

## **WORKSHOP 3A: AIMING HIGH: GOALS, TARGETS, DEFINITIONS**

### **DEFINING AND QUANTIFYING PRO BONO: THE PROS AND CONS**

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#### **Introduction**

One of the most hotly debated topics in pro bono, most recently evident in the agenda and discussions at Australia's Second National Pro Bono Conference, is the wisdom and feasibility of crafting a voluntary aspirational minimum pro bono goal for lawyers (see *Establishing a Voluntary Minimum Pro Bono Target for Australian Lawyers*, David Hillard, available on the National Pro Bono Resource Centre website).

Aspirational pro bono goals/targets are not a cure-all. The United States has, not one, but rather a plethora of such aspirational targets. These include: ABA Model Rule of Professional Conduct 6.1, as revised in 1993, which defines pro bono and suggests a minimum of 50 hours of service pursuant to that definition annually and which has been adopted by a small number of states; a wide array of state and local bar aspirational resolutions which sometimes define pro bono and sometimes do not and that include a wide range of hourly (and, occasionally, percentage) goals; and the Pro Bono Institute's Law Firm Pro Bono Challenge, an aspirational minimum goal targeted not to individual lawyers but to law firms as institutions. Despite these many exhortations and goals, and despite its overall leadership in pro bono, the U.S. is hardly a beacon of pro bono

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participation. While no one can presently claim knowledge of precisely how many of the U.S.'s million or so lawyers do pro bono - nor of how much or what kinds of pro bono service they undertake - a best estimate, based on extrapolation from data obtained through several state surveys, is that less than one-half of America's lawyers perform any pro bono service each year.

### **Defining Pro Bono**

Despite the limitations of pro bono aspirational targets as a prod to pro bono service, they do perform several critical functions. First, they define, explicitly or implicitly, the parameters of what we mean by the term "pro bono." Why is defining pro bono so important? Explicating **what** pro bono service means is, in its own way, as critical a reflection of professional and ethical values as articulating a pro bono obligation.

Pro bono definitions, of course, can vary widely, but, for purposes of their focus, impact and symbolic value, there are four broad categories into which most definitions fall. They are, moving from the narrowest to the broadest, as follows:

1. Legal services to the poor and near-poor. In this iteration, pro bono service is defined as the provision of legal services (typically in the litigation context) to low-income individuals or families or to non-profit associations or groups whose purpose is the provision of services to the poor (e.g., homeless shelters, welfare rights groups, etc.)

**Pros:** A definition focused exclusively on the delivery of legal services to the poor and to groups whose primary (or sole) organizational purpose is to serve the poor is simple,

clear-cut, and easy to understand. This narrow definition has the advantage of focusing pro bono resources on the population with the greatest volume of legal need. Legal needs studies have determined that approximately half of the United States's 35 million poor persons experience a legal problem annually. Given the limited financial support available for legal services/legal aid programs, it is not surprising that studies have found that 80% or more of poor persons with legal needs are not able to secure legal assistance.

**Cons:** Focusing pro bono exclusively on services to the poor omits many critically important areas of legal assistance and counsel, including a number of civil rights and civil liberties issues, environmental protection matters, and issues affecting enfranchisement, such as redistricting and voting rights cases, education quality suits, and consumer protection actions, among others. These matters typically impact a broader range of individuals, families, and communities. In addition, the same legal needs studies cited above noted that households immediately above the poverty level experience even more legal problems - with the same inability to obtain assistance - as the poorest of the poor. Under this limited definition, services to this important group would not "count" as pro bono. Some commentators, in looking at the area of public interest law as a whole, have noted that focusing solely on the poor, rather than advocacy on issues that cut across economic and racial and ethnic groups, may unduly limit support and remedies. One other possible downside arises from the commonly accepted assumption that a pro bono definition focused on legal services to the poor is limited to litigation-based legal assistance. While the definition itself does not contain that limitation (though narrowly tailored to assistance to the poor, definition 1 can certainly encompass policy advocacy, research, transactional pro bono, etc.), the fact

that most legal services programs still limit their services to litigation-related matters reinforces a narrowed interpretation of the definition.

