Report No. 1363
January 19, 2017

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William M. Paul
Acting Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: *Tax Treatment of Payments to Retired Law Firm Partners Providing Pro Bono Legal Services*

Dear Messrs. Mazur, Koskinen, and Paul:

This letter[1] considers whether a retired law firm partner's provision of *pro bono* legal services with his former partnership will cause his or her receipt of retirement payments from the partnership to be subject to self-employment tax under Section 1401 of the Internal Revenue Code of 1986,

[1] The principal drafter of this letter was Robert C. Fleder. Substantial contributions were made by David R. Sicular and Nicholas P. LaSpina. Helpful comments were received from Michael Farber, Joshua E. Gewolb, Stephen B. Land, Fred Kneip, David S. Miller, Leslie B. Samuels, Michael L. Schler, Peter F.G. Schuur, Alan Tawshunsky, and Marina Vishnepolskaya. This letter reflects solely the views of the Tax Section of the New York State Bar Association ("**NYSBA**") and not those of the NYSBA Executive Committee or the House of Delegates.

as amended (the "**Code**"). This letter also considers the effect of providing post-retirement *pro bono* legal services on the compliance of those retirement payments with Section 409A, and highlights the need for published guidance from the Internal Revenue Service (the "**IRS**") addressing these issues.

Background

In 2010, then-Chief Judge of the State of New York, Jonathan Lippman, established the Task Force to Expand Access to Civil Legal Services in New York (the "**Task Force**") as part of a comprehensive effort to expand access to legal counsel to low-income New Yorkers in civil cases.[2] The Task Force evolved into the Permanent Commission on Access to Justice (the "**Permanent Commission**") in 2015.[3] The Permanent Commission continues the Task Force's work, supporting annual hearings by the Chief Judge of the State of New York to assess the still unmet need for legal counsel in civil proceedings, and assisting in the development of reports and recommendations to the New York State legislature and executive branch regarding the resources that are necessary to meet that need.[4] In the Permanent Commission's November 2016 report, the Permanent Commission noted that more than 1.8 million people had attempted to navigate their civil cases without legal counsel in 2014, with overwhelming majorities unrepresented in eviction proceedings, child support matters, and consumer credit cases.[5] In short, despite laudable gains driven by the Permanent Commission's and the Task Force's work, there remains an extreme deficit in access to civil legal services for low-income New Yorkers.

To continue to shrink this deficit, the Permanent Commission also provides support for three major non-monetary access-to-justice initiatives:[6] a 50-hour *pro bono* service requirement for law school graduates seeking admission to the New York bar; a *Pro Bono* Scholars Program, which allows law students to spend their last semester in law school providing *pro bono* services; and the Attorney Emeritus Program ("**AEP**"), which encourages transitioning and retired attorneys to provide legal assistance to low-income New Yorkers.[7] Retired attorneys, who possess

2 *See* http://www.nycourts.gov/accesstojusticecommission/index.shtml.

3 *Id*.

4 *Id*.

5 *See* http://www.nycourts.gov/accesstojusticecommission/PDF/2016_Access_to_Justice-Report.pdf.

6 *Id*.

7 Details regarding the AEP can be found at https://www.nycourts.gov/attorneys/volunteer/emeritus/.

"extensive skills and expertise," are an invaluable source of legal services for those in need of *pro bono* assistance.[8]

As part of his efforts, then-Chief Judge Lippman discussed the issue of *pro bono* participation with prominent New York law firms, encouraging them to take steps to increase the amount of *pro bono* work performed by an attorney as he or she becomes more senior, "with a goal of 100% *pro bono* participation at the time of retirement."[9] These discussions raised the issue of whether a retired partner's providing *pro bono* legal service "that is connected to [his or her] law firm, whether it involves supervision of other law firm lawyers and staff, use of law firm resources (office space, computer and other equipment) and/or coverage under the law firm's malpractice insurance" could cause a retired partner's retirement payments from the partnership to be subject to self-employment tax under Section 1401, even though these retirement payments are generally eligible for an exclusion from self-employment tax under Section 1402(a)(10).[10] If so, the loss of the self-employment exclusion could be a significant deterrent to participation in *pro bono* efforts by retired partners—people whose knowledge and expertise is invaluable to the success of the AEP and similar initiatives. As a result of these discussions, Judge Lippman has written to encourage the Department of the Treasury and the IRS to issue guidance to bring certainty to the question of whether *pro bono* services violate the Service Prohibition.[11]

