

REPORT AND RECOMMENDATION TO THE MINNESOTA STATE BAR ASSOCIATION

The MSBA Public Law Section, with the support of the Legal Assistance to the Disadvantaged Committee requests the MSBA Policy Committee endorse the revised MSBA Model Pro Bono Policy and Procedures for Government Attorneys.

RECOMMENDATION

RESOLVED that the Minnesota State Bar Association amend the Model Pro Bono Policy and Procedures for Government Attorneys.

REPORT

Introduction

In the spring of 2005, the MSBA Public Law Section appointed a Task Force to examine Pro Bono legal services provided by public lawyers and to develop a strategy to encourage increased participation.¹ The Public Law Section understands that public law offices are not private firms but rather are publicly funded and generally must answer to elected officials. However, public lawyers and public law offices are also an untapped source of legal talent that could contribute significantly to the effort to meet the legal needs of the underserved.

Historically, many public law offices have provided public education and outreach in the community. Government lawyers have spoken at community education forums, participated in CLE programs, taught in the colleges and law schools, mentored students, and written extensively on legal issues. However, they have not provided direct pro bono legal services to clients. The primary goal of the Task Force is to provide the means and the opportunity for every public lawyer to fulfill the professional responsibility to provide pro bono legal services.

Initially, several barriers to pro bono work by public lawyers were raised and discussed. Legal and ethical barriers, including conflict of interest, heavy caseloads, and the use of public funds, have discouraged many public lawyers and public law offices from embarking on vigorous pro bono policies. To address many of these concerns, the Task Force developed the revised Pro Bono policy which provides the flexibility to permit each office to work within its legal confines and create an environment encouraging pro bono work. The Model policy suggests that each office analyze it's own legal and ethical issues and identify programs that will

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not conflict with the work of the office and further suggests that employees be granted flexibility in work hours and the ability to use limited office resources to participate in pro bono work. For example, a prosecutor in the Hennepin County Attorney's Office could avoid potential conflicts of interest by working on civil cases through Southern Minnesota Regional Legal Services. The policy anticipates that limited phone calls and internet research could be performed on office time at little or no cost to the tax payers.

When James Bailie was MSBA President he dedicated his term to increased pro bono work by all lawyers. This message did not reach the public sector, perhaps because very few public lawyers belong to MSBA. While the Task Force is not charged with increasing the public lawyer participation in MSBA, it is dedicated to increasing pro bono participation by public lawyers and public law offices. To achieve this goal, the Task Force recommends that the Chief Justice and the leadership of the Bench, the Attorney General, the United States Attorney, the County Attorneys, the City Attorneys, the Public Defenders, the Agency Heads, and other elected and appointed heads of public law offices take the challenge and create office environments that fully support pro bono work by public lawyers. It is not only the professional responsibility of lawyers and judges to do pro bono legal work but doing it can expand the knowledge and experience levels of all lawyers, and thus, facilitate staff professional development. Having a uniform pro bono policy for all public law offices will demonstrate the commitment of the elected and appointed office leaders to the concept that pro bono work benefits the office and the public at large. The lawyers will be fulfilling their professional responsibilities, the lawyers will be providing legal services to the underserved at little or no cost to the tax payers, and the lawyers will enhance their legal skills. Rather than a political liability, this pro bono legal work should be viewed as a valuable asset to clients, the office, the office leader, and the public at large.

The Need for Policy Revisions

At the initial meetings, the Task Force examined existing policies for both content and practice.² Of those, the Minnesota Attorney General's Office and the Office of Lawyers Professional Responsibility provided model policies then in effect. Several public law offices had official policies that were either outdated or not in practice or both. Still others had no formal policies but encouraged Pro Bono legal services (e.g. University of Minnesota). In 1994, the MSBA approved a Model Pro Bono policy for government attorneys. The Legal Assistance to the Disadvantaged Committee (LAD) initiated the policy discussion and sought the approval of the MSBA Public Law Section and the Minnesota County Attorney's Association (MCAA) (approved with stated caveats). The policy was updated in 2000. It appears that the policy was neither widely publicized nor used as a model by most

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public law offices. For example, neither Hennepin nor Ramsey County Attorneys' Offices have policies in place nor programs to encourage Pro Bono work.

The MSBA Public Law Section began discussing the issue of Pro Bono work by government lawyers. Aaron Marcus, then a third year student at the University of Minnesota Law School and a member of the Public Law Section Executive Council, drafted a new Pro Bono policy for government lawyers. The policy was adopted by the Public Law Section but went no further.

In light of this history, the Task Force took on the issue of redrafting a Model Pro Bono Policy. Attached below a redlined version of the Task Force Proposed Model Pro Bono Policy for Public Lawyers.³ Prior to Task Force adoption, the draft was circulated for comment to the Minnesota County Attorney's Association (MCAA), the Legal Assistance to the Disadvantaged Committee (LAD), and several public law offices. Because the LAD committee was the original sponsor of the MSBA policy, Task Force members requested and obtained the support of the LAD committee for its revisions.

