



NEW YORK  
CITY BAR

**MEMORANDUM**

May 16, 2012

**TO:** Hon. Jonathan Lippman  
Hon. Fern Fisher  
Task Force for Civil Legal Services  
Helaine Barnett [Task Force Chair]  
Gloria Herron Arthur [New York State Bar Association]  
Mary Mone [NYS Courts]

**FROM:** The New York City Bar Association's Pro Bono and Legal Services Committee

**RE:** Implementation of the 50 Hour Pro Bono Requirement for New York State Bar Admission

The Pro Bono and Legal Services Committee of the New York City Bar Association (Bar Committee) has requested comments from its members, which include representatives from law firms, law schools, and legal services and pro bono programs, as well as from participants in the Bar Committee's Best Practices in Pro Bono meetings,<sup>1</sup> regarding the implementation of New York State's 50 hour pro bono requirement for bar admission. This memo is a compilation of issues we feel should be considered by those implementing the details of this requirement. We applaud Judge Lippman's unparalleled efforts in support of access to justice for low income New Yorkers, and we provide these suggestions as a way to ensure that this program is a success. The Bar Committee recognizes that all segments of the legal community must play an active role in ensuring that the new requirements will be met.

### **What Should Count Toward the Pro Bono Requirement?**

#### *Using a Definition of Pro Bono Service*

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<sup>1</sup> In 2010, the Bar Committee formed a working group tasked with creating a forum for collaboration among law firms, legal service organizations and in-house legal departments working toward the development of improved pro bono practices. The mission was expanded in 2011 in an effort to include law schools and the courts. To date, eight facilitated sessions have been held. The working group also created a listserv available to participants in the best practices meetings; there are now over 150 members of the listserv made up of representatives from each of the five targeted constituencies. The Bar Committee solicited comments about the 50 hour pro bono requirement at the best practices meeting held on May 8, 2012 and via the listserv.

There are many definitions of pro bono service that New York could apply to the bar requirement. On the narrow end of the spectrum, the New York State Bar<sup>2</sup> and IOLA<sup>3</sup> use definitions which include primarily civil legal services to low income persons or assistance to organizations that serve low income persons. In the middle of the spectrum is the definition used almost exclusively by every large law firm in New York (and the rest of the country), which was developed by the Pro Bono Institute (PBI), and adopted by the American Lawyer. The PBI definition also encompasses assistance to persons or groups seeking to protect civil or human rights, and assistance to “charitable, religious, civic, community, governmental or educational organizations in matters in furtherance of their organizational purposes, where the payment of legal fees would significantly deplete the organization’s economic resources...”<sup>4</sup> The most broad definition, created by the American Bar Association (ABA), includes all of the above, plus participation in activities for “improving the law, the legal system or the legal profession,” and legal services to those whose incomes and financial resources place them above limited means. The ABA definition also permits the pro bono lawyer to accept a substantially reduced fee for services.<sup>5</sup>

There are different opinions among us regarding which definition is most appropriate for New York State. Here are some issues to consider.

- A focus on the needs of low income persons, exclusively. New York State’s needs in this area are tremendous, and focusing only on serving the legal needs of the State’s lowest income residents could potentially have a positive impact on that community. On the other hand, narrowing the definition of pro bono service for the purpose of the bar requirement presents concerns that the burden to provide adequate opportunities and supervision to these non-lawyers would fall disproportionately on New York’s already burdened civil legal services organizations. A narrow definition may also present difficulties for law students, many of whom do substantial and important pro bono work that does not involve providing legal services to low income individuals.
- Preservation of civil and human rights. Many of us who bring impact and other litigation to protect civil and human rights feel that this work is critical to preserving access to housing, employment, the ability to vote, and education, to name a few. A pro bono definition that was restricted to service to low income persons might exclude work in the area of, for example, preserving the environment, marriage equality, discrimination against various protected classes of people, and reproductive rights, all of which are of

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<sup>2</sup> [http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProBonoInformation/Attorney\\_Rules\\_of\\_Pr.htm](http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProBonoInformation/Attorney_Rules_of_Pr.htm)

<sup>3</sup> N.Y. Comp. Codes R. & Regs. tit. 21, §§ 7000.12(c)(4), 7000.14.

