bono practice.

Under Model Rule 1.4, attorneys must “promptly inform the client of any decision or circumstance” that requires the client’s “informed consent, as defined in Rule 1.0(e)” and reasonably consult with the client about the means by which the client’s objectives are to be accomplished.¹⁹⁶ As the representation progresses, Rule 1.4 requires the lawyer to “keep the client reasonably informed about the status of the matter” and “promptly comply with reasonable requests for information” from the client.¹⁹⁷ The Rule further requires the lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹⁹⁸

The Rule’s comments highlight the need for clarification of how this standard should apply in the context of justice gap lawyering. For example, they explain “[i]n some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action.”¹⁹⁹ However, the commentary outlines no

(*and Everything Else*), 20 HASTINGS WOMEN’S L. J. 163, 177–78 (2009). In a similar vein, Spencer Rand noted that the Rules’ definition of ethical conduct provides little or no direction to practitioners interested in advancing a social justice agency on behalf of poor persons unable to retain counsel. Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work’s Empowerment Approach*, 13 CLINICAL L. REV. 459, 459 (2006).

¹⁹⁵ Liwen Mah, *The Legal Profession Faces New Faces: How Lawyers’*

Professional Norms Should Change to Serve a Changing American Population, 93 CALIF. L. REV. 1721, 1732 (2005).

¹⁹⁶ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(1)–(2) (2012).

¹⁹⁷ *Id.* at R. 1.4(a)(3).

¹⁹⁸ *Id.* at R. 1.4(b).

¹⁹⁹ *Id.* at R. 1.4 cmt. 3.

factors to be considered by an attorney who must decide whether the action requires prior consultation with the client.

Even attorneys who do not routinely represent indigent clients recognize that discussions with “bewildered, distraught, and legally inexperienced clients must take different forms than communication with legally sophisticated clients with well-defined objectives.”²⁰⁰ In poverty law practices, clients are also likely to have disabilities, limited English proficiency or other characteristics that challenge effective communication. Pro bono attorneys from elite firm settings must navigate these communication-related concerns with individual clients while being acculturated to work with institutional clients who share few, if any, of these attributes.

Not only do these attorneys lack professional experience communicating with clients in crisis, the Model Rules’ indeterminate approach to describing effective communication standards provides little guidance to pro bono practitioners. Model Rule 1.4’s comments regarding attorney-client communications mention nothing about working with clients who have limited English proficiency or use sign language to communicate. Model Rule 1.4 also requires attorneys to communicate to the extent necessary to keep a “comprehending, responsible adult” informed about the representation.²⁰¹ Neither the text of the rule nor its interpretative comments describe which concepts an adult must “comprehend” to meet this reasonable client standard; nor do they define what makes an adult “responsible.” How can an attorney properly discharge his or her ethical obligations under Model Rule 1.4 with an adult client who is legally “competent” but has had very little formal education? To what degree must attorneys educate their clients about the American court system when the client is unfamiliar with our adversarial process? What steps should an attorney take to ensure that his client with limited English proficiency truly comprehends the information the attorney needs to share? The Model Rules and their interpretative commentary offer no instruction in these areas. To the extent the Model Rules’ approach relies on “informal normative frameworks provided by communities of practice” to

²⁰⁰ Levin & Mather, *supra* note 11, at 69.

²⁰¹ MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. 6 (2012).

supplement and particularize ethics norms, pro bono attorneys do not benefit from such institutional support.²⁰²

The client base of the nonprofit organization involved in the *MC v. GC* case discussed at the outset resembles that of many legal services organizations in major cities that refer indigent clients through pro bono initiatives. The overwhelming majority of its clients are people of color, and one third of them live in “the poorest urban county in the United States.”²⁰³ Twenty-five percent of their clients are non-English speakers.²⁰⁴ Not only do its clients experience high levels of poverty and a lack of language access to essential services, more than eighty percent of them are domestic abuse survivors. The percentages of clients in each of these categories may vary at nonprofit legal organizations around the country, but domestic violence, family law, housing and public benefits are prevalent within legal services practices for low-income people.²⁰⁵ Moreover, income eligibility at LSC-grantee organization and other legal nonprofits is generally restricted to extremely low-income individuals.²⁰⁶ Any pro bono attorney who agrees to represent clients referred from these programs should be aware of the financial and other needs of client populations from ethnically and linguistically diverse populations, as well as persons with disabilities and individuals who have experienced significant trauma.²⁰⁷

The ABA’s Standing Committee on Pro Bono offers few resources to develop pro bono attorneys’ cultural competence and client sensitivity. It prepared a two-page brochure that outlines tips for working with clients from “generational poverty” backgrounds

²⁰² Levin & Mather, *supra* note 11, at 70.

