



NEW YORK STATE BAR ASSOCIATION

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LOCAL AND STATE GOVERNMENT LAW SECTION

2015-2017 Executive Committee

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June 15, 2016

By E-Mail

Claire P. Gutekunst, Esq.

President

New York State Bar Association

Re: Model Pro Bono Policy & Procedures for
Attorneys in State and Federal Government Agencies

Dear Claire:

On June 2, 2016, as Chair of the Local and State Government Law Section, I submitted a report to the Executive Committee of the New York State Bar Association (NYSBA) on behalf of the Section supporting the concept of encouraging government attorneys to provide *pro bono* services, but noting that the implementation of such a policy presents many issues not faced by the private sector, as taxpayer personnel, time and resources are at stake. The June 2, 2016 report also conveyed the Section's reservations in its ability to fully analyze the impact of the model pro bono policy for attorneys in state government adopted by the President's Committee on Access to Justice (PCAJ) on April 4, 2016, since our Section, formerly the Municipal Law Section, only recently welcomed the addition of state attorneys in October of 2015, when the Section voted to become the Local and State Government Law Section.

Nevertheless, the Executive Committee of the Local and State Government Law Section expressed its preliminary general concern that a number of recommendations in the proposed pro bono policy may potentially allow, require and/or encourage activity by a state agency and/or its attorneys that may be either prohibited by State law or regulation or otherwise unauthorized absent a specific legislative grant of authority.

In a letter to me dated June 10, 2016, you stated that the Section's June 2, 2016 report does not identify any particular provisions of the model pro bono policy with which the Section takes issue or specific bases for its objection to adoption of the model pro bono policy. You invited the Section to provide a supplemental letter detailing those objections prior to the State Bar's Executive Committee and House of Delegates' consideration of the model pro bono policy at the end of this week. The Executive Committee offers herein the following initial, specific concerns with the policy.

1. Model Pro Bono Policy Section VII, Use of Agency Resources:

This section of the model pro bono policy recommends four (4) options that govern the use of public (state) office space, computers, supplies and other equipment by attorneys employed by the state agency to perform *pro bono* work. We direct your attention to the attached Executive Order [Paterson] No. 7 (9 NYCRR 7.7 entitled, “Prohibition Against Personal Use of State Property and Campaign Contributions to the Governor.” Part B of this Executive Order (Prohibition Against the Personal Use of State Property) contains the following proscription:

(B)(1) State supplies, equipment, computers, personnel and other resources may not be utilized for non-governmental purposes, including for personal purposes or for outside activities of any kind. This prohibition includes but is not limited to the following:

d. State computers shall be used only for official business, except that state computers may be used for incidental and necessary personal purposes, such as sending personal electronic mail messages, provided that such use is in a limited amount and duration and does not conflict with the proper exercise of the duties of the State employee. (emphasis added).

The model pro bono policy as proposed contains four (4) options for state agencies to adopt, only one of which (Choice 1) is consistent with Executive Order No. 7. As the use of state computers to provide legal services on a *pro bono* basis is not for “incidental and necessary personal purposes,” all of the other options run afoul of this proscription.

Recommendation: Only Choice 1 should be included in the final pro bono policy. Inclusion of the other choices will require either executive or legislative action.

We also note, in concurrence with the comment submitted by the President of the Albany County Bar Association, that if Choice 1 is meant to bar the use of state agency resources, then it should read that “no state agency resources shall be used” to take into account items such as government issued cell phones and tablets which are not enumerated in the list of items not to be used by state attorneys.

2. Model Pro Bono Policy Section IV(A), Agency Pro-Bono Coordinator:

The model policy provides a state agency the authority to determine which legal service organizations it will authorize its attorneys to perform pro bono work by “approving” certain legal service organizations. The model policy further states that, in the event an organization is not an approved provider, requests must be approved on an individual basis, and that 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.”

This provision confers more discretion upon state agencies than they have. Agency

approval of *pro bono* work should be limited to matters that directly relate to the employer-employee relationship between the agency and the attorney, such as the attorney's work schedule, potential conflicts of interest and the use of personal time. It should not be based on factors related to the nature of the services or the organization being served.

