



MEMORANDUM

SUBJECT: Pro Bono Institute Law Firm ChallengeSM Definition

DATE: May 22, 2007

Since its inception in 1993, the Challenge has served as a consistent guidepost to assist law firms in increasing their contributions to pro bono legal services. The Challenge Statement of Principles and Commentary, which have withstood the test of time and have indeed become the industry standard among major law firms, were carefully crafted by the Advisory Committee of PBI's Law Firm Pro Bono Project to provide meaningful guidance to peer firms to facilitate their pro bono efforts.

Over the years, the legal community has engaged in serious discussions about the nature and definition of pro bono legal services. Two broad areas of focus have received particular attention recently: (1) cases that involve awards of attorneys' fees and (2) the eligibility of non-profits, governmental entities, small businesses, and other for-profit entities for pro bono services. We are grateful to the law firms who provided PBI with their thoughts and suggestions on these and other issues regarding the Institute's definition of pro bono services. The enclosed memorandum provides a summary of the Law Firm Pro Bono Project Advisory Committee's considerations and the changes to the Commentary in these areas. We have enclosed a copy of the Statement of Principles (which was **not** revised) as well as a copy of the revised Commentary (changes are indicated in bold).

The staff of the Law Firm Pro Bono Project is available to provide your firm with confidential technical assistance regarding any aspect of your pro bono program, including developing policies for awards of attorneys' fees and developing screening criteria to determine eligibility for pro bono service. Each year the Project staff responds to hundreds of inquiries regarding "what counts" for purposes of the Challenge, providing "informal rule-making" to ensure that firms are responding to the Challenge in a uniform, consistent, and reliable manner. Later this year we will issue a revised compilation of these "what counts" determinations to provide additional guidance to firms. However, the issue of whether any individual engagement is pro bono for purposes of the Challenge is fact-based and often will require consultation with Project staff. Should you have any questions about these developments or wish to receive technical assistance, please do not hesitate to contact Tammy Taylor, Director of the Law Firm Pro Bono Project at ttaylor@probonoinst.org.

The Advisory Committee and the Project staff are sensitive to the administrative burden faced by law firm pro bono programs and are working to lessen the strain by striving to create consistency in pro bono definitions and reporting forms that are used by and submitted to various organizations and publications. To that end, we will be making changes to the Challenge reporting form in 2009, for calendar year 2008, asking for additional information, such as the

amount of time spent on transactional pro bono matters. To ensure that firm practices comply with the Challenge definition, we will also be undertaking several surveys of Challenge law firms. We ask for your cooperation in helping us to make the Challenge as effective and meaningful as possible. We will provide you with significant advance notice of these changes so that you will be able to make prospective adjustments to your firm's recordkeeping.

We have been deeply gratified by the wonderful progress, innovation, and momentum which characterize law firm pro bono programs. Many thanks for your ongoing participation and support.

Over the years, the Law Firm Pro Bono Project, law firms, the legal media, and public interest organizations have engaged in serious discussions about the nature and definition of pro bono legal services. In the past year, two broad areas of focus have received particular attention: (1) cases that involve awards of attorneys' fees and (2) the eligibility of non-profits, governmental entities, small businesses, and other for-profit entities for pro bono services. The questions arise out of changes in the legal needs of the poor, developments in the structure and operations of law firms, and the current nature of pro bono opportunities, such as the admirable increase in pro bono participation among transactional attorneys. Moreover, in recent years, there has been an explosion of for-profit businesses that are engaged in civic ventures and social justice initiatives. In 1993, when the Pro Bono Institute's Law Firm Pro Bono ChallengeSM was initially crafted by the Advisory Committee, "microlending" and "social entrepreneurs" were simply not part of anyone's vocabulary.