<sup>4</sup> [http://probonoinst.org/images/pdfs/law\\_firm\\_challenge\\_2010.pdf](http://probonoinst.org/images/pdfs/law_firm_challenge_2010.pdf) ; and see <http://probonoinst.org/resources/what-counts.html>

<sup>5</sup> [http://www.americanbar.org/groups/probono\\_public\\_service/policy/aba\\_model\\_rule\\_6\\_1.html](http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html)

great concern to many New Yorkers. In addition, a definition limited to civil needs would leave out pro bono work on unjust convictions and capital punishment.

- Legal assistance to a broad range of nonprofits. Though the New York State Bar Association defines pro bono as inclusive of assistance to organizations that serve low income persons, some of the pro bono work done in law firms and by law school pro bono and clinical programs, as well as by bar associations, includes legal assistance to nonprofits that serve other communities, for example, the environmental protection community, the arts community and the social services community. Many of these nonprofits have been hard hit by the economy and rely on pro bono assistance to help keep them going. The Association of Pro Bono Counsel (APBCo) has developed guidelines (as a supplement to the PBI definition) to enable law firms to assess a nonprofit organization's eligibility for pro bono legal services. The APBCo analysis uses the framework of considering the organizations' mission, matter and means, and law firms have found this to be an effective tool for determining eligibility of nonprofits who do not primarily serve low income persons.<sup>6</sup>
- Government service. Many law students and law firm associates provide pro bono assistance to government agencies, including, the offices of the District Attorney, the New York Attorney General, the U.S. Attorney, the New York City Law Department, and others. Law graduates also work in government full time immediately after graduation. New York will need to consider whether pro bono work for this sector qualifies for bar admission and whether the law graduate's first 50 hours of working full time for a government agency will be eligible.
- Service to the courts as a law clerk. Most New York area law schools send law students to work for judges as part of externship classes, volunteer judicial interns and/or post graduate law clerks. Some schools, like Columbia Law, count uncompensated judicial internships toward the student's pro bono requirement.
- Legal assistance to micro entrepreneurs/small businesses. Many of the large law firms count legal services to micro entrepreneurs and small businesses in the start up phase as pro bono, which helps foster economic development in low income communities (some of which are designated Economic Development Zones, such as East Harlem in Manhattan). These opportunities provide an excellent way for students and new graduates training to do transactional work to use their skills to serve their community. The Legal Aid Society of New York, Legal Services-NYC and the City Bar Justice Center have community development projects which provide legal assistance to low income small businesses.
- Community legal education. Many law schools and law firms have structured programs which allow students and lawyers to conduct legal education sessions, sometimes called

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<sup>6</sup> See APBCo Statement on the Eligibility of Non-Profit Entities for Pro Bono Legal Services, attached.

“know your rights” or “street law” programs, at a range of venues including community centers, prisons and schools. Some of these activities fall within the PBI definition of pro bono, such as those that impart legal advice (e.g., a voting rights presentation to ex-felons). Some of the presentations, such as those designed to teach and develop law related curriculums at high schools, (e.g., the Street Law program), would only count under the ABA’s definition of pro bono. Law schools in particular feel that these activities provide a meaningful and significant service to low income communities that are undereducated about their legal rights. They also provide opportunities for service that don’t involve a significant commitment of time for a supervisor.

Regardless of our differences over what sort of work should be considered eligible for the state requirement, we all agree on the following fundamentals. Whatever definition is adopted by New York, we think it should allow for a multi-sector response, counting pro bono service performed while the graduate is in law school, during his or her summer recess from law school, and post graduation. We believe the legal community needs to work together to provide ample, quality pro bono opportunities that are appropriately supervised by attorneys to meet the needs of those seeking admission to the New York Bar.

