

CORPORATE PRO BONO

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INTRODUCTION

The legal profession's tradition of providing unpaid legal assistance pro bono publico (for the good of the public) has extended historical roots, reaching back to classical Rome and medieval ecclesiastical courts.¹ In the United States, bar regulatory codes have long recognized a voluntary responsibility to provide such assistance, but the gap between aspiration and achievement has

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1. See DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 3-4 (2005).

been substantial.² Although the last few decades have brought a substantial increase in pro bono participation, involvement has remained uneven, and in-house lawyers have lagged behind.³ The most comprehensive recent survey on national participation rates, sponsored by the American Bar Association, reveals that the average hourly contribution by corporate counsel was only 11 hours per year, compared with 41 hours by lawyers in private practice.⁴ In a recent American Corporate Counsel Association survey, only a third of chief legal officers reported actively encouraging staff to engage in pro bono work.⁵

The legal academy has made surprisingly little systematic effort to understand the barriers to corporate engagement in pro bono assistance and the strategies most likely to address them. This article seeks to help fill the gap. It explores the development of pro bono among in-house attorneys, analyzes the barriers to corporate pro bono engagement, and identifies some of the best practices that corporations employ to increase pro bono participation within their legal teams. It draws both on trade and academic publications, and on original empirical research involving some two hundred responses to a survey distributed through the Association of Corporate Counsel (ACC) and the Corporate Legal Operations Consortium (CLOC). Those responses, amplified by selected follow-up interviews and published sources, offer a window into the challenges and opportunities for corporate pro bono programs.

Both the profession and the public have a substantial stake in this effort. For lawyers, volunteer work brings a variety of well-documented rewards: skill development, recognition, contacts, trial experience, and the satisfaction that comes with helping others or advancing causes they believe in.⁶ Many attorneys find pro bono service to be the most satisfying way of expressing the social justice commitment that sent them to law school in the first instance.⁷ Work for racial, ethnic, or other disadvantaged groups can also be an important form of “giving back” and expressing lawyers’ own identities. For the public,

2. *Id.* at 12-18; DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS 523 (3d ed. 2020).

3. For statistics on the growth in reported pro bono assistance, see Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 493 (2017). On the longstanding lower participation rates by lawyers not in private practice, see a 1985 survey finding that 68% of lawyers in private practice participated in pro bono work compared with 38% not in private practice. Lauren Rubenstein Reskin, *Lawyers Fall Short of Self-Imposed Pro Bono Standards*, A.B.A. J., Nov. 1985, at 42.

4. A.B.A. STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A FOURTH REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 32 (2018) [hereinafter SUPPORTING JUSTICE].

5. ASS’N OF CORP. COUNSEL, ACC CHIEF LEGAL OFFICERS SURVEY 11 (2015).

6. RHODE, *supra* note 1, at 29-30; ESTHER F. LARDENT, CORP. PRO BONO, THE BUSINESS CASE FOR IN-HOUSE PRO BONO 3 (2013).

7. RHODE, *supra* note 1, at 30.

pro bono work is a crucial way to fill gaps in the nation's legal safety net. In the United States, over four-fifths of the legal needs of the poor remain unmet, and most public interest and legal aid organizations are dramatically understaffed and underfunded.⁸ Contributions from the private bar are a crucial strategy in making law accessible to those who need it most.⁹

To help understand in-house counsels' role in this effort, the article proceeds in three parts. Part I provides some brief historical background on corporate pro bono's evolution and rationale.¹⁰ Part II draws on our empirical survey to explore the challenges it has encountered. Part III suggests best practices and strategies for reform.

I. THE EVOLUTION OF CORPORATE PRO BONO PROGRAMS: THE BUSINESS CASE

The growth of in-house pro bono programs has paralleled the growth of in-house legal departments themselves. During the late twentieth century, corporations increased the size and quality of their legal departments to handle complex risk management and corporate governance issues, as well as more routine matters.¹¹ Because in-house lawyers are familiar with the corporation's business, and have no economic incentives to inflate hours, they can often handle such work more efficiently and cheaply than outside counsel. As these offices have increased in size and stature, they have had more resources available for pro bono work. And they are commonly staffed by lawyers who come from law firms with well-developed public service initiatives.¹²

In 2000, the Pro Bono Institute and the Association of Corporate Counsel formed Corporate Pro Bono (CPBO) to encourage, support, and provide guidance for such programs. Esther Lardent, the director of the Institute, authored a report called *The Business Case for Corporate Pro Bono*, which set

8. Rhode & Cummings, *supra* note 3, at 487-88.

9. *Id.* at 493-94 (discussing the importance of pro bono contributions, which primarily come from the private bar).

10. In this article, we follow the conventional practice of using "in-house counsel" and "corporate legal departments" interchangeably.

11. PRASHANT DUBEY & EVA KRIPALANI, *THE GENERALIST COUNSEL: HOW LEADING GENERAL COUNSEL ARE SHAPING TOMORROW'S COMPANIES* 4-5 (2013) (citing Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1203-04 (1997)). For a general discussion of the rise of in-house counsel, see BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016).

