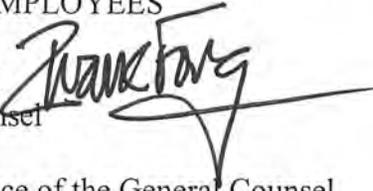




Homeland
Security

October 4, 2012

TO: ALL OGC EMPLOYEES

FROM: Ivan K. Fong 
General Counsel

SUBJECT: Pro Bono Legal Services in the Office of the General Counsel

I am pleased to announce that the Office of the General Counsel (OGC) has developed a set of guidelines to encourage and facilitate pro bono legal and other volunteer service by OGC employees. The attached Frequently Asked Questions (FAQs) are intended to help OGC employees engage in this volunteer work. The document clarifies the scope and effect of laws and administrative requirements governing federal employees and pro bono legal and volunteer service.

Employees who wish to engage in *pro bono* or volunteer service should not be dissuaded by the additional rules that they may face by virtue of their federal service. Compliance with these rules is generally straightforward and consistent with participation in a broad range of activities. Depending on their individual circumstances, OGC employees may be able to assist at advice-and-referral clinics, litigate cases in state or federal courts, or perform transactional and planning work. Such activities benefit our community, foster a sense of shared responsibility in the workplace, and provide an important opportunity for employees to develop new professional interests and skills.

Please take a moment to review the FAQs and consider setting a personal goal for your own pro bono legal and other volunteer service. Although an employee's decision to engage in pro bono legal services is a personal one, ABA Model Rule 6.1 provides a useful benchmark. Model Rule 6.1 provides that every lawyer should aspire to render at least fifty hours of pro bono legal services per year. Moreover, Executive Order 12988 (Feb. 5, 1996) encourages federal agencies and their employees to participate in this important and meaningful volunteer work. I am confident you will find that the rewards of this work more than justify the investment.

Attachment as stated



OGC Guidance on Pro Bono Legal Services FAQs

Given the significant unmet need for legal and other community services in the nation and our courts, and consistent with Executive Order 12,988 (Feb. 5, 1996),¹ the Office of the General Counsel (OGC) encourages and supports efforts by its employees to provide pro bono legal services within their communities. Although service in OGC and the Department is itself one of the highest forms of public service, we should also strive to increase access to justice for all and to strengthen our communities. This Guidance therefore provides specific recommendations for those interested in pursuing pro bono activities.²

I. DEFINITIONS AND GENERAL GUIDELINES

Q 1: What types of services are covered by this document?

This Guidance defines pro bono legal services broadly to include many different types of activities performed without compensation. Examples include, but are not limited to, legal services to persons of limited means or other disadvantaged persons; assistance to charitable, religious, civic, community, governmental, health, and educational organizations; legal services to individuals or groups seeking to protect civil rights, civil liberties or public rights; and activities seeking to improve the law or a legal system.

Q 2: To whom does this document apply?

This Guidance applies to all employees of immediate Office of the General Counsel (IOGC), and should serve as a useful resource for employees in component counsel offices. If you serve in a component counsel office and are interested in pursuing pro bono opportunities, we encourage you to consult with a local subject-matter expert to determine whether there are any special rules that apply to you or your office.

Q 3: Whom do I contact if I want to get involved?

OGC will form a Department-wide Pro Bono Committee with representatives from all participating component counsel offices. The OGC Pro Bono Coordinator will work with component representatives to serve as a liaison between the Department and the Federal Government Pro Bono Program, which coordinates pro bono trainings and opportunities in the District of Columbia and major cities across the country.

Feel free to contact your component's Pro Bono Committee member with questions about pro bono participation. You can find contact information for the OGC Pro Bono Coordinator,

¹ E.O. 12,988, sec. 2 provides that “[a]ll Federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline.”

² On October 12, 2011, DHS published a notice of proposed rulemaking, “Supplemental Standards of Ethical Conduct for Employees of the Department of Homeland Security.” 76 Fed. Reg. 63,206. When DHS finalizes this rule, this Guidance may be superseded in whole or in part by applicable provisions of the final rule as that rule pertains to outside activities, including volunteer services and pro bono legal services.

component Pro Bono Committee members, and the Federal Government Pro Bono Program on the [Volunteer & Pro Bono Opportunities](#) page of the OGC Knowledge Management Center. We update this page regularly with information on upcoming pro bono trainings and opportunities.

Q 4: Must I obtain approval to provide pro bono legal services?

No, you are not required to obtain prior approval to engage in pro bono legal services or other outside activities. If you are interested in participating in an identified pro bono activity, we recommend that you consult with an ethics official to confirm that the activity does not conflict with your official duties. Before engaging (or agreeing to engage) in representational pro bono activities that involve representing a person or entity before federal agencies or courts, or in activities that relate to the work of the Department or your official duties, we strongly recommend that you consult with an ethics official and your supervisor.

Q 5: May OGC personnel who are not attorneys engage in pro bono legal services?