The Task Force recognizes that each public law office is different and the options outlined in the revised model policy will allow each office to make the necessary adjustments considering the nature of the practice and the size of the office. By implementing the model policy, each office will save the time and resources necessary to "reinvent the wheel" and broad implementation will create a group of pro bono coordinators who can share experiences and expertise.

The revisions are necessary to address problems with the old policy – the policy lacked flexibility, didn't address technology, didn't overcome identified obstacles, and wasn't adopted by the large public law offices. By adopting the revised policy, offices will be able to expand pro bono opportunities, tailor the approved programs to the unique constraints of a particular office, identify particular programs that meet the office goals and priorities, and minimize conflicts of interest. In the end, the revised policy will provide guidance on how to achieve pro bono success by overcoming perceived barriers.

Substantive Changes

The Task Force's Model policy updates the work done by the LAD committee and the Public Law Section. It takes an active approach and assumes that some form of Pro Bono work is possible for every public lawyer and every public law office. While the Model Policy recognizes that every public law office is different, it provides a framework for individual offices to encourage and facilitate pro bono work.

- A. **Generally Approved Activities:** The policy recommends that some pro bono activities be generally approved. By this, the policy seeks to establish relationships with recognized pro bono providers and reduce the administrative burdens of managing an office pro bono program. In determining what would be a “generally approved” service, the agency will have an opportunity to examine the program’s work and determine whether there is a potential for a conflict of interest, whether the work will match the interests and the experience level of the attorneys in the office, and in cases of direct legal services, insure that legal malpractice insurance coverage is provided.
- B. **Pro Bono Coordinator:** For efficiency and continuity, the policy recommends an attorney or attorneys act as pro bono coordinators. This will permit revisions to the agency’s pro bono policy, approval of “generally approved” programs, review of requests to do pro bono with programs outside the “generally approved” category, review of cases where there have been changes in circumstances (e.g. development of a conflict of interest or the time commitment exceeds expectations and the work has the potential to interfere with the attorney’s regular workload), and assistance for attorneys handling pro bono cases.
- C. **Flexible Schedules:** To the extent it does not conflict with the attorney’s regular duties, approval of automatic flex time.
- D. **Use of Office Resources:** To the extent it would not conflict with office functions, approval for using computers, minimal supplies, and if there is minimal or no additional cost to the agency, electronic databases and other electronic research tools.
- E. **Record Keeping:** Attorneys should keep records of time spent on pro bono projects.
- F. **Recognition:** Offices should recognize those lawyers who perform pro bono legal services.

The Next Steps

- A. **Approval of the Model Policy:** Seek the adoption of the Model Policy by elected/appointed officials heading public law offices, the Courts, MSBA leadership, and organizations comprised of public lawyers.
- B. **Pilot Program:** Develop an 18 month pilot program with three distinct pro bono opportunities for public lawyers and public law offices, monitor the pro bono hours, report the success to the Public Law Section

- C. **Recognition for Pro Bono work:** Recognize those public lawyers who have not only completed work on pro bono projects but also have worked to change office cultures to embrace pro bono work.

Respectfully Submitted

MSBA Public Law Section Pro Bono Task Force

Footnotes:

1. **Task Force Members** – Greg Brooker, United States Attorney’s Office, Pat Burns, Office of Lawyers Professional Responsibility, Bill Donohue, University of Minnesota General Counsel’s Office, Mary Ellison, William Mitchell Law Student, Carole Finneran, Ramsey County Public Defender’s Office, Cliff Greene, GreeneEspel, Jay Heffern, Minneapolis City Attorney’s Office, Bill Hefner, Environmental Law Group, Joan Humes, United Health care formerly with the United States Attorney’s Office, Tom Kalitowski, Minnesota Court of Appeals, John Kingrey, Minnesota County Attorney’s Association, Ken Kohnstamm, Assistant Attorney General, Nancy McLean, Hennepin County Attorney’s Office)

2. MSBA Model Pro Bono Policy for Government Attorneys; the United States Department of Justice Pro Bono Policy; policies from other Federal Agencies; the Office of Lawyers Professional Responsibility Pro Bono Policy; the Minnesota Department of Human Services Pro Bono Policy; the American Bar Association; and many other sources, including significant research and drafting work done by Aaron Marcus while he was a student at the University of Minnesota Law School.

