

# What Counts?



## **A Compilation of Questions and Answers Interpreting the Law Firm Pro Bono Challenge® Statement of Principles**

**Prepared by PBI's Law Firm Pro Bono Project®**

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# WHAT COUNTS?

## An Updated Compilation of Questions and Answers Interpreting the Law Firm Pro Bono Challenge® Statement of Principles

### INTRODUCTION

The following supplement to the original “What Counts?” publication has been compiled to provide an easy-to-use guide of frequently asked questions and explanations of “what counts” as pro bono legal services under the Pro Bono Institute’s Law Firm Pro Bono Challenge® definition. (The Challenge *Statement of Principles* and *Commentary to Statement of Principles* are included at the end of this compilation.) The information is arranged in three general sections: **(I): “who”**—addressing questions concerning who is performing the pro bono services; **(II): “what”**—addressing questions concerning the types of activities and work (i.e., what services are being performed); and **(III): “for whom”**—addressing the eligibility of various types of potential clients (i.e., for whom the work is being done). Although many questions fall into more than one category, for ease of reference, they have been included only once. The Law Firm Pro Bono Project’s main goal in responding to law firms seeking guidance about “what counts” under the Challenge has been to define pro bono legal services in a principled, clear, and consistent fashion. The Project’s effort, which includes careful analysis and measured responses to hundreds of confidential “what counts” inquiries each year has been described as “informal rulemaking”—interpretation of the inevitable “grey” areas of the definition in a manner that strives to be as fair and uniform as possible.

Although we believe that this publication will be of general assistance to law firms, in making screening and eligibility determinations, and to the legal community at large, we add a note of caution. The Law Firm Pro Bono Challenge initiative is not about “bean counting;” it is a tool to enable major law firms to increase their contribution to pro bono legal services and enhance access to justice. As law firms have become more knowledgeable regarding the Challenge definition, the issues regarding any individual potential pro bono engagement have become exceedingly subtle and fact based. While we believe that this supplemental edition of “What Counts?” will be helpful, it is no substitute for the individual counseling and consultations the Project provides. Moreover, Challenge signatory law firms may elect to internally use a pro bono definition that is broader than the Challenge definition, so long as the hours they report to the Project reflect only Challenge-qualifying pro bono work.

Should you have any questions about these issues or wish to receive confidential technical assistance for your firm, please do not hesitate to contact the Law Firm Pro Bono Project. “What counts” questions should be submitted in writing to the Project. Project staff members are also available to work with individual firms to assist in the creation of screening policies and procedures that are most appropriate for their specific needs.

#### Contact us at:

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## I. WHO IS PERFORMING THE LEGAL WORK?

*This section addresses questions concerning the various categories of individuals associated with law firms performing pro bono legal services and whether those hours may count towards a firm's Law Firm Pro Bono Challenge<sup>®</sup> goal.*



**In determining a firm's total number of hours spent on pro bono for purposes of the Challenge, should hours spent by pro bono coordinators and other pro bono leadership be included?**

**Answer:** The determination of whether the activities of the individuals who direct or administer the firm's pro bono program (i.e., pro bono coordinators, pro bono counsel, pro bono partners, pro bono committee members) constitute pro bono hours for purposes of the Challenge is governed by the definition of pro bono in Principle 7. While that definition encompasses a wide range of legal services, it does not include non-legal services and activities. Accordingly, time spent by the firm's pro bono staff (or pro bono committee members who play a leading role in the administration of the program) in closely supervising pro bono matters handled by other firm attorneys, directly representing pro bono clients, conducting legal research on proposed and active pro bono projects, or providing legal services as a member of a task force or commission addressing an issue of importance to the community, may be counted as pro bono time for purposes of the Challenge. Time spent in recruiting firm volunteers, placing cases, revising the firm's pro bono policies and procedures, preparing the firm's pro bono newsletter or report, responding to surveys, or revamping the firm's time-keeping system to properly account for pro bono service—as essential as these activities are to ensuring an effective pro bono program—does not count as pro bono time for purposes of the Challenge.



**In determining a firm's total number of hours spent on pro bono for purposes of the Challenge, should hours billed by summer associates, law clerks, trainees and those in equivalent pre-bar admission legal roles, and other staff employed by the firm be included?**

**Answer:** Time spent by any person at the firm, including summer associates, law clerks, trainees and those in equivalent pre-bar admission legal roles, and other staff performing legal work may be considered in aggregating hours to meet the firm's five percent or three percent Challenge goal. For example, cognizable time may include direct pro bono representation by a summer associate or law clerk, under the supervision of a firm attorney, pursuant to a student practice rule; assistance provided by summer associates or law clerks to firm attorneys in pro bono matters; and time spent by summer associates at legal services, public interest and other organizations as part of a firm program in which summer associates spend a portion of their summer detailed to such a program. The pro bono time of any person included in the time counted towards the firm's three percent or five percent goal also must be included in aggregating the firm's total billable hours.



**In determining a firm's total number of billable hours and hours spent on pro bono for purposes of the Challenge, should hours billed by firm attorneys who are resident at offices outside of the United States be included?**

**Answer:** Because local practice rules and local conditions often make it less feasible for attorneys in these offices to undertake pro bono work as defined in the Challenge, firms may choose to include or exclude time billed by attorneys in firm international offices. If the pro bono time of non-U.S. attorneys is included in the firm's three percent or five percent goal, the hours billed to paying clients by non-U.S. attorneys must be included in aggregating the firm's total billable hours.



**In determining a firm's total number of hours spent on pro bono for purposes of the Challenge, should hours billed by non-legal staff and non-legal consultants employed by the firm (actuaries, economists, lobbyists, librarians, science experts, nurses, etc.) be included?**

**Answer:** The firm should not include non-legal consultant time for purposes of the Challenge unless their time is billed similar to how paralegals bill their time.



**In determining a firm's total number of hours spent on pro bono for purposes of the Challenge, should hours billed by firm paralegals be included?**

**Answer:** To qualify for purposes of the Challenge, the paralegal work must be substantive in nature, resulting in the delivery of legal services to qualifying groups and/or individuals. Paralegal hours may only be included in the firm's aggregation of pro bono hours to meet the five percent or three percent Challenge goal so long as hours spent by paralegals on behalf of paying clients are included in the firm's total billable hours. In other words, for Challenge purposes, the firm cannot include the paralegals' pro bono hours in its overall total if it does not include paralegal hours in its total billable hours to paying clients.



**In determining a firm's total number of hours spent on pro bono for purposes of the Challenge, should hours spent by fellows sponsored by the firm, such as an Equal Justice Works fellowship that allows a recent law school graduate to spend two years working with a public interest organization, be included?**

**Answer:** Although sponsoring fellowships, such as Equal Justice Works fellowships, contributes significantly to public interest groups in the community, the time an Equal Justice Works fellow spends working on pro bono matters does not count towards the firm's total pro bono Challenge hours. Unlike associates, law clerks, and summer associates, an Equal Justice Works fellow does not actually work for the firm. Because associates, law clerks and summer associates work directly for the firm, their hours are considered billable hours when it comes to both paying and non-paying clients. On the other hand, even though the firm sponsors the fellowship, the fellow is employed by the public interest organization. Therefore, the hours that fellows, such as

an Equal Justice Works fellow, devote to pro bono matters would be unassociated with the law firm's overall Challenge hours. There are, however, instances where a firm *would* include the time spent on a fellowship. Situations where time should be included are where the firm sponsors an associate in a three, four, or six-month fellowship at a local legal services or public interest organization.

Fellowships of this type (called rotation or externship programs in different parts of the country) would count for purposes of the Challenge because the associate is and remains an employee of the firm but is detailed to the public interest or legal services program for the duration. (See *next question*.)



**In determining a firm's total number of hours spent on pro bono for purposes of the Challenge, should hours spent away from the firm on public interest externship or rotation programs be included? Under these programs, firm associates, summer associates, or law students who will become associates after graduation, are paid by the firm but work at a qualifying legal services organization or governmental entity for a certain number of weeks or hours per week.**

**Answer:** Time spent at externships or rotations should be counted as pro bono time and in total billable hours for purposes of the Challenge. Since associates, law clerks, and summer associates work directly for the firm (or will work for the firm upon graduation from law school), their hours are considered billable hours when it comes to both paying and non-paying clients.