²⁰³ *Who We Serve*, HER JUSTICE, <http://www.herjustice.org/content/view/35/42/> (last visited Nov. 13, 2014).

²⁰⁴ *Id.*

²⁰⁵ *PRO BONO REPORT*, *supra* note 28.

²⁰⁶ See 45 C.F.R. § 1611.3(c) (2009). The Legal Services Corporation’s regulations establishes a maximum income level equivalent to one hundred and twenty-five percent (125%) of the Federal Poverty Guidelines. While some clients whose income reaches 200% of the poverty level may receive assistance under certain circumstances, it still restricts access to LSC and affiliated pro bono attorneys to persons of low income. According to the 2014 guidelines, the stated maximum amounts to an annual income of \$29,813 for a family of four.

²⁰⁷ See, e.g., Jacobs, *supra* note 127, at 282–84.

but largely overlooks the client demographics that distinguish justice gap pro bono from for-profit representation.²⁰⁸ Similarly, not one publication in the PBI's clearinghouse is devoted to exploring racial, cultural or linguistic diversity in pro bono practice.²⁰⁹ It is true that some law firms and pro bono advocates provide cultural competency training to their attorneys and some academic institutions have developed relevant resources for volunteer lawyers,²¹⁰ but these programs amount to more of an exception than a rule in pro bono practice.

Attorneys who accept referred pro bono matters may be hesitant to embrace the notion that "culture" matters in their definition of competence or application of ethics rules. They might even regard cultural competency as an abstraction more relevant to political correctness debates than to effective representation—until they find themselves in an ethical conundrum with their pro bono client. Insofar as individual ethics rules allocate decision-making authority between an attorney and client or require the client's informed consent, an attorney's professional conduct takes as its foundation certain shared understandings with his or her client. Cultural competence facilitates this shared understanding. An attorney who meaningfully apprehends how a client's beliefs, resources, and values shape the client's legal objectives is much better equipped to formulate a case strategy and comply with the decision-making allocation rules than an attorney who has only a limited understanding of the client's perspective.²¹¹

²⁰⁸ See ABA, *Pro Bono Clients: Strategies for Success* (2011), available at http://www.americanbar.org/groups/probono_public_service/publications.html.

²⁰⁹ See generally *Law Firm Pro Bono Project Resource Clearinghouse*, *supra* note 67.

²¹⁰ The Feerick Center for Social Justice at Fordham Law School, for example, has prepared comprehensive training materials on cultural competence for "emeritus," senior, and/or retired attorneys who participate in justice gap pro bono programs. *Managing Pro Bono: Training Resources*, FORDHAM UNIV. SCH. OF LAW FEERICK CENTER, <http://law.fordham.edu/feerick-center/30506.htm> (last visited Feb. 19, 2015).

²¹¹ In my experience, the first and most patent ethical difficulties that arise after a pro bono attorney accepts a referred client involve attorney-client privilege. Corporate lawyers are trained to aggressively protect attorney-client privilege and client confidentiality. In that context, attorneys are often confounded by their pro bono client's desire to include a family member, friend or some other third-party support in the initial meeting. Few of these lawyers have reflected upon their

E. The Need for Comprehensive, Pro Bono-Focused Review of the Model Rules

The specific Model Rules referenced here are not the only ethics rules that inadequately address the significant changes wrought by justice gap pro bono programs. Most significantly for purposes of this article, the Model Rules say nothing about a pro bono attorney's obligations to the clients to whom the legal services are provided. In fact, the Model Rules only address the pro bono attorney's rights to refuse to provide pro bono services that would cause "undue financial burden" or involve clients "so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."²¹²

The lack of ethical advice on these fundamental questions is not merely an academic issue. While working on pro bono matters as a law firm associate and with pro bono attorneys, I have encountered lawyers who appear to be genuinely confused about their client's identity. They often proceed on the misunderstanding that they are rendering a service to the referring nonprofit organization rather than the referred individual, a misapprehension exacerbated by many law firms' financial contributions to nonprofit organizations.²¹³ It is hardly surprising that, in the absence of ethical guidance highlighting the needs of pro bono clients, these disadvantaged individuals receive inadequate attention by the very attorneys retained to act as their advocates.

