Managing the Pro Bono Client's Expectations: The Nuts and Bolts of the Attorney-Client Relationship in the Pro Bono Context

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We know *why* we do pro bono. This is not a difficult question: to help those who cannot afford quality legal assistance, to aid charitable or public interest groups, to serve organizations dedicated to improving the administration of justice. While less often acknowledged, we also do pro bono work because it is good for our practice; it enhances recruitment efforts and garners the kind of public relations goodwill that money can't buy. Realistically, we do it for all of these reasons.

But *how* do we do pro bono? There are obvious big-picture considerations: where to find qualifying clients, how cases will be screened, etc. These are important questions considered in-depth by other commentators and are beyond the scope of this article. The "how" we are talking about is how to manage the attorney-client relationship in the pro bono context. Of course, pro bono clients are entitled to the same standard of care and zealous representation as paying clients. To suggest otherwise demeans our sense of fair play and even hints at potential ethical violations. But there are differences between pro bono and paying clients, and to ignore this reality would do a disservice to the clients and your firm.

So, how do we manage client expectations in pro bono matters? There are several topics to consider, including:

- Scope of representation (including assessing the client's goals, both professed and unnamed)
- Division of labor (between senior and junior attorneys, as well as between the firm and the client)
- Confidentiality (including the firm's right to publicize its pro bono work)

Scope of representation: After the firm has screened and selected a pro bono client and assigned the appropriate attorneys to the case, the supervising attorney and the client will meet, preferably face-to-face, though a conference call will suffice, especially considering the possible cost constraints. (Already, then, the difference between pro bono and paying clients comes into play.)

At this initial meeting, it is important to gauge the client's level of sophistication and legal acumen and to tailor the message accordingly. This can be difficult for lawyers accustomed to representing multinational corporations with in-house legal departments. Even relatively large and sophisticated nonprofit organizations typically do not have in-house legal staff. Moreover, the staff of nonprofit organizations, while highly knowledgeable about fund-raising and other charitable concerns, is often ill-prepared to

understand legal issues and strategy. Thus, it is important to not only understand your client as an organization but to get to know your client contact as an individual.

At the outset, it should be agreed what work will be performed, approximately how long it will take, when the representation will end, and any disbursements the client will make. The most effective tool for memorializing these considerations is the engagement letter. This letter and the initial intake meeting where the terms of engagement are painstakingly discussed will lay the groundwork for the effective management of the pro bono client's expectations.

Too often, the engagement letter is a boilerplate-laden, fill-in-the-blank template. Beyond the pertinent background information about the client and the dispute, what should the engagement letter include?

It is essential to clearly delineate the scope of the pro bono representation. Thus, in the engagement letter, the firm should articulate what services it will and will not perform. Specificity and honesty are key. For example, the firm may agree to assist the client in the present dispute but decline representation in the potential appeals process. If the firm does agree to represent the client in a separate matter (whether or not related to the current dispute), this should be addressed in a new engagement letter.

To properly negotiate the scope of representation, the attorney must first ascertain the client's goal. This may not be as simple as it seems. Of course the client wants to win, but what does winning mean? The obvious answer would be to prevail in the current dispute, whether by achieving a favorable verdict, award, or injunction, for example. However, winning could mean something more to the client. For instance, in a particularly contentious dispute, the client may seek revenge or its “day in court.” Obviously, paying clients may also be motivated by more than the search for justice; however, such peripheral motivations often dissipate when the paying client weighs its mounting legal fees against its desire to be vindicated at all costs.

Discovering these underlying motives (which may not be apparent even to the client) may require a bit of psychological detective work by the attorney. However, it is important to identify these issues as early as possible as they can cause the client to behave—in the attorney's opinion—unreasonably. For example, a pro bono client may take advantage of the fact that it is receiving free legal representation and refuse to settle, even when advised that the settlement terms are far more favorable than the result that could be attained at trial. In similar circumstances, a paying client would probably conduct a cost-benefit analysis and conclude that its obstinacy may prove too costly.

A carefully crafted engagement letter can go a long way in avoiding this problem. In the letter, the attorney should state that while the firm will offer only the best advice without consideration of the matter's pro bono status, the client owes a reciprocal duty to cooperate with its attorney, fully consider the advice of counsel, and elect a reasonable course of action. If at any time the attorney feels that the client is not living up to its pledge to act reasonably despite the firm's best efforts to resolve the impasse, the firm may be forced to withdraw from the case (of course, within the parameters of the applicable ethical rules regarding withdrawal). This should be distinctly set forth in the engagement letter and reinforced verbally with the client.

Firms should also consider sending "dummy" bills to pro bono clients at regular intervals to show the cost of the representation were the firm to bill the client at the normal rate. This will keep the client informed of the work performed on its behalf and can be especially effective in reining in unreasonable demands.

In addition to the scope of representation, the engagement letter should set forth the protocol for communication (whether it will take place via e-mail or hard-copy correspondence, if status updates will be provided and when), any disbursements for which the client may be responsible, and other such procedural matters.

Contrary to popular opinion, “pro bono" does not mean "free.” (Actually, “pro bono publico" translates as "for the good of the public.") Pro bono clients receive free legal representation but are typically responsible for all expenses (such as filing fees, copy and phone charges, and travel expenses). It is important to explain that the client will be responsible for such fees and to set forth, if appropriate, whether the client's approval will be sought before some or all costs are incurred. It is imperative to be especially precise when dealing with clients that have little or no experience with the legal system as they may be unfamiliar with the high costs for such services and how quickly they add up. Moreover, law firms should try to defray these costs by negotiating deals with their vendors, such as copiers and court reporters.

