

NEW YORK STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION REPORT AND
RECOMMENDATION REGARDING A MODEL PRO BONO POLICY FOR
ATTORNEY-EMPLOYEES OF LOCAL GOVERNMENTS
AND LOCAL GOVERNMENT AGENCIES

Following a study and recommendation performed by the NYSBA Committee on Access to Justice, on June 18, 2016 the NYSBA House of Delegates adopted a Model Pro Bono Policy and Procedures for Attorneys in State and Federal Government Agencies (“State and Federal Policy”). That policy applies to State and federal government agencies, but did not provide guidance for attorneys employed in the multitude of local governments across the State of New York.

Due largely to the great variation in laws, policies and operational capabilities and resources of those local governments, the State and Federal Policy is not translatable to local government entities. However, those local entities employ numerous attorneys, who should be encouraged to perform pro bono services in a manner which fits within their local responsibilities and conforms to legal and ethical requirements.

To that end, the Local and State Government Law Section (“LSGL”) has engaged in additional study, and has concluded that NYSBA should adopt a companion policy which would encourage and guide attorneys employed by local governments and their various agencies in the performance of pro bono services.

LSGL does not intend this policy to apply to those attorney who are in private practice, but who, in the course of their private practice, represent local governments or agencies. Those attorneys are governed by the Rules of Professional Conduct, and operate in their private law practices without most of the constraints placed on attorneys who are government employees. Rather, this proposed policy is intended to apply to the many attorneys employed in local government agencies, who are sometimes prevented or restrained from providing pro bono legal service due to legal and ethical limitations on their practice of law other than for their government employers.

The Model Pro Bono Policy and Procedures for Attorneys Employed by Local Government Agencies “Local Policy” submitted as Attachment A to this report parallels the State and Federal Policy. It is not intended to prescribe an inflexible template, but rather to encourage municipalities to utilize or, where necessary, vary any or all of its model provisions as appropriate in efforts to promote voluntary legal service activities by local government attorneys. As local governments utilize and adapt the policy, it is expected that they will thereby create models that others will use. Future iterations of this policy may reflect such evolution.

The Local and State Government Law Section requests that the NYSBA House of Delegates endorse this Report, and commend to local governments throughout New York State the adoption of a pro bono policy utilizing the model policy annexed hereto.

Respectfully submitted,

NEW YORK STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION

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ATTACHMENT A

NEW YORK STATE BAR ASSOCIATION MODEL PRO BONO POLICY FOR ATTORNEY-EMPLOYEES OF LOCAL GOVERNMENTS AND LOCAL GOVERNMENT AGENCIES

Introduction:

New York attorneys, both public and private, have volunteered countless hours of pro bono legal services to their communities. Despite these efforts, the unmet legal needs of the disadvantaged throughout the State of New York greatly exceed the combined capacity of existing legal services programs. 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.

It is commonly accepted that these unfortunate circumstances have only become worse in the years since the Task Force report. Significant efforts have been undertaken to incentivize attorneys to devote time and skill to remediate as much of this problem as may be reasonably feasible, recognizing that full remediation of the problem will require the dedication of significant societal resources. Realistically, the necessary resources will not be forthcoming in the near future, and it falls to the private Bar to step up its efforts to secure justice for all.

In recognition of the scope of the problem, and to encourage members of the Bar to increase their pro bono efforts, the New York State Supreme Court Appellate Divisions have strongly encouraged all attorneys “to aspire to provide at least 50 hours of pro bono legal services each year to poor persons,” and require all attorneys to regularly report the number of hours spent providing pro bono legal services to poor persons. For those purposes, pro bono legal services are defined as those provided for specified purposes or in aid of specified clients, without charge and without expectation of compensation of any kind.

However, unlike attorneys in private practice, attorneys who are employed by local governments face unique legal and practical obstacles to providing pro bono services, whether to poor persons or to others. Public sector employees are prohibited by the State Constitution from using the resources of their government offices, which have been paid for with taxpayer money, for non-governmental purposes.¹ In addition, the Rules of Professional Conduct proscribe attorneys taking on work that creates a conflict

¹ The State Constitution’s prohibition on using governmental resources for non-governmental purposes does not prevent public initiatives and policies that may result in an incidental private benefit.

of interest with the attorney's government client, and thus limit opportunities for pro bono service. Further still, many local governments have enacted ethics codes applicable to their employees, which may further limit pro bono work. Finally, those attorney employees will not be indemnified or defended by the local governments insurer for work performed for a pro bono client, and those attorneys must protect themselves by maintaining other insurance coverage elsewhere.