Of course, *pro bono* activities performed by retired partners may go beyond representation of the indigent (even though such representation is a significant portion of many firms' *pro bono* efforts): for example, *pro bono* work might include representation of civil rights or environmental organizations, neighborhood associations, nonprofit organizations of every stripe, or work on *amicus* legal briefs serving some public interest (*e.g.*, a brief relating to anti-trust issues prepared for a tax-exempt organization). However, as discussed in further detail below, to the

[8] *Id*.

[9] Letter from Skadden, Arps, Slate, Meagher & Flom, LLP, to the Hon. Mark Mazur, Assistant Secretary (Tax Policy), Department of the Treasury, and the Hon. William J. Wilkins, Chief Counsel, Internal Revenue Service (June 12, 2015) (on file with NYSBA) (the "**Skadden Letter**"); *see also* Sheldon I. Banoff & Richard M. Lipton, eds., *Are Potential Self-Employment Taxes Preventing Retired Partners from Doing* Pro Bono *Work?,* 123 J. TAX'N 92 (2015) (discussing the Skadden Letter).

[10] *See* Skadden Letter.

[11] Letter from Jonathan Lippman, Chief Judge of the State of New York and Chief Judge of the Court of Appeals, to the Hon. Mark Mazur, Assistant Secretary (Tax Policy), Department of the Treasury, and the Hon. William J. Wilkins, Chief Counsel, Internal Revenue Service (June 8, 2015) (on file with NYSBA) (the "**Chief Judge's Letter**").

extent that these services are provided without expectation of a fee and without a profit motive, we believe that they should be treated in the same manner as the representation of indigent clients.

Current Law and Legislative History of the Partner Retirement Exclusion

Section 1402(a)(10) provides an exclusion (the "**Partner Retirement Exclusion**") from "net earnings from self-employment" for purposes of calculating the self-employment income tax imposed by Section 1401. The Partner Retirement Exclusion applies to

> amounts received by a partner pursuant to a written plan of the partnership…and which provides for payments on account of retirement, on a periodic basis, to partners generally or to a class or classes of partners, such payments to continue at least until such partner's death, if—
>
> (A) such partner *rendered no services with respect to any trade or business* carried on by such partnership (or its successors) during the taxable year of such partnership (or its successors), ending within or with his taxable year, in which such amounts were received, and
>
> (B) no obligation exists (as of the close of the partnership's taxable year referred to in subparagraph (A)) from the other partners to such partner except with respect to retirement payments under such plan, and
>
> (C) such partner's share, if any, of the capital of the partnership has been paid to him in full before the close of the partnership's taxable year referred to in subparagraph (A). [emphasis added]

Regulations § 1.1402(a)-17(c)(1)[12] contains the same prohibition on services with respect to any trade or business carried on by the partnership as in Section 1402(a)(10)(A) (the "**Service Prohibition**") in order for payments to qualify for the Partner Retirement Exclusion. In addition, Regulations § 1.1402(a)-17(c)(1) makes clear that the Partner Retirement Exclusion is "all or nothing" for a given taxable year: that is, either all payments on account of retirement received by a retired partner during the taxable year of the partnership ending within or with his or her taxable years are excluded from net earnings from self-employment or none of the payments are excluded.

