

Making the Most of Pro Bono Opportunities

Building a Litigation Practice

GEOFFREY DERRICK AND LAUREN WEINSTEIN

Geoffrey Derrick is with Akin Gump, Washington, D.C. Lauren Weinstein is with MoloLamken LLP, Washington, D.C.

Litigation associates nationwide sometimes face tremendous hurdles in getting stand-up experience. That is due, in large part, to the decline of trials. The apex of a case is now more likely to be summary judgment briefing, a key deposition, or mediation. If the court grants argument on a dispositive motion or in an appeal, a partner will likely handle it.

Associates doubtless get valuable experience in fee-paying cases but often struggle to gain quick and frequent stand-up experience. An excellent way to obtain that experience is by building a personal pro bono practice, helping the community while developing valuable litigation skills.

Cultivating a personal pro bono practice offers litigation associates additional opportunities for courtroom experience and business development early in their careers. Pro bono work also forces associates to learn case-management skills and case-winning strategies—they are running the show after all. They gather facts from the ground up and make crucial decisions about how to litigate, all with the support of dedicated partners overseeing their work.

Many firms have already developed robust institutional pro bono practices. But associates can also find valuable opportunities by developing pro bono work in their own areas of interest. Doing so allows associates to contribute to essential, justice-oriented

work that they care about personally while cultivating critical litigation and business development skills.

Some attorneys might bristle at the suggestion that developing a personal pro bono practice is time well spent. The reality of corporate litigation is that associates may have little free time for pro bono work. And, of course, billable work is what keeps the lights on.

But associates in litigation practices should shed their hesitations about building a personal pro bono practice. Firms and clients alike want their litigation attorneys to actually have litigation instincts. Developing one's own pro bono practice is an invaluable way to hone those instincts, become a better lawyer, and develop the experience that pays dividends over the course of a career.

So how do you develop a personal pro bono practice?

Developing a Pro Bono Practice

Pursuing federal pro bono appeals, criminal pro bono matters, and amicus brief opportunities are three ways in which associates can develop their own pro bono practices. Note that these are just ideas: There are many other great prospects, as well, in landlord-tenant disputes, immigration matters, and civil rights

cases, to name only a few. When brainstorming how to develop a pro bono practice, what is most important is to identify an issue area in which you are genuinely interested and want to dedicate your time.

Federal courts of appeals provide substantial opportunities for pro bono lawyers. Many circuits have pro bono coordinators who can explain the steps for you to take on a case and ultimately assign one to you. Many firms already have relationships with the pro bono offices of federal courts of appeals and may be able to facilitate pro bono representation.

Pursuing federal appellate pro bono opportunities is time well spent, not a luxury that litigation associates should pursue only when billable work slows down. Federal pro bono appeals are a goldmine for associate drafting and advocacy experience. They provide significant opportunities for honing an associate's issue-spotting and legal-writing skills. The associate is tasked with delving into the record and researching the relevant law to determine the best issues to raise on appeal. Once that part is done, the associate must make the most persuasive case possible, drafting the brief from soup to nuts.

An associate, of course, is less likely to have an opportunity to argue an appeal in a paid case. After all, the client only gets one shot at the argument—why not give it to the head of the appellate practice or another partner who has a proven track record of success? By taking on pro bono appeals, however, associates can develop their own proven track records and better position themselves to ask for or be given an argument in a paying case down the road. Some federal courts of appeals (the Seventh and Ninth Circuits, for example) will even guarantee arguments to attorneys who take on pro bono matters.

Another area to consider when thinking about building your own pro bono practice is criminal representation. Many litigation associates hated criminal law in law school and have no desire to make it central to their practice. Yet, criminal pro bono work offers a wealth of meat-and-potatoes litigation experience. Criminal representation is one of the largest untapped pro bono resources for associates because there is such tremendous need. Courts arraign and sentence defendants in every jurisdiction every day of the week.

What specific opportunities does a criminal pro bono practice provide? One option is to second-chair a criminal trial with the local office of the state or federal public defender. The federal defender in the Eastern District of Virginia, for example, regularly offers second-chair opportunities. Representing a criminal defendant at trial offers associates opportunities that include client counseling, motions practice, negotiation with the government, and jury trial practice. Most public defenders have so much trial experience already (not to mention other cases to deal with) that they are glad to give pro bono attorneys as much stand-up experience as they can handle.