2. Legal services, more broadly defined, to the poor and near-poor, non-profit associations or groups who serve that population, **as well as** legal services to other non-profit groups, including governmental and educational institutions and assistance in civil rights, civil liberties, and public interest matters (this is, in essence, the definition promulgated by the Pro Bono Institute as the Law Firm Pro Bono Challenge.)

**Pros:** Though broader in scope, this definition, by focusing on the “bright line” of legal representation, is still clear and easy to understand and administer. It includes and values legal work undertaken in a variety of public interest areas and fora, rather than simply legal work for the poor, making it both more inclusive in terms of potential volunteers and more responsive to a wide array of legal problems. By including legal assistance to individuals and families that are above the poverty threshold, the definition permits representation of this important segment that so often is deprived of basic legal help.

**Cons:** The inclusion of legal assistance to a broad range of non-profit groups could, potentially, draw resources away from poverty law and public interest matters to “white glove” pro bono, such as serving as general counsel to the local museum or symphony. To correct this potential skewing, the Law Firm Pro Bono Challenge includes a preference for legal services to the poor and near-poor and to institutions that serve these populations.

3. All categories of pro bono service in (2) above, as well as activities to improve and enhance the administration of justice and the legal system, such as service on a bar association or courts committee, that do not include the provision of legal services (legal services provided to a bar association, court committee, or governmental entity would constitute pro bono service to a governmental or non-profit entity under the definition in paragraph 2);

**Pros:** By including time spent on bar association, court committees, or law-related activities, the definition promotes service focused on the important task of improving the legal and judicial system as a whole. Bar associations, in particular, report that lawyers, in these busy times, are less likely to find the time for bar work and committees. Including such participation in a definition of pro bono service may help to reverse that trend.

**Cons:** In using this broader definition, the bright line distinction of legal work and the use of legal skills is lost. In many instances, service on bar committees, while certainly calling on lawyers' judgement and intelligence, does not implicate actual legal skills or the delivery of legal services. In addition, lawyers participate in bar or judicial activities for a variety of reasons, so including such service in a definition of pro bono may reward behavior that is less than selfless. For example, lawyers who seek higher office in the bar may use service on bar committees or sections as a means to such office. At times, lawyers participate in bar or judicial committees to advance the interests of their commercial paying clients. It seems inappropriate to "count" time spent for that purpose as pro bono time. The law firm and corporate leaders who drafted the PBI Law Firm Pro Bono Challenge explicitly excluded non-legal bar association work from the Challenge

definition of pro bono for larger law firms because so many large firm lawyers are active in bar association and judicial committees for a wide range of purposes.

4. All categories of pro bono service in (2) and (3) above, as well as non-legal community service, such as general non-legal service on non-profit boards, fundraising, mentoring children, or building or repairing homes for low-income persons (a board member that provides legal services to the non-profit group on whose board she sits would be undertaking pro bono work according to definition 2).

**Pros:** Since a number of lawyers prefer to spend their volunteer time providing non-legal services to the community, this very broad definition validates their commitment and encourages inclusion. Lawyers who participate on non-profit boards contend that their board service, in helping those organizations with infrastructure issues and fundraising, has as much or more of an impact on assisting the poor and disadvantaged as direct pro bono legal representation. Definition 4 also fosters inclusion by identifying as pro bono activities that can be undertaken by non-lawyers as well as lawyers. A number of legal institutions, including large law firms and, particularly, corporate legal departments, have a strong interest in public service efforts that can be undertaken by all of their staff.

**Cons:** Definition 4, in its breadth, encompasses such a wide scope of worthy activities that almost any non-commercial volunteer service is included. The definition blurs the distinction between “good citizen/good neighbor” activities hopefully undertaken by many individuals in our society and the ethical obligations specifically targeted to lawyers in light of their skills, access to the justice system, and enjoyment of a monopolistic capacity to practice law. One of the most pressing motivations cited for pro bono service

