

Preventing Problems in Pro Bono Representations¹

ADVANTAGES OF PRO BONO

The Latin term “pro bono” literally translates to “for the good.” Although state and bar associations have varying criteria for what constitutes pro bono work, it is generally understood to refer to legal services performed free of charge for the public good, often on behalf of individuals or organizations of limited means.

Pro bono work can enrich a lawyer’s practice and prove beneficial for law firms. All lawyers, especially those newer to the profession, can gain knowledge and experience by handling pro bono matters that involve substantive legal work. The satisfaction of contributing to the public good and improving the lives of clients has its own humanitarian rewards that are impossible to quantify. Law firms encourage pro bono work in order to:

- Train their associates.
- Recruit law students and other lawyers.
- Enhance their own public reputations by giving back to their communities.
- Develop business.

More corporate clients are requiring substantive responses from law firms regarding their pro bono programs on Requests for Proposals and Requests for Information. While no states currently require their attorneys to perform pro bono work, several states have adopted American Bar Association Model Rule 6.1, which encourages lawyers to devote at least 50 hours per year to providing legal services to those clients of limited means. In 2013, New York state will mandate that all applicants for admission to the bar complete 50 hours of law-related pro bono service before they are allowed to practice law.²

While pro bono work can be a positive experience for lawyers and law firms, it remains the practice of law and thus has inherent risk. Problems often occur when lawyers and law firms take an inattentive approach to pro bono matters, failing to dedicate the attention and care that would be given to a paying client. A recent U.S. Supreme Court case illustrates some of the potential hazards.

A CAUTIONARY TALE

Two associates at a prestigious New York law firm agreed to represent an Alabama death row inmate in post-conviction proceedings on a pro bono basis. U.S. Supreme Court Justice Samuel Alito commented that most criminal defendants “would think that they had won the lottery if they were given the opportunity to be represented by attorneys from such a firm.”³

The dream of being represented by attorneys from such a high-quality law firm pro bono, however, turned into a nightmare for the inmate. While the inmate’s post-conviction petition was pending, both associates representing him left the law firm and their new employment prevented them from continuing with the case. The associates failed to inform the inmate about their departure from the law firm or seek the court’s permission to withdraw from the case as required by law. To make matters worse, their law firm failed to monitor the case, and no other attorneys from the law firm made a motion to act as substitute counsel.⁴

¹ Continental Casualty Company wishes to acknowledge the contributions to this article by Adam Licht, Director of Product Management at Pro Bono Net, an organization that works with not-for-profit legal organizations to increase access to justice for the indigent.

² Joan C. Rogers, “Pro Bono Mandate for N.Y. Bar Admission Brings Mixed Reactions, Lots of Questions,” 28 Law. Man. Prof. Conduct 305, May 23, 2012.

³ *Maples v. Thomas*, 132 S. Ct. 912, 928 (2012) (Alito, J. concurring).
⁴ *Id.* at 917-22.

When the trial court denied the inmate's post-conviction petition, the trial court clerk sent the notices of the orders to the two departed associates at their prior law firm. The law firm returned the letters to the trial court clerk unopened. Not surprisingly, the inmate's time to appeal the denial of his post-conviction petition expired shortly thereafter with no action taken on his behalf. After the inmate learned that no one had attempted to file an appeal on his behalf, he petitioned for a writ of habeas corpus in federal court. Both the district and appellate courts rejected his petition, citing the procedural default in state court, which was the inmate's failure to timely appeal the state trial court's denial of post-conviction relief.⁵

Fortunately, for the inmate and for the attorneys and law firm involved in his defense, the U.S. Supreme Court reversed the decisions of the lower courts and remanded the case. The U.S. Supreme Court held that the inmate should not suffer for the inaction of his attorneys, who, according to the majority opinion, had abandoned him and left him bereft of representation.⁶

While most pro bono cases do not involve such high stakes as the life or death of a client, the errors made in this case are not uncommon. To avoid these errors, which often lead to legal malpractice claims and other adverse consequences, lawyers and law firms engaging in pro bono representation should consider instituting the following procedures.

VERIFY ABILITY TO HANDLE THE PRO BONO REPRESENTATION

Lawyers have a duty to turn down any potential representations that they are not competent to perform or otherwise handle.⁷ This precept does not preclude a lawyer from taking on a pro bono matter involving an area of practice in which the attorney has never practiced. Competence may be gained by associating with another attorney who has experience in the relevant area of practice, receiving specialized training, and/or performing the necessary legal research and study. Attorneys who are contemplating accepting a pro bono representation, especially those who lack experience in the subject matter at issue, should examine whether they are committed to spending the time necessary to learn the

relevant law unrelated to their customary area of practice. In addition, lawyers must evaluate whether their existing workload for other clients allows sufficient time to adequately prepare for and manage a pro bono representation. A lack of competence and time can prove detrimental to the client as well as the attorney, as demonstrated by the case below.

