

THE FOURTH ELEMENT: PRO BONO FOR JUNIOR LAW FACULTY

EZRA ROSS¹

This short essay challenges a widely accepted conception of early career strategies for junior law faculty. That standard conception enshrines three components—teaching, scholarship, and academic service—as the legs of success in legal academia. And although scholars have engaged in some debate about these three constituents, the discussion often narrowly considers how best to balance these pursuits, or which ones warrant more time, attention, and depth.² The conversation does not sufficiently probe whether these are the *right* or *best* pursuits for junior faculty, or whether something else might form an important element of what junior law professors do.

The flaw in the standard conception, I contend, is the absence of a valuable fourth element: junior faculty pro bono legal work. Admittedly, this position may strike readers as an unrealistic take that ignores how busy faculty actually are. And this essay will directly address that important reservation. By way of background, however, I will first lay the groundwork to demonstrate why pro bono work is particularly important for junior law faculty in the first instance.

¹ Ezra Ross is a Professor of Lawyering Skills at University of California, Irvine School of Law.

² See, e.g., Ruthann Robson, *Enhancing Reciprocal Synergies Between Teaching and Scholarship*, 64 J. Legal Educ. 480, 484 (2015); Anna P. Hemingway, *Accomplishing Your Scholarly Agenda While Maximizing Students' Learning (a.k.a., How to Teach Legal Methods and Have Time to Write Too)*, 50 Duq. L. Rev. 545, 604 (2012); Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 Chi.-Kent L. Rev. 765, 812 (1998).

Benefits to Faculty

First, pro bono work directly benefits faculty members themselves, including through skills preservation. The longer a person neglects skills used for solving complex problems, the more they deteriorate.³ Nurturing a pro bono practice can help faculty keep sharp the skills they teach. And starting such a practice earlier in a professor's academic career can help ensure those skills don't decay so much that it becomes extremely difficult to restart a pro bono practice.

Further, continuing to practice law, even in a limited way, can improve scholarship. For decades, judges and commentators have criticized legal scholarship as out of touch.⁴ Maintaining a pro bono practice can help law faculty reality-check their scholarly theories to reinforce the relevance of their work for practicing lawyers and real clients.⁵ For example, continuing to practice has helped my scholarship on white collar fines and penalties match the realities of judgment collections. My pro bono practice has also positioned my scholarly work on empathic lawyering to capture the complex, multi-faceted nature of attorney-client relationships.

Finally, pro bono work affords the gratification of helping people with little voice and negligible resources. Some research suggests that even doing minimal charitable work early in an academic career can build momentum and lead to more contributions, and more community involvement, in a salutary cycle.⁶

³ See WINFRED ARTHUR JR. ET AL, *INDIVIDUAL AND TEAM SKILL DECAY: THE SCIENCE AND IMPLICATIONS FOR PRACTICE* (2013); Ezra Ross, *Reframing Faculty Pro Bono*, J. LEGAL EDUC. (forthcoming).

⁴ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

⁵ See Martin H. Pritikin, *The Experiential Sabbatical*, 64 J. LEGAL EDUC. 33, 52-54 (2014); Ross, *supra* note 3.

⁶ See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2431 (1999).

Benefits to Others

First, of course, pro bono work serves indigent members of the community. Every year, nearly a million indigent Americans don't get the legal assistance they need.⁷ Law professors have the training and the expertise to help mitigate this “justice gap.”

Faculty pro bono work also benefits students. For example, engaging in public interest work can enhance teaching.⁸ After litigating a Ninth Circuit civil rights matter—in which statutory, constitutional, and procedural issues intertwined organically—I developed a more true-to-practice memo assignment that involved cross-over of multiple areas of law. Similarly, participating in pro bono work through local public interest organizations can help law faculty stay up to date with the modern job market students face. Specifically, such work can develop and nurture contacts that law professors can leverage for students. Working relationships with practicing attorneys and employers can also help provide faculty with up-to-the-minute information about student job possibilities.

Further, faculty pro bono work can benefit law schools. Publicizing law professors' pro bono accomplishments enhances the standing of schools and challenges stereotypes about professors as ivory tower elites. And public interest organizations, in my experience, love to see law professors roll up their sleeves to work with staff attorneys and law students. Doing so can help forge more durable connections between law schools and legal organizations that regularly hire law students.

