MEMORANDUM FOR Office of the Army General Counsel

SUBJECT: *Pro Bono* Legal Services Policy

1. **Purpose.** This Memorandum sets forth the Office of the Army General Counsel (OGC) policy for *pro bono* service, consistent with Executive Order 12,988 (Reference a.), Army Regulation 600-200 (Reference b.), and JAG Pub 1-1 (Reference c.). The OGC *Pro Bono* policy will provide certain OGC personnel the authorization to perform *pro bono* legal services, on a voluntary basis, within the guidelines established herein.

2. **Scope.** This policy applies to career civilian attorneys, honors attorneys, and support staff assigned to the OGC. Judge Advocates (JAs) who wish to provide *pro bono* services must comply with the procedures in JAG Pub 1-1 (Reference c.).

3. **Background.**

   a. Executive Order 12,988 (Reference a.) provides that “all 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.” Rule 6.1 of the Model Rules of Professional Conduct (Reference d.) states that all attorneys have a duty to provide legal services to people who are unable to pay and should aspire to provide fifty hours of *pro bono* services per year.

   b. Federal government attorneys comprise a substantial portion of the legal professionals in the Washington, D.C. metropolitan area. Authorizing these attorneys to voluntarily provide *pro bono* services serves the public interest by increasing the potential availability of legal services for those in need.

   c. Because OGC attorneys rarely appear in court or represent non-institutional clients as part of their official duties, *pro bono* practice provides an excellent opportunity for OGC attorneys to hone their courtroom and advocacy skills. These skills are an integral part of any lawyer’s general professional development and enhancing these skills directly benefits the Department of the Army. Similarly, support staff members can develop their skills by volunteering with legal services organizations, and confer benefit to the Army as well.

4. **Definition of *Pro Bono* Legal Services.** Under this policy, *pro bono* service is the delivery of legal advice and/or representation to clients with no expectation or acceptance of a fee. Such legal services may be provided to:

   a. Persons of limited means or other disadvantaged persons;
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b. Charitable, religious, civic, community, governmental, health, and educational organizations in matters that are designed primarily to address the needs of persons of limited means or other disadvantaged persons;

c. Individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights;

d. Charitable, religious, civic, community, governmental, health, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would deplete the organization’s economic resources or would otherwise be inappropriate; or

e. Activities seeking to improve the law, the legal system, or the legal profession.

5. Pro Bono Coordinator. The General Counsel may appoint an OGC Pro Bono Coordinator to oversee implementation of this policy. The Coordinator will:

   a. Interface with the Department of Justice (DOJ) Pro Bono Manager and participate in the Interagency Pro Bono Working Group;

   b. Disseminate information on pro bono opportunities (typically from the DC Bar);

   c. Answer questions regarding pro bono participation; and

   d. Support OGC participation in certain pro bono activities as appropriate.

6. Authorization. Should they desire to provide pro bono services on their own time, OGC attorneys are authorized to do so under this policy and applicable professional responsibility laws and regulations. Participation in pro bono service is strictly voluntary and pro bono service, or lack thereof, will not have a positive or negative impact on any attorney’s personnel rating or standing within OGC. Records of pro bono service in which information is retrieved by the name of the individual or by an individual identifier will not be maintained.

7. Procedures for Pro Bono Volunteers.

   a. An OGC civilian attorney seeking an opportunity to provide pro bono services in general under the auspices of a particular program shall consult with his servicing ethics counselor to complete a conflicts of interest review before committing to that program. Additionally, an OGC civilian attorney must also consult with his servicing ethics counselor in each instance in which he assumes a representational role in a pro bono case. Attorneys shall also review the DOJ Pro Bono Program DVD, a copy of which can be requested from the OGC Pro Bono Coordinator.

   b. Career civilian attorneys assigned to OGC shall obtain written permission from their supervisors before seeking opportunities to provide pro bono services. See Reference b. and Enclosure 2.
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c. Honors attorneys assigned to OGC shall obtain written permission from their supervisors before seeking opportunities to provide *pro bono* services. See Enclosure 2.

d. OGC support staff members shall obtain written permission from their supervisors before beginning volunteer work with legal services agencies. See DODD 5500.07-R (Reference e.) and Enclosure 2.


a. 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;

   (2) Interfere with the proper and effective performance of the employee's official duties, including the time and availability requirements of his position;

   (3) Create a conflict of interest or appearance of one;

   (4) Reasonably be expected to reflect adversely on the government or Department of the Army;

   (5) Detract from readiness or pose a security risk; or

   (6) Conflict with the attorney’s state bar rules and requirements.

b. Only official matters, such as the factors discussed in this policy and the cited references, may be considered when evaluating a request. A supervisor's personal views on the relative merits of *pro bono* legal services in general or a particular *pro bono* case are not appropriate factors.

c. *Pro bono* legal services may not be assigned to or otherwise required of any attorney or member of support staff. This limitation does not apply to the designation of an attorney to provide legal assistance as an official duty.