## II. WHAT IS THE WORK BEING PERFORMED?

*This section addresses questions related to whether the proposed activity qualifies as pro bono service under the Law Firm Pro Bono Challenge® initiative. (Questions related to the eligibility of the recipient of the services are addressed in Section III.) The threshold determination in deciding whether particular hours count towards the Challenge is whether the activity involves the provision of legal assistance, as opposed to some other type of volunteer effort. This threshold test can be applied to a range of activities which benefit the community but may not be recognizable as pro bono time for purposes of the Challenge.*



**Does time spent performing community service or time spent participating in activities that combine legal services with community service activities count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge definition of pro bono includes a broad range of legal services but does not encompass non-legal community service or other volunteer activities (see Principle 7, Appendices 1 or 2), since one of its goals is to narrow the gap between the need for legal services and the limited legal resources available to meet those needs. The threshold determination in deciding if such hours count towards the Challenge is whether the firm is

providing *legal assistance* in conjunction with its community service activities. Time spent in providing legal advice and assistance in this context would be considered pro bono for purposes of the Challenge.

### **Specific Examples:**

**Habitat for Humanity:** Time spent on closings and other real-estate-related work for low-income families assisted by Habitat for Humanity and similar qualifying organization, as well as time spent providing corporate, real estate, and other legal representation and advice to the qualifying organization itself, comports with the Challenge definition. However, time spent by firm lawyers and other staff actually building and renovating homes, while laudable, is not pro bono within the scope of the Challenge.

**Adopt-a-School Programs:** Time spent on an “adopt-a-school” project unrelated to legal work, such as mentoring and reading to students, would not be considered pro bono. However, some programs include use of the school as a site for legal clinics for students and their families. Time spent providing legal advice and assistance in this context would be considered pro bono service for purposes of the Challenge, and this is an excellent way to combine community service with legal service.

**Homeless Shelters:** Time spent advising residents of a homeless shelter about their eligibility for government benefits falls within the Challenge definition of pro bono; time spent preparing or distributing food to those residents does not.

**Street Law Programs:** Time spent on certain Street Law programs (for example, those designed to mentor youth and teach practical law in school, but not designed to offer legal services) does not generally qualify as Challenge pro bono hours. However, legal “know your rights” trainings devoted to educating community groups on their legal rights may count as pro bono hours under the Challenge where the focus is on facilitating more effective pro se advocacy by community members in attaining or protecting such rights. Additionally, if a firm were to establish a weekend clinic in order to provide legal advice or assistance to Street Law students and their families, any time spent in such a clinic would count as pro bono hours under the Challenge.

**Humanitarian Crises:** It is often the case that the most critical immediate needs flowing from humanitarian crises caused by conflict or natural disaster are material needs. Time spent fundraising, volunteering to gather or distribute material goods, or similar non-legal efforts is not pro bono within the scope of the Challenge. However, assisting and advocating on behalf of disaster victims in a way that facilitates their access to legal rights may qualify in certain circumstances, for example, liaising or advocating with government agencies and civil society organizations to assist victims access their legal rights to housing, educational support, and medical care.



### **Does time spent on non-litigation activities count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge focuses on direct representation in the broadest sense but is not limited to litigation activities. Other types of representation, such as legislative or administrative policy advocacy on behalf of a qualifying client or client group, working with a community organization on an affordable housing project, providing tax advice and other corporate assistance to a nonprofit organization, are just some of the representational activities contemplated by the Challenge.



### **Does time spent on a legal research project, such as researching international human rights and preparing a report on violations of those rights, count as pro bono hours for purposes of the Challenge?**

**Answer:** Legal research and analysis on behalf of a qualifying client group constitutes pro bono work within the scope of the Challenge. Such research on behalf of an eligible client or client group is consistent with the Challenge's focus on representation and providing legal services.

Authoring an analysis of the legal and factual issues relating to an environmental hazard, preparing a report on the level of compliance by a municipality with consent decrees that impact the welfare of its residents, or conducting research on an alleged violation of human rights are all activities that fall within the Challenge. Moreover, if the client is a poor person or an organization designed primarily to address the needs of persons of limited means, these activities also can be counted toward Challenge Principle 3, which provides that a majority of pro bono time should be focused on delivery of legal services to those of limited means. Additionally, legal research and analysis on behalf of multilateral institutions like the United Nations, World Bank, OSCE, or similar organizations may also fall within the scope of the Challenge if the research focuses on a qualified issue covered in the Challenge definition. Requests for legal research and analysis on behalf of multi-stakeholder initiatives (e.g., frameworks for engagement between businesses, civil society, and other stakeholders such as governments) may also qualify if the research focuses on a qualified issue covered in the Challenge definition. However, due to private sector involvement, such requests should be carefully scrutinized to assess who the ultimate beneficiary of the work is.



### **Does time spent conducting research on behalf of a court count as pro bono hours for purposes of the Challenge?**

**Answer:** Conducting legal research would be considered a legal service. The definition of pro bono in Principle 7 consists in part of the “the delivery of legal services to persons of limited means or to charitable, religious, civic, community, *governmental* and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise

inappropriate” (emphasis added). Courts regularly experience severe budgetary constraints and generally qualify for pro bono services.



**Does time spent doing research, conducting interviews, and issuing recommendations about the criminal justice system for a local organization count as pro bono hours for purposes of the Challenge?**

**Answer:** Legal research and analysis on behalf of a qualifying client group constitutes pro bono work within the scope of the Challenge. Such research on behalf of an eligible client or client group is consistent with the Challenge focus on representation. If the client is a poor person or an organization designed primarily to address the needs of low-income persons, the legal research conducted on their behalf would meet the requirements of Principle 3, which provides that a majority of pro bono time should be focused on delivery of legal services to those of limited means. Other examples of legal work that fit the Challenge definition include authoring an analysis of the legal and factual issues relating to an environmental hazard, preparing a report on the level of compliance by a municipality with consent decrees that impact the welfare of its residents, or conducting research on an alleged violation of human rights.



**Does time spent working with a low-income tax clinic at a law school, including teaching or supervising, count as pro bono hours for purposes of the Challenge?**

**Answer:** Time spent providing legal advice and assistance in the context of such a clinic would be considered pro bono for purposes of the Challenge. In determining what counts as pro bono, the bright line defined by the Challenge is the provision of legal services. A pro bono matter is not disqualified under the Challenge simply because it is not litigation-oriented work. Furthermore, providing legal services for a low-income tax clinic not only meets the definition laid out under Principle 7, but also embodies the object and purpose of Principle 3, which encourages firms to devote a majority of their pro bono activities to low-income persons. The provision of such legal services, not only meets the Challenge definition, but also counts toward low-income pro bono service.

In general, time spent teaching and supervising law students in connection with a low-income clinic counts towards the Challenge. The clinic is an educational organization with budgetary constraints that qualifies as a worthy beneficiary of pro bono service. Many law school clinics are designed primarily to address the needs of persons of limited means or to provide services to groups that have traditionally lacked access to the justice system. Teaching and supervising law students are legal activities that are essential to the functioning of the clinic. Therefore, hours spent teaching in the clinic and supervising clinic cases would count towards the Challenge.

However, teaching a law school class on any substantive topic, such as Sales and Secured Transactions or Healthcare Law, would not. Even though the two teaching scenarios appear similar in nature, the latter, unlike the clinic setting, is not designed to provide actual legal

assistance and to benefit persons of limited means and therefore falls outside the Challenge definition of pro bono.



**Does time spent creating a charter school count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 defines pro bono to encompass a broad range of activities, so long as such activities include the provision of legal services. All time spent on legal issues involved in setting up the school would count towards the Challenge. Furthermore, if the charter school were designed to serve low-income communities, the legal services provided would also count towards low-income pro bono hours under the Challenge. However, not all time devoted to the charter school would automatically count. If, for example, lawyers from the firm devoted time to mentoring or reading to students at the school, this time would not count towards the Challenge, since those activities do not include the provision of legal services.



**Does time spent in the daily administration of the firm's pro bono program count as pro bono hours for purposes of the Challenge?**

**Answer:** Time spent on non-legal activities (including service on the firm's pro bono committee, as well as time spent in recruiting firm volunteers, placing cases, revising the firm's pro bono policies and procedures, preparing the firm's pro bono newsletter or report, responding to surveys, or revamping the firm's time-keeping system to properly account for pro bono service) is an aspect of the firm's institutional commitment (see Principle 1, Appendices 1 and 2), but does not constitute pro bono work within the definition of the Challenge. However, the time spent by an attorney coordinator directly representing pro bono clients or closely supervising other firm lawyers providing such representation would come within the Challenge definition.



**Does time spent in training or traveling for a particular part of a pro bono case or matter count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge definition of pro bono includes a broad range of legal services but does not encompass non-legal activities (see Principle 7, Appendices 1 and 2). However, when the non-legal elements of the attorney's time are integral to the legal work as a whole, those hours can be included toward the firm's Challenge goal. If an attorney would have been unable to handle a particular pro bono case without training on the subject, then the training becomes a non-legal element that is essential to the overall legal work. Accordingly, in this and similar instances, where the non-legal activities are integral to the provision of effective legal representation, time spent on those activities can count towards the Challenge. Training, however, should be linked to actual pro bono matters and representations to avoid situations where the only activities taking place are training sessions without any actual client representations.

