

**NATIONAL LABOR RELATIONS BOARD'S REVISED POLICY STATEMENT
ON *PRO BONO* LEGAL AND VOLUNTEER SERVICES
(for all NLRBU Represented Employees)**

I. NATIONAL LABOR RELATIONS BOARD *PRO BONO* LEGAL AND VOLUNTEER POLICY

The Policy: Given the significant unmet need for legal and other community services in the nation, it is the policy of the Agency to encourage and support efforts by Agency employees to provide *pro bono* legal and volunteer services within their communities that are consistent with applicable federal statutes and regulations governing conflicts-of-interest and outside activities. While service in the Agency is itself one of the highest forms of public service, the Agency further strives to increase access to justice for all and to strengthen our communities.

COMMENT: Scope of the Program. The Agency's Policy Statement on Pro Bono Legal and Volunteer Services (the "Policy Statement ") will extend to all Agency employees and encourage all volunteer work, legal or non-legal. This inclusive structure best reflects the Agency's commitment to developing a sense of community responsibility, not only among lawyers, but among all citizens.

II. DEFINITION OF *PRO BONO* LEGAL AND VOLUNTEER SERVICES

Definition: *Pro bono* legal work and volunteer services are broadly defined to include many different types of activities, performed without compensation.

- A. ***Pro Bono* Legal Services.** *Pro bono* legal services are those legal services performed without compensation and include, but are not limited to, the provision of legal services to:
1. persons of limited means or other disadvantaged persons;
 2. charitable, religious, civic, community, governmental, health and educational organizations in matters which are designed primarily to address the needs of persons of limited means or other disadvantaged persons, or to further their organizational purpose;
 3. individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights; or
 4. activities for improving the law, the legal system, or the legal profession.

COMMENT: This definition is based on Rule 6.1 of the ABA Model Rules of Professional Conduct, with some modifications that, among other things, make clear that the legal services must be provided without fee. This definition of pro bono legal services includes a broad range of activities; the listed activities are intended as examples only. The Agency recognizes, however, that statutory or regulatory restrictions may prohibit government lawyers from performing certain pro bono services. See Section III.

B. Volunteer Services. Volunteer services are those activities, other than the practice of law, performed without compensation. They include, but are not limited to, the provision of services to:

1. persons of limited means or other disadvantaged persons; or
2. charitable, religious, civic, community, governmental, health and educational organizations in matters which are designed primarily to address the needs of persons of limited means or other disadvantaged persons.

COMMENT: The Agency does not seek to restrict the type of volunteer activities in which employees may engage in their free time, provided that the activities do not violate any statutory or regulatory restrictions. See Section III.

The Chairman and the General Counsel encourage Agency employees to participate in the Agency-sponsored tutoring programs and volunteer activities that further the Agency's program priorities. For example, the strong leadership skills of many Agency employees could be put to good use helping at-risk youth in classrooms, youth clubs, shelters, and midnight basketball programs. The Volunteer Services Program Coordinator, see Section VI, will have information regarding such programs.

III. LIMITATIONS ON PRO BONO LEGAL AND VOLUNTEER SERVICES

A. Prior Approval.

1. Pro Bono Legal Services. An employee seeking to engage in any *pro bono* legal work must follow agency procedures for outside activities, and must consult with his or her Designated Agency Ethics Official regarding prior approval requirements. See 5 C.F.R. § 2635.803 and note thereto.

Office heads are encouraged to designate some *pro bono* legal activities as preapproved such that the employee need only give advance notice to a designated supervisor before undertaking the outside activity. Activities

sponsored by the *Pro Bono* and Volunteer Services Committee are deemed to be preapproved.

In general, approval of an employee's request to engage in *pro bono* legal work shall be granted if the work would not:

- (a) violate any federal statute, rule or regulation, including, for example, 18 U.S.C. § 201 et seq. and 5 C.F.R. Pt. 2635;
- (b) interfere with the proper and effective performance of the employee's official duties (including time and availability requirements of his or her position), see 5 C.F.R. § 2635.705;
- (c) create or appear to create a conflict of interest, see Section III.B. below; or
- (d) cause a reasonable person to question the integrity of the Agency's programs or operations.

Where an employee has been denied approval by an office head's designee to perform *pro bono* legal work, the decision will be appealed automatically to the office head.

