



ABA Military Pro Bono Project Guidelines For Military Supervising Attorneys

I. Overview

The ABA Military Pro Bono Project (the “Project”) provides a means for active-duty military personnel facing civil matters to be connected to volunteer attorneys when their legal needs require services beyond what can be provided by legal assistance offices. The Project has an online portal that allows case-handling Judge Advocates and their civilian attorneys to refer financially-eligible servicemembers to the Project, which then connects the servicemembers with volunteer attorneys.

II. Your Role as a Supervising Attorney

As a supervising attorney, you have been designated by your service branch to review all referrals from specific legal assistance offices, and approve the referrals for passage to the Project only if the referrals meet the Project’s criteria for good cause. Because the pro bono attorneys participating in the Project are volunteering their time to take these cases, the Project is dedicated to ensuring that only those cases that are legally and financially meritorious and support the well-being of the servicemembers are referred through the Project. By reviewing these referrals, you play an essential role in achieving this goal.

III. The Referral Process

The referral procedure is designed to minimize the time commitment required by the military attorney. All client and case information will be provided by legal assistance handling attorneys through the Project’s website, www.militaryprobono.org. The handling attorney is required, at a minimum, to supply enough information for a pro bono attorney to conduct a conflict check and understand the legal issues involved, and the handling attorney will affirm “good cause” for the referral.

Once the information is submitted online by one of your handling attorneys, you will be notified by an email stating that a referral has been made and providing a link to the case information on the Project website. By clicking the link, you will access all of the case material submitted by the handling attorney. The email also contains information on the steps you will take to approve, reject, or request additional case workup by the handling attorney. You may approve the case immediately or request additional information from the handling attorney, upon the receipt of which you may then approve the referral.

Once approved, the referral will be received by the ABA Project Director, who will then make every effort to place the case with a pro bono attorney or law firm. The handling attorney will be notified once the case is placed and will complete the case “handoff” to the pro bono attorney by conveying all case information necessary for the pro bono attorney to begin work. In general, the referral

process is designed to minimize the required time commitment for handling attorneys initiating referrals.

IV. Client Financial Eligibility

The Project is designed to provide pro bono referrals for servicemembers who cannot afford the fees of a private civil attorney. Clients at current paygrade of *E6 or below* will be presumed financially eligible, and no further financial disclosures are required by the Project. When reviewing a referral, you should ensure that the client's current paygrade meets this requirement. Servicemembers at paygrades above E6 are strongly presumed *ineligible*. Such referrals will only be accepted in special cases, left to the discretion of the pro bono attorney or firm. If the referral is for an above-E6 client, make certain that the handling attorney has thoroughly documented compelling circumstances justifying the referral.

V. Who May be Considered a "Client" for Project Referral

Referral to the Project is generally available to active-duty servicemembers, including National Guard and Reserve members on federal active-duty under Title 10. A referral may also be made for National Guard and Reserve members on Title 32 active-duty status or who are not currently on active duty so long as the referral is for a legal matter related to or arising from mobilization, demobilization, or military status.

A referral to the Project may be provided to a non-servicemember spouse of an active-duty servicemember meeting the above financial criteria if three criteria are met.

1. The legal issue must directly affect the well-being of the servicemember, his or her family as a whole, or his or her military readiness;
2. The legal interests of the spouse and servicemember must be aligned in the matter—in other words, a non-servicemember spouse will not receive a referral through the Project for representation adverse to the servicemember; and
3. The legal issue must be such that the servicemember would have pursued the matter were he or she present to do so. That is, the spouse is acting as a surrogate to protect the nonpresent servicemember's interests. For example, a referral may be made for a deployed servicemember's spouse involved in a dispute with a landlord or creditor where the servicemember is a party to the agreement or contract, but not for a case where the servicemember's spouse is involved in a family law dispute with his or her former spouse.

