



The Office of
Minnesota Attorney General Keith Ellison

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RULE 6

& the Pro Bono Obligations of a Government Attorney

Why Should Everyone Do Pro Bono?

Because there is a **HUGE** unmet need
for legal services in Minnesota!

The Numbers

Example—Evictions:

- In Minneapolis, over 3,000 evictions are filed in the 4th District Housing Court each year. Evictions are a major issue facing renters in low income and minority neighborhoods, **affecting 43-48% of renter households in North Minneapolis.**
 - *Evictions in Minneapolis: Executive Summary*, Minneapolis Innovation Team (July 2016).
- When tenants receive representation, **83-96% win or settle their cases.**
 - *Legal representation in Evictions – Comparative Study*, Luke Grundman (Mid-Minnesota Legal Aid) & Muria Kruger (Volunteer Lawyers Network) (Nov. 2018).
- Evictions are up **60%** from pre-pandemic levels across Minnesota.
 - James Walsh and Mary Jo Webster, *Minnesota Eviction Filings Soared in April*, StarTribune, May 7, 2022.

The Numbers

Civil Legal Aid Does Not Meet Client Need

- One private attorney for every 310 potential paying clients
- One legal services attorney for every 4501 low-income individuals
- Statewide, legal aid organizations turn away 55% of eligible clients due to lack of resources
 - Data provided by the Minnesota State Bar Association

The Numbers

2019-2020 Case data

MN Judicial Branch, Percentage of parties with representation:



Housing:

- Landlords 61%
- Tenants 6%



Consumer Credit Cases:

- Creditors 98%
- Debtors 10%

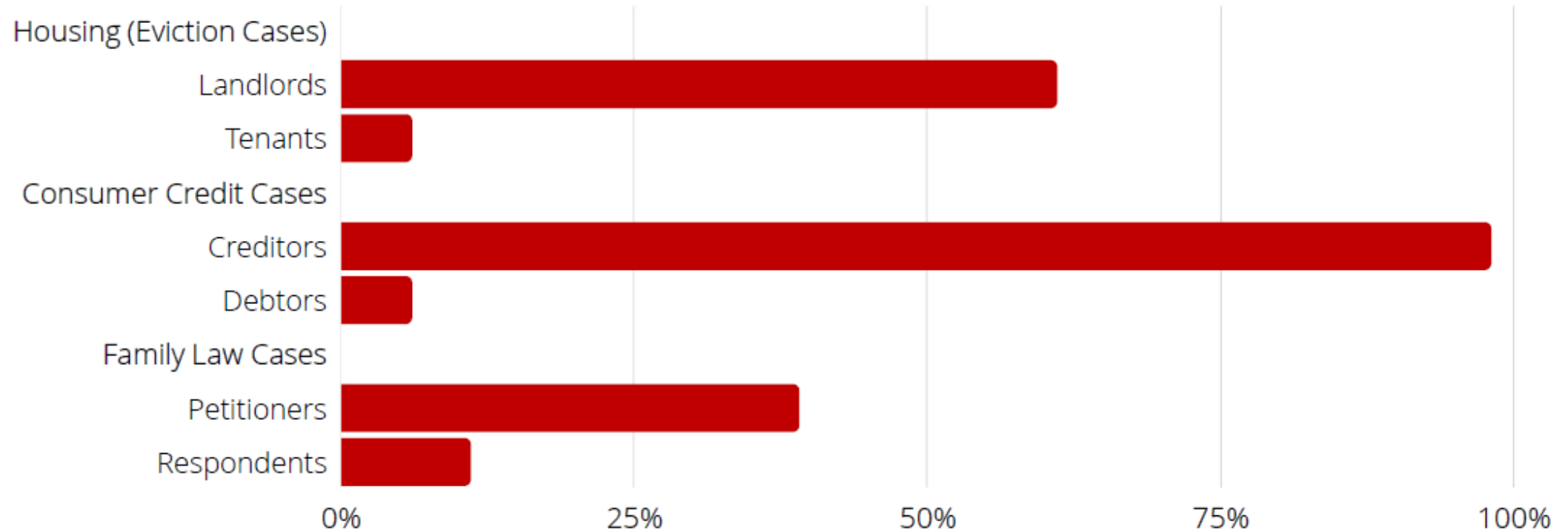


Family Law:

- Petitioners 39%
- Respondents 11%

The Numbers (fun graph version)