Likewise, an attorney should not be prohibited from performing *pro bono* services on his or her own time because an agency did not approve a legal service provider or that the legal services to be provided are not "the kinds of *pro bono* services" permitted by the policy. From the state agency's perspective, the only relevant considerations are those that are relevant the employer-employee relationship of the agency and attorney. Beyond that, it is up to the attorney and the legal service provider or client.

The section becomes more problematic if the use of state resources is involved, as it may give rise to a property interest in the legal provider that is approved. The amount of subjective discretion may create problems and possibly litigation when an agency is not approved or an approved agency is subsequently removed from the approved list.

Recommendation: The model *pro bono* policy and procedures should eliminate state agency approval of organizations, and specify that an agency shall approve *pro bono* work by an attorney based on considerations that relate directly to the employer-employee relationship between the agency and attorney.

3. Model Pro Bono Policy Section I, Introduction

We note that the model *pro bono* policy, while it defines "Pro Bono Legal Services," contains no similar language or provision defining what is meant by an "agency attorney," state or federal.

Recommendation: The model policy should define attorney as "an attorney employed in a legal capacity or position by the [agency name]."

Further, there should be a provision defining the scope of the policy in the preamble as applying to attorneys employed by the federal government, New York State and any agency thereof, and public authorities. In the absence of such clarifying language, it is unclear, for example, whether an agency attorney includes one employed by a public authority or whether it also applies to attorneys employed by agencies in a non-legal position.

4. Model Pro Bono Policy Section II, Definition of Pro Bono Legal Services

The model *pro bono* policy definition of *pro bono* services includes litigation services. We note that a *pro bono* policy issued by then New York State Attorney General Eliot Spitzer *via* Executive Order Number 4.1 in January of 2002 permitted only *non-litigation* *pro bono* services for attorneys in that office. *See* attachment. Also note that N.Y.C Administrative Code § 7-103 specifically prohibits attorneys in the New York City Law Department from being involved in *any* litigation except in the discharge of their official duties.

Recommendation: Given the recognition factor of state attorneys who regularly appear in courts on behalf of their state agencies, consideration should be given in the model pro bono policy to limiting *pro bono* services to non-litigation activities for state attorneys, particularly those state attorneys who serve as prosecutors and public defenders.

Thank you for your courtesies in affording the Local and State Government Law Section the opportunity to detail some of its specific comments and issues concerning the model pro bono policy.

Sincerely,



Carol L. Van Scoyoc
Chair

Local and State Government Law Section

Attachments

cc: Sharon Stern Gerstman, Esq.
William Russell, Esq.

Compilation of Codes, Rules and Regulations of the State of New York Currentness

Title 9. Executive Department

Subtitle A. Governor's Office

Chapter I. Executive Orders

Part 7. Executive Orders (David A. Paterson)

9 NYCRR 7.7

Section 7.7. Executive Order No. 7: Prohibition Against Personal
Use of State Property and Campaign Contributions to the Governor

WHEREAS, government employment is a privilege rather than a right, and is based upon the trust and confidence placed in the State's workers by the public; and

WHEREAS, all State employees and officers should be able to pursue the interests of the public in an environment that is free from political party influence or interference; and

WHEREAS, it is the obligation of every State employee and officer to pursue a course of conduct that will not engender public concern as to whether the individual is engaged in acts that may violate his or her public trust; and

WHEREAS, all State employees therefore must act in a manner consistent with that public trust, and must not take any actions that are intended, or appear to be intended, to achieve personal gain or benefit; and

WHEREAS, employees and officers of State agencies and public authorities are subject to certain ethical statutes and rules, including but not limited to the State Code of Ethics ([Section 74 of the Public Officers Law](#)), and statutory restrictions on business and professional activities ([Section 73 of the Public Officers Law](#)); and

WHEREAS, there are some areas where New York's existing statutes governing ethical standards can and should be improved or clarified;

NOW, THEREFORE, I, David A. Paterson, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the laws of the State of New York, do hereby order as follows:

A. Definitions

1. "Agency" shall mean any state agency, department, office, board, commission or other instrumentality of the State, other than a public authority.

2. "Public authority" shall mean a public authority or public benefit corporation created by or existing under any State law, at least one of whose members is appointed by the Governor (including any subsidiaries of such public authority or public benefit corporation), other than an interstate or international authority or public benefit corporation.

