

## **Law Firm Pro Bono Challenge®**

### **COMMENTARY TO STATEMENT OF PRINCIPLES**

#### **PRINCIPLE 1**

Our firm recognizes its institutional obligation to encourage and support the participation by all of its attorneys in pro bono publico activities. We agree to promulgate and maintain a clearly articulated and commonly understood firm policy which unequivocally states the firm's commitment to pro bono work.

#### **COMMENTARY**

##### **An Institutional Commitment**

We ask that each law firm recognize and structure an active institutional commitment to pro bono publico service, rather than simply accommodating the interest and commitment of its individual attorneys. The goal of such institutional support is to ensure that the special resources and expertise of the firm are collectively focused on the management and implementation of an effective and productive pro bono effort and on the reduction or elimination of barriers to pro bono work. It is also designed to develop and nurture a firm culture in which pro bono service is a routine and valued part of each individual's professional life. The leadership of the firm should convey, in clear, unambiguous terms, the firm's commitment as an institution as well as its expectation that each individual will strive to help fulfill the firm-wide commitment. Many firms have found that a comprehensive written pro bono policy is an excellent vehicle for communicating that commitment. The firm should then implement its policy through a structured program that fosters pro bono work.

#### **PRINCIPLE 2**

To underscore our institutional commitment to pro bono activities, we agree to use our best efforts to ensure that, by no later than the close of the calendar year, our firm will either:

- 1) annually contribute, at a minimum, an amount of time equal to 5 percent of the firm's total billable hours or 100 hours per attorney to pro bono work;
- 2) annually contribute, at a minimum, an amount of time equal to 3 percent of the firm's total billable hours or 60 hours per attorney to pro bono work.

## **COMMENTARY**

### **Quantifying the Commitment**

We believe that the establishment of a concrete, quantifiable, firm-wide aspirational goal will assist firms in communicating support for pro bono and in assessing the overall effectiveness of their pro bono programs. The expression of that goal as a percentage of total billable hours, rather than as a goal of hours per individual attorney, underscores the institutional nature of the commitment. While we believe that it is both feasible and appropriate for major law firms to contribute 5 percent of their billable hours to pro bono activities, we recognize that substantial differences exist among firms with respect to their current levels of pro bono activity. Accordingly, we have provided firms with a choice between two alternative aspirational goals—a goal of 5 percent of total billable hours or a goal of 3 percent of total billable hours. Many firms already report contributions of pro bono time far in excess of either of these goals. Indeed, several major firms presently expend 8 percent or more of their time on pro bono activities. For other firms, accepting the challenge to aspire to even the lower of the two goals represents a dramatic expansion of their current level of effort. These levels are consonant with existing aspirational bar resolutions which call for annual goals of up to 80 hours per attorney.

For example, we anticipate that the 3 percent aspirational goal will translate into a per-attorney goal somewhat in excess of 50 hours annually, a commitment that is consistent with the aspirational goals established by the American Bar Association and many state and local bar associations. Many major law firms have established branch offices in foreign countries. Recognizing that pro bono service may not be feasible for attorneys in these offices, the 5 percent/3 percent goals should be applied only to the total billable hours performed by firm attorneys working in the United States, unless the firm specifically elects to report the time of all its attorneys regardless of location. In 2000, the Advisory Committee of the Law Firm Pro Bono Project amended the Challenge to allow firms the option of selecting either a 5 percent/3 percent goal or a 100/60 hour per attorney goal.

## **PRINCIPLE 3**

In recognition of the special needs of the poor for legal services, we believe that our firm's pro bono activities should be particularly focused on providing access to the justice system for persons otherwise unable to afford it. Accordingly, in meeting the voluntary goals described above, we agree that a majority of the minimum pro bono time contributed by our firm should consist of the delivery of legal services on a pro bono basis to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means.