2. Volunteer Services. An employee seeking to engage in volunteer activities must follow agency procedures for outside activities, and, where appropriate, must consult with his or her Designated Agency Ethics Official regarding prior approval requirements. See 5 C.F.R. § 2635.803 and note thereto.

The standards for granting approval for volunteer services are the same as those set forth above for volunteer legal services. See Section III.A.1.a. Activities sponsored by the *Pro Bono* and Volunteer Services Committee are deemed to be preapproved.

COMMENT: Offices may choose to institute their own pro bono or volunteer service program in which certain activities are pre-approved. The Chairman and the General Counsel urge all offices to consult with the Pro Bono and Volunteer Services Committee, see Section VI.A., and the Agency's Designated Ethics Official to determine which outside activities it may want to designate as preapproved.

B. Conflicts of Interest.

1. General Standard. Agency employees may not engage in *pro bono* legal or volunteer services that create or appear to create a conflict of interest with their work for the Agency. Under the Standards of Ethical Conduct for

Employees of the Executive Branch, 5 C.F.R. § 2635, a conflict of interest generally exists where the services would:

- (a) require the recusal of the employee from significant aspects of the employee's official duties, see 5 C.F.R. § 2635.802(b);
 - (b) create an appearance that the employee's official duties were performed in a biased or less than impartial manner, see 5 C.F.R. § 2635.502; or
 - (c) create an appearance of official sanction or endorsement, see 5 C.F.R. § 2635.702(b).
1. 18 U.S.C. § 205. With limited exceptions, outside activities may not include the representation of third parties before the federal government, see 18 U.S.C. § 205.
 2. Criminal Representation. Agency attorneys are prohibited by statute from providing *pro bono* legal assistance in any case in which the United States is a party or has a direct and substantial interest -- which includes criminal defense representation in federal court, see 18 U.S.C. § 205.
 3. Responsibility for Conflicts Check.
 - (a) The office head or the office head's designee will be responsible for completing the conflicts check for *pro bono* legal activities prior to approving such activities.
 - (b) The Agency employee will be responsible for ensuring that his or her volunteer services do not present a conflict of interest, and do not otherwise violate any applicable statute or regulation.

COMMENT: *The issue of conflicts should be determined by reference to the government-wide standards of conduct, 5 C.F.R. § 2635 (particularly §§ 2635.801 - .802), and any subsequently published Agency supplemental regulations.*

Application of these standards of conduct necessarily will involve the exercise of judgment. These judgments likely will differ from one office and situation to another. For this reason, each office will be asked to work with the Pro Bono and Volunteer Services Committee, see Section VI, and the Agency's Designated Ethics Official in setting its own office-specific conflict standard. The Designated Agency Ethics Official is available for consultation on conflicts questions, as is the Pro Bono Program Manager. See Section VI.B.

Hatch Act Policy: Outside activity by Agency employees must comport with the regulations implementing the Hatch Act Reform Amendments of 1993, 5 C.F.R. Pt. 734, and with all memoranda delineating the Agency policy concerning political activities by employees. Agency policy holds all political appointees to the restrictions of 5 C.F.R. Pt. 734, subpt. D.

Non-Representational Assistance: Agency employees may provide non-representational assistance without compensation, such as assistance in the filling out of forms for persons seeking government benefits, and may assist in the preparation of tax returns without compensation (e.g., through the Voluntary Income Tax Program), provided that the services satisfy the prior approval requirements of Section III.A of this Policy Statement, and do not present a conflict of interest as addressed in Section III.B.

C. Additional Considerations.

1. Retainer Agreement. The *Pro Bono* Program Manager, see Section VI.B., will have available a model retainer letter making explicit to a *pro bono* legal client that the attorney is acting in his or her own individual capacity and not on behalf of the Agency. The client must countersign a retainer letter in acknowledgment of this fact.
2. Malpractice Coverage. Before agreeing to meet with or accept a *pro bono* legal client, an Agency attorney should determine whether the referring *pro bono* program or organization has a malpractice insurance policy covering volunteer attorneys. The Agency does not provide malpractice coverage for *pro bono* work.