B. Prohibition Against the Personal Use of State Property

1. State supplies, equipment, computers, personnel and other resources may not be utilized for non-governmental purposes, including for personal purposes or for outside activities of any kind. This prohibition includes but is not limited to the following:

a. Official stationery may not be used for non-governmental purposes, nor may State government resources be used to mail personal correspondence. The designation "personal" on agency stationery means only that the contents are meant for the personal viewing of the addressee and not that the sender is acting unofficially. All letters and other written materials printed on such official stationery are considered official, and thus the designation "unofficial" has no meaning and may not be used.

b. Under no circumstances may State mail, postage, internal office mail, or inter-city couriers be used for non-governmental purposes.

c. State telephones may not be used for non-governmental long-distance calls, except for toll-free calls, collect calls, and calls billed to a personal telephone number. State telephones may be used for incidental and necessary personal local calls that are of limited number and duration and do not conflict with the proper exercise of the duties of the State employee.

d. State computers shall be used only for official business, except that state computers may be used for incidental and necessary personal purposes, such as sending personal electronic mail messages, provided that such use is in a limited amount and duration and does not conflict with the proper exercise of the duties of the State employee.

e. State vehicles shall be used only for official business or incidental personal use associated with official business away from an employee's official work station. Individuals who are authorized by their agency or public authority to use a vehicle for personal purposes shall keep records of such use, and the value of such personal use shall be calculated and reported as personal income to such individual for tax purposes.

C. Prohibition Against Campaign Contributions to the Governor

1. No State agency officer or employee who serves at the pleasure of the Governor or their appointing authority, and no member of a public authority appointed by the Governor, may make or offer to make any monetary contribution to the campaign of the Governor, or to any political campaign committee organized by or for the specific benefit of the Governor. In addition, no such individual may request or demand that any other person make or offer to make any monetary contribution to the campaign of the Governor, or to any political campaign committee organized by or for the specific benefit of the Governor.

D. Application to Public Authorities

1. Each public authority shall adopt policies or rules applying the restrictions set forth above to all officers and employees who serve at the pleasure of their appointing authority.

E. Penalties

1. Any violation of this order may result in dismissal or other appropriate sanction as determined by the appointing authority of the individual committing such violation.

Signed: David A. Paterson

Dated: June 18, 2008

Credits

Order dated June 18, 2008, filed June 18, 2008.

Current with amendments included in the New York State Register, XXXVIII, Issue 23 dated June 8, 2016.

9 NYCRR 7.7, 9 NY ADC 7.7

End of Document

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ADMINISTRATION MEMORANDUM NO. 80.04
DISTRIBUTION: STATEWIDE-GENERAL

STATE OF NEW YORK
DEPARTMENT OF LAW

January 7, 2002

**TO: ALL EMPLOYEES OF THE
DEPARTMENT OF LAW**

**FROM: ELIOT SPITZER
ATTORNEY GENERAL**

**RE: GUIDELINES FOR PRO BONO PUBLICO AND
BAR ASSOCIATION ACTIVITIES
EXECUTIVE ORDER NUMBER 4.1**

WHEREAS, there is a significant need for attorneys to render pro bono publico services and to support the work of bar associations; and

WHEREAS, many attorneys in the Department of Law have expressed a desire to provide pro bono services and participate in bar association activities; and

WHEREAS, the Department of Law encourages its employees to engage in pro bono and bar association activities; and

WHEREAS, this office is supported by public funds for the sole purpose of providing governmental legal services, and attorneys providing pro bono services and participating in bar association activities must do so in their private capacities, on their own time and without conflicting with the Department's work;

NOW, therefore, in order to encourage Department attorneys to engage in pro bono and bar association activities while ensuring that such activities do not conflict with the purposes or activities of the Department of Law, it is hereby

ORDERED, that:

1. All attorneys employed by the Department of Law are encouraged to render pro bono legal services and support the work of bar associations.

2. Any attorney seeking to undertake such activities must: (1) ensure that the activities are consistent with the guidelines set forth in this order; and (2) obtain all necessary approvals prior to commencing such activities.