Yes! If you are a non-attorney employee interested in assisting with pro bono legal services, you should contact your component's Pro Bono Coordinator(s) for information on available programs. You can also contact the Federal Government Pro Bono Program directly. The Program manages a central pool of federal professional staff volunteers for pro bono legal projects.

OGC attorneys engaging in pro bono work may not request assistance from OGC's non-attorney professional staff.

Q 6: What types of pro bono legal services are prohibited?

Any activity that would conflict with your official duties is prohibited. An activity will conflict with your official duties if it violates any federal statute, rule, or regulation, including, but not limited to, the criminal conflict of interest statutes at 18 U.S.C. §§ 201-209 (Bribery, Graft, and Conflicts of Interest); the Hatch Act at 5 U.S.C §§ 7321-7326 (and related regulations); the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. part 2635; and Department regulations or policies that will require you to disqualify yourself from matters that are central or critical to the performance of your official duties. For more information on activities that would conflict with your official duties, consult the FAQs below.

II. CONFLICTS OF INTEREST AND RELATED ISSUES

Q 7: May I represent other persons in legal matters before federal agencies or courts?

Generally, no. A criminal conflict of interest law, 18 U.S.C. § 205, prohibits federal employees from acting as an agent or attorney for another before any federal department, agency, court, court-martial, or civil or military commission in connection with a matter in which the United States is a party or has a direct and substantial interest. Under the same provision, a federal employee also may not act as an agent or attorney for prosecuting any claim against the government. There are limited exceptions for representing a parent, spouse, or child; for serving as a personal fiduciary such as an executor or guardian for another person or legal entity; and for representing persons in federal personnel disputes under certain circumstances, as long as such

representation does not otherwise conflict with your official duties. (This law does not restrict your ability to represent others before the District of Columbia government.)

Q 8: May I assist persons seeking federal government benefits?

Yes, in limited ways. You may provide non-representational assistance, such as filling out forms for a person seeking government benefits. You may not, however, represent a third party before any federal agency or court in this context. You should be mindful that you may not contact a federal agency, with the intent to influence the agency on behalf of another person, except those persons permitted by 18 U.S.C. § 205(e).

Q 9: May I prepare federal or state income tax returns?

Yes. For federal returns, however, you are prohibited from representing another person before the IRS in connection with a tax return dispute other than serving as a fact witness to answer questions about the preparation of the return. You may not advocate for or against any action by the IRS on behalf of the taxpayer. You may prepare District of Columbia and state returns and represent persons in these matters before the District of Columbia or other state government.

Q 10: May I provide services to political organizations?

The Hatch Act and related regulations govern your participation with organizations or persons whose activities are geared towards the success or failure of a partisan political party, candidate, or group. Additional rules also apply to DHS political appointees, by DHS policy.

Accordingly, this Guidance does not cover providing services to these organizations. You should consult with an ethics official and review information from the U.S. Office of Special Counsel if you have questions about the rules for engaging in partisan political activities in a volunteer capacity.

Q 11: Are there activities I can participate in that do not involve client representation?

Absolutely! Many legal clinics allow attorneys to provide brief advice and referral for clients on a walk-in basis, without taking on individual cases. You can also staff intake sites, guide clients through divorces at a pro se divorce clinic, help clients to fill out tax forms, perform know-your-rights workshops for victims at domestic violence shelters, write wills and powers of attorney for elderly clients, and much more.

III. USE OF POSITION AND AGENCY RESOURCES

Q 12: May I use my official title in connection with my pro bono services?

No. You may not indicate or represent in any way that you are acting on behalf of the Department of Homeland Security, or in your official capacity, when providing pro bono legal services.

We recommend that you make the distinction between your official duties and your pro bono work especially clear when you are engaging in representational pro bono work. To that end,

your component's Pro Bono Committee member can provide you with a model retainer agreement for you and your pro bono client to execute.

Q 13: May I use Department letterhead or business cards?

No. You may not give the appearance that your pro bono activities are being carried out as part of your official duties. Therefore, you may not use Department letterhead, business cards, fax cover sheets, envelopes, or franked mail for any communication, correspondence, or pleading in carrying out your pro bono activities.

Q 14: May I use Department information systems or government-issued office equipment such as my office phone/cell phone, email, internet, printers, or other government property in connection with my pro bono services?

DHS employees may use Department information systems and other government property for authorized purposes only. Limited personal use of such resources by employees during non-work time is authorized, as long as the use:

- a. involves minimal additional expense to the government,
- b. is performed on the employee's non-work time,
- c. does not reduce productivity or interfere with the Department's mission or operations, and
- d. does not violate the Standards of Ethical Conduct for Employees of the Executive Branch.

To avoid confusion as to whether you are participating in the pro bono activity in your personal or official capacity (as the latter is prohibited), when using Department e-mail, you should indicate that the e-mail is being sent in your personal capacity and not in your official capacity as an employee of the Department of Homeland Security.

Q 15: May I use Westlaw and other electronic computer databases?

IOGC will allow for the use of Westlaw and LexisNexis as long as there is no additional cost to the Department. Basic use of Westlaw does not impose any additional costs, and is therefore permitted. Contact your component's Pro Bono Committee member to determine whether your component has a similar policy.

