

Ethical Issues in

California Pro Bono Representation

November 21, 2017

AIDS Legal Referral Panel

Pro Bono Service

- 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.

The Need



Basic principles of pro bono representation

- Same ethical obligations as for paying clients
- Be culturally competent/non-judgmental
- Go through recognized legal services provider
- Keep legal services provider informed
- Call legal services provider if there are problems

Commencing the Representation

- Be Admitted and in Good Standing:
Unauthorized Practice of Law
 - Law student pro bono/Non-attorney pro bono
 - Retired attorneys
 - Attorneys admitted in other states
 - Non-state practice areas
 - Registered Legal Services Attorneys (CRC 9.45)
 - Registered In-House Attorneys (CRC 9.46)

Pro Bono as a Loss Leader for Future Pecuniary Gain

- Expectation is key
- What if you end up with fees?

Selecting and Vetting the “Right” Pro Bono Clients

- Working Through a Pro Bono Program
 - Malpractice insurance
 - Training
 - Mentoring
 - Screening
 - Help if problems arise

Checking for Conflicts of Interest

or, pro bono client conflict rules are mostly the same as paid client conflict rules

- **Conflicts Between Clients**
- **Conflicts Between Attorney and Client**
- **Conflict Imputation and Screening**
- **Conflict Waivers**

Particular pro bono conflicts issues

- Pro Bono limited legal services in a clinic setting: California Rule of Professional Conducts 1-650
 - Legal services clinic
 - Visual conflicts check
 - If services are extended past clinic, full conflict check rules apply
- “Business conflicts”
 - Not really a conflict issue

Defining Scope of Representation

- 3 options:
 - Full scope: “till death (of the case) do us part”
 - Limited scope: limits on time or subject matter
 - Self-Help: “This is how these types of cases usually go.”

Limited Scope Representation

- 4 rules
 1. Limitation must be reasonable
 2. Limitation must be in writing
 3. Any extension of scope must be in writing
 4. Must advise about existence and potential time constraints of related matters

Documenting the Representation

- Written retainer agreement required
 - Plain language
 - Cover payment of costs and potential for statutory or contractual attorneys fees
 - Standard law firm letters
- Non-representation letter

Conducting the Representation

The 4 C's

- Conflicts (Loyalty)
- Competence
- Confidentiality
- Communication

Competence

- Legal learning
- Ability to act diligently
- Mental, emotional and physical ability to perform

Learning - options

- Pick an area you already know about and have practiced in
- Partner with a practitioner who knows
- Training by legal aid organization
- Get a mentor
- Undertake your own study

Confidentiality

- Largely the same as with paying clients
- Discussing case with legal services staff
- Discussing case with volunteer mentor
- Emailing, Google Drive, DropBox, etc.

Communication

- Critical to keep in touch with client
 - RPC 3-500 – “reasonably informed about significant developments”
- At beginning of representation, obtain contact info for client, including relative or friend
- Use writing AND phone/in person for important updates
- All written settlement offers must be conveyed (RPC 3-510) – best practice is to convey ALL

Professionalism and Cultural Competence

- Your oath: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.”
- Don’t be a jerk
- You have nothing but your reputation, and once gone, it’s next to impossible to get it back
 - Lawyers and judges love to talk.

Cultural differences

- Terrible choices: pay the rent, or feed the kids?
- It takes money to look good to get a job to make money.
- When television is more important than food.
- The need for some happiness now

Balancing attorney role and cultural differences

- Personal, socio-economic status, ethnicity, religion
 - clients with different values than your own
- Attorney's role is to explain what's happening and what can be expected to happen, and what the options are (not to decide, or to judge)
- The client ALWAYS makes the decision
 - The attorney implements client's decision, unless doing so conflicts with attorney's ethical obligation
- These rules are no different than for paying clients

Hypo 1

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

Hypo 1

What should Pedro do?

- A.** Pedro should meet with Catherine and urge her to reconsider
- B.** Pedro should follow Catherine's instructions and dismiss the action
- C.** Pedro should call ABC.org for advice
- D.** Pedro should call ABC.org and ask them to remove him from their list, since all of his work has just gone down the drain
- E.** Other

Some of the ethical duties of attorney to court

- No threatening criminal, administrative or disciplinary charges to gain advantage (RPC 5-100)
- No prejudicial trial publicity (RPC 5-120)
- No misleading or misrepresenting to the Court (RPC 5-200)
- No suppression of evidence (RPC 5-220)
- No purchase of witness testimony (RPC 5-310)
- No contact with jurors (RPC 5-320)

Handing off the Representation

- It may be that the pro bono attorney at some point wishes to hand off the case, even though it is not completed, to someone else. Common reasons include:
 - A paying client whose interests are adverse to the pro bono client wishes to retain the attorney or his/her firm
 - The attorney is leaving the firm
 - The case is now viewed as a political “hot potato,” either by the attorney or by the firm
 - Dual representation and issues arise
 - Ethical advice – not so fast!

Ending the representation

- Disengagement letter
 - Gets you off the hook
 - Remind the client of deadlines, further action
 - Enclose copies of settlement/judgment
- Client right to files
- Time tracking and outcome info
 - Why programs ask you for this information
 - Why it's in your best interests to help!