3. Model Policy:

COMPARISON OF MSBA POLICY AND THE CURRENT PROPOSAL BY THE PUBLIC LAW SECTION

MSBA

Model Pro Bono Policy and Procedures For Government Attorneys

Approved by the MSBA House of Delegates on January 29, 1994; updated August, 2000

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~~On August 25, 1993, the Minnesota County Attorneys Association Board Of Directors adopted as a general policy Section 1, Paragraph A of Draft II of the Model Pro Bono Policy and Procedures for Government Attorneys with the following addition:~~

~~THE POLICY. Recognizing the ethical obligation of every attorney to provide legal services to those of limited means and to undertake activities to improve the legal system, and the significant unmet need for civil legal services for low income and disadvantaged persons in this state, it is the policy of this office, under appropriate terms and conditions, to encourage and support participation by agency attorneys in pro bono activities.~~

Model Pro Bono Policy and Procedures For Government Attorneys

As approved by the MSBA House of Delegates January 29, 1994

Introduction/Preamble

~~Minnesota attorneys, both public and private, have volunteered countless hours of pro bono legal services to their communities. Despite the effort of many volunteer attorneys, however, the unmet legal needs of the disadvantaged, throughout the state, greatly exceed the capacity of volunteers and full-time legal services.~~

~~In an effort to encourage and support participation by government attorneys and judges in pro bono services and activities, the Minnesota State Bar Associations, Legal Assistance to the Disadvantaged Committee has drafted a model pro bono policy for government agencies, offices and attorneys, to assist them in developing pro bono policies and procedures.~~

~~This policy is intended to be a model. The Committee does not necessarily anticipate wholesale adoption of this, or any, policy without consideration of the needs and concerns of the individual agency or office. Specific components of the policies adopted may vary from the agency to agency or office to office. The model policy is based on a review of government attorney pro bono policies in Minnesota and throughout the country and reflects what the Committee considers to be the most reasonable and supportive provisions of those we reviewed. The model policy should, at a minimum, be used as a reference to identify the areas and issues which should be addressed in developing a government attorney pro bono policy.~~

~~We recognize that some government attorneys, other public sector attorneys, and judges may be restricted from participation in certain pro bono activities. Further, government attorneys face a number of perceived and actual impediments to involvement in the provision of pro bono legal services, such as conflict of interest and limitations on the use of state resources. Nevertheless, it is possible for public sector attorneys to provide pro bono services, and we encourage government agencies and offices to adopt a pro bono policy and to actively support, encourage, and recognize government and public sector attorneys who wish to do pro bono work.~~

DRAFT (September, 2006)

Model Pro Bono Policy

For Government/Public Attorneys and Agencies

Portions of this model draft were taken from the MSBA Model Pro Bono Policy for Government Attorneys, the United States Department of Justice Pro Bono Policy, policies from other Federal Agencies, the Office of Lawyers Professional Responsibility Pro Bono Policy, the Minnesota Department of Human Services Pro Bono Policy, the American Bar Association, and many other sources, including significant research and drafting work done by Aaron Marcus while he was a student at the University of Minnesota Law School.

I. The Policy.

Recognizing the ethical obligation of every attorney to provide legal services to those of limited means and to undertake activities to improve the legal system, and recognizing the significant unmet need for civil legal services for low-income and disadvantaged persons in this state, it is the policy of this ~~office-agency~~ to encourage, facilitate, and support participation by agency attorneys in at least 50 hours of pro bono activities services per year.

Comment

~~It is important for government agencies and offices to formally recognize and approve participation by government attorneys in pro bono activities. This section sets out a proposed statement of policy for an agency or office supporting that desires to support participation by its staff attorneys in pro bono activities services. The scope of the policy covers all department employees and the spirit of the policy is designed to reflect on non-attorney employees as well. While recognizing that employment as a government attorney is already one of the highest forms of public service, the unmet public need for legal assistance triggers an additional obligation to perform volunteer work. Therefore, this agency strongly urges each attorney to set a personal goal of providing at least 50 hours of pro bono legal and volunteer services each year.~~

Rule 6.1 of the Minnesota Rules of Professional Conduct provides that:

A lawyer should render public interest legal services. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the

legal profession, and by financial support for organizations that provide legal services to persons of limited means.

In 1990, the Minnesota State Bar Association adopted an aspirational standard for the provision of pro bono legal services of fifty hours per year with at least twenty-five hours devoted to direct legal services to low-income persons. The American Bar Association has adopted a similar standard. Pro bono work reflects favorably upon this agency's commitment to public service. Attorneys have unique skills and abilities which can be used to provide services for the disadvantaged, and to promote the public interest, in ways no other profession can. Volunteering for pro bono work also provides individual attorneys an opportunity to broaden their professional experience and skills, as well as the satisfaction of helping those in need

II. Pro Bono Services

A. Definitions:

Pro Bono Services (~~i.e. donated legal and law-related services~~) include both the pro bono representation of clients and non-litigation volunteer activities. As used in this policy, "pro bono services" means:

1. Providing legal services without remuneration to:
 - a. Persons of limited means; or
 - b. Charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
2. Providing additional law-related services through:
 - a. The delivery of legal services without remuneration to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or 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; or
 - b. Participation in activities for improving the law, the legal system or the legal profession.

