



NAVIGATING CHANGE IN PRO BONO

To Do or Not to Do – Pro Bono Work In State Criminal Trial Courts

By Marc Kadish

Traditionally, large firm pro bono work has focused on litigation matters. While many firms have increasingly become involved in pro bono transactional matters, litigation still consumes the vast majority of large firm pro bono hours. Although many law firms have handled death penalty matters on the appellate level, and some firms, such as, my firm, Mayer Brown, have an extensive federal appellate pro bono practice, few have become involved in trials of misdemeanor or felony cases in the state trial courts.

Many firms prefer the traditional menu of civil legal aid matters. However, when it comes to legal matters that can possibly subject a litigant to the loss of freedom, most firms shy away from this work. A number of people are involved in a movement to make the promises of *Gideon v. Wainwright* apply in the civil context. But where are the firms when it comes to fulfilling the almost 50-year-old promises of *Gideon* in the criminal context?



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Funding for civil legal aid has been reduced by Congress, state governments and even private charitable contributions. This has been caused by political ideology, economic conditions and the actions of thieves like Bernie Madoff. However, political ideology and economic conditions have also impacted the state criminal

justice system. More people face an ever expanding panoply of criminal statutes. Fulltime public defender offices, where they even exist throughout the nation, are underfunded and overextended.

So why can't large law firms see this as a need they can fill? Is it the age-old problem of representing "guilty people"? Some firms may shy away from involvement in the state criminal justice system because even if the accused are innocent, poor criminal defendants are seen as "difficult" people to represent. But people facing civil legal problems can be just as desperate, and sometimes even more difficult to deal with, as criminal defendants.

I would prefer to think that it is a lack of expertise and experience in the high volume, high pressure state criminal courts that keep large firms from doing such work. Many experienced criminal lawyers who end up at large firms are former assistant U.S. attorneys with no state experience. These attorneys are brought into the large firms for the purpose of attracting white-collar clients. Most experienced public defenders, state criminal defense lawyers and state prosecutors don't end up at large firms.

I have been director of pro bono activities and litigation training at Mayer Brown since June 1, 1999. Although my responsibilities are firmwide, I primarily practice in our Chicago office. Since joining the firm, I have supervised five death penalty matters, 13 murder trials and two felonies. We have two murder and two felony cases awaiting trial.

I am neither a former assistant U.S. attorney nor the

product of a large firm background. I was a clinical law professor at Chicago-Kent College of Law from 1979 to 1999. While there I was involved in an experimental fee generating criminal defense clinic and also taught Evidence and various clinical lawyering skills classes. Mayer Brown hired me to start a formal pro bono program that combined pro bono and training.

We started the program by bringing my cases to Mayer Brown. We continued to take pro bono criminal cases because I had 30 years of experience, a continued fascination with the criminal justice system and because I wanted to make sure that trial work was available to our lawyers. Even though most criminal cases are pleaded out, many more criminal cases are tried in this nation than civil cases. (Even though we accept some prisoner civil cases only three of these have resulted in a trial in the past 10 years.)

Today, training has to be one of the goals of a large firm

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pro bono program. Given the current economic realities, and the enormous changes likely to occur in large law firm practice, the use of pro bono, with proper supervision, as a means of training young lawyers is a priority.

Many corporate clients will no longer permit junior associates to be staffed on their cases if they have to pay for their time. Where else will young lawyers learn how to try a case? Every matter I have supervised has involved a team of partners and associates. The associates are not just assigned discrete research and writing tasks. They are part of the decision making for the entire case from start to finish. They are responsible for court appearances, have a large amount of client contact, handle contested motions, work on jury selection, examine and cross-examine expert and lay witnesses and make opening statements and closing arguments.

I supervise every aspect of the case from gaining the confidence of the client so that a successful attorney-client relationship can be built, to the filing and arguing of contested motions, and the planning of trial strategy. Witness preparation and opening statements and closing arguments are prepared in the office's mock courtroom. I still function like a clinical law professor, except I do it at a law firm rather than a law school.

A large firm does not have to find a Marc Kadish or a Marcia Levy (another experienced clinician who made the transition from academia and now heads the pro bono program at New York's Sullivan & Cromwell) to incorporate criminal law cases into their pro bono programs. There are a number of organizations throughout the nation that provide criminal defense to the indigent. Partnering with these organizations when there is not an

experienced state criminal law practitioner within a firm simply means that a system for training and supervision of a firm's lawyers has to be established.

In addition to the felony cases listed above which we supervise internally, Mayer Brown also works with the Innocence Project at Cardozo Law School headed by Barry Scheck and Peter Neufeld. We have done cases in conjunction with the Center for Wrongful Convictions and the clinical program at Northwestern Law School. We have also started a relationship with the Neighborhood Defender Service of Harlem headed by Rick Jones, who is an adjunct professor at Columbia Law School. Our New York office is working on a high profile murder case with the group and has started working on their misdemeanor representation project in New York. That experience has led us to try to establish a similar misdemeanor project with the Cook County Public Defender's Office. In these relationships, supervision is done by both the agencies and myself.

In the interest of full disclosure I need to admit that one reason the felony cases listed above have worked out so well is because they are not normal court appointments. With the agreement of the Presiding Judge of the Criminal Division in Cook County, we accept voluntary appointments from only one judge. That Judge contacts me when there is a case that needs the resources that a large firm can devote to a matter. We are permitted to decline a case.

On occasion, I will contact the Judge if a partner or associate wants to work on a felony. The downsides are that you can't absolutely guarantee the case will result in a trial. Obviously some cases result in a guilty plea. The other downside is that a murder case that results in a jury trial can consume many hours. One case took about three years and 4,000 hours to resolve. One reason we are trying to start a misdemeanor representation project is to expand the number of people who can take these cases but spend less time on each matter.

One final issue — although some people may feel "conflicted" about representing a defendant in a brutal murder case, the normal direct and business conflicts that confront a large firm's pro bono program do not arise in the criminal area.

What if a lawyer wants to do pro bono criminal work but wants to work with the prosecutor's office rather than the defense side. Although I must admit that after 40 years of doing defense work it would be an interesting proposition, it would not happen here in our Chicago office because of my background. While we have a good reputation and work well with the prosecutor's office, I doubt they would ask us to do a case with them. In all honesty, I don't think I would feel comfortable prosecuting an accused who would be facing a lengthy prison sentence.

While the definition of pro bono we adhere to permits representation of governmental entities, there are members of our pro bono committee who are troubled by this because they believe the government can and should pay for representation. There are also people who are simply troubled by the notion of helping to prosecute criminal cases.

Helping someone charged with a crime is a heavy responsibility. But it can be immensely rewarding — and it can be fun. It is one of the few places where you are more likely to go to trial. If your goal is to combine pro bono and training, it's a win-win situation.