

# Pro Bono Publico— Cui Bono?

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The title of this presentation is a question which questions itself. Who benefits from the provision of pro bono legal services? There are many ways of answering that question.

Let me begin with an hypothetical. You are a Western Australian barrister and solicitor in a busy legal practice. Your firm offers free, no-obligation, 15 minute consultations for people with legal problems. A couple come to your reception seeking a consultation. They run a business selling a product under a franchise agreement with a national distributor. Their franchise is to be terminated. The franchisor has found an alternative distributor with a greater number of better established outlets for the product. They think that the franchisor is in breach of the franchise agreement. You look at the agreement and at the *Franchising Code of Conduct* made under the *Australian Competition and Consumer Law 2010* (Cth). The franchisees may have a case to challenge their termination. Interestingly, they belong to the Association of Concerned Franchisees representing past, present and prospective victims of franchisors. They cannot afford to pay your fees. They say you seem like a nice person. They ask whether you would be prepared to take on their case without fee for the public good. 'Pro bono' you think but 'cui bono?' you wonder — for whose benefit?

In considering their inquiry you might conceivably ask yourself one of a number of questions which are of general importance in any discussion of pro bono legal services. The questions can be arranged in a kind of periodic table of moral merit ascending from the base metal of economic self-interest to the pure gold of disinterested generosity. The questions might be preceded by an unworthy negative thought — why should I, as a lawyer, give my legal services for free when I have to pay for all the goods and services I wish to acquire? The negative thought is not trivial. Professor Richard Abel, writing in the *Fordham Law Review* in 2010 about what he called 'the paradoxes of pro bono' encapsulated an important issue about pro bono services in the setting of public services generally:

Pro bono provides high quality legal services to large numbers of clients who would otherwise go unrepresented, thereby helping to fulfill our legal system's promise of 'Equal Justice under Law'. But what a bizarre way to address a foundational element of liberal legalism. Could we imagine relying on volunteerism to perform other core governmental functions; police (the deputy sheriffs of the frontier are a distant memory), national security (privateers), foreign relations (honorary consuls), education (volunteer parents as the *only* teachers), or transportation (hitch hiking)?<sup>1</sup>

Putting negative thinking to one side, you might consider reasons for acting for the couple by posing one or more of a series of nine questions:

1. Is this an opportunity for me to take on a loss leader case to help me develop a franchise dispute practice?
2. Can I look and feel good at minimum cost by drafting, free of charge, a complaint to the ACCC asking it to investigate the alleged breach of the Franchise Code at public expense without my having to devote any more of my valuable time to the matter?
3. Should I take on the case because it will create an opportunity to enhance my standing and reputation with the clients and their friends, with other members of my firm and perhaps in the profession and wider society?
4. Even if it is not all about me, should I take on the case because it is an opportunity to contribute to the standing and reputation of the profession?
5. Putting to one side my personal interests and those of the profession, do I have some kind of obligation to contribute, when I can, to maintaining the rule of law by providing access to justice to people whose need for its protection is critical?
6. Do I have an obligation to devote some of my time to provide free services in consideration of the occupational monopoly which the law has conferred upon me?
7. Do I have an ethical obligation to give my services for free simply because I am a member of a profession?

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<sup>1</sup> Richard Abel, 'The Paradoxes of Pro Bono' (2010) 78(5) *Fordham Law Review* 2443, 2443 (footnote omitted) (emphasis in original).

8. Should I forget about economics, the rule of law and ethical objectives and simply say yes to these people because I don't like injustice and if I don't help them they may suffer an injustice?
9. Should I say yes because if I do God will reward me ten-fold in heaven?

Those nine questions are posed to illustrate the variety of considerations which may inform the question who benefits from the provision of pro bono legal services? Like anything in the law, of course, they are neither mutually exclusive nor exhaustive.

