A. Introduction

You are an attorney who wants to give back to the community by providing pro bono legal representation to those in need. Perhaps you were inspired by the ABA’s National Pro Bono Celebration. Or you were motivated by a local domestic violence restraining order clinic that is seeking volunteers. Maybe your law firm or local bar association is encouraging you to get involved.

Whatever the reason, your services are critical because the need for pro bono services is greater than ever during these tough economic times. But what do you do about malpractice insurance? Per one study, free malpractice insurance is one of the top three incentives to doing pro bono work, and a particularly high incentive for solo practitioners.1

So is someone else providing it to you? Do you need to purchase a special policy? What if you are an in-house attorney, government attorney, or retired attorney—are there different considerations in those situations?

This brochure is designed to guide you through these issues and more, so that you can begin or continue your pro bono legal service with the peace of mind that both you and your client are protected in malpractice situations.

B. Different Considerations for Different Types of Attorneys

1. Law Firm Attorneys

Many law firms have internal policies on what type of pro bono representation is allowed, and the process for accepting an engagement. This should be the starting point for any attorney employed by a law firm who is interested in pro bono work.

Most mid-sized and larger law firms purchase malpractice insurance (also known as lawyers’ professional liability insurance, or LPL insurance) for the benefit of their attorneys and for the protection of the organization and the clients. In you are an employee acting within the parameters of your firm’s pro bono policy, then it is likely that the pro bono engagement is covered under the firm’s policy. You typically will need to be doing the work on behalf of the named insured (your firm), and using the firm’s letterhead in all communications and the firm’s

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name on pleadings. The coverage language in many policies refers to work done “in the name of
or on behalf of [the firm].” Basically, your pro bono client is simply another client of the firm,
only without the obligation to pay for your services.

A 2010 examination of 18 different commercial LPL policy forms generally available to
firms of 10+ attorneys revealed that pro bono services as described in the preceding paragraph
are likely covered on each, even though they do not specifically mention pro bono
representation.2 Some forms, however, require that the firm managers give prior approval for the
pro bono services in order for the representation to be covered, so you should always conduct
yourself in accordance with the firm’s pro bono policy and obtain explicit authorization to begin
your work, in order to best protect yourself, the client, and the firm.

If you are employed by a law firm and contemplating doing pro bono work that would
not be done under the firm’s name—such as volunteering at a clinic, or participating in a bar
association initiative such as Wills for Heroes—then you will need to take some extra steps to
ensure coverage for your work. You should speak with the firm’s managing partner or general
counsel, and encourage them to speak with the law firm’s broker or insurer if there are any
questions. As discussed below, many legal services organizations, pro bono clinics, and other pro
bono programs also offer free and primary malpractice insurance to attorney volunteers working
under their purview.

2 One indicator of coverage is the language in the policy regarding the fees paid in a given engagement. Many
policies require that the “fees, if any” from the engagement are for the benefit of the insured law firm. The “if any”
language may suggest that pro bono (free) services provided by the firm are covered.

2. Small firm attorneys, solo practice attorneys,
contract attorneys, and part time attorneys:

The considerations are generally the same for small firm attorneys and solo practitioners
as they are for the law firm attorneys described in the last section. It is less likely, though, that
small firms will have written internal pro bono policies, so extra diligence is required whenever
engaging in pro bono representation. You should examine your insurance policy and speak with
your insurer or broker, especially if you do a lot of pro bono work.

Some solo practitioners also will act as a contract attorney for other lawyers or law firms.
In this instance, it is crucial for you to ascertain and confirm if you have coverage under the
policy of the firm hiring you (which is often the case), or if you need to have your own coverage
in place. If both you and the firm for which you are providing the contract services have policies,
you then will want to explore which policy provides primary coverage.

