

Pro Bono Lawyers: A View From the Bench
 Judge Jay Quam
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On June 5, 2008, Judge Jay Quam spoke at the annual meeting of the Volunteer Lawyers Network, where he chose to speak personally, recognizing the value each pro bono lawyer brings to not only the client, but to the judge who presides, and to the justice system in general. His message deserves an even larger audience, and so we include it in this issue that, appropriately, focuses on professional values.



Judge Jay Quam

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When I look around this room and see who is here, and reflect on what you do, I conclude that there are few groups of people I admire, and respect, as much as you. Combining that, with my nature, I feel a lot of pressure to give you something memorable and profound.

Memorable and profound are probably unrealistic, but I can give you what I promised I would give you: (1) my perspective on lawyers, and especially those that do pro bono; and (2) why the work you do—and especially the pro bono work you do—has such an impact on the courtroom, the legal system, and the clients you represent.

Not to foreshadow too much, but you will see that I regard lawyers very highly, and lawyers who do pro bono especially highly. And I feel that way, not based on some feel-good ideology that believes that there is some intrinsic value in giving time and effort for the sake of giving without regard for the outcome. Instead, as I will discuss, when you do pro bono work, you have a profound, and sometime *lifesaving*, effect on the clients you represent, and the system and ideals we all serve. I don't expect you to just take my word for it. My goal is to convince you of how much a difference you make, with relatively little effort, in the lives of the unfortunate.

I'll start with how I feel about lawyers. Being on the bench, I am still only one figurative step away from lawyers and the practice of law. And from that perspective I have come to deeply appreciate the importance, and value, of lawyers. I especially appreciate those who do pro bono.

Even though this group, and this talk, is mainly about pro bono, I think you can better understand my view of lawyers who do pro bono if you first understand my view of lawyers, and the legal system, in general. It helps bring it all into better context.

I'll start that discussion with what many see as a tired quotation that you all learned, at the latest, your first year of law school (In my case, it was on my first day of law school on the back of a T-shirt of a 2L). You know the quotation, spoken by Dick the Butcher in Shakespeare's *Henry VI*: "First thing, we'll kill all the lawyers!"

The quotation may be a bit worn, but I haven't found a better starting point for a discussion about the role, and value, of lawyers in our society.

There are two interpretations of that quotation. The first interpretation is a cynical one, though a minority one: That is, that lawyers should be stamped out because they are nothing more than a bunch of—and you can fill in a host of more colorful descriptors than this—valueless, selfish, morally bankrupt parasites.

It is understandable that the general public may hold this view: What was the last story you read about lawyers in the mainstream media? It was probably the Millberg Weiss lawyers who are going to prison. And the one before that was probably similar. The fact is that the good work that lawyers like you do is not newsworthy. So the general public has a negative view of lawyers.

The second interpretation of the quotation—the "kill the lawyers" one—is far more favorable, and, in my opinion, far more accurate. That interpretation is that lawyers are the powerful protectors of a system that provides justice, not

just to the rich and powerful, but to the poor and weak. So if you want power that is not checked by a system of justice, you have to eliminate those who hold that power. In that context Dick the Butcher was right: You have to kill the lawyers.

I'm pretty sure that I am right on this one. Support for my position is even found within the play itself. In the continuing dialogue in the play, the evil aspiring tyrant, Cade, rues the power of lawyers. He laments (and I am paraphrasing a little) that "through the power of pen and paper, the lawyer can destroy a man."

He knew what lawyers could do to stop tyranny, and he, not surprisingly, didn't like it. He recognized the power of the lawyer, and knew that he needed to kill them if he were to rule without regard for their power.

Fast-forward to the present day. Remember last February when Pakistan was on the brink of martial law and dictatorship? What was the first action the man in power attempted to take when he tried to consolidate his power? He tried to rig the courts by dismissing the judges who did not support his efforts.

And could the judges stop it? No. Of course, you know who did, because you have seen the footage of the suit-and-tie-wearing Pakistani lawyers getting beat up because they would not allow their legal system to be up-ended that way. They didn't have guns, but they had ideals, courage, and power. And they *won*.

