

Professional Responsibility for Pro Bono Practice

Alabama State Bar Pro Bono Celebration – October 24-30, 2010

Continuing Legal Education Program for 1 hour of Ethics Credit

Presentation Notes

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Note to Presenters:

Thank you for undertaking the presentation of this CLE program for the Alabama State Bar's Pro Bono Celebration Week. These notes are to guide you in the presentation of a 1-hour Ethics CLE session, and Alabama State Bar has accredited this course for CLE Ethics Credit.

Primarily, this is a survey of the Alabama Rules of Professional Conduct as they address pro bono and public interest practice, and it includes proposed discussion questions to explore the policy, limitations and application of these rules. You may choose from among the proposed questions and add your own thoughts to the suggested comments in response to the questions.

The companion Power Point presentation includes only the Rules and the comments to the Rules referenced in these notes. The notations [SLIDE] should guide you to advance the Power Point slide show in concert with your presentation.

Introduction and Greeting

[Introduce yourself, the setting and the purpose of the event: CLE, Pro Bono Celebration]

Suggested Notes:

This week is national Celebrate Pro Bono week. The ABA initiated this effort to highlight pro bono work by our noble profession and to encourage attorneys to embrace our calling to provide pro bono services for those who do not have adequate access to the legal system by their own means. The Alabama State Bar, led by Alyce Spruell on the task force and supported very ably by Linda Lund at the Bar headquarters, have led the nation in state efforts and has gotten some national accolades from the ABA as we have prepared for this week.

Today, we are going to discuss the ethics of pro bono services. This is not a recruiting speech, but we will take a good look at our calling to provide pro bono services, why we are bound to do it (even more than warm and fuzzy feelings of self-satisfaction), and how we should proceed ethically when we undertake this fruitful enterprise.

I. Public Citizenship

We are going to discuss the rules of the Alabama Rules of Professional Conduct that encourage us to participate in pro bono efforts, but let us begin earlier in the rules with a broader sense of purpose. The Preamble to the Rules of Professional Conduct describes lawyers as “public citizens”:

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Preamble: A Lawyer’s Responsibilities

*As a **public citizen**, a lawyer should seek improvement of the law, of the administration of justice, and of the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ the knowledge in reform of the law, and work to strengthen legal education. **A lawyer should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. . . .***

. . . . Lawyers play a vital role in the preservation of society. The fulfillment of these role requires an understanding by lawyers of their relationship to our legal system.

Ala. R. Prof’l. Conduct, Preamble, paras. 5, 12 (emphasis added).

Potential Discussion Questions:

1. What is a “public citizen,” and how is a public citizen different than a private citizen?
2. Why should attorneys bear any greater burden for society than anyone else?
3. Why does this status as “public citizens” impose on us this special concern for poor people?
4. Why does our concern for the legal system itself imply a concern people who cannot afford adequate legal services themselves?
5. Besides affordability, why else might poor people be reluctant to access the legal system?

Suggested Comments in Response to the Discussion Questions:

The Preamble calls lawyers “public citizens.” This necessarily is some status other than “private citizens,” and it surely recognizes that our profession handles society’s most difficult problems. We bear the responsibility for representing neighbors, families and businesses as they work through conflicts by procedural processes and the Rules of Law, rather than by brute force or vigilantism. We bear society’s responsibility for prosecuting people who violate our laws and disrupt our communities, and we represent those accused of crimes to ensure that society does the job properly, fairly and justly. We guide businesses who serve communities, employ people, compete in the marketplace and affect the environment. Our community’s greatest controversies and issues rest in the work of lawyers, so as we serve individual clients, we also are promoting a peaceful, orderly, predictable and just society. The Bar is a bulwark against arbitrary government, violent dispute resolution and criminal oppression.

