

April 30, 2018

Department of Commerce Office of the General Counsel

***Pro Bono* Legal and Volunteer Service Policy**

This Policy updates the November 4, 2002 Statement on *Pro Bono* Legal and Volunteer Service Activities from Theodore W. Kassinger.

1. GENERAL

Pro bono legal work and activities allow attorneys to use their skills to assist the significant needs of individuals and communities, while providing opportunities to enhance professional skills. The Department of Commerce strongly supports the volunteer efforts of Department attorneys and legal support staff who seek opportunities to participate in these activities consistent with applicable Federal statutes and regulations that govern participation in activities outside the Federal government and conflicts of interest with applicable bar rules.

The American Bar Association recommends that every attorney should aspire to provide at least fifty (50) hours of *pro bono* service each year to those who are unable to pay. Since 1996, the Federal Government *Pro Bono* program has been led by the Federal Interagency *Pro Bono* Working Group which serves as a resource for over 40 federal agencies that participate in the Program, including the Department of Commerce.

OGC supervisors and managers that have a collective bargaining unit within their offices should determine whether this restatement of the *pro bono* policy triggers any labor obligations—and satisfy those obligations—before implementing for bargaining unit members.

2. GOAL

The Department of Commerce encourages each of its attorneys to set a personal goal of at least 50 hours per year of *pro bono* legal assistance consistent with guidance from Model Rule 6.1 of the American Bar Association. Department attorneys are encouraged to provide legal services to some degree, but may also fulfill their goals by providing other forms of community service. However, Department attorneys are not mandated to provide any *pro bono* legal services to the

community and are not authorized to provide *pro bono* legal services as part of their official duties.

3. POLICY

Attorneys in the Department of Commerce can play a significant role in providing voluntary legal assistance and other community services to members of the public in need of their knowledge and legal experience. In view of the impact this Department can make on the community, and pursuant to Executive Order 12988, the Office of the General Counsel of the Department of Commerce encourages Department attorneys to undertake *pro bono* activities consistent with this policy, and applicable statutes and regulations governing conflicts of interest and outside activities.

a. Definition of *pro bono* legal assistance.

Pro bono legal services contemplated by this policy include legal services provided without compensation to:

- Persons of limited means or other disadvantaged persons;
- Charitable, religious, civic, community, governmental (state, local, or tribal), health, and educational organizations in matters designed to address the needs of persons of limited means or disadvantaged persons;
- Individuals or organizations seeking to secure or protect civil rights, civil liberties or public rights or constitutional rights; or
- Activities seeking to improve the law, the legal system or the legal profession.

Non-legal voluntary services contemplated by this policy include voluntary services to persons or organizations in the first two categories described above.

b. Approvals Required – Supervisory.

This policy encourages Department attorneys to participate in *pro bono* legal and other volunteer activities to the extent that these activities do not interfere with the performance of their official duties for the Department of Commerce. This includes performing services that can be accomplished outside of their scheduled duty hours. Some activities may involve obligations that can only occur during work hours and, in such cases, the employee may request advance

approval from their supervisors and managers prior to taking leave without pay, annual leave, compensatory time off, credit hours, or other earned time off, or administrative leave.

Supervisors and managers are encouraged to be flexible and to accommodate the grant of leave to permit employees to engage in volunteer activities, however, due attention should be given to the impact of the employee's absence on office operations. Supervisory approval is not required to engage in *pro bono* activities beyond approval for leave, if necessary to engage in activities.

Use of administrative leave: In some situations, *pro bono* activities may require employees to perform services during their scheduled duty hours. Employees are encouraged to minimize this to the extent practicable. However, certain volunteer activities and training offered by volunteer and *pro bono* organizations may complement or benefit Department attorneys in many aspects of their official responsibilities to the Department. In such cases, employees are required to request permission to take administrative leave (an excused absence) to attend *pro bono* activities and training offered by *pro bono* organizations that would provide skills relevant to the Department. Prior to requesting leave, employees are encouraged to discuss the impact of the time spent on *pro bono* activities with their supervisors, and to develop a written work plan to be submitted to supervisors for approval of leave. The work plan should provide supervisors with documentation and clear descriptions of the volunteer time and the training to be provided. Supervisors and managers are encouraged to allow such requests when the office workload will not be compromised by the *pro bono* activity and may allow up to 20 hours of administrative leave per year.

