

Ethics of Pro Bono

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The last week in October each year has been designated as National Pro Bono Week. It is an opportunity to encourage and celebrate pro bono service by lawyers. While lawyers are all encouraged to provide pro bono legal services, it is important that they understand the ethical issues that may arise in a pro bono¹ representation.

Understanding the ethical issues in pro bono legal services requires a definition. The Los Angeles County Bar Association, in its Pro Bono Policy, defines the phrase as follows:

“C. Pro bono publico legal services, for purposes of this policy, shall mean providing legal services without expectation of a fee to:

1. persons of limited means;
2. charitable, religious, civic, community, or educational organizations in matters which are designed primarily to address the needs of persons of limited means;
3. individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or
4. charitable, religious, civic, community, governmental or educational organizations in furtherance of their organizational purposes, where payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.”²

The policy goes on to state that “a substantial majority of pro bono legal services should consist of services provided without expectation of a fee under paragraphs C1 and C2 above.”

There are two key provisions in this definition that give it more substance. First, it requires “providing legal services.” As explained in the Commentary to the Pro Bono Policy,³ the policy recognizes that community service generally is a valuable

activity and is encouraged, but pro bono service requires that the activity involve lawyers employing their knowledge and ability to deliver legal services. Second, it must be “without expectation of a fee.” The commentary explains this: “For purposes of this Policy, legal services ‘without expectation of a fee’ does not include time written off as not collected or not collectable, services provided for business development or other commercial purposes, or contingency fee work. The potential availability of attorneys’ fee shifting statutes, however, typically will not disqualify legal service that otherwise qualifies as pro bono work.”

It is often said that lawyers have an ethical responsibility to do pro bono work. In California, there are two sources for this thought. Business and Professions Code section 6068(h) provides that it is the duty of a lawyer "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."⁴ In addition, comment 5 to rule 1.1 of the Rules of Professional Conduct addresses pro bono as part of a larger obligation of lawyers: “all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility of the profession, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. The lawyer should aim to provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged.” While failing to meet this standard is not a disciplinable offense, the rules make clear that it is an expectation for all lawyers.

The ethical issues that arise in a pro bono representation are no different than in any other representation. The same duties of competence, diligence, communication, confidentiality, loyalty, and all of the others still apply. The California Supreme Court addressed the question with regard to diligence in *Segal v. State Bar of California* (1988) 44 Cal. 3d 1077: “Segal's argument presupposes that pro bono clients deserve less diligent services than paying clients, a proposition that undermines the integrity of the legal profession. *An attorney's*

*standard of professional conduct to a pro bono client should be no different from his or her responsibility to any other client."*⁵

One of the most frequent ethical issues to arise in pro bono representation is conflicts of interest. The conflicts rules for pro bono cases are the same as for any other case, and exist for the same reason, to avoid a breach of the duties of loyalty and confidentiality. In order to handle a pro bono matter, the attorney must run a conflict check and avoid any conflicts with present or past clients.⁶ One way around this problem is to seek out pro bono cases in areas that are unlikely to create a conflict. If your firm represents financial services institutions, then you probably should not volunteer at a pro bono bankruptcy clinic; however, work assisting immigrant victims of domestic violence to regularize their status is not likely to create any conflicts.

There is one exception to the normal conflicts rules. If an attorney provides limited legal services to a client under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, the normal conflicts rules do not apply. Instead, the lawyer must be conflicted out only if he or she is personally aware that the representation would be a conflict for the attorney, either directly or by imputation from the law firm.⁷ If the assistance extends beyond the initial limited scope services, the attorney then must comply fully with the normal conflicts rules.⁸

Another question that often arises is competence. Rule 1.1 requires lawyers to perform legal services with the learning and skill reasonably necessary for the performance of such services.⁹ There are several ways to address this concern. Pro bono needs are far more than just family law, housing, or other litigation matters. Nonprofit organizations often need help with tax or human resource issues. Low income housing developers need help with acquisition, permitting, and other development issues. Many lawyers can find pro bono opportunities within their area of expertise. Beyond that, most pro bono providers offer training, mentoring, or co-counseling to allow almost any lawyer to meet the requirement of competence.¹⁰

The duty of communication is another issue that needs to be addressed.. Rule 1.4 and 1.4.1 specify several circumstances where communication with a client is required, including settlements, significant developments and responses to client

requests. The duty to communicate with the client raises three issues. First, many pro bono clients are not fluent in English. It may be necessary to speak to the client through an interpreter. Using someone other than a staff member or a competent independent interpreter raises concerns about both the competence of the interpretation and confidentiality. A second concern is that pro bono clients may be difficult to contact or locate. Given their limited income, they often do not have access to a working phone, or may have moved. One way to address this is to get from the client at the beginning of the representation permission to contact a relative or friend who is likely to know how to reach the client for the limited purpose of contacting the client.

The third issue with communication is understanding the cultural differences that exist between you and your client. The client's socio-economic status, ethnicity, and values may be different than the attorney's. It is the attorney's job to recognize those differences and communicate with the client in a way that the client can understand. The attorney must then accept the client's decisions without condescension or judgment. While this is true of any client, it may be more difficult when the differences are greater.

While there are ethical issues to watch out for when providing pro bono services, it remains the most fulfilling and rewarding part of the practice of law.

¹ "pro bono" is short for *pro bono publico*, Latin for "for the good of the public."

² Los Angeles County Bar Association (LACBA) Pro Bono Policy, dated August 25, 2015.

<https://www.lacba.org/docs/default-source/pro-bono-policy/lacba-pro-bono-policy-2015.pdf>.

³ <https://www.lacba.org/docs/default-source/pro-bono-policy/pro-bono-commentary.pdf>.

⁴ See *Payne v. Superior Court* (1976) 17 Cal. 3d 908, 917

⁵ 44 Cal. 3d at 1084. (emphasis added)

⁶ California Rules of Professional Conduct, rules 1.7, 1.9. All future reference to rules are to the California Rules of Professional Conduct.

⁷ Rule 6.5.

⁸ Rule 6.5, comment 5.

⁹ Rule 1.1 (b).

¹⁰ Rule 1.1 (c).