9. Licensure.

a. Attorneys licensed in the jurisdiction where the *pro bono* work occurs must comply with that bar’s *pro bono* rules (e.g., Maryland requires all members of its bar to report *pro bono* service annually. See Reference f.).

b. Attorneys not licensed in the jurisdiction where the *pro bono* work is to occur must thoroughly investigate and comply with that jurisdiction’s rules on the practice of law by foreign attorneys and the unauthorized practice of law. Some jurisdictions allow federal attorneys who are not members of that bar to handle *pro bono* cases, while others do not.
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(1) District of Columbia. Under D.C. Court of Appeals Rule 49(c)(9), federal attorneys not licensed in the District of Columbia may handle pro bono cases, subject to certain requirements. Such an attorney must:

(a) Be an officer or employee of the United States;
(b) Be a member in good standing of the highest court of a state or territory;
(c) Provide legal counsel without a fee in any matter that is handled;
(d) Be assigned or referred to the matter by an organization that provides legal services to the public without fee;
(e) Be supervised by an enrolled, active member of the D.C. Bar; and
(f) 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 Certification of Practice Pro Bono Publico (a certificate that the attorney is providing representation in that particular case without compensation). See Reference g. and Enclosure 3.

(2) Virginia and Maryland. To contribute pro bono services in Virginia or Maryland, an attorney must be a member of that state's bar. See References h. and i., respectively.

(3) Other Regions. OGC attorneys who wish to perform pro bono services in other jurisdictions are advised to consult and comply with local rules and requirements of the governing licensing authorities.


a. 18 U.S.C. § 203. Ban on Compensated Representation. A federal employee may not receive compensation for representing another person before any court, agency, or commission of the United States in a matter in which the United States is a party or has a direct and substantial interest. See Reference j.

b. 18 U.S.C. § 205. Ban on Uncompensated Representation. A federal employee may not represent another person before any court, agency, or commission of the United States in a matter in which the United States is a party or has a direct and substantial interest. For example, federal pro bono attorneys may not advise or represent clients in cases concerning Social Security, Medicare, immigration, or bankruptcy, nor may they appear in civil protective order cases when criminal charges are pending. Under a DOJ interpretation of this statute, federal pro bono attorneys may help clients complete federal income tax forms but may not provide advice in cases against the IRS. (Note that under limited circumstances, an attorney may be permitted to represent immediate family, fellow employees in personnel administration proceedings, and certain non-profit employee organizations in controversies against the United States.) See Reference k.
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c. 18 U.S.C. § 208. Conflicts of Interest. A federal employee may not knowingly participate personally and substantially in any particular matter in which he; his spouse; minor child; general partner; organization in which he is serving as officer, director, trustee, general partner or employee; or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. See Reference 1.

d. 18 U.S.C. §209. Ban on Supplementation of Salary. A federal employee may not receive any compensation, salary, or supplementation of salary in exchange for services performed as an officer of the United States, from any source other than the United States government. See Reference m.

e. 5 C.F.R. § 2635.502. Duty of Impartiality. A federal employee may not participate personally and substantially in any particular matter in which the employee knows that the matter is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter. See Reference n.

f. 5 C.F.R. § 2635.802. A federal employee may not create a conflict of interest with his official duties. For example, pro bono activities that require an attorney to disqualify himself from critical work tasks and impair his ability to perform his job functions are prohibited. A DOJ interpretation of this rule also prohibits an attorney from using the expertise gained in an official capacity in a pro bono activity. See Reference n.