A staff attorney at a well-known New York law firm agreed to handle a divorce matter for a client through a not-for-profit entity that assists low-income women in family law cases. The client requested that the staff attorney attain an equitable distribution of assets and secure her right to move to another state, which would affect the custody of the couple's child. The staff attorney advised the client that her divorce would be easier if she signed a settlement agreement that did not accomplish the client's stated goals. In describing to the client why settlement was preferable, the staff attorney explained that she lacked the necessary trial experience to handle a contested matter. After breaking down in tears, the client signed the settlement agreement. Shortly thereafter, the client moved to void the settlement. The court granted the client's motion, in part, because the advice given by the staff attorney was inaccurate and confusing.⁸

ENSURE PROPER SUPERVISION

As indicated in the two cases above, a failure to properly supervise subordinate lawyers or support staff can lead to the mishandling of pro bono matters. In the divorce case mentioned above, the judge chided the law firm for failing to provide "appropriate training and supervision."⁹

Law firms seeking to reap the benefits of pro bono work must cultivate their own assets. In a law firm setting, supervisory lawyers should be assigned to every pro bono matter, and there should be direct communication between the supervisory and subordinate lawyers on timelines and resources for each matter. When feasible, law firms should match supervisory assignments to the relevant experience of the supervisors. It does a subordinate transactional lawyer working on a pro bono litigation matter little good to be paired with a supervisory transactional lawyer who has no litigation experience.

⁵ *Id.*
⁶ *Id.* at 927-28.

⁷ ABA Model Rule 1.16

⁸ Zach Lowe, "Pro Bono Gone Bad," Am Law Daily, June 18, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/06/pro-bono-gone-bad.html>; Carolyn Elefant, "Law Firms Need to Keep an Eye on Lawyers Performing Pro Bono Work," Legal Blog Watch, June 19, 2009, <http://legalblogwatch.typepad.com/legal-blog-watch/2009/06/law-firms-need-to-keep-an-eye-on-lawyers-performing-pro-work.html>.
⁹ *Id.*

As important as communication, experience, and supervision are to handling pro bono matters, the law firm must develop a culture where pro bono cases receive the same level of attention as other client business. Some partners in supervisory roles do not scrutinize their pro bono matters in the same fashion as their billable matters because they feel that there is no economic incentive to do so. Law firm management must convey to those partners that the law firm values pro bono legal work even though such matters do not generate much if any income for the law firm. Apart from the intrinsic value of pro bono work, there are practical reasons for treating these cases seriously as well. If a pro bono case goes badly due to neglect by the lawyer or law firm, a civil jury or disciplinary authority will care little that the lawyer was not paid for the legal services provided. Instead, they will be primarily concerned with the mismanagement of the case by the lawyer or law firm.

MONITOR THE MATTER

The death penalty case noted earlier highlights the importance of proper tracking of pro bono matters. All pro bono cases should be opened in accordance with a law firm's routine protocols, including a conflicts check and engagement agreement. Key dates and deadlines of all pro bono matters should be entered into a centralized calendar system. The individual attorneys responsible for such matters should maintain their own calendars as well. Some law firms organize their matters through their billing procedures. Consequently, pro bono representations may be neglected, since such clients do not pay for their legal services. If a lawyer or law firm commits to accepting a pro bono representation, they must implement and adhere to a monitoring system that ensures fulfillment of deadlines and project completion. Part of any comprehensive monitoring system includes an exit procedure for attorneys

departing the law firm. Law firms should institute exit interviews for all departing attorneys in order to track any outstanding active matters, arrange for the transfer of files, and assign other law firm personnel to such matters.

CONCLUSION

Pro bono work can contribute to the public good and constitute some of the most rewarding work an attorney can perform over the course of a legal career. The absence of payment from a client, however, does not diminish the standard of care for attorneys who handle pro bono matters. Lawyers and law firms that agree to represent pro bono clients should establish that they either possess or will acquire the knowledge to handle a particular matter. Law firms also must ensure that their subordinate lawyers that perform pro bono work have adequate time and resources to competently complete their work. Careful monitoring of pro bono matters safeguards clients' rights from being prejudiced and lawyers from facing legal malpractice lawsuits or disciplinary actions. By treating their pro bono cases with the same dedication and professionalism as their other matters, lawyers can provide legal services to the indigent while protecting themselves from legal malpractice and other claims.



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