

ETHICAL ISSUES IN WORKING WITH PRO BONO CLIENTS



PRESENTED BY

TOBY ROTHSCHILD, OF COUNSEL

ONEJUSTICE

OCTOBER 24, 2023

AGENDA



Definition

Who is client?

Who is lawyer?

Scope of work

Duties to client

Special issues

Nonprofit organizations

Why do Pro Bono



Law as a Profession

“Every lawyer has a professional responsibility to provide legal services to those unable to pay.

Rule 6.1

PRO BONO PUBLICO



What is Pro Bono: Rule 6.1

- Direct delivery of legal services
- Without expectation of compensation
- To indigent individuals
- Or to not for profit organizations whose primary purpose is services to the poor or disadvantaged

Can I Do Pro Bono?



Must be admitted and authorized to practice in the state

If authorized under in-house counsel program, check with state

Out of state lawyers if doing only non-state federal law

Non-lawyers can work under the supervision of a lawyer



Finding the “Right” Pro Bono Client

Working with a Legal Services Provider or Pro Bono Program

- Training
- Mentoring
- Screening
- Malpractice insurance
- Help if problems arise

WHO IS THE CLIENT?



Individual

- Parent or Child?
- Conservator
- Guardian ad Litem

Couple

Group

Organization

Legal services organization is normally not the client

WHO IS THE LAWYER?



- Associate
- Partner
- Legal Services lawyer
- Co-counsel
- Define role for each

WHAT AM I DOING?



- Scope of work
- Retainer or Engagement letter
- Define clearly
- Define limits
- Stay within limits

DUTIES TO PRO BONO CLIENT



- Competence – Rule 1.1; Diligence – Rule 1.3
 - Must treat like paying clients
 - Must have knowledge and skill
- Confidentiality – Rule 1.6
 - Dealing with 3rd parties in the room – friends and family
- Communications – more later
- Loyalty – conflicts of interest – Rules 1.7, 1.9
 - Special rule for conflicts of interest – Rule 6.5

Ending the Representation



“Disengagement letter”

- Remind client of deadlines, further action
- Inform client of right to obtain the file
- Include copy of settlement/judgment
- Gets you off the hook

Provide time and outcome information to pro bono program

Helps program with grants and other funding to allow program to continue

SPECIAL ISSUES



- Remote Practice
- Limited Scope Representation
- Cultural Competence
- Representation Creep
- Diminished Capacity

Issues with Remote Working



- Make sure work is not UPL
- Don't use open or public Wi-Fi network
- Work in an private area away from family and others
- Make sure any client information is stored on the firm's servers, not on your computer, tablet or phone
- Don't conduct any conversations in range of Amazon Alexa or Google Voice
- Be careful in client communications that only client can hear and that client is safe.

Limited Scope Representation



“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.”

Rule 1.2 (c)

CULTURAL COMPETENCE



Role of Culture

Perceptions, values, attitudes and beliefs

Response to environment and circumstances

Expectations

External behavior

Understanding court system and procedures

CULTURAL COMPETENCE



- Communication
 - Empathy
 - Language
 - Document challenges
 - Expectations
 - Safety

EMPATHY



Four Qualities of Empathy

1. Perspective taking;
2. Staying out of judgment;
3. Recognizing emotion in other people;
4. Communicating that recognition

LANGUAGE



Using Interpreters

- Is interpreter qualified?
- Do you have a confidentiality agreement, and does everyone understand?
- Did you plan extra time for interpreting?
- Is everything being interpreted and relayed?
- Are any side conversations taking place?

Understand Client Needs



- Time and transportation
- Location
- Dress

SCOPE OF WORK



- Clear in retainer
- Define what is included and excluded
- Clarify client expectations
- Clarify future contacts
- Malpractice risk if not done right

DIMINSHED CAPACITY



- Rule 1.14
- Maintain normal attorney/client relationship
- Where risk of substantial physical or financial harm, can take “reasonably necessary protective action”
- Under Rule 1.6, must reveal only as much information as is necessary to protect client

ORGANIZATIONAL CLIENTS



- What is the legal status of the organization?
- Who speaks for the organization?
- What is the decision making structure?
- Is there a higher authority within the organization?

Hypothetical #1



- Husband and Wife are sued for eviction. Pro Bono attorney A agrees to represent them. Shortly after A files the response in court, the couple notifies him that they have separated, and H has moved out of their apartment. Husband and wife have different ideas of who is responsible for the debt if it needs to be paid.
- What steps can A take to address the situation?

