



The State Bar *of California*

OPEN SESSION

AGENDA ITEM 4.1

AUGUST 2023

LEGAL SERVICES TRUST FUND COMMISSION RULES COMMITTEE

Date: August 2, 2023

To: Members, Legal Services Trust Fund Commission Rules Committee

From: Amin Al-Sarraf, Member, LSTFC Rules Committee
Louise Bayles-Fightmaster, Member, LSTFC Rules Committee
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Subject: 4.1 Approve Recommendations Regarding Pro Bono Allocation

EXECUTIVE SUMMARY

The Legal Services Trust Fund Commission Rules Committee (Rules Committee) is working to gather, codify, and revise, as necessary and appropriate, the decision points and considerations related to the grants administration process. The purpose of the codification process is to ensure consistency, ease of administration, and clarity for grantee applicants, the commission, and State Bar staff.

This memo presents a working group of the Rules Committee's preliminary recommendations regarding the pro bono allocation test for organizations that meet the definition of Qualified Legal Services Projects (QLSPs) under Business and Professions Code section 6214(b)(3)(A). This memo will review the following:

- Governing authorities in determining eligibility for the pro bono allocation
- Whether to eliminate the "Substantial Numbers" Threshold Test
- Whether and how to modify the "Principal Means" Tests A, B, and C
- Clarifying definitions of terms that impact how roles are considered: non-attorney volunteers, law students, legal fellows

The working group met in June to review and discuss the issues, review past efforts, and develop preliminary recommendations. The working group sought feedback regarding the proposed recommendations from the legal aid community through the Legal Aid Association of California (LAAC). The working group will present the recommendations and the legal aid community's feedback to the Rules Committee on August 2, 2023.

BACKGROUND

CODIFICATION PROCESS

In 2019, at the recommendation of the State Bar Board of Trustees, State Bar staff and the Legal Services Trust Fund Commission (commission) agreed to engage in a multi-phase process of revising and/or codifying decision points employed in the grant-making process for Interest on Lawyer Trust Account (IOLTA) grants, Equal Access Fund (EAF) grants, and other Trust Fund Program grants. The intent was to provide more transparency about the process and to ensure consistency in administering the grants.

Commission members form working groups to investigate the questions raised in the Rules Committee's work plan and develop preliminary recommendations. The working groups develop preliminary recommendations, which are circulated by the committee to the legal aid community through the Legal Aid Association of California (LAAC) to obtain feedback. The Rules Committee considers the feedback before making a final recommendation to the commission, and in turn, the Board of Trustees. The Board of Trustees must approve any recommendation made by the commission unless it makes a finding in writing that a recommendation conflicts with a statutory, fiduciary, or legal obligation of the State Bar.

GOVERNING AUTHORITIES

IOLTA grants are awarded to approximately 100 QLSPs and support centers (SCs) each year. These organizations provide free civil legal aid in California to indigent persons¹, or legal training, legal technical assistance, and advocacy support to the organizations that directly serve indigent persons. IOLTA funds are mainly generated from interest accrued on lawyers' trust accounts.

IOLTA grants are governed by Business & Professions Code 6210-6228 (IOLTA statute), State Bar Rules, and Eligibility Guidelines for Legal Services Projects and Support Centers (Guidelines). The IOLTA statute is the primary governing authority that defines how IOLTA funds are generated and distributed, utilizing a formula to calculate individual award amounts.

The IOLTA formula provides that 85 percent of funds go to QLSPs, allocated to each county based on the relative size of each county's indigent population, and 15 percent to support centers. The formula reserves 10 percent of the QLSP funding in each county as an additional allocation for QLSPs that recruit "substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects" as their "principal means of delivering legal services." The 10 percent pro bono set-aside is distributed to grantees qualifying for the pro bono allocation on a pro rata basis based on the relative amount of each grantee's qualifying expenditures. (Bus. & Prof. Code, § 6214(b)(3)(A) and §6216(b)(1)(B).) This is commonly referred to as the "pro bono allocation." The IOLTA statute

¹ Per the IOLTA statute, an "indigent person" is an individual 1) whose income is 200 percent or less of the federal poverty threshold, or 2) is eligible for Supplemental Security Income or free services under the Older Americans Act (seniors 60+) or Developmentally Disabled Assistance Act (Bus. & Prof. Code, § 6213(d)).

does not define “substantial numbers” or “principal means,” and State Bar Rules are silent on pro bono allocation. The Guidelines outline the tests by which grantees can demonstrate “substantial numbers” and “principal means.” See Attachment A for excerpts of relevant governing authorities.

Eligibility Guidelines

- 1) Part One “Substantial Numbers” Threshold Test: As a preliminary matter, applicants must demonstrate that they recruit “substantial numbers” of pro bono attorneys. To meet this threshold requirement, applicants must satisfy at least one of the following:
 - a) they recruited at least 30 attorneys who provided services in the previous calendar year; or
 - b) they recruited at least 5 percent of the licensed attorneys in the county served who provided services in the previous calendar year; or
 - c) the attorneys they recruited donated at least 1,000 hours of legal services to their clients in the previous calendar year.² (Eligibility Guidelines for Legal Services Projects, Guideline 2.9.1, referring in part to Guideline 2.6.3.1.)
- 2) Part Two “Principal Means” Test: If applicants meet the threshold requirement, applicants must then demonstrate that pro bono is their “principal means” of delivering legal services by meeting one of three tests in each county where they are requesting the allocation. These options for demonstrating the “principal means” are commonly referred to as “Tests A, B, and C.” The applicant can:
 - a) show that the attorneys recruited actually provided substantial free civil legal services and that the number of hours of services provided in the previous calendar year by volunteer attorneys exceeded the number of hours of services provided by staff attorneys (“Test A”); or
 - b) demonstrate:
 - i) that the attorneys recruited actually provided substantial free legal services;
 - ii) that the combined hours of service by volunteers, both attorneys and paralegals³, exceeds the combined number of hours of service by staff attorneys and paralegals; and
 - iii) that the number of hours of service by volunteer attorneys is more than half as many as the combined number of hours of service by staff attorneys and paralegals (“Test B”); or
 - c) describe and explain its method used to demonstrate that pro bono is its principal means of delivering legal services (“Test C”). (Eligibility Guidelines for Legal Services Projects, Guideline 2.9.2, Bus. & Prof. Code, § 6216(b)(1)(B).)

² Guideline 2.6.3.1 outlines additional factors relevant to a determination that an applicant has recruited “substantial numbers of attorneys.” In practice, because some of the factors are somewhat repetitive of the three minimum threshold options discussed above (e.g. demonstrate substantial numbers through the number of attorneys recruited), meeting one of those thresholds is generally considered sufficient.

³ Per the IOLTA statute, paralegals are required to perform substantial legal work under the direction and supervision of an attorney and must possess certain educational and certification credentials (Bus. & Prof. Code, §6450).

DISCUSSION

The IOLTA statute's purpose is "to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them."⁴ Important to this goal is the promotion of pro bono legal services. Pro bono allows the legal aid system to leverage the resources of the private bar to increase access to legal services for low-income Californians.

Some grantees have expressed concern that the Guidelines' numerical based tests have an "urban bias," making it more difficult for rural and/or smaller organizations to meet the pro bono allocation tests in comparison to their urban counterparts. The issue has been raised with the Eligibility & Budget Review Committee in its review of IOLTA applications where QSLPs have applied for the pro bono allocation under Test C, as well as by organizations that fail to meet the requirements of the threshold test.

With these considerations as background, the Rules Committee has taken the opportunity to examine the pro bono allocation tests under the Guidelines and explore options for promoting equity, transparency, and clarity in determining eligibility for the pro bono allocation.

PAST EFFORTS

In 2021, a working group of the Rules Committee convened to explore codification and revision of the pro bono allocation process. The working group sought community input on a range of options through a survey conducted in January 2021 of 28 legal aid services organizations who had previously applied or were likely in the future to apply for the pro bono allocation. (See Attachment B). The survey asked organizations about their experience applying for the pro bono allocation and the challenges they face administering a volunteer-based program. The working group also gathered community feedback through communications with LAAC in early 2021. The working group incorporated this feedback into its analysis when it presented initial recommendations for discussion at the Rules Committee meeting on April 23, 2021.

The Rules Committee made the following recommendations:

- Eliminate the "substantial numbers" threshold test
- Clarify that legal fellows who are attorneys count as staff attorneys and that organizations may explain the impact of these temporary staff on their reported staff hours as part of Test C, if necessary
- Allow applicants to count law students as pro bono volunteers, even if they receive a nominal stipend for their work
- Establish factors for the Test C analysis

The Rules Committee delegated further revision of the principal means test and clarification of roles back to the working group for further investigation, analysis, and recommendations. The focus now is to expand upon the recommendations from 2021 and codify what was previously

⁴ Bus. & Prof. Code, § 6210

only in the Eligibility Guidelines into State Bar Rules to ensure all grant requirements are contained in the governing authorities. The three issues presented include:

1. Whether to eliminate the “Substantial Numbers” Threshold Test
2. Whether and how to modify the “Principal Means” Tests A, B, and C
3. Clarifying definitions that impact how roles are considered

LEGAL AID COMMUNITY FEEDBACK

The working group sought the legal services community’s feedback on the above issues and the working group’s proposed recommendations from July 5, 2023, to July 14, 2023. The working group appreciates the time and effort LAAC invested in circulating a draft of this memo, meeting with its members, writing a letter to the working group (Attachment C), and forwarding additional feedback from one of its members (Attachment D). The feedback was largely supportive of the working group’s recommendations with some areas of disagreement that will be addressed in the relevant sections below.

One of LAAC’s general suggestions was to survey QLSPs directly to seek additional feedback regarding the pro bono allocation since the pro bono environment has changed substantially following the pandemic. LAAC further suggested seeking direct feedback from law firm counsel to learn more about the work law firms are able to take on and better understand the “deeper change” in the pro bono legal services landscape. However, LAAC acknowledged the importance of revising the pro bono allocation practices now, recognizing additional changes may be needed later. The working group agrees and will consider ways to gather information directly from stakeholders in the future. Additionally, the State Bar’s Office of Access & Inclusion plans to conduct a landscape analysis of the state of pro bono post pandemic.

WHETHER TO ELIMINATE THE “SUBSTANTIAL NUMBERS” THRESHOLD TEST

Part one of the Guidelines’ pro bono allocation test is the threshold test that determines whether a QLSP has a baseline “substantial number” of pro bono attorneys. If the QLSP cannot demonstrate that they recruited (1) 30 attorneys, or (2) recruited five percent of the county’s attorneys, or (3) the attorneys the QLSP recruited donated at least 1,000 legal hours of legal services, that is the end of the inquiry. The QLSP is not eligible for the additional pro bono allocation and does not continue to the second part of the test, despite the fact that it may meet Tests A, B, and/or C. If a QLSP meets the “substantial numbers” threshold test, it must then show in part two that pro bono is the “principal means” by which it delivers legal services by demonstrating it met either Test A, Test B, or Test C.

Three considerations support eliminating the “substantial numbers” threshold test: (1) there is no statutory requirement for two separate tests to determine pro bono allocation eligibility, (2) the test does not provide a realistic opportunity to gain eligibility for some applicants, and (3) “substantial numbers” can be adequately measured by the principal means tests A, B, or C.

First, there is no statutory requirement for two separate tests to determine eligibility for the pro bono allocation. The IOLTA statute requires that a QLSP recruit a “substantial number” of pro bono attorneys and that these pro bono attorneys’ services are its “principal means” of delivering legal services, but the statute does not require a unique threshold test to assess

substantial number. Nor is there a statutory requirement that there be two separate tests for substantial numbers and principal means. Furthermore, the State Bar Rules are silent as to pro bono allocation.

Second, the “substantial numbers” threshold test does not provide a realistic opportunity to achieve eligibility as some grantees have described due to urban bias. A QLSP in a rural area with few active attorneys may be unable to recruit 30 attorneys, obtain 1,000 pro bono hours, or recruit five percent of the county’s active attorneys if those attorneys already work at the QLSP, are conflicted out, or do not have bandwidth to volunteer. On the other hand, urban centers have more attorneys, more law schools, and more large law firms, which often actively support their attorneys’ pro bono work. Such heavy reliance on a numerical approach to measure the recruitment of pro bono attorneys across counties may not allow for the dramatic difference in size and composition of organizations, as well as the uneven distribution of attorneys across geographic regions. Notably, only 13 of the 58 counties in California had a provider or providers that received a pro bono allocation in 2023; of those 13 counties, one is rural, six are urban, and six are urban-rural.⁵

The number of attorneys in each county and types of law firms vary widely across California. For example, Los Angeles County has a pool of 57,309 active attorneys from which to recruit; Napa County has 426; Alpine County has four.⁶ Of the 58 counties in California, 22 have fewer than 100 attorneys. The composition of attorneys varies widely across the state as well. Rural areas may consist primarily of district attorneys, public defenders, and the attorneys who work for QLSPs or SCs. The remaining attorneys likely work in very small firms or solo practices. Furthermore, the evolving nature of pro bono legal services may allow for remote opportunities where attorneys can provide services in counties other than the ones where they practice. See Attachment E for a list of the number of active attorneys per county. To address this diversity, it is important to examine what “substantial numbers” may look like for different counties. What constitutes a substantial number varies from one organization or one county to another.

