



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of a resolution with respect to the report and recommendations of the President's Committee on Access to Justice.

Attached is a memorandum from the President's Committee on Access to Justice requesting the adoption of a Model Pro Bono Policy and Procedures for Attorneys in State and Federal Government Agencies. As set forth in the memorandum, the committee identified issues to be addressed to encourage public sector attorneys to perform pro bono service, including unclear rules with respect to public sector attorneys performing private work; disparate agency policies on attorneys performing outside work; and the lack of formal referral processes for attorneys to receive pro bono cases. The proposed "Golden Gavel" policy is intended to encourage public sector attorneys to provide pro bono legal services by providing a definition of pro bono service; compliance with Public Officers Law §§73 and 74; procedures to be followed by the agency in developing a referral process; and use of agency resources.

The committee's materials also include a proposed resolution for your consideration in connection with approval of this policy.

This report was submitted in April 2016 and posted in the Reports Community. The Albany County Bar Association has indicated that it supports the development of a model policy and makes several recommendations for changes; the association's comments are attached.

The report will be presented at the June 18 meeting by C. Kenneth Perri, chair of the Golden Gavel Subcommittee of the President's Committee on Access to Justice.

MEMO TO: Members of the NYSBA Executive Committee

FROM: Claire Gutekunst and William Russell, Jr., Co-Chairs,
President's Committee on Access to Justice

RE: Proposed New York State Bar Association Model Pro Bono Policy and
Procedures for Attorneys in State and Federal Government Agencies

DATE: April 7, 2016

To further the New York State Bar Association's interest in providing access to justice to low-income New Yorkers in civil legal matters affecting the essentials of life, the President's Committee on Access to Justice (PCAJ) requests that the Executive Committee adopt the attached proposed New York State Bar Association Model Pro Bono Policy and Procedures for Attorneys in State and Federal Government Agencies, which the PCAJ approved at a meeting on April 4, 2016.

Background: At a meeting held on October 4, 2010, the PCAJ created a Golden Gavel subcommittee to develop a Golden Gavel pro bono program for public sector attorneys. From materials prepared by Michael Barrett, who led the initiative, the problems to be addressed were identified as follows:

- A tremendous need for pro bono legal services;
- Unclear ethics and conflicting rules with respect to public sector attorneys performing private work;
- The existence of disparate agency by agency policies on staff attorneys performing outside work; and
- The lack of formal referral processes for agency attorneys to receive pro bono cases.

The proposed solution was the NYSBA Golden Gavel pro bono program for public sector attorneys.

Again, from Mr. Barrett's materials, the Golden Gavel subcommittee contended that it would be better if:

- There were clear rules that everyone knew with respect to public sector attorneys doing outside, pro bono legal work;
- There was a formal referral process to receive a pro bono case; and
- There was an overarching agency policy that encouraged its attorneys to get involved.

With Mr. Barrett's departure from New York State, the initiative for which he laid the groundwork was reactivated by the creation of a reconfigured Golden Gavel subcommittee appointed by PCAJ co-chairs David P. Miranda and William T. Russell, Jr. in January 2015.

The Proposed Policy: To further the New York State Bar Association's interest in providing access to justice to low-income New Yorkers in civil legal matters affecting the essentials of life, the PCAJ recommends that the Executive Committee adopt as the formal policy of NYSBA the model pro bono policy, which has been developed by the new Golden Gavel subcommittee.

The proposed policy, which the PCAJ approved at its meeting on April 4, 2016,

- Summarizes the high unmet need for additional resources to provide civil legal services to low-income people who currently must proceed unrepresented in court proceedings and in other civil matters;
- Aims to encourage and support participation by attorneys in state and federal government agencies in the provision of pro bono legal services;
- Defines pro bono legal services consistently with the New York Rules of Professional Conduct, 22 NYCRR Part 1200, Rule 6.1;
- Takes into consideration Public Officers Law §§73 and 74, which govern the business and professional activities of state employees, including uncompensated outside employment; and
- Provides a series of recommended policies and procedures for state and federal agencies.

Adoption of the policy by the Executive Committee and promotion of the policy by NYSBA, through NYSBA leadership, the PCAJ and the Committee on Legal Aid, will help address the high unmet need for civil legal services in matters such as housing, family matters, subsistence income issues, access to health care and access to education faced by low-income New Yorkers.