Likewise, firms should use their best judgment in deciding how to treat unproductive travel time in pro bono cases and look for guidance to their general firm policies regarding travel and billing guidelines issued by their paying clients.



**As part of a project that provides representation (including participating fully in hearings by examining witnesses and reviewing relevant reports and legal documents) to children who are the subject of custody disputes or have been abused or neglected, the referring agency strongly encourages volunteer counsel to spend additional time with the child. They believe that, for children who may, by virtue of their experiences, be reluctant to trust adults and authority figures, establishing a strong relationship with the child is essential to effective advocacy. Accordingly, lawyers are encouraged to go on outings and sponsor other recreational activities for their clients. Does this additional time with the children count as pro bono hours for purposes of the Challenge, and if so, how much?**

**Answer:** The Challenge definition of pro bono does not typically encompass non-legal activities (see Principle 7, Appendices 1 and 2). In this instance, however, the non-legal elements of the attorneys' time appear to be an integral part of the legal work. Different types of pro bono work often require expenditures of time that appear to be non-legal in nature. In death penalty post-conviction appeals or clemency proceedings, for example, spending time with reporters and editors to establish positive media coverage may be an essential element of the defense. Lawyers who serve as general counsel for neighborhood organizations or nonprofits may spend considerable time in meetings that have little or no legal content as a means of better understanding the client group. Legal advocacy on behalf of children understandably often requires some additional efforts. Accordingly, in this and similar instances, where the non-legal activities are integral to the provision of effective legal representation, time spent on those activities can count towards the Challenge.



**Does time spent offering legal seminars to low-income individuals, low-income business people, and nonprofits serving low-income people count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge focuses on direct representation in the broadest sense but is not limited to litigation-oriented activities. Other types of representation, such as providing legal advice and conducting legal seminars, fall under the scope of legal activities envisioned by the Challenge.

Furthermore, the fact that these legal seminars are delivered to low-income people and nonprofits serving low-income people fulfills the object and purpose of Principle 3, which encourages firms to devote a majority of their pro bono activities to low-income persons.



### **Does service on a law-related board count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge definition of pro bono excludes participation in activities for improving the law, the legal system, or the legal profession. This exclusion stems from the concern that this category of activities is so broad, and large firm participation in bar association and judicial committees so extensive, that the primary purpose of the Challenge—expanding the provision of legal services to the poor and disadvantaged—would not be served. Any determination as to whether work can be counted as pro bono work under the Challenge should focus on whether the attorney is actually providing legal assistance. Accordingly, solely serving on a bar committee or on the board or the fundraising committee of a legal services or other public interest program would not count towards the Challenge. Even if the board or committee focuses on legal services, environmental justice, or civil rights, general board service is not a pro bono matter within the scope of the Challenge.

The purpose of the Challenge is to address the enormous need for direct legal representation, particularly for persons of limited means. Ordinarily, mere service on a board or bar committee is not considered a pro bono activity within the definition of the Challenge.

However, legal assistance provided in the context of such membership, or through other avenues, should be counted toward the firm's Challenge goal. The bright line rule defined by the Challenge is the provision of legal services. Such services do not necessarily have to be provided to an individual client; the client can be a bar association or a board. If an attorney board member undertakes *legal work* for the organization, such as by negotiating a lease or drafting by-laws, that representation could be considered pro bono work for purposes of the Challenge.



### **Does time spent in meetings with the board and CEO of the client, a community-based nonprofit group, count as pro bono hours for purposes of the Challenge?**

**Answer:** For business lawyers serving as general counsel for their qualifying client, spending time with the board and staff leadership of the organization to learn more about its goals and plans for the future is an important activity on the part of transactional lawyers. Helping the client to identify and attract capital that will enable the group to develop affordable housing, assist low-income residents to start businesses, or improve the safety of the community by facilitating relationships with private lenders and public officials who may be able to tap enterprise zone funds and other public monies and then developing the applications, financing mechanisms, or tax schemes that will enable that funding to flow is equally critical. At times, legal advice and business advice may blur somewhat in the transactional context, but this should not prevent such representations from being undertaken.



**Does time spent working at a reduced rate count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 defines pro bono, in part, as activities “undertaken normally *without expectation of fee*” (emphasis added). Where the payment of standard legal fees would be inappropriate or burdensome, working at no cost would count for purposes of the Challenge; however, working for a fee, even at a reduced rate, would not.



**Does time spent working on a contingency fee case count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge gives special priority to the legal needs of persons of limited means by requiring that a majority of pro bono time be spent in addressing the needs of these persons (see Principle 3). Moreover, Principle 7 defines pro bono, in part, as activities “undertaken normally *without expectation of fee*” (emphasis added). A matter undertaken with the expectation of a fee, such as a contingency fee arrangement, does not count as pro bono for purposes of the Challenge.



**Does time spent on Criminal Justice Act and similar court/legal aid appointments paying nominal fees count for purposes of the Challenge?**

**Answer:** There are very limited instances in which the acceptance of a fee award will not disqualify a matter from inclusion in the Challenge definition of pro bono. Post-conviction capital appeals, for example, where firms contribute thousands of hours without compensation but may receive the limited fees available to counsel under the Criminal Justice Act, are clearly pro bono cases for persons of limited means.

Similarly, firms that take on civil or criminal matters on behalf of indigent individuals assigned under local legal aid schemes where nominal fees are paid by the government may count such matters as pro bono for purposes of the Challenge. Firms that receive fees in such cases are strongly encouraged to contribute those fees to organizations or projects that provide services to persons of limited means.



**Does time spent serving as a “judge” on a panel or committee of a judicial or attorney disciplinary hearing body count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7, with its focus on “the provision of legal assistance” to a qualifying client is a conceptual bright line in determining whether a particular activity meets the definition contained in the Challenge. Service on a disciplinary hearing body, assessing the alleged disciplinary violations of lawyers or judges, is a vitally important and difficult task, and lawyers should be encouraged to participate. While the activity involved implicates legal skills, it is

service as a judge, rather than in a representational capacity. Therefore, such service would not count as pro bono for purposes of the Challenge. The Challenge excludes the category of general activities that benefit the administration of justice because of the Challenge's focus on increasing representation to address the crisis of unmet legal needs. Challenge Signatory law firms, of course, may elect to internally use a pro bono definition that is broader than the Challenge definition, so long as the hours they report to the Project reflect only Challenge-qualifying pro bono work.



**Does time spent serving on a rules committee of a court count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7, with its focus on “the provision of legal assistance” to a qualifying client is a conceptual bright line in determining whether a particular activity meets the definition contained in the Challenge. If service on a court rules committee involves reviewing, drafting, commenting upon, or editing current and proposed practice rules, that type of activity falls within the ambit of what would be termed legal work. Principle 7 notes that included in its definition of pro bono is legal assistance to “... charitable, religious, civic, community, *governmental*, and educational organizations ... in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.” (Emphasis added.) The courts qualify as governmental organizations with limited resources. Accordingly, this type of service would be considered pro bono for purposes of the Challenge.



**Does time spent serving as counsel to a committee or group assessing judicial candidates, including time spent reading and abstracting decisions of candidates, count as pro bono hours for purposes of the Challenge?**

**Answer:** Time spent analyzing a candidate’s judicial rulings and legal writing qualifies as legal assistance. In signing on to the Challenge, however, law firms made a commitment to give special priority to the legal needs of persons of limited means by agreeing that a majority of their time commitment would be spent in addressing the needs of these persons or of organizations in matters designed to address their needs. Evaluating judicial temperament and qualifications for certain nonprofit organizations is a legal service that qualifies as pro bono, but it does not qualify as low-income pro bono. Therefore, a firm should assess what impact the work for such a committee will have on the firm’s low-income and other pro bono commitments before it takes on such a matter.