The hypothetical example has its limitations. It sets up a sympathetic case — two people who have complied with their franchise agreement pitted against the economic power and amoral decision-making of a mighty national distributor. None of the nine questions concern the ethical position of the prospective client. Let us suppose that the couple had come to you saying — the franchisor has treated us well and they are really nice people, but their product is losing market share. It is being beaten hands down by the next 'big thing' in that class of product. We have been asked by the national distributor of the next 'big thing', which is produced by a gigantic tax avoiding, polluting, multi-national corporation using sweated labour in third world countries to which it also sells tobacco and arms, to cut our ties with our existing franchisor and enter into a new agreement to distribute their product. We want to terminate our existing franchise agreement. Life for us will become immeasurably better if we do. Please help us. Is the practitioner entitled to ask, when deciding whether or not to provide services free of charge, whether the cause of the prospective client is a worthy cause? Does the idea that the provision of services free of charge is pro bono publico — for the public good — incorporate some notion of the extent to which a specific aspect of the public interest is served by resolution of the pro bono client's particular legal problem? *Hic sunt dracones* seems apposite, a saying which, according to popular myth appeared on the edge of old sea charts, — here there be dragons — uncharted waters where judgment may be at the mercy of things roaming the deeps of individual lawyers' psyches, including personal moral beliefs and values, biases, prejudices and, perhaps even ideology.

The lawyer's nine questions and the problem of judging the public good in particular cases lead into large issues about the values served by the provision of pro bono legal services, the purposes which they advance, the individual and societal benefits to be derived from them, and how those benefits are distributed. Importantly, each of the nine questions is

asked from the perspective of a lawyer deciding whether to provide his or her services. There is, however, another perspective — that of the client seeking the legal services. Does it matter to people facing the loss of their liberty or reputation or facing economic ruin, whether the pro bono lawyer's motives are disinterested, self-interested or somewhere in between? Probably not. The reality is that the prospective client wants good legal representation.

Professor Lorne Sossin, writing in the *Osgoode Hall Law Journal* in 2008 made the point well:

Some lawyers may seek out pro bono opportunities because they see this work as a public duty. Other lawyers, however, may work for partial or no compensation for self-interested reasons: to enhance their reputation, to market their services, as a loss leader for an important client, to impress someone more senior, or for other idiosyncratic motives. If the point of pro bono is to reflect the best public service traditions of the legal profession, some of these motivations seem antithetical to that goal. If, however, the perspective of the client is paramount, then meeting the client's needs is the point of pro bono, irrespective of the lawyer's motivation.<sup>2</sup>

One thing can be said with confidence. The lawyer providing pro bono legal services has an obligation to provide them to the same standard as the services provided to a paying client. The standard is not qualified by the purity or otherwise of the lawyer's motivation. I once heard a sermon on the life of Saint Paul, delivered at Gray's Inn Chapel in London by the late Reverend Roger Hollingworth. He made my point well in his concluding remarks:

What the life of Saint Paul teaches us is that God helps the meek and the humble but also the pushy and the articulate and particularly the competent.

The relationship between the status of the legal profession as a profession and the notion that there is an obligation to give free service in the public interest is more complicated than it looks. This is a particular application of the general question whether the concept of a 'profession' involves some sort of ethical obligation to society which does not attach to other classes of occupation and which might underpin an obligation to provide pro bono services. No such obligation is apparent from the definition of the word 'profession' in

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<sup>2</sup> Lorne Sossin, 'The Public Interest, Professionalism and Pro Bono Publico' (2008) 46 *Osgoode Hall Law Journal* 131, 133.

the *Shorter Oxford English Dictionary*. It is defined rather blandly as 'a vocation, a calling, [especially] one requiring advanced knowledge or training in some branch of learning or science'.<sup>3</sup> In 1987, not long after I had been appointed to the Federal Court, I had to grapple with the definitional difficulties. A firm of consulting engineers filed a motion to set aside proceedings instituted against it claiming damages for misleading or deceptive conduct in trade or commerce in contravention of the *Trade Practices Act 1974* (Cth). They argued that they were members of a profession and therefore not engaged in trade or commerce. I held that if you are providing services for reward, you are engaged in trade or commerce. In so finding I had become aware of the real difficulties of trying to distinguish a 'profession' from other occupations.<sup>4</sup> Sir Isaac Isaacs once called it a description of a class of occupations which shifts with general community perceptions.<sup>5</sup> Sir Hayden Starke, on another occasion, said that whether a person carries on a profession is a question of degree and always of fact.<sup>6</sup> Those two great lawyers didn't try to pin the term down any further. Social scientists have fared no better. One social scientist, whom I quoted in the judgment, said that attempts at theoretical definition had resulted in 'a confusion so profound that there is even disagreement about the existence of the confusion.'<sup>7</sup>