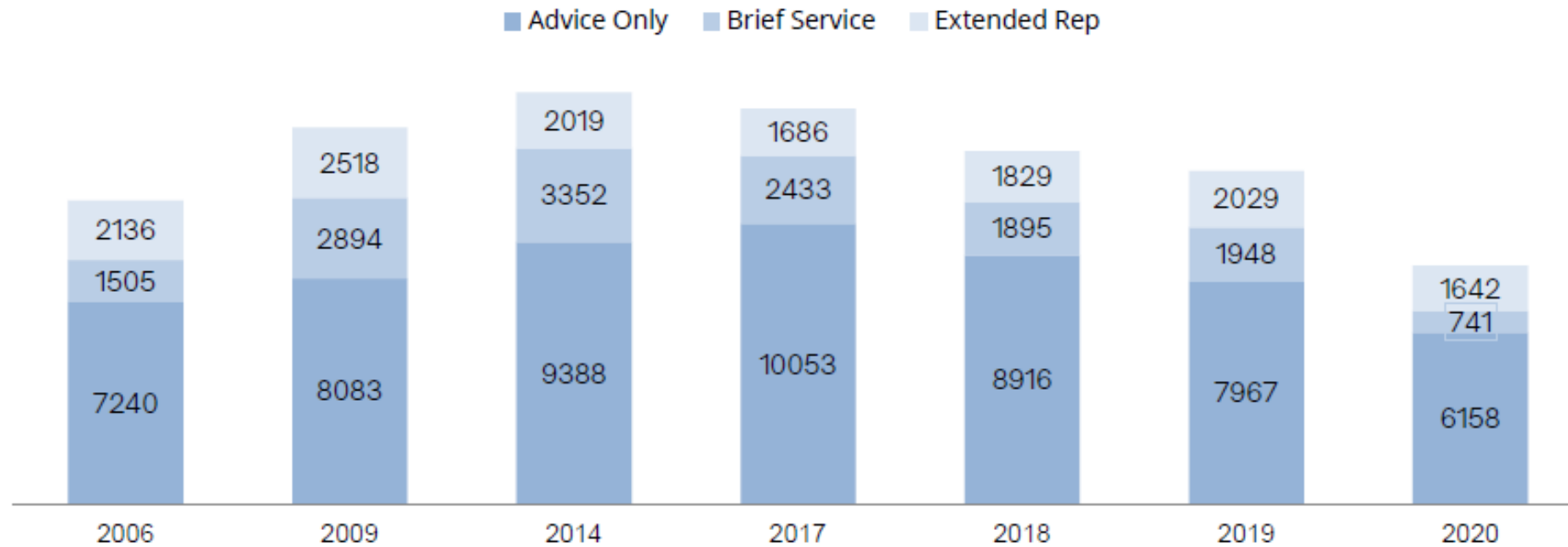
Attorney Representation by Case Type



The Numbers

LSAC Pro Bono Data

Pro Bono Cases Closed by LSAC Grantees



Minn. R. Prof. Conduct 6

PUBLIC SERVICE

This rule has five components:

- 6.1 Voluntary Pro Bono Publico Service
- 6.2 Accepting Appointments
- 6.3 Membership in Legal Services Organization
- 6.4 Law Reform Activities Affecting Client Interests
- 6.5 Pro Bono Limited Legal Services Programs

Minn. R. Prof. Conduct 6

PUBLIC SERVICE

Rule 6, generally, implicates other rules:

- 1.1 (competence);
- 1.2 (c)(scope of representation)
- 1.7 (conflict of interest: current clients);
- 1.9 (duties to former clients);
- 1.10 (imputation of conflicts of interest: general rule);
- 1.16 (a) (declining or terminating representation); and, my personal favorite...
- 8.4 (d) (“it is professional misconduct for a lawyer to: ... engage in conduct that is prejudicial to the administration of justice.”)

Minn. R. Prof. Conduct 6.1

Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least **50 hours** of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- a) provide a **substantial majority** of the 50 hours of legal services without fee or expectation of fee to:
 - 1) persons of limited means; or
 - 2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- b) provide any **additional** services through:
 - 1) delivery of legal services at no fee or substantially reduced fee to individuals, groups, or organizations seeking to secure or **protect civil rights, civil liberties, or public rights**, or 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;
 - 2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - 3) participation in activities for improving the law, the legal system, or the legal profession.

In addition, a lawyer should voluntarily **contribute financial support** to organizations that provide legal services to persons of limited means.

What Constitutes Pro Bono Work?

Services provided to

- **Persons of Limited Means:** People who “qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but *nevertheless, cannot afford counsel.*” Rule 6.1, cmt. 3.
 - People who qualify = those at or below 125% of the federal poverty line.
- &
- People whose “incomes and financial resources place them above limited means” *if* that work relates to “protect[ing] civil rights, civil liberties, or public rights.” Rule 6.1(b)(1); cmt. 6.

Minn. R. Prof. Conduct 6.1

Voluntary Pro Bono Publico Service

This obligation can also be fulfilled or substituted with financial contributions:

*“Because the provision of pro bono services is a professional responsibility, **it is the individual ethical commitment** of each lawyer. Nevertheless, there may be times when it is not feasible.... At such times, a lawyer **may discharge the pro bono responsibility by providing financial support** to organizations providing free legal services to persons of limited means. Such financial support should be **reasonably equivalent to the value of the hours** of service that would have otherwise been provided.”*

Minn. R. Prof. Conduct 6.1, cmt. 9.