12. According to survey data from the Association of Corporate Counsel, 86% of in-house lawyers have prior experience working in law firms or other outside legal positions. See ASS'N OF CORP. COUNSEL, *2015 ACC GLOBAL CENSUS: A PROFILE OF IN-HOUSE COUNSEL* 26 (2015).

out the organizational justifications for public service initiatives.¹³ For the most part, these rationales tracked those for pro bono programs generally: recruitment, retention, employee engagement, professional development, teamwork, community contacts, reputation, and diversity.¹⁴ However, Lardent also stressed two distinctive benefits that corporate programs offer: integration with the company's social responsibility efforts, and partnerships with outside attorneys that enable mutual understanding and help them better serve the organization's commercial needs.¹⁵

Many in-house counsel have agreed and cited other benefits. Michael Callahan, former General Counsel of LinkedIn and Yahoo, notes that one such benefit

is the opportunity to take individual ownership of a matter - so perhaps it is part recognition, part skill development. But I think it is more of a "I usually work on these huge cross company product launches/initiatives that don't lend themselves to individual work and on this matter I owned it successfully start to finish." I have seen that be a driving force for more junior lawyers and staff but also for senior lawyers taking on a project outside of their area of expertise (for example political asylum work). The second [benefit] is the teamwork element and team building. As a GC I had the opportunity to do some pro-bono work offsite doing case intakes for a non-profit and the other members of our team working that day were junior and not teammates I would normally work directly with on projects. As a result, I got to know more about their working style, why they were engaged in pro-bono and some more of the personal aspects of the team than I otherwise would have.¹⁶

Pro bono work can also be an effective way of engaging non-lawyer staff and building cross-disciplinary collaborations. In Callahan's experience, these staff often became "terrific advocates and evangelists for our work."¹⁷

Many GCs have found these justifications persuasive. Corporate legal departments tripled their pro bono hours between 1999 and 2010.¹⁸ By 2016, some 165 companies had committed to the Corporate Pro Bono Challenge, which required 50% of in-house lawyers to participate in pro bono work.¹⁹

13. LARDENT, *supra* note 6, at 1-4.

14. *Id.* For the business case for pro bono programs, see generally RHODE, *supra* note 1; Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 *FORDHAM L. REV.* 1435 (2009).

15. LARDENT, *supra* note 6, at 2, 4.

16. Email from Michael Callahan, Professor of Law, Stanford Law School, to Deborah Rhode, Ernest W. McFarland Professor of Law and the Director of the Center on the Legal Profession, Stanford Law School (Oct. 1, 2019, 08:53 PST) (on file with author).

17. *Id.*

18. Rebecca Lowe, *Can Corporates Do Pro Bono?*, *IN-HOUSE PERSPECTIVE*, July 2011, at 17.

19. *A Challenge 10 Years in the Making: The CPBO Challenge Initiative*, *CORP. PRO*

However, that figure represents a small percentage of in-house corporate legal departments. As noted earlier, in the ABA's most recent survey, in-house lawyers reported an average annual contribution of only 11 hours, compared with 41 hours by lawyers in private practice.²⁰ Given that the response rate for the survey was only 7% and likely overrepresented those who care about pro bono and made some contribution, the actual national figures are probably significantly lower.²¹ A 2017 survey by the American Bar Foundation found substantially lower rates than the ABA study: only slightly over half of lawyers reported doing pro bono work, with a median of 25 hours per year.²² These modest rates of service are in part a response to organizational values and priorities. In a national survey of 24,000 lawyers that asked about what was necessary to succeed in a legal career, only about a quarter saw pro bono work as necessary; another quarter thought it was irrelevant.²³

II. CHALLENGES FOR IN-HOUSE PRO BONO PROGRAMS

To explore the reasons for relatively modest pro bono participation among in-house lawyers, we distributed an online national survey under the sponsorship of the ACC and the CLOC. Respondents had the option of remaining anonymous or identifying themselves in follow-up telephone interviews. The distribution list included approximately four thousand attorneys, whose demographic backgrounds appear in Appendix 1. Our relatively low response rate of around two hundred attorneys cautions against drawing firm conclusions.²⁴ However, some generalizations can be made from

BONO, <https://perma.cc/N4UP-AA9L> (click through the CPBO Challenge Initiative to access statistics).

20. See *supra* text accompanying note 4.

21. SUPPORTING JUSTICE, *supra* note 4, at 45.

22. In the ABF survey, the median contribution rate was 25 hours per year, compared with an average contribution of 41 hours in the ABA survey. Rebecca L. Sandefur, *What AJD3 Lawyers Do*, in AFTER THE JD III: THIRD RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 32, 37 (Gabriele Plickert ed., 2017); see *supra* text accompanying 4.

23. See ALLI GERKMAN, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 1, 10 (Inst. for the Advancement of the Am. Legal Sys. ed., 2016).