F. Ethical Ambiguities in Legal "Backwaters"

Some argue that ABA's ethics rules serve more of a symbolic function rather than an instrumentalist one.²¹⁴ While the

client's transportation or childcare needs; nor have they considered how conducting the initial meeting in a well-appointed, corporate environment may intimidate the client. Only after grappling with such questions do most pro bono attorneys begin to reflect upon their need to adopt lawyering skills that balance their ethical duties with their client's experience.

²¹² MODEL RULES OF PROF'L CONDUCT R. 6.2(b)-(c) (2012).

²¹³ See generally Symposium, *A Brief Moment of Opportunity: The Effects of the Economic Downturn on the Delivery of Legal Services to the Poor*, 33 U. ARK. LITTLE ROCK L. REV. 435, 438 (2011).

²¹⁴ Symposium, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 668-69 (1981).

indeterminate approach to articulating ethics norms in the Model Rules lends some support to this contention, I agree with ethics scholars who conclude that formal professional conduct rules serve three interrelated functions: they “protect the interests of clients, safeguard the integrity of the legal system, and encourage high standards of attorney conduct.”²¹⁵ Within that framework, the application of legal ethics is controlled more by the cultural norms of a particular practice community and cultivated habits of individual attorneys rather than formal rules adopted by the ABA.²¹⁶

Each subsector of the legal community, from securities defense litigators at white shoe law firms, to public defenders in Legal Aid offices around the country, establishes internal norms for professional conduct.²¹⁷ This “common law of ethics” consists of “understandings that lawyers observe in their dealings with one another . . . and with the courts” as well as social norms about how attorneys within the particular community should treat clients.²¹⁸ In the various subsectors of elite firm practice, conventions on competence, supervision, relationship formation, communication and other ethical duties are largely shaped by the financial accountability imposed by clients and the demands of adversaries. Elite law firms that dominate the pro bono landscape develop thick positional identities and associated practice conventions that reflect their paying clients’ business needs. When attorneys in these firms represent indigent clients on a pro bono basis, they depart from the familiar confines of their practice norms and enter into an unfamiliar terrain of low-status legal work where the customs of professional conduct to which they are accustomed seem inapplicable.

Stratification and status hierarchies in legal work exist in both the for-profit and public interest sectors and are directly relevant to the application of professional conduct norms in the pro bono context. The ethical concerns addressed herein are less likely to occur when high status attorneys engage in pro bono work that impacts their stature within their subsector of the legal community. For example, class action litigation in civil rights matters represents

²¹⁵ Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 ST. MARY’S L. J. 661, 704 (2008).

²¹⁶ Schiltz, *supra* note 112, at 713.

²¹⁷ Levin & Mather, *supra* note 10, at 3–5.

²¹⁸ Schiltz, *supra* note 112, at 718; Mah, *supra* note 195, at 1722.

a kind of “high status” public interest practice that is not the mainstay of nonprofit lawyers who offer direct services to poor individuals.²¹⁹ Similarly, death penalty appeals can be construed as a form of high status, public interest work inasmuch as those cases have less to do with the facts surrounding an indigent persons’ experience and are more concerned with protecting the integrity of the legal system as a whole.²²⁰ What most distinguishes justice gap pro bono initiatives from high status, impact litigation is that they connect the most elite, highly compensated members of the bar with work that has been traditionally devalued within the legal community.

Direct representation of poor persons in individual disputes over essentials of life is the least prestigious sector of the profession. The prevailing assumption is that full-time poverty lawyers are “‘low’ status lawyers who perform that kind of work because they cannot get other jobs.”²²¹ Marina Zaloznaya and Laura Beth Nielsen who conducted ethnographic research into Chicago’s legal aid system found that poverty lawyers continue to experience “ideological marginality,” struggling with their commitment to social justice in a profession that accords prestige to profit-generating work, “task marginality” as they complete administrative tasks, and “status marginalization” within the professional, particularly as they advance in their careers.²²² Civil legal services attorneys are often derided by others within the legal community as being less capable practitioners than their colleagues involved in impact litigation or other types of public interest legal work.²²³

²¹⁹ Symposium, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 L. & SOC. INQUIRY 919, 921 (2011).

