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Letter from Esther: Measuring the Quality and Impact of Pro Bono Service

More than 15 years ago, a small working group of law firm and in-house corporate leaders undertook an audacious project. Operating under the auspices of the Law Firm Pro Bono Project, and utilizing the Project's research on the pro bono performance of major law firms, the group set out to establish a quantitative benchmark for pro bono performance by large law firms. That project culminated in the creation of the Law Firm Pro Bono Challenge®, now the industry standard for major law firms. The Challenge was revolutionary (not evolutionary) in a number of respects. First, it focused, unlike any existing ethical standards or aspirational pro bono guidelines, on the law firm as an institutional presence and force, rather than on the pro bono obligation of each individual lawyer. Second, it established a metric that was progressive and collective (percentage of total firm billable hours) rather than individual and regressive (hours per lawyer). Third, it included quantitative measures other than pro bono performance (e.g., participation in pro bono by a majority of lawyers at the firm). Fourth, it offered a definition of pro bono tailored to the resources and practice of one segment of the legal profession – large law firms. And, finally, although voluntary in nature, it required firms to report their performance to the Law Firm Pro Bono Project and to the firm itself.

The results of that bold action are striking. Despite the inevitable controversy surrounding the Challenge definition and principles, time has demonstrated both the feasibility and wisdom of the quantitative metrics adopted by the working group. Convincing *The American Lawyer* and its progeny to broaden their reporting on pro bono and to adopt the Challenge definition heightened the impact and acceptance of the Challenge. While many factors played a role in the extraordinary transformation of pro bono at major law firms since 1993 – recasting pro bono from “good works” to a business necessity, tripling pro bono time, and vastly broadening the pro bono docket – the Challenge clearly played a pivotal part in that sea change.

The growth and maturation of law firm pro bono, coupled with two important new factors – the profound changes under way at many large law firms and the entry of in-house legal departments into the pro bono arena – offer the opportunity (some would say necessity) of another major step forward in pro bono. The creation and implementation of the Law Firm

Pro Bono Challenge® demonstrated the importance of metrics and benchmarking. Tracking the quantitative performance of law firms improved their performance. As the corporate mantra notes: “what gets measured gets valued; what gets valued gets done.”

Quantitative benchmarking and measurement in the pro bono context are important, but not sufficient. As pro bono reputation and performance has become more important and visible – to law firms, to their corporate clients, and to their legal staff and potential recruits – the singular focus on quantity of pro bono service, which helped to enhance pro bono, has become inadequate and somewhat counterproductive. This is particularly the case for the nation’s 200 largest law firms. The formula used by *The American Lawyer* to rank those firms’ pro bono programs places a premium on the number of lawyers at the firm that contribute at least 20 hours of pro bono – a metric without a rational basis – and, as a result, is vulnerable to “gaming.” We have all heard of firms whose pro bono “culture” is embodied in their effort to rotate as many lawyers as possible through pro bono engagements to reach the 20 hour mark – hardly the ideal system for lawyers and their pro bono clients.

Adding qualitative assessment of pro bono is one way to limit gaming. But qualitative assessment is important for many other, more critical reasons. I began to focus on the issue several years ago when several top corporate and law firm leaders asked me two thought-provoking questions about pro bono. The first question was “how do we know if our pro bono work is making a difference?” The second query was why, when law firms have contributed millions of hours of pro bono service (5 million hours in 2008 by Challenge firms alone) do studies of unmet legal needs reveal no meaningful improvement in the percentage of low-income people who receive assistance for their legal problems? The answer to both questions is “we don’t know.” Given the amount of time and talent devoted to pro bono work, and its importance, we must find a way to answer both of these questions, and we must ensure that the way in which we are undertaking pro bono work makes a real difference. To put it graphically, imagine two law firms, each with 500 lawyers and each generating 50,000 hours annually of pro bono service. We know that despite their similarity quantitatively, the strength of their respective pro bono cultures, the impact of their pro bono work, and the outcomes generated by that work could be completely different.

PBI first raised these issues and the need for qualitative assessment at the 2009 Annual Seminar/Forum, and we were heartened by the response. Representatives of corporate legal departments, law firms, and public interest groups who

attended one of several sessions on this topic were extremely supportive of the need for more sophisticated evaluation, though appropriately cautionary about the difficulty of developing a workable and effective system for qualitative assessment. Cognizant of the complexity and difficulty of the task, we began to look for a partner who could bring much-needed expertise to the table. I am delighted to report that Deloitte, the major international consulting firm, has agreed to work with PBI on a pro bono basis to begin to build a conceptual framework and a template to evaluate the quality and impact of pro bono work. Deloitte has broad experience in a variety of industries through their consulting practice and understands the legal profession through their financial services work. Because of that intersection, they have the right skills to undertake the first two steps in this effort: researching and analyzing the criteria and processes used in other contexts – other professions, the corporate world, foundations, and other charitable givers – to assess quality and impact and getting input from key stakeholders in the legal community on this issue.

We know that, even with Deloitte's expert assistance, this effort will be complex and difficult for a number of reasons:

- *The lack of models of qualitative assessment in the legal profession, and, particularly, the lack of such models in the public interest community.

- *The unease that the prospect of assessment creates in all segments of the pro bono community – public interest groups, law firms, and legal departments.

- *The concern about unintended consequences arising from inherently subjective qualitative assessment and the lack of consensus about what is valuable and what works. For example, one possible criterion for assessment might be whether or not the client prevailed in their legal matter. That criterion, however, could inadvertently discourage pioneering litigation in unsettled areas of the law.

- *The complexity of the range of roles played by lawyers and the difficulty of applying an assessment process to all of those roles/tools. For example, it could be more difficult to assess the impact of policy advocacy in comparison to litigation.

- *The lack of resources and experience in assessment raises the concern that time better spent doing actual pro bono work may be diverted to measuring pro bono work.

All of these are very real and important concerns. Our task is to determine whether and how it may be possible to identify an approach that will honor the range of pro bono work, be

simple enough to be workable, yet nuanced enough to be meaningful. We are also committed to finding an approach that will measure both the social benefit of pro bono (i.e., the impact of pro bono assistance on the client and the larger community in need) as well as the business benefit (e.g., the impact of pro bono on core competencies and skills development among younger lawyers).

As we move forward, we will be seeking your input, and we hope that many of you will attend the sessions on qualitative assessment at our upcoming Annual Seminar/Forum in March 2010 to offer your ideas and views.

A handwritten signature in black ink, appearing to read "E. Shee".

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