24. Survey Response, Research study on the development of legal pro bono within corporate legal departments (on file with authors). Our survey was designed to be answered by the individual responsible for pro bono services in the corporate legal department. Our partners in distributing the survey, the ACC and the CLOC, maintain their own list of members, and sent the questionnaire directly to them. ACC disseminated the survey to approximately 6200 general counsel members, and CLOC disseminated it to their 1500 members. We assume there is significant overlap between the two lists. We received 220 completed questionnaires, a response rate too limited to make valid generalizations about the entire sample. However, it does not appear that those who participated were much different in one of the most relevant dimensions, size of organization, than participants in other corporate

the pattern of our responses, supplemented by over twenty-five interviews, as well as Corporate Pro Bono reports and articles in law reviews and trade publications.

A. Structural Challenges

Taken together, these sources suggest a number of factors that make pro bono work particularly unattractive to in-house lawyers, which we explore below, including lack of incentives and resources. However, there are also structural differences between corporate and law firm practice that bear on pro bono involvement. In-house corporate lawyers work in organizations that are not generally led by a lawyer. General counsel report to business leaders who are not familiar with the tradition of pro bono work and may not have thought much about its justifications.

These justifications begin from the premise that access to law is a fundamental interest, and that the legal profession, which enjoys a monopoly over many tasks, has a special obligation to help make law available.²⁵ That obligation takes on special urgency in a society in which legal services are so unequally distributed and where the potential consequences are so crucial for low-income communities, which are disproportionately communities of color.²⁶ A number of our survey participants commented on the disconnect between their view and their managers' view of charitable responsibilities. As one respondent put it,

I don't think that non-lawyer managers or C-suite [leaders] really understand the argument for pro bono because they aren't lawyers—but our legal system really depends on lawyers using their professional skill to serve a higher purpose. Other professionals don't have that requirement or that educational foundation—we learn about pro bono in law school.

counsel surveys. Of the nearly 1100 respondents to the Association of Corporate Counsel's Chief Legal Officers 2017 survey, nearly 82% of the corporations participating in that survey had legal teams with fewer than ten attorneys. Of the respondents to our survey, 67% employed fewer than ten attorneys, showing that both surveys—despite the difference in response numbers—featured a majority of small legal departments. We also made some efforts to encourage participation from GCs of larger organizations, with limited success. As a consequence, our respondents were significantly more likely to be part of large legal teams, with nearly 22% having legal teams of more than fifty lawyers, as compared to the 5% of respondents to the ACC's 2017 survey that were a part of legal teams with fifty or more attorneys. We also asked respondents to volunteer to participate in a qualitative follow-up interview. We reached thirteen of those who volunteered. Finally, we also spoke on an ad hoc basis to several individuals who engage with in-house legal departments around pro bono: law firm pro bono coordinators and legal service organization representatives.

25. Rhode, *supra* note 1, at 26-28.

26. Cummings & Rhode, *supra* note 3, at 487-88.

So nonlawyers see our other charitable work as sufficient and don't appreciate the distinction.²⁷

Another lawyer who responded to our survey noted, "I've been the GC of five companies and in not one has either another executive or shareholder cared [a] whit about pro bono. If anything, they look on it as a potential problem."²⁸

Even when corporations promote volunteerism among their employees, they often fail to differentiate between legal and non-legal work. Several respondents noted that their corporation's leadership viewed non-legal volunteer work as sufficient to meet their organization's community service goals and policies. Another survey participant explained that his office chose to count all volunteer work, not just legal, as pro bono service "so that all members of our Office of General Counsel (and not just lawyers) could participate if they so choose."

In addition to this disconnect between lawyers' and managers' views, there are other distinctive obstacles to corporate pro bono involvement. These include lack of incentives, resources, expertise, structure, and malpractice liability.

B. Lack of Incentives for Organizations and Attorneys

One of the main rationales for law firms to support pro bono is that it provides crucial training, experience, and client contact to recent law school graduates.²⁹ But in the corporate context, as an eBay lawyer noted, "the people we hire are already experienced . . . so they don't need the training."³⁰ In-house departments also lack the reputational incentives that characterize private practice. The *American Lawyer's* 1994 decision to begin publicly ranking firms based on the average number of pro bono hours per attorney and percentage of lawyers contributing at least 20 hours dramatically affected firm support. The rankings provided a readily accessible and seemingly objective method for evaluating public service opportunities and shaming poor performers.³¹ The stakes escalated in 2003, when the magazine also began publishing an A-List of the top twenty firms based on several metrics including pro bono

27. Telephone Interview with Marc Milano, Assoc. Gen. Counsel & Senior Vice President, BB&T, and Gen. Counsel, AFCO (Mar. 29, 2019).

28. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

29. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2386, 2426-28 (2010) [hereinafter Cummings & Rhode, *Managing Pro Bono*].