It is not easy to find a logical basis for importing into the concept of 'profession' an ethical dimension which rises above the requirements of honesty, competence, reasonable care and diligence — standards we are entitled to expect of anyone providing a service for reward. The notion of consideration for the grant of a monopoly doesn't quite cut it. There are many occupations, not recognised as professions, which have, in effect, statutory monopolies. The challenge was highlighted in a lecture delivered in 1989 by Professor Edmund Pellegrino, Director of the Kennedy Institute of Ethics at Georgetown University. He observed:

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<sup>3</sup> *Shorter Oxford English Dictionary*, (Oxford University Press, 5th ed, 2002) vol 2, 2358.

<sup>4</sup> *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215.

<sup>5</sup> *Bradfield v Federal Commissioner of Taxation* (1924) 34 CLR 1, 7.

<sup>6</sup> *Robbins Herbal Institute v Federal Commissioner of Taxation* (1923) 32 CLR 457, 461.

<sup>7</sup> Terence J Johnson, *Professions and Power* (London, Macmillan, 1972) 22.

we still lack a coherent moral philosophy of the professions in which to locate the concepts of character, altruism and self-interest and to define the relationships between them.<sup>8</sup>

That doesn't mean we should give up trying. In Pellegrino's view we cannot avoid engagement with what he described as the central crisis in the professions today — the confusion about who, and what we are, and what we should be. Although he was writing in 1989, I suggest that the challenge continues and affects the legal profession in common with others. Pellegrino proffered a definition of 'profession' with an explicitly ethical dimension when he said:

By a profession, I mean something more than the usual, sociological definition. A profession is, literally speaking, a declaration of a way of life that is specific, a way of life in which expert knowledge is used not primarily for personal gain but for the benefit of those who need that knowledge.<sup>9</sup>

That definition may seem aspirational at least in relation to the legal profession. It may seem difficult to reconcile with the business models of contemporary legal practices and their focus on commercial objectives. Yet, somehow, those business models and those commercial objectives seem able to coexist in Australia and other countries with a substantial amount of pro bono activity.

Pro bono service has a long history in the law. It has ethical and wider societal dimensions and, like most things with a long history in the law, is not able to be characterised neatly by reference to a single rationale such as an ethic of disinterested service or the pursuit of enlightened self-interest. It seems to involve a mix of elements.

The concept of an obligation by persons learned in the law to help those who cannot help themselves, has its roots deep in legal history. An early precursor may have been the Roman Jurisconsult, a person skilled in the law, who would consult with litigants, give legal advice and represent litigants in court. Apparently no fees were charged for the Jurisconsult

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<sup>8</sup> Edmund D Pellegrino, 'Character, Virtue and Self-Interest in the Ethics of the Professions' (1989) 53 *Journal of Contemporary Health Law and Policy* 53, 54.

<sup>9</sup> *Ibid* 56–57.

practiced 'not as a way of earning a living but rather as a gentleman's hobby'<sup>10</sup> — a kind of *noblesse oblige* which supported a degree of prestige in Roman society with spin-offs in other directions, including political advancement.

The notion that canon lawyers had an obligation to provide legal services to *miserabiles personae* — loosely translated as 'disadvantaged persons', was well-established in the 12th century. In an interesting article in the *Journal of Legal History*, published in 1988, James Brundage described the practice of canon lawyers in medieval times and referred to a decree of Pope Honorius III, which authorised ecclesiastical judges to appoint advocates for those who could not secure representation. Brundage wrote:

Canonistic writers interpreted this to mean not only that courts should appoint advocates for those too poor to afford them, but also that judges should order a 'distribution of counsel' if one part to a case had engaged all of the experienced senior advocates in the community or, as occasionally happened, had put every local practitioner on retainer. Moreover ... clerics who were otherwise not supposed to act as advocates or proctors in secular courts, could also be called upon to furnish legal assistance to poor or disadvantaged litigants.<sup>11</sup>

