

# **BEST PRACTICES GUIDE FOR A FIRM PRO BONO POLICY**

*PREAMBLE: Pursuant to Rule 4-6.1(a), “Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.” These recommendations are offered as a guide to formulating a policy for discharging that professional responsibility. These best practices are recommendations only, and each firm may consider adopting those which are conducive to the firm's specific circumstances.<sup>1</sup>*

## **A. INITIAL INTAKE**

*General Comment – The pro bono client should be treated for all matters and purposes the same as any other client of the firm (except with respect to billing)*

### **Conflict check**

- Conflict by parties
- Issue preclusion
- Other reasons that the firm should not take the case

### **Comply with other firm procedures for pro bono intake, if applicable**

- Get any internal committee approval

### **Initial interview**

- Confirm that the client qualifies for either the firm or referring agency's criteria for pro bono assistance
- Request that prospective client bring knowledgeable parties and applicable documents
- Explain the scope of the attorney client privilege

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<sup>1</sup> The Pro Bono Committee of the Business Law Section of The Florida Bar has developed this Best Practices Guide to encourage you to adopt a formal pro bono policy in your firm, or, if you have a policy in place, to review that policy and determine whether you wish to make changes in accordance with these suggestions. The Guide is set up to provide you with a general checklist of recommended procedures followed by detailed commentary that provides in-depth analysis, where necessary, of the checklist. We welcome comments. Please feel free to send those comments to Mark Stein, Esq, Chair, Business Law Section Pro Bono Committee [MStein@hlglawyers.com].

### **Engagement letter**

- Client expectations
- Arrangement regarding costs
- Scope of services
- What kind of reports and records should be sent
- Confirm the agreement with the client or, if none, the firm policy, regarding disposition of the fee award

### **If needed – Declination letter**

- Statute of limitations caveat
- Document preservation caveat

### **Open the file**

- Follow the firm's procedure for creating a client number, billing codes and time entries
- Send any paperwork required by firm procedures that the client needs to review or sign
- Send any other preliminary notices the law requires

### **Commentary:**

*A pro bono client and a pro bono case should be treated for all matters and purposes the same as any other client or client matter of the firm. Thus, when deciding whether to take a case all the same procedures should be followed with respect to determining conflicts, opening a file, and following formal engagement procedures.*

*In making the determination whether to take the case the firm must also determine that the matter is consistent with the assigned attorney's capabilities and competency. There needs to be a determination that the lawyer has the ability to represent the client, either directly or with mentoring or supervision, that the case can be properly staffed, and that the firm has the necessary resources to service the client, all as provided under the Rules Governing The Florida Bar.*

*It is important when doing a conflict check to make sure that there are no conflicts between the potential client or case and other clients in the firm. The conflict may be obvious, an adverse party, or a party on the other side of a business transaction may be a firm client, but it may also be a conflict regarding a client's position. So, for example, accepting a lawsuit that seeks to sue banks for filing false claims in bankruptcy cases might conflict with a bank client who files claims in bankruptcy cases, even though the claims your client files are not false. It is also important to make sure that the firm does not take a case that philosophically conflicts with another matter that firm is handling. For example, it would not be appropriate for a firm to accept a case defending a not-for-profit client's trademark on the basis that it was not necessary to register the trademark in order for it to be a protected mark, if that firm is advocating in another case that all trademarks must be registered to be protected. Finally, there may be other reasons that the firm should not take the case. Perhaps the debtor that has been referred to the firm is a serial bankruptcy filer that has had his or her case dismissed several times. There may be other reasons that a client is one that the firm chooses not to represent.*

*Some firms have formal pro bono procedures that require additional steps before a case is accepted. Some firms have limits on the number of pro bono cases they will accept, or will authorize a particular attorney to handle. Other firms also look at whether the case qualifies under its criteria for pro bono representation (see section B infra).*