New York State Bar Association

President's Committee on Access to Justice

April 4, 2016 Proposed Resolution

WHEREAS, the New York State Bar Association's President's Committee on Access to Justice on April 4, 2016 issued a report recommending that a model pro bono policy and procedures for attorneys in state and federal government agencies be adopted; and

WHEREAS, the model policy would assist state and federal agencies that wish to establish formal pro bono legal services programs with clear ethical rules, conflict procedures, referral mechanisms and forms for keeping track of attorney participation; and

WHEREAS, in the past, NYSBA has actively promoted the adoption of model pro bono policies by law firms and the Corporate Counsel Section of the New York State Bar Association has developed a model pro bono policy for use by corporate law departments;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby approves the model pro bono policy and procedures for attorneys in state and federal government agencies recommended by the President's Committee on Access to Justice; and it is further

RESOLVED, that the officers and staff of the New York State Bar Association are empowered to take such further steps as they deem appropriate to distribute to and encourage use of the policy by state and federal agencies.

NEW YORK STATE BAR ASSOCIATION
MODEL PRO BONO POLICY AND PROCEDURES
FOR ATTORNEYS IN STATE AND FEDERAL
GOVERNMENT AGENCIES¹

¹ The opinions expressed are those of the President's Committee on Access to Justice and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

I. **Introduction:**

New York attorneys, both public and private, have volunteered countless hours of pro bono legal services to their communities. Despite the efforts of many volunteer attorneys, however, the unmet legal needs of the disadvantaged, throughout the state, greatly exceed the combined capacity of legal services programs using a staff attorney and volunteer delivery model. For example, in its report and recommendations to the Chief Judge in November 2014, the Task Force to Expand Access to Civil Legal Services in New York concluded that more than 1.8 million New Yorkers were unrepresented in court proceedings involving civil matters in 2013. The Task Force also estimated that at best 30% of the civil legal needs of low-income New Yorkers in matters involving the essentials of life are being met by the civil legal services delivery system in New York State.

The agency recognizes that some attorneys in state and federal government agencies may be restricted from participation in certain pro bono activities. Attorneys in state and federal government agencies face a number of impediments to involvement in the provision of pro bono legal services, such as conflicts of interest and limitations on the use of state resources. Nonetheless, the agency believes that it should be the policy of every state and federal agency, under appropriate terms and conditions, to encourage and support participation by agency attorneys in pro bono activities. Government agencies should actively support, encourage and recognize government attorneys who wish to do pro bono work.

To encourage and support participation by agency attorneys in pro bono services, the agency has developed this pro bono policy. The agency strongly encourages our attorneys to provide voluntary pro bono legal services to benefit low-income persons.

II. **Definition of Pro Bono Legal Services:**

Pro bono legal services include the pro bono representation of clients, including non-litigation activities, at no cost to clients and without any expectation of compensation. As used in this policy and consistent with the Rules of Professional Conduct (22 NYCRR Part 1200, Rule 6.1), pro bono legal services means:

- Professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;
- Activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and
- Professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

III. Public Officers Law and Other Considerations:

Public Officers Law §73 governs the business and professional activities of state officers and employees, including both compensated and uncompensated outside employment. It can be found at:

<http://www.jcope.ny.gov/about/ethc/PUBLIC%20OFFICERS%20LAW%2073%20JCOPE.pdf> .

Public Officers Law §74 establishes a code of ethics for officers and employees of state agencies. It can be found at:

<http://www.jcope.ny.gov/about/ethc/PUBLIC%20OFFICERS%20LAW%2074.pdf>.

Public Officers Law §§73 and 74 permit pro bono legal services under certain conditions.

An agency attorney may render pro bono legal services if the activities are consistent with the guidelines set forth in this policy. No pro bono legal services activities may be rendered if they would:

1. Constitute a practice prohibited by Public Officers Law §73 or §74;
2. In any manner interfere or conflict with the proper and effective discharge of the attorney's official duties;
3. Create or appear to create a conflict of interest with the attorney's official position;
4. Be of such nature that the outcome would be influenced or appear to be influenced by the attorney's position in the agency;
5. Involve matters in which the State of New York, its agencies, or its officers or employees in an official capacity is a party or has a direct or substantial interest [**If not a state agency, adapt this language to federal agencies**]; or
6. For policy making attorneys, conflict with Executive Law §94 or the rules and regulations of the New York State Joint Commission on Public Ethics or any successor entity.