Serving as pro bono counsel in a criminal trial provides opportunities to open, close, and examine key witnesses. And the seasoned, first-chair public defender can provide valuable mentorship through novel litigation situations that, as a practical matter, seldom arise in the corporate context, including negotiations with the government, witness proffers, and sentencing hearings.

But what if the pro bono client ultimately chooses to plead guilty? Handling the earlier stages of a criminal pro bono matter still permits associates to develop useful litigation skills. Nearly every billable litigation matter entails a fact-finding investigation and discovery practice; so too does every criminal trial matter. Even if the client pleads guilty, you will learn how to handle clients, conduct discovery, and develop a winning theory of the case. All of those skills are directly transferrable to billable practices.

Another option is to handle a client's direct appeal from a criminal conviction in state court. This involves counseling incarcerated clients, reviewing the trial record, briefing issues on appeal, and arguing the case. Combing a pretrial and trial transcript for legal error is a fantastic chance to issue-spot: It demands the same rigor and analysis that more senior attorneys

apply when preparing deposition outlines and strategy memos in billable cases. Associates should not overlook the opportunity to do essentially the same record review early on in their careers.

Besides mechanical litigation skills, working on a criminal case offers associates a new perspective. There are few lawyering opportunities more fulfilling than the opportunity to fight for a client's liberty. And it is hard to think of anything that would motivate an associate more to sharpen his or her listening, investigative, writing, and critical thinking skills.

Strategies for Finding Criminal Work

So how can associates cultivate criminal pro bono work? It starts by convincing a partner—ideally a former public defender or prosecutor who shares the associate's desire to affiliate the firm with providing representation to indigent criminal defendants—to supervise the matter, assuming the firm can secure it. The associate then has to connect with the public defender's office to try and get a case assigned.

Does the public defender's office have a committee of pro bono firms that offer it assistance? As with developing any new business, it will be difficult to grow the firm's relationship with the public defender's office from scratch. Associates should ask colleagues at their firm and at peer firms whether anyone has a relationship with the local state or federal public defender. If so, get an introduction; if not, take the initiative to email the public defender's office to talk about opportunities for you to help.

Here are some other strategies you might try:

Ask whether any colleague previously worked as a public defender or local prosecutor. If so, enlist that attorney in efforts to instill the public defender's trust in the firm's competency to handle matters.

See if any law firm colleagues are members of the local Criminal Justice Act (CJA) panel. If so, see if the colleague would accept an assignment on which you could work.

Reach out to nonprofits that litigate criminal law issues. Those issues run the gamut from suits challenging conditions of confinement to post-conviction habeas corpus motions. For example, the affiliate offices of the national Innocence Project recruit law firm attorneys to investigate claims of actual innocence and file the attendant habeas corpus challenges or to seek and obtain pardons and compensation from the state for exonerees.

Nonprofits are typically understaffed but tightly control their dockets. They may not need help on their high-profile cases, but associates can get a foot in the door by offering to handle smaller matters. Stay in touch with the nonprofit's attorneys and show a genuine interest in their work. Attend the nonprofit's fundraiser to foster the relationship. If nothing else, you will learn how to build relationships and work a room—key parts of any business development strategy.

By doing criminal pro bono, associates can deepen (or establish) their firms' relationships with local state and federal public defenders' offices or national nonprofits focused on particular criminal law matters. Associates should consider partnering with public defenders' offices or not-for-profit organizations focused on criminal justice reform like the Innocence Project or the MacArthur Justice Center to provide pro bono services in criminal cases.

Writing Amicus Briefs

Writing amicus briefs is another valuable way to build a pro bono practice and develop litigation skills along the way. Some attorneys view amicus briefs as a drag: Judges sometimes don't read them; and, at their worst, they can devolve into glorified law school papers. But an amicus brief with a powerful messenger or a powerful message can be very effective. Moreover, drafting amicus briefs offers associates valuable drafting experience and the opportunity to build their own reputations.

Amicus briefs are most often filed in the Supreme Court (at the merits or certiorari stages) or the federal courts of appeals. But they are becoming increasingly common in federal district courts as well.

Drafting an amicus brief teaches an associate the essential mechanics of litigating—formatting the brief; complying with federal, local, and judge-specific rules; editing until the draft is file-ready; and e-filing. For associates in practices that don't do much writing or for more junior associates who rarely have an opportunity to draft an entire brief from scratch, they can provide invaluable legal writing experience.