Finally, looking at the pro bono allocation test holistically, the threshold test may be unnecessary because the substantial number requirement may already be adequately measured by the principal means test (Tests A, B, C). Test A and Test B require an organization to show that volunteer attorney hours exceed staff attorney hours. This ratio indicates an organization’s reliance on “substantial” numbers of pro bono attorneys relative to its number of staff attorneys. Thus, it may be inferred that this involves “recruiting substantial numbers of attorneys.” While Test C in its current form does not require demonstrating “substantial numbers” of pro bono attorneys, adding language to make that need explicit would also sufficiently meet the statutory requirement, as will be discussed later in this memo.

⁵ California Health and Human Services Geospatial Data, as of December 9, 2019, <https://gis.data.ca.gov/datasets/CHHSAgency::mssa-detail/about>

⁶ The State Bar of California, *Attorney Demographics*, as of May 29, 2023, https://members.calbar.ca.gov/search/demographics_counties.aspx

Response from the Legal Aid Community

In 2021, LAAC queried members of the legal aid community about eliminating the threshold test, and the summarized response indicated their support for eliminating it. See Attachment F. While the comments do not represent the community's unanimous opinion, the general feedback from those organizations impacted was that requiring programs to meet minimum number of hours or persons recruited may not be equitable due to differences in staff size, location (urban vs. rural), and service delivery (e.g. clinics vs. appellate representation). All of these factors may affect the number and type of volunteers available to an organization and put some organizations at a disadvantage. In 2023, the legal aid community expressed continued support for eliminating the threshold test.

Working Group Recommendation

The working group recommends eliminating the threshold test. The requirement of recruiting "substantial numbers of attorneys" may be met by revising and codifying the principal means test (Tests A, B, and C) as State Bar Rules, as discussed below.

WHETHER AND HOW TO MODIFY THE "PRINCIPAL MEANS" TESTS A, B, AND C

Currently, if an organization meets the "substantial numbers" threshold test, it must then show that pro bono is the "principal means" by which it delivers legal services, by demonstrating one of the following:

- Test A: Pro bono attorney hours exceed staff attorney hours; or
- Test B: Combined number of hours of service by volunteers, both attorneys and paralegals, exceeds combined number of hours of service by staff attorneys and paralegals; AND the number of hours by volunteer attorneys is more than half as many as the combined number of hours by staff attorneys and paralegals; or
- Test C: Describe and explain its method used to demonstrate that pro bono is its principal means of delivering legal services.

In the 2023 Grant year, 18 organizations received the pro bono allocation by qualifying through either Test A, B, or C. Five qualified through Test A (four met both Test A and Test B; one met Test A and not Test B). Two qualified through Test B only (met Test B and not Test A). And 11 qualified through Test C only. Numbers were similar in 2021 when 18 organizations received the pro bono allocation, seven through Test A, three through Test B, and eight through Test C. The Rules Committee has the opportunity to assess whether the current principal means tests accommodate all models of pro bono organizations serving California's indigent population, or whether adjusting the tests could improve equity, transparency, and clarity. Below we will explore Test A, Test B, and Test C and make recommendations for each.

"Principal Means" Test A

Test A simply compares the cumulative number of pro bono attorney hours to the cumulative number of staff attorney hours. If pro bono hours are greater than staff hours, the presumption is that the applicant uses more pro bono attorneys to achieve its legal aims than staff attorneys. As is, Test A provides a straightforward test to demonstrate that an applicant's pro bono

attorney hours are substantial, relative to its staff attorney hours, and that pro bono attorney hours serve as the principal means of delivering legal services.

The 2021 Rules Committee made no recommendation regarding Test A.

Response from the Legal Aid Community

Feedback from the legal aid community supports maintaining Test A as is since simple, numerical tests provide certainty, give applicants confidence, and minimize the applicant's administrative burden. However, LAAC noted that Test A may need revisiting in the years to come as the staff of legal services organizations continues to grow and meeting Test A becomes more difficult, even for organizations where pro bono is their principal means of service delivery.

Working Group Recommendation

The Working Group recommends no changes to Test A.

“Principal Means” Test B

The goals of Test B are to ensure that a majority of service hours are provided by volunteers rather than staff, and that attorney volunteers provided more than half the number of service hours provided by all staff. One consideration supporting Test B's revision is that the two-step calculation is not intuitive, and its goals may be achieved with a simpler approach. In 2023, only two applicants out of 18 qualified for the pro bono allocation solely under Test B. A total of six satisfied Test B but four of those had already qualified under Test A. Nonetheless, Test B with its inclusion of paralegals allows applicants that rely on substantial non-attorney assistance to capture those contributions in a way Test A does not. While this may enable a few organizations each year to receive the allocation, these applicants would likely qualify under Test C, which allows applicants a narrative explanation of their “principal means” of service delivery.

Another concern with Test B is that counting only pro bono attorneys and paralegals is limiting and does not represent the evolved practice of legal aid. In the 40 years since the IOLTA statute's enactment, the delivery of legal services, including pro bono services, has changed. Many legal service organizations take a more holistic approach, incorporating a wide variety of volunteers beyond attorneys and paralegals to address legal problems. Today, non-attorney volunteers may include interpreters, legal assistants, social workers, undergraduate law students, and intake volunteers. These roles regularly provide support that enables pro bono attorneys to communicate and outreach more effectively with clients, whether through other languages, by bridging service gaps, or by handling administrative tasks. These roles extend the capabilities of attorneys and broaden their reach, thereby increasing the number of clients an organization can serve.

The American Bar Association (ABA) Standard 4.9⁷ encourages the inclusion of other practitioners in the delivery of legal services:

“A legal aid organization should consider using paraprofessionals, tribal advocates, lay advocates, law students, social workers, and other professionals when authorized by state, federal, or tribal law, and appropriate court rules, rules of professional conduct, and professional regulatory rules.” These roles “when supervised by an attorney have long played an essential part in legal aid practice. There are many circumstances in which these professionals can assist clients directly and greatly enhance the work of an attorney in serving clients, often in a cost-effective manner.”

Current office practice allows counting some of these roles toward the Test B calculation when related to the legal outcome. Explicitly broadening the definition of non-attorney volunteer hours would acknowledge the breadth of volunteers serving legal aid clients and provide both consistency and clarity to staff and grantees as service models evolve.

Discussion from April 2021 LSTFC Rules Committee

In 2021, the Rules Committee considered options for revising Test B to simplify the test and make it more inclusive of non-attorney volunteers. At the end of the meeting, the Rules Committee delegated revision of Test B back to the working group for further analysis.

Response from the Legal Aid Community

The feedback from the legal aid community was mixed over how to evolve Test B. Some support eliminating Test B entirely while still encouraging organizations to track and report all volunteers by folding this requirement into Test C. One organization considers Test B a useful way to develop and track performance against internal quantitative goals, calibrate throughout the year, and make adjustments to maintain its qualifying status. This organization further noted that any concern that the use of non-attorney volunteers could overshadow the work of attorney volunteers is already addressed by clause iii in Test B that requires that the number of hours of service by volunteer attorneys is more than half as many as the combined number of hours of service by staff attorneys and paralegals.

The legal community expressed consensus about expanding who counts toward non-attorney volunteers as part of the organization’s pro bono hours regardless of the test used to qualify for the allocation. According to some organizations queried, defining the category to be more inclusive would better reflect the full scope of service delivery, as it has changed considerably over time.

Working Group Recommendation

The working group explored several options in its analysis: (1) keep Test B as is; (2) simplify Test B into a single step and include work done by non-attorney volunteers toward pro bono hours; (3) add an additional parameter to the revised test that required, within total volunteer hours, that the number of pro bono attorney hours exceed the number of non-attorney volunteer

⁷ State Bar Rule 3.661 advises the LSTFC to use the ABA’s *Standards for the Provision of Civil Legal Aid* as guidelines in grant administration.

hours; or (4) omit Test B altogether. Considerations that informed the working group's discussion included the legislative intent of the IOLTA statute, feedback from the legal aid community, concerns about wraparound services overshadowing core legal services, and a desire to evolve the tests to adapt to future models of service delivery.

Another important consideration was the recent revision to State Bar Rule 3.672(A), which became effective July 1, 2023. The revised rule defines "legal services" more broadly as "work that uses legal knowledge and skills to create, advance, protect, or enforce the legal rights of clients or communities" and may include "complementary services provided they advance a legal outcome and serve as an integral part of an attorney's strategy in a legal matter or case, and the attorney directs the work in that matter or case." The working group seeks to connect the evolution of the pro bono allocation tests to this foundational definition that essentially places the determination of whether roles providing "complementary services" qualify as legal services in the hands of the attorney directing the work. This obviates the need for a bright line distinction in the pro bono allocation tests clarifying which services qualify as legal services and which do not.

As such, the working group aims to simplify the application process while still ensuring those who qualify have demonstrated pro bono is their principal means of providing these legal services. The working group believes organizations can achieve this by either meeting Test A's straightforward calculation showing pro bono attorney hours exceed staff attorney hours, or by submitting a narrative that meets the requirements of a more explicitly defined Test C. Currently, only a handful of organizations qualify exclusively under Test B each year, and the working group believes Test C will accommodate those applicants who rely on a large number of non-attorney volunteers in their pro bono models. Essentially, the purpose of Test B can be accomplished by Test C. Thus, the working group recommends eliminating Test B entirely.

"Principal Means" Test C

Unlike Tests A and B, Test C allows an applicant to describe rather than numerically demonstrate how it satisfies the requirement that pro bono is its principal means of delivering legal services. This option can be valuable for small or rural organizations who may not have sufficient staff or resources to follow up with and track volunteer hours or who lack the attorney numbers to qualify. Or the option can be helpful when an organization encounters unique circumstances that prevent it from meeting the numerical tests it typically qualifies under.

Applicants' responses to Test C vary widely in length, approach, and topics covered. All Test C requests are elevated to the Eligibility and Budget Review Committee for review with staff recommendations. In reviewing applications, staff consider any changes to the volunteer component of service delivery and how they impact case closures, staff participation, and pro bono productivity; if hours reporting is transparent and sound; and the staff role in pro bono work. In 2023, 11 of 18 pro bono allocation recipients qualified through a narrative response to Test C.

Recommendation from April 2021 LSTFC Rules Committee

The 2021 Rules Committee recommended establishing factors for Test C that would serve as clear standards on which to assess applications and also provide guidance on what the LSTFC considers relevant in its determination. Establishing specific factors would add clarity and transparency for applicants and add consistency and transparency to the review process.

Response from the Legal Aid Community

The legal aid community expressed consensus that Test C was a useful option that allowed flexibility and consideration of individual or unique circumstances. And with the elimination of Test B as a means to qualify for the allocation, Test C takes on added importance. They considered the addition of factors as helpful to eliminate ambiguity in Test C's current form. One specific suggestion was to ensure that the rules clearly instruct organizations to address all factors in their response and that additional information was also welcome.

A concern the legal aid community expressed was with the working group's preliminary recommendation to include a factor requiring applicants to provide "data demonstrating quantifiable commitment to pro bono as principal means of delivery, either by percent or number of pro bono cases compared to cases by staff." They noted that this was not data currently tracked by organizations, and moreover, that many attorneys were more interested in remote clinic work or smaller-scale cases now, which is not the type that would be accurately captured in the data points identified.

Working Group Recommendation

The working group recommends expanding Test C to include a set of factors applicants are required to address to demonstrate that pro bono legal services is the organization's principal means of legal services delivery. With the above recommendation to omit Test B from the pro bono allocation test, this recommendation becomes a necessary corollary. The working group clarified and revised the phrasing to allow organizations flexibility in determining what data to provide to demonstrate their quantifiable commitment to pro bono as principal means of delivery.

The revised Test C would require applicants to provide a narrative explanation of the applicant's program, including, but not limited to, a description of the following factors:

- Pro bono recruitment and retention strategy,
- Training curriculum,
- Type and number of volunteer opportunities available,
- Service delivery model that requires volunteers,
- Supervision and scope of support for volunteers, and
- Data demonstrating quantifiable commitment to pro bono as the principal means of delivery, such as percent or number of pro bono cases compared to cases by staff attorneys, a substantial combined number of total attorney and non-attorney volunteer hours, or other relevant data points.

Applicants could address a range of scenarios within their descriptions. For example, a program could elaborate on the challenge of recruiting volunteers in rural areas, or a grantee could explain the role of its pro bono coordinator. This is not an exclusive list of factors. After addressing the required factors, applicants are welcome to describe their programs and methodology for determining principal means as they deem appropriate. These components would provide an overall view of how an organization incorporates pro bono, and to what extent. Analysis of the factors should help distinguish organizations that rely on pro bono assistance as their principal means of service delivery from those that utilize volunteers as a smaller piece of their overall service model.

CLARIFYING DEFINITIONS THAT IMPACT HOW ROLES ARE CONSIDERED

State Bar Rules and the Guidelines provide few definitions for terms used to determine the pro bono allocation. Defining the following terms to reflect the evolving legal services practice will improve equity, transparency, and clarity: non-attorney volunteers, law students, and legal fellows.