I won't belabor the point, but do you think there would be light shed on practices in Guantanamo if it weren't for lawyers stepping up in the face of strong governmental resistance? Whether or not one agrees with the practices that those lawyers exposed, it can hardly be argued that there is good in at least knowing what our government is doing there.

There are countless other examples, international and local, where lawyers have stepped up, used their power, and done something that either changed the world for the better or saved it from getting worse.

The power that Shakespeare recognized, and that is evident in the examples of Pakistan and Guantanamo Bay, is the power that is found throughout the legal profession today. There are also the same ideals and courage.

But in many cases, those ideals don't follow through to the individual level.

This is the part where I talk about you.

At virtually every lawyer's swearing-in ceremony there is some notable person who talks about the value, and importance, of pro bono. All those listening feel proud to be going in to a profession which includes as a professional ethical obligation the requirement to do pro bono.

And, as they stand, they raise their right hands, and, in the spirit of all the great and noble things that lawyers have done before them, give their *sacred oath* that they will satisfy their ethical responsibility to perform pro bono work.

I have no doubt that most new lawyers have a strong commitment, and the best intentions, of doing pro bono work. Yes you, and nearly every lawyer passing the bar, at one time wanted to make the world a better place—or keeping it from getting worse—by representing those people, and those causes, in need.

But, as you know, the practice of law is hard, even when it is for pay. For most people, it is even harder to do for free. The pressures of the business of law, and the pressures of leading a satisfying non-legal life, are enormous. Those pressures have a way of slowly (and often very rapidly) grinding a new lawyer's idealism, and the commitment to doing pro bono that goes with it, to dust.

I completely understand that happening: How many of you, on a beautiful Friday afternoon where you only had work on a pro bono case to do, didn't feel the urge to take off the afternoon to spend time with your kids or your partner, or go golfing, or do something to take you away from the relentless practice of law?

And don't tell me that you haven't, after spending 20 hours getting ready for and trying a pro bono case, thought about how you *really* needed to do some work for a paying client?

And who of you hasn't done the math calculating, if you would just bill clients instead of doing 50 hours of pro bono per year over the last 20 years, how much more money you would have made?

When you look at it objectively, there are few rational, tangible reasons for you to do pro bono. And despite an

occasional article that tries to argue the contrary, it is against all economic common sense to do pro bono. If cold rationality and economic common sense were what drove all lawyers, this would be an empty room, and there would be a whole lot more people suffering because of their need for legal help. But you are here. You are here because, somehow, you have held fast to the ideals that you held when you took your oath despite all the pressures that lead many others to put them aside. You do pro bono because it is the right thing to do. And God bless you for that. Because you have held on to your ideals, you deserve to be publicly recognized for the true heroes that you are. You deserve the gratitude of a nation that depends on your generosity.

Unfortunately, I have no doubt that most of you will never receive the recognition that you deserve. But I take some comfort in the fact that you are not in this for the recognition. You do it because it is the right thing to do. You are the best of the best. Not only are you good people for doing pro bono, but what you do tremendously benefits the courtroom and the people you represent.

I see that from the bench day in and day out. The benefit you bring to the courtroom is evident to me every time a lawyer is in my courtroom. To state it simply, but truthfully: You have a profound, and sometimes *lifesaving*, effect on what happens to people who come into the courtroom. And you have a huge, and positive, effect on the operation of the courtroom itself.

This is the part where I try to explain to you, from my perspective, why you are so incredibly valuable.

To understand how valuable you are from the judge's perspective, you have to understand our motivation: Every judge really, really, really wants to do the right thing. And if we get it wrong, we don't have anyone to blame. The buck stops with us.

