

## **APBCo STATEMENT ON THE ELIGIBILITY OF NON-PROFIT ENTITIES FOR PRO BONO LEGAL SERVICES**

### **PART I: OVERVIEW**

The Association of Pro Bono Counsel (“APBCo”), an organization with more than 80 members (mostly attorneys) who manage law firm pro bono practices on a full-time or near full-time basis, provides this Statement of its members’ consensus views on a methodology to employ when evaluating the eligibility of non-profit organizations for pro bono legal services.<sup>1</sup> (As used in this Statement, “pro bono legal services” means those services that we believe meet the Pro Bono Institute’s definition.)

The purpose of this Statement is not to propose an alternative definition of pro bono. We believe that the Pro Bono Institute (“PBI”) is the appropriate organization to continue its excellent work in providing both a definition of pro bono legal services and accompanying commentary. Rather, this Statement offers our members’ experience and insights regarding the factors we consider and the analysis we employ when considering a non-profit organization’s eligibility for pro bono legal services.<sup>2</sup>

APBCo members are acutely interested in this issue because we routinely assess requests for pro bono assistance from non-profit organizations. Accordingly, we have the expertise to evaluate whether a proposed definition or commentary is likely to be clear, effective, efficient and consistently implemented by our firms. APBCo members are also typically responsible for reporting data relating to our firms’ pro bono practices (particularly the number of hours recorded on pro bono matters) to organizations like PBI (to which most APBCo members’ firms belong) and the American Lawyer.

The issue of which non-profit organizations should qualify for pro bono representation was highlighted by the American Lawyer in a July 2006 article,<sup>3</sup> but it is important to note that

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<sup>1</sup> This Statement is the result of an APBCo membership meeting on March 1, 2007, where all participants expressed their views, and an open task force that followed. While the views at the membership meeting were nearly unanimous, we do not represent that all APBCo members agree to every element of this Statement. Moreover, neither this document nor our membership meeting addressed the circumstances under which governmental or for-profit entities might qualify under the PBI definition.

<sup>2</sup> While this Statement makes suggestions bearing on the PBI definition and related commentary, APBCO members and their law firms are free to adopt broader, narrower or simply different criteria to determine whether they should provide free legal services to non-profit organizations and count that, for internal purposes, as “pro bono legal services.” However, a more specific, uniform definition of which non-profit organizations qualify for pro bono legal services is useful in guiding external reporting of our firms’ pro bono practices.

<sup>3</sup> Since the publication of this article, the issue of which non-profit organizations qualify for pro bono legal services has been a topic of much conversation. It is, however, important to emphasize that this “qualification” issue affects a very small proportion of the pro bono matters undertaken by our law firms. Our pro bono practices are focused predominantly on direct representation of the poor or organizations that directly serve the poor, and on issues of human rights, civil rights and civil liberties. Accordingly, while important, the outcome of the debate of which non-profits qualify for pro bono representation is unlikely to materially affect the vast majority of work done in our pro bono practices.

APBCo members have been applying PBI definition for many years. While this analysis is usually straightforward, there are some gray areas. Specifically, assessing whether payment of fees would “significantly deplete the organization’s resources or would otherwise be inappropriate,” presents challenges. Likewise, it is clear that there is no universally-accepted definition of what constitutes a “public right.”

Consistent with the current PBI definition of pro bono legal services,<sup>4</sup> APBCo members believe that a non-profit organization seeking pro bono representation should be evaluated according to its mission and the purpose of the matter proposed. If the organization does not qualify under these first two criteria, it should be assessed according to its ability to pay for legal services. This “Mission-Matter-Means” paradigm is detailed in Section II below, which also includes a discussion of the factors we typically consider under each of these three criteria. Section III of this Statement presents a number of hypothetical situations, akin to the PBI “What Counts?” guidance on which we all rely regularly. We hope that PBI uses the ideas presented in this Statement to expand the “What Counts?” document and would be happy to work with PBI on this project.

