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Departments

Legal Services News

CBA Voluntary Pro Bono Public Service by Government Attorneys
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On May 6, 2000, the CBA Board of Governors approved the following voluntary *pro bono* policy. It is hoped that its use, or adaptations of it, by government offices in Colorado will facilitate participation in *pro bono* work by government attorneys. The Task Force wishes to thank H. Lawrence Hoyt for doing the lion's share of the writing.

CBA Voluntary *Pro Bono* Public Service by Government Attorneys: Provision of Direct Representation of Indigent Persons

SUGGESTED PROGRAM GUIDELINES

Statement of Purpose and Background

These Program Guidelines are intended to provide guidance to government attorneys and their government or agency clients for meeting the attorneys' obligations under Rule 6.1 of the Colorado Rules of Professional Conduct through provision of direct legal representation of indigent persons or their service organizations. It is contemplated that, by providing specific recommended guidelines, it will be easier for such clients, and/ or managing attorneys, to assist all attorneys on staff to accomplish this goal.

Rule 6.1 of the Colorado Rules of Professional Conduct, as amended November 2, 1999, effective January 1, 2000, exhorts all Colorado attorneys to aspire to render public interest at least fifty (50) hours of *pro bono* public legal services per year. It goes on to state that ". . . a substantial majority of the annual *pro bono* services should be no fee professional 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."

The official comment on Rule 6.1 indicates that the primary thrust of the Rule is to the direct provision of legal services to impoverished persons. Unlike the ABA Model Rule 6.1, Rule 6.1 as adopted in Colorado expressly anticipates that government attorneys will discharge the *pro bono* duties as set forth in the Rule. The final paragraph of the Colorado rule exempts government and public sector lawyers and judges from direct representation of the indigent only where constitutional, statutory, or regulatory restrictions prohibit same.

In the 1999 session, the Colorado General Assembly passed House Bill 99-1301, concerning a "Prohibition on the Requirement of Donation of Professional Services as a Condition of Licensure in a Regulated Profession or Occupation." This legislation purports to prohibit mandatory *pro bono* service for attorneys (as well as other licensed professionals) employed by state or local governments in Colorado, but clearly does not prohibit state agency or local government facilitation of *pro bono* service by attorneys employed by such agency or government.

Throughout the history of the bar, government attorneys have provided a variety of voluntary *pro bono* legal services, including service to non-profit organizations, community service, and bar association activities, as well as direct representation of indigent persons and their service organizations. A number of local and federal government law offices located in Colorado have created programs to assist attorneys in those offices in providing *pro bono* services.

Although government attorneys have a long history of providing *pro bono* services through educational programs, bar association activities, and representation of non-profit organizations, and will continue to do so, government attorneys have often felt uncomfortable meeting *pro bono* goals through direct representation of indigent clients and their service organizations. The need for the bar generally to undertake such representation has never been greater, and, therefore, by suggesting ways in which to assist and support government attorneys in such undertakings, a part of this critical need which is currently going unmet can be resolved.

Nothing in this document is meant to suggest that government attorneys cannot, or should not, meet their *pro bono* goals through other activities, either in part or in whole. This document is intended solely to provide guidance and assistance where government law offices and individual attorneys in those offices seek to undertake such representation on a voluntary basis.

These Program Guidelines recognize the particular difficulties presented by the involvement in direct representation of the indigent by members of the Attorney General's Office, district attorneys offices, and other government prosecutors. Although some offices may decide that limited opportunities suggested under these guidelines exist for such representation, other *pro bono* activities are available through which members of such offices can meet their obligations, including educational presentations to the public and participation in call-a-lawyer or ask-a-lawyer programs, as noted in Rule 6.1(b), as amended.

Goal for *Pro Bono* Services by Government Attorneys

Government attorneys and their offices should attempt to meet the aspirational goals stated by Rule 6.1, Colorado Rules of Professional Conduct, and should fully consider ways to meet the need for representation of indigent clients. It is particularly appropriate for government law offices to accommodate *pro bono* legal services to the indigent by their attorneys, since one of government's primary purposes is the provision of services to persons of limited or modest means. Government employment is not itself sufficient to meet this goal.