Minn. R. Prof. Conduct 6.1

Voluntary Pro Bono Publico Service

Rule 6.1 declares a “professional responsibility” to provide pro bono services, but does not mandate fulfillment of that responsibility.

- *“The responsibility set forth in this rule is not intended to be enforced through disciplinary process.”*

Minn. R. Prof. Conduct 6.1, cmt. 12; Model R. of Prof. Conduct (ABA) 6.1, cmt. 12

But do it anyway!

Minn. R. Prof. Conduct 6.1

Voluntary Pro Bono Publico Service

Why Do It?

- Cardiovascular health. Duh.
- And...
 - The rules say so.
 - The caselaw says so.
 - Ethical reasons.
 - Reputational reasons.

Minn. R. Prof. Conduct 6.1

Voluntary Pro Bono Publico Service

“Providing legal services to the poor is a complex undertaking, but at a minimum, **all attorneys bear the ethical responsibility** at some point in their career to represent indigent clients or in some manner work to make the legal system accessible to those who could not otherwise afford it. To that end, bar associations recommend that their members designate a certain number of hours each year to pro bono services.”

Washington Legal Found. v. Legal Found. of Washington, 271 F.3d 835, 843 (9th Cir. 2001) (citing ABA Model Rules of Professional Conduct Rule 6.1), *aff'd sub nom in Brown v. Legal Found. of Washington*, 538 U.S. 216, 123 S. Ct. 1406 (2003).

Minn. R. Prof. Conduct 6.1

Voluntary Pro Bono Publico Service

“‘[T]he bar's monopoly over legal services entails obligations to court and society.’ These obligations often take the form of ethical duties to the profession as opposed to legally enforceable requirements...”

Naranjo v. Thompson, 809 F.3d 793, 803 (5th Cir. 2015) (Quoting *United States v. Bertoli*, 994 F.2d 1002, 1018 (3d Cir. 1993))

Some state bar associations mandate that attorneys perform a certain quantity of pro bono work.

- In Minnesota, that quantity is **50 hours per year.**

Minn. R. Prof. Conduct 6.2

Accepting Appointments

A lawyer **shall** not seek to avoid appointment by a tribunal to represent a person **except for good cause**, such as:

- a) representing the client is likely to result in **violation of the Rules** of Professional Conduct or other law;
- b) representing the client is likely to result in an **unreasonable financial burden** on the lawyer; or
- c) the client or the **cause is so repugnant** to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Minn. R. Prof. Conduct 6.2

Accepting Appointments

“**For good cause** a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular.

Good cause exists if:

- “The lawyer could not handle the matter **competently** (see Rule 1.1)”;
- “If undertaking the representation would result in an improper **conflict of interest**” (see Rules 1.7 and 1.8);
- “The cause is so **repugnant** to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client”; or
- If accepting the appointment “would be **unreasonably burdensome**, for example, when it would impose a financial sacrifice so great as to be unjust.”
 - Minn. R. Prof. Conduct 6.2, cmt. 2.

Minn. R. Prof. Conduct 6.2

Accepting Appointments

“Federal courts may not compel counsel’s services in **civil matters**.” *Smith v. United States*, No. Civ. 03-5195 ADM/RLE, 2005 WL 681301 (D. Minn. Mar. 24, 2005).

- Whether and when a **state civil court** may compel counsel’s services by appointment, without violating the constitution, is an issue beyond the scope of this presentation.

Hepfel v. Bashaw (Minn. 1979):

- “We therefore hold, pursuant to our supervisory power to ensure the fair administration of justice, that in paternity adjudications counsel must be provided indigent defendants where the complainant is represented by the county attorney. . . . our holding in no way affects the right of indigent defendants in other civil actions to court-appointed counsel.”

Membership in Legal Services Organization

A lawyer may serve as a director, officer, or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not **knowingly participate** in a decision or action of the organization:

- a) if participating in the decision or action would be **incompatible with the lawyer's obligations to a client** under Rule 1.7; or
- b) where the decision or action could have a material **adverse effect** on the representation of a **client of the organization** whose interests are **adverse to a client of the lawyer**.

Membership in Legal Services Organization

Comments:

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization **does not thereby have a client-lawyer relationship with persons served by the organization.** However, **there is potential conflict between the interests of such persons and the interests of the lawyer's clients.** If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer **knows that the interests of a client** may be materially **benefited** by a decision in which the lawyer participates, the lawyer **shall disclose that fact but need not identify the client**

Law Reform Activities Affecting Client Interests

Comment:

Lawyers involved in organizations seeking law reform generally **do not have a client-lawyer relationship with the organization**. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. *See also* Rule 1.2(b) (scope of rep). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7 [conflict of interest]. A lawyer is **professionally obligated** to protect the integrity of the program by making an **appropriate disclosure** within the organization when the lawyer knows a private client might be materially benefited.