For the legal system to work, the people, our neighbor citizens must trust it to work. If we expect litigants, defendants, families and voters to accept the outcomes we generate through the legal system, they must accept the system as legitimate. Legitimacy rests on some fundamental ideas: The people must accept the system as generally fair and uncorrupted. The people must believe that the Law rules, not the caprice of a judge or government functionary. The people must trust that the system does not favor the rich or privileged, and this is the vital need for equal and fair access to justice. Underpinning all of this, though, is a fundamental trust in the people who operate the system, judges and lawyers. If the people do not trust us, the operatives of the Rule of Law, then they will not trust the legal system we represent. This is part of our high calling.

Pro bono services to underserved communities strengthen our roles as public citizens, because public interest practice promotes all of these elements critical to the legitimacy of the legal system. By providing access to poorer people, we work to ensure that our legal system is not the exclusive province of the privileged. By demonstrating a willingness to work for free, to take cases regardless of profit, we show ourselves to be more trustworthy, more honorable and less mercenary. By claiming the Law for those who cannot afford representation, we demonstrate our own faith and reliance on the Rule of Law, rather than a complex manipulation of a stacked political game.

II. Pro Bono Obligations

The Rules of Professional Conduct make this observation a little more concisely. This is the comment to Rule 6.1 of the Rules of Professional Conduct:

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*The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice. . . . **The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.***

ALA. R. PROF'L. CONDUCT 6.1 (comment).

Rule 6.1 is the plain statement of lawyer's obligation to provide pro bono legal services.

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Alabama Rule 6.1 Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

ALA. R. PROF'L. CONDUCT 6.1

Discussion Questions:

1. In addition to the aspirational reasons we've already discussed, why should lawyers render public interest services? What other reasons motivate this kind of work?
2. Why do you think this rule says that lawyers "should," rather than lawyers "must" render public interest service?
3. Mississippi, among other states, makes pro bono service mandatory; either you donate a minimum amount of hours or you or must pay a fee to the Bar to assist institutional legal aid services. Should Alabama adopt this approach?
4. What are some professional barriers that discourage attorneys from providing pro bono services?
5. How should lawyers accommodate this obligation when they are bound to billable hour quotas, self-employment taxes, more work than they can handle or not enough paying work to keep the lights on?

Also from the Comment:

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*The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. **Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.** The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. **Every lawyer should support all proper efforts to meet this need for legal services.***

ALA. R. PROF'L. CONDUCT 6.1 (comment).

Perhaps to overcome the practical barriers of individual pro bono legal services and to capitalize on attorneys' various talents and callings, the Rules provide for two other means of rendering service in the public interest:

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ALA. R. PROF'L. CONDUCT 6.3 - MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

ALA. R. PROF'L. CONDUCT 6.4 - LAW REFORM ACTIVITIES

Both of these Rules include some special guidance if the lawyer's participation in these activities affect their private clients, either adverse to the client's interest or in the client's benefit.

III. Applying the Rules of Professional Conduct to Pro Bono Practice

It should go without saying that the Rules of Professional Conduct apply equally to pro bono clients as they do to paying clients.

For example, all of these standards apply to pro bono work in every way as they apply to fee-generating work:

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ALA. R. PROF'L. CONDUCT 1.1 – COMPETENCE

ALA. R. PROF'L. CONDUCT 1.3 – DILIGENCE

ALA. R. PROF'L. CONDUCT 1.4 – COMMUNICATION

ALA. R. PROF'L. CONDUCT 1.6 – CONFIDENTIALITY

ALA. R. PROF'L. CONDUCT 1.6 – 1.9 – CONFLICTS OF INTEREST

ALA. R. PROF'L. CONDUCT 1.13 – ORGANIZATION AS CLIENT

ALA. R. PROF'L. CONDUCT 1.14 - CLIENT WITH DIMINISHED CAPACITY

ALA. R. PROF'L. CONDUCT 1.16 - DECLINING OR TERMINATING REPRESENTATION

Discussion Questions:

1. How might pro bono work for a poor client challenge our typical application of these precepts?
2. Why might we be tempted to be less disciplined in regard to [confidentiality, diligence, communication, etc.] for a client who is unable to pay for our services?
3. How might the client's limited options for representation affect her response to you and your response to her, and how might this affect the quality of your services?