Defining Non-Attorney Volunteers

In the 40 years since the IOLTA statute's inception, delivery of legal services has evolved to be more holistic. Non-attorney roles enable grantees to increase their reach and provide more culturally competent services. Like paralegals, volunteers are supervised by attorneys and are trained in the grantee's services and legal subject matters. Expanding who counts as "pro bono" beyond attorneys and paralegals to include non-attorney volunteers—such as interpreters, legal assistants, social workers, undergraduate students, law students, intake volunteers and other volunteers—would provide clarity and allow for flexibility as legal service delivery models continue to advance. Current practice allows counting some of these roles, such as law students, when directly related to the legal outcome.

Response from the Legal Aid Community

As mentioned in the above discussion under "Principal Means" Test B, the legal aid community supported expanding who counts toward non-attorney volunteers as part of the organization's pro bono hours to better reflect the full scope of service delivery. Furthermore, the feedback included a suggestion to add a data point in Test C of all volunteers, attorney and non-attorney. The legal aid community expressed concern with the working group's preliminary recommendation to count non-attorney volunteer hours if, among other things, their "roles are related to the client's legal outcome." They saw this as limiting and sought a more expansive definition that included counting non-attorney volunteer hours spent undertaking projects that benefited the client community, whether working on a specific client's case or not.

Working Group Recommendation

The working group's recommendation is to clarify that the work done by non-attorney volunteers can count toward pro bono hours so long as the work is supervised by an attorney and the work of the volunteer contributes to the delivery of free legal services to the indigent.

Defining Law Students

The Guidelines are silent on whether law students can be counted as pro bono volunteers under the principal means tests. Defining which categories of law students can be counted would provide clarity to applicants.

Law students support pro bono programs of all kinds across the state. Law student tenure at an organization typically lasts a summer or a semester. Like paralegals and other volunteers, law students are supervised by attorneys and are trained in the organization's services and legal subject matters. Law students are primarily considered to be participating in a learning or educational experience while also contributing to the work of the QLSP; in contrast, legal fellows are usually full-time junior staff members who have completed their education. Law students may receive course credit, compensation, or a stipend during their engagement with an organization. Historically, law students have not earned enough to be considered a living wage and must supplement income with other sources.

In 2023, in response to the recruitment and retention crisis in legal aid, the LSTFC launched the Legal Aid Leaders Fellowship grant program (Law School Fellowship Grants) to fund law students interning at legal aid organizations during the summer. This funding allows grantees to pay law students a living wage—many for the first time—and provides law students, who might not otherwise be able to take an unpaid summer internship, opportunities in legal aid. The goals of the program include supporting diversity and equity in legal aid and developing the pipeline of attorneys to legal aid. These experiences are instrumental in encouraging law students to pursue legal aid employment or to become volunteers themselves after law school.⁸

There is a tension between the broader goals to address diversity, equity, and inclusion in the sector and to develop the attorney pipeline to legal aid versus the need to separate paid versus unpaid work for purposes of considering an applicant's eligibility to receive the pro bono allocation. Unfortunately, the Guidelines do not provide a clear definition of compensation as it relates to pro bono work, only that "attorneys can be considered to serve without compensation even when they are reimbursed for out-of-pocket expenses, whether by the client, the applicant, or other sources." (Eligibility Guideline 2.6.3.1) Current office practice is to count law student hours toward pro bono volunteer hours, regardless of whether law students receive academic credit, a stipend, or compensation.

Recommendation from April 2021 LSTFC Rules Committee

The 2021 Rules Committee recommended counting students as non-attorney volunteers under the principal means tests regardless of whether they receive a nominal stipend.

Response from the Legal Aid Community

Current practice is consistent with how legal aid organizations view their law student volunteers. The legal aid community consistently agreed with the idea of counting law students

⁸ The State Bar of California: *2019 California Justice Gap Study*
<https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf>

as pro bono volunteers. They noted that whether students receive academic credit, a stipend, or compensation in exchange for their time is secondary to the learning experience provided to each student.

Recently, a grantee participating in the 2023 LSTFC Legal Aid Leaders Fellowship grant program shared specific concerns that because the law students interning at her organization are labeled as “fellows” and receive compensation, they would be required to count as staff attorneys, similar to how legal fellows are usually treated. Having to exclude the law students’ hours from the organization’s pro bono hours calculation would discourage future participation in law student funding programs.

Initially, to accommodate the tension identified above, the working group considered a preliminary recommendation to add language that requires an applicant to demonstrate that there is some component of volunteerism inherent to the law students providing these services. For example, if an applicant could show that the amount a law student earns during their tenure at the organization is less than what a law student could earn during a competing opportunity at a law firm or government agency, then that law student’s hours can be included in the organization’s total pro bono hours. After reviewing the working group’s preliminary recommendation, the legal aid community expressed concern with this proposal. They viewed the requirement’s application as burdensome and unnecessary since evidence will almost certainly show the differential.

Working Group Recommendation

The working group recommends allowing law students’ time to count as pro bono hours even if the law student receives academic credit, a stipend, or compensation. To accommodate the legal aid community’s concern about requiring applicants to provide evidence of their law students’ lower compensation relative to law students at law firms or government agencies, the working group recommends requiring an explanation to demonstrate a law student’s commitment to volunteerism. For example, a grantee could provide information that would distinguish a law student pro bono volunteer from a law student working parttime providing paralegal-level services.

Defining Legal Fellows

Principal means tests measure pro bono attorneys against staff attorneys but do not define whom to include under “staff attorney.” Counting legal fellows as staff attorneys may preclude applicants from meeting Test A or B because it increases the number of paid attorney hours against which pro bono attorney hours must be compared.

The Guidelines do not define “staff attorneys.” However, the Commentary to Eligibility Guideline 2.6.3.1 provides that “Any attorney who is not an employee of the applicant can be considered in private practice, and attorneys may be considered in private practice even though they work for government agencies, corporations, or in non-legal occupations.”

Many characteristics of legal fellows align them with staff attorneys. Legal fellows typically work full-time on a one-year or two-year fellowship as employees of an organization, though some have all or part of their salaries paid by third-party sponsors. Fellows typically perform duties

similar to entry-level staff attorneys. Fellows are often licensed or achieve licensure during the tenure of their fellowship. Furthermore, current office practice treats fellows as staff attorneys during the grant budgeting process.

The LSTFC Legal Aid Leaders Fellowship grant program mentioned above uses the term “fellows” to refer to law students receiving compensation of \$7,500 to provide legal services to indigent persons at QLSPs and SCs for the summer. However, the fellow label is somewhat of a misnomer in that these law student “fellows” share the same characteristics as the law students described in the above section on “defining law students.”

Recommendation from April 2021 LSTFC Rules Committee

The recommendation from the 2021 Rules Committee was to count legal fellows as staff attorneys. Organizations may explain the impact of these temporary staff on their reported staff hours as part of Test C, as necessary.

Response from the Legal Aid Community

The legal aid community was mixed about classifying legal fellows as staff attorneys. The general response was that counting legal fellows as staff attorneys was acceptable so long as it was conditioned on there being space and flexibility under Test C for organizations to differentiate between fellows and paid staff attorneys and to explain the impact on their pro bono models. There was concern, however, with the specificity of the working group’s proposed definition of the term “legal fellow” and suggested it be more inclusive of what a legal fellow is versus what it is not.

Some grantees opposed classification of legal fellows as staff attorneys altogether, stating that doing so disincentivizes organizations from seeking support from fellows since it skews numbers against qualifying for the pro bono allocation’s numerical tests. They noted that fellows often rely on third-party support for their salaries, and that fellows are not likely to perform the same type of work as staff attorneys due to being newer law graduates or having a discreet and particular focus and limited caseload.

Working Group Recommendation

The working group recommends, for purposes of the pro bono allocation, defining legal fellows as law graduates or licensed attorneys who have temporary and/or timebound employment and are typically compensated by a third party. The working group recommends counting legal fellows as staff attorneys unless they are current law students and/or participating in the LSTFC Legal Aid Leaders Fellowship grant program.

SUMMARY OF WORKING GROUP RECOMMENDATIONS

The working group's recommendations to the Rules Committee are as follows:

- 1) Eliminate the threshold test for establishing recruitment of "substantial numbers of attorneys," and codify the Principal Means Test as State Bar Rules to ensure applicant meets substantial numbers eligibility requirement.
- 2) Make the following changes to the Principal Means Test:
 - a) Maintain Test A as is: Pro bono attorney hours exceed staff attorney hours.
 - b) Eliminate Test B and ensure Test C is expansive enough to encompass organizations who use a pro bono model that incorporates a large number of non-attorney volunteers.
 - c) Expand Test C to include a set of factors applicants are required to address to demonstrate that they recruited a substantial number of attorneys in private practice to provide free legal representation to indigent persons or qualified legal services projects in California and that pro bono is their principal means of legal service delivery. A narrative explanation must include, but need not be limited to, a description of the following factors:
 - i) Pro bono recruitment and retention strategy,
 - ii) Training curriculum,
 - iii) Type and number of volunteer opportunities available,
 - iv) Service delivery model that requires volunteers,
 - v) Supervision and scope of support for volunteers, and
 - vi) Data demonstrating quantifiable commitment to pro bono as the principal means of delivery, such as percent or number of pro bono cases compared to cases by staff attorneys, a substantial combined number of total attorney and non-attorney volunteer hours, or other relevant data points.
- 3) Clarify the following definitions related to the principal means tests:
 - a) Non-attorney volunteers: Clarify that the work done by non-attorney volunteers can count toward pro bono hours so long as the work is supervised by an attorney and the work of the volunteer contributes to the delivery of free legal services to the indigent. For example, "Non-attorney volunteers may include interpreters, legal assistants, social workers, undergraduate students, law students, intake volunteers, and other volunteers so long as their work is supervised by an attorney and the work of the volunteer contributes to the delivery of free legal services to the indigent."
 - b) Law students: Include law students within pro bono hours and define law students to ensure receiving academic credit, a stipend, or compensation does not disqualify them from being counted as pro bono volunteers. Require applicants provide an explanation to demonstrate a law student's commitment to volunteerism. For example, a grantee could provide information that would distinguish a law student pro bono volunteer from a law student working parttime providing paralegal-level services.
 - c) Legal fellows: For purposes of the pro bono allocation, define legal fellows as law graduates or licensed attorneys who have temporary and/or timebound employment and are typically compensated by a third party. Count legal fellows as staff attorneys unless they are current law students and/or participating in the LSTFC Legal Aid Leaders Fellowship grant program.

CONCLUSION

Attachment G provides proposed State Bar Rule language on pro bono allocation. These rules would provide clear guidance in grants administration for applicants, the LSTFC, and State Bar staff. These rules would promote equity, transparency, and clarity in determining eligibility for the pro bono allocation.

FISCAL/PERSONNEL IMPACT

None

RECOMMENDATIONS

RESOLVED, that the Legal Services Trust Fund Commission Rules Committee approves the following working group recommendation:

Adopt new State Bar Rules 3.680(F) and 3.680(G) as set forth in Attachment G of the working group's August 2, 2023, memo to establish clear guidance in determining eligibility for the pro bono allocation.

ATTACHMENTS LIST

- A. Excerpts from governing authorities: Business and Professions Code; Eligibility Guidelines for Legal Services Projects
- B. January 2021 Pro Bono Allocation Survey results
- C. LAAC's feedback to working group's preliminary recommendations
- D. Bet Tzedek's feedback to working group's preliminary recommendations
- E. List of active attorneys in California by county
- F. Comments from LAAC and Legal Aid of Sonoma County regarding the pro bono allocation
- G. Proposed State Bar Rule language

**Excerpts of Governing Authorities:
Business and Professions Code sections 6213, 6214, and 6216;
Eligibility Guidelines for Legal Services Projects, Guidelines 2.6.3. and 2.9.**

California Business and Professions Code section 6213

As used in this article:

(a) "Qualified legal services project" means either of the following:

(1) A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California that meets the requirements of subparagraphs (A) and (B).

(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars (\$20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(B) The program shall have quality control procedures approved by the State Bar of California.

(b) "Qualified support center" means an incorporated nonprofit legal services center that has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge and which actually provides through an office in California a significant level of legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects on a statewide basis in California.

(c) "Recipient" means a qualified legal services project or support center receiving financial assistance under this article.

(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this

subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

(e) “Fee generating case” means a case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered fee generating if adequate representation is unavailable and any of the following circumstances exist:

(1) The recipient has determined that free referral is not possible because of any of the following reasons:

(A) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(B) Neither the referral service nor any attorney will consider the case without payment of a consultation fee.

(C) The case is of the type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee.

(D) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time.

(2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(f) “Legal Services Corporation” means the Legal Services Corporation established under the Legal Services Corporation Act of 1974 (P.L. 93-355; 42 U.S.C. Sec. 2996 et seq.).

(g) “Older Americans Act” means the Older Americans Act of 1965, as amended (P.L. 89-73; 42 U.S.C. Sec. 3001 et seq.).

(h) “Developmentally Disabled Assistance Act” means the Developmentally Disabled Assistance and Bill of Rights Act, as amended (P.L. 94-103; 42 U.S.C. Sec. 6001 et seq.).