A referral of a nonmarried servicemember's parent(s) to the Project may be made applying the above analysis. Referral of a nonmarried servicemember's parent to the Project may be made for legal issues involving payment of survivor benefits or establishment of a guardianship for an incapacitated servicemember. In all instances where a spouse or parent is referred to address legal issues on behalf of a servicemember, the military handling attorney should elaborate in the case notes on the basis for referring the family member in lieu of the servicemember. As the supervising attorney, you would review the referral notes to ensure that all of the above criteria are met.

VI. Qualified Case Types

The Project accepts referrals of clients with legal issues falling within certain defined categories. Before approving a referred case, a supervising attorney will review the case to make certain that it meets these substantive legal categories, which are the following:

Consumer Law: Referrals may be made for a wide variety of consumer law issues affecting servicemembers' well-being, financial and otherwise. The Project is particularly interested in lending issues: predatory lending (including payday lending), TILA, FDCPA, lemon law, lender violations of SCRA interest rate and payment moratorium provisions, vehicle repossession protections for deployed servicemembers, and foreclosures. Referrals may also be made for consumer bankruptcy cases where the facts are sympathetic and/or bankruptcy is prompted by circumstances beyond the client's control or bankruptcy is required to preserve other life necessity (e.g., prevent foreclosure, avoid significantly burdensome wage garnishment). Straightforward no-asset Chapter 7 bankruptcies would be a core case type.

Employment: Referrals may be made for employment law issues generally involving Uniformed Services Employment and Reemployment Rights Act (USERRA) issues. Most USERRA cases are expected to originate with Guard and Reserve legal offices. Referrals should be made only where alternative resources (Department of Labor and others) are unavailable or incapable of providing assistance.

Expungements: Referrals may be made for clients seeking to expunge their criminal records. The Project is particularly interested in expungements that will help remove barriers to housing, loan eligibility, and civilian employment. The referring attorney must articulate in the referral how the client satisfies the expungement requirements of the applicable jurisdiction. Referrals for executive clemency and pardons are not accepted.

Family Law: The Project accepts referrals for family law matters only where at least one of the following five elements is present:

1. Servicemember is deployed outside of the country and needs a lawyer in the U.S. to handle his/her legal matter;
2. Opposing party is represented by counsel;
3. Servicemembers Civil Relief Act is implicated;
4. Servicemember's physical custody of his/her children is at issue (see *Appendix A, Family Law Case Involving Changes of Physical Custody of Children*); and/or
5. Servicemember has established, to the satisfaction of the referring military attorney, that he/she has experienced domestic violence perpetrated by the adverse party and is seeking legal assistance for a divorce, order of protection, child custody and/or visitation.

Acceptance of referrals for family law matters that have none of these five elements are presumed ineligible; however, if the case is particularly compelling but lacks any of the five elements, a handling attorney may submit a referral with a detailed explanation of the exigent factors. You may exercise your discretion to determine whether the case is important enough to utilize the Project's limited pro bono resources.

Generally, referrals should not be made for a non-servicemember spouse with a family law issue not directly involving the servicemember, such as a custody or child support dispute between the spouse and another parent regarding children the spouse does not share in common with the servicemember. The Project will rarely accept referrals where both parties to a family law dispute are servicemembers by involving a second casehandler on the Project staff and screening client information to avoid any real or perceived conflict of interest. If this situation should arise, you should contact the ABA Project Director for further guidance on how to proceed. If there is a potential conflict of interest, the Project may reject a referral.

Guardianship: Referrals may be made for (1) guardianship matters when a servicemember needs to establish guardianship over a relative, or (2) representation of a current spouse or parent needing to secure guardianship of a legally-incompetent servicemember. Exercise caution and discretion when considering referral of a client in a contested guardianship proceeding involving a legally-incompetent servicemember, and refer only those cases where the client (i.e., prospective guardian) has a strong position supported by clear facts and evidence, and there is good cause to believe that it is in the servicemember's best interests by having that client appointed as legal guardian.

Landlord/Tenant: Referrals may be provided for *tenants only* in all manners of landlord/tenant disputes, including representation to avoid wrongful termination of tenancy, including where property is being foreclosed upon. Cases may be referred even if small-claims court is available as a remedy.