- the gap between the need for legal assistance and the resources available to help the poor and disadvantaged - is lost, as is the sense of pro bono as the unique professional contribution of lawyers, under this approach. Since non-legal activities may be less demanding, in terms of time, skills, controversy, and effort, there is a concern that the commitment to legal work may suffer when non-legal volunteer time is considered equally valid. In addition, as with definition 3, lawyers may serve on boards or fundraising committees for a variety of reasons - professional or social prominence, accommodation to their clients' interests or favorite charities, etc. The gravest concern articulated by some commentators is that, in light of the breadth of this definition, the goal of promoting pro bono service - increasing the number of volunteers and the amount of resources available - will be lost, since virtually everyone can identify, among their current activities, non-legal or legal volunteer service to their child's school or team, to their religious institution or a political party, to a family member or friend, that will meet the pro bono standard and definition. Finally, broadening the definition is incompatible with the important trend toward providing parity for pro bono time at large law firms. While the number of major firms that permit lawyers to count pro bono hours toward billable hour targets has increased dramatically, it is unlikely that firms will continue to do so when those hours include serving as a big brother/big sister, serving on the board of the local library, or teaching someone to read, wonderful and helpful as those activities may be.

While each potential definition has its own strengths and drawbacks, each, as well, presents a different symbolic perspective on the nature and role of lawyers' pro bono service. Definition (4), for example, clearly equates pro bono with charity. While that parallel has its strengths (particularly for those of a religious bent), it also has troubling

and limiting implications. To date, pro bono has been framed as a natural and consequential part of the lawyer's role in society and as an integral, albeit voluntary, part of each lawyer's ethical responsibilities. To define pro bono so that it is seen as a matter of compassion rather than professional obligation risks losing an important - often critical - motivator of pro bono work.

### **Quantifying Pro Bono**

Aspirational goals or targets, in addition to addressing the critical issue of the definition of pro bono, are important because they establish an expected, desirable, and appropriate level of pro bono activity. Quantification of pro bono expectations is essential for several reasons.

First, establishing an ambitious, but feasible, target for pro bono service is an effective means to create appropriate expectations regarding pro bono performance. The impact of the Law Firm Pro Bono Challenge is an example of the power of quantification. For large law firms in the United States, the Challenge established a national norm of appropriate and acceptable pro bono performance at a time when local pro bono norms (and pro bono numbers) varied widely. An informal survey conducted by the Law Firm Pro Bono Project in the late 80's, before the Challenge was created, revealed wide variations in pro bono contributions between and among various communities and law firms, with firms reporting as little as .1% of total lawyer hours spent on pro bono matters and as much as 9-10% of total billable hours contributed to pro bono engagements. In the absence of a quantifiable norm for pro bono, firms had no sense of whether their commitment of pro bono time was notable or lacking. A number of firms with the lowest

levels of pro bono performance were comfortable with their hours because they were consistent with local norms. Setting a reasonable goal challenges conventional - though flawed - wisdom about pro bono.

Second, quantification permits the use of competition and conformance to enhance pro bono performance. In determining appropriate behavior, lawyers look to their peers and rivals for cues. The publication of pro bono statistics in the American Lawyer magazine is a powerful motivator for the larger law firms highlighted in that publication. The fact that some firms achieve high levels of pro bono hours - while, at the same time, generating strong revenues and profits per lawyer - inspires other firms to strive to match those achievements.

Third, quantification leads to more accurate collection and reporting of pro bono time. Prior to the Challenge, many law firms - even those with well-established pro bono traditions - had no capacity to track the pro bono hours of their attorneys. Indeed, some firms prided themselves on not knowing how much time was spent on pro bono matters, arguing that the lack of timekeeping was consistent with the ethos of pro bono. However, as a result of the failure to collect and report pro bono time accurately, firms evaluated their pro bono performance subjectively and without regard to hard data. Again, this led to a sense of complacency about pro bono even at firms that were, by any objective standard, weak pro bono performers. Once a specific numeric goal has been established, it paves the way for far more accurate assessments of pro bono work in general - assessments that can help to improve stagnant or inadequate programs.

## **Summary**

Pro bono targets or goals are not, as some have argued, a particularly effective motivator for individual pro bono participation. The reasons lawyers take on pro bono matters vary widely: professional obligation, personal commitment to a cause, a desire to do something different than one's day-to-day work, religious or moral views, an interest in expanding one's professional horizons and skills... and so on. Aspirational targets that are sufficiently thoughtful and ambitious, however, have been and can be an importance force for structuring pro bono expectations and improving pro bono performance.