The legislative history of the Partner Retirement Exclusion reflects an intent that "partnership payments which are clearly retirement income should be excluded" from net earnings

[12] References to "Regulations" are to Treasury Regulations promulgated under the Code.

from self-employment.[13] In stating this, the House Committee on Ways and Means explained that the Partner Retirement Exclusion was designed to ensure that "bona fide retirement income" would be exempt from self-employment tax, but that the exemption "would not apply to retirement payments made in a year in which the partner performed *any* services for the partnership."[14] The Partner Retirement Exclusion appears to have been motivated by a desire to extend to retired *partners* an exclusion comparable to the then-existing exclusion enjoyed by retired *employees*: prior to the enactment of the Social Security Amendments of 1983, "retirement payments (whether received by an employee or a self-employed person) [we]re, in general, not covered under social security for purposes of contributions, benefit computations, and the retirement test."[15]

Case Law Interpretations of the Service Prohibition

There has been only one case interpreting the Service Prohibition. In *Brandschain v. Commissioner*,[16] the Tax Court held that a retired law firm partner's retirement payments failed to qualify for the Partner Retirement Exclusion because, after his retirement, the retired partner continued to serve as a labor arbitrator for the National Academy of Arbitrators and remitted his arbitration fees to the firm.

Mr. Brandschain retired from his law firm in 1975.[17] Before retirement, Mr. Brandschain was the head of his firm's labor department and also served as an impartial labor arbitrator for the National Academy of Arbitrators, turning over his arbitration fees to the firm.[18] Following

[13] Comm. on Ways and Means, U.S. House of Representatives, 90th Cong., Actuarial Cost Estimates for the Old-Age, Survivors, Disability, and Health Insurance System as Modified by H.R. 12080 as Passed by the House of Representatives, as Reported to the Senate, and as Passed by the Senate 35 (Comm. Print 1967).

[14] *Id*. (emphasis added).

[15] *Id*. As part of the Social Security Amendments of 1983, Sections 3121(v) and 3306(r) were added to the Code, which subjected employees' nonqualified deferred compensation (including nonqualified retirement pay) to FICA and FUTA. The Partner Retirement Exclusion was not affected by the addition of Sections 3121(v) and 3306(r), and remains in effect today. Although one might argue that the original motive for the Partner Retirement Exclusion has been extinguished by the enactment of Sections 3121(v) and 3306(r), and that the exclusion is therefore no longer needed, no Congressional action has been taken to date to repeal it, and, as described below, denying a retired partner the benefit of the Partner Retirement Exclusion solely because he or she has engaged in *pro bono* activities with his or her former firm creates a disincentive to engage in those activities with no apparent tax policy served.

[16] 80 T.C. 746 (1983).

[17] *Id*. at 747.

[18] *Id*. at 747–48.

retirement, Mr. Brandschain continued to serve as an impartial labor arbitrator in 1976 and 1977 and was paid for his services personally.[19] In accordance with his firm's partnership agreement, which required retired partners to remit fees to the firm that retired partners earned from the practice of law and "other services, such as serving as a fiduciary or director of a corporation" that would otherwise be considered income of the firm in the case of an active partner, Mr. Brandschain continued to turn over the fees to his firm after his retirement.[20]

Mr. Brandschain also received retirement payments from his former firm in 1976 and 1977, but did not report the payments as self-employment income, believing that the Partner Retirement Exclusion applied.[21] Before the Tax Court, Mr. Brandschain argued that his services as a labor arbitrator were not "services with respect to any trade or business carried on by" the firm within the meaning of the Partner Retirement Exclusion because the firm was not engaged in the practice of providing labor arbitrators.[22] The Tax Court dispensed with this argument by pointing out that law firms could be engaged in more than one business, and that in any case, both Mr. Brandschain and the firm treated Mr. Brandschain's services as a labor arbitrator as "other services" within the meaning of the partnership agreement that required Mr. Brandschain to remit his arbitration fees to the firm.[23] This same arrangement existed both before and after Mr. Brandschain's retirement, which the Tax Court viewed as further evidence that services as a labor arbitrator were in respect of the firm's trade or business.[24] Therefore, Mr. Brandschain had violated the Service Prohibition in 1976 and 1977, and his retirement payments from the firm did not qualify for the Partner Retirement Exclusion.

[19] *Id*.

