December 9, 2016

MEMORANDUM FOR: ALL SOL EMPLOYEES

FROM: M. PATRICIA SMITH
Solicitor of Labor

SUBJECT: Pro Bono Policy

I am pleased to report that our Pro Bono Program Committee has reviewed and revised the Office of the Solicitor (SOL) Pro Bono Policy. By this memorandum I am issuing the revised Policy, which replaces and supersedes the Pro Bono Policy memorandum issued in 2008 by then Solicitor Gregory Jacob.

The provision of pro bono legal services plays an important role in narrowing the legal services gap for low-income individuals, provides valuable training and skill development, and contributes to higher job satisfaction and morale at work. I encourage the involvement of attorneys and legal support staff in pro bono legal services.

The American Bar Association’s Model Rule 6.1 recommends that all attorneys, regardless of their area of practice, provide at least 50 hours of pro bono legal services per year in recognition that lawyers have a professional responsibility to provide legal services to those unable to pay. SOL encourages its employees to set a personal goal of meeting the American Bar Association’s goal for pro bono legal service.

While pro bono activities are performed in an employee’s personal capacity, SOL considers itself a leader among federal agencies working to implement the Executive Order 12988 mandate to encourage attorneys and legal support staff employed by the federal government to provide pro bono legal services. For this reason, on October 23, 2015, I established a new SOL Pro Bono Program Committee and asked them to review the SOL Pro Bono Policy. The Policy issued today is a result of their input and work.

The updated Policy is attached and makes several important changes.

- It raises the amount of administrative leave available to employees when it is not practicable to conduct pro bono activities outside working hours from 24 hours to 30 hours and lays out a clear process for communicating with supervisors regarding administrative leave hours.
• It encourages divisions and regions to set an aspirational goal of at least 50 pro bono hours each year collectively.

• It contains a section encouraging SOL leadership to highlight and recognize employees who provide pro bono legal services, in an appropriate manner.

• It includes the recently issued Guidance on Pro Bono Activities, which clarifies the use of Department of Labor resources, ethics considerations, and unauthorized practice of law.
DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
PRO BONO LEGAL SERVICES POLICY STATEMENT

This Policy rescinds and supersedes the November 2008 Memorandum for Employees in the Office of the Solicitor (SOL) on the Pro Bono Policy from Solicitor of Labor Gregory Jacob.

I. Policy Change

SOL strongly supports volunteer efforts and encourages all SOL attorneys and legal support staff to actively seek out opportunities to participate in pro bono legal services that are consistent with applicable Federal statutes and regulations governing outside activities.

The admonition in the American Bar Association Model Rules of Professional Conduct that all attorneys aspire to provide at least 50 hours of pro bono legal services per year is not limited to attorneys in the private sector. As attorneys for the federal government, lawyers in the Solicitor’s Office perform critically important public service every day. Our professional responsibilities do not end there, however.

The Pro Bono Policy memorandum issued in 2008 was the first federal agency pro bono policy that granted attorneys engaged in pro bono services administrative leave. Since then, more than 20 other agencies have issued such policies, the vast majority of which are more generous than SOL’s 2008 policy. In recognition of these changes and a growing awareness of the importance of pro bono work, the Policy is updated as follows:

II. Administrative Leave and Leave Process for Pro Bono Legal Work

A. 30 hours of administrative leave: Department employees are encouraged to seek pro bono legal services opportunities that can be accomplished outside typical business hours. However, recognizing that it may not always be practicable for pro bono activities to occur outside of typical business hours, SOL attorneys and legal support staff will be allowed up to 30 hours of administrative leave per calendar year to engage in pro bono activities during work hours, such as client meetings, the preparation of filings and other written and oral advice, clinics, consultations with pro bono legal services organizations, court appearances, participation in mediation or settlement discussions, etc. If employees exceed 30 hours of administrative leave, at their managers’ discretion, they may be granted additional hours for pro bono activities on an ad-hoc basis. Employees do not need to take administrative leave to conduct pro bono activities during their lunch or other breaks that regularly occur during the workday.