**Does time spent working on behalf of a bar association count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge definition excludes general participation in activities for improving the law, the legal system, or the legal profession. This exclusion stems from the concern that this category of activities is so broad, and large firm participation in bar association and judicial

committees so extensive, that the primary purpose of the Challenge—expanding the provision of legal services to the poor and disadvantaged—would not be served. Accordingly, serving on a bar committee, even one that focuses on legal services, environmental justice, or civil rights, is not a pro bono activity within the ambit of the Challenge. However, *legal assistance* provided in the context of such membership, or through other avenues, would be considered pro bono work for purposes of the Challenge. For example, preparing a brief in support of the constitutionality of IOLTA would constitute legal services for purposes of the Challenge. Legislative advocacy on behalf of a filing fee surcharge, with proceeds going to legal services, would also fit the Challenge definition. Drafting a proposed revision of the state’s domestic violence statute at the behest of a bar association family law section would also be considered pro bono work. Another example of pro bono work for purposes of the Challenge would be serving as an adviser without compensation to a foreign nation in drafting that nation’s constitution, revamping its criminal justice system, or implementing a commercial code. The bright line defined by the Challenge is the provision of legal services. The qualifying client, as discussed further in Section III, may be a poor nation, a bar association, a legal services program, or even a court system.



**Does time spent as a legal observer protecting First Amendment rights during political conventions and protest marches count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 includes in the definition of pro bono “the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights ....” Although the Challenge places great emphasis on meeting the needs of low-income persons, this emphasis is not meant to devalue other important work done in the process of protecting and enforcing public and individual rights.

Guaranteeing First Amendment rights is an important protection of civil rights and liberties. However, the threshold rule for determining Challenge hours must still be met: there must be a provision of legal services. Work done by a lawyer as a legal observer would qualify as providing legal assistance and would be considered pro bono work for purposes of the Challenge. Acting as a general volunteer or marshal for safety purposes, however, would not meet the threshold requirement of provision of legal services, and, therefore, would not count.



**Does time spent as an Election Day poll observer or as a ballot monitor count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 includes in the definition of pro bono “the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights ....” Although the Challenge emphasizes meeting the needs of low-income persons, this emphasis is not meant to devalue other important work done in the process of protecting and enforcing public and individual rights. Service as a poll observer would be considered service that seeks to protect civil rights and liberties. Poll

observation in a historically underserved community could even fulfill the object and purpose behind Principle 3, which focuses on contributing pro bono time to persons of limited means. However, the threshold requirement for determining Challenge eligibility must still be met: there must be a provision of legal services. Work done by a lawyer as a legal observer would qualify as providing legal assistance and would be considered pro bono work for purposes of the Challenge. Acting as a general volunteer or marshal for safety purposes, however, would not meet the threshold requirement of provision of legal services, and, therefore, would not count.



**Does time spent drafting legislation for a qualifying organization count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7, with its focus on “the provision of legal assistance” to a qualifying client is a conceptual bright line in determining whether a particular activity meets the definition contained in the Challenge. The Challenge definition of pro bono is not limited to litigation-oriented activities. Drafting legislation qualifies as legal assistance, and this type of work for a qualifying client would be considered pro bono for purposes of the Challenge.



**Does time spent lobbying count as pro bono hours for purposes of the Challenge?**

**Answer:** The Challenge definition of pro bono is not limited to litigation-oriented activities. Principle 7, with its focus on “the provision of legal assistance” to a qualifying client is a conceptual bright line in determining whether a particular activity meets the definition contained in the Challenge. Lobbying qualifies as legal assistance, and this type of work for a qualifying client would be considered pro bono for purposes of the Challenge.



**Does time spent working on a pro bono matter which eventually results in an award of attorneys’ fees still count as pro bono hours for purposes of the Challenge?**

**Answer:** Under Principle 7, “the term ‘pro bono’ refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice ....” If the firm originally accepted the matter in question on a pro bono basis, then an award of attorneys’ fees will not change it from being a pro bono matter. Time spent on the pro bono matter should be counted as the firm would count any pro bono matter in which the award of attorneys’ fees was not present. However, accepting a matter on a contingency fee basis (even where the chance of recovery is remote) does not make it a pro bono matter under the Challenge. Time expended on contingency cases cannot be counted for purposes of the Challenge.

The Challenge definition is designed to encourage law firms to seek awards of attorneys’ fees in appropriate pro bono cases. In handling cases in the public interest, law firms are acting as “private attorneys general,” enforcing legal rights, promoting access to justice for those who

would otherwise be unable to press their suits, and uncovering and deterring unlawful behavior. Seeking attorneys' fees, as well as damages or equitable relief, on behalf of pro bono clients increases the disincentives and deterrence benefits of these cases by making defendants who have acted unlawfully pay the full costs associated with their behavior. Accordingly, firms are encouraged to seek attorneys' fees and to request compensation at the usual and customary billing rates. In 2007, the language of the Commentary to Challenge Principle 7 was strengthened by adding emphasis to state that that "[f]irms that receive fees in such cases are strongly encouraged to contribute an appropriate portion of those fees to organizations or projects that provide services to persons of limited means."



**Does time spent providing legal assistance to a large for-profit company in a matter that seeks to produce strong financial returns as well as positive social and/or environmental returns count as pro bono hours under the Challenge?**

**Answer:** Previous answers noted that, in recent years, the bright line between nonprofit organizations and for-profit businesses that are also engaged in social impact on behalf of historically disadvantaged individuals and communities and social justice initiatives has blurred. Through its newly updated Challenge Commentary, PBI provides some guidance as to when and under what circumstances for-profit entities might be eligible for pro bono legal services.<sup>1</sup>

These representations require ongoing monitoring, and eligibility determinations must be reevaluated over time. Care must be taken from the outset to plan for a successful outcome (here, a profitable business). As this answer illustrates, for-profit eligibility determinations are fact intensive, and we invite your confidential inquiries about specific questions to be submitted in writing.



**Does time spent working on appellate cases as court-appointed amicus, to brief and argue the positions of an unrepresented party, or to address a question not addressed in the parties' briefs, count as pro bono for purposes of the Challenge, where the appointment is made for the benefit of the court, and also benefits a pro se party?**

**Answer:** Principle 7 of Challenge includes in the definition "the provision of legal assistance to ... charitable, religious, civic, community, *governmental* (emphasis added) and educational organizations in matters which are designed primarily to address the needs of persons of limited means ... [and] in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate." Time spent on matters assigned by the court count as pro bono for purposes of the Challenge, because they are the delivery of legal services to governmental organizations which are designed primarily to address the needs of persons of limited means. Even when amicus counsel is appointed to address legal questions (possibly because neither

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<sup>1</sup> You may also find more details for consideration regarding eligibility at the [Association of Pro Bono Counsel's Mission, Matter, Means 2.0](#), Section II.

party wants to brief it), the matter would still be appropriately considered pro bono; this work would fall under the category of service to the court for the administration of justice.

## PUBLIC RIGHTS

*Principle 7 includes in the definition of pro bono “the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights ....”*

### Specific Examples:



**Does representation of a well-endowed animal rights organization in litigation against a company that is allegedly engaged in acts of cruelty against animals count as pro bono hours for purposes of the Challenge?**

**Answer:** The representation of a well-endowed animal rights organization in litigation against a company that is allegedly engaged in acts of cruelty against animals could be considered as falling under the “public rights” prong of Principle 7 of the Challenge definition. If there is otherwise no market-force that would address this issue, animal welfare issues qualify because without human involvement, animals cannot otherwise protect themselves. Moreover, the welfare of animals has moral and environmental implications for humans.



**Does time spent working on a Supreme Court amicus brief in a dispute regarding what triggers the statute of limitation for federal securities claims count as pro bono for purposes of the Challenge, as a “public right”?**

**Answer:** When evaluating pro bono legal services, one should consider that in an environment of significant need and constrained resources, pro bono should be reserved for instances where market forces will not address a public need. An amicus brief in litigation pending before the Supreme Court involving a dispute regarding what triggers the statute of limitation for federal securities claims should not qualify as pro bono. Although a firm could argue that this work should count as pro bono because (1) the administration of federal securities law, and (2) the need to protect the defendant corporations from stale securities fraud lawsuits, are both issues of “collective concern”, the commercial nature of these issues are such that this work should be addressed outside the sphere of pro bono representation. Moreover, the nature of the legal work would benefit a narrow band of the general public, further arguing against counting this work as pro bono for purposes of the Challenge.



**Does time spent representing a group of wealthy landowners in a matter adverse to a state government that is trying to seize property pursuant to a takings clause count as pro bono for the Challenge, based on the argument**

**that allowing the seizure of this land could lead to the further seizure of low-income housing in the same area?**

**Answer:** Principle 7 includes in the definition of pro bono “the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means ... [and] the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights ....” In this instance, the financial resources of the landowners weighs against taking this work on as pro bono, as should the narrow band of people impacted by this particular taking of land. The argument that it *could* impact low-income individuals in the future may not be compelling—as the link to an impact on persons of limited means may be too tenuous. However, if the taking would have a direct impact on a marginalized community, this may weigh in favor of counting it as pro bono for purposes of the Challenge.