(i) “Supplemental security income recipient” means an individual receiving or eligible to receive payments under Title XVI of the federal Social Security Act, or payments under Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(j) “IOLTA account” means an account or investment product established and maintained pursuant to subdivision (a) of Section 6211 that is any of the following:

- (1) An interest-bearing checking account.
- (2) An investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money market fund.
- (3) An investment product authorized by California Supreme Court rule or order.

A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities or other comparably conservative debt securities, and may be established only with any eligible institution that is “well-capitalized” or “adequately capitalized” as those terms are defined by applicable federal statutes and regulations. An open-end money market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities or other comparably conservative debt securities, shall hold itself out as a “money market fund” as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.), and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars (\$250,000,000).

(k) “Eligible institution” means either of the following:

- (1) A bank, savings and loan, or other financial institution regulated by a federal or state agency that pays interest or dividends in the IOLTA account and carries deposit insurance from an agency of the federal government.
- (2) Any other type of financial institution authorized by the California Supreme Court.

California Business and Professions Code section 6214

(a) Projects meeting the requirements of subdivision (a) of Section 6213 which are funded either in whole or part by the Legal Services Corporation or with Older American Act funds shall be presumed qualified legal services projects for the purpose of this article.

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

(1) They receive cash funds from other sources in the amount of at least twenty thousand dollars (\$20,000) per year to support free legal representation to indigent persons.

(2) They have demonstrated community support for the operation of a viable ongoing program.

(3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.

California Business and Professions Code section 6216

The State Bar shall distribute all moneys received under the program established by this article for the provision of civil legal services to indigent persons. The funds first shall be distributed 18 months from the effective date of this article, or upon such a date, as shall be determined by the State Bar, that adequate funds are available to initiate the program. Thereafter, the funds shall be distributed on an annual basis. All distributions of funds shall be made in the following order and in the following manner:

(a) To pay the actual administrative costs of the program, including any costs incurred after the adoption of this article and a reasonable reserve therefor.

(b) Eighty-five percent of the funds remaining after payment of administrative costs allocated pursuant to this article shall be distributed to qualified legal services projects. Distribution shall be by a pro rata county-by-county formula based upon the number of persons whose income is 125 percent or less of the current poverty threshold per county. For the purposes of this section, the source of data identifying the number of persons per county shall be the latest available figures from the United States Department of Commerce, Bureau of the Census. Projects from more than one county may pool their funds to operate a joint, multicounty legal services project serving each of their respective counties.

(1) (A) In any county which is served by more than one qualified legal services project, the State Bar shall distribute funds for the county to those projects which apply on a pro rata basis, based upon the amount of their total budget expended in the prior year for legal services in that county as compared to the total expended in the prior year for legal services by all qualified legal services projects applying therefor in the county. In determining the amount of funds to be allocated to a qualified legal services project specified in paragraph (2) of subdivision (a) of Section 6213, the State Bar shall recognize only expenditures attributable to the representation of indigent persons as constituting the budget of the program.

(B) The State Bar shall reserve 10 percent of the funds allocated to the county for distribution to programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 and which perform the services described in subparagraph (A) of paragraph (3) of Section 6214 as their principal means of delivering legal services. The State Bar shall distribute the funds for that county to those programs which apply on a pro rata basis, based upon the amount of their total budget expended for free legal services in that county as compared to the total expended for free legal services by all programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 in that county. The State Bar shall distribute any funds for which no program has qualified pursuant hereto, in accordance with the provisions of subparagraph (A) of paragraph (1) of this subdivision.

(2) In any county in which there is no qualified legal services projects providing services, the State Bar shall reserve for the remainder of the fiscal year for distribution the pro rata share of funds as provided for by this article. Upon application of a qualified legal services project proposing to provide legal services to the indigent of the county, the State Bar shall distribute the funds to the project. Any funds not so distributed shall be added to the funds to be distributed the following year.

(c) Fifteen percent of the funds remaining after payment of administrative costs allocated for the purposes of this article shall be distributed equally by the State Bar to qualified support centers which apply for the funds. The funds provided to support centers shall be used only for the provision of legal services within California. Qualified support centers that receive funds to provide services to qualified legal services projects from sources other than this article, shall submit and shall have approved by the State Bar a plan assuring that the services funded under this article are in addition to those already funded for qualified legal services projects by other sources.

Eligibility Guidelines for Legal Services Projects, Guideline 2.6.3.**2.6.3. The applicant must provide at least one of the following special services:**

2.6.3.1. Recruiting substantial numbers of attorneys in private practice who serve without compensation providing the legal services referred to in Guideline 2.3 above, or

Commentary:

In deciding whether you are eligible to apply as a project that recruits substantial numbers of attorneys, the Legal Services Trust Fund Commission will consider several factors. At a minimum you must meet at least one of the following tests:

- a. you recruited at least 30 attorneys who provided services in the previous calendar year; or
- b. you recruited at least five percent of the licensed attorneys in the county you serve who provided services in the previous calendar year; or
- c. the attorneys you recruited donated at least 1,000 hours of legal services for your clients in the previous calendar year.

Provided you meet one of these minimum tests, you may demonstrate your project's recruitment of substantial numbers of attorneys in one or more of the following ways:

- a. the number of attorneys recruited;
- b. the percentage of attorneys in your local service area that donated services through your project;
- c. the verified value of donated civil legal services in comparison to your expenditures and budget;
- d. the number of hours donated by each attorney;
- e. the number of attorneys in your area who have special expertise needed to provide the services your project offers; or
- f. other considerations that may affect the availability of volunteer attorneys in your service area.

Any attorney who is not an employee of the applicant can be considered in private practice, and attorneys may be considered in private practice even though they work for government agencies, corporations, or in non-legal occupations.

Attorneys can be considered to serve without compensation even when they are reimbursed for out-of-pocket expenses, whether by the client, the applicant, or other sources. [B&P Code §6214(b)(3)(A); Guideline 2.3.2 and supporting Commentary]

[Guideline 2.6.3.2. omitted]

Eligibility Guidelines for Legal Services Projects, Guideline 2.9

2.9. An applicant wishing to qualify for the additional allocation reserved for organizations that demonstrate the volunteer services of private lawyers as their principal means of delivering legal services must meet each of the following requirements:

2.9.1 the requirements of Guideline 2.6.3.1 above; and

2.9.2 the applicant's principal means of delivering legal services is the recruitment of attorneys in private practice.

Commentary:

See Commentary concerning Guideline 2.6.3.1. One method by which you may demonstrate that such recruitment is your project's principal means of legal services delivery is to show by objective evidence that the attorneys recruited actually provided substantial free civil legal services and that the number of hours of services so provided in the previous calendar year by attorneys recruited exceeded the number of hours of services provided by lawyer staff employed by the applicant.

An alternative method by which you may demonstrate that such recruitment is your project's principal means of legal services delivery is to show by objective evidence (1) that the attorneys recruited actually provided substantial free civil legal services; (2) that the combined number of hours of service by volunteers, both attorneys and paralegals, exceeds the combined number of hours of service by staff attorneys and paralegals; and (3) that the number of hours of service by volunteer attorneys is more than half as many as the combined number of hours of service by staff attorneys and paralegals.

If you do not use either of these methods to demonstrate your principal delivery means, you should describe and explain in your application the method used. [B&P Code §6216(b)(1)(B)]

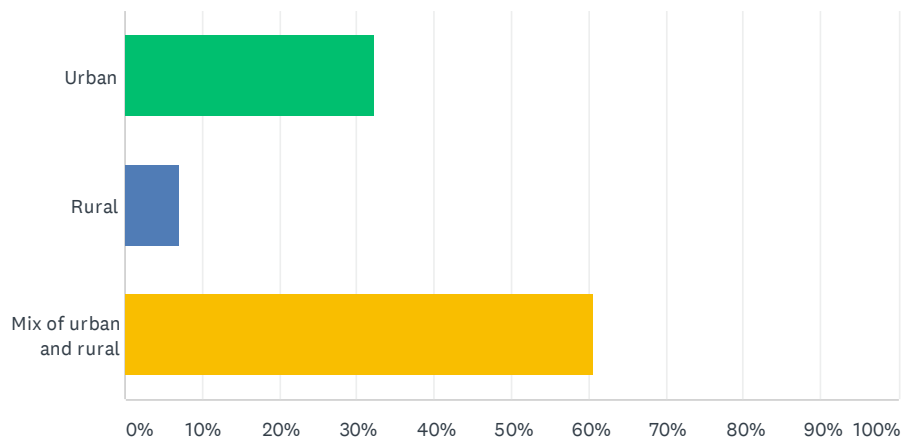
Q1 Name of organization

Answered: 28 Skipped: 0

#	RESPONSES	DATE
1	Bet Tzedek Legal Services	1/22/2021 5:50 PM
2	Veterans Legal Institute	1/22/2021 5:01 PM
3	Public Law Center	1/22/2021 4:53 PM
4	Casa Cornelia Law Center	1/22/2021 3:16 PM
5	Iacba	1/22/2021 3:09 PM
6	INLAND EMPIRE LATINO LAWYERS ASSOCIATION	1/22/2021 2:48 PM
7	Los Angeles County Bar Association	1/22/2021 1:43 PM
8	YUBA SUTTER LEGAL CENTER	1/22/2021 12:47 PM
9	NLSLA	1/22/2021 12:46 PM
10	Family Violence Appellate Project	1/22/2021 11:37 AM
11	Community Legal Aid SoCal	1/21/2021 2:22 PM
12	Public Law Center	1/21/2021 1:14 PM
13	Legal Access Alameda	1/21/2021 7:44 AM
14	SOCIAL JUSTICE COLLABORATIVE	1/20/2021 5:57 PM
15	Stephanie Haffner	1/20/2021 4:03 PM
16	Capital Pro Bono	1/20/2021 3:26 PM
17	Community Legal Services in East Palo Alto	1/19/2021 4:46 PM
18	Inland Empire Latino Lawyers Association	1/17/2021 5:35 PM
19	Justice & Diversity Center of The Bar Association of San Francisco	1/15/2021 6:53 PM
20	Legal Aid Society of San Bernardino	1/12/2021 6:04 PM
21	Alliance for Children's Rights	1/12/2021 10:00 AM
22	Legal Aid of Sonoma County	1/11/2021 4:28 PM
23	Public Counsel	1/11/2021 9:49 AM
24	San Diego Volunteer Lawyer Program, Inc.	1/11/2021 9:09 AM
25	Riverside Legal Aid	1/10/2021 1:06 PM
26	CCLS	1/9/2021 6:25 AM
27	Harriett Buhai Center for Family Law	1/8/2021 5:55 PM
28	San Diego Volunteer Lawyer Program, Inc.	1/8/2021 5:19 PM

Q2 Is your organization in a county that is:

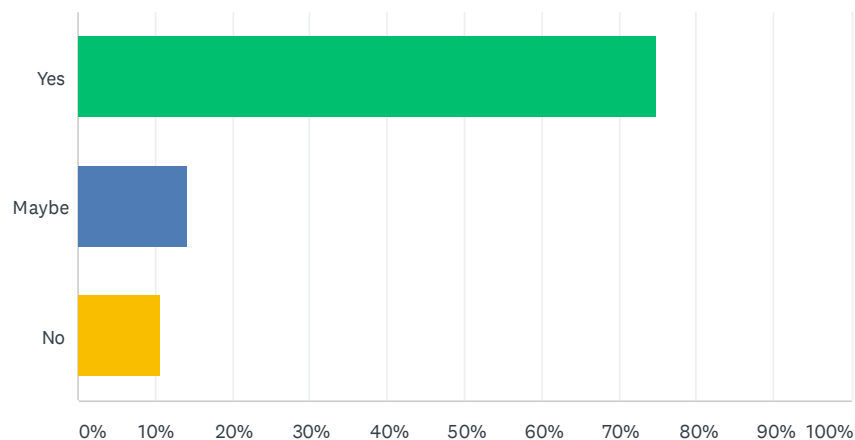
Answered: 28 Skipped: 0



ANSWER CHOICES	RESPONSES	
Urban	32.14%	9
Rural	7.14%	2
Mix of urban and rural	60.71%	17
TOTAL		28

Q3 Do you plan on applying for the Pro Bono Allocation for the 2022 grant year?

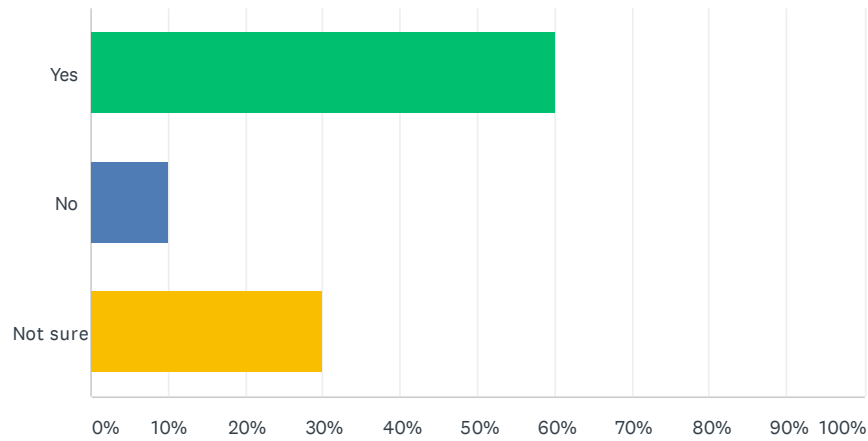
Answered: 28 Skipped: 0



ANSWER CHOICES		RESPONSES	
Yes		75.00%	21
Maybe		14.29%	4
No		10.71%	3
TOTAL			28

Q4 Do you anticipate that your organization may have difficulty meeting the Pro Bono Allocation requirements?

