

Pro Bono Activity:

A Legal and Procedural Guide for Federal
Agency Ethics Counsel

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Why Should Federal Attorneys Do Pro Bono Work?

- **Need is Enormous**

According to the ABA and LSC, 80% of poor Americans' legal needs are not met.

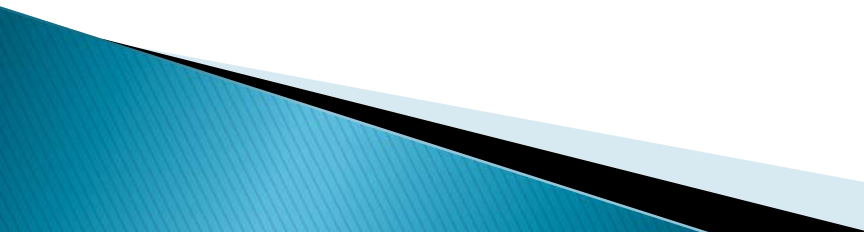
- **Free Professional Development/Training**

Attorneys gain experience at no expense to the agency.

- **Professional Satisfaction**

Government attorneys do not often get a true client experience in their jobs.

Federal Government Pro Bono Program

- Executive Order 12988 (1996) directed federal agencies to encourage employee volunteerism, specifically pro bono work.
 - Department of Justice coordinates government-wide effort and Chairs the Program.
 - 40 agencies currently participate.
 - Formal programs exist in DC, Chicago, New York City, and San Francisco.
 - In 2009, ABA selected the FGPPB for its Pro Bono Publico Award.
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DOJ Attorneys Volunteer at Advice Clinic >>

Eleven federal agencies have committed to send volunteers to the DC Bar Pro Bono Program Advice & Referral Clinic in 2011. Agency leaders often participate. Here, Assistant Attorney General Tony West accompanies a group from the DOJ Civil Division.

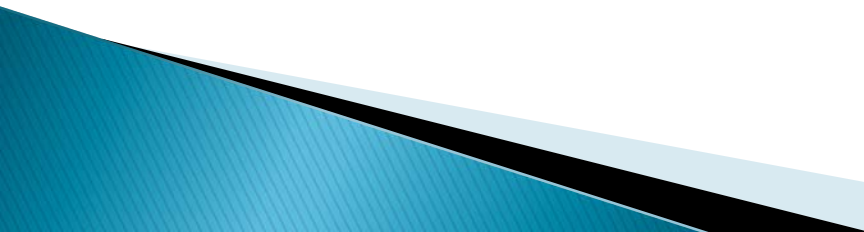


Department of Labor Recognized for Pro Bono >>>
Leadership in 2009

Conflicts of Interest

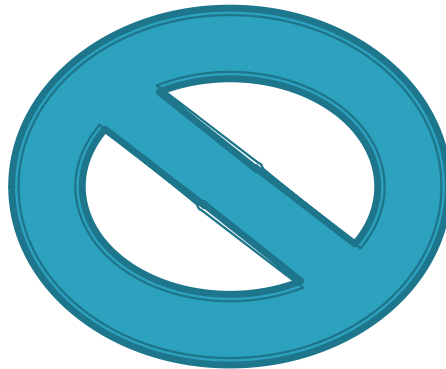
18 U.S.C. 205:

It is prohibited for a federal employee to prosecute any claim against the United States or assist in any such prosecution or act as an agent or attorney for anyone in connection with any proceeding “in which the United States is a party or has a direct and substantial interest.”