*COMMENT: Generally, volunteer programs organized by the local bar or the more established referral programs do provide malpractice coverage. The *Pro Bono* Program Manager will have information regarding which programs provide malpractice insurance coverage for volunteer attorneys. Attorneys who choose to provide legal services without malpractice insurance coverage are acting at their own risk.*

3. The District of Columbia Professional Licensing Fee. The D.C. Code has been amended to provide members of the District of Columbia bar "engaged in the provision of legal services, on a *pro bono* basis solely or in combination with government service," an exemption from the requirement to pay the District of Columbia professional licensing fee of \$250. D.C. Code § 47-1814.1a(b)(3).
4. Restrictions on the Unauthorized Practice of Law. Attorneys not licensed in the District of Columbia do not need to pay the District of Columbia licensing fee, but may only practice subject to the constraints of the District of Columbia's local rule regarding the unauthorized practice of law. D.C. Court of Appeals Rule 49.

COMMENT: D.C. Court of Appeals Rule 49 currently exempts federal government attorneys who are members in good standing of another state bar and who accept *pro bono* cases assigned or referred by an organization that provides legal services to the public without fee, provided that the attorney is supervised by an enrolled, active member of the D.C. Bar. If the matter requires a court appearance, such an attorney shall file with the court having jurisdiction over the matter, and with the D.C. Court of Appeals Committee on Unauthorized Practice, a certificate that the attorney is providing representation in that particular case without compensation. The Pro Bono Program Manager will have information regarding the revision of Rule 49 for Agency attorneys who are not members of the D.C. Bar but who wish to accept *pro bono* cases.

Agency attorneys in other jurisdictions are advised to consult their local rules and regulations regarding any professional fees and practice restrictions that may exist.

IV. USE OF OFFICIAL POSITION OR PUBLIC OFFICE

The Policy. Agency employees 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 Agency, or in their official capacity. The incidental identification of an employee's position or office -- for example, when an office number and street address are not sufficient to ensure mail delivery or when receiving a telephone call -- is not prohibited.

- A. An Agency employee may not use office letterhead, agency or office business cards, or otherwise identify himself or herself as a Agency employee in any communication, correspondence, or pleading connected with *pro bono* legal activities or other volunteer services.
- B. An Agency 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 Agency.

V. USE OF AGENCY RESOURCES

- A. **Hours of Work.** Agency employees are encouraged to seek volunteer activities and *pro bono* legal opportunities that can be accomplished outside their scheduled work hours. However, *pro bono* legal or volunteer activities may sometimes necessarily occur during work hours. For example, judicial proceedings or personal contacts with clients or opposing counsel may be

required during work hours. An employee whose *pro bono* legal and volunteer activities require their performance during work hours may elect, with his or her supervisor's approval, to make up the time lost in order to meet those obligations. To the extent that such modifications in work schedule do not interfere with the efficient operation of an office, the supervisor may afford the employee the opportunity to work a reasonable time before or after the period in question. The premium pay provisions for overtime work in Part 550 of Title 5 Code of Federal Regulations and Section 7 of the Fair Labor Standards Act, as amended, do not apply to work performed by an employee under this section.

Employees seeking to participate in *pro bono* legal or volunteer activities during work hours may also be granted leave without pay, annual leave. Supervisors are urged to be flexible to accommodate, where feasible, the efforts of their employees to *do pro bono* legal or volunteer work. When considering employee requests for leave to engage in *pro bono* legal or volunteer activities, supervisors should give due attention to the effect of the employee's absence on office operations.

The decision to grant an employee's request to engage in *pro bono* legal or volunteer activities during work hours may not be affected by a supervisor's personal views regarding the substance of the *pro bono* activity.

COMMENT: *While this Policy Statement directs supervisors to be flexible in dealing with employees seeking to engage in pro bono legal or volunteer activities, it also recognizes that supervisors must be able to judge whether such accommodations would interfere with the operation of the office.*

B. Use of Office Equipment. As a general rule, employees may use government property only for official business or as authorized by the government. See 5 C.F.R. § 2635.101(b)(9), .704(a). Agency policy authorizes the following personal uses of government office and library equipment and facilities where required by approved *pro bono* and legal volunteer activities:

1. personal uses that involve only negligible expense (such as electricity, ink, small amounts of paper, and ordinary wear and tear); and
2. limited personal telephone/fax calls to locations within the office's commuting area, or that are charged to non-government accounts.