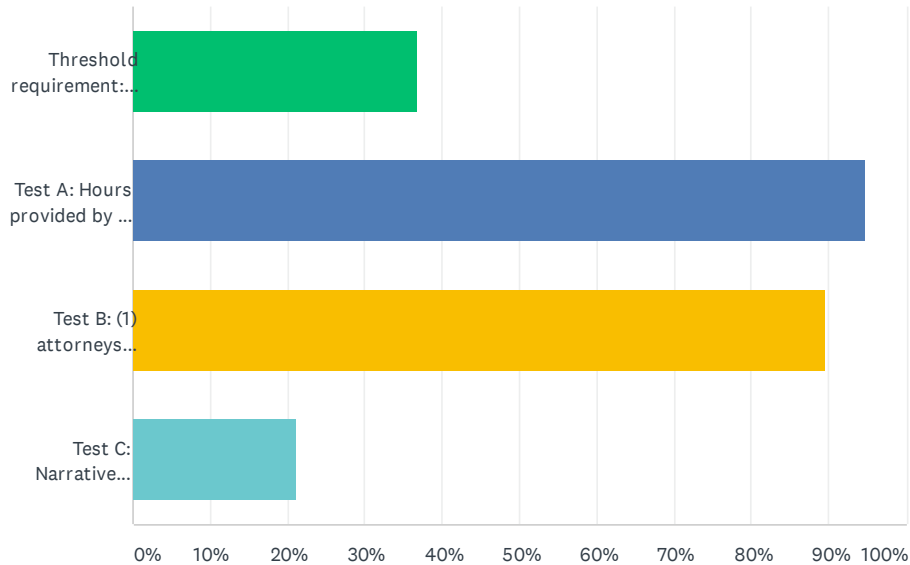
Answered: 20 Skipped: 8



ANSWER CHOICES	RESPONSES	
Yes	60.00%	12
No	10.00%	2
Not sure	30.00%	6
TOTAL		20

Q5 If you anticipate potential difficulty meeting the Pro Bono Allocation requirements, which of the following do you think that you will have difficulty with? (Check all that apply.)

Answered: 19 Skipped: 9

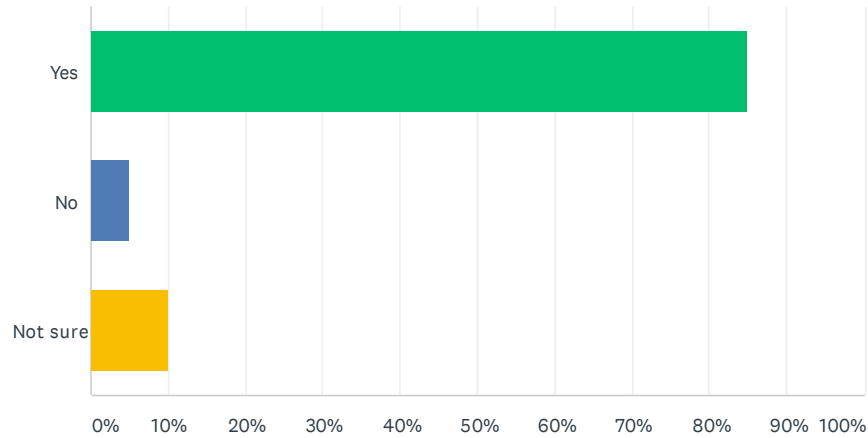


ANSWER CHOICES	RESPONSES	
Threshold requirement: Recruited 30 pro bono attorneys or recruited 5% of county's attorneys or 1000 pro bono attorney hours	36.84%	7
Test A: Hours provided by pro bono attorneys greater than hours worked by staff attorneys	94.74%	18
Test B: (1) attorneys recruited provided substantial free civil legal services; (2) hours by volunteers, both attorneys and paralegals, exceeds the hours by staff attorneys and paralegals; and (3) hours by volunteer attorneys is more than half of hours by staff attorneys and paralegals	89.47%	17
Test C: Narrative explanation for your method of calculating the delivery of services through pro bono attorneys	21.05%	4
Total Respondents: 19		

#	ANY ADDITIONAL INFORMATION YOU WOULD LIKE TO SHARE:	DATE
1	While our organization was able to place more individual matters with law firm attorneys for pro bono representation, the number of community volunteers we engaged this year dropped as compared the past years. Community volunteers are the individuals who, pre-COVID-19, would volunteer at our office and at our clinics. Remote work structures impacted the ability of volunteers to come to our office and volunteer with our staff. In addition, we had to take time to switch our in-person clinics, all of which were supported by volunteers, to a remote clinic model. During this time period, we were not able to use volunteers. Once the clinics were back up and running on a virtual model, it took time to recruit and retrain the volunteers. Not all volunteers were able to participate, sometimes because of technology issues. For those volunteers that would work side-by-side with our attorneys, and it took some time to facilitate their ability to volunteer remotely. Even after we were able to transition and more easily facilitate their remote volunteer experience, it remained difficult to recruit and integrate these volunteers.	1/22/2021 6:29 PM
2	Because we are currently collecting 2020 hours from volunteers, this survey question is a little bit premature. We'll know better in a few weeks.	1/22/2021 5:01 PM
3	We incorporate pro bono services into all of our work. Our program "feels" like a pro bono program. We also are adjacent to, but not in, a county where major law firms are located. Smaller firms in our county donate time, but do not have the resources to give away the type of hours that large firms often do.	1/20/2021 4:12 PM
4	COVID-19 demands on the lives of our volunteers, in combination with shelter in place orders, greatly hindered volunteer availability (and continues to), making it impossible for our small, purely pro bono organization, to meet the Pro Bono Allocation requirements for 2020. We are hopeful that the State Bar will take this into account when determining our eligibility. We are actively seeking all possible means to encourage and facilitate continued volunteer involvement with our organization while the vaccine is distributed and the situation improves.	1/20/2021 3:40 PM
5	The tests established long favored urban areas and are always difficult to meet in areas where there are mostly solo practitioners. Now, COVID is making volunteer attorney participation exceptionally difficult.	1/11/2021 4:33 PM
6	Our normal volunteer activities have been severely impacted by the remote work required by the pandemic. Historically our volunteers provide in office volunteer services directly to clients. This has been impossible given the current pandemic. It has been very difficult to replicate that system of volunteering in a remote setting due to security/ confidentiality concerns.	1/8/2021 6:20 PM

Q6 Did you have any current pro bono volunteers who were not able to take cases/provide services March-December 2020 because of COVID-19 (for any reason)?

Answered: 20 Skipped: 8



ANSWER CHOICES	RESPONSES	
Yes	85.00%	17
No	5.00%	1
Not sure	10.00%	2
TOTAL		20

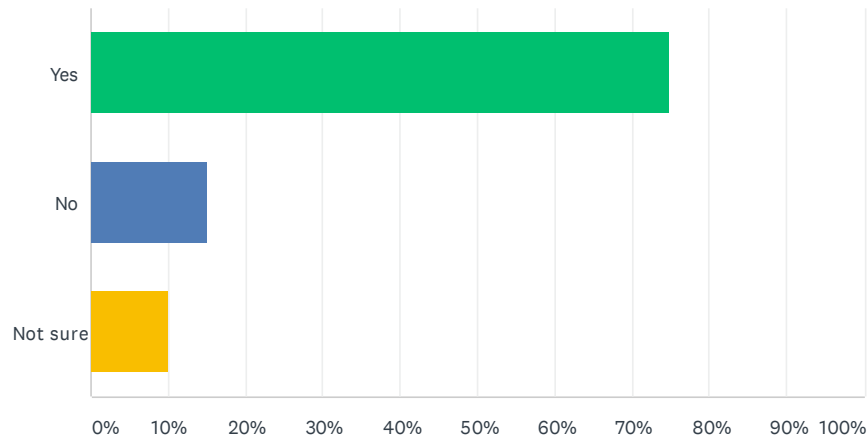
Q7 If yes, approximately how many?

Answered: 17 Skipped: 11

#	RESPONSES	DATE
1	We estimate that there were nearly 60 volunteers a week that were not able to volunteer with our agency as a result of COVID	1/22/2021 6:29 PM
2	10	1/22/2021 5:04 PM
3	Not certain	1/22/2021 5:01 PM
4	Dozens	1/22/2021 4:09 PM
5	40-50	1/22/2021 3:10 PM
6	20	1/22/2021 2:08 PM
7	3 firms minimum, possibly more	1/22/2021 11:11 AM
8	That is difficult to estimate - given the size of our pro bono program and fluidity of the situation with the pandemic. I would estimate a 30% to 40% drop in pro bono availability during certain heightened portions of the pandemic.	1/22/2021 10:51 AM
9	10	1/21/2021 7:53 AM
10	roughly 40	1/20/2021 4:12 PM
11	Approximately 30, which is a large number of our active volunteers.	1/20/2021 3:40 PM
12	10 or so? One firm.	1/20/2021 12:06 PM
13	30	1/17/2021 5:46 PM
14	5	1/12/2021 6:13 PM
15	3 to 4	1/11/2021 4:33 PM
16	6	1/10/2021 1:10 PM
17	We had 116 less volunteers provide services during Mar-Dec than the same period in 2109. The average number of hours per volunteer were also down from 25 to 19.	1/8/2021 6:20 PM

Q8 Did your organization have difficulty recruiting new pro bono volunteers in 2020 due to the impact of COVID-19?

Answered: 20 Skipped: 8



ANSWER CHOICES		RESPONSES	
Yes		75.00%	15
No		15.00%	3
Not sure		10.00%	2
TOTAL			20

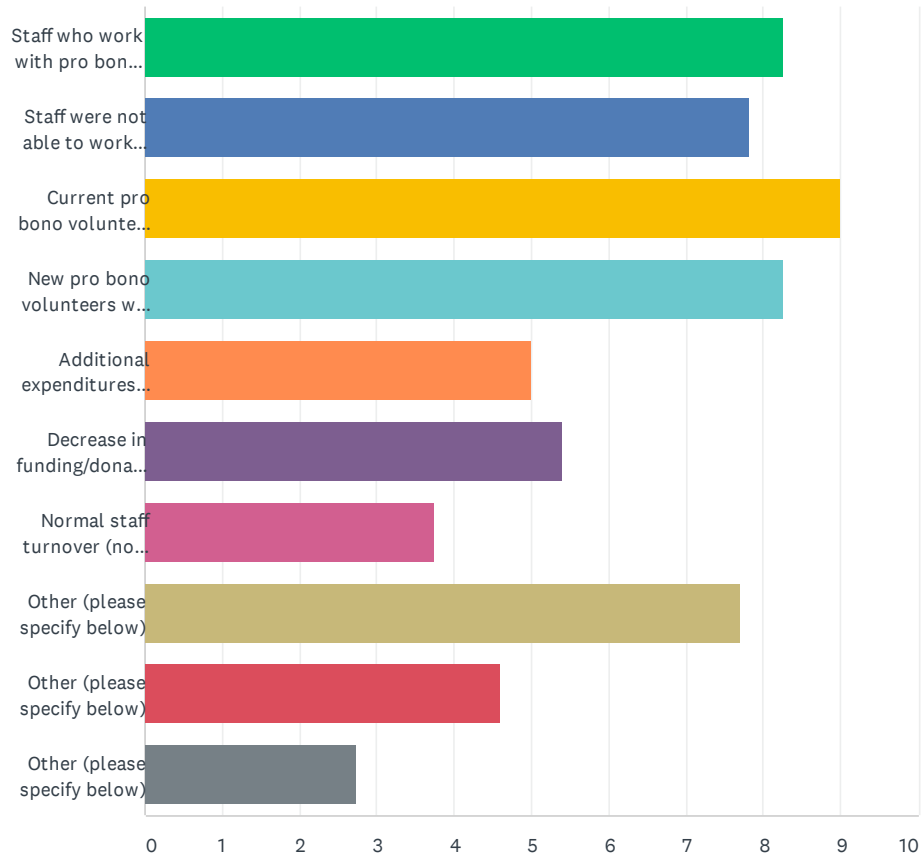
Q9 If yes, approximately how many new volunteers were unable to join your organization?