Problems that can arise

- Losing track of the client
- Having questions, feel out of your depth
- Confidentiality, death or imminent bodily harm
- Client not cooperating
- Client with diminished capacity
- Incubator - free legal clinics that transmogrify into paying cases?
- Paying client's costs, rent, etc. - RPC 4-210

Hypo 2

- Irene In-house is admitted to practice in New York. She now has her dream job at Google, working on IP issues.
- Her friends at local law firms have talked about their cool pro bono work in eviction, immigration and writing civil rights amicus briefs.
- Irene is intrigued - can she join her friends? What should she be looking out for?

Hypo 3

- Law firm pro bono team represent client in civil rights case that has lasted 5 years, costing firm \$1.5 million in attorney time and costs.
- The retainer agreement provides that if attorneys' fees and costs are awarded against opposing party, the firm may recover those fees & costs.
- Defendant makes a settlement offer to plaintiff. The offer is conditioned on law firm waiving attorneys' fees and costs.

Hypo 3, cont'd

- Can Defendants place condition of waiver of fees/costs on offer?
- Can Law Firm advise clients to reject offer to hold out for additional money for fees/costs?
- If clients want to accept, is Law Firm bound to accept settlement offer?
- Can law firm negotiate with clients for some of settlement?

(Please switch to polling)

Hypo 3

Can Law Firm advise clients to reject offer?

A. Law firm must accept the offer, because it cannot place its interests above the clients'

B. Law firm must do whatever the clients want

C. Law firm should negotiate with opposing counsel and try to get some fees

D. Law firm should negotiate with clients

E. Other

Hypo 4

- You file a divorce petition on behalf of Husband (H) against Wife (W). W's attorney files a response, seeking custody of children and particular property. Your client H also wants these things.
- Shortly after W's response is filed, W's attorney withdraws from the case. A few weeks later, you receive a letter from W, informing you that she will be representing herself from now on, and providing you with her new address. You send a copy of the letter to your client.

Hypo 4, cont'd

- Last week, you received a notice from the Court, setting the trial on the matter for today. You notice that the Court's notice lists service on W's old address. In court today, you see that W is not present. You know that if you proceed to trial, with W not present, the judge will grant H's request for custody and for the property.
 - ❖ Should you proceed to trial without saying anything? Or should you tell the judge, or the clerk, about the erroneous mailing of the notice?
 - ❖ Does your answer change if you discuss this issue with your client, and he directs you not to say anything?
- (Please switch to polling)**

Hypo 4

Should you proceed to trial without saying anything? Or should you tell the judge, or the clerk, about the erroneous mailing of the notice?

A. You should proceed to trial – you cannot jeopardize your client’s interests

B. You should tell the Court about the mistake, but only if the client has not instructed you not to

C. You should tell the Court about the mistake, even if the client has instructed you not to

D. Other

Hypo 5

- Barbara and nephew Albert ask for pro bono representation in credit card collection case.
- Both are named in lawsuit but neither claim to have an account with creditor. Pro Bono Attorney accepts both as clients.
- Albert later admits to Pro Bono Attorney that he used Barbara's identity to open account and charged it up.
- What are volunteer's options?

Hypo 6

- Penelope Pro Bono Attorney signs up to staff a limited scope clinic, where she helps Charles Client fill out his petition for guardianship for his nephew. Charles and Penelope get along well, and when Charles asks Penelope if she could go with him to the first court appearance, she wants to say yes.
- Do you have any advice for Penelope?

Hypo 7

- Volunteer attorney represents Tom in a government benefits matter.
- Tom is so overwhelmed with crises in his life that he is unable to provide real assistance in the case.
- His unavailability jeopardizes your ability to represent him, and deadlines are looming.
- What are the pro bono attorney's options?

Hypo 8

- 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? Options?

Hypo 9

- Associate from the ABC firm volunteers for the PDQ brief advice clinic, and has for 5 years. At this clinic she offers brief advice and referral, including help filling out forms, to immigration clients (she took the training that PDQ offered).
- Now, Associate has gotten a lateral offer to join the firm of XYZ. She's very excited. XYZ asks her for the names of all her clients (standard) to do a conflicts check. They also ask her for all the names of the clients she has advised through the PDQ clinic.
- She calls PDQ in a panic, wanting only to please XYZ and get out of the hell hole that ABC has become. What is she obligated to disclose?

Hypo 10

- Solo attorney accepts family law case as pro bono.
- Later, the ED of the PB organization has dinner with old friend, a family law specialist.
- In passing conversation, family law specialist reveals that she is having a difficult time with the solo attorney in the pro bono case, with behavioral clues that clearly show volunteer is losing cognitive function, misstating the law, asserting inappropriate positions for client, even screaming at judge and others.

Hypo 10, cont'd.

- ED later meets with pro bono volunteer and determines that family law specialist was right and that volunteer has deteriorated badly and should not be volunteering further.
- What is ED's obligation?
- To client? To State Bar?
- What is opposing counsel's obligation?
- What is judge's obligation?
- Options?

CONTACT INFORMATION

- Questions:

Contact Tiela Chalmers

Chief Executive Officer and General Counsel

Alameda County Bar Association and

Volunteer Legal Services Corporation

1000 Broadway, Suite 480

Oakland, CA 94607

Ph: (510) 302-2208

Fax: (510) 452-2224

tiela@acbanet.org