[20] *Id.* The opinion also notes that, in 1977, Mr. Brandschain reluctantly advised the Philadelphia Academy of Music in a contract negotiation at the request of the firm's labor department. *Id*. at 749. The firm billed the academy for these services. This fact, while certainly not helpful to Mr. Brandschain's position, was given short shrift in the court's opinion, which focused on whether Mr. Brandschain's work as a labor arbitrator violated the Service Prohibition. *Cf.* PLR 8052117 (Oct. 6, 1980) (stating that an "association arrangement" under which a retired partner may bring in business for the partnership appears to violate the Service Prohibition); PLR 200403056 (stating that a partner's "of counsel" services following retirement will cause retirement payments to fail to qualify for the Partner Retirement Exclusion).

[21] Brandschain, *supra* note 16, at 749.

[22] *Id*. at 751.

[23] *Id*.

[24] *Id*. at 752–53.

IRS Guidance on the Service Prohibition

To date, the IRS has issued limited guidance on the application of the Partner Retirement Exclusion, and almost none on the Service Prohibition.[25] The one exception is a relatively old General Counsel Memorandum,[26] which, of course, is not precedential, that advised against issuing a revenue ruling that would provide a carve out from the Service Prohibition in a case where a retired partner voluntarily provided services in respect of a partnership's trade or business for which no fee was paid to the partnership. The GCM concludes that whether a partnership receives fees for such services is not determinative of whether the services are "with respect to the partnership's trade or business," and that the statutory language of Section 1402(a)(10)(A) is clear that no services can be performed in respect of a partnership's trade or business by a retired partner for the Partner Retirement Exclusion to apply. However, the GCM makes no reference to whether the services at issue were *pro bono* services, and the proposed revenue ruling appears to have been seeking a broad exclusion to the Service Prohibition for any services for which the partnership was not compensated.

Application of Current Law and IRS Guidance to Post-Retirement *Pro Bono* Legal Services by a Retired Law Firm Partner

Whether providing *pro bono* legal services will cause a retired law firm partner's retirement payments to be subject to self-employment tax turns on whether those *pro bono* services represent "services with respect to any trade or business carried on by" the partnership within the meaning of the Service Prohibition. However, *Brandschain* and the publicly available administrative guidance on the Partner Retirement Exclusion are not instructive. The services at issue in *Brandschain* were not *pro bono* services: Mr. Brandschain was compensated for arbitrating disputes, and he paid any fees he earned over to his firm (both before and after retirement). There is no indication that the arbitrations were for the benefit of low-income or indigent parties; in fact, the *Brandschain* opinion suggests that the arbitrations were between employers and unions, entities that do not usually need *pro bono* services.

Similarly, GCM 38723's reluctance to promulgate a revenue ruling that would carve out from the Service Prohibition *all* services for which a firm was not paid does not signal that the

[25] *See, e.g.*, PLR 7306260460A (June 26, 1973), PLR 7751045 (Sept. 27, 1977), PLR 7905032 (Oct. 31, 1978), PLR 7930183 (Apr. 30, 1979), PLR 8220110 (Feb. 22, 1982), PLR 8426073 (Mar. 28, 1984), PLR 8524017 (Mar. 15, 1985), PLR 9630012 (July 26, 1996), and PLR 200142004 (Oct. 22, 2001), all of which, while stating the Partner Retirement Exclusion, provide no analysis of the Service Prohibition.

[26] GCM 38723 (May 20, 1981).

IRS believes that *pro bono* services should cause a retired partner to lose the benefit of the Partner Retirement Exclusion. It merely states that whether the firm is compensated for services is not necessarily determinative of whether a retired partner's performance of any portion of those services violates the Service Prohibition. (Notably, the GCM does not expressly address *pro bono* services and, indeed, "recognize[s] that a strict application of [the Service Prohibition] could have unduly harsh effects where the retired partner performed very insubstantial services and the partnership did not benefit to any significant extent from the services.")

Having *pro bono* services jeopardize the Partner Retirement Exclusion serves no plausible policy objective. It imperils worthy initiatives such as the AEP, which in turn aggravates the serious problem of access to legal services for the poor. Nor can this state of affairs be expected to raise any significant revenue for the government, except perhaps from the few hapless retired partners who fall into this trap by mistake.