In the fourteenth and fifteenth centuries in England and Scotland private practitioners could be required to represent indigent litigants. Serjeants could be denied the right of practice for refusing a court appointment for that purpose.<sup>12</sup> The Statute, 11 Hen. 7, c 12, passed in 1495, provided for the appointment of 'learned Councill' to represent paupers. Similar provision was made in Scotland in 1424.<sup>13</sup> Then there was the dock brief under which, for payment of a small fee, a disadvantaged defendant could engage the services of any advocate who happened to be in court while the defendant was in the prisoner's dock for indictment.<sup>14</sup> Counsel who refused to accept such a brief could apparently be held in contempt, but there were evidently no reported cases of evasion of uncompensated

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<sup>10</sup> Hans Julius Wolff, *Roman Law* (University of Oklahoma Press, 1951) 96 cited in Athanassios N Yiannopoulos, 'John H Tucker Jnr, The Jurisconsult' (1985) 45(5) *Louisiana Law Review* 1011, 1011 n 4.

<sup>11</sup> James A Brundage, 'Legal Aid for the Poor and the Professionalization of Law in the Middle Ages' (1988) 9 *Journal of Legal History*, 169, 172–173.

<sup>12</sup> William Holdsworth, *A History of English Law*, vol 2, 491 cited in Deborah L Rhode, *Pro Bono in Principle and in Practice* (Stanford University Press, 2005) 4.

<sup>13</sup> Scottish Parliamentary Act 1424 c 45.

<sup>14</sup> Rhode, above n 11.

appointments.<sup>15</sup> One barrister who no doubt wished he could have avoided a dock brief was Mr Worsley who, in 1959, agreed to represent Norbert Fred Rondel for a fee of two pounds four shillings and sixpence. Rondel, who was evidently an enforcer for the notorious landlord, Rachman, had gone to a house on behalf of the landlord and bitten off the lobe of the doorkeeper's ear. He had also torn the doorkeeper's hand in half. Six years after his trial and conviction, Rondel sued Worsley for professional negligence. The case proceeded through all three levels of the judicial system. Eight years after his conviction the House of Lords asserted the barrister's immunity and with that assertion, dismissing the appeal, put an end to Rondel's action.<sup>16</sup>

The provision of pro bono legal services has different histories in different parts of the world. At one time the coverage of legal aid schemes in the United Kingdom, Canada, Australia and New Zealand may have meant there was less pressure on the profession to provide pro bono services in those jurisdictions than in the United States where such coverage was not provided. That is not the case anymore. Professor Deborah Rhode, in her frequently cited work on pro bono legal services published in 2005, makes an interesting point about the relationship between the role of lawyers in particular societies and the development of pro bono traditions. She writes:

The absence of well-developed pro bono traditions in many nations is ... partly attributable to the less dominant role of law and lawyers. Compared with the United States, most other countries do not rely so heavily on the legal system to meet basic welfare needs and to address social problems. For example, many nations use administrative structures and no-fault insurance coverage to handle claims that Americans pursue through litigation. Almost all nations rely more extensively on trained nonlawyers to handle routine needs ... The United States is unique in the extent to which lawyers, particularly public interest lawyers, are involved in shaping and implementing environmental, health, safety, consumer, and antidiscrimination protections. Because most countries grant the legal profession a less pivotal governance role, their need for pro bono legal assistance has been less pressing.<sup>17</sup>

On the other hand, Professor Rhode points to a dramatic increase in recent years in pro bono work throughout Europe, Canada and Australia and, to a lesser extent, South America and

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<sup>15</sup> Ibid 5.

<sup>16</sup> *Rondel v Worsley* [1969] 1 AC 191.

<sup>17</sup> Rhode, above n 11, 102 (footnotes omitted).

Asia. She attributes this in part to a persistent and growing inadequacy in legal services, coupled with the increasing influence of American law firms and legal culture.<sup>18</sup> Whether or not one accepts in its entirety that theoretical perspective, it suggests a combination of historical and international influences on the role of pro bono legal service in contemporary societies.

