

# **THE WEST VIRGINIA STATE BAR PRO BONO POLICY FOR GOVERNMENT ATTORNEYS**

## **I. POLICY STATEMENT:**

The purpose of this policy is to assist attorneys employed by any state, county or municipal governmental body or any political subdivision thereof (government attorneys) in meeting their professional obligations to provide pro bono legal services.

The provision of pro bono legal services is consistent with and furthers the interests of the State of West Virginia by providing access to justice for persons of limited means, broadening the experience of government attorneys, and enabling them to fulfill the professional responsibility assumed by their oath and licensure by the West Virginia State Bar.

West Virginia Rule of Professional Conduct (RPC) 6.1 provides that “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” A lawyer’s status as a government attorney does not create an exemption from the responsibilities in Rule 6.1.

## **II. SCOPE OF ACTIVITIES:**

Under RPC 6.1, lawyers should provide legal services without fee to:

- (1) Persons of limited means; or
- (2) Charitable, religious, civil, community, governmental and educational organizations in matters designed to primarily address the needs of persons of limited means.

Examples of pro bono representation that involve creating an attorney-client relationship and fulfill the pro bono responsibility of Rule 6.1 include, but are not limited to:

- Providing advice or representing persons of limited means in family law cases, domestic violence protective order cases, landlord/tenant disputes, public benefits and veterans’ benefits cases, consumer protection and bankruptcy;
- Drafting wills, handling simple probates, drafting guardianships and conservatorships, or otherwise serving low-income persons in those matters;
- Assisting a non-profit organization in the process of incorporation and filing for 501(c)(3) status; or
- Working with the West Virginia State Bar to provide legal advice to low-income persons through West Virginia Free Legal Answers.

Examples of pro bono service that do not involve creating an attorney-client relationship, but that are within the scope of Rule 6.1, include, but are not limited to:

- Providing information at pro se workshops or clinics, helping pro se litigants navigate through court forms and process;
- Making law-in-the-classroom or other public legal education presentations;
- Presenting at CLEs on poverty law and pro bono issues, and mentoring attorneys who take cases in those areas; or
- Working with the West Virginia State Bar to provide legal information and referrals to the public through Tuesday Legal Connect, by providing information and referral only.

### **III. RESPONSIBILITIES OF GOVERNMENT ATTORNEYS:**

#### **A. Approval Procedures**

Government attorneys shall seek approval from a supervisor before participating in pro bono representation or pro bono service. Participation in pro bono service that does not involve creating an attorney-client relationship requires prior approval unless an office policy makes clear that attorneys do not need to seek further permission for participation in these activities.

Pro bono representation always requires case-specific approval to determine that there is no conflict of interest and that the work will not interfere with the attorney's responsibilities. However, short-term limited pro bono representation provided through West Virginia Free Legal Answers does not require case-specific approval, due to the limited nature of assistance provided.

Government attorneys engaging in pro bono representation shall send a client a retainer letter, except in cases where the attorney is providing short-term limited assistance through West Virginia Free Legal Answers. If an attorney decides to provide full representation to a client after providing limited assistance through West Virginia Free Legal Answers, the attorney shall send the client a retainer letter.

Retainer letters should confirm the scope of the representation and outline the client's obligations and responsibilities. The letter must make it clear that the attorney is not acting on behalf of the government body or in an official capacity. Once the government attorney has completed representation, a brief letter must be sent to the client and referring organization stating that the case has been completed and what was accomplished.

Further, government attorneys shall comply with the West Virginia Rules of Professional Conduct (RPC) and the West Virginia Governmental Ethics Act.

Attorneys who are subject to West Virginia Division of Personnel (WVDOP) policies must complete and submit the Division of Personnel Secondary Employment/Certain Volunteer Activity Policy Request for Determination Regarding Secondary Employment or Volunteer

Activity for approval before engaging in pro bono work. The policy and attendant form are on the WVDOP website at <https://personnel.wv.gov/SiteCollectionDocuments/Policies/OtherEmp.pdf>.

Attorneys who are not subject to WVDOP policies, but who are subject to the WV Ethics Act, should complete and submit the above-referenced form. Attorneys for the federal government are encouraged to consult with their ethics boards to determine whether there are required or recommended forms to complete before undertaking pro bono work.

#### **B. General Standards for Approval of Involvement in Pro Bono Legal Services**

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

- Violate any federal or state law, rule, or regulation;
- Interfere with the proper and effective performance of the attorney's official duties, including the time and availability requirements of his or her position; or
- Create or appear to create a conflict of interest.

A supervisor's personal views regarding the substance of the pro bono activity should not influence the decision to grant an attorney's request to engage in pro bono legal activities during hours of work.