## **COMMENTARY**

### **Pro Bono—Meeting the Need**

While we recognize and applaud the rich diversity of pro bono activities undertaken by law firms, with respect to the minimum aspirational goal established by the Challenge, we strongly support a special emphasis by firms on the legal problems of persons of limited means. Studies routinely report that more than 80% of the civil legal needs of the poor are not presently being met. The resources and expertise of leading law firms should be brought to bear to assist the most vulnerable of our citizens in securing their rights. Legal services, as used in this Commentary, consists of a broad range of activities, including, among others, individual and class representation, legislative lobbying and administrative rulemaking, as well as legal assistance to organizations seeking to develop low-income housing, improve community services, or increase the financial resources of persons of limited means. Many activities traditionally viewed by firms as falling in other pro bono categories such as civil rights or civil liberties cases, environmental claims, community economic development, and consumer protection matters can, in fact, often also be accurately described as falling within the priority for legal services to persons of limited means. Emphasis on the legal needs of persons of limited means is not intended to supplant the involvement of firms in complex pro bono matters for other populations. Many major law firms have a strong commitment to public interest litigation and projects, including high impact class action suits and policy advocacy, which promote essential public policies and ensure that our society functions equitably. Firms undertaking these complex and time-consuming matters often commit resources far in excess of the Challenge's minimum goals.

## **PRINCIPLE 4**

Recognizing that broad-based participation in pro bono activities is desirable, our firm agrees that, in meeting the minimum goals described above, we will use our best efforts to ensure that a majority of both partners and associates in the firm participate annually in pro bono activities.

## **COMMENTARY**

### **Broad-based Participation in Pro Bono**

While we urge the firm's institutional support for pro bono, that support will be enhanced if pro bono publico service is the concern of all lawyers in the firm rather than only a few highly committed individuals. Experience has demonstrated that broad based participation at all levels, including the most senior members of the firm, is a key element in developing and nurturing a successful firm pro bono program. Myriad opportunities for service exist—opportunities that will interest and challenge senior partners as well as young associates, business and tax lawyers as well as litigators. Broad-based participation in pro bono service promotes firm-wide support for that activity and serves as a concrete and visible affirmation of the firm's institutional commitment.

Finally, by involving lawyers with a broad range of interests and skills, the firm can enrich its service to the community.

## **PRINCIPLE 5**

In furtherance of these principles, our firm also agrees:

- a. To provide a broad range of pro bono opportunities, training, and supervision to attorneys in the firm, to ensure that all of our attorneys can avail themselves of the opportunity to do pro bono work;
- b. To ensure that the firm's policies with respect to evaluation, advancement, productivity, and compensation of its attorneys are compatible with the firm's strong commitment to encourage and support substantial pro bono participation by all attorneys;
- c. To monitor the firm's progress toward the goals established in this statement and to report its progress annually to the members of the firm and to the Law Firm Pro Bono Project; and
- d. To support the proactive reinforcement of policies, practices, attitudes and actions that produce equitable power, access, opportunities, treatment, impacts and outcomes for all by identifying and volunteering for pro bono opportunities that target racial injustice and other systemic inequities in the legal system.

## **COMMENTARY**

### **Promoting and Recognizing Pro Bono Service**

- a. We encourage firms actively to seek out a broad range of pro bono opportunities for their lawyers and to provide or secure the necessary support, training, and supervision so that lawyers will be encouraged to take on these cases or projects. Pro bono matters should be administered in the same manner as commercial work. All of the firm's resources and support services should be available to the pro bono attorney, and the matter should be subject to the firm's oversight and quality control procedures. It is especially important that all pro bono matters be supervised in a manner consistent with the firm's overall supervision requirements. One obstacle that often limits participation in pro bono work is the concern that a firm lacks sufficient substantive expertise in particular areas of law. Many firms have taken steps to ensure that the necessary substantive supervision is available by identifying experts within or outside of the firm or by providing or securing training for firm attorneys.