In order to facilitate the provision of such services, the following are suggested programmatic guidelines, which are recommended to overcome problems which may currently exist from *pro bono* representation of private clients by government attorneys. *It is suggested that governmental law offices obtain express approval of the pro bono program guidelines by their agency or governmental body clients.*

Current Impediments to Direct

Indigent Representation

Government attorneys have tended in the past not to participate in the provision of direct *pro bono* services to the poor or to their service organizations, for several reasons. There are a number of identified reasons for this.

First, there has been the feeling on the part of many government attorneys that, since their practice necessarily involves issues of public interest, and since government salary scales tend not to equal private practice or even corporate legal department levels, they already gave at the office and therefore were meeting the intent of the Rule simply by their employment. However, it is quite clear from the comment statements for the above rules that this does not in fact constitute compliance. A full-time salary cannot be considered to be a substantially reduced fee, and the representation is of the government's interests, not that of individual members or even classes of the indigent.

Other problems which have been recited include statutory or regulatory prohibition of moonlighting; lack of experience in dealing with issues normally confronted by the poor (competence); impropriety of using taxpayer-funded resources (support staff, office space, equipment, and supplies); lack of malpractice insurance and client funds trust accounts; improper appearance where representing a private client in public fora, especially during normal office hours; and finally, the biggest problem cited, the possible creation of conflicts of interest, for which the government employer may then be required to hire expensive outside counsel for future representation in areas of such conflict. It is the intent of this Policy Statement to make recommendations to eliminate or minimize these problems.

Recommended Guidelines for *Pro Bono* Service Programs of Government Law Offices:

I. Overcome Statutory/Regulatory Moonlighting Prohibitions

Although § 12-1.5-101, C.R.S., as amended, prohibits mandatory *pro bono* service, voluntary *pro bono* representation by government attorneys can be facilitated by willing governmental employers. However, there are some governments or client agencies which have, by regulation, prohibited outside legal representation by in-house attorneys. These regulations are generally only intended to prohibit moonlighting, *i.e.*, provision of legal services for compensation. However, they are often stated very broadly, such that provision of direct legal representation to persons of limited means would be entirely precluded.

Recommendation: In obtaining approval for the *pro bono* services program for the office, seek repeal of any prohibitory regulation, or amend the regulation to indicate that it is intended only to prohibit provision of legal services for compensation, and not intended to prohibit the activities outlined in the *pro bono* program.

II. Activities in Public Fora and During Office Hours

It is necessary that attorneys, in providing *pro bono* legal services, make clear both to their private clients as well as to any persons involved in a public forum in which such services occur that the attorney is not acting on behalf of the government employer. However, in order for a *pro bono* program to work, it is essential that attorneys be permitted to flex their employment hours so that *pro bono* services, which must take place during normal office hours, can be accommodated. Depending on how flexible attorneys' work schedules are in the office, it may or may not be necessary for attorneys to obtain advance approval from a

supervisor or client in order to take off time to provide *pro bono* services during office hours.

Recommendation: All services to private clients must be done pursuant to an express understanding by all persons involved that the attorney is not providing such services in the capacity of her/his government position. Flex time, whether approved in advance or otherwise, is provided to accommodate such services.

III. Use of Office Resources

This could be one of the biggest stumbling blocks, and it is therefore necessary to have a very clear definition of what is acceptable. This issue includes use of office space and equipment, for which *de minimis* wear and tear may be the only consideration (although long distance phone/fax and computerized online legal research service charges can be substantial), as well as support staff and supplies, for which direct out-of-pocket expenditures are involved. If the client government or agency is one for which services to impoverished persons is a statutory responsibility, the expenditure of public funds, within reasonable limits, can be justified. If the client government or agency does not have such a statutory charge, then the use of public funds is likely to need to be more circumscribed.