COMMENT: *This Agency policy permits personal use of equipment and facilities only if it involves negligible additional expense to the government--such as electricity, ink, small amounts of paper, and ordinary wear-and-tear. When office computers, printers and copiers are used in moderation,*

there is only negligible additional expense to the government for electricity, ink and wear-and-tear. Such use, therefore, is authorized as long as only small amounts of paper are involved and as long as the use does not interfere with official business. Employees wishing to use more than a small amount of paper must provide their own or pay for its cost. Employees should contact their supervisor if there is any question whether an intended use involves "negligible" expense or "small amounts" of paper.

This policy does not authorize the personal use of commercial electronic databases when there is an extra cost to the government. On the other hand, research using the library's books or microfiche would be authorized, as it involves only negligible additional expense to the United States.

The policy also authorizes limited personal telephone/fax calls to locations within the office's commuting area, or that are charged to non-government accounts (for example, personal telephone credit cards). Again, such use must not interfere with official business, and supervisors should be consulted if there is any question over whether such use is in fact "limited."

This policy does not override statutes, rules or regulations governing the use of specific types of government property, such as electronic mail, and 41 C.F.R. (FPMR) § 201-21.601 (governing the ordinary use of long-distance telephone services). It may be revoked or limited at any time by any supervisor or office for any business reason. Any employee who has questions about the application of this section to any particular situation should consult his or her supervisor.

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 C.F.R. § 2635.101(b)(9), .704(a), .705(a); 41 C.F.R. § 101-35.201(d)(1).

C. Clerical Support. *Pro bono* legal and volunteer work are not official duties and may not be assigned to or otherwise required of support staff.

COMMENT: *It may be coercive to ask subordinate employees if they will volunteer to help perform pro bono legal or volunteer services, i.e., the typing of briefs or documents. See 5 C.F.R. § 2635.705. On the other hand, support staff may wish to volunteer their services. The Pro Bono Program Manager and Volunteer Services Program Coordinator will develop a central pool of support staff who are willing to volunteer to support pro bono legal or volunteer projects on their own time. See Section VI.B.*

VI. ADMINISTRATION OF PRO BONO AND VOLUNTEER SERVICES PROGRAMS

- A. **Pro Bono and Volunteer Services Committee.** A *Pro Bono* and Volunteer Services Committee will be established to oversee the implementation of the Agency's Policy Statement. The Committee will be chaired by the *Pro Bono* Program Manager, see Section VI.B., and include representatives of various Agency offices and the Volunteer Services Program Coordinator, see VI.C.

COMMENT: The Agency recognizes that further refinements of its Policy Statement will be necessary. Specifically, the implementation of the Policy Statement in the Agency's Regional Offices will need further examination. In addition, the approval process outlined in Section III.A. will need to be monitored closely.

- B. **Pro Bono Program Manager.** The *Pro Bono* Program Manager will develop and publicize *pro bono* legal opportunities in order to facilitate an increase in such activities throughout the Agency. The position will initially be located in the Contempt Litigation and Compliance Branch. The Program Manager will work with Agency offices in the development of office-specific *pro bono* programs.

*COMMENT: It is anticipated that each Agency office will appoint an individual to publicize and coordinate *pro bono* activities within the office and to refer persons to the Designated Agency Ethics Officer for conflicts screening.*

- C. **Volunteer Services Program Coordinator.** The Volunteer Services Program Coordinator publicizes the volunteer service opportunities throughout the Agency. The position is located in the Division of Administration. The Coordinator refers employees to volunteer clearinghouses in their communities, assists employees in establishing and participating in Partners in Education programs, organizes National Volunteer Week activities, and promotes other volunteer programs.

VII. DISCLAIMER

The Policy Statement is intended only to encourage increased *pro bono* legal and volunteer activities by Agency employees, 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.

The United States and the Agency will not be responsible in any manner or to any extent for any negligent or otherwise tortuous acts or omissions on the part of any Agency employee engaged in any *pro bono* or volunteer activity. While the Agency encourages *pro bono* and volunteer activities by its employees, the Agency exercises no control over the services and activities of employees engaged in *pro bono* or volunteer activities nor does it control the time or location of any *pro bono* or volunteer activity. Each employee is acting outside the scope of his or her employment whenever the employee participates, supports or joins in any *pro bono* or volunteer activity.

APPROVED: _____
John C. Truesdale, Chairman

DATE:

APPROVED: _____
Leonard R. Page General Counsel

DATE: