

LOS ANGELES

Daily Journal

THURSDAY,
MAY 18, 2006
Vol. 112. No. 96

— SINCE 1888 —

OFFICIAL NEWSPAPER OF THE LOS ANGELES SUPERIOR COURT AND UNITED STATES SOUTHERN DISTRICT COURT

Pro Bono Has ‘Benefits Beyond the Heart’

Public-Interest Firms Can Reap Rewards When Co-Counsel in Private Practice Share Their Fees

By Anat Rubin
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LOS ANGELES — When a federal judge told Los Angeles County it could not close a rehabilitation center providing specialized medical services to severely injured or disabled residents, the public-interest law firms who filed the suit celebrated.

When checks for attorneys’ fees came months later, those firms had even more reason to celebrate.

Chicago-based Kirkland & Ellis, whose Los Angeles office co-counseled pro bono on the class action, was donating \$460,000, its share of \$1.75 million in attorneys’ fees, to the public-interest firms.

“It makes a huge difference for us,” Eve Hill, executive director of the Disability Rights Legal Center, said of the roughly \$208,000 the center received from Kirkland & Ellis. “It’s 10 percent of our budget this year.”

The American Bar Association encourages private firms to contribute an “appropriate portion” to organizations or projects that “benefit persons of limited means.”

While several state bar associations make similar recommendations, most, like California’s, have no policy.

“It’s sort of left up to the individual pro bono firm,” said California State Bar spokeswoman Diane Curtis.

Policies vary from firm to firm. Some firms have foundations or pro bono budgets, said Esther Lardent, president of the Pro Bono Institute at Georgetown University Law Center. The institute evaluates law firms’ pro bono programs.

A small minority of larger firms may have a policy of putting fees into general revenue, but that is unusual, Lardent said.

Even firms without such a policy may put some pro bono fees in general revenue for strategic reasons, she said, especially when the case creates controversy within the firm over whether it should be taken on or is expensive to litigate.



ROBERT LEVINS/Daily Journal

“This \$208,000 is by far the largest we’ve ever gotten,” Pegine Grayson, left, Western Center for Law and Poverty executive director, said of a check from Kirkland & Ellis, whose partner Jeff Davidson, right, co-counseled with the center on the appeal of a class action.

Lardent said a national survey conducted by the Pro Bono Institute found that “the issue of awarded attorneys’ fees never came up for some firms. It’s only when you’re talking about civil rights matters or environmental cases that it’s an issue.”

Those cases are more likely to result in hefty attorneys’ fees.

San Francisco-based Heller Ehrman donates part of any fees to public-interest firms, said Bob Borton, former head of the firm’s pro bono committee. The other portion, he said, “just becomes a part of the firm’s general revenues.”

Lardent said putting the fees into general revenue is “one way of underscoring that pro

bono is not a revenue drain.”

Kirkland and Ellis also donated \$208,000 to the Western Center for Law and Poverty in the rehabilitation center case, said Executive Director Pegine Grayson.

“This is by far the largest we’ve ever gotten,” she said. “Kirkland & Ellis took that money and turned around and cut us a check.”

Kirkland partner Jeff Davidson said donating that award was “by far the most appropriate thing to do.”

“Generally speaking, the firm will try to cover out-of-pocket costs,” said Davidson, who argued the rehabilitation center class action on appeal and is the Western Center’s board president. “But

if we get fees, we think it's part of our responsibility to provide those fees to organizations that depend on such awards to survive."

Kirkland's policy is not universal, Hill said. "In the seven years I've been [at the Disability Rights Legal Center]," she said, "some firms donate some of the fees, and some of them donate tables at our events. Some of them will give back the full fee, but not many."

Hill said private firms should always donate the fees, making their work "truly pro bono."

"Otherwise, it's like contingency," she said. "We make those distinctions when we honor somebody at the end of the year. You can't get both the revenue and the credit."

The American Bar Association says the difference between pro bono and contingency is the expectation of the fee.

As long as the firm or attorney accepts the case without anticipating attorneys' fees, the work performed, even if fees are collected, still will count toward the firm's donated hours.

This is especially important to top firms, who use pro bono work as a recruiting tool.

"The vast majority of students at top-flight schools specifically asked most recruiters about the details of their pro-bono policies," said David Lash, managing counsel of Pro Bono and Public Interest Services at O'Melveny & Myers.

"It's a big tool for recruitment, and it's a big tool for retention," he said.

Pro bono work "has benefits beyond the heart," Lash said. "It offers fabulous hands-on training for lawyers. They get to be the lead person on a deal or in court. They get to conduct trials, prepare witnesses, be the main point of contact with opposing counsel and witnesses."

Various ranking systems heavily weigh pro bono hours, attracting important publicity for high-scoring firms.

Washington, D.C.-based Covington & Burling ranked first, with the most pro bono hours per lawyer in American Lawyer magazine's 2005 list of the 200 top-grossing firms.

"The number of fee awards we get are relatively small in the scheme of things," said Tony Herman, who heads Covington's public-service committee. "We handle many death-penalty cases, and none of those generate attorneys' fees, but they cost millions."

Public Counsel President Dan Grunfeld said his organization "always encourages attorneys and law firms to go after attorneys' fees and punitive damages because we want to discourage the type of behavior we are complaining about from happening again, to discourage other potential scam artists from perpetrating the same scam."

David Lash has looked at pro bono from both sides, as executive director of the legal nonprofit Bet Tzedek and as managing counsel of Pro Bono and Public Interest Services at Los Angeles-based O'Melveny & Myers.

How O'Melveny handles pro bono attorneys' fees "depends on how much the fees are and how much time the firm put into it and what the needs of the nonprofit are," he said.

At Bet Tzedek, he said, "There were times when I insisted law firms take their attorneys' fees. It would be much easier for me to come back to them and ask them to do another case later on."

When O'Melveny does "some six-figure amount of work and the court awarded \$2,000, then we'll let the organization keep it," Lash said.

Amounts that small, said David Ackerly, director of Private Attorney Involvement at the Legal Aid Foundation of Los Angeles, are almost always donated.

"When we have cases where we would get

attorneys' fees, like unlawful detainers, the firms will be awarded \$350 to \$500," he said. "Firms wouldn't ask for that."

Since it is federally funded, the Legal Aid Foundation is barred from seeking attorneys' fees, meaning the only way it can get any of that money is if the private firm it co-counsels with donates it.

"Most nonprofits really hope that firms will give them the money," Ackerly said. "But I don't think there's a firm unified stance on it."

Organizations like Public Counsel and Bet Tzedek often provide direct client services on cases that do not generate attorneys' fees, unlike larger, high-impact cases, like the ones brought by organizations like the ACLU and the Western Center.

Even when firms win large attorneys' fees, they may not collect all of them.

"The law says a firm is entitled to market rate for pro bono cases," Grayson said. "You get to bill your time at your regular hourly rate, even though you don't always get it because there's all kinds of ways in which the fees get slashed."

Ackerly said some judges "seem to think that, because the attorneys are not seeking fees in the first place, they shouldn't collect them in full. But no judge should devalue the work of the firm because it's not getting paid for that work."

The fees Kirkland was awarded in the rehab center case don't "really represent our cost and did not represent all the time we spent on this case," Davidson said.

Donating the fees may not even occur to some firms, Grayson said, but "it's still a big deal that a firm agrees to take the case on in the first place, knowing that they may not get any fees."

Law firms do pro bono cases "for all the right reasons," Grunfeld said. "And, at the end of the day, if there are attorneys' fees, they will continue to do the right thing."