Ethical Considerations for In-House Pro Bono Programs

October 19, 2011
Steve Keane, Morrison & Foerster
Is Pro Bono Work An Ethical Obligation?

• ABA Model Rule of Professional Conduct 6.1:

“[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono legal services per year.”

• But no disciplinary rule in California requires that an attorney provide pro bono legal services
Pro Bono Work Strongly Encouraged

Pro Bono Resolution
(Adopted by the Board of Governors of the State Bar of California at its December 9, 1989 Meeting and amended at its June 22, 2002 Meeting)

RESOLVED that the Board hereby adopts the following resolution and encourages legal bar associations to adopt similar resolutions:

WHEREAS, there is an increasingly dire need for pro bono law disinterested persons to adopt similar resolutions;

WHEREAS, the federal, state and local governments are not providing legal services to the poor and disadvantaged; and

WHEREAS, lawyers should ensure that all professional and ethical rules governing legal services and access to lawyers allow legal services to the poor and disadvantaged; and

WHEREAS, the Chief Justice of the California Supreme Court, the Judicial Council of California have courageously employed, lawyers and its importance to the fair and efficient administration of justice;

WHEREAS, California Business and Professions Code Section 6068(b) limits “Neither nor, nor any combination thereof shall be used by a lawyer; nor, therefore, at is

RESOLVED that the Board of Governors of the State Bar of California:

(1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;

(2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;

(3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring of the law firm that offers to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities;

(4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are prohibited from directly rendering pro bono services.
If No Binding Obligation, Why Do It?

- Lawyers who do pro bono work are upholding the highest standards of the legal profession.
  
  • “If the motto ‘and justice for all’ becomes ‘and justice for those who can afford it,’ we threaten the very underpinnings of our social contract.”

  Former California Chief Justice Ronald M. George, State of the Judiciary speech, 2001
The Need For Pro Bono Help is Great

2: TYPES OF LEGAL NEEDS
Prevalence: Low & Moderate Income

A quantitative representation showing the prevalence of different legal needs among low and moderate income households. The chart indicates the percentage of households requiring legal help in various categories such as financial/consumer, housing/property, community/regional, family/domestic, employment-related, personal/economic injury, estates/directives, health-related, public benefits, small business/foreign, children's schooling, other rights/liberty, ADA-related, immigrant needs, Native Americans, military/veterans, and vocational aid.

ABA Comprehensive Legal Needs Study
Those Needs Go Largely Unmet

- 2002 Report: over 70 percent of low-income Californians’ legal needs were not being met
- 2009 Report: over 80 percent of low-income Americans’ legal needs were not being met
Most Lawyers Do Not Volunteer

• A study found that only 10% of California lawyers donate any time to pro bono programs serving the poor.

• Among those who did, the average hours contributed per year was less than 30.
Increased In-House Commitment Helps

- Many Fortune 500 companies’ legal departments have established in-house pro bono programs

- In 2000, ACC and the Pro Bono Institute formed Corporate Pro Bono
  - Reached 100th Challenge Signatory milestone in November 2010
Key Ethical Considerations

- Avoiding Unauthorized Representation
- Conflicts
- Engagement and Limited Scope Agreements
- Duty of Confidentiality
- Duty to Competently Represent Your Client
 Avoiding Unauthorized Representation

- In-house lawyers might not be admitted to the bar of the state in which they practice
  - “Registered In-House Counsel” in California

- Some states have passed explicit rules allowing registered in-house lawyers to represent pro bono clients
  - In-house legal departments have been important advocates for changes
    - For example, Caterpillar’s advocacy in Illinois and Florida
CA Allows RIHC To Do Pro Bono Work

Cal Rules of Court Rule 9.45 and Rule 9.46

Registered in-house counsel may provide pro bono services while working under supervision with one qualifying legal services provider; Counsel must apply to be a registered legal aid lawyer. Practice is permissible for no more than three years.
RIHC Restrictions

• But restrictions on RIHC doing pro bono work are major barrier
• Options:
  • RINC can proceed with state bar approval process
  • Alternatively, RINC can conduct research, team up with others who are representing a client, etc.
Conflicts

- Generally rare with in-house legal departments
  - But important to develop internal mechanism to identify conflicts

- Actual and potential conflicts

- Practical considerations

- Resolving conflicts:
  - Some conflicts can be waived with informed written consent
  - But with unlimited number of clients in need, easiest to steer clear of clients with conflicts
Pro Bono Engagement

• Preliminary matters with new clients:
  • Communication:
    • Practical considerations: plan your method of communication; get backup phone numbers

Cal. Rule Prof. Conduct 3-500: Communication
A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.
Pro Bono Engagement

- Always have written engagement letter
  - Clearly identify client
  - Define scope of representation
  - Modify later if scope changes
  - Discuss financial agreements re: attorney fee and costs awards
  - Outline termination provisions
  - Have it signed by client and attorney

---

July 7, 2011

By U.S. Mail
Maryam Niazi
Casa Constan Law Center
2700 Fifth Avenue, Suite 200
San Diego, CA 92103

Re: Engagement to Perform Legal Services Re: Maryam Niazi & Jamal Diqqane

Dear Ms. Niazi:

Morrison & Foerster LLP ("Morrison & Foerster" or the "firm") is pleased to provide you, our client, with legal services on a pro bono basis, that is, without charge for our time. This engagement letter sets forth the basic terms of our agreement to perform those legal services.