3. The following are types of pro bono legal services that may be permitted, subject to the restrictions set forth in this order:

a. Legal services, other than litigation services, rendered through a pro bono program of an organization which provides legal services to individuals or entities unable to afford such services.

b. Legal services, other than litigation services, to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

c. Legal services, other than litigation services, rendered through a pro bono program of an organization and designed to increase the availability of legal services or otherwise improve the legal profession or the administration of justice.

d. Legal services, other than litigation services, on behalf of a family member of the employee, and any type of pro se legal services. While these are not traditional pro bono services, they may be permitted if the attorney first obtains the approval of his or her supervisor and the Employee Conduct Committee pursuant to the provisions of Executive Order Number 10.

4. Pro bono and bar association activities are not within the scope of the public employment or duties of Department of Law attorneys, and no State representation or indemnity will be provided for such activities. As a result, attorneys should consider whether the organization involved has adequate malpractice insurance coverage and provides reimbursement for expenses.

5. No pro bono legal services or bar association activities may be performed which would:

a. interfere with the proper and effective performance of the employee's official duties;

b. be of such nature that the outcome would be influenced or appear to be influenced by the employee's position in the Department of Law;

c. involve matters in which the State of New York, any of its agencies, or any of its employees acting in an official capacity is a party or has a direct or substantial interest; or

d. in any other way create or appear to create a conflict of interest

6. Pro bono services are outside activities, and thus an attorney may not engage in such activities unless the attorney first obtains approval from his or her supervisor and the Employee Conduct Committee pursuant to the provisions of Executive Order Number 10. Supervisors shall review each application and shall grant approval where the pro bono activity will not interfere or conflict with the attorney's responsibilities to the office, and otherwise meet the requirements set forth herein. The amount of time to be spent on the pro bono activity shall be carefully considered.

7. Although bar association activities similarly are considered outside activities, the approval of the Employee Conduct Committee pursuant to the provisions of Executive Order Number 10 is not required for an attorney to join a bar association or participate in committee or other association activities, provided that: (a) the attorney obtains the approval of his or her supervisor; and (b) the bar association activities do not violate the prohibitions set forth in Paragraph 5 above.

8. Attorneys receiving reimbursement for expenses incurred during the performance of pro bono or bar association activities must ensure that such reimbursement complies with all applicable limitations, including 19 N.Y.C.R.R. Part 930.

9. When a pro bono or bar association activity occurs during normal working hours, leave accruals must be charged or the time spent on the activity must be made up within one week.

10. Attorneys must keep their supervisors informed whenever pro bono or bar association activities will occur during regular working hours. While supervisors are encouraged to provide reasonable accommodation to attorneys desiring to perform pro bono legal services, supervisors may limit these activities and the attorney must refrain from performing them, when the supervisor determines that such services will conflict with the attorney's work obligations.

11. Support staff of the Department of Law may not be used to perform any functions in connection with pro bono or bar association activities.

12. When engaging in pro bono or bar association activities, attorneys may not use office letterhead or business cards, or otherwise, in any manner, represent that they are acting in their official capacities or on behalf of the Attorney General's office

13 When engaging in pro bono or bar association activities, attorneys may use office space, but may not use office equipment unless such use involves only nominal cost to the State. For example, attorneys may use their computers, make local telephone calls, send e-mail, use the law library, do computer research (including using the Premis CD-Rom databases), and use very limited amounts of paper for copying or receiving faxes. Attorneys may not make long-distance telephone calls, make large numbers of copies, use government vehicles, use government postage, or use any office equipment in support of pro bono or bar association activities in a manner that will incur more than a nominal cost to the State.

14 In rare circumstances, an attorney may be asked to participate in bar association activities as a representative of the Department of Law. In those cases, the activities are part of the attorney's official duties and can be performed during business hours without charging time, and the attorney may use office support services and supplies. Under these rare circumstances, the activities are within the scope of the attorney's official duties, and if necessary the State provides representation and indemnity.

15. Any violation of this Order may result in dismissal or other appropriate sanction.

Dated: January 7, 2002

ELIOT SPITZER
Attorney General

**Administrative Memorandum Number 80.04 dated January 7, 2002 supersedes
Administrative Memorandum Number 80.04 dated April 15, 1999.**