Hypothetical #1 (cont.)



- There are a number of issues that should be discussed with and agreed to by all clients when representing more than one client in the same case. Some of them are:

Hypothetical #1 (cont.)



- Potential conflicts of interest - Clients may have different desired outcomes or give different instructions to attorney
- Possible aggregate settlement (Rule 1.8(g))
- Confidentiality and Privilege – communications with one client may not be confidential from the other client
- There may be a need to withdraw from both clients

Hypothetical #1 (cont.)



- If conflict discussion not held in advance, A can try to convince the clients to work something out, or have one client consent to the conflict and allow A represent the other. Otherwise, A must withdraw from representing both clients.

Hypothetical #2



- Volunteer represents Mrs. R in eviction defense on pro bono basis.
- Mrs. R is indigent and lives in federally subsidized apartment with three children.
- If she is evicted, she will lose subsidy and probably become homeless. She owes landlord \$450.
- Can firm cover copying costs? Transporting her to and from court/law firm?
- Can firm cover rent arrearages?

Hypothetical #2 (cont.)



- Rule 1.8 (e) prohibits financial assistance to a client in connection with litigation.
- There is an exception that permits paying court costs and litigation expenses for an indigent client.
- Copying costs is clearly covered by the exception, and transportation probably is as well.
- Paying the back rent goes beyond “litigation expenses”, and is not permitted. (But check your state’s version)

Hypothetical #3



- Sofia is a pro bono attorney who signs up to staff a remote limited scope domestic violence restraining order clinic. Before the start of the clinic she receives the client's file, blank pleadings, and a link to join the video clinic. She helps the client fill out his petition she realizes that the client does not have the ability to file the papers in court in person or remotely. She would like to help the client file the papers and serve the respondent. Do you have any advice for Penelope?

Hypothetical #3 (cont.)



- The key issue is scope of representation. She only agreed to help fill out the petition. If she does more than that, she is at risk of becoming attorney of record for the entire case. Before doing anything more she should consult with the agency sponsoring the clinic, and if she goes forward, get a new retainer agreement limiting the scope of her service to filing and service.
- If her initial assistance was covered by rule 6.5, she should be sure to do a conflict check before doing more.

Hypothetical #4



- Pro Bono Attorney has agreed to take a domestic violence family law matter from Legal Aid. He met with Client a couple of times, and filed a divorce petition, request for restraining order and motion for custody on her behalf. The hearing is next week.
- This morning Client calls Attorney and tells him that she wants to drop the case, because she has reconciled with her husband.
- What should Attorney do?

Hypothetical #4 (cont.)



- This is an example of the need to understand where the client is coming from.
- It is important to understand that it often takes 5 or more tries for a domestic violence victim to leave her or his abuser.
- The client clearly controls this decision, but it may be worthwhile to speak with the client before dismissing the case to make sure it is her wish, and not the result of duress. It may also be useful to talk to a DV expert at the legal aid program to get a better sense of how best to proceed.

Hypothetical #5



- Dana is a pro bono attorney filing a civil harassment petition on behalf of Henry, an elderly man who feels threatened, against his neighbor Louis. Louis' attorney files a response and files a cross petition against Henry. Both clients seek restraining orders against the other.
- Shortly after Louis' response is filed, his attorney withdraws from the case. A few weeks later, Dana receives a letter from Louis, informing Dana that he will be representing himself from now on, and providing Dana with his new address. Dana sends a copy of the letter to Henry.

Hypothetical #5 (Cont.)



- Last week, Dana received a notice from the Court, setting the trial on the matter for today. Dana noticed that the Court's notice shows service on Louis' old address.
- In court today, Dana sees that Louis is not present. Dana knows that if the case proceeds to trial, with Louis not present, the judge will grant Henry's request for a restraining order, and deny Louis' petition.
- should you proceed to trial without saying anything? Or should you tell the judge, or the clerk, about the erroneous mailing of the notice?
- What if the client tells Dana not to tell anyone?



Review

Same ethical obligations as for paying clients (except for 6.5)

Be culturally competent, non-judgmental

Keep within agreed scope

Go through a recognized legal services provider

Keep legal services provider informed

Call legal services provider if there are any problems

Enjoy practicing law again