Recommendation: For governments/agencies with low-income service responsibilities, the approved *pro bono* policy should include a provision for use of office space, equipment, support staff, and supplies, although such provision could contain a fiscal limitation, such as expenditure of not more than \$50 per case. In order to avoid any misperception by an indigent client about the capacity in which the government attorney is providing services, meetings with clients, to the extent permitted in government facilities, should be held in conference rooms not directly associated with the government law office (*e.g.*, in a conference room in the client agency's office). For other governments/agencies, provision of *pro bono* services through a local legal aid organization, with utilization of its space, equipment, meeting rooms, support staff, and supplies, may be the best solution. (*See discussion below of malpractice insurance/ trust accounts.*) Stationery: Use of office letterhead is obviously not appropriate (*see discussion above in Section II*). However, creation of separate letterhead from standard paper stock or use of paper supplies without letterhead can be accomplished without compromising the office. Whichever is utilized, return address should be limited to street address/post office box, without identification of the government law office, or else a separate post office box may need to be arranged.

IV. Malpractice Insurance/Client Funds Trust Accounts

Most government law offices do not carry malpractice insurance. Generally, such attorneys are covered by statutory immunities and limitations on tort liability and/or by the client government/agency's official errors and omissions insurance policy, either purchased or self-funded. These protections extend only to the official duties of the government attorneys.

Recommendation: Where the governmental insurance plan does not provide coverage, *pro bono* services should be arranged by the local legal aid organization or *pro bono* program, and coverage of such services provided by their policy. Such organization should also be able to provide client funds trust accounts to the extent necessary, although using *in forma pauperis* pleadings should reduce the need and expense for such accounts. Where a government/agency client has statutory obligations for services to the poor and a purchased or self-funded insurance policy provides some or all of the protection, it may be possible to amend such policy to cover *pro bono* services provided by the government/agency's attorneys.

V. Conflicts of Interest

The single most troublesome issue, and potentially the most costly to the government/agency client, is the creation of conflicts of interest. Although generally a conflicts problem with the *pro bono* client can be resolved by a knowing and voluntary waiver, the ability to preserve the government law office's future ability to represent the government/agency client in dealings with the *pro bono* client may not be dealt with so readily. In the worst case scenario, such future dealings would have to be contracted to outside counsel, always expensive and generally an embarrassment to the in-house office.

Recommendation: There are several ways to handle this to minimize the possibility of future conflicts. First, the *pro bono* services policy should outline either a list of acceptable areas of *pro bono* representation, where the possibility of a future conflict is remote, or a list of unacceptable areas, where there is some likelihood of a future conflict situation. In order to minimize the latter, divisions within the law office which exist can be utilized to differentiate acceptable services, so that one division of the office can provide services where a different division's provision of such service would likely create a conflict. Where intake is provided by an indigent legal services organization or *pro bono* program, such organization can screen and assign based upon an agreed list of acceptable areas of representation.

Second, a single supervisor, or possibly a management committee, should routinely screen potential *pro bono* cases for conflicts, either all cases or those which are not on the pre-existing list of acceptable areas for representation.

Resources for Creation of a *Pro Bono* Services Program

For general resources, consult the ABA *Pro Bono* Legal Services Center at its website: www.abanet.org/legalserv/probono.html; e-mail to allenb@staff.abanet.org; or call the Hotline, (312) 988-5769. In addition, the ABA Government and Public Sector Lawyers Division, in conjunction with the ABA Standing Committee on *Pro Bono* and Public Service, has published a book covering these issues: *Pro Bono Project Development: A Deskbook for Government and Public Sector Lawyers* (Chicago, IL: ABA Publishing, 1998). This book contains descriptions and contact persons for numerous successful government law offices' *pro bono* programs.

Legal Services News is published bimonthly to apprise members of the Bar of legal services projects, issues, and *pro bono* opportunities. Readers are encouraged to submit article and topic ideas to Jo Ann Viola Salazar, (303) 824-5310.