American Bar Association  
Proposed  
Department of Justice  
Guidance on  
Federal Government Lawyer  
Participation in Professional Bar Association Activities

INTRODUCTION

Advantages of Government Lawyer Participation in Professional Bar Association Activities

Participation by government lawyers in professional bar association activities should be encouraged and facilitated by the federal government. Such participation enables lawyers to fulfill their professional responsibility to improve the law and to engage in pro bono work, and it significantly enhances their professional development and thus their value to their agencies. It also provides the private bar with the perspective of the government and a better understanding of how the government conducts its business. Thus, for example, it may help private attorneys and bar associations to develop a more balanced assessment of the effect that proposed legislation and regulations may have on executive branch agencies, and improve interpretation and enforcement of the law. In addition, it will provide the government with an additional means of communicating its perspective on issues of concern to the legal community, and an opportunity for an exchange of views with private sector lawyers on matters of public policy. Considering the importance that may be attached to recommendations of bar associations by Congress, by courts, and by the public, effective participation by government lawyers in the development of those recommendations by their profession should prove especially valuable to the government.

Increased Government Lawyer Professionalism

A government lawyer’s involvement in bar activities will generally be in areas directly related to the lawyer’s responsibilities in government. Government lawyers, no less than their counterparts in private practice, are understandably drawn to professional activities that focus on their areas of practice. Discussions held or recommendations considered during bar association business meetings or educational programs frequently involve the very subjects a lawyer is working on in his or her government position, such as recent court decisions or pending legislation. Bar activity thus affords the government lawyer an opportunity to work very closely with other professionals who can provide valuable insight into the perspective of the private bar, and at the same time provides members of the private bar with a better understanding of the government’s views, in general and on particular matters. In this continuous learning environment, government lawyers bring valuable ideas and a broader perspective to the private bar and to their home agencies.
In sum, the opportunities for educational development, for meeting other professionals, and for discussing a wide variety of legal and policy issues fully justify the government in encouraging and facilitating its lawyers' participation in bar activity as an integral part of their government service — just as private law offices encourage their lawyers to participate in bar activity, and for the very same reasons.

Support for Government Lawyer Professional Bar Association Participation

Government lawyers generally participate in bar association activities not as official federal agency representatives, but rather in their professional capacity. Federal agencies should support such “professional” participation by enabling government lawyers to use government time and resources for this purpose. The extent of such agency support will necessarily vary from case to case, depending upon what is deemed reasonable and appropriate in the applicable circumstances consistent with the agency’s mission and currently available resources. Most agencies can provide access to resources for the support of professional development and training of their personnel, which could be used to defray costs associated with participation in bar association programs and activities. Particular decisions respecting the allocation of such resources can be made on a case-by-case basis, depending upon available resources and competing priorities. In short, an agency's decision to provide a general level of support for its lawyers' bar association activities, or to support a particular lawyer's bar participation, involves normal resource allocation considerations, giving due consideration to the importance of improving the professional development of government lawyers.

In some cases a government agency may designate one or more of its lawyers to represent its interests within the bar, in which case the lawyers will be regarded by their agency — and by the bar — as participating in an "official" capacity. In a few instances, some bar groups specifically reserve places on their governing bodies for government representatives. A government agency may assign a lawyer to present the agency's views at a particular bar function, or to serve as a more permanent liaison with a bar group.

Government Lawyer Participation in Professional Associations is in the Government's Interest

A government lawyer’s participation in bar activities will generally be in the government’s interest. There is no inherent conflict of interest for a lawyer in actively participating in such activities and performing such service in bar associations. Occasionally, a specific conflict could arise because of a government lawyer’s work on a particular matter, either for the government or for the bar. Only in the rare instance where a federal government lawyer formally represents a bar association before a federal executive branch agency or court, would an issue be raised under 18 U.S. C. § 205.1 Neither concern should discourage participation. A generalized concern for

1 Section 205 of Title 18 of the United States Code prohibits a United States government employee from "acting as agent or attorney" for anyone before any agency or court of the United States in connection with a “covered matter” in which the United States is a party or has a direct and substantial interest,
possible future conflicts should not deter federal government lawyers' full participation in most bar activities, since specific conflicts can be handled through recusal on a case-by-case basis. Moreover, a government lawyer will rarely be called upon to act as a representative of a bar association before a federal government agency.\textsuperscript{2} Further, § 205 has recently been significantly narrowed by the courts in its application to federal government lawyers.\textsuperscript{3}

To be a fully involved and effective member of a bar association, a lawyer may often be required except when the employee is performing official duties. The statute applies to employees in the executive, legislative, and judicial branch. Although not defined by the statute, the phrase "acts as an agent or attorney" is generally regarded as encompassing representational activities on behalf of another. A "covered matter" is defined in section 205(h) as including "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter." The Office of Government Ethics has defined "particular matter" as one "that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." There are certain exceptions in the statute, but they are not relevant to representation of bar associations. No individual member of a professional association would normally be considered as authorized to "represent" the association without express authorization from its board of governors (or other management body) relating to a formal position that had been taken by that board on a specific issue or matter. The possibility that such circumstances will arise in the course of ordinary participation in bar programs and activities is, therefore, remote.

