

Model Pro Bono Policy For Government/Public Attorneys and Agencies

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 agency to encourage, facilitate, and support participation by agency attorneys in at least 50 hours of pro bono services per year.

Comment

This section sets out a proposed statement of policy for an agency that desires to support participation by its attorneys in pro bono 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 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, there may be statutory and/or regulatory restrictions 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 are approved, if participation does not violate other terms of the policy. Attorneys who wish to pursue other 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 Aid Clinics
- 2. Volunteer Lawyers Network

Comment:

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.

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 (***Each agency will choose its own programs- here are a few examples of activities/programs an agency may choose. It is recommended that the list be complete – but subject to revision.***) :
 1. Legal Services Programs
 2. Volunteer Lawyers Network
 3. Minnesota Justice Foundation
 4. State or Local 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

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. 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, 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 MPRC, 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. 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.

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. Attorneys generally should be permitted to receive calls from opposing attorneys or other non-clients on their personal lines. 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. 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.

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.

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 pro bono projects. 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 with the approval of the clerical staff supervisor, to the extent 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. 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. 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 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

Coordinators or committees are encouraged to consider the availability of supplies when generally approving a legal services program or activity. 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. The provision 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.

Where costs are significant and identifiable 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.

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

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.