Conflicts of Interest – Examples

- Immigration issues
- Public Benefits (Medicaid, Medicare, SSI, SSDI)
- Federal tax issues
- Bankruptcy petitions



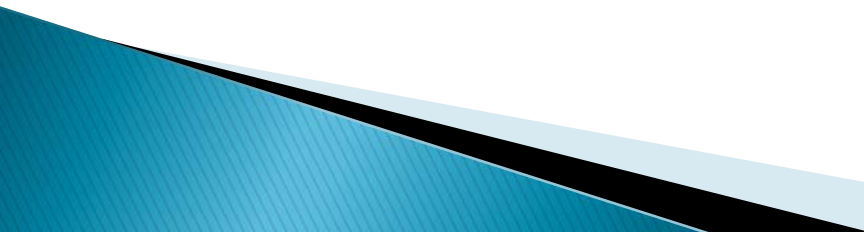
Conflicts – Outside Activities

Outside Activities – 5 C.F.R. 2635.801 – 803

- 2635.801(c) – “an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part”

Conflicts – Outside Activities

2635.802 – An employee shall not engage in outside activity that conflicts with his official duties.

- ▶ Prohibited by statute or agency supplemental regulation
 - ▶ Requires employee's disqualification from matters central or critical to his performance of official duties that his ability to perform is materially impaired
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Conflicts – Outside Activities

2635.803 – When required by agency supplemental regulation, an employee shall obtain prior approval before engaging in outside activities.

- Agency Pro Bono Policies usually outline approval procedures.
- Agencies without a Pro Bono Policy can follow procedures for all outside activities.

Individual Capacity

When engaging in pro bono work, a federal employee is acting in his individual capacity, not his official capacity.

Misuse of Position – 5 C.F.R. 2635.701–705

Individual Capacity

2635.702 – Cannot imply that the Government sanctions or endorses the employee's personal activities or those of another.

Attorney must make it clear to all involved in the pro bono matter that his agency is not involved in the pro bono matter in any way.

- Client
- Opposing Party
- Opposing Counsel
- Judge
- Witnesses

Individual Capacity

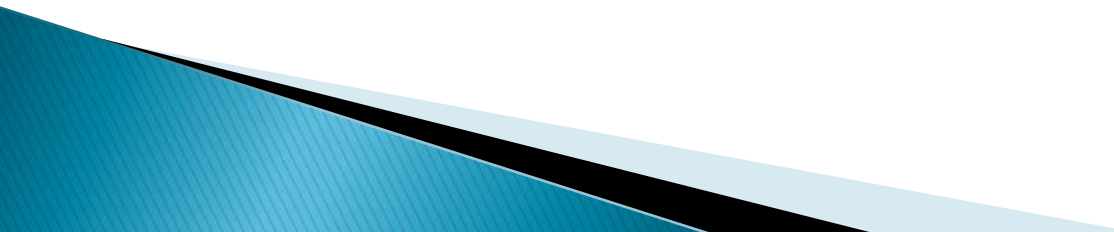
Retainer Agreement

- Sample created for government attorneys
- Specific language regarding capacity:

“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].”

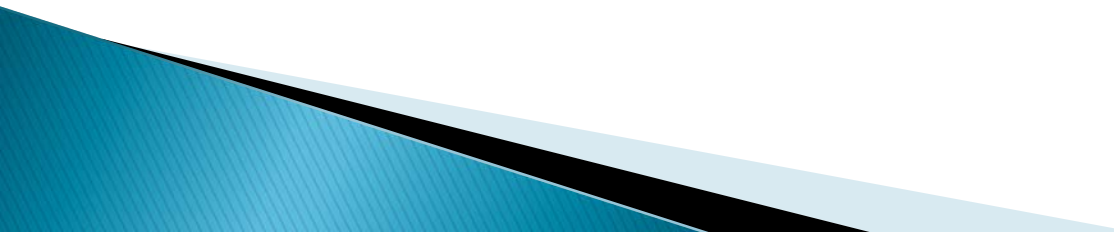
Individual Capacity

Attorneys should avoid the appearance that the agency is involved in the pro bono matter:

