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First Do No Harm: Law Firm Risk Management in Pro Bono Work

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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 usually not as dramatically personal as in medicine, they often have profound impacts on our clients. RPC 6.1 encourages lawyers to provide pro bono legal services: “Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay.” Although RPC 6.1 and its accompanying comments note that our pro bono obligation can be met in a wide variety of ways, direct representation of clients unable to afford counsel is a particularly pressing need.

At the same, a variety of trends have combined to drive many lawyers into narrowly tailored practices that do not necessarily mesh well with traditional pro bono legal service needs. Moreover, with the increasing complexity of almost all areas of the law, even a “simple” will or the equivalent in any number of 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 first survey our duty of competence and then turn to some of the ways lawyers can meet that duty while providing pro bono services through direct client representation.

The Duty of 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 new matter in a new area. We are expected, however, to devote sufficient time to learn the area involved and to seek out more experienced help if we need it.

Comment 2 to RPC 1.1 captures these concepts neatly:

“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. Washington Pattern Civil Jury Instruction 107.04 outlines the standard of care for legal work:

“An attorney in the State of Washington owes to the client a duty to comply with the standard of care for attorneys.

“An attorney has a duty to use that degree of skill, care diligence, and knowledge possessed and used by a reasonable, careful, and prudent attorney in the State of Washington acting in the same or similar circumstances.

“Failure to use such skill, care, diligence, and knowledge constitutes a breach of the standard of care and is negligence.”

Although rare, lawyers have been disciplined for RPC violations arising out of deficient pro bono work.¹ Similarly, there is no bar to legal malpractice claims stemming from mistakes in pro bono work—with a justice of the Washington Supreme Court recently noting: “Attorneys who serve indigent persons . . . are not exempt from potential malpractice claims, although we recognize the need to encourage pro bono representation.”²

No one sets out to commit malpractice in a pro bono matter. Providing legal services outside a lawyer’s areas of principal expertise, however, presents well-documented risks. An article on the ABA’s web site earlier this year highlighted these risks based on statistics compiled by insurance carriers over three decades for the ABA’s *Profile of Legal Malpractice Claims* series:

“When grouped together, substantive errors account for more than 46 percent of reported [legal malpractice] claims. The most obvious error in this category is a failure to know or properly apply substantive law. Another rather obvious error is the failure to know or ascertain a deadline. . . . Claims further indicate that ‘dabblers,’ or lawyers acting outside their usual practice area, are far more likely to fail to know or apply the law.”³

Meeting the Duty

While there are many paths to meeting the duty of competence when providing pro bono services, two in particular stand out.

The first is to focus on activities that are within your area of expertise. A family law practitioner, for example, might provide pro bono mediation services in that same area. Similarly, a corporate tax lawyer might help with returns for people of modest means through a community organization. In the same vein, a large firm commercial litigator might volunteer to work on “impact” litigation for a legal services organization that would benefit from precisely the same skills the lawyer uses every day on behalf of corporate clients. In still other instances, lawyers with specialized skills may provide their expertise to civic or charitable organizations directly. The examples are many, but the point is simple: use the knowledge and skills you already have to assist clients who would not be otherwise able to hire a lawyer.

The second is to learn an area or partner with someone who has the requisite knowledge and 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 or 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

Just as there are many paths available to serve pro bono clients, there are also many avenues available to meet the requisite duty of competent representation. That way, in doing good, a lawyer-volunteer will “first do no harm.”

ABOUT THE AUTHOR

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¹ See, e.g., *In re Kuvara*, 149 Wn.2d 237, 66 P.3d 1057 (2003) (lawyer disciplined for improper efforts to correct earlier deficient pro bono work).

² *Piris v. Kitching*, 185 Wn.2d 856, 872, 375 P.3d 627 (2016) (Stephens, J., dissenting).

³ Daniel E. Pinnington, *The Biggest Malpractice Risks*, published April 2, 2019 at: https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/march/the_biggest_malpractice_claim_risks/.