The law provides few constraints on what the right thing is. Every once in a while the law dictates what the "right thing" is, but nearly always the law is permissive enough for us to rule for either party depending on what the *facts* are. So, in the very large majority of cases, the facts are what we need to guide us to the right decision. One of the biggest nightmares a judge has is to make an uninformed decision on a close case where there is something significant at stake. Maybe it is someone's liberty, or the custody of a child. We are always afraid that important facts might be out there that we don't know, but that would have changed our decision. And we sometimes think about whether we made the wrong decision and subjected some innocent person to wrongful suffering.

And the consequences are usually greater for those people you represent pro bono. They are those who can't afford a lawyer because they are the ones most often fighting for the things that are at the heart of survival: protection from physical, sexual, and mental harm, food, shelter, and medical care.

As I'll now explain, you are so valuable because lawyers take the judge's nightmare away. As I mentioned, a judge's greatest need is to be fully informed, and that need coincides, *exactly*, with what lawyers do. From the judge's perspective, you perform two functions essential to the legal system: You are professional story gatherers, and professional storytellers. When I have lawyers in my courtroom, I know that in a typical case they have spent hours, if not days, gathering their client's respective stories. They have investigated, analyzed, and exposed everything that may shade their client's story.

Even when you have only spent a little time with a client, you know how to ask questions to get the essential information. You may not get everything, but you will certainly get the important stuff. So when I hear a case where lawyers are representing the parties, I know that people with trained eyes have looked to see what should be presented to me. Simply put, I don't have to wonder what else is out there that the party didn't know to tell me, or, for some reason, could not tell me. Because you have already looked. And that is a great comfort to me. And an even greater service to your client. That's the story-gathering function, and it is more important to me as a judge than you will ever know.

The storytelling part is equally valuable. For starters, you have to appreciate how strange and unfamiliar the courtroom is to most people. The list of important things you take for granted, but unrepresented people don't know, is a really long list. I'll name a few to illustrate the point: You know the sequence involved in your courtroom appearance, the law, the rules of evidence, the protocol for presenting evidence, you know when to speak, you know when not to speak, you know how to brief, and you know what is relevant and what is not.

To top everything off, you put it together in a way that makes sense for me. I just have to sit there and listen. I know what you want me to conclude, and why you think I should draw that conclusion. Nothing is easier for a judge than knowing both sides of a case, and simply choosing which one is the better one. When that happens on both sides, the adversary system that is at the heart of our system of justice works. And, as a judge, I am confident that I am

making a decision that is as good as it can be because I know that all the relevant facts have been presented to me. To put it simply, lawyers make my job easier, and they help me sleep better at night because I believe that, with the lawyer's help, I have done the right thing.

With all that lawyers do, you may, very appropriately, ask: How in the world does our adversary system function when there are not adversaries (at least trained ones) in it? The answer, I have found, is "not very well." Given the complexities of our court processes, as well as the difficult skill of presenting effectively on anything that matters, it is not hard to understand why it does not work well.

Think about some pretty highly functioning, well-educated person you have represented. And imagine how that person would perform if plopped into some very important, and very emotional, proceeding. That person would have no clue where to stand, what to say, when to talk, and when to stop talking. And they have more resources and skills to call on than most people who find their way into the courtroom. If a talented, educated person doesn't perform well in the courtroom, how can you expect more of people who have some of the challenges that judges see routinely—those with mental illness, chemical addiction, don't speak English very well, or are challenged in some other way? You might just as well put them on a high wire and tell them to walk across it, as tell them to prepare and present their case—a case involving some important aspect of their *lives*—in court.

Our legal system is all about giving each person a chance. And without someone helping them, they don't stand a chance. What is the judge to do? The judge, so badly, wants to do the right thing.