IV. Procedures:

A. Agency Pro Bono Coordinator:

The agency has appointed ____ to serve as the agency's pro bono coordinator. The agency's pro bono coordinator will approve organizations that the agency's attorneys can work with on a pro bono basis. The agency pro bono coordinator must also approve pro bono activities that are not referred by an approved organization.

B. Approved Organizations:

The agency has determined that matters referred to agency attorneys by the organizations on the list attached to this policy as appendix A are approved for pro bono services. The matters may be referred for direct representation, for the provision of counsel and advice or for the provision of legal information. Such matters may include advice clinics for low-income people and legal information clinics for low-income people.

The organizations that are approved have each certified that:

- The organization provides malpractice insurance coverage for attorneys who accept pro bono matters from it;
- The organization conducts financial eligibility screening for clients to ensure that their household income is at or below 200% of the federal poverty level;
- The organization assesses the legal merit of a matter before it is referred to a pro bono attorney;
- The organization screens pro bono attorneys to ensure that the matters referred to them match the pro bono attorneys' areas of interest and/or expertise;
- The organization provides training and support for its pro bono attorneys; and
- The organization or the pro bono client pays for litigation expenses such as court filing fees that cannot be waived.

Information regarding the service areas and substantive law practice areas of the organizations listed on appendix A is available at www.lawhelpny.org.

When an agency attorney accepts a pro bono matter from one of the approved organizations listed on appendix A, the agency attorney shall notify the agency's pro bono coordinator and the attorney's supervisor of the attorney's acceptance of the pro bono matter by submitting the notification form attached to this policy as appendix B.

C. Further Approval by Agency:

Participation by an agency attorney in pro bono activities other than those sponsored by the organizations listed in appendix A must be approved in advance by the agency pro bono coordinator and the attorney's supervisor. An agency attorney wishing to participate in a pro bono activity other than those sponsored by the organizations listed in appendix A must submit the request for approval form, attached to this policy as appendix C, to the agency pro bono coordinator and to the attorney's supervisor. In determining whether to approve the request, the agency pro bono coordinator and the attorney's supervisor will consider whether the request falls within the kinds of pro bono services or activities permitted by this policy and does not violate any of the restrictions delineated in section III of this policy.

V. Identification with Agency:

Agency 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.

In particular:

- The attorney is responsible for making it clear to the client, any opposing parties, any court or administrative agency 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;
- The attorney may not use agency letterhead, agency business cards, or otherwise identify himself or herself as a government attorney in any communication;
- The agency telephone number, the agency email and the agency fax number may not be used for pro bono activities; and
- Agency offices may not be used for meetings with clients or opposing counsel in a pro bono case.

VI. Malpractice Insurance:

The agency does not provide malpractice or any other professional liability coverage for the pro bono work of agency attorneys.

VII. Use of Agency Resources:

A. Hours of Work:

When performance of pro bono work is required during regular work hours, the attorney may request that the attorney's supervisor approve a flexible work schedule to accommodate the time needed for pro bono work. The attorney may, if he or she prefers, take leave without pay, vacation time or personal time.

B. Offices/Library/Computers/Supplies and Other Equipment²:

Choice 1:

Attorneys may not use their personal offices, their computers, their word processing equipment, office supplies or photocopying to perform pro bono work.

Choice 2:

Attorneys may use their personal offices to do research and to draft pleadings, briefs, letters or other written materials. Such work should be done in a manner that does not interfere with the performance of the attorney's regular functions or duties and responsibilities. Office research tools may be used to do pro bono research.

Attorneys who use office computers to do pro bono work must adhere to the incidental personal use provisions of the agency's technology use policy. In addition, insofar as anything transmitted or received via any agency technology and information stored on any agency computer is the property of the agency, and the agency reserves the right to read, view or listen to these messages, agency attorneys who use agency computers to do pro bono work should consider the confidentiality provisions of the Rules of Professional Conduct, including 22 NYCRR Part 1200, Rule 1.6.

Attorneys may use word processing equipment provided that such use does not interfere with the performance of the attorney's regular functions or duties and responsibilities. Office supplies and photocopying are available in de minimis amounts to attorneys performing pro bono work.