*Sometimes a referring agency will have an engagement letter. A firm will need to review the agency engagement letter and determine whether it is still necessary for the firm to provide its own engagement letter as a supplement to the agency letter.*

*The nature of the case and the nature of the client will determine what the assigned lawyer intends to accomplish at the initial interview. If there are documents the lawyer wants to review ahead of time, make sure to explain clearly to the client what to bring to the interview. If the client is going to sign the engagement letter at the initial interview, make sure the firm has provided a copy of the letter ahead of time for the client to review. If the client does not speak English and the assigned attorney does not speak the client's language the firm needs to determine who will interpret. If possible use someone in the firm because*

*the firm must preserve the attorney client privilege. If the person interpreting is a friend or family member of the client the firm needs to determine what steps it must take to preserve the privilege.*

*When the client gets to the interview it is important the client understands the attorney client privilege. Even clients a firm thinks are sophisticated may not understand the nature and scope of the privilege. The client must understand that any work email must not be used to communicate with the firm – only a private email on a non-work computer. Also, the client must understand that any conversations with the attorney or relating to the matter in which the firm is representing the client must not be posted on any type of social media. If the client is a corporation, the individual with whom the assigned attorney is meeting must understand the privilege is with the client corporation not the individual with whom the attorney is meeting.*

*At the initial interview the assigned attorney may determine that the client does not meet either the referring agency's requirements or the firm's requirements for pro bono representation. The firm needs to have an understanding of the procedure if this happens – Does the firm send the client back to the referring agency? Is the firm allowed to negotiate a fee-based representation? Finally, the firm needs to make sure that the firm and the client understand what are the client's expectations with respect to the case and that no results are guaranteed.*

*Once the case and client have cleared conflicts and any additional required screening, the client needs to sign an engagement letter that clearly spells out what services the firm is agreeing to provide, what costs, if any, the client will need to pay, and how those will be paid (cost retainer? pay as billed?), and what type of reports will the client receive and with what frequency. Will the debtor receive monthly billing reports that details all the work that has been done, but without an actual bill? Will the client receive status reports? The firm will also need to have an understanding regarding any fees awarded in a fee shifting case. The client should understand whether the firm will take the fee award if one is awarded. For example, one firm has a policy that, if fees are awarded in a pro bono case, those funds are placed in a special account that the firm uses to pay costs in other pro bono cases. The client should be given the opportunity to consult with independent counsel regarding any fee award.*

*When the firm opens a pro bono file, it should follow normal firm procedures, or the specific procedures the firm has established for opening a pro bono file. Also make sure the firm complies with normal case-opening check lists. For example, in a trademark case, does the firm need to send an insurance letter? In a litigation case, does the firm need to send the client a litigation hold letter? In a bankruptcy case, are there certain intake forms or checklists that the client needs to complete before the next meeting?*

*If either the firm or the potential client decides that the firm will not take the matter, then the firm should send a letter confirming that understanding (the declination letter), which letter should outline any statute of limitation issues about which the potential client should be aware, as well as, if relevant, any obligations by the firm or the potential client to preserve certain documentation.*

## **B. DECIDING WHAT IS PRO BONO**

*General Comment - The firm's policy should define the legal services or other activities that will qualify for pro bono credit under the policy. The firm does not need to limit itself to the Florida Bar criteria, but should make clear, if the firm recognizes services outside the Florida Bar criteria, that the attorney may not list those activities as qualifying on the annual Bar application for renewal. These best practices are recommendations only, and a firm may adopt policies compatible with the firm's specific circumstances.*

### **Pro Bono**

- Legal services
- Rendered without charge or expectation of fee at the time service commences

### **Florida Bar Pro Bono**

- Pro bono legal services to the poor
- Charitable, religious, or educational organizations who serve the poor

### **Other Pro Bono**

- Individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights
- Charitable, religious, civic, community, governmental or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate

### **What Is Not Pro Bono**

- Legal services written off as bad debts
- Activities that do not involve the provision of legal services, such as community service or serving on a board of directors
- Free or reduced fee work that an attorney provides to a client for purposes of good-will
- Legal services provided for an employee of the firm
- Legal services provided for friends or family members of employees of the firm

- Legal services provided for the benefit of a religious or educational organization with which the attorney is affiliated, unless the work solely involves the charitable works of that organization or involves the provision of other direct benefits for low-income individuals
- Other volunteer or charity work of a legal nature or otherwise

### **Commentary:**

*Pursuant to Rule 4-6.1(a), “Each member of The Florida Bar in good standing, as part of that member’s professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.” Under the Florida Bar Rules, the key analysis in determining whether the provision of free legal services qualifies as “pro bono” is whether those services are serving the needs of the poor. The comments to the rule state that pro bono legal services are to be provided not only to those persons whose household incomes are below the federal poverty standard but also to those persons frequently referred to as the “working poor.” Pro bono services may also be provided to organizations such as church, civic, or community service organizations so long as the services relate to a project seeking to address the problems of the poor. Pro bono legal service to the poor can also be provided through legal services to charitable, religious, or educational organizations whose overall mission and activities are designed predominately to address the needs of the poor.*

*The commentary to Rule 4-6.1 states that “Lawyers providing pro bono legal service on their own need not undertake an investigation to determine client eligibility. Rather, a good faith determination by the lawyer of client eligibility is sufficient.” However, the firm may want to include in its policy the criteria for determining a prospective pro bono client’s eligibility. For example, the policy may set forth criteria for evaluating the prospective client’s indigence or ability to pay. On the other hand, the firm may wish to rely primarily on screening by legal services providers or other referral organizations to make such determinations. As such, the firm may want to consider specifically identifying in the policy sources of pro bono referrals that will automatically qualify for pro bono credit. For example, the policy may state that cases referred by legal assistance programs, such as*

*Florida's "The One" program, the 11<sup>th</sup> Circuit's "Put Something Back" program, or the firm's local legal aid organization, automatically qualify for pro bono credit.*

*It is easier to determine what individual qualifies for pro bono representation, than to determine what entity qualifies for pro bono representation. When considering pro bono representation for not-for-profit organizations, the firm should consider whether the not-for-profit entity can pay for legal services without substantially compromising its mission or the matter for which legal services are sought (i.e., the proposed pro bono matter would not be undertaken, or its success would be substantially compromised, without pro bono legal services). The ability of an organization to pay for legal services can be evaluated on a case-by-case basis, considering (i) the organization's history of payment of legal fees to the firm or to other legal counsel; (ii) the firm's history of charging fees to non-profit entity clients in similar situations; (iii) the payment by the organization of professional fees to non-legal service providers for the same or similar matters; (iv) the organization's budget relative to other organizations considered potential pro bono clients; and (v) the payment of legal fees by organizations of a similar size and purpose. The size of an organization's budget may be relevant to this analysis, but not necessarily dispositive, as legal services and other public interest organizations with relatively large budgets often do not customarily pay for legal counsel as such payments would compromise their missions.*

*In deciding whether to retain a not-for-profit organization as a pro bono client, the firm should also consider whether the entity's mission fits within the goals of the firm's pro bono philosophy. There appears to be universal agreement that organizations that provide legal services to low-income individuals or otherwise serve the needs of low-income individuals, or promote human rights, public rights or civil rights ordinarily qualify as pro bono clients. Conversely, some groups direct that religious organizations qualify as pro bono clients only to the extent the proposed matter is intended to further the organization's charitable mission; educational organizations qualify as pro bono clients only to the extent the proposed matter primarily serves low-income individuals. Other non-profit organizations, such as charitable, public health and arts organizations, should be evaluated according to their ability to pay legal fees, with some consideration also given to whether the entity charges fees or is open for little or no charge to the public at large. The firm can also give weight to whether the non-profit*