Objections

A threshold concern with faculty pro bono practice is bandwidth. Where is a junior legal academic—swamped with

⁷ See THE UNMET NEED FOR LEGAL AID, LEGAL SERVICES CORPORATION, <https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid> (last visited February 26, 2022).

⁸ See, e.g., Erwin Chemerinsky, *A Pro Bono Requirement for Faculty Members*, 37 LOY. L.A. L. REV. 1235 (2004); Ross, *supra* note 3.

teaching new courses, attending workshops, serving on committees for the first time, testing out scholarly ideas and approaches—supposed to find the time for any of this? Many law professors feel overrun by these competing commitments and challenges. And some may associate pro bono work with the image of taking on an entire case top to bottom, such as a federal court appeal or other matter. That form of full-scale representation can pose severe challenges during a regular teaching-filled, non-sabbatical semester.

Instead, particularly when law professors are very busy or just starting a pro bono practice, I advise considering more compact projects.⁹ For example, I recently plugged into a public interest organization's unlawful detainer clinic. After participating in a training, I can now spend three hours on a Tuesday reviewing a file, conducting a client interview, and then helping draft an answer or streamlined motion to dismiss. The experience can remain highly contained—I can schedule around those three hours blocked off in my calendar—and although the program includes an opportunity to keep the case if desired, doing so is not necessary. This type of compact pro bono practice provides faculty fresh experience in interviewing, strategizing, and legal writing, all skills legal writing professors teach their students.

Plugging into a law school clinic can accomplish the same thing. Lawyering skills professors may be able to arrange a relatively compact role with clinic professors, for example, by helping a pair of clinic students prepare to take a deposition. Furthermore, connecting with law school clinic professors can help boost visibility by showing that a new legal writing professor can collaborate across different segments of legal education.

A related objection is that law schools don't consider faculty pro bono work in promotion and tenure decisions, so law professors need to prioritize the other three facets of faculty development. This

⁹ Ross, *supra* note 3.

pressure from law schools themselves can pose a significant problem, especially for junior faculty. But many law schools have written that they *will* consider faculty pro bono work in evaluating law professor promotions.¹⁰ And a growing literature supports law schools crediting law faculty for their pro bono work. This scholarship includes work by luminaries like Erwin Chemerinsky, David Luban, and Deborah Rhode.¹¹ When pursuing merits or advancements, junior faculty can tether their pro bono work to the scholarship urging more of it. Of course, some law schools value public service more than others. So, for junior faculty on the market who are interested in pro bono work, this can be an important topic to explore before accepting an offer. In any event, as discussed earlier, pro bono work can often lead to new scholarly work and teaching ideas. So even if a school gives little credit for pro bono work standing alone, pro bono work can nevertheless help junior faculty satisfy the other criteria for faculty advancement.

One final objection is that pro bono may be fine—just *after* you receive tenure. In other words, play the game, get tenure, and *then* do good work for others. This position holds some intuitive appeal. But taking this approach implicates the problem of cognitive inertia, which can keep people anchored to the status quo.¹² Inertia, along with skill decay, can impede the transition to pro bono work for law professors who have not practiced law for years. New law professors, closer to practice, face a lesser barrier. And pro bono work, as discussed above, comes in a range of different time commitments. Doing at least some compact projects during a professor's junior years can help generate the momentum to ramp

¹⁰ See AMERICAN BAR ASSOCIATION DIRECTORY OF LAW SCHOOL PUBLIC INTEREST & PRO BONO PROGRAMS, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/ (last visited February 26, 2022).

¹¹ See David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58 (1999); Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158 (2001); Chemerinsky, *supra* note 8.

¹² See Matthew B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 115 (2015).

things up post-tenure if junior faculty develop an appreciation for the many benefits of pro bono practice.

Conclusion

A limited conception of what junior law faculty should do dominates the conversation. Scholarship, teaching, and academic service comprise an incomplete picture. A fourth element, faculty pro bono, provides a connection to real practice and to the public interest. And although other commitments can make finding time for public interest work challenging, compact pro bono representations can not only serve those in need, but can enhance, rather than detract from, the professional development of junior faculty.