We are concerned about unemployed new graduates, or new graduates without eligible pro bono opportunities through their employer (e.g., those going to work at small law firms or non-legal employers, or those going to work in-house at a corporate law department) who will seek to fulfill the requirement independently. We are concerned that this requirement places an additional burden on a population that is already struggling to make a living. We are concerned that these individuals may not be adequately supervised in their pro bono endeavors, and that they will further burden legal services providers to find and supervise an eligible short term project to meet the state requirement. Indeed, legal services providers are already receiving phone calls from concerned students seeking opportunities. We are concerned that there might be some in this group who commit to representing a low income person motivated only to fulfill their 50 hours, and then do not provide adequate representation beyond that point. We hope the guidelines will be structured to minimize the number of people in this group by using a broad enough definition of pro bono work, and by allowing new graduates to complete their service under the auspices of a law school program or during their summers.

## **Specific Issues for Consideration**

### *Compensation – Cash or School Credit*

Many, if not most, applicants to the New York Bar will seek to fulfill the pro bono requirement in law school. Law schools offer many different opportunities to be considered. For example, a student can spend a summer at a public interest organization or government agency as an unpaid intern or as a lightly compensated intern receiving a federal work study grant, or a stipend from a law school or independent source. Or the student could spend a summer as an associate at a law firm being paid a weekly salary which would compensate for work on both billable matters and pro bono matters. The New York City large law firms feel strongly that their summer associate pro bono work should count toward New York’s requirement, so that they might be able to assist their associates who will not be able to find eligible pro bono work at their schools. This is especially true if eligible pro bono service must be performed in New York, as many of these

associates come from non-New York law schools, including law schools outside of the United States, and some have never spent time in the state prior to their start date. In addition, law firm attorneys can supervise their own summer associates on pro bono matters, thereby lessening the burden on legal services providers.

Law schools offer many credit bearing opportunities to be considered for inclusion. Students can participate in clinics, externships, and seminars with field components, which would provide opportunities for eligible service. Some law schools with mandatory pro bono programs count credit bearing activity toward their pro bono requirements, while others do not because they believe the ethic of pro bono service is instilled when the service is performed in addition to the work that is expected of a law student. However, for many law schools, credit bearing activities will provide the majority of eligible work, especially in rural areas where quality, supervised opportunities do not abound. They also provide opportunities for well-defined and well-supervised service projects.

Most nationwide law schools do not have a pro bono requirement, and many have only limited clinic opportunities for credit. Thus, many new graduates may be unable to fulfill the requirement in law school and will seek to fulfill it as a new employee of a law firm, legal services organization, government agency, or other institution. We believe that anyone being paid to provide qualifying services full time should be able to count the first 50 hours of that work toward the requirement. We also believe that anyone electing to do pro bono in a workplace where they are being paid to provide non-qualifying legal service should be able to count those pro bono hours toward the requirement.

#### *Location of Service/Location of Clients Impacted*

New York will need to consider whether to include qualifying pro bono service performed out of state, as well as service performed in state but which impacts non-New Yorkers (e.g., human rights research for grassroots NGO's). Limiting eligible service to work performed in New York will have an adverse impact on the many law graduates who come from out-of-state law schools to work in New York. Out-of-state graduates planning to practice in New York will lack the incentive to take advantage of their law school pro bono programs that help their own communities, as they hunt for opportunities to do pro bono work in New York. They will also have less motivation to do pro bono work for non-New York summer employers, who would provide quality opportunities and meaningful supervision. This narrow construction would also exclude many meaningful and important pro bono service programs run by New York law schools and law firms that impact non-New Yorkers. For example, law schools have sent students across the country on spring break caravans to assist victims of natural disasters, or provide legal services to low income people living in the Navajo Nation. Law firm associates in New York represent clients on death row in states all across the south.

Though we recognize that meeting the needs of low-income New Yorkers is a primary concern, we think this should be a long term goal for licensed attorneys once they are admitted and practicing in New York. Indeed, Judge Lippman identified one of the goals of the program as “instilling and fostering a culture of service in the men and women who enter our profession as

lawyers each year.”<sup>7</sup> A program designed in this spirit should allow each law graduate the flexibility to choose how to perform this service so that pro bono work becomes meaningful to each of them personally, and not just another requirement.

