

National Family Planning & Reproductive Health Association

MEMORANDUM

TO: Interested Parties

FROM: Robin Summers, Vice President and Senior Counsel

DATE: September 23, 2024

RE: Considerations and Tips for Family Planning Providers When Entering into Engagement Agreements with Pro Bono Attorneys

The information in this memorandum is intended to help publicly funded family planning providers that are considering entering into engagement agreements with pro bono counsel. This memorandum is not intended to and does not provide legal advice to any entity or individual nor is it intended as a solicitation. Organizations should consult with their own business legal counsel when entering into engagement agreements.

INTRODUCTION

Amidst the shifting environment of state restrictions and evolving federal case law concerning sexual and reproductive health, it is important for family planning administrators and providers to assess their organizational risks related to the provision of family planning services. To that end, NFPRHA has been engaged in a pilot project to connect Title X-funded entities with qualified pro bono legal counsel in the entities' states. Because this is a pilot, the number of Title X-funded entities that will participate in the project is small.

To help support the Title X network as a whole, as part of this project NFPRHA is making available various learnings, considerations, and tips to assist publicly funded family planning entities in engaging their own pro bono local legal counsel to help assess and mitigate organizational risk. Risk assessment and mitigation does not include litigation. This memo explores considerations for family planning providers when entering into engagement agreements with pro bono counsel.

PRO BONO ENGAGEMENT AGREEMENT CONSIDERATIONS

Consideration 1: Scope of Services

The scope of services is a detailed description of the attorney's responsibilities to the client in the representation of the client. Consider:

- Does the engagement agreement specifically and accurately state the scope and limitations of the engagement (such as explicitly stating that it does not include representation in civil or criminal litigation)?
- Does the engagement agreement specify who at the firm (particularly if it's a larger firm) will be principally responsible for your pro bono representation?
- Does it specify who else at the firm may assist with your representation?

Consideration 2: Costs and Billing

In the context of a pro bono agreement, it is particularly important to detail what will and will not be provided to the client without cost, and whether there are any services that the attorney agrees to provide as part of the engagement agreement but not provided without cost to the client. Consider:

- Does the engagement agreement specify that the engagement is pro bono, meaning that you will not be charged for attorneys' fees incurred during the representation?
- Does the engagement agreement specify who will pay for expenses in connection with your representation, such as phone, mail, and copying charges, or travel charges?
- Are there additional services, such as representation in litigation, you would like included in the agreement but that fall outside what will be provided pro bono? If so, what are the costs for such services?
- How will any costs agreed to by the client be billed?

Consideration 3: Confidentiality

A fundamental part of the attorney-client relationship is the attorney's obligation to protect the confidentiality of communications made for the purpose of seeking or providing legal advice. It is also important, though, to reach an agreement with your attorney regarding whether counsel's representation of your organization is confidential. Consider:

- Does the engagement agreement specify whether your pro bono counsel may identify you publicly as a client, including in promotional materials, on the firm website, or in applications for firm/lawyer recognition?

Consideration 4: Termination

It is important that any engagement agreement provide terms regarding both parties' right to terminate the engagement and end the attorney-client relationship. Consider:

- Does the engagement agreement recognize that you have the right to terminate your representation at any time?
- Does the engagement agreement specify that your pro bono counsel also has the right to withdraw from the engagement?
 - If so, does the engagement agreement outline limitations on your pro bono counsel's right to withdraw, such as that it may only withdraw either with your consent or if withdrawal can be achieved without prejudicing your interests?
 - Is your pro bono counsel required by the agreement to first give notice of the intention to withdraw?
- Does the engagement agreement include any provisions regarding how a representation could be revived after it is terminated?

Consideration 5: Conflicts

By the time you are ready to enter into an engagement agreement with pro bono counsel, the counsel's law firm should have already completed an internal check to ensure that no conflict of interests prevents the firm from taking on your representation. Consider:

- Does the engagement agreement require you to waive a conflict of interests? If so, does the agreement provide that the attorneys working on your matter will not work on the matter(s) that

create the conflict of interests? Does it provide that lawyers may not share confidential information with attorneys working on conflicting matters?

- Does the engagement agreement give the law firm the right to represent existing or new clients in matters directly adverse to your interests as long as such matters are not substantially related to the current representation, subject to applicable ethics rules?
- Does the engagement agreement provide a process by which the law firm will handle conflict of interests if they arise in the future?

Consideration 6: Document and File Retention

It is important to understand the terms by which your counsel will keep (or destroy) your client file.

Consider:

- Does the engagement agreement define which types of documents will be included in your client file (e.g., internal work product, correspondence, and administrative files)?
- Does the engagement agreement specify how long the law firm will retain the client file? At the end of that time period, is the law firm required to notify you before destroying your client file?

CONCLUSION

As a general matter, any pro bono attorney you are considering entering into an agreement with should be able to provide you with a draft agreement for your review. The information provided in this memo is intended to offer and explain specific, key considerations to look for and assess as part of an engagement agreement with pro bono counsel.

If you have questions about the information contained in this memo, please contact Robin Summers, NFPRHA's Vice President and Senior Counsel, at rsummers@nfprha.org.