30. Telephone Interview with Scott Andrews, Dir., Global Intellectual Property, eBay, Inc. (Mar. 21, 2019).

31. Cummings & Rhode, *Managing Pro Bono*, *supra* note 29, at 2371.

performance.³² As the *American Lawyer* itself noted, its ranking structure “ratcheted up the pressure” on firms to support such work.³³

Corporations lack similar reputational incentives. There are no widely accessible rankings akin to law firm rankings, and in-house offices operate within a corporate culture not schooled in seeing pro bono as a professional obligation. Moreover, in-house lawyers who are steeped in pro bono traditions do not have autonomy over their budget and priorities.³⁴ Susan Hackett, when she was General Counsel of the Association of Corporate Counsel, noted that some GCs may worry that “if it gets out that you have time for a pro bono caseload, your CEO may begin to think that you don’t have enough work to do or that the legal department might merit another look at budget-axing time.”³⁵ Similarly, participants in our survey acknowledged that “one of things at the back of everyone’s mind [is]—if everyone is so busy and you take on a pro bono [case], are you identifying yourself as not as busy as everyone else?”³⁶ In organizations that have company-wide service projects, there may be additional resistance to lawyers who want to do different, additional pro bono work.³⁷ One respondent noted that his corporation had such annual initiatives, which last year involved physical labor at a woman’s shelter. Lawyers in his department felt that they were making a sufficient charitable contribution through that effort.³⁸

Many individual in-house attorneys also note a lack of incentives for pro bono involvement. In Corporate Pro Bono’s most recent benchmarking report, in which 70% of respondents were relatively large legal departments (over fifty attorneys) with well-developed pro bono programs, only 38% reported that pro bono work was a factor in evaluations, advancement and bonuses.³⁹ In our survey, which included mainly smaller organizations (under fifty attorneys), only 16% reported considering such work in performance reviews and fewer than 1% considered it in compensation and bonus determinations. And unlike law firms, which generally count at least some pro bono work toward billable

32. *Id.*

33. Daphne Eviatar, *Pro Bono Pros*, AM. LAW., July 2008, at 104, 106.

34. David March, *Inspired to Serve: In-House Pro Bono Is on the Rise*, BENCH & BAR OF MINN., Oct. 2017, at 25-26 (noting that pro bono work is often not seen as part of corporations’ social responsibility).

35. Susan Hackett, *Breaking New Ground: How Corporate Pro Bono Can Work*, 7 BUS. LAW TODAY, May/June 1998, at 50, 53.

36. Telephone Interview with Joel Silver, Senior Corp. Counsel, Gilead Sciences, Inc. (Nov. 13, 2018).

37. Telephone Interview with Marc Milano, *supra* note 27.

38. *Id.*

39. CORP. PRO BONO, 2018 BENCHMARKING REPORT: AN OVERVIEW OF IN-HOUSE PRO BONO 6, 9 (Mar. 2019) (relatively large organization, involved departments of attorneys).

hour requirements, in-house departments have no such metrics.

In describing the level of priority that her in-house attorneys give to pro bono, Hanh Vo of LinkedIn noted,

I'm going to give it a five out of ten. It depends on the convenience of the pro bono activity, time of year, etc. I wish it would be a nine out of ten, but it just won't happen given that, in general, in-house attorneys are limited in numbers and we must balance our clients' needs with pro bono.⁴⁰

Over four-fifths of the participants in our survey did not set any pro bono goals. And although average hours were modest, only a quarter of those surveyed were slightly or very dissatisfied with their department's level of pro bono involvement.

C. Lack of Time and Expertise

In surveys of lawyers in general and in-house lawyers in particular, the most commonly reported obstacles to pro bono involvement have been insufficient time and skills. In the ABA's 2018 study, the top-ranked barriers were lack of time, competing commitments to family or other personal obligations, and lack of necessary skills and experience.⁴¹ In a recent Association of Corporate Counsel survey, GCs reported that limited time and staff were the main factors influencing their lack of support.⁴² In our study, a number of participants reported that the "biggest impediment is time."⁴³ Another added, "this is the busiest legal group I've ever worked in . . . the leanest and highest workload. There is also a priority on work-life balance."⁴⁴ These constraints reportedly make in-house lawyers particularly reluctant to take cases requiring significant long-term or unpredictable commitments. Michael Callahan, former GC of LinkedIn and Yahoo, noted that one major reason lawyers choose in-house positions is to gain greater control over their schedules and to work from home during certain times of the day.⁴⁵ Pro bono work, particularly if it involves litigation or significant office meetings, may be seen as compromising those values.

These are not, of course, insurmountable barriers. Many pro bono projects,

40. Telephone Interview with Hanh Vo, Vice President and Head of Commercial Legal, LinkedIn, Co. (Mar. 20, 2019).

41. SUPPORTING JUSTICE, *supra* note 4, at 20.

42. See ASS'N OF CORP. COUNSEL, ACC CHIEF LEGAL OFFICERS SURVEY, *supra* note at 5, at 11; Catherine Dunn, *Stepping Stones to More In-House Pro Bono*, CORP. COUNSEL (Feb. 21, 2012), <https://perma.cc/TWQR-BD3Y>.

