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Pro Bono Representation and the Government Lawyer

BY MARSHALL J. BREGER

As some of you may know, the Administrative Conference of the United States is an independent agency of the U.S. government dedicated to the promotion of fairness and efficiency in governmental processes. To this end, the conference commissions studies and makes recommendations for procedural improvements to federal agencies, Congress, and occasionally to the judiciary.

The conference’s interest in the provision of pro bono legal services by government lawyers began nearly two years ago when a member of the conference’s Special Committee on Government Ethics Regulation brought to its attention section 205 of title 18 of the criminal code. Section 205 prohibits federal lawyers from acting as agent or attorney, with or without compensation, in any matter in which the government has a “direct and substantial interest.” A government lawyer who violates the prohibition may be imprisoned for up to one year and fined $100,000, or the Justice Department may seek a civil penalty of up to $50,000 for each violation (or the amount of any compensation, whichever is greater). That’s serious stuff.

This seems like a draconian law should it be applied, for example, in the case of a Federal Energy Regulatory Commission lawyer who on her own time chooses to help social security claimants exercise their rights under federal disability laws.

In order to spark discussion of these issues, the conference sought a consultant to study the effect of 18 U.S.C. § 205 on the pro bono activities of government lawyers. Professor Lisa Lerman, the conference’s consultant, discovered in the course of her study that section 205 was only one restriction faced by government lawyers who wanted to provide pro bono legal services. And while section 205 bars representation in matters in which the government has an interest, certain administrative barriers apply to all outside activities. Until superseded on April 19, the Federal Personnel Manual stated in uncompromising terms:

Federal attorneys may not perform pro bono services on Government time or at Government expense. Similarly, attorneys may not utilize the services of other Federal employees on Government time to carry out otherwise impermissible pro bono services. In addition, OPM has concluded that Federal attorneys engaged in pro bono activities may not solicit Federal clerical employees to assist with pro bono work even on off-duty hours on a voluntary basis. . .

Certainly this language was not calculated to encourage government lawyers to engage in pro bono legal work.

There are, of course, good reasons for the rules against use of government time and resources for nonofficial business. But if those rules were rigidly applied, they would make it next to impossible for government lawyers to provide pro bono legal services. Professor Lerman’s report contains the following description of what might happen if such rules were strictly applied: “A dutiful government lawyer who wished to comply with the regulations and call her opposing counsel during the day might leave the office with her (privately purchased) pen and pad in hand and stand in a phone booth on the corner hoping that her adversary would return her call to the public phone within the appropriate time.”

Since the Administrative Conference started its study of this topic, two changes have occurred that make it somewhat easier for government lawyers to provide pro bono legal service. First, with respect to what constitutes a conflict of interest, the Ethics Reform Act of 1989 amended 18 U.S.C. § 205 to treat the District of Columbia as separate from the federal government for purposes of the prohibition. This distinction allows federal government lawyers to represent clients before the District of Columbia government, and it allows District of Columbia lawyers to represent clients before the federal government.

Second, and most recently, the Office of Personnel Management (OPM) issued new guidance on employee community service. That guidance contains a section on pro bono publico service that supersedes chapter 990, subchapter 2, of the Federal Personnel Manual, quoted above.

The new guidance certainly changes the mood and tone of federal policy regarding the provision of pro bono legal services. As an example, it specifically states:

OPM encourages agencies to be supportive of employees who wish to provide volunteer services to help those in need of legal assistance. Attorneys in the Federal Government, in keeping with their ethical obligation to the system of justice, may provide legal services pro bono publico to those in need, when such activities do not present a conflict of interest with their job responsibilities.

The guidance goes on to urge flexibility in considering requests for leave, changes in work schedule, or other steps to allow attorneys and other employees to render pro bono publico and related services.

In one area there appears to be substantive change as well. The new OPM guidance on pro bono publico service states: “Federal attorneys may use the services of other Federal employees on Government time to carry out pro bono services that satisfy one or more of the criteria for conducting such services.”
activities on an excused absence basis, provided appropriate supervisory approval has been granted. Excused absence is OPM’s term for “administrative leave.” Excused absence may be granted for volunteer service if the agency determines that one or more of the following criteria is satisfied: the service is directly related to the department’s or agency’s mission, is officially sponsored or sanctioned by the head of the department or agency, or will clearly enhance the professional development or skills of the employee in his or her current position.

These new changes don’t go so far as some people would like to ease the restrictions that apply to federal government lawyers’ provision of pro bono legal services. Clearly they don’t go as far as Professor Lerman would like. She recommends that 18 U.S.C. § 205 be narrowed to define the government lawyer’s client as his or her own agency rather than the federal government. Others have suggested that pro bono legal work be allowed unless the employee’s agency determines that the outside work would involve a conflict with a federal interest or would interfere with the efficient operation of the agency.

Discussion of this subject within the conference has revealed a number of reasons or concerns that are likely to cause federal agencies to resist further liberalization of the rules governing pro bono legal service by government lawyers.

One reason is that the narrowing of section 205 would run counter to the concept of a unitary executive. By this I mean the view—essentially correct in my opinion—that the federal government is of a piece, and that all responsible federal officials operate in pyramid fashion under the president’s authority. If the federal government is unitary, then government lawyers who have federal agencies as their clients will have conflicts when representing positions adverse to any part of the federal government in court. This view of the federal executive will make it very difficult to narrow section 205 further.

Fortunately, many cases do not involve the government as a party and therefore would pose no problem for federal government attorneys. Professor Lerman’s report, for example, quotes Federal District Court Judge Royce Lamberth as saying that 40 percent of the cases in his court do not involve the government.

Another reason further liberalization is likely to be resisted is that federal government managers naturally prefer “bright line” rules that can be applied across the board in a variety of situations. It is easy to argue that a “rule of reason” should be applied to specific requests to perform pro bono legal service. The problem in practice is that individual employees are likely always to view their requests as eminently reasonable, thus putting the burden on the manager to explain why they are not. The granting of an exception in one case is likely to become the office base line, and before long a common law of pro bono approvals will arise. No wonder that many managers find comfort in an unsympathetic, across-the-board rule.

Finally, there is a concern that taxpayers’ dollars should be spent on purposes approved through the appropriations process. Some will see liberalized pro bono opportunities as a “slippery slope” that may lead to more federal employee work and resources spent on personal interests or causes than on the government’s business.

When a lawyer takes on a case, whether pro bono or not, the lawyer has an obligation to represent the client competently, and the amount of time or resources that representation will require is not always evident at the outset. Undertakings that may not seem large when permission is sought may end up consuming a great deal of the government lawyer’s time.

These caveats aside, the new OPM guidance changes the prevailing tradewinds and opens new and creative opportunities for government lawyers to perform pro bono work.

The D.C. Bar Rules of Professional Conduct state clearly that “a lawyer should render public interest legal service.” The official comments to those rules, however, make clear that they are not “intended to place any obligation on a government lawyer that is inconsistent with...laws...limiting the scope of permissible employment or representational activities.” The new guidelines make it easier to place federal attorneys on a par with those in the private sector in regard to implementation of the code.

President Bush has urged that we seek a community where a “thousand points of light” illuminate our civic landscape. The new OPM guidance opens the door for federal attorneys, too, to respond to the President’s challenge.