### III. FOR WHOM IS THE LEGAL WORK BEING PERFORMED?

*This section addresses questions related to determining client eligibility for pro bono legal services for purposes of the Law Firm Pro Bono Challenge® initiative. These determinations usually involve unique fact patterns, and we invite firms to consult with us on an individual, confidential basis, as we are only able to provide general guidance in this publication.*



**Does time spent working for a nonprofit organization count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 defines pro bono, in part, as matters that consist of “the provision of legal assistance to charitable, religious, civic, community, governmental or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.” A broad range of nonprofit organizations fall into the categories listed in the definition. To determine whether work for a specific nonprofit organization counts toward the Challenge, a firm should examine the nonprofit’s budget to determine whether the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate. In analyzing the nonprofit organization’s budget, the firm should determine what other professional services it pays for. If a particular nonprofit cannot afford to pay for general routine operating services, such as accounting, it more than likely cannot afford to pay for legal services. On the other hand, some nonprofits have such large budgets and endowments that they can afford to pay standard legal fees (even if they may not be able to pay your firm’s regular rates). General legal services provided to those well-endowed organizations, even at reduced rates, would not count under the Challenge.

Alternatively, a firm must examine the nature of the possible representation for the nonprofit and the overall work and purpose of the nonprofit. If the potential matters “are designed primarily to address the needs of persons of limited means,” the legal services would count under the Challenge. Likewise, if the legal assistance would assist the organization “to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights” the time spent would count for purposes of the Challenge.



**Would time spent working for a nonprofit organization whose funding comes from for-profit entities count as pro bono hours for purposes of the Challenge?**

**Answer:** Funding from for-profit entities does not alter a nonprofit’s status. The firm should treat this organization like it does all other nonprofits and examine its overall budget. If the budget analysis reveals that this organization could not ordinarily afford to pay standard legal fees, then the firm could count pro bono hours devoted to it towards the Challenge. Furthermore, if this nonprofit primarily services low-income people, work for this organization also fulfills the object and purpose behind Principle 3. As this example illustrates, nonprofit eligibility determinations are fact specific, and we invite your confidential inquiries about specific questions to be submitted in writing.



**Does time spent working on behalf of a well-funded nonprofit that addresses a matter of collective concern count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 defines pro bono, in part, as matters that consist of “the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights ....” Because of the potential breadth of this provision, firms should center the eligibility analysis on the mission of the organization and the nature of the work. If the potential matter is “designed primarily to address the needs of persons of limited means,” the legal services would count under the Challenge. However, if the representation involves an organization that nominally secures or protects public rights, but the essence of the representation addresses commercial or legislative issues that are self-serving to those proposing the representation, such pro bono representation should be discouraged.

#### **Specific Examples:**



**Should the representation of a well-endowed life sciences nonprofit organization count as pro bono hours for purposes of the Challenge?**

**Answer:** The representation of a well-endowed life sciences nonprofit that requests pro bono representation may qualify for pro bono depending on the focus of the legal work at issue. For example, if the pro bono request is focused on work supporting the development of an “orphan” drug to combat a rare medical condition, this legal work

should count as pro bono because of an interest in supporting medical progress where a drug might otherwise not be developed without such assistance. However, if the pro bono request relates to the development of a medical therapy or drug in areas that may overlap with profitable commercial enterprises, this work should not count. The nature of these therapies or drugs could otherwise be supported by market forces. One indicia of whether a therapy or drug can be supported by market forces is the extent to which for-profit companies are supporting the nonprofit. Moreover, if the firm or person proposing the work engages in similar work as part of their commercial practice, that work might be more appropriately classified as “business development.”



**Does the representation of a well-endowed nonprofit media organization that creates content for public service announcements count as pro bono hours for purposes of the Challenge?**

**Answer:** Work on behalf of a tax-exempt nonprofit that creates social media content to encourage Gen Z people to register to vote or otherwise get involved in matters of public interest (environmental causes, vaccine acceptance, etc.) may count as pro bono for purposes of the Challenge if the work is nonpartisan. Although the large financial backing of an organization might weigh against counting it as pro bono, if the nature of the work being requested involves, for example, the impact of political content on nonpartisan tax-exempt status, the work might be appropriate as pro bono.<sup>2</sup>



**Does time spent by attorneys in a rotation program count as pro bono hours for purposes of the Challenge?**

**Answer:** In Principle 7, pro bono is defined, in part, as “the provision of legal assistance to ... charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means ... [and] in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.” Accordingly, the provision of service to clients of a legal services program, public defender office, or other nonprofit or governmental agency, either through referrals to the firm or through a rotation/externship/fellowship program would not only qualify as pro bono service for purposes of the Challenge but may also constitute service to persons of limited means under Principle 3 of the Challenge. Since many prosecutors’ offices, other governmental entities, and legal service organizations experience severe budgetary constraints, rotation programs and referrals from these offices would be considered pro bono for purposes of the Challenge.

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<sup>2</sup> For more details on analysis of pro bono eligibility regarding well-funded nonprofit organizations, see the [Association of Pro Bono Counsel’s Mission, Matter, Means 2.0](#).



**Does time spent in a government office, such as a prosecutor’s office, the public defender, the attorney general or a city legal counsel, as part of a firm-sponsored rotation/externship program count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 defines pro bono, in part, as “the provision of legal assistance to ... charitable, religious, civic, community, *governmental* (emphasis added) and educational organizations in matters which are designed primarily to address the needs of persons of limited means ... [and] in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.” Since agencies, such as prosecutor’s offices, city legal counsel and attorney general’s offices often experience budgetary constraints, service as a volunteer lawyer qualifies as pro bono hours under the Challenge. This work is not disqualified from being considered pro bono for purposes of the Challenge simply because there are secondary benefits, such as training/professional development opportunities that also benefit the firm.



**Does time spent working for a low-income relative count as pro bono hours for purposes of the Challenge?**

**Answer:** Legal work for a low-income person generally qualifies as pro bono for purposes of the Challenge. Work for a relative, however, raises several policy issues and requires the firm’s discretion in determining whether to take the work at all and, if so, whether to treat it as a pro bono matter. Taking on pro bono matters for relatives may negatively impact the firm if it does so at the expense of its other low-income pro bono commitments. If the firm were to decline other pro bono projects in order to provide free legal assistance to relatives of firm lawyers and staff, this could damage the firm’s reputation with public interest groups in the community. Moreover, pro bono work for relatives not only raises ethical concerns regarding potential conflicts of interest but may also lead to internal conflicts if the client is unhappy with the representation or the outcome. A firm should seriously assess the consequences of such an action before taking on matters for low-income relatives and before treating those matters as pro bono.



**Does time spent working on a personal matter for a corporate client’s employee count as pro bono hours for purposes of the Challenge?**

**Answer:** Legal work for a low-income person generally qualifies as pro bono for purposes of the Challenge. Personal legal work for an employee of an existing corporate client, however, rarely qualifies as pro bono. Under most circumstances, such an employee can afford legal representation, even if that representation is not at the law firm’s usual billing rates. A firm may, of course, perform legal work for free or at greatly discounted rates—this does not automatically mean that the matter is pro bono work for purposes of the Challenge.



**Does time spent on litigation involving civil rights/discrimination issues and civil liberties matters, such as cases involving the First Amendment, count as pro bono hours for purposes of the Challenge, despite the Challenge’s focus on legal assistance to low-income persons?**

**Answer:** Principle 7, which sets out the Challenge definition of pro bono, explicitly includes in that definition “the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights ...” While the Challenge emphasizes addressing the enormous unmet need for legal services to the poor or to organizations designed to address their needs, it is not intended to limit or devalue the traditional role played by major law firms in protecting and enforcing important public and individual rights. In addition to complying with the Challenge definition, these matters may, in fact, also be categorized as legal services to the poor.

As the Challenge Commentary to Principle 3 notes, “many activities traditionally viewed by firms as falling in other pro bono categories such as civil rights or civil liberties cases, environmental claims, community economic development and consumer protection matters can, in fact often also be accurately described as falling within the priority for legal services to persons of moderate means .... Emphasis on the legal needs of persons of limited means is not intended to supplant the involvement of firms in complex pro bono matters for other populations.” An employment discrimination class action involving minimum wage employees, for example, or a challenge to the adequacy of health care or privacy rights of prisoners, constitute civil rights/civil liberties activities that also primarily benefit low-income persons.