*organization has been referred to the firm by a bar association or legal services organization (e.g. "The One" program, or the 11<sup>th</sup> Circuit's "Put Something Back" program) that has screened the entity for eligibility for pro bono legal services. Since the key criterion of The Florida Bar in the evaluation of a non-profit's qualification for pro bono legal services ability to pay for legal services, many large, well-funded cultural institutions, such as symphony orchestras, are not recognized as qualifying pro bono clients. Conversely, many times smaller and less well-funded cultural organizations, like dance troupes or community theaters, may qualify as pro bono clients.*

*The policy may also include other activities that do not qualify as pro bono under the Florida Rule but, nonetheless, are widely viewed as pro bono activities. The ABA and the Pro Bono Institute include in their definition of "pro bono" other legal activities, such as: Providing free or reduced fee legal services to: Individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights; and charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.*

*The firm needs to determine how to allocate its pro bono resources -- should those resources be devoted primarily to representing the poor and working poor and those non-profit organizations that have an impact on persons of low or moderate means, or is the firm willing to support a broader spectrum of potential qualifying candidates? In any instance, proposed pro bono representation of an organization should not interfere with the firm's commercial work for nonprofit entities.*

*While activities may be included that do not qualify for pro bono credit under the Florida Bar Rule, the policy should still strive to include activities that involve the provision of legal services. That is, the attorney should provide pro bono services that would otherwise have required the retention of counsel for a fee. "Pro bono legal service" means legal service rendered without charge or expectation of a fee for the lawyer at the time the service commences. The attorney may, if appropriate, consider listing those activities on the non-pro bono services volunteer activities survey of the annual Florida Bar renewal application.*



### C. HOW CREDIT IS GIVEN FOR PRO BONO CASES

*General Comment – The firm should have a policy that sets forth the manner in which pro bono service will be recognized – will the hours be credited to the attorney’s billable goal; if so, will there be a “cap” to that credit? Will the hours receive no “credit” except that the firm will consider the pro bono service in compensation determinations? Will the firm have a “non-billable” requirement?*

#### **Credit for Time Spent on Pro Bono Client Matters**

- “Billable” credit to the same extent time is credited for other client matters
  - With or without an hours cap
- Non-Billable
  - Specify aspirational goal

#### **Other Factors**

- Consider pro bono commitments when determining an individual’s availability for other assignments
- Consider giving credit for reasonable time spent on training required to represent an actual or prospective pro bono client

#### **Commentary:**

*A successful pro bono practice requires the steady support of firm management, and internal firm policies that support and encourage attorneys, paralegals and other employees who serve the firm's pro bono clients. In turn, attorneys, paralegals and other employees who work on pro bono matters must treat pro bono clients as they would all other clients by providing excellent service that meets the highest ethical and professional standards, and that is performed in an efficient manner. In furtherance of this standard, it is recommended that time spent on approved pro bono client matters be credited to attorneys and paralegals to the same extent time is credited for any other client matter. It is further suggested that time spent on approved pro bono matters should also be counted in determining an individual's availability for other assignments within the firm. Finally, it is suggested that there should be no cap on credit for time spent working on approved pro bono client matters, or, if there is a cap on “billable” credit, that that cap not be less than the Florida Bar twenty hour requirement.*

*If the firm is unwilling or unable to give billable credit for pro bono service, then it*

*is recommended that the firm develop a policy for non-billable credit. Timekeepers should be instructed to keep track of all their time worked on a pro bono matter so that the service can be considered as part of any compensation review for the timekeeper. The firm should be clear whether that consideration will apply towards an increase in base salary, bonus consideration, or both. In some firms, the firm has a non-billable requirement, in addition to a billable requirement. For example, a firm could have a one hundred or two hundred hour non-billable requirement that would include pro bono work, community service, attendance at bar events and seminars, and firm administrative responsibilities.*