\textsuperscript{2} An individual lawyer is not normally regarded by bar associations as acting as its representative unless the lawyer has been specifically and officially designated to do so. See, e.g., American Bar Association Policy and Procedures Handbook, p.78, 1995-1996 ed.: “In a governmental communication undertaken on behalf of the ABA, the spokesperson shall only address issues within and consistent with official ABA policy and shall not volunteer to discuss other issues. If asked about issues outside the scope of such policy, the spokesperson should respectfully decline to respond or, if a response is unavoidable, should indicate that the response represents the spokesperson's personal views and not those of the Association.”

\textsuperscript{3} Jeffrey Van Ee v. EPA and U.S. Office of Gov't Ethics, 202 F.3d 296 (D.C. Cir. 2000). In Van Ee, the court of appeals held that a federal employee could act as spokesperson for environmental groups, of which he had been a long-time member, in these groups' public comments on draft environmental impact statements and similar land use plans issued by federal agencies other than his own employing agency. The court stated that § 205 is "not intended to apply to a federal employee's volunteer activities on behalf of ...[private organizations] because such activities would not give rise to the type of divided loyalty at which the statute was aimed." 202 F. 3d at 308. The proceedings at issue lacked the particularity required by the statute, did not result in a direct material benefit to the public interest groups, and did not create a specific conflict of interest or entail an abuse of position by Van Ee. The court went on to explain, "[n]either the text nor the legislative history demonstrates a congressional intent to prevent federal employees from representing nongovernmental interests without compensation in proceedings in which broad policy issues are at stake because the causal link giving rise to a conflict of interest would be too insubstantial.” Id. at 310. “Although in a very broad sense such proceedings may serve to advance the interests of a public interest group to the extent that the agency adopts its views or moderates proposals to address considerations of importance to the public interest group, this is hardly the situation that caused Congress to enact a criminal statute to preserve the integrity of governmental service and decisionmaking.” Id at 309. See also, O'Neil v. HUD, 220 F. 3d 2000 (Fed. Cir. 2000).
to take on leadership positions. The more senior the leadership position, the more valuable the lawyer’s participation may be -- for the lawyer’s own professional development and for the lawyer’s agency. For example, it may increase the lawyer’s stature when representing the agency and help in recruiting new lawyers.

Government lawyers have sometimes been discouraged from becoming involved in activities sponsored by bar associations because of an assumption, in some cases inadvertently reinforced by management directives, that such participation is not a legitimate part of their service to the government. In the past, some government advice has suggested that a lawyer’s participation in bar activities is not entitled to agency financial and logistical support unless it is undertaken in an “official” capacity, where the lawyer has been designated by agency management to represent the government. Government lawyers have been further discouraged by a concern of some that taking a leadership role in a bar association will necessarily involve them in a conflict of interest, or in some undefined improper or even illegal “representational” activity on behalf of the bar.

The following guidance implicitly rejects both of these assumptions. It is premised rather on a different assumption: that the government stands to benefit in a variety of ways from the participation of its lawyers in the full range of bar association activities, that this benefit will increase with the level of responsibility involved in such participation, and that it is therefore entirely appropriate for the government to support and encourage it. Accordingly, where the benefits exist and the resources are available, use of government time and resources to support individual lawyers’ professional bar association activities is authorized and encouraged.

**SPECIFIC GUIDANCE**

1. **Federal government lawyers should be encouraged to participate in programs and activities conducted or sponsored by bar associations, including professional development and continuing education, justice system improvement activities, and pro bono representations.**

   - As a general matter, government lawyers should be encouraged by their supervisors to take advantage of the full range of programs and activities conducted or sponsored by bar associations. Federal government lawyers may join bar committees and become involved in and contribute to bar-sponsored projects. They should be supported by their agencies in these endeavors as part of their professional development, especially since it is in the interest of the government to do so.

   - As with their other responsibilities, lawyers engaged in bar activities should be expected to keep their supervisors apprised of their activities and to perform their assigned duties fully and promptly. Any questions about the use of government resources or time should be raised with supervisors and resolved through normal management resource-allocation processes, giving due consideration to the importance of improving the professional development of government lawyers.
2. Federal government lawyers should be authorized by their agencies to make reasonable use of official government time and resources in support of their participation in bar association activities.

- The level of agency support for the participation of its lawyers in professional development activities, including activities sponsored by bar organizations, should be determined in accordance with normal resource allocation principles and processes, giving due consideration to the importance of improving the professional development of government lawyers.

- Particular decisions respecting the extent of use of government time and resources for participation in bar association activities may depend upon the value the agency places on the specific bar activity, the degree of the particular lawyer's participation in it, and competing priorities.

- The fact that a particular outside professional activity is authorized for agency support does not mean that the participating lawyer is acting in an “official capacity,” and such a designation will ordinarily be reserved for the unusual case where the agency has been invited by the bar to send an official observer or ex officio representative.