**Does time spent providing legal assistance to a start-up company or other small business count as pro bono hours under the Challenge?**

**Answer:** Previous answers noted that, in recent years, the bright line between nonprofit organizations and for-profit businesses that are also engaged in civic ventures and social justice initiatives has blurred. The Challenge Commentary was updated in 2007 to provide guidance as to when and under what circumstances for-profit entities might be eligible for pro bono legal services. For-profit businesses will rarely be eligible for pro bono services under the Challenge. Nevertheless, if the individuals behind the for-profit venture would be eligible for pro bono legal services themselves or where the for-profit business is operating as the functional equivalent as a nonprofit, the business may be eligible for pro bono services. If the individuals behind the business do not themselves qualify for pro bono legal services, the business venture could still qualify if: the primary mission of the business venture is to assist and enhance the well-being of low-income people and groups; the revenues from the business venture, if any, support that mission and assist people of limited means; the business venture possesses insufficient operating funds to pay for legal and other professional services; and the pro bono relationship is considered, from the beginning, of limited duration.

These representations require ongoing monitoring, and eligibility determinations must be reevaluated over time. Care must be taken from the outset to plan for a successful outcome (here, a profitable business) and the transition from being a pro bono client to a paying client. As this example illustrates, for-profit eligibility determinations are fact intensive, and we invite your confidential inquiries about specific questions to be submitted in writing.

In 2023, PBI provided additional clarification for consideration when determining if time spent providing legal assistance to a start-up company or other small business counts as pro bono hours under the Challenge. That guidance provides that: In determining whether to provide pro bono legal assistance to a start-up or existing small business, law firms should evaluate (a) individual income, (b) entity income, and (c) impact on the community.

- (a) If the principal(s) behind a start-up for-profit are themselves low-income, legal guidance to help with formation and related work would count as pro bono.
- (b) An entity that has been in existence for a year or more will generally be considered an ongoing business rather than a start-up. If a small business entity does not qualify for services based on the principal(s)' individual finances, it may still be eligible for pro bono representation based on the limited finances of the entity itself (if the entity already is operational).
- (c) The beneficial impact of the entity on a low-income community might qualify it for pro bono service. Such work could help increase employment opportunities as a stimulus to improving the economic status of low-income communities and individuals.

To determine eligibility for an existing small business, under b) or c) above, firms may consider a variety of factors. PBI staff invites your confidential inquiries about specific questions to be submitted in writing.<sup>3</sup>



### **Does time spent providing legal assistance to a poor nation count as pro bono hours for purposes of the Challenge?**

**Answer:** When evaluating pro bono hours, the bright line defined by the Challenge is the provision of legal services. The firm would have to investigate whether the country could pay for legal services and analyze in what form it is aiding the developing country. If legal services without compensation are being provided, then such work could be considered pro bono for purposes of the Challenge. Several examples of Challenge pro bono work could include serving as an adviser in drafting a nation's constitution, revamping its criminal justice system, providing legal training and other capacity building support, or implementing a commercial code. Under the Challenge, a client does not necessarily have to be an individual; a poor nation could qualify as a pro bono client. When evaluating whether a country is a "poor nation," firms may consider

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<sup>3</sup> You may also find more details for consideration regarding eligibility at the [Association of Pro Bono Counsel's Mission, Matter, Means 2.0](#), Section II.

whether the country is a [U.N.-designated Least Developed Country](#), review [World Bank World Governance Indicators](#), and whether the pro bono matter was referred by a public interest organization.



**Does time spent providing general legal assistance to a church, synagogue, or other religious institution count as pro bono hours for purposes of the Challenge?**

**Answer:** Principle 7 defines pro bono, in part, as “the provision of legal assistance to ... charitable, *religious*, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means ... [and] in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.” (Emphasis added.) The firm should examine the potential religious institutional client as it does any other nonprofit to determine the organization’s budget, what other professional services it pays for, and whether it could afford to pay for legal services. Many religious institutions are well-endowed and can afford to pay standard legal fees. Moreover, while providing legal representation or advice to a qualifying religious institution may count as pro bono hours for purposes of the Challenge, volunteering as part of the institution’s various community service activities would not.



## Law Firm Pro Bono Challenge® STATEMENT OF PRINCIPLES

Recognizing the growing severity of the unmet legal needs of the poor and disadvantaged in the communities we serve, and mindful that major law firms must—in the finest traditions of our profession—play a leading role in addressing these unmet needs, our firm is pleased to join with other firms across the country in subscribing to the following statement of principles and in pledging our best efforts to achieve the voluntary goals described below.

1. Our firm recognizes its institutional obligation to encourage and support the participation by all of its attorneys in pro bono publico activities. We agree to promulgate and maintain a clearly articulated and commonly understood firm policy which unequivocally states the firm's commitment to pro bono work.
2. To underscore our institutional commitment to pro bono activities, we agree to use our best efforts to ensure that, by no later than the close of the calendar year, our firm will either (please check one option below):
  - annually contribute, at a minimum, an amount of time equal to **5 percent** of the firm's total billable hours or **100 hours per attorney** to pro bono work; or
  - annually contribute, at a minimum, an amount of time equal to **3 percent** of the firm's total billable hours or **60 hours per attorney** to pro bono work.
3. In recognition of the special needs of the poor for legal services, we believe that our firm's pro bono activities should be particularly focused on providing access to the justice system for persons otherwise unable to afford it. Accordingly, in meeting the voluntary goals described above, we agree that a majority of the minimum pro bono time contributed by our firm should consist of the delivery of legal services on a pro bono basis to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means.
4. Recognizing that broad-based participation in pro bono activities is desirable, our firm agrees that, in meeting the minimum goals described above, we will use our best efforts to ensure that a majority of both partners and associates in the firm participate annually in pro bono activities.

5. In furtherance of these principles, our firm also agrees:
  - a. To provide a broad range of pro bono opportunities, training, and supervision to attorneys in the firm, to ensure that all of our attorneys can avail themselves of the opportunity to do pro bono work;
  - b. To ensure that the firm's policies with respect to evaluation, advancement, productivity, and compensation of its attorneys are compatible with the firm's strong commitment to encourage and support substantial pro bono participation by all attorneys;
  - c. To monitor the firm's progress toward the goals established in this statement and to report its progress annually to the members of the firm and to the Law Firm Pro Bono Project; and
  - d. To support the proactive reinforcement of policies, practices, attitudes and actions that produce equitable power, access, opportunities, treatment, impacts and outcomes for all by identifying and volunteering for pro bono opportunities that target racial injustice and other systemic inequities in the legal system.
6. This firm also recognizes the obligation of major law firms to contribute financial support to organizations that provide legal services free of charge to persons of limited means.
7. As used in this statement, the term pro bono refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of (i) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means; (ii) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights; and (iii) the provision of legal assistance to charitable, religious, civic, community, governmental, or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

## **Law Firm Pro Bono Challenge®**

### **COMMENTARY TO STATEMENT OF PRINCIPLES**

#### **PRINCIPLE 1**

Our firm recognizes its institutional obligation to encourage and support the participation by all of its attorneys in pro bono publico activities. We agree to promulgate and maintain a clearly articulated and commonly understood firm policy which unequivocally states the firm's commitment to pro bono work.

#### **COMMENTARY**

##### **An Institutional Commitment**

We ask that each law firm recognize and structure an active institutional commitment to pro bono publico service, rather than simply accommodating the interest and commitment of its individual attorneys. The goal of such institutional support is to ensure that the special resources and expertise of the firm are collectively focused on the management and implementation of an effective and productive pro bono effort and on the reduction or elimination of barriers to pro bono work. It is also designed to develop and nurture a firm culture in which pro bono service is a routine and valued part of each individual's professional life. The leadership of the firm should convey, in clear, unambiguous terms, the firm's commitment as an institution as well as its expectation that each individual will strive to help fulfill the firm-wide commitment. Many firms have found that a comprehensive written pro bono policy is an excellent vehicle for communicating that commitment. The firm should then implement its policy through a structured program that fosters pro bono work.

#### **PRINCIPLE 2**

To underscore our institutional commitment to pro bono activities, we agree to use our best efforts to ensure that, by no later than the close of the calendar year, our firm will either:

- 1) annually contribute, at a minimum, an amount of time equal to 5 percent of the firm's total billable hours or 100 hours per attorney to pro bono work;
- 2) annually contribute, at a minimum, an amount of time equal to 3 percent of the firm's total billable hours or 60 hours per attorney to pro bono work.

## **COMMENTARY**

### **Quantifying the Commitment**

We believe that the establishment of a concrete, quantifiable, firm-wide aspirational goal will assist firms in communicating support for pro bono and in assessing the overall effectiveness of their pro bono programs. The expression of that goal as a percentage of total billable hours, rather than as a goal of hours per individual attorney, underscores the institutional nature of the commitment. While we believe that it is both feasible and appropriate for major law firms to contribute 5 percent of their billable hours to pro bono activities, we recognize that substantial differences exist among firms with respect to their current levels of pro bono activity. Accordingly, we have provided firms with a choice between two alternative aspirational goals—a goal of 5 percent of total billable hours or a goal of 3 percent of total billable hours. Many firms already report contributions of pro bono time far in excess of either of these goals. Indeed, several major firms presently expend 8 percent or more of their time on pro bono activities. For other firms, accepting the challenge to aspire to even the lower of the two goals represents a dramatic expansion of their current level of effort. These levels are consonant with existing aspirational bar resolutions which call for annual goals of up to 80 hours per attorney.

