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Pro Bono Survey

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PRO BONO OPPORTUNITIES FOR GOVERNMENT LAWYERS

“Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.” – *Justice Sandra Day O’Connor*, 78 *Or. L. Rev.* 385, 391 (1999)

I. INTRODUCTION

Why should a state governmental unit, a county unit or a municipal unit have a commitment to pro bono set forth in a written policy?

First, it encourages the government attorneys to do pro bono work and is a simple way in which to underscore the importance of pro bono service. Second, it reflects support from the management level and gives pro bono services credibility, all of which assist in developing a pro bono culture within the office. Third, it highlights the office’s public service mission and boosts the public image of government attorneys.

There are the misconceptions and myths to set straight when discussing pro bono. Some of us have probably had discussions with fellow government attorneys discussing the fact that they would like to get involved in pro bono but believe their agency would never approve the work, so they never approach their general counsel about it. A perception exists that old-school government management would not allow this, however, many do not try to test or challenge the myth.

The first thing to do is find out if the agency has a written policy governing pro bono in conducting a random sampling of various state agencies, in fact, most state agencies do not have a written policy specifically addressing pro bono. Out of the state agencies contacted regarding pro bono policies, the Office of the Attorney General was the only one having policies directly addressing pro bono work or volunteer opportunities. However, please be advised that if a agency does not have an official policy in place, it does **not** mean pro bono is out of the question. The agency’s ethics officers should be able to apply whatever procedures they have regarding outside activities to pro bono. Also, if the agency can seek direction from the Texas State Bar for more information.

Another common misconception among government attorneys is that they lack the skills or knowledge to provide pro bono legal services. The prospect of representing an indigent client in the courtroom or providing advice at a clinic can be daunting to a government attorney who, say, specializes in the contracts at a state agency.

This type of thinking is common of government attorneys because they do not have the benefits that come with the built-in culture of pro bono at law firms, where there are mentors and training opportunities. Many of those resources don’t exist in the government because it still is a patchwork

process, with some state agencies allowing pro bono and others not even in the game. The Texas State Bar can assist in the development of pro bono programs as well as the Texas Rural Legal Aid in helping to create interagency groups which will create and publicize training opportunities in an effort to break down the perception that you have to be an expert in poverty law to help someone with their divorce or custody battle. There are also some opportunities where you don't need any training at all, like volunteer legal services clinics.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." – *U.S. Supreme Court Justice Hugo Black (1964)*

II. HISTORICAL BACKGROUND: GENERAL PRINCIPLES GOVERNING PRO BONO OPPORTUNITIES FOR GOVERNMENT ATTORNEYS

A. AMERICAN BAR ASSOCIATION

The American Bar Association ("ABA") adopted the Code of Professional Responsibility in 1969, which addresses for the first time the responsibility of the lawyer to engage in pro bono work, in Ethical Consideration 2-25. It states among other things:

"Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Further, in 1975 the ABA House of Delegates adopted a resolution which formally acknowledges "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" (the "Montreal Resolution"). It defined pro bono in part by specifying areas in which the services should be rendered, namely: poverty law, civil rights law, public rights law charitable organization representation and the administration of justice.

More formally, in 1983, the ABA adopted Model Rule 6.1, which states that a lawyer "should render public interest legal service." It specifies certain ways a lawyer can discharge the responsibility: "by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means." See, *Appendix "A."*

In 1988, for the first time, an actual time component was added. The ABA adopted the "Toronto Resolution," which, among other things, resolves to "[R]ecognize and support the professional obligation of all attorneys to devote a reasonable amount of time, but in no event less than 50 hours per year to pro bono and other public service activities that serve those in need or improve the law, the legal system or the legal profession."

Following the addition of the aspirational goal in ABA resolutions, the ABA revised Model Rule 6.1 to include a quantified aspirational goal (i.e. at least 50 hours per year), a more refined definition of pro bono, and more specific ways to discharge the pro bono responsibility. The revision also included terms establishing that a substantial majority of the 50-hour responsibility should be discharged through the provision of legal services to low-income people and groups that serve low-income people.

The ABA in 2002 revised Model Rule 6.1 to add a sentence at the beginning of the Rule to give greater prominence to the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay. A new Comment [11] was also added that calls upon law firms to act reasonably to enable all lawyers in a firm to provide the pro bono legal services called for by this Rule. See, *Appendix "A"* for ABA Model Rule 6.1 with its comments.

Despite the perception that pro bono work is undertaken by the private sector, it is important to note that the ABA's position on government attorneys providing legal services is steadfast: "First, the unmet legal needs of the lower income persons in this country continue to mushroom. Attorneys,

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