With these constraints in mind, this municipality² has established the following procedures and policies to support and encourage employees of the municipality to perform pro bono legal services for individual clients, and/or for organizations that provide services to poor persons or otherwise qualify as recipients of pro bono services, or for other pro bono clients.

PRO BONO POLICY

I. Permitted Pro Bono Legal Services

Pro bono legal services are those which fall within the definition of such services pursuant to the Rules of Professional Conduct and the rules of the Appellate Divisions, and include the pro bono representation of clients, including non-litigation activities, at no cost to clients and without any expectation of compensation.

General Considerations:

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 any applicable state or local ethics restriction, including rules, regulations or other guidance of the municipal ethics board, or any other applicable law or regulation [cite any specific local restriction here];
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; or
5. Involve matters in which the municipality, its agencies, or its officers or employees in an official capacity is a party or has a direct or substantial interest.

² Note to drafter: globally replace the term "municipality" with the term "agency" or other descriptive term if appropriate.

For the Benefit of Poor Persons

The provision of pro bono legal services for the benefit of poor persons³ and others by attorneys employed by this municipality is encouraged and permitted, subject to the limits and conditions in this policy or as otherwise restricted by law or regulation. Pro bono legal services encompassed by this policy are:

- (1) professional services in a civil matter, or in a criminal matter for which the government is not required to provide legal representation, rendered directly to an individual who is financially unable to pay an attorney;
- (2) 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
- (3) professional services rendered to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

[OPTION WITH RESPECT TO OTHER WORTHY ORGANIZATIONS:

For the Benefit of Worthy Organizations

The municipality recognizes that there are other worthy non-profit organizations in the community that would benefit from the volunteer legal services of attorneys. The provision of pro bono legal services to other worthy organizations, by attorneys employed by this municipality, is permitted, subject to the limits and conditions in this policy.]

[OPTION WITH RESPECT TO LIMITED SCOPE REPRESENTATION:

Limited Scope Representation

The municipality recognizes that there are Limited Scope Representation programs in the community that involve training attorneys to help in a clinical setting, or at a time and place established and publicized in advance for people with particular legal needs. These programs do not involve a continuing client relationship, and may be particularly convenient for attorneys seeking to balance the demands of governmental service with volunteer opportunities. The provision of pro bono legal services to organizations that provide limited scope representation opportunities, by attorneys employed by this municipality, is permitted, subject to the limits and conditions in this policy.]

II. Procedures

A. Use of Attorney's Own Time and Resources

An attorney employed by this municipality may perform pro bono legal services strictly on the attorney's own time and exclusively using the attorney's own resources (including a non-municipal telephone and non-municipal computer), provided that the work meets the requirements of the General Considerations set forth in Section I above and the employee ensures that his or her pro bono activities are covered by an outside professional liability insurance policy.

³ 22 NYCRR Part 1200, Rule 6.1.

Any attorney may seek an opinion of the municipal ethics board regarding the permissibility or propriety of a proposed pro bono matter prior to accepting it, even if the attorney will be exclusively using his own time and resources.

[Optional: If the attorney holds a high-level or policy-making position in the municipality, then he or she should obtain the approval of the INSERT ENTITY/PERSON⁴ before accepting a specific pro bono matter for which the attorney plans to exclusively use his or her own time and resources.]

B. Minimal and Incidental Use of Employer's Time [and Resources]⁵

The municipality's time [and resources] may be used in a minimal and incidental manner by an attorney employed by this municipality to provide pro bono legal services permitted by this policy, subject to the terms and conditions set forth below.

C. Procedure for Approval

[Note to drafter: OPTION 1 – use (a) only]

(a) Approval by the INSERT ENTITY/PERSON

If the attorney wishes to make minimal and incidental use of employer time and resources to perform the pro bono work covered by this policy, the attorney's participation in a specific pro bono matter must be approved in advance in writing by the INSERT ENTITY/PERSON. In determining whether to approve the request, the INSERT ENTITY/PERSON will consider whether the request falls within the kinds of pro bono services or

⁴ Note to drafter: "ENTITY/PERSON" may be the municipal governing board, the municipal ethics board, the attorney's supervisor, or some other person or body.

Further note to drafter: if there is an individual within the law department who has been given the role of pro bono coordinator (this role may exist in large city law offices and county law offices), use this optional text in lieu of "ENTITY/PERSON":

Agency Pro Bono Coordinator:

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

⁵ "and resources" should be omitted if Option 1 of Section IV.B. is selected, prohibiting the even minimal use of municipal resources. The phrase should be included if Option 2 in Section IV.B. is selected, which permits minimal and incidental use of municipal resources.

activities specifically permitted by this policy and does not violate any of the restrictions delineated in this policy.