B. Process for taking administrative leave to conduct pro bono legal services: Employees who foresee conducting pro bono activities during their workday should consult their
managers to request administrative leave. Approval will normally be granted, absent compelling business reasons. If the request for administrative leave is denied, managers should provide a reason for the denial in writing. Employees do not need to request permission to take less than an hour of administrative leave per day during duty hours for pro bono work. However, employees should notify their managers of their involvement in pro bono work and their intent to take administrative leave during the pay period when they expect to take administrative leave in less than one-hour increments. SOL employees remain responsible for ensuring that their pro bono work will not interfere with the proper and effective performance of their official duties, including the time and availability requirements of their positions.

C. Non-administrative leave or off-duty hours used to conduct pro bono legal services and process for using non-administrative leave or off-duty hours to conduct pro bono work: Employees may use other forms of leave such as annual leave and compensatory time off—once requested and approved in accordance with standard leave procedures—to engage in pro bono legal services. The Department’s workplace flexibilities policy—particularly elements such as the variable work week and the narrow band of core hours—allows employees to provide pro bono legal services without requiring them to take leave or consult managers. SOL employees remain responsible for ensuring that their pro bono work will not interfere with the proper and effective performance of their official duties, including the time and availability requirements of their positions.

III. Goals for SOL Divisions and Regional Offices

In order to create an environment that encourages and promotes SOL employees to provide pro bono legal services, the Solicitor encourages each SOL division and region to set a goal of an amount of hours the division aspires to achieve each year collectively, with a floor of 50 collective hours of pro bono legal services each year. The Solicitor will recognize each division and region annually that has met or surpassed this goal. In order to assist SOL divisions and regions to achieve this goal, the Solicitor encourages attorneys to work together in conducting pro bono legal services work, such as co-counseling on cases or participating in a clinic together with one’s office.

IV. Employee Recognition

Given the amount of time and effort employees contribute to effectively participate in pro bono activities, each division and region is encouraged to develop ideas for recognizing employees who perform pro bono or volunteer services. As an example, an office may wish to recognize employee efforts by circulating an email congratulating employees who have engaged in pro bono work during Government Pro Bono Week, which usually takes place the first week in October.

The Pro Bono Program Committee will, in collaboration with leadership in their respective offices, find appropriate opportunities to highlight employees who have made significant
contributions in the area of pro bono legal services. Such opportunities might include a newsletter and/or hosting a meet-and-greet event with regional/national leadership, as appropriate, and SOL employees who have provided pro bono legal services in the prior year.

The Pro Bono Program Committee Representatives will solicit nominations from their respective offices and recommend to leadership, including regional/national leadership as appropriate, recipients for a pro bono award at the annual Honors Award ceremonies. Regional/national leadership should consider the recommendations and strive to award an SOL employee with a pro bono award each year.

V. Administration of Pro Bono Services Program

A. Pro Bono Program Coordinator(s). The Program Coordinator(s) develops and publicizes pro bono legal services opportunities to facilitate participation in such activities throughout the Solicitor’s Office. One or two attorneys from SOL will voluntarily serve in this role as part of their official duties. There must be at least one Program Coordinator in the National Office so that the Coordinator can work with the U.S. Department of Justice and the Interagency Pro Bono Working Group in the development of pro bono programs and events. The Coordinator(s) serves as an example and resource for pro bono participation and information, and oversees the SOL Pro Bono Program Committee as chair(s) of the committee. The Coordinator(s) should be selected by the Committee and should have served at least one term as a representative to the Committee.

B. Pro Bono Program Committee. The Committee Representatives publicize and coordinate pro bono activities within their division or region, refer persons to the Agency Ethics Official when appropriate, and serve as an example and resource for pro bono participation and information. The Committee includes at least one representative from each division and region within SOL, nominated annually by the Associate Solicitor or Regional Solicitor, respectively, as well as one representative from each union. The Committee will meet on a regular basis, striving to meet quarterly, will facilitate and coordinate volunteer opportunities for SOL employees where appropriate, will collectively discuss issues and strategies for facilitating SOL participation in pro bono activities, and host or arrange for trainings and other events for SOL employees interested in pro bono.

