

# ETHICAL ISSUES IN WORKING WITH PRO BONO CLIENTS



PRESENTED BY  
TOBY ROTHSCHILD, OF COUNSEL

---

ONEJUSTICE  
OCTOBER 26, 2022

# AGENDA

---



Definition

Who is client?

Who is lawyer?

Scope of work

Duties to client

Special issues

Nonprofit organizations

# Why do Pro Bono

---



Law as a Profession

“A lawyer, as a member of the legal profession, is ... an officer of the legal system and a public citizen having special responsibilities for the quality of justice.”

Rule 1.0 Comment 5

# PRO BONO PUBLICO

---



What is Pro Bono:

- Direct delivery of legal services
- Without expectation of compensation
- To indigent individuals
- Or to not for profit organizations whose primary purpose is services to the poor or disadvantaged

# Can I Do Pro Bono?

---



Must be admitted and authorized to practice in the state

If practicing under Registered In-house Counsel program (Rule 9.46) or Registered Military Spouse Attorney program (Rule 9.41.1)

Out of state lawyers if doing only non-state federal law

Non-lawyers can work under the supervision of a lawyer

# Finding the “Right” Pro Bono Client

---



## Working with a Legal Services Provider or Pro Bono Program

- Training
- Mentoring
- Screening
- Malpractice insurance
- Help if problems arise

# WHO IS THE CLIENT?

---



## Individual

- Parent or Child?
- Conservator
- Guardian ad Litem

## Couple

## Group

## Organization

Legal services organization is normally not the client

# WHO IS THE LAWYER?

---



- Associate
- Partner
- Legal Services lawyer
- Co-counsel
- Define role for each



# WHAT AM I DOING?

---



- Scope of work
- Retainer or Engagement letter
- Define clearly
- Define limits
- Stay within limits

# DUTIES TO PRO BONO CLIENT

---



- Competence – Rule 1.1; Diligence – Rule 1.3
  - Must treat like paying clients
  - Must have knowledge and skill
- Confidentiality – Rule 1.6
  - Dealing with 3<sup>rd</sup> parties in the room – friends and family
- Communications – more later
- Loyalty – conflicts of interest – Rules 1.7, 1.9
  - Special rule for conflicts of interest – Rule 6.5

# Ending the Representation

---



## “Disengagement letter”

- Remind client of deadlines, further action
- Inform client of right to obtain the file
- Include copy of settlement/judgment
- Gets you off the hook

Provide time and outcome information to pro bono program

Helps program with grants and other funding to allow program to continue

# SPECIAL ISSUES

---



- Remote Practice
- Limited Scope Representation
- Cultural Competence
- Representation Creep
- Diminished Capacity

# Issues with Remote Working

---



- Don't use open or public Wi-Fi network
- Work in an private area away from family and others
- Make sure any client information is stored on the firm's servers, not on your computer, tablet or phone
- Don't conduct any conversations in range of Amazon Alexa or Google Voice
- Be careful in client communications that only client can hear and that client is safe.

# Limited Scope Representation

---



“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.”

Rule 1.2 (b)

# CULTURAL COMPETENCE

---



## Role of Culture

Perceptions, values, attitudes and beliefs

Response to environment and circumstances

Expectations

External behavior

Understanding court system and procedures

# CULTURAL COMPETENCE

---



- Communication
  - Empathy
  - Language
  - Document challenges
  - Expectations
  - Safety



# EMPATHY

---



## Four Qualities of Empathy

1. Perspective taking;
2. Staying out of judgment;
3. Recognizing emotion in other people;
4. Communicating that recognition

# LANGUAGE

---



## Using Interpreters

- Is interpreter qualified?
- Do you have a confidentiality agreement, and does everyone understand?
- Did you plan extra time for interpreting?
- Is everything being interpreted and relayed?
- Are any side conversations taking place?

