

MONTANA DEPARTMENT OF JUSTICE PRO BONO POLICY

1. **PURPOSE AND SCOPE.** This policy addresses the performance of pro bono legal services by attorneys employed by the Montana Department of Justice.

2. **DEFINITIONS.**

“Pro bono legal services” means legal services described in Mont. R. Prof. Cond. 6.1, including but not limited to those performed without the expectation of compensation for low income individuals who otherwise lack the ability to retain attorneys to provide legal services for them.

3. **GENERAL POLICY.** By any standard, there is a large unmet need for legal services for low income persons in Montana. The Montana Supreme Court has adopted a Rule of Professional Conduct which encourages each Montana attorney to perform 50 hours of pro bono legal service each year. Mont. R. Prof. Conduct 6.1. It is the policy of the Attorney General to encourage attorneys employed by the Department of Justice to volunteer to provide pro bono services in compliance with this policy and other applicable provisions of Montana law and the Montana Rules of Professional Conduct for attorneys.

4. **USE OF AGENCY RESOURCES.**

4.1 **Hours of Work.** Department attorneys are encouraged to seek pro bono opportunities that can be accomplished outside of scheduled working hours. However, pro bono legal services activities may sometimes occur during work hours. Supervisors are encouraged to be flexible and to accommodate, where feasible, the efforts of the attorneys they supervise to perform pro bono services. Employees seeking to participate in pro bono activities during regularly scheduled work hours may be granted annual leave, compensatory time off, or leave without pay, consistent with policies governing the use of such leave by state employees generally. Supervisors' decisions as to the authorization of leave may not be influenced by a supervisor's personal views regarding the substance of the pro bono activity.

4.2 Use of Office Equipment. Pro bono legal services are services provided in the public interest and in satisfaction of an ethical obligation of all attorneys to ensure that legal services are made available to persons of limited economic means. The Congress of the United States has recognized that this is not a private matter by authorizing the expenditure of tax dollars for the support of the national Legal Services program. Pro bono legal services therefore do not constitute the "private business" of the attorney for purposes of Mont. Code Ann. § 2-2-121(2)(a). Nevertheless, respect for the public trust requires that public agency attorneys refrain from inappropriate use of state resources for purposes not connected to the agency's mission. Use of law books or on-line resources for which there is no usage-based charge in the performance of pro bono services involves only a negligible additional expense, if any, and is therefore permissible. When office computers, printers, Xerox machines, and telephones are used in moderation for pro bono legal services, there is only negligible additional expense to the State for electricity, ink, and wear and tear, and such use therefore is permissible as long as the agency is reimbursed for supplies in accordance with Section 8, below.

This policy does not authorize the use for pro bono services of commercial electronic services for which there is a usage-based charge to the State.

Attorneys are encouraged to use personal cell phones when possible. If necessary, consistent with this policy, attorneys may use office telephone and facsimile machines for essential pro bono-related communication as long as no long distance or other additional usage-based charges to the State are incurred, the agency is reimbursed for any fax paper used in connection with the pro bono services, and the usage does not interfere with official business.

This policy does not supersede agency policies designed to protect the safety or security of computer or local area network operations. Any use of agency-provided equipment for pro bono activities must be consistent with such policies. This policy is also subject to any restrictions arising from law or contract on the use of agency equipment or supplies.

Attorneys should contact their supervisors if there is any question as to whether an activity involves a negligible additional expense, or

interferes or threatens to interfere with official business, and is consistent with agency computer security policies or legal or contract restrictions on use of equipment or supplies.

4.3 Email. Department attorneys are encouraged to use personal email if possible. Work email may be used if necessary, but attorneys are cautioned that emails sent over the state system may be subject to a public record request and to take steps to protect client confidentiality.

4.4 Letterhead. A Department attorney may not use office letterhead or agency or office business cards in the performance of pro bono legal services.

5. CONFLICT OF INTEREST.

5.1 General. Department attorneys are bound by the Rules of Professional Conduct for attorneys and the ethical rules governing state employees to avoid conflicts of interest. Department attorneys may not accept pro bono clients in matters which create or appear to create a conflict of interest with their work for the State. Such a conflict exists, among other situations, if a pro bono representation would require the attorney's recusal in a matter involving the attorney's official duties.

5.2 Prohibited actions. Given the Attorney General's role in criminal cases and in cases involving the State of Montana, Department attorneys may not undertake pro bono representation in any case involving: (a) current actual or suspected abuse against a partner or family member, or any other current criminal conduct by any party; or (b) an administrative or judicial proceeding in which the State of Montana or any political subdivision thereof is a party, or in which state interests are likely to be involved. Nevertheless, as long as the case does not involve criminal conduct, an attorney may participate in a case in which the State of Montana, Department of Public Health and Human Services, is providing child support enforcement services under Title IV-D of the Social Security Act to one or more of the parties. (See Mont. Code Ann. § 40-5-202(5)). But the attorney must make it clear to all parties and DPHHS that the attorney is acting in his or her individual capacity.