Probate: Referrals may be provided to a servicemember's next-of-kin experiencing difficulty securing military benefits. Referrals may also be made for a servicemember or next-of-kin in resolving significant (i.e., not small estate) probate issues. When considering a client's financial eligibility for referral for probate involving estates with considerable assets beyond military benefits, discretion should be exercised to avoid referring cases where for-fee legal counsel may be easily obtained due to the size of the estate.

Tax Law: Referrals may be made for a variety of tax law issues, ranging from complex tax return preparation to resolution of federal tax debts and liens to mortgage foreclosure taxation issues.

Trusts and Estates: Referrals may be made for (1) the creation of special needs trusts, or (2) estate planning assistance otherwise beyond normal scope of work of the military legal services office.

Note that it is expected that Servicemembers Civil Relief Act (SCRA) protections will apply to many referred cases in any of the above legal areas. Many non-military volunteer attorneys will be relatively unfamiliar with this statute (as well as other servicemember-specific statutes), so SCRA claims, defenses, and remedies should be clearly and fully described by the referring attorneys in the request for referral form.

Where a client's legal issue falls outside of one of the above-defined areas, the handling attorney may refer the case based upon an articulation of how a referral for legal assistance will support the servicemember's readiness for military duty and how a lack of legal assistance will negatively affect such readiness. You should carefully review this explanation and approve only those referrals that clearly demonstrate a high degree of need and necessity where the servicemember's readiness and well-being is concerned.

VII. Affirmation of Good Cause

As stated above, it is essential to the Project's effectiveness and success that all clients referred to the Project have high-priority legal issues justifying receipt of the limited pro bono time available from private attorneys. In order to ensure that cases referred to the Project meet this standard, the handling attorney must review the Project's "good cause" checklist, and when referring cases, check off a box indicating that the handling attorney affirms that the case has good cause for referral. In

addition to certification that the client meets financial eligibility requirements, the handling attorney will be affirming good cause based upon the answers to the following questions:

- 1. What are the operative facts regarding the legal issue?** The handling attorney will concisely state the operative facts related to the client's legal issue, attributing information for which the client is the sole source ("Client says X"; "Client claims Opposing Party did Y") and making clear which facts the handling attorney personally knows or has verified. The handling attorney will describe attempts to verify key factual elements either through further discussion with the client or independent verification. It is not expected, however, that the handling attorney will exercise any more due diligence than would ordinarily be undertaken in any given case. In some cases, the facts provided by the client may be incomplete, confusing, or present a close question as to whether the client's legal position is supportable. The handling attorney may still refer the case if believing, in his or her best legal judgment, that it is more likely than not that a pro bono attorney will be able to develop the facts more fully in the client's favor; however, the handling attorney should specifically identify those facts needing further development to support the client's position.
- 2. What is the client's desired outcome?** The handling attorney will state the client's specific objective (or objectives) for the pro bono representation. Good cause will be found only where the handling attorney can articulate a good-faith legal basis for the client to obtain his or her objective. The handling attorney must identify both an attainable legal remedy under the facts and the law, and explain how securing this remedy will support the well-being of the servicemember. For example, an attorney would use remedies available under state landlord-tenant law and the SCRA to prevent eviction and maintain stable housing for the servicemember's family.
- 3. What is the specific legal theory under which the client may achieve his or her objective?** The handling attorney must explain the statutory and/or case law supporting the client's legal position in the matter. In some instances the handling attorney may not be able to obtain clear or supportable facts that are necessary to clearly establish a legal claim. Again, the handling attorney will need only to determine a reasonable likelihood of success on the merits based upon further development of the facts by a pro bono attorney and the legal theories available should those facts be developed. If the client is a plaintiff or petitioner, the handling attorney will describe the legal theory under which the client has a reasonable possibility of securing the remedy sought. If the client is a defendant or respondent, demonstrate the existence of a non-frivolous defense. In family matters, the person seeking a change in the status quo shall be deemed the plaintiff and the person defending the status quo shall be deemed the defendant for purposes of this determination, regardless of their formal procedural status. It is understood that certain statutory protections found in the Servicemembers Civil Relief Act (SCRA) will be implicated in many cases involving other substantive areas of law.
- 4. How has the client attempted to resolve this issue?** The handling attorney will provide the client's description of any formal or informal efforts to resolve the legal issue, whether with the help of military legal assistance or otherwise. Good cause to refer a case will exist only where all reasonable efforts to resolve the matter, whether in a legal forum or not, have either failed or are impracticable. The account of good-faith efforts to resolve the dispute will include explanation of attempts to secure legal assistance through alternative means (e.g., pursuing the claim through a government agency, or obtaining counsel on a contingency fee) when relevant, whether self-help and pro se representation is either not recommended or has