Certain lawyers also only work part time, and purchase policies specially crafted for
attorneys who work less than a certain number of weeks. These policies typically would cover
pro bono engagements, but you should check with the insurer or broker.
3. **Government attorneys:**

Most governmental agencies do not provide any coverage for their attorneys for legal representation outside of their official governmental representation. While some agencies explicitly prohibit their employed attorneys from practicing law outside of their duties at the agency (because of conflict of interest concerns and otherwise), others allow it with pre-approval. Your employer may even offer a program for you to purchase a low limit policy that provides malpractice coverage for any legal representation provided outside of the agency. The 2011 survey of LPL insurers\(^3\) ("2011 Survey") revealed that several insurers offered such insurance.\(^4\)

The bottom line is that your first step is to check to see if there is an internal policy about whether pro bono representation is allowed. If it is allowed, then check to see if your agency has a program that allows you to purchase a malpractice policy, or consult a broker or insurer about the possibility of purchasing one on your own. As mentioned, many legal services organizations, pro bono clinics, and other pro bono programs also offer free and primary malpractice insurance to attorney volunteers working under their purview.

4. **In-house counsel:**

There are some great resources out there for in-house attorneys (called “employed attorneys” in the insurance industry) who wish to engage in pro bono representation. The Association of Corporate Counsel, for example, has a joint project with the Pro Bono Institute that they call Corporate Pro Bono (www.cpbo.org). The CPBO has formally researched malpractice issues for in-house counsel doing pro bono work. Its findings are at: [http://www.cpbo.org/wp-content/uploads/2012/09/Insurance-Paper.pdf](http://www.cpbo.org/wp-content/uploads/2012/09/Insurance-Paper.pdf)

Generally, if an in-house lawyer wants to do pro bono work, the first step is to ensure there is an “employed lawyer malpractice policy” in place.\(^5\) The cost estimate for an employed lawyer policy in 2011 is in the range of $3,000-$5,000 a $1 million per occurrence and $1 million aggregate limit.

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3 The survey on this issue and the others referenced in this brochure was conducted specially by the ABA Standing Committee on Lawyers’ Professional Liability for the purpose of the publication.
4 These included Minnesota Lawyers Mutual, Oklahoma Attorneys Mutual, the Oregon State Bar Professional Liability Fund, the Bar Plan Mutual Insurance Company, and Wisconsin Lawyers Mutual, suggesting that mutual insurance companies (owned by the insureds) are more likely to offer this coverage. Please note that these insurers, as well as the other mentioned in this brochure, are not endorsed by the ABA or recommended by this publication. The names are provided only to give you as reference point to begin your research. It is important to note that there are likely other insurers who provide the same coverage, and that malpractice insurers enter the market with some frequency, and sometimes withdraw from markets.
5 In-house lawyers will have their companies generally purchase malpractice insurance for them for a variety of reasons that go well beyond the issue of pro bono work, including potential claims by non-client third parties, SEC and regulatory claims, and potential claims by individual employees the in-house attorney is assigned to represent. While the insurance industry changes, the carriers that offered coverage for employed lawyers as of the time of the publication of this report in 2013 included, but are not limited to, ALAS, CNA, Monitor Liability Managers, Zurich, Chubb, AIG, James River, and Minnesota Lawyers Mutual.
A 2010 examination of different employed lawyer malpractice insurance forms revealed that each specifically referenced pro bono services as covered professional/legal services, although each form had various qualifiers to coverage. The 2011 Survey likewise revealed that every insurer that responded that offered such a policy intended to cover pro bono work.

It appears that coverage for pro bono services by in-house attorneys is readily available from most markets, either as part of the main coverage form or by endorsement where requested by the insured company that hires the in-house lawyer.

5. **Retiring lawyers**

Some jurisdictions even allow retired or inactive lawyers to provide pro bono services. Illinois, for example, modified its rules in 2008 to give retired, inactive, and corporate attorneys limited admission status to provide on a pro bono basis critical legal assistance to vulnerable and disadvantaged people who would otherwise be shut out of the justice system. In Illinois, these attorneys must provide pro bono services under the auspices of a sponsoring entity, which is defined as “a not-for-profit legal services organization, governmental entity, law school clinical program or a bar association providing pro bono services.”