Comment

The definition of "pro bono services" used in this model policy recognizes the critical need for legal services for disadvantaged persons and persons of limited means. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule-making, and the provision of training or mentoring to those who represent persons of limited means. This definition of "pro bono services," however, also includes a broad range of non-litigation activities. Government attorneys who are unable or find it difficult to provide direct representation to pro bono clients can, nevertheless, contribute by participating in non-litigation activities or by providing litigation and non-litigation services described in A(2). In some circumstances, ~~We recognize that there may be~~ statutory and/or regulatory restrictions ~~may~~ that prohibit or impede

government and public sector lawyers and judges from performing certain pro bono services. Every effort should, nevertheless, be made to encourage and support government attorneys who wish to provide pro bono services.

B: Types of Pro Bono Services:

Specifically, the following types of pro bono services ~~may be approved~~ are approved, if participation does not violate other terms of the policy. Attorneys who wish to pursue other ~~activities~~ services must obtain prior approval from *[their supervisor; the office pro bono coordinator or committee; the division director etc.]* [Examples of case types and activities an agency may designate/list as approved]:

1. Legal advice clinics
2. Volunteer lawyer panels
3. Bar Association Committee work

Comment:

~~Although not a necessity, the Committee encourages agencies or offices to consider listing specific (or not so specific) types of cases and activities which meet the agency's needs and the interests of staff attorneys. The following list is an example which may provide a starting place and, as appropriate, may be rejected, modified or adopted as is.~~

~~Pro bono matters and activities which may be approved include, but are not limited to:~~

- ~~1. Representation of individual clients: (a) in domestic abuse cases; (b) with AIDS or other disabilities;~~
- ~~2. Serving as a guardian ad litem;~~
- ~~3. Providing representation to nonprofit organizations which provide services falling within the definition of pro bono services;~~
- ~~4. Providing advice: (a) in landlord-tenant or consumer matters; (b) on wills, powers of attorney, and private guardianships;~~
- ~~5. Providing research assistance or expert advice to providers of legal services to the low-income and disadvantaged;~~
- ~~6. Participating on the board of a legal services organization;~~
- ~~7. Providing training or preparing materials for seminars or other educational activities involving poverty law issues;~~
- ~~8. Participating on bar committees and project relating to the delivery of legal services and pro bono legal services.~~

~~This list is not comprehensive but is included to provide an example and some suggestions with respect to the types of services and activities which might be considered. A good reference is the Minnesota State Bar Association Pro Bono Opportunities Directory which lists a number of different volunteer programs and a wide variety of pro bono opportunities.~~

The listed agencies, case types, and activities do not conflict with this agency's needs and are designed to meet the interests of staff attorneys. They encompass all types of services that may be approved. They are broader than the list of "generally approved" services as defined in IIC. For additional opportunities, agencies should consult the MSBA's Directory of Pro Bono Opportunities for Lawyers. The most recent edition can be found at www.projusticemn.org.

III. Procedures

~~———A. Approval by Agency. Participation in pro bono activities must be approved in advance by [the attorney’s supervisor, the office pro bono coordinator or committee; the division director, etc.]. Prior to approval, [the attorney’s supervisor; the pro bono coordinator in consideration with the attorney’s supervisor, etc.] shall determine:~~

- ~~1. Whether the request falls within the kinds of pro bono services or activities permitted by this policy.~~
- ~~2. Whether the matter appears likely to interfere with the performance of the attorney’s official duties and responsibilities (e.g., the matter or activity appears likely to require protracted absences during office hours; or participation would clearly conflict with the interests of the agency or office).~~
- ~~3. [The attorney’s supervisor, etc.] must be contacted and continuing participation in the matter or activity discussed if, after obtaining approval for a pro bono project, it appears that the matter will be more time consuming or complex than originally contemplated.~~

COMMENT:

~~Approval of pro bono services does not necessarily have to be made on a case-by-case basis. Consideration should be given to establishing a procedure for pre-approval of certain activities or types of cases.~~

C: Generally Approved Services:

The designation of an activity or program as “generally approved” indicates that employees in the agency have permission to engage in these services, or seek referrals from these programs, without having to seek further permission from the approving entity as described in section IV. For use in this policy, generally approved services may include:

- a. Types of pro bono legal services that will not result in a conflict of interest with the duties of the attorney; and
- b. Types of pro bono legal services within the experience level of the agency’s attorneys.
- c. In the case of activities such as walk-in clinics, the general approval conferred by the approving entity [supervisor, pro bono coordinator, committee, or other designated officer] covers the employee’s participation in the activity as well as minimal follow-up activity such as providing information, making phone calls for the client, or making a referral for further assistance. In the case of referrals from legal services organizations, the general approval conferred by the approving entity permits the employee to seek cases from the programs; however, the attorney must adhere to the conflict rules described *infra*. The following is a complete list of generally approved services (***It is recommended that the list be complete – but subject to revision.***):

1. _____
2. _____
3. _____
4. Bar Association Committee work.
5. Mentoring

Comment

By pre-approving services in particular areas of practice, through specific legal services organizations, and through other pro bono opportunities, the agency sets a clear policy; eliminates bureaucratic barriers for attorneys wishing to participate in pro bono projects; eases administrative responsibilities on pro bono coordinators; and refers attorneys to agencies that may be well suited to the attorneys' skills.