Since its inception in 1993, the Challenge has served as a consistent guidepost to assist law firms in increasing their contributions to pro bono legal services. The Statement of Principles and Commentary, which have withstood the test of time and have indeed become the industry standard, were carefully crafted by the Advisory Committee to provide meaningful guidance to peer firms to facilitate and strengthen their pro bono efforts. After many years and much effort, on the part of law firms and our Law Firm Pro Bono Project staff, firms now understand the Challenge definition on a real and substantive level. The Law Firm Pro Bono Project has endeavored, in the text, Commentary, and in ongoing responses to individual inquiries from law firms seeking guidance about "what counts" under the Challenge definition, to define pro bono legal services in a careful, clear, and consistent fashion. Definitional changes are only made when they would create further stability and eliminate sources of potential confusion. Changes to the Challenge definition are not made lightly and are undertaken only when supported by real world needs, as demonstrated by empirical facts, and not as a response to media attention or based only on limited anecdotal reports.

Awards of Attorneys' Fees: Issues Discussed

The Challenge is designed to encourage law firms to take on important cases and has consistently focused on legal activities generally undertaken without the expectation of a fee as pro bono. Concerns have been raised about counting as pro bono time matters where attorneys' fees are ultimately awarded. Major firms, however, are not motivated to take on these cases

based on the potential for fee awards, and they are not akin to contingency fee cases. If a firm originally accepted the matter on a pro bono basis, then an award of attorneys' fees should not alter its pro bono nature. Indeed, the Challenge encourages law firms to seek awards of attorneys' fees in appropriate cases as both a matter of public policy and as a source of funding for public interest organizations. In handling these cases, law firms are acting as "private attorneys general" enforcing legal rights, promoting access to justice for those who would otherwise be unable to pursue their cases, and uncovering and deterring unlawful behavior. Seeking attorneys' fees on behalf of pro bono clients, like seeking damages or other forms of relief, increases the deterrence benefits of these cases by making defendants pay the full costs associated with their behavior. This is particularly the case since Legal Services Corporation grantees have, since 1996, been barred from requesting or accepting attorneys' fees. To enforce public policy and deter lawless behavior, it is even more important that pro bono counsel apply for and receive fees when they prevail. On a practical note, it is hard to see how the cases that end up generating fee awards could be handled any differently, since these cases tend to unfold over many years and take a long time to resolve. The Committee could not envision a scenario that would have firms, after fees are awarded, go back and restate the pro bono hours for years in which the matter was active and treated as pro bono.

Some may argue that all attorneys' fees awarded in pro bono matters should be donated to public interest legal groups. Firms, however, will reasonably differ as to how they handle any fee awards. A survey conducted by the Project several years ago found that the great majority of firms donate all or a portion of the fees to a non-profit, often after the firm recoups any disbursements and out-of-pocket expenses not otherwise reimbursed. A number of firms use fee awards to fund additional pro bono matters at the firm. A growing number of firms transfer the fees to the firm's charitable foundation.

Summary of Action Taken by the Project's Advisory Committee

The language of the Commentary to Challenge Principle 7 has been strengthened by adding emphasis. The new language states that "[f]irms that receive fees in such cases are **strongly** encouraged to contribute an appropriate portion of those fees"

Eligibility of Non-Profits and Governmental Entities for Pro Bono Legal Services: Issues Discussed

As firms have heeded the Institute's call to take on transactional/business pro bono matters, the legal profession has grappled with articulating criteria for determining non-profit eligibility for free legal services. Tightening the eligibility definition of non-profits and governmental organizations, however, would pose formidable challenges for our national pro bono definition because of vast differences in community cultures and the availability of pro bono opportunities and the differences in firms' commercial practices. Tinkering with the definition would also risk a significant diminution of sophisticated transactional opportunities, at a time when we are trying to increase major pro bono transactional work. Other than a few anecdotes about pro bono work for large, well-endowed non-profits that do not primarily serve persons of limited means, there is no clear sense of the extent of the issue and scope of the potential problem. In other words, there is no meaningful evidence on how much pro bono work is being done for non-profit organizations and governmental entities and no data to suggest that pro bono legal services have

been diverted from individuals of limited means and the disadvantaged to these other entities. Figures collected by the Law Firm Pro Bono Project indicate that in 2005, the average percentage of total pro bono hours contributed to persons of limited means or to non-profit groups serving this population was 76.81%; the median percentage for “low-income” pro bono was 83.91%.