Answered: 16 Skipped: 12

#	RESPONSES	DATE
1	We estimate there were approximately 3 to 5 new volunteers a week that we were not able to recruit.	1/22/2021 6:29 PM
2	25	1/22/2021 5:04 PM
3	Not certain	1/22/2021 5:01 PM
4	See 14 for answer.	1/22/2021 3:25 PM
5	20-30	1/22/2021 3:10 PM
6	5	1/22/2021 2:08 PM
7	at least 5 firms (with an unknown number of associates)	1/22/2021 11:11 AM
8	See response to question 7.	1/22/2021 10:51 AM
9	we reached new volunteers who would not otherwise be available	1/20/2021 4:12 PM
10	Unknown, as we were unable to recruit new volunteers at all. We cannot provide adequate supervision for new and inexperienced volunteers using remote technology.	1/20/2021 3:40 PM
11	40	1/17/2021 5:46 PM
12	can't determine that number	1/15/2021 6:56 PM
13	5	1/12/2021 6:13 PM
14	6	1/11/2021 4:33 PM
15	unknown	1/10/2021 1:10 PM
16	We skipped 4 new volunteer onboarding cycles that would have normally been scheduled. Resulting in a loss of an estimated 40 new volunteers during the time period.	1/8/2021 6:20 PM

Q10 If your organization may not meet the Pro Bono Allocation requirements, what are the top 3 reasons why? (Please rank 1-3, with 1 being the primary reason.)

Answered: 19 Skipped: 9



Pro Bono Allocation for Grant Year 2022

ATTACHMENT B

	1	2	3	4	5	6	7	8	9	10	TOTAL	\$
Staff who work with pro bono volunteers/programs had to focus on transitioning services to a remote environment	26.67% 4	13.33% 2	46.67% 7	6.67% 1	0.00% 0	0.00% 0	0.00% 0	6.67% 1	0.00% 0	0.00% 0	15	
Staff were not able to work, or had to work fewer hours, because of COVID-related issues	16.67% 1	33.33% 2	0.00% 0	33.33% 2	0.00% 0	16.67% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	6	
Current pro bono volunteers were not able to perform the duties they would normally perform due to COVID shelter-in-place orders	38.89% 7	44.44% 8	5.56% 1	0.00% 0	11.11% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	18	
New pro bono volunteers were not able to join our organization due to COVID shelter-in-place orders	26.67% 4	20.00% 3	40.00% 6	0.00% 0	0.00% 0	6.67% 1	6.67% 1	0.00% 0	0.00% 0	0.00% 0	15	
Additional expenditures due to COVID led to layoffs	0.00% 0	0.00% 0	0.00% 0	20.00% 1	40.00% 2	20.00% 1	0.00% 0	0.00% 0	0.00% 0	20.00% 1	5	
Decrease in funding/donations led to layoffs	0.00% 0	20.00% 1	0.00% 0	0.00% 0	20.00% 1	40.00% 2	0.00% 0	0.00% 0	20.00% 1	0.00% 0	5	
Normal staff turnover (not due to COVID)	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	75.00% 3	25.00% 1	0.00% 0	0.00% 0	4	
Other (please specify below)	30.00% 3	20.00% 2	20.00% 2	10.00% 1	0.00% 0	0.00% 0	0.00% 0	20.00% 2	0.00% 0	0.00% 0	10	
Other (please specify below)	0.00% 0	20.00% 1	20.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	60.00% 3	0.00% 0	5	
Other (please specify below)	0.00% 0	0.00% 0	25.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	75.00% 3	4	

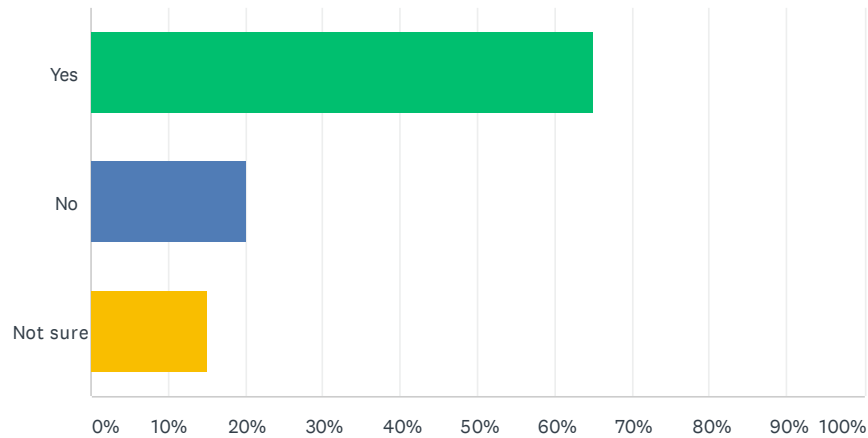
Q11 If you answered "Other" above, please specify here:

Answered: 8 Skipped: 20

#	RESPONSES	DATE
1	Some volunteers expressed difficult in being able to work remotely. Some of these difficulties were technology based. In other instances, our ability to utilize volunteers were impacted by the fact that it took a significant amount of time for our clinics, which were staffed by volunteers, to get back up and running on a virtual platform. In some instances, it took months of planning for these clinics to go virtual. After this, it took a great deal of time to get volunteers reconnected and retrained for these new clinic versions.	1/22/2021 6:29 PM
2	The pandemic created an immediate shift in legal needs. It took time to assess and create pro bono opportunities around these needs. Some of those needs (e.g., commercial lease re-negotiations) created conflicts for the usual pro bono supporters like the big firms. The pandemic also resulted in courts being closed and cases being continued. Many of our pro bono hours relate to litigation and court-related matters that require the courts to be open and processing cases in order for the work to be done.	1/22/2021 10:51 AM
3	Staff attys spend more hours than pro bono in aggregate	1/20/2021 5:59 PM
4	Potentially, application of the "C" test; lack of strong access to large firm markets	1/20/2021 4:12 PM
5	Virtually none of our volunteers were interested in or willing to provide legal services remotely. They lost a major benefit to them of the volunteer experience.	1/20/2021 3:40 PM
6	Big volunteer events are prohibitive now. We can't accommodate everyone who wants to volunteer. Our clients have a hard time accessing digital media for appointments. We also were told that some attorneys wanted to wait for the election to know what administration they would be against before taking cases. Services have changed - less housing cases because of moratorium. The courts run our zoom link for some events and they limit access. For reentry - we require fingerprints and the pandemic limited that - so we needed fewer volunteers.	1/20/2021 12:06 PM
7	Several Pro Bono Attorney Panel Members contracted COVID-19 and became too ill to volunteer.	1/17/2021 5:46 PM
8	Our typical volunteer model does not easy convert to a remote environment.	1/8/2021 6:20 PM

Q12 If your organization does not meet the Pro Bono Allocation requirements for grant year 2022, will this be the first time your organization has not met the requirements since you have been approved for a Pro Bono Allocation?

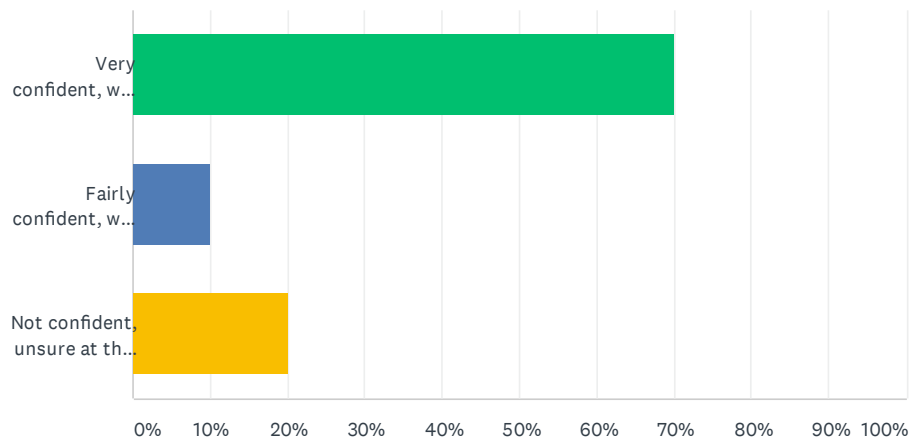
Answered: 20 Skipped: 8



ANSWER CHOICES	RESPONSES	
Yes	65.00%	13
No	20.00%	4
Not sure	15.00%	3
TOTAL		20

Q13 If not for COVID-19, how confident are you that your organization would otherwise meet the Pro Bono Allocation requirements?

Answered: 20 Skipped: 8



ANSWER CHOICES	RESPONSES	
Very confident, we have met it for many years	70.00%	14
Fairly confident, we have met it for a few years now	10.00%	2
Not confident, unsure at this time	20.00%	4
TOTAL		20

#	PLEASE SHARE ADDITIONAL COMMENTS, IF APPLICABLE	DATE
1	The biggest impact on volunteerism was in mid-March through April. Once we had remote clinics set up and the bugs worked out and once volunteers had come to grips with their own remote work capabilities and limitations we had better success in recruiting volunteers.	1/22/2021 5:01 PM
2	If not for COVID-19, as in past years, all of our in-person clinics and in-office opportunities would have had ample volunteers participating. However, the challenges of overseeing the work of remote volunteers, particularly new volunteer attorneys, greatly limited the number who could participate. It also limited the type of work they were willing to take on. In-person mentorship and supervision is often needed with new volunteers, and this was not possible. Consequently, far fewer volunteers were involved.	1/22/2021 4:09 PM
3	We were very confident that we would have met the pro bono this year because we came really close in 2019 to meeting the 1000 per county hours and we were implementing new strategies and ideas.	1/22/2021 3:10 PM
4	We are in conversation with the State Bar to learn more how we might qualify. This is so that our Board may assess how much effort to invest in qualifying as a pro bono program, and the realistic possibilities for doing so. Using the A and B tests, we are unlikely to qualify as a pro bono program at this time.	1/20/2021 4:12 PM
5	We do hope that the State Bar is able to come up with another way of evaluating the Pro Bono applicants this year.	1/8/2021 6:20 PM

Q14 Please share any additional general comments

Answered: 7 Skipped: 21

#	RESPONSES	DATE
1	You might consider doing this survey again in a month or so. Law firms typically report their pro bono hours annually and we don't have them all in yet.	1/22/2021 5:01 PM
2	Answer to question 9. This is hard to quantify how many new volunteers were unable to join the organization. However, our Volunteer Attorney Information sessions may provide some guidance. Pre-pandemic, these sessions were in-person, hour-long introductions to Casa Cornelia's work where volunteers could ask all manner of questions to attorneys and discuss their hope and goals for doing pro bono. These sessions (non-MCLE), served to route volunteer attorney recruits into the appropriate trainings. In 2018, approximately 55 new attorneys attended these introductory sessions, and approximately 40 in 2019, for a total of approximately 95 attorneys who were new to CCLC. However, in 2020 only 13 attended in-person Volunteer Attorney Information sessions. After the pandemic, we arranged individual Zooms to meet and assess new attorneys but it is not as effective a recruiting tool as an in-person session. For the full-representation services we offer for which many volunteers must commit months and perhaps years, it is very important to get a sense of a volunteer's level of commitment and suitability for a case, and that is still best done in person.	1/22/2021 3:25 PM
3	The firms' uncertainty (in particular with respect to summer programs and new associate classes) in the environment of the pandemic contributed to their hesitancy to take on pro bono work.	1/22/2021 11:11 AM
4	We'd like to get the pro bono allocation if it could be a bit more flexible	1/20/2021 5:59 PM
5	We would like to be able to pay law students if the funding is available, but we don't because of the impact it would have on the pro bono allocation. Volunteer hours would decrease and staff hours would increase.	1/20/2021 12:06 PM
6	We had to expend substantial time and funding in order to transition into a cloud-based delivery system. Some elderly pro bono attorneys are not tech savvy, and it took some time to get them acclimated and able to perform pro bono services remotely. COVID-19 has hit Riverside and San Bernardino County very hard. We had several volunteers who contracted COVID-19 and became too ill to volunteer. A few reported that they could no longer volunteer because they had to become a caregiver to a spouse or child who contracted COVID-19. We've also had volunteers report that they are coping with grief and loss due to losing a family member to COVID which exhausted them mentally from being able to volunteer. Needless to say, 2020 was a very difficult year to recruit volunteers, retain volunteers, and meet pro bono goals due to the pandemic.	1/17/2021 5:46 PM
7	Thank you for your continued support of our efforts to serve the most needy residents of California, who live in San Bernardino and Riverside County.	1/12/2021 6:13 PM

Legal Aid Fights for Justice. We Fight for Them.



July 14, 2023

LSTFC Rules Committee Working Group
180 Howard St.
San Francisco, CA 94105

Submitted via email to Angela O'Hara, Angela.OHara@calbar.ca.gov, cc Elizabeth Hom, Elizabeth.Hom@calbar.ca.gov

RE: Comments on Codification of Grant Administration Practices: Pro Bono Allocation

Dear Committee Members:

The Legal Aid Association of California (LAAC) and the legal aid community appreciate the opportunity to provide feedback on the Rules Committee Working Group's preliminary recommendations regarding the pro bono allocation test for Qualified Legal Services Providers (QLSPs). As acknowledged, the committee has received feedback from the legal services sector regarding the pro bono allocation and the organization's pro bono practices within the last few years. Considering the changes that have occurred during that time, we believe it is important that the Committee is revisiting the proposal(s).

LAAC is the statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California's unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice.