Distinguishing between non-representational and representational services is of key importance. General approval should cover those services not subject to the uncertainties of trial, the potential for a malpractice lawsuit, the burden of costly litigation, and those tending to be time sensitive. For example, receiving training or referrals from legal service organizations or assisting the organization in a non-representational matter may be generally approved. Research, advice, or other non-representational services can also be performed with a general approval.

III. Implementation

A: Pro Bono Coordinator or Committee:

The agency shall select an attorney or attorneys to act as either a pro-bono coordinator or a pro bono committee. The coordinator or committee shall act to establish and execute the pro bono policy.

Comment

It is recommended that an agency with over 10 attorneys establish, at minimum, a coordinator position. In a larger agency, there may be a greater need to implement the policy, revise the policy and coordinate pro bono activities. This need may be better served by a committee reflecting the different areas of the agency's practice.

B: Duties of the Coordinator or Committee:

The coordinator and/or the committee shall be responsible for:

1. Adopting and revising the agency's pro bono policy;
2. Disseminating the pro bono policy to agency attorneys;
3. Identifying, approving, and posting generally approved services;
4. Being available to assist or advise attorneys on pro bono opportunities;
and
5. Either investigating and approving pro bono service requests or acting as advisor to approved entities when requested.

Comment

Adopting and revising the agency's policy is important as the initial draft may prove to be cumbersome or too limiting. A periodic review will enable the agency's attorneys to better adjust to the changing needs of the community and the legal profession. If a committee is created, this should be an expressed duty of the committee.

Identifying, approving, and posting generally approved services is better suited for a committee although the coordinator is capable of performing the task. If a committee is established, the final list should be compiled and approved by the entire committee.

Advising on pro bono matters should be the sole responsibility of the coordinator as communication to a single person will be easier to manage and create a greater base of knowledge in the coordinator.

Each agency has its own structure which may permit approval of representational services and activities that have not been generally approved by an approving authority, rather than the pro bono coordinator or the committee. Supervisors will traditionally have a much more intimate knowledge of the requesting attorney's duties at the agency, the time required to complete their duties, the flexibility of that attorney's schedule, and other factors that may affect the attorney's work at the agency and the representation of the client. However, an individual supervisor may not be in a position to make decisions or commitments that affect the office as a whole. The coordinator should seek to advise the supervisor of particular services that provide malpractice coverage and training. The coordinator should also encourage the supervisor to request advice regarding particular activities, legal service organizations, and other matters concerning the request.

If the agency is small and there are only one or two main supervisors, delegating the approval function to the coordinator may be more appropriate as the coordinator will know the attorneys making requests and most likely understand the needs of the agency. Further, the small number of requests will not overburden the coordinator.

IV. Approval

A. Generally Approved Services:

As defined in section II.C, generally approved services do not require the approval of the approving authority before an attorney may engage in the pro bono services. The generally approved services shall be listed in the pro bono policy. Generally approved services may be periodically added or removed by the coordinator or committee as is deemed necessary.

B. Approval Required for All Services not on the Generally Approved List.

Participation in pro bono services, if not listed under generally approved services, must be approved in advance by the approving authority. In representational services, the requesting attorney must also comply with section IV.D infra. When approving a request, the approving entity shall determine:

1. Whether the request falls within the kinds of pro bono services permitted by this policy.
2. Whether the matter appears likely to interfere with the performance of the attorney's official duties and responsibilities (e.g., the matter or activity appears likely to require protracted absences during office hours; or use of an unreasonable amount of office supplies or services)

3. Whether participation would result in a conflict of interest under Minnesota Rules of Professional Conduct 1.7, 1.9, 1.11. Each agency must determine its own conflict of interest policies and standards.

C. Changes in Circumstances after Approval

If, after commencing a pro bono service, the demands, time commitment, clients, or other obligations undergo a material change or become more complex than originally expected, the attorney must notify the approving authority of the changed circumstances. The approving authority may approve of the changed service after considering the factors listed in IV.B. If the changed circumstances fail to satisfy one or more of the factors in IV.B, withdrawal or termination shall be considered in accordance with Minnesota Rules of Professional Conduct 1.16.

Comment

If the agency develops the prior approved activity model, it is anticipated that prior approval will seldom be needed. In most instances, providing a substantial list of generally approved services will eliminate the need for case by case review except for unique requests by particular attorneys.

Under IV.B, the agency must consider the amount of time and resources the pro bono service will require of the attorney. Minnesota's moonlighting provision, Minn.Stat.§43A.38, subd. 4, prohibits public attorneys from using state resources for private purposes that are "not in the interest of the state." However, the agency head should establish a policy supporting pro bono services and advocating that pro bono work is "in the interest of the state".

