October 2015 *Multnomah Lawyer Ethics Focus*

Pro Bono: Staying Safe While Doing Good

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Lawyers are generous with their time and talents in the form of *pro bono* representation. When taking on that very commendable work, however, lawyers should remain sensitive to law firm risk management considerations. In the *pro bono* setting, those considerations frequently revolve around three core concepts: competence; diligence; and conflicts. In this column, we'll look at each in the particular context of *pro bono* representation.

Competence

Competence is one of our bedrock duties—so fundamental, in fact, that it is first in order in the Rules of Professional Conduct: RPC 1.1. Under that rule, competence is measured by the particular matter we are handling. In the *pro bono* setting, that can raise a key question: although a lawyer may be a specialist in a particular area—such as securities or intellectual property law—can the lawyer still take on a *pro bono* case that involves an area with which the lawyer doesn't regularly practice? The answer is a qualified "yes." Lawyers are not prevented from taking on a matter in a new area. But, we are also expected to devote sufficient time to learn the area involved and to seek out more experienced help if we need it.

Comment 2 to ABA Model Rule 1.1, on which Oregon's rule is patterned, summarizes this notion nicely:

> "A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

Diligence

Whenever we take on a matter, RPC 1.3—the "diligence rule"—requires that we "not neglect a legal matter entrusted to the lawyer." Comment 3 to the corresponding ABA Model Rule observes that "[p]erhaps no professional shortcoming is more widely resented than procrastination." In short, whether the client is paying or not, we need to handle the matter with the efficiency that would be reasonably expected under the particular circumstances.

"Diligence" can sometimes be a sensitive issue in the *pro bono* setting. A case taken on with great enthusiasm at a Monday night law clinic may be competing with an urgent matter for a paying client that arrives on the lawyer's

desk Tuesday morning. If we are handling a *pro bono* case, we are expected to devote the same attention to it as we would a similar matter for a paying client. That doesn't mean that, just like "paying" matters, some schedule juggling won't happen. But, we can't simply ignore a *pro bono* matter either. In 2012, the OSB Disciplinary Reporter included a stipulation imposing a 60-day suspension on a partner at a large law firm who took on a *pro bono* case and was then found to have not handled it with the diligence required under RPC 1.3.

Conflicts

When Oregon moved to professional rules based on the ABA Model Rules in 2005, one of the new rules that was included addressed conflicts when providing limited scope representation in a *pro bono* (or equivalent) context—RPC 6.5. The comments to the corresponding ABA Model Rule reflect that it was intended to foster *pro bono* representation in circumstances—such as assisting low-income clients with completing forms—where full conflict checks may not be either feasible or available. The rule provides:

> "(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, 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 Rule 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 this Rule."

Absent the comparatively limited contours of RPC 6.5, however, lawyers handling *pro bono* matters are subject to the same conflict rules as those governing paying clients. Those include RPC 1.10(a)—the so-called "firm unit rule"—which generally imputes one law firm lawyer's conflicts to all lawyers at the firm.

Summing Up

Lawyers provide great service to their communities through *pro bono* work. At the same time, they need to remain sensitive to risk management considerations so that they can stay safe while doing good.

ABOUT THE AUTHOR

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