

U.S. DEPARTMENT OF TRANSPORTATION PRO BONO LEGAL SERVICES POLICY STATEMENT

OCTOBER 2023

I. The Policy

While service in the U.S. Department of Transportation (DOT or the Department) is itself one of the highest forms of public service, we, as attorneys, should strive to increase access to justice for all and to strengthen our communities. Given the significant unmet need for legal and other community services in the nation, it is the policy of the Department to encourage and support efforts by Department employees to provide pro bono legal services within their communities consistent with applicable federal statutes and regulations governing conflicts of interest and outside activities.

The decision of a DOT attorney to provide pro bono legal services remains strictly a personal one and cannot be officially influenced by the Department. However, consistent with applicable statutory, regulatory, and administrative requirements, DOT attorneys are encouraged to offer their professional services to help address the unmet legal needs of our communities and disadvantaged individuals.¹

II. Definition

Although there is no single definition of pro bono legal services, the American Bar Association's Model Rules of Professional Conduct provide useful guidance. The Model Rules state that lawyers have a professional responsibility to provide legal services to those unable to pay. Pro bono legal services are those legal services performed without compensation and include, but are not limited to, the provision of legal services to: persons of limited means, charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means, or to further their organizational purpose; individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or participation in activities for improving the law, the legal system, or the legal profession. Other related activities and services that should also be considered include efforts designed to increase individuals' understanding of the law, the legal system, or the legal profession.

III. Ethics and Other Considerations

¹ One source of guidance that may inform individual choices in providing pro bono legal services is Rule 6.1 ("Voluntary Pro Bono Publico Service") of the American Bar Association's Model Rules of Professional Conduct (2020) which states: "A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year." The Model Rule also suggests that a lawyer voluntarily contribute financial support to organizations that provide legal services to persons of limited means. DOT attorneys, as well as other employees, are of course free to make voluntary contributions to legal services organizations and other organizations through the Combined Federal Campaign, or otherwise.

DOT attorneys need to be aware of several legal constraints that may apply to outside activities, including pro bono activities. These legal constraints include:

- 18 U.S.C. § 205 (prohibiting Federal employees from engaging in the prosecution of claims against the Government or acting as an agent or attorney in matters in which the United States is a party or has a direct or substantial interest).
- Office of Government Ethics' Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635), including:
 - Sec. 2635.502 (regarding activities that appear to interfere with the employee's performance of his or her duties in an impartial and unbiased manner);
 - Sec. 2635.702 (prohibiting use of a Government title or position in any way that suggests that the Government is sanctioning personal activities);
 - Sec. 2635.704 (prohibiting the use of real or personal Government property for other than authorized purposes); and
 - Sec. 2635.801, et seq. (regarding outside activities by Federal employees, including prohibitions on outside activities that would conflict with the employee's official duties).
- The Hatch Act (5 U.S.C. § 7323(a) and § 7324(a) and 5 CFR Part 734) regarding outside political activity.

DOT attorneys seeking to engage in any pro bono legal work are responsible for ensuring that their pro bono legal services do not create a conflict of interest and do not otherwise violate any applicable statute or regulation.

The Designated Agency Ethics Official and/or the Deputy Chief Counsels, shall be responsible for ensuring that a conflicts check is conducted before approving pro bono legal services. Every pro bono case must receive a case-specific conflicts check before it is accepted, whether the attorney has taken it on through a generally approved pro bono activity or another program.

IV. Use of Official Position

DOT attorneys who provide pro bono legal services or who participate in volunteer activities may not indicate or represent in any way that they are acting on behalf of the Department, or in their official capacity. A DOT employee may not use office letterhead or fax cover pages, agency, or office business cards (whether or not purchased with appropriated funds), or otherwise identify himself or herself as a Department employee in any communication, correspondence, or pleading connected with pro bono legal activities or other volunteer services. (The incidental identification of an employee's position or office is permissible.)

A DOT attorney *may* use their work e-mail address for pro bono activities, as long as no email signature or identifier of the Departmental affiliation other than the email address is included within the email. However, it is recommended that a DOT attorney create and use a separate email from their DOT email to keep work and pro bono matters separated.

Also, a DOT attorney is responsible for making it clear to the client, any opposing parties, or others involved in a pro bono case 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 Department. DOT attorneys are encouraged to sign a retainer letter with their clients making explicit that the DOT attorney is acting in his or her individual capacity and not on behalf of the Department or employing operating administration. A model retainer letter is attached.