It is appropriate, against that background, to focus briefly upon the provision of pro bono legal services in Australia. There is a general, although not completely uniform, understanding of what constitutes the provision of pro bono legal services in Australia today. A Law Council Policy Statement released in September 1992, defined pro bono legal services in the following way:

1. A lawyer without fee or expectation of a fee or at a reduced fee, advises and/or represents a client in cases where:
  - (i) a client has no other access to the courts and the legal system; and/or
  - (ii) the client's case raises a wider issue of public interest; or
2. The lawyer is involved in free community legal education and/or law reform; or
3. The lawyer is involved in the giving of free legal advice and/or representation to charitable community organisations.<sup>19</sup>

The National Pro Bono Resource Centre (NPBRC), which was set up as an independent non-profit organisation to encourage and support lawyers and law firms to provide high quality pro bono legal services, has a similar although not identical definition:

1. Giving legal assistance for free or at a substantially reduced fee to:-
  - (a) individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or

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<sup>18</sup> Ibid.

<sup>19</sup> Law Council of Australia, 'Pro Bono Publico — For the Public Good' (Policy Statement, 5 September 1992).

- (b) individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or
  - (c) charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good.
2. Conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
  3. Participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or
  4. Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.<sup>20</sup>

The NPBRC definition excludes from the concept of pro bono service the provision of legal assistance to a person for free or at a reduced fee without reference to whether he or she could afford to pay for that legal assistance and without reference to whether his or her case raised an issue of public interest. It also excludes free first consultations with clients otherwise billed at a firm's normal rates, legal assistance provided under a grant of legal assistance from Legal Aid, contingency fee arrangements, the sponsorship of cultural and sporting events or work undertaken for business development and other marketing opportunities and time spent by lawyers sitting on the boards of community organisations.

It is interesting that both the Law Council definition and the NPBRC definition include reference to a public interest criterion. The public interest is sometimes used as a kind of filter to separate deserving cases from undeserving cases. The franchisee who may be a victim of contractual wrong-doing versus the franchisee who wants to find a way of escaping from contractual obligations represent two cases which could attract a distinction based on a public interest criterion. It is, of course, arguable that the provision of legal services is in the public interest regardless of the ethics of their beneficiary. It can be accepted that judgments which try to distinguish between deserving and undeserving cases are necessary simply because pro bono legal resources are limited and there has to be some way of allocating priority. Nevertheless, the difficulty of those judgments should not be under-estimated. One could readily find voluble non-lawyers with loud voices in the media

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<sup>20</sup> National Pro Bono Resource Centre, *National Pro Bono Aspirational Target Statement of Principles*  
<http://www.nationalprobono.org.au/page.asp?from=8&id+169>

who would assert that the pro bono representation of a person such as Rachman's enforcer Norbert Rondel, would not serve the public interest. They might argue that the sooner such a person is locked up and the key thrown away, the better for society. I venture to say, however, that most lawyers in this country would think that the public interest is served in respect of a 'Rondel', as it is for all litigants, by enabling the judgment of guilt in a criminal case, or of liability in a civil case, to be made according to the rule of law after a fair and open hearing in which each party is competently represented. The proper process by which judicial determinations are reached, affirms and reaffirms in a public way equality before the law however deserving or undeserving the individual may be of sympathy or condemnation. That public interest dimension is particularly acute where personal liberty is at stake. The more difficult question is how, if at all, does one draw the line in other areas of the law which may involve civil litigation, alternative dispute resolution or transactional advice.

There is a substantial commitment by the legal profession at various levels in Australia to the provision of pro bono legal services. The NPBRC in 2007 proposed an aspirational target of a minimum of 35 hours of pro bono legal service per lawyer per year.<sup>21</sup> A report by the Centre published in October 2013 noted that an average of 33.6 hours of pro bono legal work per lawyer was undertaken in the previous financial year. The economic value of those services was substantial. The value can be inferred from the results, five years earlier, of a survey conducted by the Australian Bureau of Statistics. That report based on that survey estimated the value of pro bono legal services in the 2007/2008 financial year at \$238 million. \$26.6 million of that amount comprised work undertaken in providing free community education and/or law reform. Qualified legal staff spent an estimated 955,400 hours providing pro bono work in that financial year. The majority of that time, that is 810,200 hours, was spent on clients other than those covered by community legal centres.<sup>22</sup> Pro bono activity is supported by the profession at an institutional level, by governments providing incentives to firms who engage in such activity and by law schools through clinical legal education programs.