Minn. R. Prof. Conduct 6.5

Pro Bono Limited Legal Services Programs

- a) A lawyer who, under the auspices of a program offering pro bono legal services, provides short-term limited legal services to a client **without expectation** by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
 - 1) is subject to Rules 1.7 and 1.9(a) **only if the lawyer knows** that the representation of the client involves a conflict of interest; and
 - 2) is subject to Rule 1.10 **only if the lawyer knows** that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by the rule.

Minn. R. Prof. Conduct 6.5

Pro Bono Limited Legal Services Programs

Even when engaging in pro bono services under rule 6.5 understand that:

- **A client-lawyer relationship is established**, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation.
 - Minn. R. Prof. Conduct 6.5, cmt. 1
- **Consent as to the limited scope of the representation is required**. If short-term representation is not feasible, the attorney must tell the client to seek out other representation.
 - Minn. R. Prof. Conduct 6.5, cmt. 2

Minn. R. Prof. Conduct 6.5

Pro Bono Limited Legal Services Programs

Takeaways from 6.5

- Knowledge and the duration of the representation are key.
- An attorney can't stumble into violating this rule if the representation is temporary. You must be aware of a conflict of interest to violate rule 6.5.
- The comments to the rule contemplate that “it is not feasible for a lawyer to systematically screen for conflicts of interest” as is generally required, and that’s okay.
 - Minn. R. Prof. Conduct 6.5, cmt. 1

Barriers

What are the Top 4 Barriers Preventing Government Attorneys From Engaging in Pro Bono Work?

1. Conflict of Interest
2. Lack on Malpractice Insurance
3. Inability to Use Office Resources
4. Inability to Volunteer During Office Hours

But guess what, we have solutions!

Minn. R. Prof. Conduct 6.5

Pro Bono Limited Legal Services Programs

Examples of representation under Rule 6.5

- (short-term representation, under auspices of another program)
- Eviction Clinic (SMRLS)
- Expungement Clinic (Mitchell Hamline)
- Wills for Heroes (MSBA)
- Not Covered by 6.5, generally: Immigration and child protection
 - WHY?
 - *Generally*, requires long-term representation, opening the door for conflicts of interest

Conflict of Interest

There are many pro bono opportunities, you **CAN find one that does not present a conflict if you look**

- Find opportunities that fall within Rule 6.5
- Find opportunities that do not involve client work (e.g. participating in legal services orgs. that address the needs of persons of limited means, *see* Rule 6.1)
- When in doubt, consult with the Office of Lawyers Professional Responsibility.

Request an Advisory Opinion at:

<http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinionRequestForm.aspx>

Malpractice Insurance

You should **always** ensure that your pro bono program provides malpractice insurance to cover your legal work.

Your government employer will (likely) not provide it.

Use of Office Resources

Every government office should have a pro bono policy delineating what resources can and cannot be used.

Remember that when you engage in pro bono work, you are not acting as a governmental employee, but instead, you are acting in your **individual capacity** using your own resources or the resources provided by the pro bono program you are working with.

Office Hours

Again, check with your office's pro bono policy in determining when you can engage in pro bono work.

You may be able to do pro bono during traditional office hours, but you may need to flex your time or use annual leave.

Again, your pro bono work is done in your individual capacity, not your official capacity.

What Else Can you Do?

If you are unable or unwilling to engage in pro bono work, what else can you do to contribute to the unmet need to legal services?

- Volunteer in another (non-lawyer) capacity
- Donate!
- Mentor
- Teach/tutor
- Coach a moot court/mock trial team
- Be creative, but honor your obligation to give back

Helpful Resources

- When in doubt **request an advisory opinion from the Professional Responsibility Board at:**
 - <http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinionRequestForm.aspx>
- MSBA Model Pro Bono Policy and Procedures for Governmental Attorneys, available online
 - https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/msba_gov_attorneys_probono.pdf
- “Pro Bono Project Development” A Deskbook for Government & Public Sector Lawyers, available online
 - https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/gvtatt_ylowresfnl.pdf

The Office of the Minnesota Attorney General's Pro Bono Policy and Checklist

- The AGO in 2021 formed a Pro Bono and Volunteer Committee
- The purpose of the Committee is to ensure the AGO has policies, practices, and procedures that allows attorneys to engage in pro bono work consistent with their ethical obligations
- In 2021, the Committee published a revised Pro Bono Policy
- Currently, the Committee is developing a Pro Bono Checklist to ensure attorneys can easily follow office policy in

Questions?



Email: joseph.heegaard@ag.state.mn.us