Nonetheless, we recognize that the IRS has to interpret and enforce the law is it exists, not as we or they might like it to be. The Service Prohibition is a part of current law, and therefore any proposed treatment of retired partners must be consistent with a reasonable interpretation of the Service Prohibition in light of its intended purpose.

The Service Prohibition targets a retired partner's providing "services with respect to any trade or business carried on by" his firm. One could question whether *pro bono* work is a "trade or business" at all, given that it is not profit-seeking.[27] However, we acknowledge that a retired partner's *pro bono* activities can certainly be *related* to the trade or business of his or her former firm, in two principal respects. First, these activities may be conducted in cooperation with other attorneys and staff at the firm, may make use of the firm's computers and other resources, and may extend to the retired partner coverage under the firm's malpractice insurance for work performed in connection with those services. Second, these activities can indirectly benefit the firm, by enhancing relationships with key clients; providing opportunities for networking; developing the firm's reputation and prestige in the community at large; providing recruiting appeal to potential candidates for employment; satisfying the firm's (and its attorneys') professional and

[27] Although "trade or business" is not defined in Section 1402 (or in Section 162, which Section 1402(c) looks to for the meaning of "trade or business" for purposes of Section 1402), the Supreme Court has stated that, to constitute a trade or business, a "taxpayer's primary purpose for engaging in [an] activity must be for income or profit." *See* Comm'r v. Groetzinger, 480 U.S. 23, 35 (1987) (emphasis added); *see also* Bagley v. United States, 963 F. Supp. 2d 982, 993-94 (C.D. Cal. Dec. 8, 1998) (citing Independent Elec. Supply, Inc. v. Comm'r, 781 F.2d 724, 726 (9th Cir. 1986) ("holding that, for a particular activity to constitute a trade or business, the activity must be undertaken or continued in 'good faith, with the dominant hope and intent of realizing a profit'").

ethical obligations;[28] and by educating the firm's attorneys and staff through interaction with the retired partner.

Yet the legal question remains: are these *pro bono* services necessarily to be regarded as having been performed *with respect to* a trade or business activity carried on by the partnership? That question is best answered in light of the purposes of the Partner Retirement Exclusion and the Service Prohibition. As noted above, the legislative history of the Partner Retirement Exclusion reflects an intent that "partnership payments w*hich are clearly retirement income* should be excluded" from net earnings from self-employment.[29] The bright line test of the Service Prohibition appears to be intended to obviate any need to allocate a partner's retirement payments among those payments that are actually "retirement income," and those that are compensation for services performed after retirement. Indeed, this is reflected in the "all or nothing" rule embedded in Regulations § 1.1402(a)-17(c)(1) discussed above: that is, either all of a partner's retirement payments from his or her former partnership qualify for the exclusion in a given taxable year, or none of them do. However, uncompensated *pro bono* services do not present this allocation issue.

Indeed, provided that the retired partner's pension is not dependent upon the performance of *pro bono* services (which should rarely if ever be the case), then the performance of those *pro bono* services does not call into question whether the pension is payment for current services rather than true retirement income that is payment for pre-retirement services. Accordingly, even if those *pro bono* services are "related" to the firm's trade or business in terms of the operational linkages or indirect firm benefits described above, the retired partner can be viewed as not performing the *pro bono* services "with respect to" the firm's trade or business for the simple reason that neither the partner nor the firm is being paid for it.

Section 409A

Retirement payments that qualify for the Partner Retirement Exclusion may also implicate Section 409A. In common practice, these retirement payments commence upon a partner's retirement from his firm, or in Section 409A parlance, upon a "separation from service."[30] Under the Section 409A rules, however, there is no "separation from service" if a former employee (or

[28] *See, e.g.*, Rule 6.1 of the Rules of Professional Conduct of the New York State Unified Court System.