V. Scheduling Volunteer Activities

Performing pro bono legal services is a professional duty for all attorneys. It also enhances the skills that Department attorneys use in their work for the Department. Department employees are encouraged to seek pro bono legal services opportunities that can be accomplished outside their scheduled working hours. However, pro bono legal services may sometimes occur during work hours. Supervisors are urged to be flexible and to accommodate, where feasible, the efforts of their employees to do pro bono legal work.

To that end, as Acting General Counsel, I have determined that engaging in pro bono legal services will enhance the professional development or skills of the employee in his or her current position. To support the fulfillment of this professional duty, the Department provides 30 hours per year of administrative leave for approved pro bono activity that cannot be accomplished outside of business hours for all attorneys and legal staff. Administrative leave must be coordinated with and approved by the attorney's supervisor in advance of use.

Supervisors will consider the following factors when reviewing a request for administrative leave for approved pro bono activity: First, the supervisor will determine whether the activity cannot be accomplished outside of business hours. For example, if the activity, such as a court appearance or meditation, can only be scheduled during business hours, then this criterion is met. Second, the supervisor will determine whether the employee has already received 30 or more hours of administrative leave for approved pro bono activity during that calendar year. If not, then this criterion has been met.

Administrative leave will not be granted for pro bono legal services that directly benefit an employee or those with whom an employee has a personal relationship.

VI. Use of Office Resources

As stated above, Federal employees may not use Government property for other than official purposes. However, it is reasonable to allow attorneys *de minimus* use of office equipment in connection with pro bono activities. Therefore, use of Government offices

and equipment, including *de minimus*, reasonable use of online research services, is permissible only if it involves negligible additional expense to the Government. Most bar associations that coordinate pro bono opportunities can also provide non-governmental online legal research services or technology services, in which case those resources should be used first. In using government property, employees must be mindful of their responsibility to protect and conserve such property and to use official time in an honest effort to perform official duties. *See* 5 CFR §§ 2635.101(b)(9), 704(a), 705(a).

VII. Malpractice Insurance

The Federal Government does not provide malpractice insurance to its employees when they are undertaking pro bono activities. However, in many cases, legal services organizations do have umbrella malpractice insurance that covers pro bono work by volunteers. Before agreeing to meet with or accept a pro bono legal client, a Department attorney should determine whether the referring pro bono program or organization has a malpractice insurance policy that covers volunteer attorneys. Immunities that may be granted to government attorneys in the performance of their official duties do not extend to pro bono work because attorneys providing pro bono legal services are not acting in their official capacity. Therefore, the Department recommends that Department attorneys work with a legal services provider that carries malpractice insurance.

VIII. Additional Considerations for Attorneys Not Licensed to Practice in the Jurisdiction in Which They Would Perform Pro Bono Services

Generally, attorneys performing pro bono work must be licensed in the jurisdictions where they are practicing. A few jurisdictions have exceptions to this rule. For example, the District of Columbia allows government attorneys to provide pro bono legal services in the District of Columbia so long as they are members of a bar of a state, get cases on referral from an organization providing pro bono legal services, and are supervised by an active member of the District of Columbia Bar. You should check the rules in your jurisdiction.

IX. Administration of the DOT Pro Bono Policy Statement and Dissemination of Pro Bono Opportunities

Working with Chief Counsel offices, the Office of the General Counsel will establish a Pro Bono Services Committee to oversee the implementation of the DOT Pro Bono Policy Statement. The Committee will be chaired by a Pro Bono Program Manager. The Committee will also develop and disseminate information about pro bono service providers and other information on opportunities for DOT attorneys to engage in pro bono services in the Washington, D.C. area and in areas where DOT non-headquarters facilities are located. DOT attorneys are not limited to selecting pro bono opportunities disseminated by the Pro Bono Services Committee and are free to explore other pro bono options.

X. Disclaimer

This Pro Bono Policy Statement is intended only to encourage pro bono activities by DOT attorneys and does not 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. Neither the United States nor the Department of Transportation will be responsible in any manner or to any extent for any negligence or otherwise tortious acts or omissions on the part of any DOT employee while engaged in any pro bono activity. While the Department encourages pro bono activities by its employees, it exercises no control over the services and activities of employees engaged in pro bono activities nor does it control the time or location of any pro bono activity. Each employee is acting outside the scope of his or her employment whenever the employee participates, supports, or joins in a pro bono activity.

APPROVED.

DATE: October 24, 2023

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U.S. Department of Transportation