- If the agency defrays all or part of the government lawyer's expense in connection with attendance at a bar meeting, in that it is in the government's interest to do so, these outlays should not be considered a part of the lawyer's salary. Similarly, if a bar association reimburses the government for this expense, this should not be considered a gift to the lawyer.

3. Federal government lawyers may accept benefits offered them by a bar association on account of their status as public employees, as long as such benefits are generally available to all similarly situated government lawyers.

- It is not a conflict of interest or otherwise inappropriate for federal government lawyers to take advantage of discounts offered by bar associations to all government lawyers on dues, meeting costs, member benefits, and CLE course fees. Nor is it inappropriate for a government lawyer to take advantage of benefits that are available to similarly situated private lawyers, such as expense reimbursement for attendance at association meetings.

- Government lawyers should be authorized by their agencies before accepting reimbursement from a bar association for the cost of traveling to meetings or participating in bar-sponsored programs, and approval should be given unless the circumstances are such that acceptance would create a conflict of interest or an appearance of a conflict.
4. **There is no inherent conflict of interest when federal government lawyers participate in bar association activities in their own professional capacity.**

- Federal government lawyers' participation in bar association activities does not normally create a conflict of interest. Government lawyers, however, should be alert to situations where it may be necessary or prudent not to participate in a particular bar matter because of their government position.

- Decisions concerning a lawyer's participation in specific bar association matters should be made on a case-by-case basis, since a possible conflict is dependent on the facts of the particular situation. Any questions about participation in a specific matter because of a possible conflict of interest can be raised with agency ethics officials.

- Government lawyers must be alert to situations in which their acceptance of benefits from non-governmental sources, including bar associations, may give rise to a conflict of interest. As previously noted, lawyers should be sure that accepting such benefits is appropriate before accepting them.

5. **Federal government lawyers should be encouraged to serve in leadership positions within a bar association.**

- Serving in bar association leadership positions may make government lawyers even more valuable in their government jobs. The more senior the leadership position, the more valuable the lawyers' participation may be for their professional development and for their agency. However, government lawyers in bar leadership positions must be careful to make it clear when they are acting in their governmental position and when in their professional capacity.

- When government lawyers serve in leadership capacities in bar associations or are involved in developing bar association recommendations, they should make it clear to others the capacity in which they are acting, and should be aware of the possibility of misperception of their capacity in such circumstances.

6. **Federal government lawyers may communicate information about bar policies and programs and may advocate the adoption or implementation of such policies and programs within their agencies or generally within the government.**

- Federal government lawyers may communicate with agency officials that a bar association has adopted a policy or taken a position, or that it has developed or

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4 For example, when a lawyer who is the chair of a bar committee communicates with a court or agency on bar letterhead, the lawyer might well still be regarded as representing the bar notwithstanding any disclosures to the contrary. Similarly, where a government lawyer communicates with the bar on agency letterhead, the lawyer is likely to be regarded as representing the government.
implemented a program. In addition, they may advocate the adoption or implementation of such policies, positions, or programs, and for the government's support of them. They should, however, make clear that they are expressing their own views as professionals and are not acting as representatives of a bar association or otherwise on its behalf. If acting as representatives of a bar association, their actions should conform to Specific Guidance 7.

- Government lawyers may allow their names to be used on bar-generated material to indicate, for example, the role they played in its preparation. They should not, however, permit their names to be used on bar-generated material to indicate that they support a particular position that has been taken by the bar association in a matter (as opposed to helping prepare a study or analysis) where they could not otherwise advocate such a position directly on behalf of the association.

- Federal government lawyers may encourage their agencies to facilitate agency lawyers' participation in bar activities and advocate for the bar's participation in certain governmental activities, such as the selection of judges or the development of ethical standards, as long as they make clear that they are expressing their own views as professionals, and are not acting as representatives of a bar association or otherwise on its behalf.

7. **Federal government lawyers may act as representatives of a bar association and may advocate the bar's position in a particular matter before the government without violating 18 U.S.C. § 205, in the following circumstances:**

- **Before Congress.** Because Congress is not a department, agency, or court, § 205 does not apply. However, government lawyers must make it clear that they are acting on behalf of the bar association and not their agency. They should not use or permit the use of their official title in connection with the testimony, except as part of several biographical details. They must also comply with ethical and other rules for the protection of confidential government information.

- **Before a court or executive agency, if the representation does not involve a covered matter.** Section 205 extends only to matters in which "the government decision at stake is focused on conferring a benefit, imposing a sanction, or otherwise having a discernible effect on the financial or similarly concrete interests of discrete and identifiable persons or entities." Accordingly, § 205 does not bar federal employees from advocating on behalf of a bar association on broad policy issues, although it may preclude such advocacy in connection with a specific pending matter involving or affecting particular parties.

- **Before a court or executive agency, if it is within one of the statutory exceptions to 18 U.S.C. § 205.** Congress has enacted several exceptions to § 205, including one that allows a government employee to act as a representative of a private organization consisting primarily of other government employees, and one that allows a government employee to testify under oath.