For example, we anticipate that the 3 percent aspirational goal will translate into a per-attorney goal somewhat in excess of 50 hours annually, a commitment that is consistent with the aspirational goals established by the American Bar Association and many state and local bar associations. Many major law firms have established branch offices in foreign countries. Recognizing that pro bono service may not be feasible for attorneys in these offices, the 5 percent/3 percent goals should be applied only to the total billable hours performed by firm attorneys working in the United States, unless the firm specifically elects to report the time of all its attorneys regardless of location. In 2000, the Advisory Committee of the Law Firm Pro Bono Project amended the Challenge to allow firms the option of selecting either a 5 percent/3 percent goal or a 100/60 hour per attorney goal.

## **PRINCIPLE 3**

In recognition of the special needs of the poor for legal services, we believe that our firm's pro bono activities should be particularly focused on providing access to the justice system for persons otherwise unable to afford it. Accordingly, in meeting the voluntary goals described above, we agree that a majority of the minimum pro bono time contributed by our firm should consist of the delivery of legal services on a pro bono basis to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means.

## **COMMENTARY**

### **Pro Bono—Meeting the Need**

While we recognize and applaud the rich diversity of pro bono activities undertaken by law firms, with respect to the minimum aspirational goal established by the Challenge, we strongly support a special emphasis by firms on the legal problems of persons of limited means. Studies routinely report that more than 80% of the civil legal needs of the poor are not presently being met. The resources and expertise of leading law firms should be brought to bear to assist the most vulnerable of our citizens in securing their rights. Legal services, as used in this Commentary, consists of a broad range of activities, including, among others, individual and class representation, legislative lobbying and administrative rulemaking, as well as legal assistance to organizations seeking to develop low-income housing, improve community services, or increase the financial resources of persons of limited means. Many activities traditionally viewed by firms as falling in other pro bono categories such as civil rights or civil liberties cases, environmental claims, community economic development, and consumer protection matters can, in fact, often also be accurately described as falling within the priority for legal services to persons of limited means. Emphasis on the legal needs of persons of limited means is not intended to supplant the involvement of firms in complex pro bono matters for other populations. Many major law firms have a strong commitment to public interest litigation and projects, including high impact class action suits and policy advocacy, which promote essential public policies and ensure that our society functions equitably. Firms undertaking these complex and time-consuming matters often commit resources far in excess of the Challenge's minimum goals.

## **PRINCIPLE 4**

Recognizing that broad-based participation in pro bono activities is desirable, our firm agrees that, in meeting the minimum goals described above, we will use our best efforts to ensure that a majority of both partners and associates in the firm participate annually in pro bono activities.

## **COMMENTARY**

### **Broad-based Participation in Pro Bono**

While we urge the firm's institutional support for pro bono, that support will be enhanced if pro bono publico service is the concern of all lawyers in the firm rather than only a few highly committed individuals. Experience has demonstrated that broad based participation at all levels, including the most senior members of the firm, is a key element in developing and nurturing a successful firm pro bono program. Myriad opportunities for service exist—opportunities that will interest and challenge senior partners as well as young associates, business and tax lawyers as well as litigators. Broad-based participation in pro bono service promotes firm-wide support for that activity and serves as a concrete and visible affirmation of the firm's institutional commitment.

Finally, by involving lawyers with a broad range of interests and skills, the firm can enrich its service to the community.

## **PRINCIPLE 5**

In furtherance of these principles, our firm also agrees:

- a. To provide a broad range of pro bono opportunities, training, and supervision to attorneys in the firm, to ensure that all of our attorneys can avail themselves of the opportunity to do pro bono work;
- b. To ensure that the firm's policies with respect to evaluation, advancement, productivity, and compensation of its attorneys are compatible with the firm's strong commitment to encourage and support substantial pro bono participation by all attorneys;
- c. To monitor the firm's progress toward the goals established in this statement and to report its progress annually to the members of the firm and to the Law Firm Pro Bono Project; and
- d. To support the proactive reinforcement of policies, practices, attitudes and actions that produce equitable power, access, opportunities, treatment, impacts and outcomes for all by identifying and volunteering for pro bono opportunities that target racial injustice and other systemic inequities in the legal system.

## **COMMENTARY**

### **Promoting and Recognizing Pro Bono Service**

- a. We encourage firms actively to seek out a broad range of pro bono opportunities for their lawyers and to provide or secure the necessary support, training, and supervision so that lawyers will be encouraged to take on these cases or projects. Pro bono matters should be administered in the same manner as commercial work. All of the firm's resources and support services should be available to the pro bono attorney, and the matter should be subject to the firm's oversight and quality control procedures. It is especially important that all pro bono matters be supervised in a manner consistent with the firm's overall supervision requirements. One obstacle that often limits participation in pro bono work is the concern that a firm lacks sufficient substantive expertise in particular areas of law. Many firms have taken steps to ensure that the necessary substantive supervision is available by identifying experts within or outside of the firm or by providing or securing training for firm attorneys.

A number of firms have established a pro bono committee, identified an individual to serve as the firm's pro bono coordinator, or otherwise formally assigned someone in the

firm the responsibility for ensuring that the firm offers interesting pro bono opportunities and supports its lawyers in undertaking pro bono work. A formalized structure for identifying, screening, and monitoring pro bono work strengthens the visibility and effectiveness of the firm's overall pro bono effort.

- b. In an era of increased expectations with respect to billable hours, receipts, or similar measures, a firm commitment to pro bono must include positive incentives to perform that work. Whether this takes the form of billable hours credit, receivables equivalent credit, or some other form of recognition for time spent on pro bono work will depend on the firm's existing incentives system. It is equally important that participation in pro bono work be identified as one criterion for positive evaluations and advancement in the firm. Many firms have developed systems to ensure that such evaluations explicitly include assessment of pro bono work. Firms have also established supplemental efforts to promote recognition of pro bono work, such as firm-wide pro bono awards and bonus programs.
- c. As part of its institutional commitment, the firm should monitor its progress in meeting its aspirational minimum goal, as well as its level of involvement in legal services to persons of limited means and should disseminate information on the status of the pro bono program broadly within the firm. To assist the Law Firm Pro Bono Project in assessing the impact of the Law Firm Challenge on the availability of pro bono firm resources, the firm will also provide information to the Project. That information will be confidential and will not be released in any form that identifies a specific firm.
- d. In January 2022, PBI expanded the Law Firm Pro Bono Challenge pledge by adding provision 5(d) to expressly embody a commitment by Challenge signatories to combat racial injustices and other systemic injustice through their pro bono work.

Heartened by both the individual and collective efforts law firms are making to address racial injustice in the wake of the murder of George Floyd, the PBI Law Firm Pro Bono Project initiative, with the endorsement of both the PBI Board of Directors and the Law Firm Pro Bono Project Advisory Committee, embraced the legal communities' renewed commitment to work toward identifying, resisting, and ultimately eradicating racism and systemic inequities in a legal system that promises access to justice for all.

#### Considerations for Engaging in Racial Justice Pro Bono Work

Given the importance of racial justice pro bono work and a desire to be inclusive of what law firms are doing and would endeavor to do in this area, we offer the following items that law firms should consider when engaging in racial justice pro bono work. We developed these considerations with the knowledge that racial justice pro bono work will and should evolve:

- Law firms should consider consulting and collaborating with the legal services organizations focused on racial justice issues before engaging in this work.

- Law firms should consider examining prospective pro bono matters through a racial justice lens in order to determine whether their pro bono efforts will achieve a systemic impact.
- Racial justice pro bono work can benefit individual clients and/or be undertaken to have a systemic impact. In either case, law firms should consider whether their pro bono efforts will target racial injustice and other systemic inequities in the legal system.