43. Telephone Interview with Shannon Castellani, Gen. Counsel, AgeofLearning.com (Mar. 25, 2019).

44. Telephone Interview with Joel Silver, *supra* note 36.

45. Email from Michael Callahan to Deborah Rhode, *supra* note 16.

such as walk-in advice clinics, involve limited and predictable time commitments; others involve teams of attorneys who can adjust workloads to accommodate the ebbs and flows of in-house needs. Lawyers with children can sometimes bring them along, which has the additional value of modeling altruistic behavior. Demonstrating charitable commitment and involving their children in such activity is one of the most effective ways for parents to reinforce pro-social values and encourage lifelong service to others.⁴⁶

Another barrier to pro bono work is lack of expertise. In-house lawyers typically focus on transactional work in contexts far removed from the legal needs of poor people. Although many organized pro bono programs provide training, mentoring, and back-up resources, attorneys with already heavy workloads may be reluctant to commit the time required to master new subjects and skills.⁴⁷ James Office, GC of Victory Wholesale Group, reported frustration with the kind of work that legal aid organizations often pitched to his department. “It’s not that I wouldn’t want to help them,” he noted, “but the areas of practice aren’t ones that I would feel competent in.”⁴⁸ Scott Andrews of eBay said that his team members are willing to take cases outside their day-to-day specialties but prefer to have co-counsel in litigation to ensure both proper levels of experience and flexibility to manage the increased workload.⁴⁹ One respondent to the survey went so far as to say, “We do not perform pro bono legal services in our department. Our view is that pro bono legal work should be undertaken solely by lawyers with expertise in their clients’ areas of need, i.e., legal aid societies and similar organizations (e.g., Bet Tzedek), and not by for-profit enterprise legal department employees.”⁵⁰

Other GCs, however, did not view lack of experience in the field as an insurmountable barrier. Michael Callahan pointed out that in-house attorneys often had more transferable expertise than junior attorneys in private practice. As he noted,

the vast majority of attorneys in house have at least 3-5 years’ experience already so they can handle matters on their own in most cases . . . Having a

46. DEBORAH L. RHODE, CHARACTER: WHAT IT MEANS AND WHY IT MATTERS 16-17 (2019); ALFIE KOHN, THE BRIGHTER SIDE OF HUMAN NATURE: ALTRUISM AND EMPATHY IN EVERYDAY LIFE 91-92 (1990); VIRGINIA A. HODGKINSON & MURRAY S. WEITZMAN, GIVING AND VOLUNTEERING IN THE UNITED STATES 11-12 (1992).

47. See Hackett, *Breaking New Ground*, *supra* note 35, at 52. In Rhode’s pro bono survey, the most common reason attorneys cited for not engaging in pro bono work was workload demands. Rhode, PRO BONO IN PRINCIPLE, *supra* note 1, at 132-133.

48. Telephone Interview with James Office, Vice-President and Gen. Counsel, Victory Wholesale Group (Mar. 27, 2019).

49. Telephone Interview with Scott Andrews, *supra* note 30.

50. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

training program is probably less necessary for some areas. [For example, many attorneys] could handle a “corporate governance scrub,” [i.e.] helping a non-profit with charters, by-laws, board committee minutes and procedures, etc.⁵¹

D. Lack of Structure, Resources, and Oversight

The structure and resources of pro bono programs vary, but often fall short of meeting perceived needs. In the corporations surveyed in the Corporate Pro Bono Benchmarking Report, 88% had a pro bono committee and 57% had a coordinator.⁵² By contrast, over 80% of our survey respondents had no pro bono coordinator or committee.⁵³ Nor were most them actively involved in management. Over half of our respondents spent no time coordinating pro bono activities and most of the rest (37%) spent only 1-10% of their time on it.⁵⁴ Seventy percent said they did not share such responsibilities with anyone else.⁵⁵ One participant in our survey noted that “[w]hile larger corporations have the resources to support pro bono efforts, most smaller companies do not.”⁵⁶ Another respondent offered a “departmental definition” of legal pro bono service as “[a] luxury we can’t afford.”⁵⁷ To compensate for lack of structure and resources, some respondents relied on partnerships with outside counsel. One respondent explained, “We act as co-counsel with the law firm generally taking the lead.”⁵⁸ Another said, “The law firm typically manages the relationship with the nonprofit, in collaboration with the law department.”⁵⁹

Funding for pro bono work is also generally modest. Among the larger companies in the Corporate Pro Bono survey, only a quarter spent more than \$50,000, and about half spent \$10,000 or less.⁶⁰ In our survey, over 85% also said that they had no budget specifically designated for pro bono work.⁶¹

51. Email from Michael Callahan, *supra* note 16.

52. CORP. PRO BONO, 2018 BENCHMARKING REPORT, *supra* note 39, at 7-8.

53. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

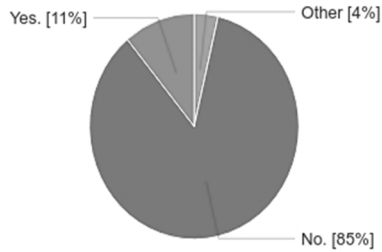
58. *Id.*

59. *Id.*

60. CORP. PRO BONO, 2018 BENCHMARKING REPORT, *supra* note 39, at 25.

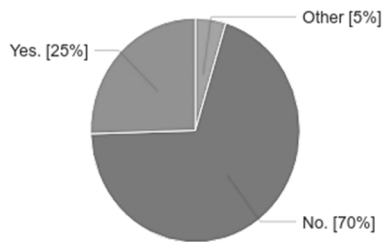
61. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

Does your legal department have an annual budget specifically for supporting legal pro bono service?

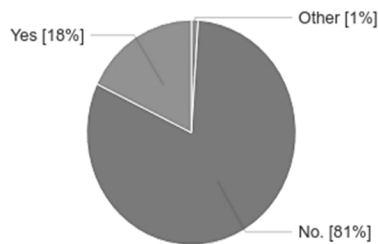


Tracking efforts were minimal among organizations of all sizes. Only 35% of the larger corporations in the Corporate Pro Bono Survey collected data on the number of clients served, and only 15% on the outcome of matters.⁶² In our survey, nearly 70% of respondents did not even track hours, and 81% didn't report any information on their work to outside organizations.⁶³ No companies in either survey mentioned efforts to monitor satisfaction either among clients or the non-profit providers with whom they partner.

Do you track attorneys' hours committed to pro bono?



Do you report pro bono engagement (hours or other metrics) to any outside organizations or publications?



62. CORP. PRO BONO, 2018 BENCHMARKING REPORT, *supra* note 39, at 19.

63. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

This absence of oversight is not unique to corporations. We have found no published survey reporting that law firms systematically monitor satisfaction with pro bono programs.⁶⁴ Nor did any seek to gauge the social impact or cost effectiveness of their work. This and other research suggests that lawyers tend to “conflate good intentions with good results.”⁶⁵ It is, of course, understandable why. Attorneys who are stretched for time and resources, and invested in feeling appreciation for their efforts, may choose not to spend scarce resources in collecting information that might highlight problems or diminish their satisfaction. Some lawyers assume that “we’d hear about it if there was dissatisfaction,” or that non-profit service providers “wouldn’t keep referring cases if there were problems.”⁶⁶ But cash-strapped providers may themselves lack resources for quality control or may be reluctant to raise performance concerns with organizations that are offering charitable assistance.⁶⁷ Strategic philanthropy literature makes clear that donors who want to make a difference need to invest some of their effort into oversight.⁶⁸

E. Lack of Strategic Focus

The lack of resources and formal structures of many pro bono programs impedes their ability to develop strategic focus. Experts in philanthropy emphasize the need to develop clear objectives, policies that will advance them, and metrics to assess performance.⁶⁹ At a minimum, in-house counsel offices need to identify available skills, resources, and interests, and how to match them most effectively with unmet legal needs.

Although for small departments, a highly formal process may not make sense, many in-house offices are large enough to benefit from a more strategic focus. No respondents in our survey mentioned consulting lawyers concerning their preferences, and most (62%) do not consult public interest groups in identifying possible projects.⁷⁰ Only 10% consult public interest groups in identifying areas of needs, and only 3% consult them in setting pro bono priorities.⁷¹

64. Rhode conducted a comprehensive search in 2010. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono*, *supra* note 29, at 2401-02. We have found no study since then.

65. Rhode, *Rethinking the Public*, *supra* note 14, at 1452.

66. Cummings & Rhode, *Managing Pro Bono*, *supra* note 29, at 2403.

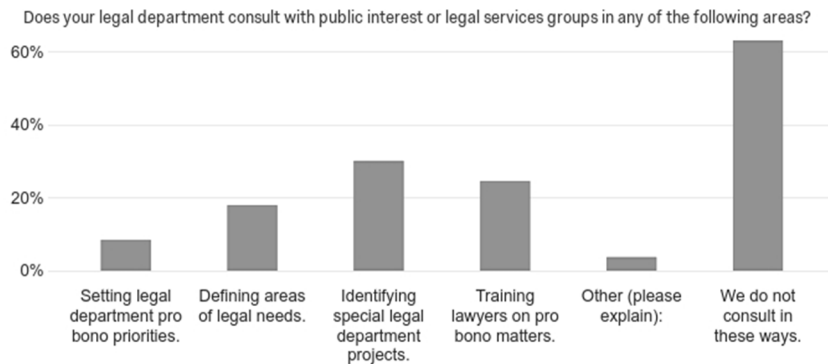
67. *Id.*

68. *See* Rhode, *Rethinking the Public*, *supra* note 14, at 1445.

69. *See id.* at 1446-47.

70. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

71. *Id.*



Only a quarter of respondents partnered with outside counsel in some projects, and only 12% reported that a majority or great majority of projects involve such partnerships.⁷² For most respondents, limited scope clinics were the projects of choice because they involved a relatively small number of hours with minimal administrative effort.⁷³

Although such projects often provide crucial assistance to a group in need, they are not necessarily the highest and best use of experienced in-house lawyers. Many of these individuals have transactional and technological skills that could provide a major contribution to non-profit public interest organizations. And many in-house lawyers might be more interested in substantial pro bono projects if they involved greater challenge and potential impact than limited engagement clinics. As Part III indicates, a growing number of corporations have found that they can maximize their effectiveness by partnering with other organizations and law firms on such signature projects.

F. Liability and Unauthorized Practice Concerns

Two other less significant barriers to effective pro bono programs involve the lack of malpractice insurance or lawyers licensed to practice in the jurisdiction in which they work. Although liability claims arising from pro bono work are extremely rare, many in-house counsel may be uncomfortable or unwilling to provide services without protection.⁷⁴ However, it appears that most lawyers can obtain coverage without significant expense. In the Corporate

72. *Id.*

73. *Id.*

74. Hackett, *Breaking New Ground*, *supra* note 35, at 54; 2 AMY WEAVER & CATHERINE MORENO, ASS'N OF CORP. COUNSEL, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 37:25 (Robert L. Haig ed., 2016).