## **PART II: ANALYTICAL FRAMEWORK - “MISSION-MATTER-MEANS”**

We believe that a representation should be considered to be in compliance with the Pro Bono Institute definition of pro bono legal services as long as it satisfies one of the three criteria below. Of course, every situation is unique there should always be room for the application of professional judgment in determining whether a representation qualifies.

A) **Mission:** A non-profit organization qualifies under the PBI definition when its mission is to serve the indigent or to protect or preserve civil rights, civil liberties, public rights, as well as human rights, regardless of its budget or means to pay attorney fees. While the term “public rights” is not defined, APBCo members agree that “public rights” may include environmental matters, public health care issues, peace building initiatives, and activities related to government regulations that affect the public at large.<sup>5</sup>

Once a particular organization satisfies the Mission test, no further review is necessary. The provision of free legal services to an organization that has a qualifying mission benefits those served by the non-profit organization’s work. Therefore, in the case where the organization’s mission qualifies, the budget of the organization itself is irrelevant.<sup>6</sup>

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<sup>4</sup> We understand that PBI is considering changes to its definition of pro bono legal services that may address some of the issues raised in this Statement. We believe, in any event, that any workable definition will require interpretation and guidance, and accordingly strongly encourage PBI to expand its “What Counts?” guidance.

<sup>5</sup> Firms must be careful, however, not to allow the civil rights, civil liberties and “public rights” qualification to become a proxy for endorsing one political view over another. For instance, challenges to affirmative action programs should qualify for pro bono legal services just as challenges to the denial of access for minorities do.

<sup>6</sup> While we do not believe very large and well-funded non-profit organizations that meet the Mission test should be disqualified from receiving pro bono legal services under the PBI definition, for several reasons they are unlikely to consume substantial pro bono legal resources. First, some firms represent large, well-funded charitable institutions with constant legal needs on a fee-generating basis. These firms often, for client relations reasons, choose not to offer pro bono services to organizations with similar funding to that of the firm’s fee paying clients.

B) **Matter:** A non-profit organization with an overall mission that does not fit the criteria above nonetheless may be eligible under the PBI definition if the specific matter proposed itself presents a qualifying mission. In cases where a non-qualifying organization proposes to engage in a qualifying activity, i.e., one that serves the indigent or fosters human, civil or public rights, the matter should qualify under the PBI definition regardless of the entity's ability to pay attorney fees. If the specific matter satisfies the Mission test, no further review is necessary.

C) **Means:** Where neither Section II.A nor II.B above is satisfied, a matter can still qualify under the PBI definition if the organization does not have the means to pay for legal services. In these circumstances, the question is whether the organization has sufficient means to afford competent legal counsel to handle the matter presented. This is not always a simple determination. We believe that, in evaluating whether a non-profit organization has sufficient means to afford legal counsel, many factors may be examined, including:

*Referral by a Legal Services Organization:* In many communities, there are sophisticated legal services organizations that screen and refer non-profit organizations to law firms for pro bono legal services. Law firms rely heavily on such referrals, and absent any clear indication that pro bono representation of a non-profit organization would be inappropriate, such a referral should be a sufficient indication that an organization qualifies for pro bono services.

*Financial Criteria:* If not pre-screened by a trusted legal services organization, a firm may want to examine statements reflecting the organization's financial condition (such as an IRS Form 990). In particular, firms may wish to consider non-profit organizations' revenues as compared to their overall budgets, executive compensation, and debt-to-asset ratios. If the organization has budgeted for legal fees to cover the proposed matter, this may be an indication that the entity has the means to pay for legal fees. Free services, such as Charity Navigator, that evaluate the management of non-profit organizations may be a useful resource.

*Past payment of legal fees or other professional fees:* An organization's past payment of legal fees and other professional fees may also be considered. Payment of legal fees in the past should not automatically disqualify an organization from pro bono representation. On the other hand, the ability to pay for fees in the past may well be a good indication of a current ability to pay. The payment of other professional fees may also be considered.