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<sup>21</sup> National Pro Bono Resource Centre, *National Pro Bono Aspirational Target*  
<http://www.nationalprobono.org.au/page.asp?from=8&id+169>.

<sup>22</sup> Australian Bureau of Statistics, *Legal Services Australia 2007-08* (24 June 2009)  
<http://www.abs.gov.au/AUSSTATS/abs@nsf/Lookup/8667.0Main+Features82007-08>

This presentation has focused upon the domestic market for legal services. Pro bono activity extends beyond our borders. Australian lawyers and judges are involved in voluntary programs in capacity building, legal education and judicial training in countries in and outside our region. International law firms are providing pro bono legal representation to post-conflict countries and emerging democracies and markets. As one commentator, Maya Steinitz has written:

the trend of international mega law firms undertaking pro bono representations concerning rule of law development should be understood as part of an even larger phenomenon — that of the growing and changing nature of the 'corporate responsibility' movement.<sup>23</sup>

The involvement of the legal profession within Australia and elsewhere in the provision of pro bono legal services internationally is a topic which merits a paper of its own. It is, however, a dimension of pro bono activity and opportunities which must be borne in mind when discussing this topic.

The provision of pro bono legal services be they advisory, transactional or involving representation in dispute resolution mechanisms, may serve the public interest in different ways. A person properly advised may be able to resolve a legal problem in accordance with the law and avoid costly and time-wasting mistakes. A competently drawn transactional document may ensure that rights and liabilities are properly defined and unnecessary disputes avoided. A dispute fairly resolved by negotiation or some other form of non-litigious mechanism, may serve the public interest in the avoidance of unnecessary litigation. A dispute resolved after competent representation before a court or tribunal stands as an affirmation, for the purposes of that case, of the rule of law even if the party represented by the pro bono lawyer does not succeed. In some cases the service provided to a particular client will help to resolve a disputed question of public or private law affecting a larger class of persons. The provision of pro bono legal services in such a case may enliven the power of precedent and in that way serve the public interest.

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<sup>23</sup> Maya Steinitz, 'Internationalized Pro Bono and a New Global Role for Lawyers in the 21st Century: Lessons from Nation-building in Southern Sudan' (2009) 12 *Yale Human Rights & Development Law Journal* 205, 213.

The public interest may also be served by the example set when a legal service provider acts pro bono. That action may not make headlines but it will be known to the person who benefits and, in all probability, to that person's family, friends and acquaintances. A multiplicity of small expanding ripples of awareness can inform a whole of community consciousness of the public interest dimension of what the legal profession does. When the profession then speaks about changes to the law, which might affect the rule of law or the independence of courts or the profession itself, there may be more who hear it not as a special pleading in support of self-interest, but as an expression of a wider commitment to the proper working of the legal system.

The public interest served by the provision of pro bono legal services can be equated to its public benefits. The answer to the question *cui bono?* — who benefits — is the 'whole community'. The benefits should not be overstated. The provision of pro bono services is an important aspect of the work of the legal profession. It has considerable symbolic significance. However, its practical significance is limited. It cannot, for example, overcome the systemic problems of cost and delay which continue to bedevil our dispute resolution processes despite the decades' long efforts of leaders in the profession, courts and court administrators, and governments. Everybody here should be aware of the magnitude of that systemic problem and the continuing urgency of the need to do something about it. Doing something about it involves asking hard questions uninfluenced by the economic interests of the profession about what is essential to pretrial preparation and the conduct of litigation. It may also involve a paradigm shift to treating court time as a finite resource to be allocated to each case according to reasonable requirements, but subject to fixed limits which can be varied only in the most exceptional circumstances. The profession's contribution to responding to these and other systemic problems of the cost and accessibility of legal services is, perhaps, the most important pro bono service that it can offer.