[29] Comm. on Ways and Means, U.S. House of Representatives, 90th Cong., Actuarial Cost Estimates for the Old-Age, Survivors, Disability, and Health Insurance System as Modified by H.R. 12080 As Passed by the House of Representatives, As Reported to the Senate, and as Passed by the Senate 35 (Comm. Print 1967) (emphasis added).

[30] Treas. Reg. § 1.409A-1(h).

in this case, former partner) continues to provide services after the purported separation above the level of 20 percent of his or her pre-separation services.[31] Therefore, retirement payments that qualify for the Partner Retirement Exclusion raise the additional question as to whether participating in post-retirement *pro bono* activities might subject a retired partner to penalties under Section 409A (because the partner may be deemed to have received an impermissible acceleration of his retirement payments to a period before a "separation from service" under Section 409A), in addition to loss of the Partner Retirement Exclusion.[32]

Guidance is Needed from the IRS on the Application of the Service Prohibition to Post-Retirement *Pro Bono* Legal Services by a Retired Law Firm Partner

The issue of the tax treatment of retirement payments to law firm partners who provide *pro bono* legal services will only become more pressing as firm *pro bono* programs (and initiatives like the AEP) continue to grow. Retired law firm partners who would otherwise lend their expertise to clients in need will be discouraged from doing so if it causes their retirement payments from their firms to become subject to self-employment tax. In addition, as described above, in the absence of further guidance, these retired partners raise questions as to whether they have indeed "separated from service" for purposes of Section 409A and, accordingly, lack certainty that they can receive their retirement payments free of Section 409A penalties.

[31] Technically, providing services above the level of 20 percent, but below 50 percent, of pre-separation services requires a facts and circumstances analysis, while providing services at or above 50% of pre-separation services results in a presumption that a taxpayer has not separated from service. Treas. Reg. § 1.409A-1(h).

[32] Note that Notice 2005-1, Q&A 7—as repeated in the preamble to the Final Regulations under Section 409A (*see* I.R.B. 2007-19)—has generally reserved on the application of Section 409A to arrangements among partners, but has expressly tagged a few such arrangements that are subject to Section 409A, including guaranteed payments and Section 736 retirement payments that qualify for the Partner Retirement Exclusion. (Note that the typical partner retirement arrangement may not be treated as a guaranteed payment because such arrangements are generally capped at a percentage of the firm's income.) Therefore, if *pro bono* services would cause retirement payments that would otherwise qualify for the Partner Retirement Exclusion to fail to so qualify, it is unclear whether such payments would be subject to Section 409A. Notice 2005-1 states that Section 409A may apply to payments covered by Section 707(a)(1) (partner not acting in capacity as partner) if those payments otherwise would constitute a deferral of compensation under Section 409A. Given the significant penalties for noncompliance with Section 409A, there is a particularly acute need for clarity on whether providing post-retirement *pro bono* services will adversely affect retirement payments that would otherwise comply with Section 409A.

The legislative history of the Partner Retirement Exclusion, and the language of the Service Prohibition, indicate that post-retirement *pro bono* services, where neither the firm nor the retired partner is compensated for their work, are not inconsistent with the retired partner's being truly "retired" and are therefore not the types of services that were intended to cause retirement payments to fail to qualify for the Partner Retirement Exclusion. To bring clarity and closure to this issue, the IRS should issue guidance containing a safe harbor under the Service Prohibition stating that these *pro bono* services will not prevent retirement payments that would otherwise qualify for the Partner Retirement Exclusion from so qualifying.[33] Issuing this guidance in the form of a revenue procedure would allow the IRS to address this issue in a concise and targeted manner without committing to a position on its enforcement activities under any other section of the Internal Revenue Code. Any such guidance should include an express statement that providing post-retirement *pro bono* services will also not result in a retired partner being deemed to not have "separated from service" under Section 409A.[34] This would be a logical and consistent conclusion given the express link between Section 409A and the Partner Retirement Exclusion that the IRS provided in Notice 2005-1.