*Nature and extent of the legal services requested:* Firms may also consider the nature of the specific matter when determining whether an organization can afford legal services. Some matters may require specialized legal expertise the cost of which may be prohibitive. Some matters might not be undertaken

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Similarly, nonprofit organizations with substantial and time-critical legal needs often choose not to rely on pro bono legal services and instead elect to become paying clients of a firm.

but for the availability of pro bono assistance. Some matters might be crucial to the continued viability of the organization. On the other hand, certain matters, like some plaintiff-side litigation, can routinely be handled by contingent-fee lawyers.

*Constituency Served:* If a non-profit organization is exclusively or primarily serving a constituency of persons of relatively substantial means, the organization may be able to afford legal fees even though the organization itself may not have funds immediately available to pay legal counsel. For instance, a non-profit homeowners' association funded by members' dues, not in a low-income area, would likely fail to qualify for pro bono assistance if it has the ability to obtain funding through its membership.

*Affiliation of the individual proposing the pro bono representation:* When a pro bono representation is proposed for a private non-profit membership organization with which the individual proposing that representation is affiliated – e.g., private schools, synagogues, churches – the request should be given close scrutiny. If the matter would likely have qualified regardless of the individual's affiliation, representation may appropriately be considered pro bono legal services.<sup>7</sup>

### **PART III: EXAMPLES ILLUSTRATING MISSION-MATTER-MEANS FRAMEWORK**

These hypothetical scenarios are intended to illustrate the application of the Mission-Matter-Means Framework described above.

1. A firm partner sits on the board of a statewide legal services organization. The organization has many lawyers on staff and an annual revenue stream of many tens of millions of dollars, most of which is funded by the state. The organization seeks corporate governance advice.

*Commentary:* This organization fulfills the Mission test – the beneficiaries of its work are the indigent – and no further inquiry is necessary. The fact that a lawyer serves on the board of or is otherwise substantially involved with a non-profit organization that meets the Mission or Matter test does not disqualify the project, since the ultimate beneficiaries of the legal services qualify for assistance.

2. A firm partner is a member of a wealthy congregation in a major city which is winding up its affairs. The congregation has, for many years, provided community services and periodically has opened its doors to the homeless. The congregation has about \$300K in the bank and a church building worth about \$6 million. The congregation seeks real estate counsel to assist with the below-market rate sale of the church building to another

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<sup>7</sup> It is relatively unlikely, given even the starting salaries at large law firms, that organizations of which lawyers at such firms are members would come within the Means test described herein, although some such organizations would satisfy the Mission test and others would satisfy the Matter test with regard to the particular legal work requested.

non-profit which serves low-income individuals. Proceeds from the sale will be donated to another religious non-profit that will serve the poor.

*Commentary: This proposed representation fulfills the Matter test because the ultimate beneficiaries of the particular matter – legal assistance on the sale of the property – are low-income individuals. Under these circumstances, the firm partner’s involvement is irrelevant.*

3. A fee-generating client asks the firm to assist a children’s museum that has an annual revenue stream of approximately \$10 million and a single large asset, their building, valued at approximately \$30 million. The museum needs help with a corporate governance question. The museum’s annual operating expenses average approximately \$11 million and the museum has been operating at a deficit for the past three years. Approximately half of the museum's educational programs are targeted at low-income communities. Additionally, the museum offers free attendance to local schools and non-profits.

*Commentary: First, the fact that a fee-generating client of the firm made the request is irrelevant. By themselves, neither the fact that some organizational programs are directed towards low-income individuals nor the fact that the museum offers free admittance to some, but not all, qualifies the organization under the Mission test described in Part II. Similarly, the proposed Matter is not, itself, directed specifically at low-income individuals. However, despite the large revenue stream and the major asset, the non-profit organization has been operating at a deficit for several years and, therefore, the organization could qualify under the Means test described above.*

4. A large environmental conservation non-profit seeks counsel regarding the establishment of a web-based program whereby individuals can purchase and own (and protect from development) tracts of land in the Amazon. The non-profit will take a percentage of the funds from each transaction to finance its operations and purchase even more undeveloped land. The non-profit hopes to raise \$100 million through this project.