- Cannot use business cards or agency letterhead
 - Cannot ask support staff to assist on pro bono matter
 - Cannot meet client or counsel at agency office
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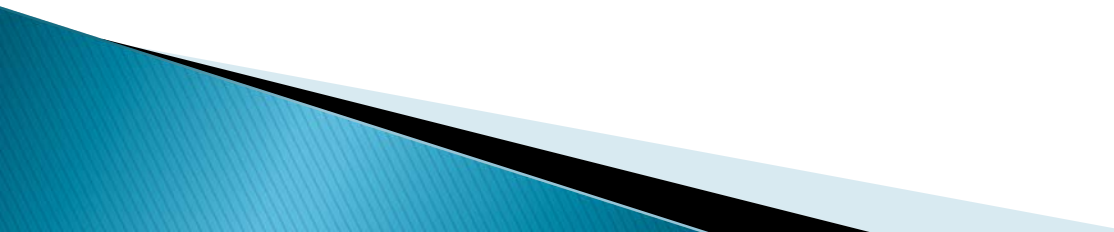
Individual Capacity

The attorney may:

- Tell the client where he works
 - Use his office mailing address without the agency name
 - Use his office phone number
 - Use his government email address with a disclaimer
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Individual Capacity

Malpractice Insurance

- The government does not provide any malpractice insurance coverage for pro bono activity.
 - Many legal services organizations provide coverage for their volunteer attorneys.
 - The Federal Government Pro Bono Program will promote and publicize only those pro bono opportunities in which malpractice insurance coverage is provided.
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Individual Capacity

Use of Agency Resources

5 C.F.R. 2635.704 – “Employees have a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.”

Agency Supplemental Regulations generally allow for the personal use of Government property when the cost to the Government will be negligible.

Individual Capacity

Generally permissible to use:

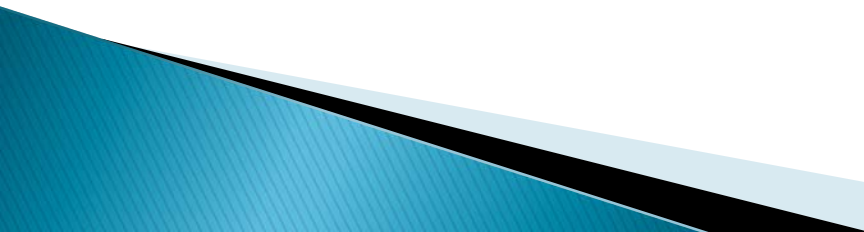
- Telephone for local calls
- Copier
- Fax machine for local faxes
- Library
- Computer and printer
 - *Internet use should follow agency policy
 - *Some agencies now allow the use of Westlaw and LEXIS for pro bono work

Individual Capacity

5 C.F.R. 2635.705 – An employee shall use official time for official duties.

The general rule is that pro bono work should be done on an employee's personal time.

Not a problem for most pro bono activity:

- Clinics
 - Drafting wills
 - Research and writing
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Individual Capacity

When pro bono work cannot be accomplished outside of business hours, such as for court appearances and mediations, options include:

- Annual leave
- Leave without pay
 - Flex schedules
- Administrative leave/excused absence

Individual Capacity

Administrative Leave

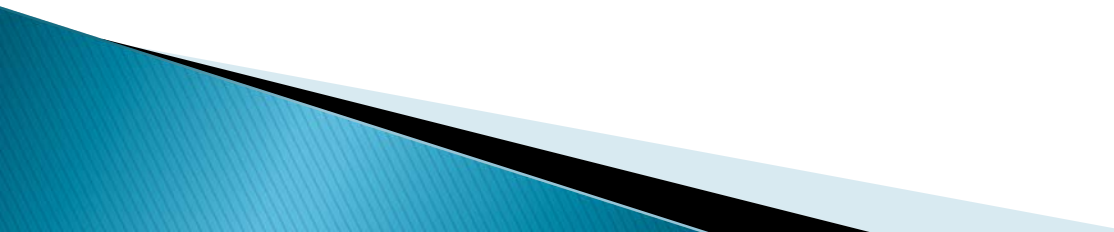
OPM Guidance: Permits employee to request administrative leave for volunteer activity when that activity will enhance the professional development or skills which the employee uses in his work for the agency.