²²⁰ Since death penalty appeals do not involve “the merits of the death penalty, but rather the integrity of the profession by which people are condemned,” these cases are less likely to antagonize law firm attorneys’ sense of professional identity as elite lawyers. Rather, they reinforce those attorneys’ elite status by placing them in the position of defenders of the legal system as a whole. Tyrrell, *supra* note 47, at 21.

²²¹ Jacobs, *supra* note 127, at 296.

²²² Symposium, *supra* note 213, at 927–38; *see generally* Jacobs, *supra* note 127, at 295–96.

²²³ Even during law school, students find that those interested in serving poor clients find themselves at the bottom of the school hierarchy. Aliza B. Kaplan, *How to Build a Public Interest Lawyer (And Help All Law Students Along the*

In her incisive analysis of status and perceived value within the public interest community, Rebecca Sharpless explained that “[a] hierarchy of helping that puts individual service at the bottom has existed in progressive lawyering theory and practice for the last half century.”²²⁴ Sharpless noted that the high volume, poverty, and overwhelmingly female make-up of civil legal services clients parallels the relatively non-elite, lower income, largely female and non-white composition of many civil legal aid lawyers.²²⁵ Prejudices and misconceptions related to these characteristics have resulted in denigration of direct legal services work and skewed the perception of work done by civil legal services attorneys such that direct services have been referred to as the “backwater” of practice.²²⁶ While “the top status hemisphere of the legal profession contains corporate lawyers,” the legal community’s “bottom hemisphere” is populated by a disproportionately female group of attorneys who represent individuals unable to afford counsel.²²⁷ Justice gap pro bono initiatives transport “top status” lawyers into the world of “bottom hemisphere” work without offering a clear framework to guide attorneys’ professional conduct.

These perceptions of relative value within the legal profession described by Zaloznaya, Nielsen, Sharpless and others influence attorneys’ interpretation of existing professional conduct norms. In the case of impact litigation or other forms of high status pro bono work, attorneys at elite firms will perform in accordance with the ethical norms that define his or her professional identity. Not only

Way), 15 LOY. J. PUB. INT. L. 153, 155 (2013) (“Public interest law students often find themselves at the bottom of their institution’s hierarchy with regard to resources, programs, job search assistance, and relevant course work.”); Rebecca Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 359 (2012); Symposium, *supra* note 213, at 935 (reporting that poverty lawyers “claimed that private firm and corporate lawyers often treated them as if they were in some way less qualified professionally”); see also Chiaki Ota, *Legal Humanitarian Assistance: Instituting Disaster Response Clinics and Law Firm Engagement*, 19 GEO. J. ON POVERTY L. & POL’Y 515, 519 (2012) (“Within the legal culture, it is clear from the percentage of law students advancing to corporate law that public interest law is not fully embraced as a preferable practice, based on prestige and income.”).

²²⁴ Sharpless, *supra* note 223, at 359.

²²⁵ *Id.* at 361–62.

²²⁶ *Id.* at 361.

²²⁷ Symposium, *supra* note 213, at 921.

will a high status matter confer prestige upon the pro bono attorney and firm, it will require less of the non-legal administrative work typically associated with poverty law practice that results in the “task marginality” that Zaloznaya and Nielsen described.²²⁸ Arguing a high profile civil rights case, for example, can advance a young attorney’s reputation within and beyond his or her firm. On the other hand, justice gap pro bono typically does not expose junior associates to substantive areas of the law that directly relate to a firm’s for-profit practices, nor do these matters usually involve high-profile issues that could raise the attorney’s profile within his or her legal community subsector. Direct legal services, by definition, require one-on-one interactions with disadvantaged clients in crisis, advocacy in slow-moving and indifferent bureaucracies like public assistance offices, and overextended state courts. Child custody, divorce proceedings, eviction prevention, and administrative hearings on public benefit denials rarely make headlines or offer opportunities for elite practitioners to enhance their professional stature.