VI. Ethical Guidance on the Performance of Pro Bono Legal Services –
Because pro bono legal services are performed in an individual’s personal capacity there are important ethical issues and limitations that must be considered before undertaking pro bono legal services. The Office of Legal Counsel’s Pro Bono Guidance is provided below and questions should be directed to the Counsel for Ethics in the Office of Legal Counsel, Office of the Solicitor.
Pro Bono Activities
Summary of the Ethics Rules

I. INTRODUCTION

This guidance lays out the requirements for employees of the U.S. Department of Labor (hereinafter Department or DOL), regardless of their agency or division within the Department, who provide or seek to provide pro bono legal services. For questions about this guidance or its application, please contact the Counsel for Ethics in the Office of Legal Counsel in the Office of the Solicitor.

II. DEFINITION OF PRO BONO LEGAL SERVICES

Pro bono legal services are those legal services performed without compensation and include, but are not limited to, the provision of legal services to:

- Persons of limited means;
- Charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means, or to further their organizational purpose;
- Individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or
- Activities for improving the law, the legal system, or the legal profession.

III. USE OF OFFICIAL POSITION

Any pro bono legal services you provide are performed in your personal capacity. You may not indicate or represent in any way that you are acting on behalf of the Department, or in your official capacity, when you are providing pro bono legal services.

You may not use office letterhead or fax cover pages, Department or office business cards (whether or not purchased with appropriated funds), or otherwise identify yourself as a Department employee in any communication, correspondence, or pleading connected with pro bono legal activities. The incidental identification of your position or office – for example, when an office number and street address are not sufficient to ensure mail delivery or when receiving a telephone call – is, however, permissible.

You are responsible for explaining to the client, any opposing parties, or others involved in a pro bono case that you are acting in your individual capacity as a volunteer, and are not acting as a representative of, or on behalf of, the Department. You are strongly encouraged to enter into an engagement agreement with your client in a pro bono matter stating that you are acting in your
individual capacity and not on behalf of the Department. The sample representation agreement attached to this guidance includes suggested language.

IV. ETHICS CONSIDERATIONS AND LIMITATIONS

a. Prior Consultation Requirement

Anyone seeking to engage in pro bono legal work must consult with the Ethics Office prior to engaging in such legal work. The purpose of this consultation is to ensure that the services contemplated comply with Departmental Policy, and to assist you in complying with the Policy. Before taking on a pro bono matter, DOL employees should email Rob Sadler at Sadler.Robert2@dol.gov (or his successor) a completed Prior Consultation Form (Appendix A). Rob Sadler, or a member of his staff will respond within a timely fashion, usually within one week, with approval or follow-up questions.

Unlike some other agencies, the Department does not require or provide an ethics “clearance” for attorneys engaged in pro bono activities. However, even after consultation with Rob Sadler, or one of his staff, DOL employees remain responsible for ensuring that they are not in violation of the Policy and restrictions on federal employee activities.

Specific Examples

DOL employees who have already consulted with Rob Sadler or a member of his staff should fill out a second Prior Consultation form and consult with the Ethics Office again if the nature of the matter changes.

DOL employees who represent an organization as the organization’s general counsel should consult with the Ethics Office each time the employee undertakes a new project for that organization.

b. Ethics Considerations

A number of legal constraints may apply to pro bono activities. These legal constraints include:

- 18 U.S.C. § 205 (subjects Federal employees to penalization under 18 U.S.C. § 216 for engaging in the prosecution of claims against the Government or acting as an agent or attorney in matters in which the United States is a party or has a direct and substantial interest).
  - This prevents employees from working on immigration cases, social security cases, etc. where the federal government is involved.

- Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. Part 2635; 39 C.F.R. § 3000.735-101), including:
- Section 2635.502 (regarding activities that appear to interfere with the employee’s performance of his or her duties in an impartial and unbiased manner);
  - An OSHA investigator involved in an ongoing case against a restaurant takes on a pro bono case suing the same restaurant

- Section 2635.702 (prohibiting use of Government title or position in any way that suggests that the Government is sanctioning personal activities);
  - Writing a letter to opposing counsel on DOL Letterhead

- Section 2635.704 (prohibiting the use of real or personal Government property for other than authorized purposes);
  - Printing out 1,000 pages of evidentiary materials on the office printer

- Section 2635.801 et seq. (regarding outside activities by Federal employees, including prohibitions on outside activities that would conflict with the employee’s official duties);
  - An MSHA employee involved in any case involving a mine.

If you are handling cases under special appointment by the Department of Justice, you may also be subject to Department of Justice ethics rules.

If a pro bono legal activity at any time begins to create a conflict of interest, you must cease providing such legal services.

c. Malpractice Coverage.

Before agreeing to meet with or accept a pro bono legal client or matter, you should determine whether the referring pro bono program or organization has a malpractice insurance policy that covers you. The Department does not provide malpractice insurance to its employees when they are undertaking pro bono activities. NOTE: Typically, volunteer programs organized by the local bar and more-established referral programs do provide malpractice coverage. All DOJ-referred pro bono projects are with organizations that provide malpractice insurance.

V. USE OF DEPARTMENT RESOURCES

A. General Provision: As a general rule, you, as a Federal employee, may not use Government property for other than official purposes. However, consistent with DLMS 9 Ch. 900, it is permissible for you to use office equipment (including office computers,
printers, and copiers, and the use of fax machines and telephones within local area codes) used in moderation on a limited basis during non-work hours in connection with pro bono activities. If you use your DOL e-mail address in connection with pro bono activities, you must ensure that any signature block stating your title and affiliation with the Department is removed. Incidental identification of an employee’s official position or office, such as providing the employee’s office phone number or using the Department’s mailing address, when necessary, is allowed.

You may not meet with clients or opposing parties in the Department’s buildings or on the grounds of the Department.¹

B. Because partisan political activity is subject to more restrictive rules than other non-official activity, you cannot use government property to conduct partisan political activity.

C. **Use of Electronic Databases:** Use of commercial electronic databases, such as Westlaw, is permissible to the extent there is no additional cost to the government and authorized by your office. For example, you may use Westlaw for legal research related to your pro bono activities for up to 30 hours per month. If your use of Westlaw or other commercial-electronic databases will exceed 30 hours per month, you must seek supervisory approval beforehand. Use of commercial electronic databases when there is an extra cost to the government is not authorized. These restrictions are intended to ensure compliance with the legal requirement that Government resources can be used only if that use involves negligible additional expense to the government.

D. **Use of Clerical Support:** Department support staff may not be assigned or otherwise be required to perform unofficial duties, such as pro bono legal work. However, a member of the Department’s support staff may volunteer their services to support pro bono legal activities on their own time. You must avoid prohibited coercive conduct, such as pressuring a subordinate employee to volunteer their time to support the pro bono legal activities.

VI. **UNAUTHORIZED PRACTICE OF LAW**

**Local Bar and Licensing Rules.** You should be aware that local bar and professional licensing rules, including those regarding the unauthorized practice of law, apply to pro bono legal

¹ We encourage you to meet with your clients in public spaces where confidentiality between you and the client can be maintained, such as DC Public Libraries. In choosing a location, we recommend you consider proximity to your work, public transportation, and ease of access for your client.
services. Employees are personally responsible for ensuring compliance with these rules and should consult local rules and restrictions. NOTE: DOL assumes no responsibility for researching or providing advice regarding local bar rules.