Whether because of time constraints, or ethical constraints, here's a short list of things judges need to do, but can't do, to make a good decision that would make them comfortable:

Educate the parties about the law that applies to their case so they know what claims they can make and what claims they can't make, and what evidence is relevant. With you, that is already done. Without you, we either spend precious time trying to explain it, or, if we don't have the time, have no choice but to leave the party in a legal fog;

Educate the parties about the procedures that need to be followed to present their case so they know what to present, and how to present it. With you, that is already done. Without you, many important documents never get filed, and many important witnesses never get heard. I frequently hear at trial that some witness can come in and testify on some crucial matter, and it hurts to tell them that they needed to be here today;

Teach them how to present themselves coherently and concisely. With you, that is already done. Without you, I often see two equally ineffective styles. One style is the person who is so intimidated that he or she can hardly speak. The other, who apparently watches a lot of Jerry Springer, acts as though he or she will get an advantage by talking over the other party AND the judge. It really is more like chaos; and

Probably most importantly, investigate the parties and the dispute so we understand the important facts upon which to make our decision. With you, that is already done. Without you, I don't have the time to get the story, and couldn't do it ethically anyway.

Being unable to do even a few of the essential tasks that need to be done, judges muddle through as best we can. But we know, in our hearts and in our heads, that justice is really not being done. There is always a nagging feeling that we made the wrong decision because we didn't know what we needed to know. And that innocent, undeserving people are suffering because of it. And if only a lawyer would have been willing to take the case, maybe we would have made the right decision, so there would be fewer innocent people suffering.

I just had a trial yesterday involving a custody fight over a little girl. I have to decide where this little girl will spend the rest of her childhood, and my decision will have a very significant impact on her. I'd dread that decision, but there were pro bono lawyers who agreed to represent the main parties. I can't overstate how much better a decision I will be able to make because they were there. And how much that child will benefit because of the lawyers.

Lawyers representing clients pro bono can give them a chance. And as I hope to have impressed on you, in many cases, *only* lawyers can give them a chance. Of course, that doesn't mean that you will win every case, or that you should. But at least you can give them what the legal system promises them: Their day in court, and to be fairly heard.

The last thing I will say in praise of the lawyer doing pro bono is this: You may not realize how much you are

helping even when you are only spending a little bit of time for your client. You may have the mind-set that you need to be fully prepared and fully educated about the law before you can represent someone effectively. That's something you hear all the time as an excuse for not taking family law cases.

I'm all for full preparation and education, but what I, and clients, really need is someone to talk to them for a few minutes to get their story and tell it to me! Remember: The law doesn't limit me to much, so what I really need to hear is your client's story.

And you are professional story gatherers and storytellers. Believe me: ANYTHING you do is a thousand times better than what clients will be able to do themselves. And to emphasize an important point, I repeat: ANYTHING you do is a thousand times better than what clients will be able to do themselves.

I know family law seems complicated and intimidating, but believe me on this one as well: In 30 minutes with an expert, you will know enough to be intelligible on the substantive law. Then you just need to get the facts and tell them to me. I know that uncertainty makes people feel uncomfortable, but, from my perspective, I'd rather see lawyers putting a little of their pride and ego aside so that they can help people who need it.

There are lots of places where you can help with a relatively minimal time commitment that has a major effect on the people you serve and on the legal system. For instance:

Say you meet and represent a person seeking an order for protection (OFP). It may be that just your presence results in the person accepting the OFP. But even if it goes to hearing, and you are there reluctantly because you have had very little time to prepare, believe me on this one: If you go through it anyway—do your best and just wing it—you will have done immeasurably better than if the person did it himself or herself. Believe me on this because I have seen many people try to do it themselves, and many people fail.

Or you may serve clients and the system by keeping them out of court.

Say you meet a person for 15 minutes at the Legal Access Point clinic, hear the story, and conclude that the claim has no merit. If you convince that person to simply let it go, you have saved that person the stress and expense of what could be years of litigation. And you have saved the court the very same thing.

To sum it up, lawyers, my new job as a judge has given me a much greater appreciation for the good that lawyers do in general. And, it has given me an especially strong appreciation for those who somehow find it in themselves to give their time and skill for free to those who need help the most, but who have the least.

If you ever doubt your value to the clients who cannot afford to pay you, to the court, or to the system, please call me. You truly are unsung heroes of our time. I will say it one last time: You are the best of the best. For that, I thank you, and will forever be grateful for what you do.