A number of firms have established a pro bono committee, identified an individual to serve as the firm's pro bono coordinator, or otherwise formally assigned someone in the

firm the responsibility for ensuring that the firm offers interesting pro bono opportunities and supports its lawyers in undertaking pro bono work. A formalized structure for identifying, screening, and monitoring pro bono work strengthens the visibility and effectiveness of the firm's overall pro bono effort.

- b. In an era of increased expectations with respect to billable hours, receipts, or similar measures, a firm commitment to pro bono must include positive incentives to perform that work. Whether this takes the form of billable hours credit, receivables equivalent credit, or some other form of recognition for time spent on pro bono work will depend on the firm's existing incentives system. It is equally important that participation in pro bono work be identified as one criterion for positive evaluations and advancement in the firm. Many firms have developed systems to ensure that such evaluations explicitly include assessment of pro bono work. Firms have also established supplemental efforts to promote recognition of pro bono work, such as firm-wide pro bono awards and bonus programs.
- c. As part of its institutional commitment, the firm should monitor its progress in meeting its aspirational minimum goal, as well as its level of involvement in legal services to persons of limited means and should disseminate information on the status of the pro bono program broadly within the firm. To assist the Law Firm Pro Bono Project in assessing the impact of the Law Firm Challenge on the availability of pro bono firm resources, the firm will also provide information to the Project. That information will be confidential and will not be released in any form that identifies a specific firm.
- d. In January 2022, PBI expanded the Law Firm Pro Bono Challenge pledge by adding provision 5(d) to expressly embody a commitment by Challenge signatories to combat racial injustices and other systemic injustice through their pro bono work.

Heartened by both the individual and collective efforts law firms are making to address racial injustice in the wake of the murder of George Floyd, the PBI Law Firm Pro Bono Project initiative, with the endorsement of both the PBI Board of Directors and the Law Firm Pro Bono Project Advisory Committee, embraced the legal communities' renewed commitment to work toward identifying, resisting, and ultimately eradicating racism and systemic inequities in a legal system that promises access to justice for all.

#### Considerations for Engaging in Racial Justice Pro Bono Work

Given the importance of racial justice pro bono work and a desire to be inclusive of what law firms are doing and would endeavor to do in this area, we offer the following items that law firms should consider when engaging in racial justice pro bono work. We developed these considerations with the knowledge that racial justice pro bono work will and should evolve:

- Law firms should consider consulting and collaborating with the legal services organizations focused on racial justice issues before engaging in this work.

- Law firms should consider examining prospective pro bono matters through a racial justice lens in order to determine whether their pro bono efforts will achieve a systemic impact.
- Racial justice pro bono work can benefit individual clients and/or be undertaken to have a systemic impact. In either case, law firms should consider whether their pro bono efforts will target racial injustice and other systemic inequities in the legal system.

### Examples of Racial Justice Pro Bono Work

The following examples of racial justice pro bono work were provided by law firms in response to PBI's Annual Law Firm Challenge Report. We believe these examples can provide additional guidance to law firms that are exploring racial justice pro bono opportunities. The list is not exhaustive or in any way meant to limit what law firms can or should do in this area:

- Representing victims of mass incarceration and wrongfully convicted individuals
- Challenging racial gerrymandering and/or violations of the Voting Rights Act
- Addressing heirs property laws and related legal work to prevent the involuntary loss of land of minority land owners
- Researching legislative enactments that impose restrictions and/or limitations on the use of force by police, including bans on the use of chokeholds
- Increasing access and opportunity for minority-owned startups and other businesses
- Preparing and filing comments in support of or opposition to administrative rules that impact equity in urban development, and low-wage workers' rights
- Providing legal assistance to minority students facing educational barriers
- Sealing and expunging criminal records
- Filing lawsuits designed to bring about police reform

## **PRINCIPLE 6**

This firm also recognizes the obligation of major law firms to contribute financial support to organizations that provide legal services free of charge to persons of limited means.