[Note to drafter: OPTION 2 – omit (a) above; instead use (aa) and (bb) below together]

(aa) Approved Legal Services Organizations

This municipality has determined that matters referred to its attorney-employees by the legal services organizations on the list attached to this policy as Appendix “A” are approved for pro bono services to poor persons.⁶ The matters may be referred for direct representation, for the provision of counsel and advice, or for the provision of legal information, subject to the restrictions set forth below in this policy. These matters may include advice and legal information clinics for low-income people.

The organizations that are approved have each certified that:

1. The organization provides professional liability insurance coverage for attorneys who accept pro bono matters from it;
2. The organization screens clients to ensure that they are eligible to receive pro bono services;
3. The organization assesses the legal merit of a matter before it is referred to a pro bono attorney;
4. The organization provides training and support for its pro bono attorneys; and
5. The organization or the pro bono client pays for expenses, such as court filing fees and publishing costs, that cannot be waived.

[OPTIONAL: When an attorney accepts a pro bono matter from one of the approved organizations listed on appendix A, the attorney shall notify INSERT ENTITY/PERSON.]

(bb) Approval by the INSERT ENTITY/PERSON

Participation by an attorney-employee in covered pro bono activities other than those sponsored by the legal services organizations listed in appendix A must be approved in advance in writing by the attorney’s INSERT ENTITY/PERSON. In determining whether to approve the request, the attorney’s INSERT ENTITY/PERSON will consider whether the request falls within the kinds of pro bono services or activities covered by this policy and does not violate any of the restrictions delineated in this policy.

III. Prohibition on Identification with Municipality when Representing a Pro Bono Client

Attorneys who participate in pro bono activities must not indicate or represent in any way that they are acting on behalf of the municipality or in their official capacity, or allow the inference or permit confusion as to that fact.

⁶ Note to drafter: If the municipality allows pro bono work for other worthy organizations, and has a pre-approved list of such organizations, mention it here.

In particular:

1. The attorney must make it clear to the pro bono client and all others involved in a pro bono matter 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 municipality;
2. The attorney must not use municipal letterhead, agency business cards, or otherwise identify himself or herself as a government attorney in any communication;
3. The municipality's telephone number, email and the fax number must not be used for pro bono activities; and
4. Municipal offices must not be used for meetings in connection with in a pro bono activity.

IV. Use of Agency Resources:

A. Use of Work Hours

An attorney-employee must ascertain before accepting a pro bono matter whether the attorney can provide the pro bono legal services (1) entirely outside of regular work hours, (2) mostly outside of regular work hours and only minimally and incidentally during regular work hours, or (3) during regular work hours in a non-minimal, non-incidentally way.

If the pro bono matter will require work during regular work hours in a non-minimal, non-incidentally way ((3) above), the attorney may ask INSERT ENTITY OR NAME to approve a flexible work schedule to accommodate the time needed for such pro bono work. Although INSERT ENTITY OR NAME will not be required to accommodate the request, the INSERT ENTITY OR NAME may allow the flexible schedule if the attorney's performance of the attorney' work for the municipality will not be negatively impacted. Alternatively, the attorney must use his or her accrued annual or personal leave to perform the pro bono work, and must follow the municipality's rules for obtaining permission to use such accrued leave.

B. Use of Offices, Computers, Supplies and Other Municipal Resources

OPTION 1 (prohibition):

Attorneys may not use any of the resources of the agency, including but not limited to their personal offices, their computers, their word processing equipment, office supplies or photocopying to perform pro bono work.

OPTION 2 (limited use allowed; drafter should edit as appropriate):

So long as there is compliance with the foregoing restrictions on prohibiting identification with the municipality and use of work hours, attorneys may utilize municipal resources in a limited way to perform pro bono work permitted by this policy, as follows:

- a. Attorneys may use their personal offices and office computers to draft legal documents for pro bono clients.
- b. Office supplies:

Option 1: Attorneys must supply their own paper and office supplies for pro bono matters.

Option 2: Attorneys may use minimal amounts of municipal paper and office supplies for pro bono matters.