Pro Bono Benchmarking survey, only 9% had purchased a separate insurance policy.⁷⁵ Over three quarters worked with legal services organizations that provided coverage, a fifth self-insured, and several respondents also relied on coverage from other policies.⁷⁶ Our survey did not explicitly ask about insurance and respondents did not cite it as a significant problem, perhaps because much of their work was for limited-scope clinics where insurance coverage was provided by the sponsoring entity.⁷⁷

Unauthorized practices rules are also a barrier, although workarounds are increasingly available. A report by Corporate Pro Bono found that many jurisdictions have rules based on the ABA's Rule 5.5 of the Model Rules of Professional Conduct, which permit in-house counsel to provide legal services outside the jurisdictions where they are licensed so long as those services "are provided to the lawyer's employer or its organizational affiliates."⁷⁸ The comment to Rule 5.5 explains that non-locally licensed attorneys may be subject to registration or certification systems that include requirements such as continuing legal education and contributions to client protection funds.⁷⁹ Four states, Virginia, Illinois, New York, and Wisconsin, have recently modified their rules to enable registered in-house attorneys to provide pro bono services, subject to other general rules of professional conduct.⁸⁰ Many states have no specific rule (twenty-three jurisdictions), while others allow registered in-house counsel to offer such services only if associated or affiliated with approved legal services organizations and/or under the supervision of a local licensed attorney (twenty-one jurisdictions).⁸¹

In-house lawyers who want to provide pro bono work outside the jurisdiction in which they are licensed have several options. The simplest is to offer services under the supervision of a licensed attorney and/or in affiliation with recognized service providers, such as through limited engagement clinics. Other possibilities noted by the Corporate Pro Bono report are to provide assistance that is not technically considered the practice of law, such as intake and screening for legal aid organizations, dispute resolution, and administrative agency cases for which a legal license is not required (including immigration,

75. CORP. PRO BONO, 2018 BENCHMARKING REPORT, *supra* note 39, at 11.

76. *Id.* The survey asked for all forms of insurance that they relied on, so the numbers added up to more than 100%.

77. Survey Response, Research study on the development of legal pro bono within corporate legal documents, *supra* note 24.

78. MODEL RULES OF PROF'L CONDUCT r. 5.5(d)(1) (AM. BAR ASS'N 2019); CORP. PRO BONO, MULTIJURISDICTIONAL PRACTICE IN THE U.S.: IN-HOUSE COUNSEL PRO BONO 1-2 (2019).

79. MODEL RULES OF PROF'L CONDUCT r. 5.5 cmt. 17.

80. CORP. PRO BONO, MULTIJURISDICTIONAL PRACTICE, *supra* note 78, at 2-3.

81. *Id.*

tax, Medicaid, school board hearings, Social Security benefits, unemployment insurance, Veterans Affairs benefits appeals, welfare, and special education).⁸² However, these options may not be possible for lawyers in jurisdictions that consider any work for a client to be the practice of law, or whose insurance policies cover only work performed in a lawyer-client relationship.⁸³ *Pro hac vice* admission may also be available for lawyers engaged in litigation outside their licensed jurisdiction, but it can be a time-consuming and cumbersome process.⁸⁴ To facilitate pro bono services, we join Corporate Pro Bono and the Conference of Chief Justices in recommending rule changes that would explicitly authorize such services by in-house lawyers.⁸⁵

III. BEST PRACTICES AND STRATEGIES FOR CHANGE

Research on philanthropy in general, and pro bono programs in particular, suggests that well designed initiatives should have at least five critical dimensions:

- Leadership from the top, reinforced by all supervising attorneys;
- A process for identifying objectives and establishing priorities among them;
- A process for selecting projects that will best advance those objectives;
- Policies that encourage widespread participation; and
- A system for overseeing performance and evaluating how well objectives are being met.⁸⁶

A. Leadership

Such an approach depends on leadership at all levels of the organization. A repeated theme in our survey was the importance of commitment by the General Counsel. But as one respondent also stressed, “It is critical to get management and high-level support and have it be ubiquitous through [all]

82. *Id.* at 4.

83. *Id.*

84. State and federal courts typically require lawyers to affiliate with local counsel and file a motion with the court, which is not always granted. *See* *Leis v. Flynt*, 439 U.S. 438, 443-44 (1979).

85. In 2012, the Conference of Chief Justices passed Resolution 11, “In support of Practices Rules Enabling In-House Counsel to Provide Legal Services.” *See* CORP. PRO BONO, MULTIJURISDICTIONAL PRACTICE, *supra* note 78, at 3.