Suggested Comments in Response to Discussion Questions:

Although we can be sure that all of our professional ethics apply in equal force to clients who cannot pay as to those who can, we might meet challenges or temptations to give pro bono clients lesser care. In particular, because of a client's desperation and limited options, we might be inclined to take on a matter in which we are not competent or well read. [Personal example: Landlord Tenant law in response to Hurricane Katrina in the Mississippi Bar Association's Disaster Legal Assistance Program.] We must remember that the client is trusting us with his life, livelihood or family affairs, without many other options. What to us might seem a minor trifle will be to the client a critical issue of life, death or wellbeing.

We might also be tempted to give a lesser effort for the client who cannot pay, in favor of those who do. We are responsible to both clients, and we owe every duty of diligence to the client who depends on us despite her ability to pay. The client who cannot pay will be just as anxious for word of progress, to learn the answer to a legal question or obtain a disposition as the privileged, paying client.

As we enter this enterprise of pro bono service, we must have clear, realistic expectations about our obligations and responsibilities. If we cannot ensure professionalism and our highest level of care and work for our pro bono clients, then we should not accept their cases. Providing low quality legal services or treating a pro bono client with disdain, is worse than not providing any assistance at all. If we were to give a pro bono client short shrift, we would compromise our duty to them, would tarnish our own reputation and would promote the destructive idea that our legal system (and profession) favors the rich and privileged.

IV. Special Duties and Care for Pro Bono Clients

Final Discussion Questions:

1. What is the difference between Pity and Compassion?
2. Why does this matter with pro bono clients?
3. How would Pity manifest itself in service to a pro bono client, even with good intentions?
4. By contrast, how would Compassion manifest itself in service to a pro bono client?

Suggested Comments in Response to Discussion Questions:

No one likes to be a charity case. No one likes to be helpless and dependent on another's pity. Rather, people almost always prefer to be empowered to confront their own challenges and to preserve self-respect by overcoming their own obstacles. As lawyers, we are accustomed to solving problems for our clients, identifying the issue, researching the answer, proposing a solution, implementing a strategy and working for a good outcome. Of course, we should do these things for pro bono clients, but we must resist the urge to just "solve their problems." We should avoid being one more person in a long line of people who has told them what to do, when to do it, with scorn for their position. Instead of feeling sorry for the plight of the poor client and deigning to address it *for* them, we should address it *with* them.

Rather than condescend in charity for a poor client, let us pull alongside them and equip them to address their issues themselves. If there is a legal decision to make, let us not make it for them; rather, let us educate, counsel and advise the client so that she may make the decision herself. Instead of handing out a pat solution from our vaunted perspectives, let us work to understand her point of view and the pressures that have led her to this point of crisis. Then, with an understanding of her needs and goals, let us empower her to confront them herself.

Not only is this better service to the client and competent lawyering, but compassion, not pity, will give her tools to avoid the crisis again. Not only will this alleviate the immediate problem, it will restore her dignity and respect in a way that may spread from her to her family and community. Not only will compassion serve her better, it will serve our profession and the legal system more substantially. Compassionate lawyering for pro bono clients will demonstrate our better angels of competence, diligence, loyalty, zeal, honesty and even nobility.

V. Conclusion

The Rules of Professional Conduct say, “A lawyer should render public interest legal service.” The comments to the Rule declare that this is an obligation of every lawyer, regardless of professional prominence or workload. Pro bono service for “the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.” Helping people in need is good for the soul and can reinvigorate a lawyer’s work and professional life. In addition to self-satisfaction, though, pro bono work serves critical purposes for our profession and society. Providing access to the legal system to those who cannot afford to pay a lawyer strengthens the legitimacy of our system and inspires trust that our laws exist for justice, not merely to favor the wealthy and privileged. When lawyers render pro bono service with compassion and excellence, we address immediate needs and personal crises, but we also can empower and dignify our clients to be their own best advocates.