

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

## POLICY STATEMENT ON

## PRO BONO LEGAL SERVICES

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### I. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION PRO BONO LEGAL POLICY

**The Policy.** Given the significant unmet need for legal services in the nation, it is the policy of the Federal Mine Safety and Health Review Commission (the “Commission”) to encourage and support efforts by Commission employees to provide pro bono legal services within the community that are consistent with applicable federal statutes and regulations governing conflicts of interest and outside activities. While service in the Commission is itself a form of public service, the Commission further strives through this policy to increase access to justice for all individuals and to strengthen our community. To this end, the Chairman encourages Commission attorneys to set a personal goal of at least 50 hours per year of pro bono legal service.

#### COMMENTS:

*Authority. The Commission’s Policy Statement on Pro Bono Legal Services (the “Policy Statement”) is adopted pursuant to Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996), which states in section 2 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.”*

*Scope of the Program. The Commission’s Policy Statement will extend to all attorneys employed by the Commission and will encourage volunteer legal work.*

*The 50-Hour Goal. The Commission has adopted a 50-hour aspirational goal. This goal is based on the goal announced in the Department of Justice Policy Statement on Pro Bono Legal and Volunteer Services (March 6, 1996). The 50-hour goal is in accord with the American Bar Association’s Model Rule 6.1 of the Model Rules of Professional Conduct (“Model Rule 6.1”), and falls within the range adopted by other State bar associations.*

### II. DEFINITION OF PRO BONO LEGAL SERVICES

**Definition.** Pro bono legal work is broadly defined to include many different activities, performed without compensation.

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, 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 the institutional goals of these groups;
3. individuals, groups, or organizations seeking to secure or protect civil rights and civil liberties; or
4. activities for improving the legal system or the legal profession.

*COMMENT: This definition is based on Model Rule 6.1, 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 Commission notes, however, that statutory and regulatory restrictions may prohibit government attorneys from providing pro bono representation in certain types of cases. See Section III, below.*

### **III. LIMITATIONS ON PRO BONO LEGAL SERVICES**

#### **A. Prior Approval**

Commission attorneys seeking to engage in any pro bono legal work must follow agency procedures for participating in outside activities. See 5 C.F.R. § 8401.103; see generally 5 C.F.R. § 2635.803 and note thereto. Section 8401.103(a)(1) provides that approval of such activities must be in writing and signed by the volunteer attorney's immediate supervisor and the Commission's designated ethics official.

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

1. violate any federal statute, rule, or regulation, including, for example, 18 U.S.C. § 201 et seq. and 5 C.F.R. Parts 2635 and 8401;
2. interfere with the proper and effective performance or the employee's official duties, see 5 C.F.R. § 2635.705;
3. create or appear to create a conflict of interest (see Section III.B, below); or

4. cause a reasonable person to question the integrity of the Commission's programs and operations.

Where an employee has been denied approval by his or her designated supervisor or ethics official to perform pro bono legal work, the decision may be appealed to the Chairman.

## **B. Conflicts of Interest**

General Standard. Commission attorneys may not engage in pro bono legal work that creates or appears to create a conflict of interest with their work for the Commission. Under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, a conflict of interest generally exists where the work would:

1. require the recusal of the attorney from significant aspects of his or her official duties, *see* 5 C.F.R. § 2635.802(b);
2. 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
3. create an appearance of official sanction or endorsement, *see* 5 C.F.R. § 2635.702.

18 U.S.C. § 205. With limited exceptions, outside activities may not include the representation of third parties before the federal government.

### Responsibility for Conflicts Check.

1. A Commission ethics official will be responsible for completing a conflicts check for each pro bono legal activity. Approval of such activities will be made in writing and must be signed by the volunteer attorney's immediate supervisor and a Commission ethics official. *See* 5 C.F.R. § 8401.103(a)(1).
2. Volunteer attorneys will be responsible on an ongoing basis for ensuring that their pro bono legal work does not present a conflict of interest and does not otherwise violate any applicable statute or regulation.

### *COMMENTS:*

*The issue of conflicts should be determined by reference to the government-wide standards of conduct, 5 C.F.R. Part 2635 (especially sections 801 and 802), and the Commission's supplemental regulations, 5 C.F.R. Part 8401.*

*Application of these standards of conduct necessarily will involve the exercise of judgment. These judgments likely will differ from one situation to another. As the Commission's*

*ethics officials and the Pro Bono Program Manager (see Section VI, below) gain experience in this area, they will refine, as necessary, application of the Commission's conflict of interest standards to pro bono activities.*

*Hatch Act Policy. Outside activity by Commission attorneys must comport with the regulations implementing the Hatch Act Reform Amendments of 1993, see 5 C.F.R. Part 734.*

*Non-Representational Assistance. Commission attorneys 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, provided that the services satisfy the prior approval requirements of Section III.A, above, and do not present a conflict of interest as addressed in Section III.B, above.*

### **C. Additional Considerations**

Retainer Agreements. Attorneys entering into pro bono representation are encouraged to execute retainer agreements with their clients. The Pro Bono Program Manager (see Section VI, below) 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 Commission. Clients should countersign a retainer letter in acknowledgment of these facts, and any other limits on the given representation outlined in the letter.

Malpractice Coverage. Commission attorneys are encouraged to undertake pro bono representation only in cases where they are able to obtain malpractice coverage. Before agreeing to accept a pro bono case, Commission attorneys should determine whether the referring pro bono program or organization has a malpractice insurance policy covering volunteer attorneys. The Commission does not provide malpractice coverage for pro bono work.