Summary of Action Taken by the Project’s Advisory Committee

The Advisory Committee determined that there was a need for reliable and comprehensive data to provide an accurate picture of the types of non-profit and governmental groups that are receiving pro bono assistance from firms, rather than responding to a few anecdotal reports of potential abuses. Accordingly, the staff of the Law Firm Pro Bono Project will undertake a survey of Signatory law firms to obtain information about the mission, the matters, and the financial resources of the groups whom they serve and the eligibility criteria that they are currently applying. We will continue to track the percentage of pro bono efforts that are poverty-focused. To obtain a more accurate record of how much law firm pro bono work is transactional in nature, rather than litigation-based, the Advisory Committee decided that the text and format of the annual Challenge reporting form used by PBI will be revised, beginning with the 2009 report requesting information for pro bono work undertaken in calendar year 2008, to separate out the reporting for litigation and transactional pro bono work and to better capture the breakdown of pro bono efforts that are poverty-focused.

Eligibility of Small Businesses and Other For-Profit Entities for Pro Bono Legal Services: Issues Discussed

In recent years, the bright line between non-profit organizations and for-profit businesses that are also engaged in civic ventures and social justice initiatives has blurred. The Challenge Statement of Principles and Commentary are currently silent on the issue. The Committee recognized that virtually no for-profit entities would or should qualify for pro bono legal services. In very limited circumstances, however, certain small businesses and other for-profits could be eligible for pro bono services (for example, legal assistance to minority-owned small businesses operating in economically disadvantaged neighborhoods or for-profit ventures focused on enhancing housing, health and economic resources, and the like in developing countries). In other words, when the people operating the for-profit business would qualify for pro bono services or where the for-profit business is operating as the functional equivalent of a non-profit, the clients could qualify for pro bono legal services.

Summary of Action Taken by the Project’s Advisory Committee

The Committee decided to add language to the Commentary to Challenge Principle 7 that provides that:

“For-profit business ventures are rarely eligible for pro bono legal services. However, where the individuals behind the venture themselves would be eligible for pro bono legal services or where the venture benefits society and is the functional equivalent of a non-profit, the for-profit business could be eligible for pro bono legal services associated with that venture. In order to be eligible for pro bono legal services, if the individuals creating the business do not themselves qualify for pro bono legal services:

- (1) the business venture would have to have as its primary mission and purpose the enhancement of the economic, health, or social condition and overall well-being of low-income and disadvantaged people and groups;
- (2) the revenues from the business venture, if any, would have to be used to support that mission and directly assist persons of limited means and the disadvantaged;
- (3) the business or particular venture would have to possess insufficient operating funds to pay for legal and other professional services and would not be paying legal or other professional fees; and
- (4) the pro bono relationship would be viewed, from the beginning, as being “time bound” -- to last only until the business becomes successful and can pay for counsel without sacrificing its mission.

These relationships require careful ongoing monitoring. Eligibility determinations will be made on a case-by-case basis and re-evaluated regularly over time.”

Staff/Contract/Temporary Attorneys: Issues Discussed

The Advisory Committee considered the growing practice among firms of using attorneys who are neither associates, partners, or of counsel, the current semantic confusion surrounding the various categories, classifications, and employment and billing arrangements for these attorneys, and their eligibility to perform pro bono work and be counted as part of a firm’s reported pro bono performance.

Summary of Action Taken by the Project’s Advisory Committee

It was the consensus of the Advisory Committee that this is an evolving situation and there is no need to make any changes in the current Challenge language or reporting form. Firms, however, need informal guidance on a case-by-case basis, and the Project will continue to advise them, collect data, and monitor developments. Project staff will also work with legal staffing agencies and law firms to create and expand opportunities for these attorneys to perform pro bono work.

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