Note that certain databases and other sources of information (for example, law enforcement databases) may not be used in connection with pro bono activities, regardless of cost. Contact your component's Pro Bono Committee member with questions.

Q 16: May I engage in pro bono legal services on government time?

Employees are strongly encouraged to accomplish pro bono legal services outside their scheduled work hours. At times, pro bono legal activities may occur during work hours, such as an employee's attendance at a court hearing to represent a client. Employees seeking to provide pro bono legal services during work hours may be granted leave without pay, annual leave, or in very limited circumstances, administrative leave, as explained below. Supervisors are urged to

be flexible and to accommodate, where feasible, the efforts of their employees to provide pro bono legal services.

When considering employee requests for leave to engage in pro bono legal services, supervisors should give due attention to the effect of the employee's absence on office operations, to include budgetary constraints and heavy workloads. A supervisor's personal views regarding the substance of the pro bono activity may not influence the decision to grant an employee's request to engage in pro bono legal activities during hours of work.

As a general rule, it is inappropriate to pay an employee for time engaged in pro bono legal services. In limited circumstances, however, it may be appropriate to excuse an employee from duty for brief periods of time without loss of pay or charge to leave to participate in pro bono activities.

Supervisors may consider guidance from the U.S. Office of Personnel Management (OPM), which has advised that granting administrative leave is within an agency's discretion in cases where an employee's absence to participate in volunteer activities is not prohibited by law and satisfies one or more of the following criteria: (1) the absence is directly related to the department or agency's mission, (2) the absence is officially sponsored or sanctioned by the head of the department or agency, (3) the absence will clearly enhance the professional development or skills of the employee in his or her current position, or (4) the absence is brief and is determined to be in the interest of the agency. See Memorandum from Kay Coles James, OPM Director, to Heads of Executive Departments and Agencies, on Participation of Federal Employees in Volunteer Activities (Apr. 6, 2004) (referencing OPM's Guidance on Scheduling Work and Granting Time off to Permit Federal Employees to Participate in Volunteer Activities). Administrative leave should not be granted for pro bono legal services that directly benefit the employee or those with whom the employee has a personal relationship. It is recommended that supervisors approve no more than 40 hours of administrative leave each leave year for employees to perform pro bono legal services.

Q 17: Is there a directive or instruction on OGC's Guidance on Pro Bono Legal Services?

No, there is not a specific directive or instruction concerning OGC's guidance on pro bono legal services. At this time, the only directive concerning volunteer service is DHS Management Directive 254-01, Volunteer Community Service. MD 254-01 authorizes administrative leave for volunteer activities that directly relate to or support certain mission areas in the Department. General pro bono legal services would not fall within that separate authorization, except for limited situations, such as providing legal services to a victim of a natural disaster. The unique issues that arise in the pro bono context, such as conflicts of interest and professional responsibility concerns, may justify the creation of a separate directive specifically tailored to pro bono legal services. Similarly, OPM guidance and similar pro bono legal services of other agencies counsel in favor of recognizing the unique nature of pro bono legal services, as compared to the specific nature of the activities contemplated by MD 254-01.

IV. MISCELLANEOUS

Q 18: What if I have never done any pro bono work before?

It is never too late to start doing pro bono work. In addition to your component's Pro Bono Committee member, there are many resources and sources of support to help you. First, you can get comfortable in a new skill or area of law by attending a training session. Many organizations host introductory trainings throughout the year on specific skills and areas of law. Second, local legal services organizations assign mentors to government attorneys to help you with your work. (In fact, many attorneys also start by co-counseling their first pro bono case.) Third, many legal services organizations have terrific manuals, sample forms, and pleadings banks that you can use. And finally, you don't have to start by taking a case – you can attend an advice and referral clinic, volunteer at an intake site, or perform any of a range of other activities.

Q 19: Do I need to obtain malpractice coverage?

The federal government does not provide malpractice coverage for your pro bono work. Generally, volunteer programs organized by the local bar or more established referral programs provide malpractice coverage. This includes most organizations that receive attorneys through the Federal Government Pro Bono Program. You should ask the organization through which you will be providing pro bono services whether it will provide malpractice coverage for you.

Q 20: May I engage in pro bono legal services in the District of Columbia if I am not a member of the D.C. Bar?

Yes. Federal government attorneys do not need to be members of the D.C. Bar in order to do pro bono work in D.C. Under an amendment to D.C. App. Rule 49, an attorney must: (1) be an officer or employee of the United States; (2) be a member in good standing of the highest court of a state or territory; (3) provide legal counsel without a fee in any matter that is handled; (4) be assigned or referred to the matter by an organization that provides legal services to the public without fee; (5) be supervised by an enrolled, active member of the D.C. Bar; and (6) if the matter requires a court appearance, 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. If you have further questions about the application of Rule 49, please contact the District of Columbia Bar at (202) 737-4700 or www.dcbbar.org.

We urge you to check your local bar rules to determine the limits of your representational activities in providing pro bono legal services.

- Last updated: October 4, 2012