While we might ordinarily prefer to choose a less formal method of confirming the terms of our engagement than in a written statement such as this, it has been our experience that a letter is useful both to the firm and to the client. In addition, the firm is required by law to state these matters in writing in some situations. In any event, we ask that you carefully read and sign this letter. If you correctly state your understanding of your and our commitments and responsibilities, please sign the enclosed copy of this letter and return it to me at your earliest convenience. If you have any questions about what is stated in this letter, please do not hesitate to contact me or another attorney in the firm who is familiar with this engagement.

1. **Scope of Representation.** In general, we will represent you and your son in your current removal proceedings in Immigration Court concerning your unindicated claim(s) of asylum, withholding of removal, and/or relief under the Convention Against Torture (CAT). This engagement does not cover legal services related to an appeal. This engagement does not cover any legal services other than those described in this Paragraph.

2. **Services: Pro Bono Basis.** We will provide these services to you without charge for our time and without compensation in the form of a contingent fee interest in any compensatory or punitive damages. If, apart from compensatory or punitive damages, an award of attorneys’ fees is obtained from any other party based on our work on this matter, the attorneys’ fee award shall be the property of our firm. However, it is the policy of our
Limited Scope Representation

• Pro bono opportunities include limited scope matters.
  • Argue a motion
  • Attend a one-time clinic
  • Depose a witness
  • Handle a settlement negotiation

• Is this ethical? Usually.
  • No modifications to Rules of Professional Conduct necessary to authorize limited scope representation. (Board of Governors of the California Bar Association’s conclusion)
  • Keep in mind:
    • Advise your client—in writing—what you will NOT be handling (see handout).
    • At clinics, take practical steps so clients don’t think you are their lawyer (see handout).
    • When withdrawing, ensure you take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (Cal. Rule Prof. Conduct 3-700).
    • May not be acceptable for all cases (immigration).
Duty of Confidentiality

- Cal. Bus. & Prof. Code section 6068(e):

  It is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

- Take precautions
  - Secure documents
  - Lock file cabinets
  - Shred drafts
  - Don’t talk with colleagues outside legal department
Duty of Competence

“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.”


Cal. Rule Prof. Conduct Rule 3-110: Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the

1) diligence,
2) learning and skill, and
3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
Duty of Competence

- Happily, successful malpractice actions in pro bono matters are rare.
- But pro bono attorneys must maintain standards of professionalism.
    - Attorney failed to act within a reasonable timeframe when he was aware his clients needed nonprofit status to obtain contributions yet took nine months to file the incorporation documents for one client and four months to file them for another.
    - In affirming the attorney’s suspension, the California Supreme Court specifically noted that the fact that the representation was pro bono was not an excuse.
Partnerships Help Ensure Competence

• **Partnerships with law firms offer:**
  • expertise and resources if the case expands in scope
  • additional attorneys to help if in-house attorney leaves
  • administrative support (docketing departments, secretaries trained in handling court filings, etc.)
  • can serve as primary counsel if the in-house counsel is RINC

• **Partnerships with legal service providers offer:**
  • expertise
  • malpractice insurance (often, but need to confirm)
Sample of Co-Counsel Agreement

• Important provisions to include:
  • Joint defense to ensure maintenance of privilege
  • Division of work between the firm and in-house attorneys
    • Identification of lead attorney
  • Costs/Fees
    • Distribution of cost and expenses associated with the work
    • Distribution of fees and costs if awarded by the court or in a settlement agreement
  • Confidentiality issues/press releases
  • Termination of services and agreement

CO-COUNSEL AGREEMENT

1. The Public Interest Law Center of Philadelphia (the “Law Center”) and its attorneys and staff, and (2) Morrison & Foerster, LLP (“Morrison & Foerster”) and its attorneys and staff agree to serve as Co-Counsel in an appeal to the United States Court of Appeals for the Ninth Circuit captioned H.P., a student with a disability, and M.P., his parent v. Anchorage School District, No. 16-3865. This Co-Counsel Agreement states the respective rights, responsibilities, and understandings of the parties, including decision-making procedures, press releases and media contacts, allocation and budgeting of costs, and payment and apportionment of attorneys’ fees.

2. The clients in this matter are Maureen and Robert Punter, on their own behalf and as parents of Max Punter (“Clients”), who reside at 7631 Ingram Street, Anchorage, Alaska. The Clients have signed a Retainer Agreement with the Law Center. Morrison & Foerster will provide its retainer agreement with Clients for review prior to being submitted to the Clients.

3. Morrison & Foerster shall be lead counsel and take primary responsibility for the drafting of the appellate briefs and for presenting the oral argument in the Ninth Circuit, with input and advice from the Law Center. Morrison & Foerster has designated Jordan Ehr, Seth Gelman, and Nick Miranda to work on this case, but retains the right to designate different or additional attorneys at its discretion. All decisions regarding the conduct of the appeal shall, where possible, be made by consensus among the Law Center and the firm. Co-Counsel will (except in emergencies) provide each other with the opportunity to review and approve all drafts of briefs or other written documents before these documents are filed with the court, served on another party, or otherwise disclosed or made public. All attorneys involved in this matter agree
Additional Best Practices

- Find in-house supervisors
- Consider specializing
- Develop system for ensuring that deadlines are not missed
- Develop system to reassign cases after departures
  - *Maples v. Thomas* (pending in USSC)