² Different requirements govern de minimis use of office resources for pro bono work by agency attorneys, depending upon whether the attorneys are employees of state agencies or federal agencies. Accordingly, this section of this model policy expressly provides choices for agency decision makers to consider when developing policies on this issue for their attorneys. Each of several options provided for adaptation by agencies to meet their specific needs, or any combination thereof, are identified as choice 1 – choice 4.

Choice 3:

No official agency resources, including, but not limited to, employees, letterhead, business cards or email may be used to perform any function when rendering pro bono legal services, except attorneys may use office space, and may use office equipment incurring only nominal cost to the state, e.g., computers, local telephone calls, the law library, computer research and very limited amounts of paper for copying. Attorneys may not make long distance telephone calls, make large numbers of copies, use government vehicles, use government postage or use any office equipment that will incur more than a nominal cost to the state.

Choice 4:

When engaging in pro bono activities, agency attorneys may use office space, but may not use office equipment if such use involves additional costs to the state. For example, attorneys may use their computers, make local telephone calls and use the law library. Attorneys may not make long distance telephone calls, use government vehicles, use government postage or otherwise use public resources in support of pro bono or volunteer activities.

This pro bono policy does not override statutes, rules or regulations governing the use of government property. Any agency attorney who has questions about the application of this section to any particular situation should consult his or her supervisor.

VIII. **Aspirational Goal:**

Consistent with the New York Rules of Professional Conduct (22 NYCRR Part 1200, Rule 6.1), the agency encourages every attorney to aspire to provide at least 50 hours of pro bono legal services each year to poor persons.

Appendix A

Approved Organizations for Pro Bono Services:

Appendix B

Pro Bono Services Notification Form:

This form is submitted to the agency pro bono coordinator and to the agency attorney's supervisor to serve as notification that _____(agency attorney name) has accepted a pro bono matter from _____(name of referral organization), an organization included on the list of organizations approved for referral of pro bono matters pursuant to the agency's pro bono policy.

Appendix C

Pro Bono Services Request Form:

This form must be completed and submitted to the agency pro bono coordinator and to the attorney's supervisor by any attorney who wishes to engage in pro bono services in connection with a matter not referred by an approved organization listed in appendix A of the agency's pro bono policy. The agency attorney must receive required approvals prior to the commencement of pro bono services.

Agency Attorney Name: _____

Organization Information:

Name, if applicable, of referring organization: _____

Address: _____

Telephone Number: _____

- or -

____ Not Applicable

Provide a description of the prospective pro bono matter, including the name and address of the pro bono client and the name and address of any opposing party:

I attest that all of the above information is correct.

Agency Attorney Signature: _____

Date: _____

The above pro bono service request is _____ approved _____ not approved.

If not approved, provide explanation:

Agency Pro Bono Coordinator Signature: _____

Date: _____

The above pro bono service request is _____ approved _____ not approved.

If not approved, provide explanation:

Agency Attorney Supervisor's Signature: _____

Date: _____

Thank for your soliciting input on this draft policy.

As you know, the largest employer of attorneys in Albany County, by far, is the government. Not just New York State, but also many county and municipal governments employ attorneys full-time, part-time and/or contract for services from attorneys.

Many of these attorneys are barred or significantly constrained from taking pro bono cases. To that end, we applaud NYSBA's efforts to develop a model pro bono policy.

I asked the chairs of our Committee on Public Service to review the policy and forward below the comments received from co-chair Ann Lapinski:

- 1) The document speaks of state and federal government attorneys but says nothing about local government. I think it would help if the document also recognized local government;
- 2) In part VII (B) containing the choices with respect to use of agency resources. The language in choice 1 is not limiting enough. There needs to be a general statement that "no agency resources" may be used. In today's world, there are unlimited ways that agency resources can be used – a simple example being smart phones- and use of all of those resources should be restricted;
- 3) This is not a comment on the policy but more of strategy with respect to this issue. One of my thoughts is that it would be legitimate for government agencies to authorize no charge to leave credits for pro bono work that earns CLE credits since earning CLE credits is a requirement to maintain a law license. Since NYS allows for "2 for 1" CLE credits, that would mean 2 hours of pro bono work would result in 1 hour charged to leave credits and 1 hour counted as "work" because of the CLE credit earned. Making this happen for executive branch employees would require a focus on the GOER/Governor's office to approach the issue. It would also be possible to approach the Attorney General and/or Comptroller about their staff too.

Please do not hesitate to contact me should you have any questions or wish to discuss further.

Dan

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