D. Representation of Pro Bono Clients.

1. Malpractice Coverage:

Before agreeing to meet with or accept a pro bono client, the attorney should determine whether the referring program or organization has a malpractice insurance policy which covers volunteer attorneys. This agency does not provide malpractice coverage for pro bono work.

Comment

If malpractice coverage is a concern, such coverage is available through some referral programs or organizations, including the civil legal services programs' volunteer attorney programs. Many of the referral programs (SMRLS, VLN) provide malpractice coverage for volunteer lawyers. It is recommended that any generally approved services be screened to determine if the organization provides malpractice coverage.

2. Accepting a Pro Bono Case:

~~(a) The client must be informed that a conflicts check must be made before acceptance of the case. After the first meeting with the client, a conflicts check must be made. (See III(B). Conflict of Interest below.). (b) A retainer letter, specifically confirming the scope of the representation and outlining the client's obligations and~~

~~responsibilities, should then be sent to the client. A copy should be maintained in the attorney's file. (c) The client should be informed how, when, and where to contact the attorney by letter.~~

- a. Each agency will establish its own conflicts checking procedure (See IV(D)3)
- b. The client will be notified that representation is subject to the conflicts check.
- c. The attorney will follow established agency procedures for opening a file and communicating with the client.
- d. The client should be informed how, when, and where to contact the attorney by telephone or letter.

Comment

Many referral programs and/or organizations have form retainer letters ~~and closing letters, or may be able to provide examples, and either have, or may be able to provide,~~ suggested procedures for opening and closing files, and may provide other case management assistance.

3. Conflict of Interest. A conflict of interest exists where:

- a. Acceptance of the case would result in simultaneous representation by the attorney of parties with adverse interests, or the attorney's obligations to the client would limit his or her ability to represent the agency. MRPC, Rule 1.10, 1.7, Rule 1.9.
- b. Acceptance of the case would result in representation adverse to the interests of a former client. MRPC, Rule 1.9.
- c. The representation of the client would involve the attorney in a matter in which the attorney participated personally and substantially as a public officer or employee unless, after consultation, the appropriate government agency or office consents. MRPC, Rule 1.11.
- d. The attorney knows or has access to confidential government information which could be used to the disadvantage of the adverse party. MRPC, Rule 1.11.
- e. The attorney is restricted from representation ~~by Lawyers Professional Responsibility Board Opinions 2 and 6~~ MRPC, Rule 1.11 and the adjacent comment which place certain limits on the defense of criminal cases by city, municipal, or county attorneys.
- f. Those matters in which representation or participation would clearly create the appearance of a conflict of interest.

Comment

One impediment to the participation of government attorneys in pro bono services is the perceived or actual potential for a conflict of interest with the attorney's official duties and the interests of the agency for which the attorney works. The potential for a conflict of interest, or the appearance of a conflict of interest,

should not be viewed so broadly as to discourage pro bono service. Each agency should identify situations which are clear conflicts for that office. ~~We encourage agencies~~ Agencies are encouraged to define conflicts of interests as narrowly as possible and to review matters on a case by case basis to determine whether or not an actual conflict of interest exists in a particular case. In certain instances, such as offices, agencies, or courts representing or serving a specific county or geographic area, the potential for a conflict may be avoided by providing pro bono services in neighboring counties.

4. Case Administration.

An attorney participating in a pro bono service is personally responsible for his or her pro bono files. The attorney should open a file for each case, and implement a calendaring and/or tickler system to ensure that deadlines are met and significant dates are not missed. A closing letter should be sent to the pro bono client when the matter is completed or resolved.

Comment

A government agency is generally restricted from direct involvement in the supervision or administration of an attorney's pro bono files. Pro bono clients are, however, entitled to competent and effective representation. If guidance or assistance is needed, many referral programs or organizations can provide information on case management, and provide forms, training, and access to the expertise of their staffs.

~~Agencies or offices are encouraged to consider identifying a "pro bono coordinator" or "committee" to facilitate administration of the pro bono policy or plan. The coordinator would be responsible for administration of the pro bono policy, and could assist in identifying possible pro bono opportunities, in identifying and responding to conflicts of interest and resource problems and issues, and in identifying resources when an attorney needs assistance, as well as resolving concerns directly related to the administration of the policy. It may also be helpful to develop a form book for use in pro bono cases. (See, III A & B above).~~

5. Identification with the Agency

Government attorneys who participate in pro bono activities or in providing pro bono services may not indicate or represent in any way that they are acting on behalf of the agency, or in their official capacity. Throughout the representation an attorney:

- a. Must make it clear to the client, any opposing parties, or others involved in a pro bono case or activity, that the attorney is acting in his or her individual capacity as a volunteer, and is not acting as a representative of, or on behalf of, the agency..
- b. Not use office letterhead, agency business cards, or otherwise identify him or herself as a government attorney in any communication, correspondence or pleading connected with pro bono activities. The agency address may be used, with the permission of the coordinator or supervisor, if the address does not include the agency name or indicate the nature of the office.
- c. Not use the general agency telephone number for pro bono activities. Phone calls may be received either on the attorney's personal line or

through the referring program or organization. The attorney may not receive telephone calls from clients at the agency number if the call will or may go through a receptionist or switchboard which would identify the agency.