g. 5 C.F.R. § 2635.702(b); DODD 5500.07-R § 3-300.a.(1). A federal employee must guard against the appearance of official sanction of outside activities. Therefore, OGC pro bono attorneys must ensure that clients, opposing counsel, and all others are aware that pro bono work is accomplished solely in a personal capacity. Furthermore, attorneys must not create the impression that the government sanctions the pro bono practice, has an interest in the outcome of any particular case, or endorses the client’s position. Therefore, OGC attorneys may not use their official titles, letterhead, business cards, or government email accounts in the course of pro bono work. Honors attorneys may not wear their uniforms in the context of pro bono representation, e.g., during court appearances or client meetings. Pro bono attorneys should specifically counsel clients regarding this aspect of representation. See References n. and e.

h. 5 C.F.R. § 734. A federal employee must comport with the Hatch Act Reform Amendments of 1993, which regulates participation in political activities. See Reference o.

i. DODD 5500.07-R § 3-305. Department of Defense employees may not request the assistance of their support staff in the furtherance of unofficial activities. Therefore, OGC pro bono attorneys may not enlist the help of paralegals or other subordinates to support their own volunteer work. See Reference e.

j. 5 C.F.R. § 2635.705; DODD 5500.07-R § 3-300.c.; DODI 1400.25.E.6.; AR 600-8-10, para. 5-27. In general, a federal employee may not use official time to perform unofficial tasks,
including pro bono services. Therefore, OGC attorneys should seek pro bono opportunities they can accomplish predominantly outside their scheduled working hours. Recognizing, however, that certain aspects of pro bono representation occur only during business hours (e.g. hearings, meetings with opposing counsel), civilian OGC personnel may request, and their supervisors may authorize, up to 40 hours of excused absence annually in support of such activities, and honors attorneys may request up to five single-day-long regular passes annually. Pro bono attorneys shall consult with their supervisors when requesting excused absences or passes. Supervisors may consider the operational impact of such leave when acting on such requests; a supervisor’s personal views on the relative merits of a particular pro bono case or pro bono legal services in general are not appropriate factors. See References n., e., p., and q.

k. 5 C.F.R. § 2635.704; DODD 5500.07-R § 2-301. As a general rule, employees may use government property only for official business or as authorized by the government. Therefore, pro bono attorney-client work product materials generally shall be stored on personal computers, not on Department of the Army computers or servers. (As government computers may be accessed for a variety of reasons outside an attorney’s control, this rule also serves to protect client confidentiality.) The following personal uses of OGC office equipment and facilities are authorized:

(1) Personal uses that involve only negligible expense to the government (such as electricity, ink, small amounts of paper, and ordinary wear and tear) and that do not interfere with the conduct of official business of others;

(2) Reasonable personal telephone and fax calls to locations within the office’s local calling area or to toll free numbers, or toll calls that are charged to non-government accounts; and

(3) Reasonable use of internet, LexisNexis, and Westlaw services. See References n. and e.

11. Practice Points.

a. Retainer Agreements. A pro bono attorney who performs representational services shall prepare and execute a retainer agreement setting out the agreed scope of work and stating that there is no expectation of compensation. The retainer agreement must not reference the attorney’s official government title, position, or organization and must clearly indicate that the attorney is acting in a personal capacity. The client must countersign the retainer to acknowledge this understanding. Sample retainer agreements are often available through the referring legal services agency and may be tailored to the particular representation. Enclosure 4 provides a generic sample retainer agreement.

b. Attorney-Client Relationships with Pro Bono Clients.

(1) An OGC attorney may enter into an attorney-client relationship with a pro bono client. The attorney alone is responsible for any attorney-client records, including electronic
records; under no circumstances will the Department of the Army assume responsibility for them.

(2) If a pro bono attorney is unable to continue representing a client, the attorney must immediately discuss the situation with the client and take all necessary measures to provide for continuity of representation. Measures may include, among other things, contacting the referring legal services organization or other pro bono attorneys, filing court petitions seeking to withdraw from representation, and providing all relevant case files to any new attorneys assuming the case.

c. Malpractice Insurance:

a. The OGC does not provide malpractice coverage for pro bono work. Because the provision of pro bono services is outside the scope of an OGC attorney’s employment, any liability for malpractice accrues to the attorney personally. Furthermore, immunities that may apply to federal attorneys in the performance of their official duties do not extend to pro bono work.

b. When seeking opportunities to provide pro bono service, OGC attorneys should determine whether the referring legal services organization has a malpractice insurance policy that covers volunteer attorneys. Attorneys should confirm personal coverage in writing before agreeing to meet with or accept a pro bono legal client. The pro bono legal services organizations identified by the OGC Pro Bono Coordinator or DOJ are among those that will provide malpractice insurance for volunteers.

c. If the pro bono legal services organization does not provide malpractice coverage, the attorney should strongly consider purchasing coverage.