*In addition, reasonable time (perhaps up to one day) spent on training required to represent an actual or prospective pro bono client, as well as time spent evaluating potential pro bono matters, should be credited, either as billable or non-billable time. While training time is not usually considered client time, seminars and other training events sponsored by bar associations and legal services organizations are often the most efficient and effective way to learn a new body of public interest law required for representation of a client, and can replace the research typically conducted for commercial clients. Pro bono training is therefore distinguishable from continuing legal education when its sole function is to facilitate the representation of a specific client or clients. For instance, Human Rights First regularly hosts a 2-3 hour training on asylum law that presents information required to represent clients and that is more efficient than reading a treatise or performing original research. Likewise, local bar associations and legal service agencies sponsor pro bono training events, with the requirement that those attending agree to handle a pro bono matter.*

*In addition, reasonable time spent evaluating cases referred by legal services organizations with which the firm has established relationships could be counted as pro bono "client" time. In order to record this time, these agencies should be opened as firm clients for the limited purpose of working with them as co-counsel to evaluate cases.*

## **D. USE OF NON-LAWYERS FOR PRO BONO CASES**

*General Comment - Pro bono cases have the same importance to the firm as any other legal matter which the firm undertakes, and they should be given the same level of staffing, support and supervision in a manner that will assure the provision of competent and efficient representation to the client. Appropriate staffing is also more efficient for the firm as the attorney can spend his or her time performing legal services, rather than paralegal or administrative tasks.*

### **Staffing Pro Bono Matters**

- Give pro bono cases same level of staffing, support, and supervision as other firm legal matters
- Encourage paralegals and other firm employees to participate in pro bono service if capable with appropriate supervision
- Track paralegals' pro bono time consistent with firm's customary time keeping procedures
- Consider pro bono service in paralegals' evaluations and compensation decisions
- Devote same levels of administrative, word processing, duplicating, and similar support resources as other firm legal matters
- Supervisors should provide appropriate guidance to attorneys, paralegals, and support staff assigned to pro bono matters
- Make available to both lawyers and non-lawyers necessary training to assure competent representation

### **Commentary:**

*Paralegals and other firm employees should be encouraged to participate in pro bono service to the extent they can assist in the matter with appropriate supervision. Supervisors on pro bono matters should assure that adequate and appropriate staffing, both with lawyers and non-lawyers, is achieved commensurate with the complexity and demands of the pro bono matter. While the firm may have committed its resources to a pro bono matter, lawyer and non-lawyer work on any particular pro bono matter should still be voluntary. If a particular pro bono matter is controversial or otherwise objectionable to an*

*individual lawyer or non-lawyer, the individual should be allowed to decline to work on the matter in their discretion.*

*Paralegals should keep track of all time incurred in pro bono service following the same procedures applicable to billable cases and other non-billable time tracked by the firm. Pro bono service by non-lawyers is encouraged, and it should be taken into account in all periodic reviews and performance evaluations, including in compensation decisions. As with lawyers, paralegals should be included in any training necessary to permit competent representation in a pro bono case, such as areas of public interest law not typically handled by the firm.*

*If paralegals and support staff are not encouraged or permitted to participate in pro bono cases, then the burden of doing non-legal work falls on the attorney. This approach is not efficient for the firm as it increases, unnecessarily, the time the attorney must devote to the matter, and it is not efficient for the client, as there are many tasks more appropriately performed by paralegals and other administrative staff.*

## **E. FEES AND COSTS**

*General Comment – When a matter is accepted and approved for pro bono representation, the engagement letter should make clear that the client will not be charged for legal services provided and should also set out to what extent the client will be responsible for costs incurred in the representation.*

### **Costs**

- Paid by client
  - Payment of a cost retainer at the outset
  - Monthly or other appropriate billing
- Paid by firm
  - Establish a procedure for pro bono attorney to request payment by the firm of expenses in pro bono matters
- Routine office expenses should be paid by the firm
- Keep track of expenses in all cases in the event there is any opportunity for cost shifting or reimbursement, including a cost award