been attempted and is no longer effective, and in every case why the local Legal Assistance office is not in a position to resolve the issue in the manner being requested of the volunteer private attorney.

Certification: Following the completion of the above elements, the handling attorney will affirm good cause (by clicking an “affirm” button) with the following statement: “To the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the client I am referring to the Military Pro Bono Project has a bona-fide legal dispute, that the client’s position is legally meritorious, with a good-faith basis for proceeding with the client’s claim or defense, and that other available avenues for resolution of the issue have been exhausted.”

As stated above, a referral should not be made until other known and practical means of resolving the legal issue have been exhausted, including (but not limited to) where appropriate: negotiation, seeking assistance from government agencies, attempting to secure contingency fee counsel, proceeding pro se with advice and self-help materials, and additional assistance through military legal assistance office. The handling attorney should assess what alternative resources or means of resolving the issue are available and explain how these have been exhausted. As the supervising attorney, you should carefully review the case referral to ensure all of the above criteria are clearly met.

VIII. Conclusion

We look forward to working with you to secure pro bono legal assistance for your clients. Please contact the ABA Military Pro Bono Project Director, Mary Meixner, at 312.988.5783 or mary.meixner@americanbar.org, if you have questions or need additional information.

Appendix A

ABA Military Pro Bono Project Referral Guidelines: Family Law Case Involving Changes of Physical Custody of Children

These guidelines pertain to cases where the client is seeking to obtain primary physical custody of a child or children from another party, and the child or children do not reside the majority of the time with the client. These situations may arise in divorce, paternity, or custody modification cases. Note that these guidelines do not apply to the following circumstances:

- The child already resides the majority of the time with the client and/or the client has court-ordered primary physical custody;
- The opposing party is attempting to take primary physical custody away from the client;
- The client is seeking to adopt children or stepchildren; or
- A noncustodial client wishes to modify visitation provisions relating to his/her children, but is not pursuing a change of physical custody.

Background:

Generally, courts are not inclined to change primary physical custody from one parent to another absent strong evidence that such a change is in the best interests of the child. Accordingly, those family law attorneys volunteering to provide pro bono counsel to servicemembers for family law matters are reluctant to take on these types of custody battles unless there is clear, demonstrable evidence that a change of custody is in the best interests of the child. In order to facilitate these pro bono referrals, the Military Pro Bono Project requires military attorneys to elaborate on the evidentiary basis underlying a case involving a change of primary physical custody.

The information you should provide with your referral:

In the text box provided on the online case referral form, please describe the following:

- 1) All factors and arguments supporting the client's claim that the presumptive harm to the child by a change of physical custody is outweighed by the overall best interests of the child. Describe the evidence the client can provide the court demonstrating that a custody change is in the child's best interests. Explain how the client's arguments and evidence will show that the child's existing custodial arrangement threatens the child's physical, psychological, and/or emotional well-being.
- 2) If the case involves modification of an existing court order of custody, provide information about why the client did not pursue primary physical custody previously. It is important to also explain what circumstances have arisen since entry of the last court order of custody that support the client's arguments in favor of custody modification.
- 3) Elaborate on what arguments the opposing party may raise in opposition to the client's attempt to obtain custody. If there is an existing custody order and the client had previously attempted to gain custody, explain why the court ultimately awarded custody to the other party.

By providing this detailed information with your referral, Project volunteer attorneys will be able to effectively assess the case under their respective states' laws and determine whether the matter is one in which their donated time will more likely than not produce positive results for the clients.