As another example, in New York in 2010, the court system enlisted retired lawyers to offer free legal advice and representation to poor New Yorkers in foreclosure, debt collection, housing, family and other civil cases. They are not subject to the state's attorney registration fee or mandatory CLE requirements, and receive free training and malpractice insurance coverage from the agencies or under the state Public Officers Law.\(^6\)

If you are retiring or going inactive, and still would like to do pro bono work, please check your specific state’s rules. Many retiring attorneys also purchase what is called a “tail” malpractice policy or an “extended reporting period (ERP),” which covers claims made during the time period of the tail (usually 3 to 7 years). However, the tail policy/ERP may only cover work completed prior to the effective date of the policy, and/or may only cover work of actively licensed attorneys, so you will need to consult with your broker or insurer on the scope of the policy specifically in connection with your anticipated pro bono activities.\(^7\)

C. **Doing Work Through an Organization**

There are a handful of insurers that provide insurance to legal services organizations who use pro bono attorneys.\(^8\) A common limit would be $1 million limit per claim and $2 million limit of liability in the aggregate.


\(^7\) See [http://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/ls_lpl_tail_coverage_faq_glossary.pdf](http://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/ls_lpl_tail_coverage_faq_glossary.pdf) for a further discussion on tail coverage and ERPs.

\(^8\) Legal services organizations include legal aid organizations and defender organizations, as well as others. As of the time of the 2011 Survey, the insurers or brokers who offered these policies included the National Legal Aid and Defenders Association (NLADA), CIMA, CNA, Hanover, Lloyds, Minnesota Lawyers Mutual, Oklahoma Attorneys Mutual, the Oregon State Bar Professional Liability Fund, Travelers, and Complete Equity Markets, Inc.
Pro Bono Work and Malpractice Coverage

Since many attorneys who provide pro bono representation through legal services organizations also carry their own policies, it is important to figure out which policy is primary. In other words, the inquiry is which policy initially provides coverage, and which policy only takes effect in the event the primary policy is exhausted. Some legal services organizations have a “Primary Pro Bono Endorsement,” which means that in the event of a claim against a volunteer attorney, that policy is primary. The 2011 Survey revealed, however, that every insurer that responded that offered these policies to legal services organizations intended for “other insurance” to be primary, if such other insurance exists.

Overall, the legal services organizations that offer coverage tend to use that coverage as a selling point in seeking attorneys to provide pro bono services. It can be very attractive to volunteers, especially if they do not have their own policies.

There are also organizations that do not qualify as legal services organizations, but that offer and host pro bono programs, such as bar associations. The 2011 Survey revealed that some insurers do offer policies to such programs.9 Sometimes, however, the bar association will not secure coverage and instead require the attorney to carry his or her own malpractice insurance with a certain minimum limit. You should make the appropriate inquiries before providing any pro bono services through such a program.

D. Considerations for the Policy

So now you know there is a policy in place that covers your pro bono representation. But what provisions should be in your policy? What do you care about? The following are some of the potentially desirable elements of a malpractice policy for pro bono lawyers to consider, especially if they are not with a law firm:

1. The policy is a claims-made policy, with full prior-acts coverage.
2. No or low deductible.
3. Reasonable premium.
4. Adequate limits (minimum $1 million per claim, though a case-by-case analysis should be done based on the types of matters the particular lawyer or firm is handling).

E. Other Resources

The ABA Center for Pro Bono offers many excellent resources to attorneys considering or engaging in pro bono activities. The website is at http://www.americanbar.org/groups/probono_public_service.html.

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9 These included Minnesota Lawyers Mutual, Oklahoma Attorneys Mutual, the Oregon State Bar Professional Liability Fund, and Wisconsin Lawyers Mutual, suggesting that mutual insurance companies are more likely to offer this coverage.