# Understand Client Needs

---



- Time and transportation
- Location
- Dress

# SCOPE OF WORK

---



- Clear in retainer
- Define what is included and excluded
- Clarify client expectations
- Clarify future contacts
- Malpractice risk if not done right

# DIMINISHED CAPACITY

---



- ABA Model Rule 1.14 applies in many states, but not California
- Maintain normal attorney/client relationship
- Rule 1.6 prohibits disclosing any confidential information about the client related to the representation.
- See COPRAC opinion 2021-207

# ORGANIZATIONAL CLIENTS

---



- What is the legal status of the organization?
- Who speaks for the organization?
- What is the decision making structure?
- Is there a higher authority within the organization?

# Hypothetical #1

---



- Husband and Wife are sued on an unpaid credit card. Pro Bono attorney A agrees to represent them. Shortly after A files the response in court, the couple notifies him that they have separated, and H has moved out of their apartment. Husband and wife have different ideas of who is responsible for the debt if it needs to be paid.
- What steps can A take to address the situation?

# Hypothetical #1 (cont.)

---



- There are a number of issues that should be discussed with and agreed to by all clients when representing more than one client in the same case. Some of them are:



# Hypothetical #1 (cont.)



- Potential conflicts of interest - Clients may have different desired outcomes or give different instructions to attorney
- Possible aggregate settlement (Rule 1.8(g))
- Confidentiality and Privilege – communications with one client may not be confidential from the other client
- There may be a need to withdraw from both clients

# Hypothetical #1 (cont.)

---



- If conflict discussion not held in advance, A can try to convince the clients to work something out, or have one client consent to the conflict and allow A represent the other. Otherwise, A must withdraw from representing both clients.

# Hypothetical #2

---



- Volunteer represents Mrs. R in eviction defense on pro bono basis.
- Mrs. R is indigent and lives in federally subsidized apartment with three children.
- If she is evicted, she will lose subsidy and probably become homeless. She owes landlord \$450.
- Can firm cover copying costs? Transporting her to and from court/law firm?
- Can firm cover rent arrearages?

# Hypothetical #2 (cont.)



- Rule 1.8 (e) prohibits financial assistance to a client in connection with litigation.
- There is an exception that permits paying court costs and litigation expenses for an indigent client.
- Copying costs is clearly covered by the exception, and transportation probably is as well.
- Paying the back rent goes beyond “litigation expenses”, and is not permitted. (But check your state’s version)

# Hypothetical #3

---



- Sofia is a pro bono attorney who signs up to staff a remote limited scope domestic violence restraining order clinic. Before the start of the clinic she receives the client's file, blank pleadings, and a link to join the video clinic. She helps the client fill out his petition she realizes that the client does not have the ability to file the papers in court in person or remotely. She would like to help the client file the papers and serve the respondent. Do you have any advice for Penelope?

# Hypothetical #3 (cont.)



- The key issue is scope of representation. She only agreed to help fill out the petition. If she does more than that, she is at risk of becoming attorney of record for the entire case. Before doing anything more she should consult with the agency sponsoring the clinic, and if she goes forward, get a new retainer agreement limiting the scope of her service to filing and service.
- If her initial assistance was covered by rule 6.5, she should be sure to do a conflict check before doing more.

# Hypothetical #4

---



- Pro Bono Attorney has agreed to take a domestic violence family law matter from Legal Aid. He met with Client a couple of times, and filed a divorce petition, request for restraining order and motion for custody on her behalf. The hearing is next week.
- This morning Client calls Attorney and tells him that she wants to drop the case, because she has reconciled with her husband.
- What should Attorney do?

# Hypothetical #4 (cont.)



- This is an example of the need to understand where the client is coming from.
- It is important to understand that it often takes 5 or more tries for a domestic violence victim to leave her or his abuser.
- The client clearly controls this decision, but it may be worthwhile to speak with the client before dismissing the case to make sure it is her wish, and not the result of duress. It may also be useful to talk to a DV expert at the legal aid program to get a better sense of how best to proceed.



# Review

---



Same ethical obligations as for paying clients (except for 6.5)

Be culturally competent, non-judgmental

Keep within agreed scope

Go through a recognized legal services provider

Keep legal services provider informed

Call legal services provider if there are any problems

Enjoy practicing law again