### **COMMENTARY** **Financial Support**

The level of firm pro bono commitment identified in the Law Firm Challenge is not intended to replace or diminish a firm's monetary contributions to organizations that provide legal services to persons of limited means. The Challenge commitment is one of actual service and personal involvement in pro bono work. We strongly encourage law firms to continue and expand their financial support of legal services organizations. These organizations need both service and monetary contributions from major law firms.

## **PRINCIPLE 7**

As used in this statement, the term pro bono refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of (i) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means; (ii) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights; and (iii) the provision of legal assistance to charitable, religious, civic, community, governmental, or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

### **COMMENTARY** **Definition of Pro Bono**

The definition of pro bono contained in the Challenge, although somewhat revised, tracks existing policy definitions adopted by the American Bar Association, state and local bar associations, and many law firms. The definition ensures that the firm and its attorneys can utilize varied legal skills to undertake a broad range of activities in meeting their pro bono responsibility and goals.

#### **For-Profit Organizations**

In the past, with some exceptions, most for-profit entities would not have qualified for pro bono legal services. The current guidance provides for an expanded Challenge definition of for-profits that are pro bono eligible. All qualified pro bono engagements in support of for-profit entities

should be viewed, from the beginning, as “time bound” with eligibility reevaluated with each new engagement.

Where the principals behind a for-profit business would themselves be eligible for pro bono legal services, the business entity would be eligible.

Certain for-profit entities are organized to produce positive social and/or environmental benefits as well as positive financial returns and may, in some circumstances, qualify for pro bono legal services. Examples include:

- where the business is a Community Economic Development (CED) entity devoted to addressing the economic needs of low-income individuals and families through the creation of sustainable business development and employment opportunities (a “CED”)<sup>1</sup>; or
- where the business is a social enterprise with a stated corporate purpose of enhancing the economic, health, or overall well-being of low-income and disadvantaged people and/or addressing environmental issues, and has a formal commitment to reinvest revenues and all or a majority of profits to support its social mission (a “Social Enterprise”).

In each case where a for-profit entity is not eligible because the principal(s) are not low-income, to be eligible, the for-profit entity:

- must lack sufficient operating funds to pay for reasonable legal services, or
- the Social Enterprise has sufficient revenue but the matter for which the entity is seeking pro bono representation is integral and related to its social or environmental mission.

In addition, certain matters may qualify for pro bono legal services. If the outcome of the work would specifically address the needs of and benefit low-income and disadvantaged people or their communities, then it is appropriate for pro bono legal services.

One example is impact investing. It is defined as investments made into companies, organizations, and funds with the intention to generate measurable social and environmental impact alongside a financial return. Impact investing uses positive screens to identify socially responsible and environmentally sustainable investments, including those where the ultimate use of proceeds would benefit low-income and disadvantaged communities. Impact investments can be made in both emerging and developed markets and may target a range of returns from below market to market rate, depending on the circumstances. Impact investments share three fundamental elements: (i) intentionality; (ii) expectation of financial return; and (iii) a commitment to impact measurement. Impact investments are intentional because, but for the expected social

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<sup>1</sup> CED matters are those that expand employment for low-income individuals in communities facing persistent poverty and high unemployment by creating and expanding businesses and job opportunities. Jobs created by entities focusing on CED provide living wages, paid leave, fringe benefits, and opportunities for career growth.

or environmental returns, the investment would not be made. Impact investments are also made by some of the parties with the expectation of a financial return. Lastly, and perhaps most importantly, impact investments require some degree of measurement and reporting on the social and environmental performance of the underlying investment, thereby ensuring transparency, accountability, and the continued development of reliable non-financial impact metrics.