### Examples of Racial Justice Pro Bono Work

The following examples of racial justice pro bono work were provided by law firms in response to PBI's Annual Law Firm Challenge Report. We believe these examples can provide additional guidance to law firms that are exploring racial justice pro bono opportunities. The list is not exhaustive or in any way meant to limit what law firms can or should do in this area:

- Representing victims of mass incarceration and wrongfully convicted individuals
- Challenging racial gerrymandering and/or violations of the Voting Rights Act
- Addressing heirs property laws and related legal work to prevent the involuntary loss of land of minority land owners
- Researching legislative enactments that impose restrictions and/or limitations on the use of force by police, including bans on the use of chokeholds
- Increasing access and opportunity for minority-owned startups and other businesses
- Preparing and filing comments in support of or opposition to administrative rules that impact equity in urban development, and low-wage workers' rights
- Providing legal assistance to minority students facing educational barriers
- Sealing and expunging criminal records
- Filing lawsuits designed to bring about police reform

## **PRINCIPLE 6**

This firm also recognizes the obligation of major law firms to contribute financial support to organizations that provide legal services free of charge to persons of limited means.

### **COMMENTARY**

#### **Financial Support**

The level of firm pro bono commitment identified in the Law Firm Challenge is not intended to replace or diminish a firm's monetary contributions to organizations that provide legal services to persons of limited means. The Challenge commitment is one of actual service and personal involvement in pro bono work. We strongly encourage law firms to continue and expand their financial support of legal services organizations. These organizations need both service and monetary contributions from major law firms.

## **PRINCIPLE 7**

As used in this statement, the term pro bono refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of (i) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means; (ii) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect human rights, civil rights, civil liberties, public rights or environmental rights; and (iii) the provision of legal assistance to charitable, religious, civic, community, governmental, or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

### **COMMENTARY**

#### **Definition of Pro Bono**

The definition of pro bono contained in the Challenge, although somewhat revised, tracks existing policy definitions adopted by the American Bar Association, state and local bar associations, and many law firms. The definition ensures that the firm and its attorneys can utilize varied legal skills to undertake a broad range of activities in meeting their pro bono responsibility and goals.

#### **For-Profit Organizations**

In the past, with some exceptions, most for-profit entities would not have qualified for pro bono legal services. The current guidance provides for an expanded Challenge definition of for-profits that are pro bono eligible. All qualified pro bono engagements in support of for-profit entities

should be viewed, from the beginning, as “time bound” with eligibility reevaluated with each new engagement.

Where the principals behind a for-profit business would themselves be eligible for pro bono legal services, the business entity would be eligible.

Certain for-profit entities are organized to produce positive social and/or environmental benefits as well as positive financial returns and may, in some circumstances, qualify for pro bono legal services. Examples include:

- where the business is a Community Economic Development (CED) entity devoted to addressing the economic needs of low-income individuals and families through the creation of sustainable business development and employment opportunities (a “CED”)<sup>1</sup>; or
- where the business is a social enterprise with a stated corporate purpose of enhancing the economic, health, or overall well-being of low-income and disadvantaged people and/or addressing environmental issues, and has a formal commitment to reinvest revenues and all or a majority of profits to support its social mission (a “Social Enterprise”).

In each case where a for-profit entity is not eligible because the principal(s) are not low-income, to be eligible, the for-profit entity:

- must lack sufficient operating funds to pay for reasonable legal services, or
- the Social Enterprise has sufficient revenue but the matter for which the entity is seeking pro bono representation is integral and related to its social or environmental mission.

In addition, certain matters may qualify for pro bono legal services. If the outcome of the work would specifically address the needs of and benefit low-income and disadvantaged people or their communities, then it is appropriate for pro bono legal services.

One example is impact investing. It is defined as investments made into companies, organizations, and funds with the intention to generate measurable social and environmental impact alongside a financial return. Impact investing uses positive screens to identify socially responsible and environmentally sustainable investments, including those where the ultimate use of proceeds would benefit low-income and disadvantaged communities. Impact investments can be made in both emerging and developed markets and may target a range of returns from below market to market rate, depending on the circumstances. Impact investments share three fundamental elements: (i) intentionality; (ii) expectation of financial return; and (iii) a commitment to impact measurement. Impact investments are intentional because, but for the expected social

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<sup>1</sup> CED matters are those that expand employment for low-income individuals in communities facing persistent poverty and high unemployment by creating and expanding businesses and job opportunities. Jobs created by entities focusing on CED provide living wages, paid leave, fringe benefits, and opportunities for career growth.

or environmental returns, the investment would not be made. Impact investments are also made by some of the parties with the expectation of a financial return. Lastly, and perhaps most importantly, impact investments require some degree of measurement and reporting on the social and environmental performance of the underlying investment, thereby ensuring transparency, accountability, and the continued development of reliable non-financial impact metrics.

Impact investing encompasses a broad spectrum of potential investment opportunities. Accordingly, consideration of impact investment transactions for pro bono representation requires a unique and flexible analytic framework. Law firms should weigh the following factors when determining whether an impact investment transaction qualifies for pro bono legal services, recognizing there are no bright lines, and law firms should be encouraged to weigh these factors against the stated purposes of PBI's mission to have pro bono attorneys serve low-income and disadvantaged communities:

- 1) The total amount of the investment;
- 2) Whether the expected rate of return is below market or market rate;
- 3) Whether the investment is made in an emerging market or a developed market;
- 4) Whether the investor(s) is a non-profit organization or a for-profit organization, or both;
- 5) Whether the investment is made into an early-stage or a mature venture;
- 6) Whether other parties to the transaction are receiving pro bono legal services;
- 7) Whether, and to what extent, commercial financial institutions are involved in the transaction;
- 8) Whether the transaction involves an innovative public-private partnership; and
- 9) Whether the investment will result in increasing access to capital for persons of limited means.

These relationships require careful ongoing monitoring. Eligibility determinations will be made on a case-by-case basis and re-evaluated regularly over time.

### Public Rights

Under clause (i) above, non-profit entities may qualify for pro bono legal services if the matters are "designed primarily to address the needs of persons of limited means." If the proposed matter does not necessarily focus on serving persons of limited means, a non-profit entity may still qualify for pro bono legal services under clause (ii) above if the organization or the matter at issue is "seeking to secure or protect civil rights, civil liberties or public rights." While society has

generally agreed upon the definitions of “civil rights” and “civil liberties” (such as rights protected by the U.S. Constitution’s Bill of Rights and similar federal, state or local laws), a similarly agreed upon definition does not exist for “public rights.”<sup>2</sup> Therefore, when analyzing whether a non-profit entity qualifies for pro bono legal services related to “public rights,” the following factors<sup>3</sup> should be taken into consideration:

- 1) If the entity has as its primary mission and purpose the enhancement of the economic, health, or social condition and overall well-being of the general population or a marginalized segment of the population, this should weigh favorably in the determination of whether a request should count as pro bono;
- 2) If the entity has a mission that for-profit commercial market forces may not be sufficient to achieve, such as animal welfare, environmental protection, or historic preservation, this should weigh favorably in the determination of whether a request should count as pro bono;
- 3) If a primary motivation for the representation includes a commercial, legislative, professional, or personal benefit that would be self-serving to those taking on the representation, this should weigh against the determination that a request should count as pro bono; and
- 4) If a non-profit entity is so well-resourced that it has extensive legal staff who could handle the representation or it could pay reasonable market legal fees for the representation, these factors should weigh against the determination that a request should count as pro bono.

### Attorney Fees

Activities under clause (i) of the definition clearly fall within the recommended priority for legal services to persons of limited means, as do some of the activities under clause (ii). In the vast majority of all matters, the firm’s pro bono participation will be undertaken without a fee or any expectation of a fee. However, there are very limited instances in which the acceptance of a fee award will not disqualify a matter from inclusion in the definition of pro bono. Post-conviction capital appeals, for example, where firms contribute thousands of hours without compensation but may receive the limited fees available to counsel under the Criminal Justice Act, are clearly pro bono cases for persons of limited means.

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<sup>2</sup> Firms and pro bono professionals vary in how they interpret public rights, but ideas to consider include: “legal efforts related to issues of collective concern, including matters traditionally considered public rights, such as environmental protection, animal protection, freedom of information, public education, health and safety, social benefits, public healthcare, fair housing, privacy, peace-building and democracy initiatives, historic preservation, protection of the sick, elderly and disabled, voting rights and fair elections, fighting discrimination, preventing unfair labor practices, protecting free speech, or other human rights” (PBI Memo 1/15/2010).

<sup>3</sup> In addition to the enumerated factors, pro bono programs may also want to consider other factors, including: referral by a legal services organization, financial sponsorship of organization’s mission and the nature and extent of the legal services requested. Moreover, attendant to this work there may be moral, historical, environmental, and other important societal issues at stake.

Similarly, the award of attorneys' fees in an employment discrimination or environmental protection case originally taken on by a firm as a pro bono matter and not in the course of the firm's ordinary commercial practice would not disqualify such services from inclusion as pro bono work. Firms that receive fees in such cases are **strongly** encouraged to contribute an appropriate portion of those fees to organizations or projects that provide services to persons of limited means.

Law Firm Pro Bono Project

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