12. Disclaimer. This Policy authorizes pro bono legal activities by career OGC attorneys, honors attorneys, and staff members. It does not 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. Neither the United States, nor the Department of Defense, nor the Department of the Army will be responsible in any manner or to any extent for any negligent or otherwise tortious acts or omissions on the part of any OGC employee engaged in any pro bono legal activity. OGC exercises no control over the services and activities of employees engaged in pro bono activities, and it does not control the time or location of any pro bono activity. All OGC employees act outside the scope of their employment whenever they participate in, support, or join in any pro bono activity or service.

BRAD R. CARSON

4 Encls
1. References
2. Sample Approval Memorandum
3. District of Columbia Certification of Practice Pro Bono Publico
4. Sample Retainer Agreement for Attorney Services
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References


b. Army Regulation 690-200, General Personnel Provisions, Chapter 213, paragraph 4-17, 1 Sep 83.


d. JAG PUB 1-1, JAGC Personnel Policies, paragraph 11-5, 1 Apr 12.

e. Maryland Rules, Rule 16-903, Reporting Pro Bono Legal Service.

f. Rules of the District of Columbia Court of Appeals, Rule 49(c)(9), Pro Bono Legal Services.


j. 18 U.S.C. § 205, Activities of officers and employees in claims against and other matters affecting the Government.


m. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.


o. 5 C.F.R. Part 734, Political Activities of Federal Employees.


q. Army Regulation 600-8-10, Leaves and Passes, paragraph 5-27, 4 Aug 11.
MEMORANDUM FOR [SUPERVISOR]

SUBJECT: Request for Permission to Provide Pro Bono Legal Services

1. I respectfully request permission to provide pro bono legal services under the auspices of [organization, program name, brief description].

2. I have carefully read the OGC Pro Bono Policy and I fully understand its terms. Having consulted with an ethics counselor, I do not believe my participation in the pro bono program offered by [organization] would create a conflict of interests or violate any other federal ethics law or rule. I also do not believe my participation will violate any other federal statute, rule, regulation, or bar rule; or reflect adversely on the Department of the Army or the United States.

3. I understand that my official duties are of paramount importance and my pro bono service must not interfere with those duties.

[Participant’s Signature Block]

Participation is:

____ Approved

____ Denied

[Supervisor’s Signature Block]
FORM 9. CERTIFICATION OF PRACTICE PRO BONO PUBLICO.

DISTRICT OF COLUMBIA
COURT OF APPEALS

[or] SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

Plaintiff/Appellant

v.

Defendant/Appellee

CERTIFICATION OF PRACTICE
PRO BONO PUBLICO

I certify under District of Columbia Court of Appeals Rule 49(c)(8) and 49(c)(9):

1. That I am a member in good standing of the bar(s) of:

2. That I have not been disbarred or suspended for disciplinary reasons, and I have not resigned a bar membership with charges pending in any jurisdiction or court.

3. That:

   (a) Under Rule 49(c)(9)(A), I am an enrolled, inactive member of the D.C. Bar; I am employed by or affiliated with a legal services or referral program; and I am providing representation in this case without compensation;

   (b) Under Rule 49(c)(9)(B), I am employed by or affiliated with the Public Defender Service or a non-profit organization located in the District of Columbia providing services without fee or for a nominal processing fee; I have submitted or will submit an application for admission to the District of Columbia Bar within

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ninety (90) days of commencing the practice of law in the District of Columbia; and I am supervised by an enrolled, active member of the D.C. Bar who is employed by or affiliated with the Public Defender Service or the non-profit organization and whose signature and Bar number appear below;

(c) Under Rule 49 (c)(9)(C), I am an officer or employee of the United States government; I have been assigned or referred by an organization providing legal services to the public without fee; and I am supervised by an enrolled, active member of the D.C. Bar, whose signature and Bar number appear below; or

(d) Under Rule 49 (c)(8), I am practicing under the direct supervision of an enrolled, active member of the District of Columbia Bar, whose signature and Bar number appear below; I am providing representation in this case without compensation; I have submitted or will submit an application for admission to the District of Columbia Bar within ninety (90) days of commencing the practice of law in the District of Columbia; I will not practice under this temporary authority for more than 360 days; and I give notice to the public of my bar status and supervision.