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

The District of Columbia Professional Licensing Fee. The D.C. Code has been amended to provide that members of the D.C. Bar “engaged in the provision of legal services, on a pro bono basis solely or in combination with government service,” are exempt from the requirement to pay the District of Columbia professional licensing fee of \$250.

Restrictions on the Unauthorized Practice of Law. Attorneys not licensed in the District of Columbia may only practice in D.C. subject to the constraints of the D.C. Court of Appeals rules regarding the unauthorized practice of law. See D.C. Court of Appeals Rule 49, as amended by Order No. M-196-96 (July 29, 1996) (providing that U.S. government attorneys in good standing with the bar of another state may provide pro bono services in D.C. provided that

the services are referred “by an organization that provides legal services to the public without fee,” that the attorneys are supervised by active members of the D.C. Bar, and that the attorneys file an appearance with the court, as necessary, certifying that their representation is gratis).

Commission attorneys licensed 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.** Commission attorneys who provide pro bono legal services may not indicate or represent in any way that they are acting on behalf of the Commission, or in their official capacity. The incidental identification of an employee’s position or office -- for example, the use of the Commission’s address to ensure mail delivery -- is permitted.

A Commission attorney may not use Commission letterhead or business cards, or otherwise identify himself or herself as a Commission employee in any communication, correspondence, or pleading connected with pro bono legal activities or services.

Commission attorneys are responsible for making it clear to their pro bono clients, any opposing parties, or others involved in a pro bono case, that they are acting in their own individual capacities as volunteers, and not as representatives of, or on behalf of, the Commission.

#### **V. USE OF AGENCY RESOURCES**

**Hours of Work.** Commission attorneys are encouraged to seek pro bono legal opportunities that can be accomplished outside their scheduled working hours. Pro bono legal services, however, may sometimes require attention during work hours. Supervisors are urged to be flexible and to accommodate, where feasible, the efforts of their employees to perform pro bono legal work. Commission attorneys seeking to participate in pro bono legal work during their normal work hours may also be granted leave without pay, annual leave, or administrative leave, the latter as explained below in the comment.

When considering employee requests for leave to engage in pro bono legal work, 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 work during normal working hours shall not be affected by a supervisor’s personal views regarding the substance of the pro bono activity.

COMMENTS:

*Administrative Leave.* 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 volunteer activities. Administrative leave should be limited to those situations in which the employee's volunteer service will enhance the professional skills or development of the employee in his or her current position.

*Administrative leave should not be granted for pro bono legal activities that directly benefit the employee requesting leave, or those with whom the employee has a personal relationship.*

*Group Work.* The Commission recommends that, except in cases involving service as arbitrators in alternative dispute resolution cases, attorneys organize themselves into teams of two or three persons to handle pro bono cases. Such an approach should help to minimize the impact pro bono cases have on the day-to-day workings of the Commission.

**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) and 2635.704(a). Under this Policy Statement, the following personal uses of government office and library equipment and facilities by Commission attorneys in connection with pro bono legal work are authorized:

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 calls or facsimile transmissions to locations within the office's local calling area.

COMMENTS:

*This policy permits personal use of equipment and facilities only if it involves negligible additional expense to the government. 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 used and 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 the Executive Director 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 other materials would be authorized, as it involves only negligible expense to the government.*

*In using government property, employees must be mindful of their responsibility to protect and conserve such property and to use official time to perform official duties. See 5 C.F.R. §§ 2635.101(b)(9), 2635.704(a), and 2635.705(a).*

**Clerical Support.** Pro bono legal services provided by Commission attorneys 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 services, e.g., the typing of briefs or other pleadings. See 5 C.F.R. § 2635.705(b). On the other hand, support staff may wish to volunteer their services. The Pro Bono Program Manager, in consultation with the Executive Director, will develop a pool of support staff who are willing to volunteer for pro bono projects, if such interest is found to exist.*

## **VI. ADMINISTRATION OF THE PRO BONO LEGAL SERVICES PROGRAM**

The Chairman shall appoint a Commission attorney to be Pro Bono Program Manager. The manager will undertake the following responsibilities:

1. identify Commission attorneys interested in performing pro bono legal services and the areas of the law in which they are interested;
2. consult with pro bono referral organizations to identify pro bono activities in which Commission attorneys may have an interest, and to publicize such pro bono activities within the Commission;
3. work with the Commission's ethics officials in screening for conflicts cases referred to Commission attorneys;
4. work with the Executive Director in identifying support staff who are interested in volunteering for pro bono work;
5. report periodically to the Chairman on the status of the program, and the program's success in facilitating referrals of pro bono work to Commission attorneys; and
6. perform whatever other functions that may be necessary to further the goals of this Policy Statement.

**VII. DISCLAIMER**

This Policy Statement is intended only to encourage increased pro bono legal activities by Commission attorneys (and to a more limited extent, support staff), 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 Commission will not be responsible in any manner or to any extent for any negligent or otherwise tortious acts or omissions on the part of any Commission employee engaged in any pro bono activity. While the Commission encourages pro bono legal activities by its employees, the Commission exercises no control over the services and activities of employees engaged in pro bono legal work, nor does it control the time and location of any pro bono activity. Each employee is acting outside the scope of his or her employment whenever the employee participates in, supports, or joins in any pro bono legal activity.

APPROVED: \_\_\_\_\_  
Mary Lu Jordan, Chairman

DATE: \_\_\_\_\_