www.opm.gov/oca/leave/html/Volunteer2.asp

Individual Capacity

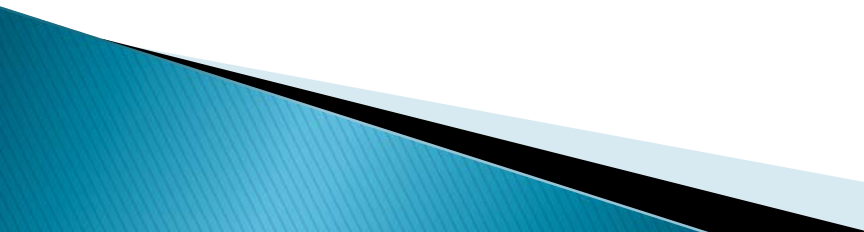
Administrative Leave

Many agencies have now adopted their own policies allowing for administrative leave for pro bono work.

- Department of Justice (various divisions)
 - Department of Labor
 - Department of Energy
 - Department of Housing and Urban Development
 - National Labor Relations Board
 - US Agency for International Development
 - US International Trade Commission
 - Pension Benefit Guaranty Corporation
 - Merit Systems Protection Board
 - Federal Election Commission
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Pro Bono Opportunities

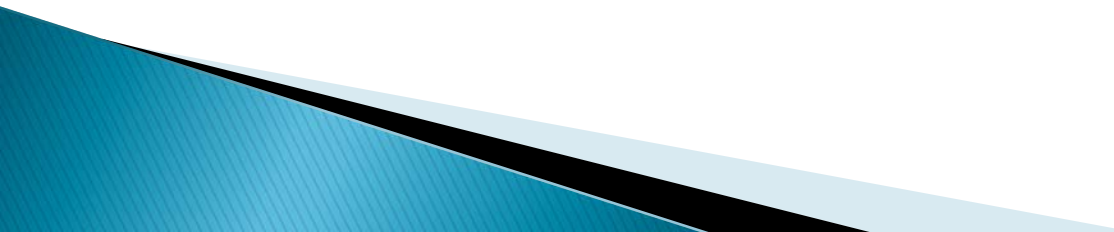
How To Analyze A Particular Pro Bono Opportunity

- Does the organization offer malpractice insurance coverage to volunteers?
 - Does the opportunity allow time for a conflicts check?
 - Does the opportunity pose a conflict?
 - Are training and mentoring available for volunteers?
 - Does the opportunity require the attorney to be out of the office during business hours?
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Pro Bono Opportunities

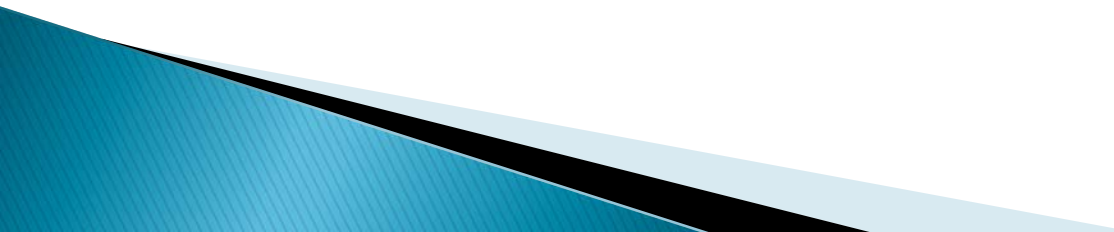
Examples of Appropriate Opportunities:

Non-Litigation

- Clinics
 - Drafting Wills and Powers of Attorney
 - Guardian ad Litem
 - Law-related Education in Schools
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Pro Bono Opportunities

Litigation

- Family law – divorce, custody, support
 - Housing – landlord–tenant
 - Domestic Violence – protection orders
 - Consumer law – contracts, home repairs
 - Personal Injury – car accidents, insurance
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