### **Fee-Shifting**

- Review contracts and applicable statutes at the outset to explore possible bases for fee-shifting
- Options for disposition of attorneys' fees recovered
  - Apply to out-of-pocket costs that were advanced by the firm
  - Donate to legal services or public interest organization from which the case was referred or other appropriate charitable organization
  - Create firm pro bono fund to be used for out-of-pocket expenses in other pro bono matters
  - Apply the fee award as payment for the reasonable cost of legal services provided
- Discuss with potential client (and confirm in writing) the firm's policy on disposition of attorneys' fee award

### **Funds acquired in connection with resolution of pro bono matter**

- Funds earmarked for a specific purpose must be used in that manner
- Pursuant to Bar rules, attorneys' fees awarded are not to be given to or shared with client

- Recovery of costs may be shared with client if the firm decides to forego reimbursement of out-of-pocket costs advanced

### **Comments:**

*All agreements regarding the treatment of fees and costs should be resolved at the initial interview with the client. To the extent possible, pro bono clients should bear the burden of out-of-pocket expenses related to the representation in order to ensure that the client has an appropriate investment in the outcome of the case, and so that the firm's limited pro bono resources are available to assist other clients. Depending on the client's financial resources, the client should be expected to pay in whole or in part for such costs as court reporters, interpreters, recording and other court fees, and other matter-related expenses. The client should not, however, be asked to pay for the firm's routine office expenses, such as copying, faxes, phone, mailing, and courier fees incurred in the course of the representation.*

*Any significant out-of-pocket expenses related to the handling of any authorized pro bono engagement should be discussed with and approved by the firm in accordance with its internal policies and procedures, as well as with the client, before the expense is incurred. A standard of reasonableness should be applied on a case-by-case basis. For instance, where out-of-town travel is involved, special efforts should be made to secure lower fares and inexpensive accommodations.*

*In all cases, attorneys should be sensitive to costs and make use of procedures and services that reduce costs without reducing the quality of the legal services provided, including seeking reimbursement of costs when appropriate at the conclusion of a successful litigation or settlement. Where appropriate, in forma pauperis petitions should be used, and other free support services should be utilized to the extent possible, such as free online legal research ( e.g., FastCase or Google Advanced Scholar). Vendors, including copy services, interpreters and court reporters, are also often willing to provide services or goods at or below cost for pro bono matters.*

*To the extent a pro bono client has agreed to pay expenses, a statement of such expenses should be sent on a monthly basis, or when otherwise appropriate, for prompt payment. A cost retainer may also be requested at the beginning of the*



*representation. Where significant out-of-pocket costs are likely, the engagement letter should include a provision stating that such costs will be reimbursed, to the extent the firm deems reasonable, from any judgment or settlement amount the client may receive.*

*In some cases there may be the possibility to recover attorneys' fees pursuant to a fee-shifting statute, contract, or appropriate independent fund. This possibility should be explored at the outset by a review of any written contracts and applicable statutes. The firm may decide to adopt a general policy for such cases, or may make the decision on a case by case basis in consultation with the client. The disposition of any attorneys' fee award should be discussed with the potential client at the beginning of the representation and confirmed in writing, preferably in the engagement letter. Such discussions should include giving the potential client the opportunity to consult with independent counsel regarding any fee award.*

*Counsel should be sensitive to opportunities for fee or cost recovery that may arise during the course of the representation. The court may award attorneys' fees as a sanction, or for acceptance of appointment to a case. Fees and costs may also be negotiated as part of a settlement, or recovered in connection with a closing (e.g. in certain affordable housing deals).*

*When a pro bono matter is resolved favorably for the pro bono client so as to result in the payment of money from another party, either by settlement or other agreement, any amount earmarked for a specific purpose must be used in that manner. While it is tempting to think that any attorneys' fees awarded should be given to or shared with the client, such sharing of fees with a client would violate Florida Bar rules. A recovery of costs, however, could be shared with the client, if the firm decides to forego reimbursement of out-of-pocket costs advanced.*