Elite firms construct a narrative about their attorneys’ superior educational pedigree and the intellectual complexity of corporate practice, a narrative that equates “the large amount of money at stake in large firm practice with social importance.”²²⁹ It follows, then, that pro bono cases in which little money is at stake involving clients with low social status are foreign to the legal community and the ethical conventions that normally govern their behavior. These attorneys consider pro bono work on behalf of indigent clients to be a charitable activity, not legal work, precisely because to think otherwise would challenge their positional identity. Yet, it is the lawyer’s positional identity and associated practice conventions that regulate day-to-day professional conduct by filling in existing gaps in the Model Rules. For example, elite firms construct cross-practice legal teams to comprehensively handle their corporate clients’ legal concerns, notwithstanding the vague competence requirements of Model Rule 1.1. Similarly, elite firms interpret the allocation of authority between themselves and their institutional clients by deferring to their clients’ superior understanding of the financial

²²⁸ *Id.* at 930–33.

²²⁹ *See* Rubinson, *supra* note 112, at 35.

consequences of legal choices regardless of how applicable ethics rules allocate decision-making authority. Unfortunately for many indigent clients, the pro bono attorney's departure from an elite practitioner status results in a deviation from the "common law of ethics" that normally governs their conduct.²³⁰

Thus, Justice gap pro bono exists in this state of ethical liminality between the high status professional standards common to the elite segment of private practice and charity work associated with "undistinguished" lawyers for the poor. Any practical guidance aimed at protecting pro bono clients and encouraging higher and particularized standards of ethical conduct would strengthen the integrity of the system of legal services delivery.

V. CONCLUSION

Few would contest the notion that Model Rule 6.1 has played an important role in increasing the number of attorneys who offer free or reduced fee legal assistance to low-income persons. Yet in many important ways, the thorny and nuanced balancing of interests involved in justice gap pro bono initiatives has received inadequate attention from the ABA, state-level ethics codes, and pro bono advocates. Pro bono work continues to function as an afterthought in the area of professional conduct. Even the ABA's Ethics 20/20 Commission charged with reviewing the Model Rules to "keep pace with social change and the evolution of law practice" missed an important opportunity to improve ethical handling of pro bono work. In fact, that Commission failed to include a single representative from the Standing Committee on Pro Bono and Public Service into its working groups.²³¹ In like manner, PBI and the Association of

²³⁰ Schiltz, *supra* note 112, at 713.

²³¹ According to the ABA Commission on Ethics 20/20 Introduction and Overview, available at

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf, the "Commission created seven Working Groups" to facilitate its review of the Model Rules. Those groups included representatives from the Standing Committee on Ethics and Professional Responsibility, Standing Committee on Professional Discipline, Standing Committee on Client Protection, Standing Committee on Delivery of Legal Services, Section of International Law, Section of Litigation, Section of Legal Education and Admissions to the Bar, Section of Real Property, Trust and Estate Law, Task Force on International Trade in Legal Services,

Pro Bono Counsel champion the business case for pro bono and develop pro bono recommendations from the elite law firm perspective. Neither the ABA nor justice gap pro bono proponents sufficiently incorporate full-time advocates for indigent clients into the decision-making process.

As a first step to address problems inherent in the justice gap pro bono model, the ABA must include members of the Standing Committee on Pro Bono and Public Service in any future revision of the Model Rules and invite comments from civil legal aid attorneys from different levels of practice to participate in the process. That working group should incorporate guidance specific to pro bono work into the Model Rules discussed herein. Second, the ABA should consider amending Model Rule 6.1 to harmonize its language with the principle articulated in Rule 6.2(3) that imposes “the same obligations” on attorneys serving appointed and paying clients. The commentary for this revised rule should incorporate the Civil Legal Aid and Pro Bono Standards by reference, steps that hopefully would transform state-level ethics guidance. Finally, the ABA must commission a survey of nonprofit lawyers and pro bono clients to assess the degree to which existing pro bono services operate in accordance with the best practices outlined in the Civil Legal Aid and Pro Bono Standards. Without improving participation of civil legal aid lawyers and the voices of clients, pro bono programs will continue to privilege law firms’ interests over the needs of indigent clients.

General Practice, Solo and Small Firm Division, Young Lawyers Division, Standing Committee on Specialization, Section on Law Practice Management, and the National Organization of Bar Counsel. *Id.* In the most literal way, pro bono administrators and clients did not have a seat at the table. *Id.* The Standing Committee on the Delivery of Legal Services is focused on servicing moderate-income individuals, not persons eligible for most justice gap pro bono initiatives. *See Standing Committee on the Delivery of Legal Services*, ABA, http://www.americanbar.org/groups/delivery_legal_services.html (last visited Nov. 24, 2014).