- d. Agency offices may not be used for meetings with clients or opposing counsel in a pro bono case if to do so would conflict with agency policy.

Comment

It is important that it is clear to the client, opposing parties, or others involved in a case or activity, that the attorney is acting in his or her individual capacity, and not on behalf of, or as a representative of, the government agency. Thus, the use of offices or stationary, or the receipt of telephone calls from clients where the call may be answered in a way that identifies the agency, is generally restricted to prevent leaving the incorrect impression that the agency is representing a pro bono client or is in some way involved in a pro bono services.

Agencies are encouraged to be as flexible as possible, given the circumstances of the office. ~~It may, for example, be possible to allow the receipt of telephone calls, and the use of office space and/or a limited amount of office stationary when the matter involves a non-litigation activity. Receipt of calls at an office telephone may not present a problem if the agency is not identified to the caller, or when appropriate steps have been taken to avoid confusion or misunderstanding. Attorneys generally should be permitted to receive calls from opposing attorneys or other non clients on their personal lines. Referring attorney programs or organizations should be requested to provide space for meetings with clients and opposing attorneys, and to take telephone messages or to provide a mailing address when needed. Generally approved services (identified agencies) should provide attorneys with meeting spaces and phone lines or other forms of support that the agency should not be providing.~~ It is usually appropriate for an attorney representing a pro bono client to identify him or herself on pleadings and in letters as a volunteer attorney for the referral program or organization.

V. Use of Agency Resources

1. Hours of Work.

When performance of pro bono work is required during regular work hours, the attorney may request that the approving authority authorize a flexible work schedule to accommodate the time needed for pro bono work, or permit leave without pay or use of vacation time. [The standard (work week or pay period) consists of ___ hours. Attorneys who do pro bono work during office hours must account for ___ hours per week/pay period (the standard work week or pay period) in performing their official duties and responsibilities.] If not interfering with the attorney's work at the agency, the approving authority may approve an automatic flex schedule during the course of the pro bono service which allows for the attorney to fulfill the required agency hours at times not conflicting with the pro bono services.

Comment

One of the significant impediments to participation by government attorneys in pro bono services is the cost of participation and the necessary need to avoid expending public funds. ~~A number of statutes and~~

~~regulations restrict the use of state resources or public funds for purposes other than official agency or government work. Some agencies in other states have applied such rules or statutes in a very restrictive manner, requiring government attorneys to do pro bono work outside of working hours and entirely at their own expense. Such requirements appear, to the Committee, to be unnecessarily prohibitive. The provisions of this section, therefore, reflect what the committee felt was reasonably possible, within the restrictions and prohibitions generally imposed by such statutes and rules, recognizing the concern that state agencies not spend taxpayer dollars for matters outside the public service purposes and obligations of the agencies. The provisions in this section, therefore, recognize the concern that agencies not spend taxpayer dollars for matters outside the public service purposes and obligations of the agency. Agencies are strongly encouraged to adopt a policy allowing attorneys to take advantage of flexible work schedule arrangements, rather than requiring volunteer attorneys to use vacation time or unpaid leave when work on a pro bono matter or activity is required, by the nature of the activity, during regular work hours. Most governmental agencies permit supervisors to modify work hours and to approve a flexible work schedule at the request of the employee. See, e.g., the State of Minnesota, DOER, Commissioner's Plan 1993, Ch.2. Offices or agencies may wish to consider including in this section automatic approval of a flexible work schedule if required by an attorneys pro bono work (for example, for court appearances or attendance at meetings scheduled during work hours). The attorney is still accountable for his or her regular work hours, but may make up any hours necessary as arranged with his or her supervisor.~~

~~We acknowledge that many government attorneys, as professionals, put in more than the required hours in their positions and, as a practical matter, many already work informal "flex hours". If a volunteer activity bears a reasonable relationship to the attorney's position or duties and responsibilities or will substantially contribute to advancing the attorney's skills needed in performing the attorney's job, supervisors are encouraged to include participation in such activities as part of the employee's assigned duties, e.g., participation on bar committees, or preparation of legal education materials. Such activities may not fall within the definition of "pro bono services" (because the attorney is then doing his or her regular job and is receiving remuneration in the form of wages), but such inclusion makes it easier for attorneys to be involved in public service activities.~~

2. Telephone Calls.

Local telephone calls may be made from the attorney's personal line. Long distance phone calls may not be charged to the agency. Arrangements for long distance calls should be made through the referring program or organization.