#### **C. Conflicts of Interest**

Prior to conducting any pro bono work, government attorneys seeking to perform pro bono work shall comply with RPC 1.7 and 6.5. Pro bono work cannot create or appear to create a conflict of interest with a government attorney's work for the government body. A conflict of interest generally exists where services would:

- require the recusal of the attorney from the attorney's official duties;
- create an appearance that the attorney's duties were performed in a biased or less than impartial manner; or
- create a public perception of governmental sanction or endorsement in high profile or controversial matters involving government.

Government attorneys shall consult with their supervisors prior to engaging in pro bono representation, to ensure a conflicts check is conducted. Based on RPC 6.5, pro bono representation through the West Virginia Free Legal Answers program does not require a complete conflict check prior to government attorneys providing assistance.

Government attorneys shall consult with their supervisors and contact the Office of Disciplinary Counsel if any questions arise concerning conflicts of interest.

#### **D. Work Schedule**

Government attorneys are encouraged to seek pro bono legal work outside their scheduled work hours. However, pro bono legal work may sometimes occur during work hours. Supervisors are urged to be flexible and, where feasible, accommodate the efforts of attorneys to do pro bono work. If performance of pro bono legal work requires time during the normal work day, government attorneys shall request supervisory approval of a flexible work schedule or shall request approval to use vacation time or leave without pay.

Government attorneys providing small amounts of pro bono work during work hours should be allowed to take advantage of any available flexible work schedule rather than being required to take leave. Government attorneys should be permitted to perform a *de minimis* amount of pro bono work during work hours without being required to take leave. *See* West Virginia Ethics Commission Advisory Opinions 96-18, 2001-10, 2013-34, and 2014-16 (*de minimis* use of public resources does not violate the West Virginia Governmental Ethics Act).

#### **E. Limitations for Lawyers within the Office of the West Virginia Attorney General**

Pro bono legal service opportunities for government attorneys who work in the Office of the West Virginia Attorney General (AGO) are limited to the following programs administered by the West Virginia State Bar: Tuesday Legal Connect and West Virginia Free Legal Answers ([www.wv.freelegalanswers.org](http://www.wv.freelegalanswers.org)). While performing pro bono activities, AGO attorneys must comply with the conflicts of interest provisions within Section III, Part C of this policy and the West Virginia Rules of Professional Conduct.

### **IV. USE OF OFFICIAL POSITION OR PUBLIC OFFICE**

Government attorneys who provide pro bono representation or service may not indicate or represent in any way that they are acting on behalf of the government body or in their official capacity. The incidental identification of the attorney's position or office -- for example, when an office phone number, street address, or email address is given for contact purposes -- is not prohibited by this policy. If authorized by their employers, government attorneys may list or provide their office, street or mailing address, and telephone number, on official documents and correspondence so that courts and other persons may reach them during business hours but may not use their official title or the name of the office on any official documents or correspondence. Government attorneys may not use an automatic signature that identifies their government employer or their government title. Although government attorneys are permitted to use work email, they are encouraged to create or use an existing personal email account when engaged in

pro bono work. When using work email, government attorneys should add a disclaimer that the pro bono work is not being performed by the State or the employer, and that neither are bound by the government attorney's work on any pro bono project.

Government attorneys may not use government letterhead, government email accounts, business cards or fax cover-sheets, or otherwise identify themselves as government employees in any communication, correspondence or pleading connected with pro bono legal activities. The government attorney is responsible for ensuring that clients, opposing parties, or others involved in the pro bono case, know that the government attorney is acting in an individual capacity as a volunteer and is not acting as a representative of, or on behalf of, the government body.

## **V. USE OF GOVERNMENT RESOURCES**

As a general rule, employees may only use government property for official business. This Policy does not determine the acceptable use of government resources for pro bono work by government attorneys; instead, each government body shall determine what use is permitted. W. Va. Code § 6B-2-5 (West Virginia Governmental Ethics Act). *See* Advisory Opinions 96-18 which concludes:

De minimis use of public resources for pro bono cases would not be considered a substantial material violation of the Ethics Act. *See* 158 CSR 604 and 6-5.2. However, approval of any specific uses of these resources must be left to the policies of the specific agency involved. Each agency is free to determine, in light of its resources, priorities, and activities, what would constitute an improper use of its public resources.

*See also* W. Va. Code § 61-3C-5 which generally prohibits the unauthorized access to governmental computer services, computers, and electronic devices.

Government attorneys providing pro bono representation shall not meet with a client on government premises.

## **VI. MALPRACTICE INSURANCE**

The State of West Virginia and political subdivisions do not provide malpractice coverage for pro bono work. Immunities that may be granted to government attorneys in the performance of their official duties do not extend to pro bono work. Therefore, government attorneys are strongly encouraged to work with a legal services provider that carries malpractice insurance. If coverage is not provided, each individual government attorney assumes responsibility for any malpractice liability.

*Adopted October 30, 2018.*