1. Initial Comments

To begin, we heard from organizations that the pro bono environment has changed substantially, even since 2021, due to the continued impacts of the pandemic that existed in the spring of 2021 at the time of the last opportunity to comment on these rules. Consequently, we contend that it may be beneficial to specifically survey QLSPs again to seek feedback regarding the pro bono allocation directly. Additionally, it may also be worth connecting with law firm pro bono counsel to similarly understand the work that firms are able to take on, possibly through the Association of Pro Bono Counsel or through contacts of the State Bar. For instance, the fact that more organizations are utilizing Test C for qualification for the allocation may be indicative of a deeper change in the pro bono and legal services landscape, which we will discuss more. These are changes that we expect will continue to evolve. Lastly, the statements from Attachment D by Legal Aid of Sonoma remain invaluable and reflect the continued challenges of rural programs, and we wanted to make sure that we note that those persist.

With all that in mind, we still recognize the importance of revising the pro bono allocation practices now, even if additional changes may be needed later. Below are our comments and suggestions.

2. Whether to Eliminate the Substantial Numbers Test

We agree with the Working Group's recommendation to eliminate the substantial numbers test. Any data and information currently being collected through the substantial numbers test can be combined into the second "prong" to determine that the organization meets the statutory requirements of substantial numbers and principal means.

3. Whether and how to modify the "Principal Means" Tests A, B, and C

Test A – Overall, the community generally agrees with the Working Group's recommendations. **While Test A should remain—since it is very straightforward—we recommend that the Committee may need to revisit the analysis in the years to come.** Test A most likely works best for small to mid-size organizations, and likely in more urban and suburban areas. Furthermore, as the staff of legal services organizations continue to grow (which we want to encourage), meeting Test A becomes more difficult, even for organizations where pro bono is their principal means of service delivery.

Test B – Recently, there is a trend of fewer organizations are qualifying under Test B. **We agree with eliminating Test B.** However, we do want to caution that, with the expanded definition of legal services as well as the wide variety of volunteers used (including high school and undergraduate students), organizations are **still encouraged to track and report all volunteer hours**. Specifically, these hours could be folded into Test C, showing that organizations are utilizing all types of volunteers to achieve their clients' goals.

Test C – There are also fewer organizations qualifying under Test C. We agree with the Committee, though, that this is still a useful test, provided that its application is clarified in some important ways. **Consequently, we appreciate that the Committee identified factors to guide them in responding to Test C, because it can function somewhat ambiguously without additional guidance.** Furthermore, we want to ensure that the committee is clear in their instructions to organizations that they should address all these factors in their response, and that additional information is also welcome. It is also important to note—as seems to be indicated by the memo—that the Commission may add to or modify these factors in the future as more programs utilize Test C to qualify for the pro bono allocation, especially given the Test A context noted above.

Finally, the two data points identified in the Committee's memo are not impossible data points to provide, but they are not data that is currently being reported. Requesting those two specific data points, either the number and/or percentage of cases placed with volunteers compared to cases handled by staff, will require organizations to run new reports in their case management systems. Additionally, the state of pro bono work is such that volunteers do not only handle cases; they may assist individuals at a self-help clinic, and they may provide limited scope or unbundled legal services and assist with a motion or a particular piece of a case, while staff handle the remainder of the case. Thus, identifying "volunteer cases" and "staff cases" is not always a clear-cut undertaking by QLSPs, and could result in additional complications, as well as uneven reporting, depending on how QLSPs interpret the terms "volunteer cases."

Moreover, the recent Pro Bono Institute report stated that overall, pro bono hours in the United States increased in 2022, but the number of hours per attorney decreased.¹ Anecdotal evidence from programs in California is consistent with that report, in that many attorneys, particularly in the shift to virtual work, are interested in remote clinic work or shorter-term, smaller-scale case work, compared to a few years ago. This is precisely the type of work that may not be accurately captured in the data points identified in the memo, as discussed above. In addition, litigation departments at law firms are busier than ever, according to firm pro bono counsel. Teams of attorneys handling larger litigation cases are more difficult for QLSPs to recruit—not impossible but requiring more intense recruitment and resources on behalf of the QLSP.

4. Clarifying definitions that impact how roles are considered

a. Non-Attorney Volunteers

We support the expanded definition of non-attorney volunteers. As the Working Group identified, and in line with best practices, QLSPs have expanded the volunteer community beyond lawyers, to the benefit of clients. Recognizing the engagement of these non-attorney volunteers is important in acknowledging the team of people necessary to benefit low-income Californians.

We also wanted to mention that, while they believe capturing these non-attorney volunteer hours is important, it is not clear at what point the QLSPs will be reporting these numbers to the Commission or the State Bar. Will these numbers be reported as part of Test C? Or as part of the overall volunteer hours reported to the State Bar? **We believe it would benefit the QLSP community to include a data point in Test C of hours of all volunteers, attorney and non-attorney.**

Finally, the definition proposed by the Commission suggests that non-attorney volunteers should only be included if, among other aspects, their “roles are related to the client’s legal outcome.” Some of these non-attorney volunteers, however, may participate within the programmatic side of a QLSP, but not work directly on casework. Non-attorney volunteers may assist with drafting treatises on different substantive law topics, may provide educational presentations to the client community, or may work on advocacy work that benefits the larger client population, to name a few examples. All of this work would still be done under the supervision of an attorney and would still meet the definition of legal services. **The community proposes that non-attorney hours also be included if the non-attorney volunteer is undertaking projects that benefit the client community, whether they are working on a specific client’s case or not.**

b. Law Students

We are grateful for the Working Group’s recognition of the issue of law student volunteer hours and the efforts to increase equity and diversity in legal services organizations. **We fully support the Working Group’s recommendation to continue to count the law students’ volunteer hours whether they receive compensation or a stipend or not.** In the memo, the Working Group mentions students who

¹ *The Pro Bono Wire*, Pro Bono Institute, <https://www.probonoinst.org/media/pro-bono-wire-june-2023-copy/#:~:text=Firms%20reported%20performing%20a%20total,2023%20than%20the%20prior%20year.>

receive academic credit as well; we recommend being clear that QLSPs are also able to count the hours of law students receiving academic credit.

Last, there is concern about the recommendation that QLSPs be required to show that the stipend received by the law students is less than what they would receive at a private firm or government agency. QLSPs do not typically have access to the compensation provided to law students at private firms or government agencies, outside of general salary surveys that are widely available. We do not believe QLSPs should have to seek out contacts at private firms or government agencies who are willing (and able) to share law student compensation information. We believe that there may be another reporting tool that could be used, whether information gathered by the State Bar directly from these entities or from the law schools, if they collect that information on a statewide basis. Furthermore, we also believe that if you look at general salary surveys, legal services organizations are not currently in a place to compete with the private firms or the government agencies in terms of compensation of law students. We would all prefer that the salaries are more competitive, but at this point, it is rare for legal services to exceed, much less get close to, private firms and government agencies. For this reason, requiring evidence that will almost certainly show that these law student volunteers are receiving less than they would in government or private practice is unnecessary. **In sum, we do not agree with organizations having to provide evidence around the stipend.**

c. Legal Fellows

In 2021, the legal aid community expressed concern about counting fellows as staff attorneys. In our view at the time, and acknowledged in the memo, this makes it harder for organizations to qualify under the numerical tests given that it would increase the paid staff attorney numbers and hours (potentially resulting in them thinking twice about hiring a fellow), along with the fact that fellows are different in several ways from staff attorneys (e.g., paid by third party, not producing the same work as staff attorneys). These concerns did remain in some feedback we heard, primarily focused on the fact that this could discourage organizations from hiring legal fellows and are, again, in many ways clearly distinguishable from paid staff attorneys.

Generally, we heard from the community that legal fellows *should* count as staff attorneys for purposes of counting staff hours. Even though this could make it more difficult for some organizations to meet Test A, the work that legal fellows are doing can be comparable enough to the work that newer staff attorneys are doing. This is conditional, however, in also offering some flexibility on categorization of fellows under Test C. While Test A will remain, Test C could provide a space for organizations to provide differentiation between fellows and paid staff attorneys, due to the concerns above. More specifically, though, and perhaps as a solution to these concerns, we appreciate the note from the Committee that organizations can identify hours reported by legal fellows in their narrative description in Test C. This is particularly helpful if, without the fellows' hours, the organization would have met Test A. In other words, given the proposed changes to the Test system, **so long as Test C would be a space to elaborate on, if relevant, the proportion of fellows' hours within their paid staff attorney hours for numerical purposes, it would seem, on balance, fair to include their hours.**

An additional note: The term “fellow” is used in a wide variety of ways in the law. There is some concern in the community that the definition provided by the Working Group is too specific. It might make more sense to define what a fellow is, rather than to specifically identify what a fellow is not (i.e.,

more than differentiating them from law student volunteers). For instance, practicing attorneys can apply for and earn “fellowships” for professional organizations in their areas of expertise. A possible definition could be that a legal fellow is a law graduate or licensed attorney who receives a temporary (2 years or less) offer to work at a legal services organization without a guarantee of full-time employment.

5. Proposed State Bar Rule Language

While the community recognizes that the proposed language has not been finalized, we wanted to provide some initial comments regarding the language in the memo. We suggest revising the language to make clearer that there are two prongs to the test, but that they are contained in one test, and can be met by either suggestion:

(F) An applicant wishing to qualify for the additional pro bono allocation under Business & Professions Code Section 6216(b)(1)(B) may show that they recruited substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California and that pro bono is the applicant’s principal means of delivering legal services by meeting ONE of the following requirements:

(a) The number of hours of free legal services provided by volunteer attorneys in the prior calendar year exceeds the number of hours of free legal services provided by the staff attorneys employed by the applicant.

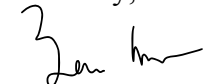
(b) A narrative description and explanation of the applicant’s program demonstrates that they recruited substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or qualified legal services projects in California and that pro bono is its principal means of delivering these legal services, including, but not limited to, a description of the following factors:

- i. Pro bono recruitment and retention strategy;
- ii. Training curriculum;
- iii. Service delivery model that requires volunteers;
- iv. Supervision and scope of support for volunteers; and
- v. Data demonstrating quantifiable commitment to pro bono as the principal means of delivery, such as percent or number of pro bono cases compared to cases by staff attorneys, a substantial combined number of total attorney and non-attorney volunteer hours, or other relevant data points.

Additionally, the recommended language states that law student hours count toward volunteer attorney hours. We want to confirm that the sentence is correct, and that law student hours count toward volunteer attorney hours, not non-attorney volunteer hours.

We appreciate the opportunity to provide the feedback from the legal services community and look forward to continued discussion and conversation on this topic. Please do not hesitate to contact me with questions or concerns.

Sincerely,



Zach Newman, Directing Attorney



July 14, 2023

To: The Legal Services Trust Fund Commission Rules Committee
From: Bet Tzedek Legal Services
Re: Codification of Grant Administration Practices: Pro Bono Allocation

Bet Tzedek Legal Services writes to share its comments to the proposed changes to the pro bono allocation test for organizations that meet the definition of Qualified Legal Services Projects (QLSPs) under Business and Professions Code section 6214(b)(3)(A). We believe that modifying the tests will (a) more accurately reflect the service delivery models utilized by qualifying organizations in their provision of legal services, (b) maintain the spirit/ legislative intent of the IOLTA statute and (c) create a positive impact by improving equity, transparency and clarity.

In response to the working group's proposed changes to the pro bono allocation tests, Bet Tzedek supports the elimination of the "Substantial Numbers" Threshold Test and encourages modifications to the "Principal Means Tests." Of those three tests, Bet Tzedek supports maintaining Test A, opposes the elimination of Test B, and supports an expansion of Test C. Furthermore, Bet Tzedek strongly supports expanding the definition of "non-attorney volunteers" and opposes counting fellows as staff attorneys.

Bet Tzedek has historically qualified for the State Bar's pro bono allocation and our reliance on our pro bono partners continues to be an indispensable resource and our principal means of delivering legal services and serving our client communities. Bet Tzedek was conceived and established as a volunteer-led response to a housing crisis in the 1970s. Since that time, we have maintained an unwavering commitment to engaging large numbers of volunteers and pro bono attorneys to provide legal services to those most in need. Volunteer engagement is a core value and vital resource, and our firm commitment to pro bono service is reflected throughout the agency.

Bet Tzedek supports elimination of the "Substantial Numbers" Threshold Test. Eliminating this threshold test will ensure greater equity among organizations of varying sizes and locations. It will also reflect the reality of trends that materially impact the volume of pro bono hours, such as the trend away from large pieces of litigation that generate significant pro bono hours in favor of limited-scope clinics and impactful but discreet pro bono matters.

With regards to the "Principal Means Tests," Bet Tzedek supports maintaining Test A, which compares the cumulative number of pro bono attorney hours to the cumulative number of staff attorney numbers.

Next, rather than eliminate Test B, Bet Tzedek recommends simplifying Test B to a single step test. As discussed below, we strongly support counting work done by non-attorney volunteers towards pro bono hours, broadening the definition of non-attorney volunteers, and counting those hours as part of an organization's pro bono hours, to better reflect the full scope of our service delivery. An acknowledgement of the critical role of non-attorney volunteers in the delivery of legal services as a means of helping eliminate the justice gap should be further acknowledged by permitting agencies that make extensive use of such volunteer help to receive the pro bono allocation by meeting the requirements delineated under Test B. While the test may benefit from being streamlined or clarified, it is not complicated or burdensome. Clarification of the requirements that "attorneys recruited actually provided substantial free legal services" would be helpful for agencies seeking to meet this test.