Litigation: Because approval of leave is always within the discretion of an employee's supervisor and because litigation may subject an employee to a court order to appear in court, the employee who engages in *pro bono* work must either avoid engaging in litigation or must take actions to ensure that the need to appear in court will not be inconsistent with the exercise of an agency manager in approving or disapproving leave, such as by ensuring that co-counsel is available and approved by a court to conduct the litigation or that leave is pre-approved.

c. Consultation Required - Ethics.

Department attorneys seeking to engage in either *pro bono* legal services or non-legal voluntary services are directed to consult an ethics attorney in the Ethics Law and Programs Division within the Office of the Assistant General Counsel for Administration and Transactions for

advice prior to engaging in *pro bono* legal services to ensure that the services contemplated comply with conflict of interest statutes or ethics regulations (including restrictions on representing clients before a Federal agency or court, or engaging in activities that interfere with the proper and effective performance of official duties).

d. Conflicts of Interest and Prohibited Activities.

Conflicts of Interest: Department attorneys may not engage in *pro bono* legal services that create or appear to create a conflict of interest with their official duties. A conflict of interest generally exists where the services would:

- Require the recusal of the employee from significant aspects of the employee's official duties (5 C.F.R. § 2635.802(b)) (recusal will be required when a client or organization with which the employee is providing voluntary services is a party or represents a party before Commerce) (5 C.F.R. § 2635.502(b)); or
- Involve the misuse of the employee's government position or an appearance of misuse of position, including through the use of the authority of the employee's position to create an inappropriate appearance of official sanction or endorsement (5 C.F.R. § 2635.702(b)); nonpublic information, government property or other resource, or official time (5 C.F.R. §§ 2635.701-2635.705).

If a *pro bono* legal activity begins to create a conflict of interest at any time, the attorney must cease providing legal services, consistent with an attorney's duty to preserve the interests of a client. Any questions related to whether a conflict of interest has emerged should be directed to an ethics attorney in the Ethics Law and Programs Division.

Matters involving the U.S. Department of Commerce: Department attorneys are prohibited from participating in a *pro bono* activity that involves the U.S. Department of Commerce, that is pending at the Department or in which Department is a party or has a direct and substantial interest.

Federal Matters: Attorneys of the Department of Commerce may not act as agents or attorneys for any person appearing before a federal court, department or agency, or in any matter affecting the federal government, in which the United States has a direct or substantial interest, or in which the United States is a party (18 U.S.C. § 205). Examples of matters that are likely impermissible

include bankruptcy cases, immigration cases, small business loan applications with the Small Business Administration, contested tax matters, and social security and disability appeals before the Social Security Administration.

Use of official position or office: Attorneys provide volunteer or *pro bono* work in their personal capacity and should not indicate nor represent that their actions are on behalf of the Department of Commerce, or in an official capacity in any form of communication, correspondence, or pleading. The incidental identification of an employee's position or office to ensure mail delivery or when receiving a telephone call is permissible, including sending or receiving emails using a government email address on occasion. In external emails in which a government email address is indicated, attorneys should indicate that the email is being sent in a personal capacity and not in an official capacity as a representative of the Department of Commerce. A Department attorney may not use office letterhead, agency or office business cards (whether or not purchased with appropriated funds), or fax cover sheets that identify the attorney as a Department employee in any communication, correspondence, or pleading connected with *pro bono* legal services.

Attorneys and other employees who have reason to believe that their position with the U.S. Government is known to clients or parties are required to explain to clients and opposing parties in *pro bono* cases that their actions are in an individual capacity as a volunteer and not as a representative of the U.S. Department of Commerce. Department attorneys are strongly encouraged to include statements characterizing their actions and representation as personal and not as a representative of the U.S. Department of Commerce when entering into a written engagement or retainer agreement as discussed in section 4.a. below.