*Commentary: The purpose of the organization, to protect a public right in the environment, fulfills the Mission test and no further inquiry is necessary. The amount of funds the organization raises is irrelevant; requiring the non-profit to devote resources to legal fees would dilute the impact of its mission.*

5. A non-profit charter school serving a range of students is faced with criminal liability stemming from the actions of a former principal. The school seeks counsel to respond to a broad subpoena and faces the possible loss of its charter. The school has annual revenue of more than \$25 million.

*Commentary: It is not clear from the hypothetical that either the organization itself or the proposed project primarily serves low-income individuals. Assuming that it does not, the proposed representation fails the Mission and Matter tests. However, although the organization has a very large revenue stream, it is facing an extraordinary and unbudgeted legal expense –*

*the equivalent of bankruptcy – and therefore is unlikely to be able to afford legal fees. Therefore this matter may qualify under the Means test.*

6. A non-profit 501(c)(6) trade organization that supports women in technology seeks pro bono help reviewing a lease. The organization's mission is to support and further women's participation in technology industries. It offers members discounted health insurance and retirement plans and assistance in negotiating with labor unions. The organization has a revenue stream of about \$5 million.

*Commentary: The organization presented above does not appear to serve low-income individuals as its primary purpose. As the proposed matter likewise does not involve service to low-income individuals, it also fails the Matter test. Finally, the substantial revenue stream would make it quite unlikely, absent other compelling reasons, that this organization would pass the Means test. (If the proposed representation involved a different project, such as a program to recycle computers and distribute them to low-income children, the Matter test might be satisfied.)*

7. A large, well-funded urban art museum decides to support an affiliated museum in a rural area by providing it with funding, operational advice and intellectual property licenses. The affiliate is a separate legal entity, not owned by the urban museum, and has limited funding with no budget for legal expenses. The affiliate has requested pro bono legal services with respect to its opening and operation, including the negotiation of the affiliation agreement with the larger museum.

*Commentary: Since the proposed client is the rural affiliate, not the well-funded urban museum, the analysis must focus on that entity. While it does not appear to qualify under the Mission or Matter criteria, it does appear that this community organization has limited means and would therefore qualify for pro bono legal services.*

8. A national non-profit organization hired XYZ law firm for a fee to provide an opinion on a corporate governance issue. The general counsel of the organization seeks a second opinion, pro bono, from your firm. The organization's sole mission is programming for poor people.

*Commentary: This organization qualifies under the Mission test, although a firm might choose not to provide free legal services for business reasons.*

9. XYZ Bank is downsizing and offers packages to employees who will volunteer to leave. Jim Johnson, a bank employee who is also a Harvard business school graduate, has always wanted to work with the children of recovering drug addicts. He takes the bank's substantial package of two years' salary, which will allow him to start a non-profit in an underserved neighborhood to work with the kids. He will not be using any of his personal funds to fund the organization. He seeks pro bono assistance in forming the non-profit.

*Commentary: The proposed representation fills the Mission test, which analyzes the purpose of the nascent organization. The personal finances of the incorporator are irrelevant – the client is the non-profit which will be formed and the beneficiaries of the non-profit organization’s work are low-income individuals.*

10. The conservative alternative student newspaper at a wealthy suburban public high school is told that it cannot publish a criticism of the school’s support of Black History Month. The newspapers’ student editors have asked the firm to file a lawsuit under the First Amendment challenging what it alleges is censorship by the school administration.

*Commentary: It is not relevant that the student newspaper is not an incorporated non-profit. Neither is it relevant that the cause itself may be unpopular nor that the school district and the students are not of limited means. The proposed representation fulfills the Matter test because it addresses an issue of civil rights.*