### **Documentation/Certification**

In his Law Day remarks, Judge Lippman stated that applicants for admission "will be required to include an affidavit describing the nature of their pro bono work, the organization and the individual lawyer who supervised them, and the dates and hours of service."<sup>8</sup> We urge that the Rules clarify that this affidavit will be made by the applicant, not by a third party. Even law firms that can afford the most sophisticated tracking software would not always be able to provide such an affidavit; much less could small nonprofits or strained legal services providers. This is especially true because there could easily be a lapse of several years between the performance of qualifying work and the date that the affidavit was needed, as, for example, when students attend law school part-time, or delay bar admission while undertaking additional graduate studies or other post-law school activities. Given these contingencies, and to promote accuracy in these affidavits, it might be helpful for there to be a simple, standard form that law students who anticipate applying for admission in New York could request supervisors to complete at the time they undertake their pro bono service.

In considering whether there needs to be certification by a third party as to whether the pro bono service was actually rendered and rendered adequately, requiring a supervisor or pro bono program administrator to sign off on a law graduate's pro bono service will cut both ways. It will help ensure that the graduate was in fact being supervised. Further, it will encourage better representation. If the law graduate provided inadequate assistance to a client, the supervisor could refuse to certify the work. However, it may also create an additional burden on supervisors and program administrators who supervise a multitude of students, and who are not set up to track hours. In New York, those who may already be able to track pro bono hours are large law firms which track summer associate pro bono hours through their regular diary entry procedures (only using the PBI definition of pro bono work), law schools which have a mandatory pro bono program and use various definitions, and the very few legal service providers which employ full time pro bono administrators. The majority of law schools do not track pro bono legal service unless it is credit-bearing, and it may be burdensome to them to set up such a system. It may be that the goal of ensuring supervision by requiring a supervisor to certify the work may outweigh such a burden.

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<sup>7</sup> Chief Judge Jonathan Lippman's Law Day Speech, 2012 at <http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf>

<sup>8</sup> See, <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202550863483&thepage=2&slreturn=1>

### **Clarification on Timing/When Will the Requirement Take Effect?**

It is unclear whether the requirement will take effect for those applying for admission in 2013, those taking the bar exam in 2013, those graduating in 2013, or some combination thereof. Given that the details regarding how to satisfy the requirement will not be released until August or September, this leaves a very short window of time for those *applying for* admission in 2013 to figure out how to comply. Many law graduates in the class of 2012 who take the bar exam in July will be in a position to apply for admission by the early spring of 2013. They will have had no meaningful notice to complete the requirement either in law school or during the summer, which starts in mid-May for many interns and summer associates. This will delay their admission applications, potentially putting their post graduate jobs at risk by not being able to appear in court, take a deposition or perform other work that requires a licensed attorney. Commonly, junior lawyers seek those sorts of opportunities in pro bono cases. An inability to become licensed (and appear in court on a pro bono case) due to not having met the pro bono requirement would certainly be an unintended result. In addition, if there is a required certification, there will not be enough time to implement the necessary tracking systems. We suggest implementing the requirement for those taking the bar exam in 2013. Consideration should also be given to phasing in the 50 hour requirement to take full effect for the class of 2015, which will be the first group to have been in law school for a full three years after its promulgation. This not only would give the students time to comply but also would allow a more systematic development of programs by law schools, legal services providers and law firms.

### **Waivers/Exceptional Circumstances**

We ask the state to consider whether there will be any waiver or adjustment of the requirement for law students who are also working full-time, who attend school through night programs, or experience other hardship. Additionally, LL.Ms should be considered differently from J.D.s because they are only in law school for two semesters, not six, come from different legal systems, and frequently have linguistic issues that could provide barriers to meaningful pro bono service. For specifically defined groups like these, perhaps the character and fitness committees could, for good cause shown, grant a special extension of one year to satisfy the 50 hour requirement when the program is inaugurated.

We would be pleased to work with you or whomever you designate to help shape the Rules and the program. Thank you for your consideration.