86. Rhode, *Rethinking the Public*, *supra* note 14, at 1446-49; *see also* PAUL BREST & HAL HARVEY, *MONEY WELL SPENT: A STRATEGIC PLAN FOR SMART PHILANTHROPY* 7, 15-17, 145-46, 214-18 (2008).

levels.” Even if the GC is supportive, if one of his or her direct reports is not, “then that entire group will be left out. You need to have buy in at every level.”⁸⁷ And leaders need to be committed in practice, not just in principle. They need to allow sufficient time for pro bono participation and count the extent and quality of pro bono legal and administrative assistance in performance evaluations. Corporations can also provide additional forms of recognition through pro bono awards, special events, and coverage in company newsletters.⁸⁸

B. Priorities

Not only do leaders need to encourage and reward pro bono assistance, they need to think more deeply about what objectives that assistance is designed to achieve. Pro bono programs can serve multiple goals, and in-house legal departments need a well-designed process for identifying priorities. For example, programs designed to maximize lawyers’ satisfaction and engagement should invest in identifying their interests in subject matter and in opportunities for skills development and community involvement. As one survey respondent noted, pro bono service “isn’t worth much unless it allows an individual to fulfill one of his or her personal goals.”⁸⁹ Programs that prioritize public impact should work with non-profit partners to identify areas where participant expertise can be most efficiently and effectively used. Finding allies and collaborators is often key to maximizing value. For example, companies including Google, Accenture, and Merck have partnered with law firms to tackle international issues involving exploitation of women, discrimination, education, and labor abuses.⁹⁰ Bank of America and other corporations have collaborated with law firms to create triage programs that offer key services that local legal aid offices are unable to provide.⁹¹ Coca-Cola’s legal department has worked with an outside firm to create a Wills on Wheels program that provides assistance to individuals who cannot afford legal services.⁹² In companies that use philanthropy to enhance their reputations and advance business objectives, lawyers might look for ways to support those

87. Telephone Interview with Joel Silver, *supra* note 36.

88. ASS’N OF CORP. COUNSEL, SUCCESSFUL PARTNERING, *supra* note 74, at § 37:26.

89. Survey Response, Research study on the development of legal pro bono within corporate legal departments, *supra* note 24.

90. Sarah Murray, *Responsible Business: The Gift of Giving*, FIN. TIMES (Dec. 1, 2010), <https://www.ft.com/content/a93715b8-fba6-11df-b79a-00144feab49a>.

91. Emma Cueto, *McGuireWoods Harnesses In-House Talent for Legal Aid*, LAW 360, (Nov. 18, 2018), <https://perma.cc/PX3B-TBQ3>.

92. Cathleen Flahardy, *Coke Makes a Difference by Refreshing Communities*, AM. LAW. (Apr. 30, 2011), <https://perma.cc/DPB4-YVXT>.

initiatives and involve non-lawyer staff.⁹³ Lawyers could identify projects that dovetail with those aims.

C. Evaluation

Evaluation is also critical. In-house legal departments need to know not only who volunteers and how much they contribute, but also how satisfied stakeholders are with their contributions. The ABA Standards for Programs Providing Civil Legal Services to Persons of Limited Means identifies strategies for assessing effectiveness, which include collecting evaluations from participants, clients, referring organizations, and peer review teams.⁹⁴

Satisfaction is, of course, not the only measure of effectiveness, and in-house legal departments need other measures to assess impact and channel resources. Although evaluation is notoriously difficult in this context, and there is no single, widely-shared methodology, corporations could build on criteria similar to those that public interest legal organizations often use setting priorities and assessing their efforts.⁹⁵ For example,

- Are in-house attorneys meeting needs that experts or client groups consider most compelling?
- How many individuals are they assisting?
- If the matter involves policy work or impact litigation, what are the chances of a long-term legal or political payoff?
- Will the work help to raise public understanding or empower clients?
- Is the assistance filling gaps in coverage or bringing some special expertise to the table?
- What are the other uses of lawyers' time? Might they find better ways to address the sources rather than symptoms of the problems?⁹⁶

93. For an argument in support of such targeted giving, see Michael Porter & Mark Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 57.

94. CHERYL M. ZALENSKI, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS 99-102 (2014).

95. For the challenges of evaluation, see Cummings & Rhode, *Managing Pro Bono*, *supra* note 29, at 2406-08.

96. Rhode, *Rethinking the Public*, *supra* note 14, at 1452.

CONCLUSION

With the rise of in-house legal departments in size and stature come new opportunities to channel more of their expertise toward the public good. Many of the corporations in our survey are leading the way. Their experience, together with other research in this area, suggests the need for more resources and strategic focus. The best practices for corporate programs require processes to

- Determine program goals;
- Identify the best use of available skills and interests;
- Encourage participation;
- Oversee the quality and cost- effectiveness of assistance; and
- Monitor the satisfaction of lawyers, clients, and nonprofit partners.

To some in-house counsel, this may seem like an overly demanding agenda. Isn't it enough that they are already committing scarce resources to worthy causes? For certain small departments, that may indeed be enough. But in-house offices with significant capacity should bring the same disciplined approach to pro bono work that they bring to corporate problem solving. To take full advantage of lawyers' capabilities and commitments, in-house legal departments need to learn from their own and their peers' experience. Only through more resources, participation, and evaluation can corporate pro bono realize its true potential for the profession and the public.