While firms must be extra sensitive to costs in pro bono cases, they should also look at the big picture when considering cost-cutting measures. For example, the cost of time wasted performing book research can be more than recouped if the lawyer is allowed to conduct expeditious online research for the pro bono client because the time saved can then be spent on billable matters. Of course, the firm's budget-consciousness should never prejudice the client.

Finally, at the outset of the representation, the lawyer should discuss the overall litigation strategy, including the focus of discovery. For example, counsel for a nonprofit may propose limiting depositions and other discovery because the costs to the nonprofit (i.e., the expenses for which the pro bono client is responsible) do not justify the potential benefit to the client. While a paying client may instruct its attorney to take numerous depositions, even knowing that several may add little value to the case, a pro bono client should likely opt for more focused discovery. However, again, the client and lawyer must discuss this strategy early in the case.

Division of labor: Related to the scope of representation is the division of duties. Often, firms agree to take on certain pro bono matters knowing that junior attorneys will perform the bulk of the work. Of course, to allay any unease the client may feel, the senior attorney assigned to the case should stress that all work will be performed under his or her supervision and will in no way result in inferior service. Equally important, the supervising lawyer must adhere to this commitment.

Staffing younger attorneys to pro bono cases makes fiscal sense for the firm in more ways than one. Yes, the firm saves money because such associates bill out at a much lower rate (and thus the firm does not "lose" as much revenue as it would if senior attorneys or partners worked the case), but pro bono matters also provide excellent

training opportunities for a firm's young attorneys and interns. Since young lawyers are often allowed greater autonomy on pro bono matters, junior attorneys can use pro bono cases to develop skills (by taking depositions, appearing in court, etc.) much earlier than they otherwise might on larger, more complex cases. This is clearly good for the attorneys and the firm.

Better trained attorneys are happier attorneys. A report published by the American Bar Association's Standing Committee on Continuing Education of the Bar listed the lack of meaningful training and professional development opportunities as a direct cause of low morale and excessive turnover. Pro bono programs can provide these missing opportunities. Likewise, the ability to take on pro bono cases is often an important factor in choosing a legal employer. In this way, pro bono work can help firms both retain valued attorneys and recruit top talent. Of course, the pro bono client is entitled to understand these staffing considerations and to be involved in, to a certain extent, the staffing process.

Some legal commentators have proposed a concept known as "unbundling" to address the severe shortage of affordable legal assistance in the United States. Unbundling, or discrete task representation, means that the client hires an attorney to perform only certain tasks agreed upon in advance. The client performs the remaining work on its own. The concept is not new. Transactional lawyers regularly provide limited representation, as do legal clinics and hotlines that advise clients on only certain topics or distinct issues.

Unbundling does raise some concerns regarding the adequacy of representation, however, as lawyers have a duty to provide competent and thorough counsel. Indeed, some states' ethics opinions have held that a lawyer may not unbundle legal services even if the client expressly requests such restricted representation.

Therefore, relevant state ethics rules permitting, a less formal version of unbundling may be considered in the pro bono context. Referencing the client's duty to cooperate with its attorney and provide all factual support needed to assist the attorney in providing the most effective representation, the attorney may suggest that the client perform some tasks that would typically be performed by the firm. For example, a seasoned business professional at a nonprofit organization can be of invaluable assistance in the document review process. A paying client would incur the hourly services of at least one associate to perform the initial review, as well as the associate's travel expenses. A knowledgeable pro bono client, however, can perform the first sweep, thus saving itself hundreds if not thousands of dollars in expenses. (Obviously, this also saves the firm in nonbillable legal services.) Of course, the attorney is ultimately responsible for reviewing all documents for relevance and privilege, but the savvy client is more than capable of gathering all such documentation from both paper and electronic sources.

Confidentiality: Of course, pro bono clients are entitled to the same level of confidentiality (for communications and work product) as paying clients. However, law firms take on pro bono cases in some part because of the positive publicity such work generates (which in turn lands more paying clients and, as aforementioned, helps recruit talented attorneys). To gain this publicity, the firm must be able to tell the world of its pro bono work. Therefore, the firm should address the topic of publicity with the client and

ask for permission to discuss the case in articles and marketing materials and on the firm's Web site, for example.

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Some experts estimate that nearly 80% of the legal needs of the poor go unmet in the United States. Small nonprofits are similarly denied access to legal services. Pro bono work is one step in rectifying this troubling situation. Many see the practice of law as a privilege that comes with responsibilities, providing pro bono services being chief among them. Indeed, recognizing an attorney's ethical obligation to give something back, in 1988, the American Bar Association adopted a resolution urging all attorneys to dedicate fifty hours per year to pro bono matters. In the mid-1990s, several large law firms accepted the Law Firm Pro Bono Challenge, which asked firms to allocate an amount of time equal to 3% to 5% of their billable hours to pro bono cases.

While the move toward greater pro bono involvement is encouraging, for this trend to continue, it is essential that the pro bono experience be positive for client and firm alike. While pro bono clients deserve the same standard of care as paying clients, the issues unique to pro bono representation cannot be overlooked. However, as long as the firm is explicit and honest in its assessment of the scope of representation, the division of labor, and confidentiality issues—and memorializes these issues (and others) in a concise, easy-to-understand engagement letter—the pro bono representation should go smoothly and prove rewarding for both client and firm.