Use of agency resources: Department attorneys may only use Government property for official purposes. However, to support the policy enunciated here, certain limited uses of Department resources may be authorized by the head of the agency/administration legal office when necessary for the *pro bono* attorney to deal with time sensitive matters as long as it does not interfere with normal operations of the office: (1) personal uses that involve only negligible expense to the Government (e.g., minimal use of ink, electricity and paper); (2) limited personal telephone or fax calls that are either local or charged to non-Government accounts; (3) minimal use of commercial electronic databases, such as Lexis or Westlaw, if paid for at a fixed rate

rather than on an hourly basis; (4) bound reference materials; and (5) Internet services used consistent with Department policy.

Department support staff may not be assigned or otherwise be required to perform unofficial duties. A member of the Department's support staff may, however, volunteer services to support *pro bono* legal activities and volunteer work on the staff member's own time.

4. ADDITIONAL CONSIDERATIONS

a. Retainer Agreements

Attorneys undertaking *pro bono* legal services are strongly encouraged to execute a retainer agreement to be signed by the client that explicitly states that the attorney is acting in an individual capacity and not on behalf of the U.S. Department of Commerce and must include such language in a retainer agreement if the client receives information that the attorney is employed by the U.S. Department of Commerce.

b. Malpractice Insurance

The Department does not provide malpractice insurance for *pro bono* work. It is recommended that attorneys protect themselves by ensuring that they have malpractice insurance for the legal services contemplated. Before agreeing to accept a *pro bono* client or matter, attorneys should determine whether the referring organization or program has a malpractice insurance policy that may provide coverage for the attorney. In cases where the referring organization or program does not provide malpractice insurance, some insurers offer affordable individual malpractice coverage. It is the responsibility of each attorney engaging in *pro bono* activities to secure malpractice insurance.

c. Compliance with Bar Rules and Unauthorized Practice of Law

Attorneys are personally responsible for ensuring compliance with the rules of the bar in the state and local jurisdiction where they will be providing the *pro bono* service. Ordinarily, attorneys must be a member of that state's bar unless an exception is provided in the bar rules. There are exceptions allowed in some jurisdictions, including the District of Columbia, Maryland, Illinois,

and Colorado. Attorneys must also comply with the bar rules of all states and jurisdictions in which they are licensed to practice law.

District of Columbia: Attorneys not licensed in the District of Columbia may practice subject to the constraints of the D.C. local rule (D.C. App. Rule 49(c)) regarding the unauthorized practice of law. D.C. Rule 49(c) permits attorneys working for the U.S. Government who are not members of the D.C. Bar to handle *pro bono* cases in the District of Columbia upon meeting several requirements.

Maryland: The State of Maryland Bar (Rule 15) permits attorneys who are not members of the Maryland Bar to handle *pro bono* cases in Maryland as long as several requirements are met.

Illinois: Illinois Supreme Court Rule 756(k) authorizes attorneys admitted in another state to provide *pro bono* legal services under prescribed circumstances.

Colorado: Colorado Bar Rule 223(2)(b) provides attorneys not authorized to practice law in Colorado licensing status to provide *pro bono* legal services to the indigent through nonprofit entities when specific conditions are met.

Attorneys are personally responsible for ensuring compliance with the rules of the bar(s) where they are admitted to practice (i.e., any requirements to report *pro bono* hours or limitations on what may qualify as *pro bono* work).

DISCLAIMER

This policy statement is intended only to encourage *pro bono* legal and volunteer services by Department attorneys, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This policy does not constitute a mandate of the Department of Commerce but is intended to encourage the contribution of available hours to voluntary *pro bono* projects within the discretion of the Department attorney.

The United States Government and the U.S. Department of Commerce will not be responsible for any negligent or otherwise tortious acts or omissions on the part of any Department employee engaged in any *pro bono* or voluntary activity. While the Department encourages *pro bono* and voluntary activities by its employees, the Department exercises no control over the services and

activities of the employees engaged in these services and activities, nor does it control the time or location of any such service or activity. Each employee is acting outside the scope of his or her federal employment when the employee participates, supports or joins in any *pro bono* legal or volunteer service or activity, even if the employee is engaging in such activities during an excused absence (administrative leave).