C. Offices/Library.

~~Attorneys may use their personal offices to do research and to draft pleadings, briefs, letters or other written materials do pro bono projects. The library may also be used for doing research related to pro bono projects. Such work should be done in a manner which does not interfere with the performance of the office's or attorney's regular functions or duties and responsibilities. Office computer research facilities (e.g. Lexis or Westlaw) may not be used to do pro bono research. Such work should be done in a manner which does not interfere with the performance of the agency's or attorney's regular functions or duties and responsibilities.~~

D. Clerical Support.

Typing, copying, collating, and other clerical support is permitted on a limited basis by clerical staff, ~~who agree to volunteer their time~~, with the approval of the clerical staff supervisor, to the extent ~~union work rules permit~~ allowable.

Comment

Clerical supervisors should be encouraged to be flexible in scheduling to allow volunteer work by clerical staff during and after regular business hours. ~~Clerical workers should be made aware that clerical work on pro bono matters is voluntary, and that any time spent on pro bono matters is not compensable work time.~~ Agency tasks must be given priority, but the typing of short letters, pleadings or other documents and limited copying should be permitted, with the approval of the clerical staff supervisor. ~~Assistance should be requested from the referring program or organization if a pro bono matter or activity requires more extensive typing or copying than the agency or office can accommodate.~~ The pro bono coordinator or committee may want to consider whether a particular referring agency provides clerical support when deciding to add it to the “generally approved” services list.

E. Supplies and Equipment.

1. Attorneys may use word processing and dictation equipment so long as such use does not interfere with the performance of the agency's or the attorney's regular functions or duties and responsibilities.
2. A limited amount of office supplies, photocopying, and fax use is available to attorneys doing pro bono work. Significant ~~identifiable expenses, e.g. use of large a large amount of paper, more than [] pages, photocopied or faxed,~~ expenditures such as use of large amounts of paper, stamps, long-distance telephone calls, and so on, should be promptly reimbursed to the agency.

Comment

~~Attorneys who participate in pro bono activities~~ Coordinators or committees are encouraged to consider the availability of supplies, ~~the use of equipment, and other resources which may be provided by or be available through referring programs and organizations.~~ when generally approving a legal services program or activity. ~~Many can provide significant support. (See comments in other sections.~~ Many offer these benefits. Use of other resources such as the Minnesota Justice Foundation, which provides research assistance through law students, should also be encouraged.

Agencies are encouraged to be as flexible as possible in allowing the use of office supplies and equipment (e.g., paper; supplies such as paper clips, staples, pens, postage, photocopying, fax, etc.) to support the provision of pro bono services ~~and activities.~~ The provision ~~as proposed by the Committee is a compromise~~ as written allows the use of a limited amount of office supplies, where the cost is minimal, and it is not cost effective to try to document, calculate and attempt to recover the expense. ~~(For example, the percentage f a pen or pencil used in doing pro bono work, the cost of a few sheets of typing or writing paper, the cost of a few pages of copying, or sending a couple of pages by fax.)~~ Where costs are significant and identifiable, ~~the Committee proposed that~~ and the referring agency does not provide the needed support, the agency should accommodate the provision of pro bono services by allowing attorneys to use office equipment and supplies and then requiring prompt reimbursement of the expense to the agency. ~~Agencies and government attorneys are encouraged to use their creativity and imagination in resolving these issues.~~

F. Use of Electronic Resources and Databases

The use of commercial and electronic databases or other resources may be used when to use them would result in minimal or no additional cost to the agency.

2. **Recording and Recognition**

A. Recording of Pro Bono Services Rendered

~~**Timekeeping.** Time spent on pro bono work during regular office hours should be recorded [in a manner to be determined by the agency or office.] No record need be maintained for pro bono work performed outside office hours.~~

~~Comment: Each agency should determine whether attorneys should be required to make a record of time spent on pro bono activities during office hours. It is probably not necessary in most situations.~~

After completion or termination of the pro bono service, the attorney shall submit a time statement to the coordinator or committee providing the name of the attorney, the commencement and completion dates, and total number of hours spent performing the pro bono service. The statement is not required to be detailed.

Comment

Recording of pro bono services is an essential component of the policy. Knowing the total hours spent by attorneys will greatly assist the coordinator or the committee in adjusting the policy to suit the needs of the agency and the volunteer attorneys. For example, certain services may require only a day long commitment while others will be substantially longer. If many employees seem to be seeking out single day services, generally approving those services may enable attorneys to more easily participate on their own schedules. Recording will also enable service organizations to work with government agencies to better facilitate connecting attorneys with opportunities. Record keeping will also assist in those cases where attorneys' fees may be awarded.

B. Recognition

The agency shall recognize attorneys completing the recommended 50 hours a year of pro bono service.

Comment

Recognition not only shows the attorney that pro bono work is important to the agency, but it also encourages an ethic of volunteerism in the agency that may encourage other attorneys to participate.