

October 2016 *Multnomah Lawyer Ethics Focus*

First Do No Harm Pro Bono and the Duty of Competence

**By Mark J. Fucile
Fucile & Reising LLP**

In medicine, the dictum “first do no harm” is well known. Put simply, it is the notion that medical intervention should not be attempted when the probable result will only make the patient worse. Although outcomes in law are sometimes not as dramatically personal as in medicine, they often have profound impacts on our clients.

ABA Model Rule of Professional Conduct 6.1 encourages lawyers to devote substantial time to pro bono legal services. Although Oregon did not adopt this provision as a part of our RPCs, we are frequently and appropriately called on to provide pro bono services by courts, bar associations, our firms and our own consciences. At the same time, a variety of trends have combined to drive many lawyers into narrowly tailored practices that do not necessarily mesh well with traditional pro bono activities. Moreover, with the increasing complexity of almost all areas of the law, even a “simple” will or the equivalent in any number of other areas isn’t necessarily as “simple” as in years past. That sometimes leads lawyers to ask: how can I help without doing harm?

In this column, we’ll look first at our duty of competence and then turn to some ways that lawyers can meet that duty while providing pro bono services.

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. 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, captures 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.”

The duty of competence is not simply a matter of regulatory ethics. The fact that a matter is being handled pro bono does not excuse the duty of care under substantive law just as it does not excuse the corresponding regulatory

duty of competence under RPC 1.1. Uniform Civil Jury Instruction 45.04 summarizes the duty of care succinctly: “An attorney has the duty to use that degree of care, skill, and diligence ordinarily used by attorneys practicing in the same or similar circumstances in the same or similar community.”

Since 1985, the ABA has published periodic “profiles” of legal malpractice claims compiled in cooperation with insurance carriers nationally. In each report, “substantive errors” have generally comprised around 45 percent of the total source of claims. There is, accordingly, a very real premium on knowing the nuances of any area we are handling for a client—whether paying or pro bono.

Meeting the Duty

One way of providing pro bono services consistent with the duty of competence and the standard of care is to focus on an area that is within your “wheelhouse.” A large firm commercial litigator, for example, might volunteer to work on “impact” litigation for a legal services organization that would benefit from precisely the same skills that the lawyer uses everyday on behalf of corporate clients. Similarly, a business lawyer might volunteer at a clinic advising “micro” businesses that could not otherwise afford legal counsel. And, a tax lawyer might help with tax returns for people of modest means at a community organization. The examples are many, but the point is simple: use the

knowledge and skills you already have to assist clients who would not otherwise be able to hire a lawyer.

Another way to provide competent representation is to learn an area or partner with someone who has the requisite experience. A patent lawyer, for example, might ordinarily want to work with someone with specialized expertise while handling a pro bono immigration case. Similarly, an environmental lawyer might gain the requisite level of knowledge to handle simple pro bono wills or a residential landlord-tenant matter through CLEs and related study. Many legal service organizations also offer volunteers training in the substantive areas of greatest need for their clients. Again, the examples are many but the point is simple: through some combination of study and association, gain the knowledge you need to handle the matters you have agreed to take on.

Summing Up

There are many paths to available to serve pro bono clients. Lawyers need to choose one that is consistent with their duty of competent representation so that they will “first do no harm.”

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.