To do pro bono work in any state, you must be a member of that state’s bar unless an exception is provided in the bar rules. Currently, we are aware of four jurisdictions have such exceptions: the District of Columbia, Illinois, Colorado, and Maryland.

i. **District of Columbia (D.C.):** The D.C. local rule (D.C. App. Rule 49(c)) concerning the unauthorized practice of law permits attorneys working for the U.S. Government who are not members of the D.C. Bar to handle pro bono cases in the District of Columbia so long as several requirements are met. The rule states that 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.


ii. **Maryland.** Effective January 2016, Maryland’s Rule Governing Admission to the Bar of Maryland (Rule15) permits attorneys who are not members of the Maryland Bar to handle *pro bono* cases in Maryland as long as several requirements are met. Attorneys must: 1) be a member of a bar of another state in good standing; 2) be a graduate of a qualified law school; 3) practice under the supervision of a member of the bar of Maryland; 4) be associated with a qualified legal services provider in Maryland; 5) file with the Clerk of the Court of Appeals a written request to practice in Maryland, accompanied by proof of the above categories, and a statement that the attorney isn’t receiving compensation. Then the Clerk issues a certificate certifying that the attorney is authorized to practice under the rule.

http://www.courts.state.md.us/accesstojustice/pdfs/probonoattorneysrulefactsheet_010216.pdf.

iv. **Colorado.** Under Rule 223 of the Colorado Court Rules Governing Admission to the Bar, attorneys do not need to be barred in Colorado to conduct *pro bono* work in Colorado.


**VII. ADDITIONAL CONSIDERATIONS**

**Retainer Agreements.** It is strongly recommended that you and your client in a *pro bono* case both sign a retainer letter that, among other things, makes it explicit that you are acting in your own individual capacity and not on behalf of the Department or the Federal government. NOTE: Legal services organizations you work with, not the Department, should be your primary source for templates and information regarding retainer agreements. Attached is a U.S. Department of Justice-approved retainer agreement template that may be used in the absence of such agreements.

**VIII. DISCLAIMER**

The Pro Bono guidance is intended only to encourage pro bono activities by attorneys and legal 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 offices, or any person. Neither the United States nor the Department of Labor will be responsible in any manner or to any extent for any negligence or otherwise tortious acts or omissions on the part of any employee while engaged in any pro bono activity. While the Department encourages pro bono activities by its employees, it exercises no control over the services and activities of employees engaged in pro bono activities nor does it control the time or location of any pro bono activity. Each employee is acting outside the scope of his or her Federal employment whenever the employee participates, supports, or joins any pro bono activity.
Appendix A

SAMPLE Prior Consultation Form

Send to Rob Sadler, Counsel for Ethics in the Office of Legal Counsel in the Office of the Solicitor at Sadler.Robert2@dol.gov. Please allow up to five-working days for a response.

1. **Organization providing services through.** [e.g. Legal Aid Society].

2. **Did the opportunity come through the Federal Pro Bono Program?** (i.e. Laura Klein)?

3. **Name of client.**

4. **Relief client seeks and relevant areas of the law.** [e.g. an aunt seeking custody of her two minor nephews who currently reside with her. The children’s mother is allegedly a substance abuser and the children’s fathers are uninvolved in the children’s lives. It is likely that the case will be uncontested, according to the assessment by the Legal Aid Society. The case was referred to me by the Legal Aid Society of D.C. ]

5. **Type of service to be provided.** (e.g. clinic, representational, etc.)

By submitting this request, I certify the following:

In the course of this representation, I will not act as agent or attorney for any person before any agency, department, or court in any matter in which the United States has a direct and substantial interest. I also will not participate in any criminal or habeas corpus matter, at the federal, state or local level, or in any matter in which the Department of Labor is or represents a party, litigant, investigator, or grant-maker. I will not participate in any matter that involves a law or program the Department of Labor administers or enforces. I will not use my official position or title in connection with my representation of any person. I understand that I may not use the time of a subordinate. This work will not interfere with my ability to meet my obligations and responsibilities to the Department of Labor. I have familiarized myself with the Department’s Policy on pro bono legal and volunteer services.

I am aware of my continuing obligation to be alert to situations that may arise during the course of representation, such as changes in the facts or law of the case that would preclude further representation or necessitate resubmitting this prior consultation request form. If at any time the United States should develop an interest in a matter covered by this request, or if any of the circumstances under which I have previously consulted changes, I will seek further advice, and further consultation as appropriate.
Appendix B

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 __________________ [name of agency].

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 which may impact Attorney’s representation; or
   (B) any plans to leave town which 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 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