Impact investing encompasses a broad spectrum of potential investment opportunities. Accordingly, consideration of impact investment transactions for pro bono representation requires a unique and flexible analytic framework. Law firms should weigh the following factors when determining whether an impact investment transaction qualifies for pro bono legal services, recognizing there are no bright lines, and law firms should be encouraged to weigh these factors against the stated purposes of PBI's mission to have pro bono attorneys serve low-income and disadvantaged communities:

- 1) The total amount of the investment;
- 2) Whether the expected rate of return is below market or market rate;
- 3) Whether the investment is made in an emerging market or a developed market;
- 4) Whether the investor(s) is a non-profit organization or a for-profit organization, or both;
- 5) Whether the investment is made into an early-stage or a mature venture;
- 6) Whether other parties to the transaction are receiving pro bono legal services;
- 7) Whether, and to what extent, commercial financial institutions are involved in the transaction;
- 8) Whether the transaction involves an innovative public-private partnership; and
- 9) Whether the investment will result in increasing access to capital for persons of limited means.

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

### Public Rights

Under clause (i) above, non-profit entities may qualify for pro bono legal services if the matters are "designed primarily to address the needs of persons of limited means." If the proposed matter does not necessarily focus on serving persons of limited means, a non-profit entity may still qualify for pro bono legal services under clause (ii) above if the organization or the matter at issue is "seeking to secure or protect civil rights, civil liberties or public rights." While society has

generally agreed upon the definitions of “civil rights” and “civil liberties” (such as rights protected by the U.S. Constitution’s Bill of Rights and similar federal, state or local laws), a similarly agreed upon definition does not exist for “public rights.”<sup>2</sup> Therefore, when analyzing whether a non-profit entity qualifies for pro bono legal services related to “public rights,” the following factors<sup>3</sup> should be taken into consideration:

- 1) If the entity has as its primary mission and purpose the enhancement of the economic, health, or social condition and overall well-being of the general population or a marginalized segment of the population, this should weigh favorably in the determination of whether a request should count as pro bono;
- 2) If the entity has a mission that for-profit commercial market forces may not be sufficient to achieve, such as animal welfare, environmental protection, or historic preservation, this should weigh favorably in the determination of whether a request should count as pro bono;
- 3) If a primary motivation for the representation includes a commercial, legislative, professional, or personal benefit that would be self-serving to those taking on the representation, this should weigh against the determination that a request should count as pro bono; and
- 4) If a non-profit entity is so well-resourced that it has extensive legal staff who could handle the representation or it could pay reasonable market legal fees for the representation, these factors should weigh against the determination that a request should count as pro bono.

### Attorney Fees

Activities under clause (i) of the definition clearly fall within the recommended priority for legal services to persons of limited means, as do some of the activities under clause (ii). In the vast majority of all matters, the firm’s pro bono participation will be undertaken without a fee or any expectation of a fee. However, there are very limited instances in which the acceptance of a fee award will not disqualify a matter from inclusion in the definition of pro bono. Post-conviction capital appeals, for example, where firms contribute thousands of hours without compensation but may receive the limited fees available to counsel under the Criminal Justice Act, are clearly pro bono cases for persons of limited means.

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<sup>2</sup> Firms and pro bono professionals vary in how they interpret public rights, but ideas to consider include: “legal efforts related to issues of collective concern, including matters traditionally considered public rights, such as environmental protection, animal protection, freedom of information, public education, health and safety, social benefits, public healthcare, fair housing, privacy, peace-building and democracy initiatives, historic preservation, protection of the sick, elderly and disabled, voting rights and fair elections, fighting discrimination, preventing unfair labor practices, protecting free speech, or other human rights” (PBI Memo 1/15/2010).

<sup>3</sup> In addition to the enumerated factors, pro bono programs may also want to consider other factors, including: referral by a legal services organization, financial sponsorship of organization’s mission and the nature and extent of the legal services requested. Moreover, attendant to this work there may be moral, historical, environmental, and other important societal issues at stake.

Similarly, the award of attorneys' fees in an employment discrimination or environmental protection case originally taken on by a firm as a pro bono matter and not in the course of the firm's ordinary commercial practice would not disqualify such services from inclusion as pro bono work. Firms that receive fees in such cases are **strongly** encouraged to contribute an appropriate portion of those fees to organizations or projects that provide services to persons of limited means.

Law Firm Pro Bono Project

Pro Bono Institute

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