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Pro Bono:
Doing It Right While Doing the Right Thing

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RPC 6.1 underscores our professional duty to provide *pro bono* services: "Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay." Comment 1 to RPC 6.1 elaborates: "Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

When we represent a client *pro bono*, we are expected to bring the same professional standards to our work as we would with a paying client. In other words, when we are "doing the right thing" we need to "do it right." In this column, we'll first look at a cautionary tale of a highly skilled large firm litigator who was disciplined for taking on a *pro bono* case and then failed in the most basic tenets of any representation: working on the matter and communicating with the client. We'll then survey practical approaches for lawyers to do it right while doing the right thing.

Cautionary Tale

The lawyer in our example was by all accounts an extremely able and deeply experienced litigator for a major Northwest law firm.[1] The lawyer had

volunteered for a *pro bono* panel under the auspices of the local United States District Court. The court appointed the lawyer to represent a client in a pending civil case that the client had already filed *pro se*. When the lawyer agreed to take the case, the defendants had recently filed summary judgment motions. The lawyer met with the client and at a scheduling conference that followed his appointment, the court extended the deadline for the client's responses to the pending motions.

After reviewing the file, the lawyer concluded that the client's case lacked merit and decided not to oppose the summary judgment motions. The lawyer, however, never told the client. Instead, the lawyer ignored repeated inquiries from the client about the status of the case. Approximately six months after the lawyer took the case, the court granted the defendants' motions and dismissed the case. Again, the lawyer did not inform the client. Following entry of summary judgment, the defendants filed a motion for sanctions against the client and the defense counsel tried to confer with the lawyer. The lawyer ignored the defense counsel, too. The lawyer neither informed the client about the motion for sanctions nor responded to it. Although the court ultimately denied the motion for sanctions, the lawyer again failed to inform the client and continued to ignore the

client's requests for updates. The client finally discovered through an internet search that his case had been dismissed.

The client filed a complaint with the lawyer's state bar. The lawyer initially did not respond to the state bar either. The lawyer eventually stipulated that he had violated his state's variants of ABA Model Rules 1.3, which addresses diligence, and 1.4, which governs communication. He was suspended for 60 days and resigned his membership in another state bar while reciprocal discipline was pending. Although the disciplinary stipulation in his home state recounted that the lawyer expressed remorse, it did not offer any explanation for the lawyer's conduct.

Approaches

RPC 1.1 frames our basic duty of competence: "A lawyer shall provide competent representation to a client." Our duty of competence in a regulatory sense mirrors the corresponding civil standard of care expressed in Washington Pattern Jury Instruction 107.04 on legal malpractice: "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." As our opening illustration demonstrated, however, competence must be paired with diligence and communication. The

former is defined by RPC 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client." The latter is governed by RPC 1.4, which, in relevant part, notes: "A lawyer shall . . . keep the client reasonably informed about the status of the matter[.]"

Washington lawyers in paid representations have both been disciplined for violations of these rules and found liable in civil suits for the equivalent under the standard of care.[2] It should not be surprising, therefore, that lawyers can also be disciplined or held to have breached the civil standard of care in *pro bono* matters.[3]

Risk management approaches for addressing competence, diligence and communication in the *pro bono* context vary with the duty and the client.

Ironically, the lawyer in our opening example was handling a matter squarely within his wheelhouse as a commercial litigator. That is often a practical way to structure *pro bono* to meet the duty of competence: use your existing knowledge, skills and experience. At the same time, that does not mean that you can't take on a matter outside your primary areas of expertise. It does mean, however, that you may have to take advantage of training offered by many *pro bono* programs or work with another lawyer who is experienced in the substantive area involved. Comment 2 to RPC 1.1 puts it this way:

> "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 under RPC 1.3 is straightforward. Comment 4 to RPC 1.3 explains: "[A] lawyer should carry through to conclusion all matters undertaken for a client."[4] In other words, if we take on a *pro bono* matter, we need to see it through with the same attention that we would for a paying client. Although some *pro bono* matters are narrower in scope and shorter in duration than their paid counterparts, others are not and may involve a significant time commitment that is foreseeable from the outset. Comment 2 to RPC 1.3 notes that "[a] lawyer's work load must be controlled so that each matter can be handled competently." Therefore, we need to make a realistic assessment of our "capacity" when taking on *pro bono* work because the duty of diligence doesn't distinguish between paying and *pro bono* matters.

Communication under RPC 1.4 touches on both "quantity" and "quality." In terms of "quantity," we need to keep the client reasonably informed of material developments on an ongoing basis. With "quality," we need to explain developments in ways that the client can understand. When representing a *pro bono* client, we may need to adjust both from our ordinary approach with paying

clients. For example, while an insurance carrier may be satisfied with monthly or quarterly reports, an anxious *pro bono* client unfamiliar with the legal system may need more frequent communication. Similarly, although we may lapse into "lawyer speak" when discussing a case with an in-house corporate counsel managing litigation we are handling, a *pro bono* client will likely need a more thorough "translation"—literally and figuratively—so that they can understand the nuances of the legal matter involved and meaningfully participate in strategic decisions.

ABOUT THE AUTHOR

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[1] The facts set out in this column are drawn from an Oregon disciplinary stipulation and order reported at 26 D.B. Rptr. 1 (Or. 2012), available on the Oregon State Bar's web site at: https://www.osbar.org/publications/dbreporter/dbreport.html. An overview of the underlying case is available at 2009 WL 789679 (D. Or. March 23, 2009) (unpublished) (opinion and order granting defense summary judgment motions) and 2013 WL 1716388 (D. Or. Apr. 18, 2013) (unpublished) (subsequent proceedings).

[2] *See, e.g.*, *In re Kagele*, 149 Wn.2d 793, 72 P.3d 1067 (2003) (regulatory discipline); *Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (civil liability).

[3] *See, e.g., In re Kuvara*, 149 Wn.2d 237, 66 P.3d 1057 (2003) (regulatory discipline imposed for conduct involved in *pro bono* matter); *see generally Piris v. Kitching*, 185 Wn.2d 856, 872, 375 P.3d 627 (2016) ("Attorneys who serve indigent persons . . . for example, legal aid attorneys—are not exempt from potential malpractice claims[.]") (Stephens, J., dissenting).

[4] With both *pro bono* and paying clients, lawyers are generally allowed under RPC 1.2(c) to limit the scope of their representation as long as the limitation is reasonable under the circumstances and the client consents. Further, RPC 6.5 facilitates "short-term limited legal services" provided *pro bono* through nonprofit organizations and courts by generally limiting the imputation of conflicts.