- c. Documents produced for pro bono clients must not be stored on the municipality's computers for any period of time.
- d. Note that attorneys who use the municipality's personal office and office computers cannot guarantee their own access to, or the confidentiality of, the attorney's documents and communications pertaining to a pro bono matter, since the municipality owns and controls these real and virtual spaces. This lack of perfect confidentiality may impact the attorney's ability to fully comply with Rule 1.2 of the Rules of Professional Conduct with respect to the pro bono client.
- e. Attorneys who use office computers to perform pro bono work must adhere to any incidental personal use provisions of the municipality's technology use policy.
- f. The municipality's license with an online legal research provider such as Westlaw or Lexis/Nexis may be used to do pro bono research. The attorney must become familiar with the scope of the license, and should not incur extra charges for researching outside the license scope unless the attorney has obtained prior approval and will reimburse the municipality.
- g. The attorney must not use the attorney's work email account to transmit or receive electronic communications, files, folders, or documents of any kind. The attorney must not copy computer files, folders or documents, or use municipal computer files, folders or documents for the benefit of a pro bono client, with the exception of templates and models.
- h. The attorney must not use the time or resources of any municipal employee for the performance of pro bono work, such as including secretaries or process servers, regardless of the time of day or location of the work.
- i. No preprinted material of the municipality, or any document or computer file that uses the logo or name of the municipality in an identifying manner, may be used in the performance of pro bono legal services, including letterhead and business cards.
- j. Attorneys must not make long distance telephone calls on the office phone if the municipality pays more for long distance calls than it pays for local calls, use government vehicles, or use government postage or delivery service accounts (e.g., UPS, FedEx) for the provision of pro bono legal services.

V. Professional Liability Insurance:

The municipality does not provide professional liability coverage for the pro bono work of its attorneys. Attorneys will not be indemnified or defended by the municipality against any claim made by a pro bono client. Therefore, attorneys must

ensure that outside professional liability insurance coverage is in place to defend and indemnify them in the case of such a claim.

VI. Aspirational Goal:

Consistent with the New York Rules of Professional Conduct (22 NYCRR Part 1200, Rule 6.1), the agency encourages, but does not require, every attorney covered by this policy to provide at least 50 hours of pro bono legal services each year to poor persons.

VII. Disclaimer:

This pro bono policy does not override statutes, rules or regulations governing the use of government property. Any attorney-employee of the municipality who has questions about the application of this section to any particular situation should consult with INSERT ENTITY/NAME.

Appendix A [if Option 2 of Section II.C is used]

Approved Organizations for Pro Bono Services to poor persons:

October 5, 2018

Dear NYSBA Executive Committee Members:

At a meeting held on October 2, 2018 the New York State Bar Association's President's Committee on Access to Justice (PCAJ) unanimously passed a motion in support of adoption by the NYSBA House of Delegates of the Local and State Government Law Section's report and recommendation to establish a model pro bono policy for attorneys employed by local governments and local government agencies. We write in our capacities as the co-chairs of the PCAJ to urge the Executive Committee to endorse the model pro bono policy and urge the NYSBA House of Delegates to approve it.

The House of Delegates adopted a similar model pro bono policy for attorneys in state and federal government agencies at its meeting on June 18, 2016, following consideration of a report and recommendation submitted by PCAJ. As with that model policy, we believe that the policy proposed by the Local and State Government Law Section will allow local government agency attorneys, under appropriate terms and conditions, to participate in pro bono activities with the encouragement and support of their employers.

The problems that will be able to be addressed by the Local and State Government Law Section's proposed model policy are the same as those that caused PCAJ to recommend the adoption of a policy for state and federal attorneys in government agencies in 2016:

- 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 the performance of outside work by the attorneys employed by them; and
- The lack of formal referral processes for government agency attorneys to receive pro bono cases.

Despite significant increases in funding for civil legal services and pro bono providers in New York State in recent years, in its November 2017 report to the Chief Judge, the New York State Permanent Commission on Access to Justice concluded that in 2016, 63% of the legal needs of low-income New Yorkers remains unmet. Pro bono attorneys are needed to help abate this high unmet need to serve, among many others, survivors of domestic violence and sexual assault, seniors who are subjected to

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consumer scams, financially distressed homeowners facing foreclosure and veterans with disabilities seeking to establish eligibility for benefits.

NYSBA has a long and rich history of encouraging New York attorneys to serve the public interest and to provide pro bono services and, together with that encouragement, NYSBA provides support for such work through our Department of Pro Bono Affairs and the provision of continuing legal education, such as the one sponsored in October 2017 on the ethics of government attorneys providing pro bono services. The adoption of the proposed model policy by the House of Delegates is consistent with this history.

The adoption of the proposed policy will provide another tool to the legal services and pro bono providers, which will be able to add new components to their service delivery systems to help those who are in need.

We thank you for your consideration of our comments and invite you to contact us if you have any questions or need any additional information.

Very truly yours,

Hank Greenberg
Co-Chair
President's Committee on Access to Justice

Edwina Frances Martin
Co-Chair
President's Committee on Access to Justice