I understand, under Rule 49 (c)(9), that I am subject to the District of Columbia Rules of Professional Conduct and the enforcement procedures applicable thereto to the same extent as if I were an enrolled, active member of the District of Columbia Bar. I further understand that my conduct is subject to all authority of the courts in which I practice.

__________  __________  __________
Signature of Certifier    Print Name    Date

__________
Business Address

__________
Telephone No.

__________  DC Bar Number  Date
Signature of D.C. Bar Member

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11
Sample Retainer Agreement for Attorney Services

1. By this agreement, ________________________________ ("Client") retains ________________________________ ("Pro Bono Counsel") to advise, represent, appear and act for Client concerning the following matter: ____________________________________________

The Pro Bono Counsel is acting in his/her individual capacity, and is not acting on behalf of the Department of the Army, the federal government, or the United States.

2. This case was referred to Pro Bono Counsel through ___________ . The client understands that it is Pro Bono Counsel and not _______________ that is representing him/her in this matter. The Client certifies that no other attorney is representing him/her in this matter and understands that the Pro Bono Counsel cannot and does not promise a successful outcome.

3. The Pro Bono Counsel agrees to undertake this representation on a pro bono basis, which means that the Pro Bono Counsel will not charge the Client for attorney or paralegal hours expended on this matter. Additionally, Pro Bono Counsel will not seek attorney’s fees in connection with this matter.

4. The Client agrees to cooperate fully with the Pro Bono Counsel and will promptly notify the Pro Bono Counsel of any of the following:
   (A) Any changes in address, telephone number, or changes in the client’s situation that may impact Attorney’s representation; or
   (B) Any plans to leave town that might interfere with court dates or appointments.

5. The Client agrees to assist the Pro Bono Counsel with this matter by:
   (A) Providing complete information, including information that will assist the Pro Bono Counsel to investigate this matter;
   (B) Maintaining regular contact with Pro Bono Counsel as is necessary for the conduct of his/her case;
   (C) Attending and being on time for all appointments and court dates;
   (D) Promptly notifying Pro Bono Counsel when other people contact Client about the case; and
   (E) Helping to locate persons who may provide information about this case.

6. Pro Bono Counsel agrees to:
   (A) Keep the Client informed about the status of his/her case;
   (B) Keep all sensitive information provided by the client confidential unless authorized by the Client to disclose it (except that information may be shared with other attorneys who are working on the case or assisting with representation);
   (C) Consult with the Client before making any significant decisions about the case; and
   (D) Not settle the case without Client’s consent.

7. The Client agrees to assume responsibility for all expenses, which may include, but are
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not limited to, agency or court filing fees, costs of service of process and certified mail and any other administrative costs or litigation expenses. Attorney will discuss any significant costs with Client before incurring them. Client understands that Pro Bono Counsel does not charge a fee for his/her work on the case.

8. When Pro Bono Counsel closes Client’s file, all original documents that were furnished by Client shall be returned. Pro Bono Counsel will maintain the file for 5 years from the date of case closing, after which time it will be destroyed.

9. By agreeing to represent Client in the matter set forth above, Pro Bono Counsel does not agree to represent Client in any appeal, to collect any money judgment, or to enforce any order obtained in this matter. The parties may agree at a later time to extend representation to another matter. Any such extension will be the subject of a separate written agreement between the parties.

10. Client understands that Client may end this agreement at any time for any reason and agrees to notify Pro Bono Counsel in writing that he/she wishes to end this Agreement.

11. Client understands that Pro Bono Counsel reserves the right to withdraw from representing Client in certain limited circumstances. These circumstances include, but are not limited to, the following:
   (A) Where insufficient legal grounds exist to continue a court or administrative action or appeal;
   (B) Where Client fails to cooperate with the reasonable requests of Pro Bono Counsel;
   (C) Where a conflict of interest is discovered or arises which makes it inappropriate for Pro Bono Counsel to continue representation; and
   (D) Where client fails to meet the terms of this agreement.

12. Client has read this agreement in its entirety, or has had it read and explained to him/her in its entirety, before signing it. Client understands the terms of this agreement and agrees that it shall apply throughout the course of Pro Bono Counsel’s representation of him/her.

13. This writing represents the entire agreement between the parties and cannot be amended or modified except in writing signed by the parties.

______________________________  ______________________________
Client                                          Date

______________________________  ______________________________
Pro Bono Counsel                    Date

______________________________  ______________________________
Pro Bono Co-Counsel                      Date

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