5.3 Guardian Ad Litem. While a Department attorney may serve as a guardian ad litem (GAL), an attorney may not act as a GAL in a case involving current actual or suspected abuse, or any other current criminal conduct, or in which the State or a political subdivision is a party, including youth in need of care cases.

6. FORMALITIES OF REPRESENTATION.

6.1 Retainer Agreement. A Department attorney shall make explicit in a retainer agreement with a pro bono client that the attorney is acting in his or her individual capacity and not as a representative of the Department. The client must sign the agreement. A sample agreement is attached to this policy. A retainer agreement is generally not required when an attorney is serving as a GAL. When serving as a GAL, the attorney shall make explicit to the Court that the attorney is acting in his or her individual capacity and not as a representative of the Department.

6.2 Malpractice Insurance. The State does not provide malpractice insurance coverage for the pro bono activities of its attorneys, since such activities are outside the course and scope of the attorneys' official duties. See Mont. Code Ann. § 2-9-305. Before accepting referral of a pro bono legal matter, the attorney should determine whether malpractice coverage exists through the referring pro bono program or organization, if any. The attorney should ask to review the referring entity's malpractice insurance policy, including exclusions. It is advisable that the attorney obtain a letter confirming malpractice coverage for the specific case. Department attorneys are encouraged to accept referrals through the Montana Legal Services Association so that MLSA's malpractice policy will cover the attorney.

7. USE OF OFFICIAL POSITION OR PUBLIC OFFICE. Department attorneys who provide pro bono legal services may not indicate or represent in any way that they are acting on behalf of the State or any agency or office of the State, or in their official capacity. The incidental identification of the attorney as a State agency employee--for example, when an office post office box address or telephone number is used--is not prohibited. The attorney is responsible for making it clear to the client, any opposing parties, or others involved in the pro bono case, that the attorney is acting in his or her individual capacity as a volunteer and not as a representative of the State or

any of its agencies. Generally, Department offices may not be used for meetings with clients or opposing counsel in a pro bono case.

8. REIMBURSEMENT. Department attorneys must reimburse the agency for costs associated with printing, photocopying, long-distance telephone charges, or faxing. When an attorney accepts a pro bono case, the attorney shall keep track of the number of pages printed on Department printers, the number of pages copied on Department photocopiers, and the number of pages received over a Department facsimile machine. The attorney shall reimburse the Department at the current per-page rate for public record requests, payable in one lump sum by May 31 of each fiscal year. The attorney shall request prior permission from his or her supervisor if the anticipated costs exceed \$50 per case.

9. DISCLAIMER. This policy is intended only to encourage increased pro bono activities by Department attorneys, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the State of Montana, its agencies, officers, or any person.

10. PERSONAL FAMILY LEGAL MATTERS. Notwithstanding any other provision of this policy, a Department attorney may perform personal and family legal services, including counseling family members in matters involving criminal law, provided the activity does not interfere with the proper and effective performance of the attorney's official duties.

Adopted this 6th day of December, 2016.

A handwritten signature in blue ink, appearing to read 'Tim Fox', is written over a horizontal line.

TIM FOX Attorney General

RETAINER AGREEMENT

The undersigned client (CLIENT) engages the undersigned attorney (ATTORNEY) for legal representation in the following matter:

ATTORNEY will make no charge for attorney fees in this matter. CLIENT acknowledges that ATTORNEY is acting in ATTORNEY'S individual capacity and is not acting as a representative of the State of Montana, Department of Justice, or any other state agency.

CLIENT will cooperate fully with ATTORNEY and will provide all information known by or available to CLIENT which may aid ATTORNEY in representing CLIENT.

CLIENT authorizes and directs ATTORNEY to take all actions which ATTORNEY deems advisable on CLIENT'S behalf. ATTORNEY agrees to notify CLIENT promptly of all significant developments and to consult with CLIENT in advance as to any significant decisions concerning those developments.

ATTORNEY will represent CLIENT diligently but makes no promises or representations as to the success of those efforts. ATTORNEY may terminate representation of CLIENT (1) if ATTORNEY believes further action is not justified on behalf of CLIENT or (2) if CLIENT does not cooperate with ATTORNEY.

CLIENT is responsible for any costs incurred other than attorney's fees. Efforts shall be made to waive costs whenever possible.

This retainer does not cover an appeal. In the event an appeal becomes possible, ATTORNEY will decide at that time whether or not to further represent CLIENT.

DATE

CLIENT

ATTORNEY