Amicus briefs also often involve clients exercising tight editorial control over content. Learning to channel the client's voice and position and learning to work with opinionated clients are essential facets of client service for all litigators. It can be difficult for junior associates to learn client-management skills. Taking the lead on an amicus brief provides junior associates the opportunity to develop those essential skills.

Amicus briefs also often contain policy arguments grounded in history or another social science. Working on those briefs allows associates to keep their non-legal research skills fresh by, for example, visiting the library to research and read primary sources. There is more to litigation research than running searches on Westlaw or LexisNexis, and the best litigation associates have a broader set of research skills.

Finding Amicus Work

How can associates cultivate work on amicus briefs? Keep your ear to the ground for cases that your friends or classmates are handling. They may be looking for pro bono authors to pair with

law professors or nonprofits who are interested in weighing in on a case but who lack the resources to draft a brief themselves or to retain their own counsel.

Run a search for the latest amicus briefs signed by any attorney at the firm. Contact that attorney and learn more about his or her relationship with the amicus. If the attorney expects to work with the amicus again, express your interest in helping out. Or, better yet, familiarize yourself with the mission of the amicus, identify recently filed cases that may particularly interest the amicus, and suggest to the partner who has a relationship with the amicus that you pitch a brief that can be filed at the preliminary injunction, motion to dismiss, or class certification stage, or any other critical point of the case.

Federal pro bono appeals are a goldmine for associate drafting and advocacy experience.

Associates can also create relationships with amici on their own. Contact law school professors who have submitted amicus briefs with law firm assistance or law school classmates and friends working at nonprofits that submit amicus briefs. Or identify potential organizations to cold-call, but first identify several high-profile federal cases in which you suspect the amici have a strong interest or in which they would be a particularly strong messenger.

Submitting a few amicus briefs in an issue area can help an associate develop a reputation in the legal community. That reputation can snowball into other opportunities. You might be invited to sit on the board of a nonprofit or to speak at a panel. Those sorts of opportunities will allow associates to expand their networks and cultivate relationships that may lead to billable work down the road.

What's in It for the Firm?

Litigation partners understand the situation and usually are supportive. They know that junior litigation associates often fail to receive as much stand-up experience as they might like. Developing a personal pro bono practice creates opportunities for litigation associates to develop critical litigation skills.

Equally important is that a pro bono matter can provide an associate with a meaningful opportunity to take control of his or

her career. It's a dry run at flexing the same project-management and business development muscles that more senior attorneys use in creating a niche to market both within the firm and to clients. And it provides opportunities to develop client-counseling and management skills.

A personal pro bono practice also serves a more practical business development goal—networking. Building a pro bono practice forces associates to think beyond the work being assigned within the firm. It affords associates early opportunities to practice the attorney-to-attorney networking that can lead to productive client contact. It draws on the same business development skills relevant to generating billable work: mining your network to see where opportunities might lie. Perhaps a law school classmate is working at the local legal aid office. Maybe a family friend works at the federal defenders' office. Or perhaps a law school professor or classmate is looking for pro bono authors for amicus briefs.

Trying to drum up one's own pro bono work is not only a good way to practice business development skills; it can also expand one's network outside the firm. Let's say, for example, an associate volunteers to write an amicus brief for a public interest organization. That contact could blossom into co-counseling with that organization on high-profile impact litigation or becoming involved with the organization's board of directors. Nonprofit boards often include prominent in-house attorneys who may become paying clients.

Originating pro bono work allows associates to grow their professional networks or reenergize old connections. In the best of cases, cultivating a pro bono practice provides a gateway to mentorship from outside one's law firm, which can provide a valuable perspective and future opportunities. In the worst case, you meet an old colleague for coffee and catch up.

The best law firms empower litigation associates to take ownership of their personal pro bono practices and work to grow them. Those firms provide opportunities for pro bono work and encourage their associates to pursue that work. Those firms may also fund associate networking opportunities with pro bono clients, including, for example, covering seats at a nonprofit's annual fundraiser.

Above all, a strong law firm pro bono practice does not presume that associates should handle only the pro bono work offered to them. Offering associates opportunities for pro bono work is important, particularly to reflect the firm's belief in the importance of pro bono. But the best pro bono practices expect associates to cultivate pro bono business of their own while balancing their billable matters and other obligations. Asking associates to perform only the work that partners hand them is a recipe for weak business development skills.

Litigation associates want stand-up and business development experience. A personal pro bono practice is one of the best ways for associates to get that experience early in their careers. ■