Nevertheless, as also discussed further below, while the move to provide clarity to Test C is welcomed, Test B is a clear quantitative analysis that supports agencies developing and performing against internal quantitative goals and benchmarks. Finally, any concern that the use of non-attorney volunteers will overshadow the work of attorney volunteers is addressed by clause iii of the test.

Non-attorney volunteers are a key component of Bet Tzedek's volunteer support network, as they are with nearly all QLSPs. From interpreters to social workers, students to retired community members, we engage scores of volunteers who help with a variety of tasks that allow our work to move forward and leverage resources for our clients. College students, for example, assist with client intake. Individuals with language proficiency beyond English (including Spanish, Mandarin, Korean, Russian, and Farsi) serve as interpreters at our various clinics and work with attorneys to translate written materials for all of our programs. High school students help put together client folders and update our forms. Lastly, we use communications, development, and other administrative volunteers to assist with our non-legal programs. All of these non-attorney volunteers work in furtherance of our mission and indisputably strengthen Bet Tzedek's provision of legal services.

We believe the working group is moving in the right direction by broadening its definition of non-attorney volunteers to include law students, undergraduate students, intake volunteers, social workers, legal assistants, and interpreters. This expansion of non-attorney volunteers logically flows from the recent broadening of the definition of "legal services" under State Bar Rule 3.672(A). We support further expansion in light of the legislative intent of the IOLTA statute and in the spirit of accurately reflecting the service delivery models utilized by legal services organizations.

Bet Tzedek opposes the classification of "legal fellows" as staff attorneys. Fellows rely on third-party support for their salaries, and are placed on agency payrolls because it would be untenable, for a variety of reasons, for the fellows to be on the payroll of the funding organization. Fellows also do not perform the same work as staff attorneys. Many fellows have a discreet and particular focus and do not carry full caseloads, and it is Bet Tzedek's understanding that some agencies make explicit to fellows that upon completion of their project they are required to apply for staff attorney position with the organization should they wish to remain with the organization. Counting fellows as staff also disincentivizes organizations from recruiting fellows because it skews staff hours against volunteer hours, and further sets back an organization from qualifying for the pro bono allocation's numerical tests.

For these reasons, we urge an expansion of the definition of non-attorney volunteers, encourage the inclusion of fellows in this group, and support maintaining Test B. We find elimination of this test counterintuitive to the spirit of counting what counts as a qualifying volunteer.

It is our understanding that some agencies in California may advocate for the entire elimination of the pro bono allocation. Bet Tzedek strongly discourages any consideration of such a move. The Justice Gap has, sadly, only worsened in light of the pandemic and other social factors. Volunteers have been a critical component of the effort to address the gap. Indeed, in times of crisis, such as the pandemic or natural disasters, our agencies have relied on volunteers to help meet the need, and for many agencies they serve as the cornerstone of service delivery. To that end, significant investment has been made to prop up entire pro bono departments dedicated to the successful deployment of pro bono services. To eliminate the pro bono allocation threatens that work.

Instead, Bet Tzedek would encourage additional investment in the effort by, for example, developing a fund to support agencies looking to start or grow their pro bono efforts. Encouraging and making possible volunteer involvement should be a goal, not the potential stymie or elimination of such efforts.

Best,

A handwritten signature in blue ink, appearing to read 'Diego', with a stylized flourish at the end.

Diego Cartagena
President & CEO
Bet Tzedek

Active Attorneys by County

County	Active Attorneys
Alpine	4
Modoc	5
Sierra	5
Glenn	14
Trinity	14
Mariposa	14
Colusa	19
Lassen	20
Inyo	34
Plumas	38
Mono	40
Del Norte	47
Tehama	54
Calaveras	56
San Benito	57
Siskiyou	64
Tuolumne	67
Amador	70
Lake	74
Yuba	79
Sutter	95
Kings	95
Madera	105
Imperial	119
Merced	151
Mendocino	173
Humboldt	218
Nevada	283
Shasta	306
Butte	332
El Dorado	363
Tulare	364
Napa	426
Stanislaus	527
Solano	543
Yolo	624
Santa Cruz	724
San Luis Obispo	735

Attachment E

San Joaquin	748
Monterey	820
Kern	848
Placer	1,248
Santa Barbara	1,398
Sonoma	1,548
Fresno	1,978
Marin	2,113
San Bernardino	2,331
Ventura	2,811
Riverside	3,281
Contra Costa	4,015
San Mateo	5,078
Alameda	7,402
Sacramento	8,483
Santa Clara	9,853
San Diego	16,342
Orange	17,602
San Francisco	17,675
Los Angeles	57,309

Source: State Bar of California, Attorney Demographics,
https://members.calbar.ca.gov/search/demographics_counties.aspx

Information current as of Jun 19, 2023.

From: [Salena Copeland](#)
To: [Nguyen, Doan](#); [Carroll, Erica](#)
Subject: Comments on the pro bono allocation and exchange funds draft memos
Date: Wednesday, April 14, 2021 9:20:03 AM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Doan & Erica!

I will send a separate email with a question that arose in our meeting, but here are the community's comments, noting that a few other people do plan to submit separate comments.

Erin Smith also raised the additional issue that support centers that primarily use pro bono attorney should also be able to be considered "pro bono projects" for the purposes of a higher income threshold, even though they do not get a pro bono allocation. Though we didn't discuss that fully on this most recent call, she has raised it in calls before, and others have agreed with her.

LAAC and the Legal Aid Community's Comments on Rules Revision: Exchanged Funds and Pro Bono Allocation

The below is a summary of concerns heard by LAAC at a call convened on April 7, 2021. This does not represent the unanimous view of all IOLTA organizations, but does represent the opinions shared during the call.

Exchanged Funds

LAAC and the community would support **Option 3 (Codify the Exchanged Funds Deduction and Extend it to All Applicants)** because it codifies the current process with QLSPs and would extend that to support centers, treating all IOLTA programs equitably.

Pro Bono Allocation

Threshold Test

LAAC and the community would support **Option 1 (Eliminate the Pro Bono Allocation Threshold Test)** or, in the alternative, **Option 3 (Establish a More Flexible Threshold Test).**

- One specific concern articulated by the community included the fact that it is challenging to hit a certain number of hours, even for urban programs.
- Also, if a threshold test exists, programs discussed the fact that there must be calibration based on program size.
- Adding a staff member becomes a challenging choice for organizations at the cusp because they can't expect the organization is going to meet the test by growing pro bono sufficiently to match the additional staff hours.
- In addition, there are trends in generating pro bono hours away from large pieces of litigation toward discrete opportunities like clinics and limited-scope, which has implications for hitting hours requirements.

Clarification of Definitions

LAAC and the community support **Option 2 (Revising Test B to Include Both Paralegal Hours and Non-Attorney Volunteer Hours)**, **Option 3 (Clarifying When Law Students Are Pro Bono Volunteers)**, and **Option 4 (Counting Staff Hours as Pro Bono Hours)**. But the community opposes **Option 1 (Defining Staff Attorneys to Include Legal Fellows)**.

- **Option 1 specific discussion:** Generally, the community did not like this proposal. Some organizations argued that legal fellows could be considered "carbon neutral," such that they don't benefit and don't harm the program when it comes to this matter. They also argued that fellows should be thought of more like law students, in that they cannot carry a caseload as staff attorneys, and the main reason why many of them are paid is due to outside funding. Several organizations shared that they struggle to decide whether or not to hire a fellow if they believe that fellow will jeopardize their pro bono allocation the following year.
- **Option 3 specific discussion:** Law students should be counted as volunteers no matter whether they're part of a stipend program or getting academic credit, and the community felt that the staff recommendation reflected how they think of their volunteer students.
- **General feedback:** organizations stressed that they are "competing" for a finite number of pro bono hours. When they hire more staff, there is not a new pool of attorneys to do pro bono work, so this will continue to be a challenge, and will grow, as organizations add staff.

Salena Copeland (pronouns she/her)
Executive Director
Legal Aid Association of California
The Unified Voice of Legal Services
510-893-3000 x 106 (messages forwarded to my email)
[Donate](#) to support our work!
www.LAACOnline.org
www.LawHelpCA.org

Why include pronouns? I include pronouns in an effort to share my personal and professional commitment to transgender inclusivity and visibility. Through sharing my pronouns, I hope to support a safer and braver space for transgender professionals to share their pronouns.

From: [Ronit Rubinoff](#)
To: [Carroll, Erica](#)
Subject: Pro Bono Allocation
Date: Monday, April 12, 2021 3:39:34 PM

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Good afternoon Doan and Erica.

Here are some of our thoughts as a rural program.

➔ **Urban Bias:** The ratios the Bar developed are more suited to a program in an urban area. In urban centers there are far more attorneys, and there are many more large law firms. In rural areas, most attorneys are in very small firms or solo practice. This makes it very difficult for them to do pro bono work. In large firms, pro bono is often supported by the firm, even financially. We saw this dichotomy play out yet again when the fires hit our area. Even working directly with a special disaster subcommittee of our local bar association, we found it very difficult to recruit the sustained pro bono assistance we needed to run our disaster clinics. Most of our clinic volunteers came from the urban SF Bay Area and from very large firms.

We believe the ratios favor urban centers and that the Bar should consider adjusting them depending upon the size and composition of the bars in rural areas. A scaled ratio would be more equitable.

➔ **Include all program volunteers:** The type of hours that count towards the pro bono ratio are overly restrictive. LASC only has one very small law school to draw upon during the academic year, and no large law firms to draw upon, so we use other types of students and community members broadly in our program. Bilingual, bicultural undergraduates, exploring a career in law, are a staple of our intake system; many have gone on to become attorneys because of their experience. Again, the Bar's measurement tool seems to favor urban centers where there are multiple law schools and many firms.

➔ **Increasing diversity in the profession:** This is one of the Bar's central goals, especially today. If recruitment and development of a more diverse bar is the goal, we need to start working with students before they get to law school. We would have more impact, by focusing on bilingual bicultural undergraduates who need support, and encouragement, to finish school and pursue legal careers. One key strategy is recruiting them to volunteer or intern as undergraduates. LASC has seen multiple first

generation students intern with us, and as a result, go on to law school (several are now working with their communities as lawyers). This is possible because we use these bilingual students as part of our volunteer model. If the Bar allowed rural programs like ours to include bilingual undergraduates in the ratio, we would support diversity in the profession, as well as honoring the important role these students play in helping clients in programs like ours.

Thanks!

Ronit



Ronit Rubinoff

Executive Director

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PROPOSED STATE BAR RULE LANGUAGE

See below for proposed new sections to add to Rule 3.680 Application for Trust Fund Program grants.

Rule 3.680 Application for Trust Fund Program grants

- (F) An applicant wishing to qualify for the additional pro bono allocation under Business and Professions Code section 6216(b)(1)(B) may show that it recruited substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California and that pro bono is the applicant's principal means of delivering legal services by meeting ONE of the following requirements:
- a. Objective evidence that the attorneys recruited provided substantial free civil legal services and that the number of hours of free legal services provided by volunteer attorneys in the prior calendar year exceeded the number of hours of legal services provided by staff attorneys employed by the applicant.
 - b. A narrative description and explanation of the applicant's program demonstrates that it recruited substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or qualified legal services projects in California and that pro bono is its principal means of delivering these legal services, including, but not limited to, a description of the following factors:
 - i. Pro bono recruitment and retention strategy,
 - ii. Training curriculum,
 - iii. Type and number of volunteer opportunities available,
 - iv. Service delivery model that requires volunteers,
 - v. Supervision and scope of support for volunteers, and
 - vi. Data demonstrating quantifiable commitment to pro bono as the principal means of delivery, such as percent or number of pro bono cases compared to cases by staff attorneys, a substantial combined number of total attorney and non-attorney volunteer hours, or other relevant data points.
- (G) For purposes of determining whether an applicant has demonstrated pro bono as its principal means of delivering legal services,
- a. any attorney who is not an employee of the applicant can be considered in private practice, and attorneys may be considered in private practice even though they work for government agencies, corporations, or in non-legal occupations;
 - b. attorneys can be considered to serve without compensation even when they are reimbursed for out-of-pocket expenses, whether by the client, the applicant, or other sources;
 - c. non-attorney volunteers may include paralegals, interpreters, legal assistants, social workers, undergraduate students, law students, intake volunteers, and other volunteers so long as their work is supervised by an attorney and the work of the volunteer contributes to the delivery of free legal services to the indigent;

- d. law student hours count toward volunteer non-attorney hours regardless of whether law students receive academic credit, a stipend, or compensation; applicants are required to provide an explanation to demonstrate a law student's commitment to volunteerism; and
- e. legal fellows are law graduates or licensed attorneys who have temporary and/or timebound employment and are typically compensated by a third party; legal fellow hours count toward staff attorney hours unless legal fellows are current law students and/or participating in the Legal Services Trust Fund Commission Legal Aid Leaders Fellowship grant program.