We believe that this guidance is warranted notwithstanding any operational links between the activities of the retired partner and those of the firm, or any indirect benefits that flow to the firm. However, if the IRS were uncomfortable providing broad guidance in this form, it could issue more targeted guidance that would cover situations where the operational linkages or firm benefits are expected to be relatively weak. For example, the safe harbor could also be limited to those *pro bono* activities that are unlikely to have a benefit closely related to a firm's business, such as legal services for the poor through firm-sponsored programs or initiatives similar to the AEP. Such a limitation would create its own line-drawing problems, and for that reason would not be our preferred solution, but even guidance that is targeted to the particular types of *pro bono* work identified in the Chief Judge's Letter would be a substantial improvement over the current situation.

33 Any such guidance should make clear, as proposed in the Skadden Letter, that this relief will apply notwithstanding the fact that the retired partner is covered under the law firm's malpractice insurance coverage, works with or supervises law firm employees or partners in performing such *pro bono* services, utilizes firm equipment or services (such as computers, printing capability, or word processing services) in performing such *pro bono* services, or maintains or otherwise uses office space on the firm's premises. These items are ancillary to providing *pro bono* services and should not prevent application of the requested relief.

34 Of course, the partner's retirement must otherwise be consistent with Treas. Reg. § 1.409A-1(h), *i.e.*, there must not be an expectation or intention that the retired partner retains a right to reemployment or to a contract for future services for his former firm.

The Skadden Letter proposed that the IRS promulgate, via a revenue procedure, a safe harbor under the Service Prohibition for *pro bono* services. We support the general approach of the Skadden Letter, although we would recommend the safe harbor outlined above.

The Skadden Letter's proposed safe harbor would require that:

(i) a retired partner receives no remuneration for those services, and to the extent that any fees or damages are awarded to the retired partner or his or her law firm in connection with the *pro bono* services, the payments (but not reimbursement of expenses) are donated to a Section 501(c)(3) organization selected by either the retired partner or the law firm;

(ii) the retired partner does not engage in the *pro bono* services in the name of the law firm, but rather solely in his or her name; and

(iii) the retired partner renders services directly to one or more *pro bono* clients and does not materially participate in internal firm activities that relate to the law firm's broader *pro bono* efforts.

In our view, condition (i) in the Skadden Letter by itself is consistent with the somewhat broader safe harbor that we have outlined above, and seems sufficient to ensure that the letter and spirit of the Partner Retirement Exclusion and the Service Prohibition are honored. This condition underscores that the *pro bono* services provided by retired law firm partners are not in pursuit of income or profit, and are therefore consistent with the fact that the former partner is actually "retired" from his former firm's trade or business. Nevertheless, if the IRS found it necessary to amplify the assurance provided by condition (i), it might be broadened to include a requirement that restricts law firms from reporting retired partners' *pro bono* hours in firm statistics; this would serve to further clarify that retired partners who provide such *pro bono* services are not doing so in pursuit of income or profit for either themselves or for their former firms, but are fulfilling their own professional and ethical responsibilities to the public.

Conditions (ii) and (iii) of the Skadden proposal, however, do not appear to bear the same relationship to the Partner Retirement Exclusion and the Service Prohibition. Accordingly, unless the IRS believes that these conditions are required by the statutory language of the Partner Retirement Exclusion or Service Prohibition in order to grant the relief described above, conditions (ii) and (iii) do not seem helpful or necessary to include as requirements to obtaining any such relief, and would in fact hamper a retired partner's ability to provide *pro bono* services with his former firm in the most effective manner possible. Therefore, if the IRS finds that conditions similar to (ii) and (iii) are necessary, they should be applied in the most narrowly tailored fashion possible.

Without guidance, retired partners may be inappropriately deterred from providing *pro bono* services because they will lack certainty as to the tax treatment of their retirement payments that would otherwise qualify for the Partner Retirement Exclusion and comply with Section 409A if they choose to engage in *pro bono* efforts. Providing *pro bono* services, which is in the best interest of the public as the legal community seeks to expand representation to those most in need, should not alter the bona fides of a retirement arrangement that otherwise meets the established guidelines for exclusion from self-employment tax and compliance with Section 409A.

Respectfully Submitted,

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Chair

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