# speaking of ethics

By Hope C. Todd

## Pro Bono Publico

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I recently had the opportunity to speak before a group of lawyers attending comprehensive training offered by the Consortium of D.C. Legal Services Providers and cosponsored by the D.C. Bar Pro Bono Program. I opened by stating that "representing clients without charging a fee does not, in any way, mitigate a lawyer's ethical obligations or responsibilities under the D.C. Rules of Professional Conduct." I could have sat down at that point, but I had 20 more minutes and a captive audience.

While the duties of competence, confidentiality, and loyalty are owed to pro bono and paying clients in equal measure, this column discusses the rules that may be particularly relevant or helpful to a lawyer who is considering taking on a pro bono matter or perhaps already engaged in one.[1]

As an initial matter, the absence of a fee for a lawyer's services does not negate the necessity for a written fee agreement. Rule 1.5(b) requires that unless a lawyer has *regularly* represented a client, he or she must communicate in writing the fee (even if it is zero), the scope of the services, and any expenses for which the client will be responsible.

Sometimes a question arises about what expenses a lawyer is required or allowed to pay. Rules 1.8(d)(1) and 1.8(d)(2) allow, but do not require, a lawyer to pay "the expenses of litigation or administrative proceedings"[2] and "other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings."[3] The rules do not require reimbursement by the client. It is prudent, although not required, to include in writing those expenses for which the lawyer has agreed to pay.

A common occurrence in pro bono representations is dealing with pro se opponents. Rule 4.3 governs communications with unrepresented persons. The rule is clear that a lawyer should not give advice to an unrepresented person whose interests are adverse to the lawyer's client, and that the lawyer must clarify his or her interests and role in the matter where the unrepresented person misunderstands. However, the rule does not prohibit a lawyer from negotiating the terms of a transaction, settling a dispute, or preparing documents that require the signature of an unrepresented person. With proper explanation and disclosure to the pro se opponent, a lawyer can appropriately carry out a representation within the parameters of the rule.

In some instances, the pro se litigant is the lawyer's client, rather than the client's opponent. Pro bono assistance may include the provision of legal assistance short of full-scale representation, sometimes called "unbundling legal services." D.C. Bar Legal Ethics Committee Opinion 330 (2005) concluded that "the provision of legal services through unbundled legal service arrangements is permissible under Rule 1.2, provided the client is fully informed of the limits on the scope of the representation, and these limits do not bar the provision of competent service."

Thus, a lawyer may, for example, agree to draft a complaint or appellate brief for a client to file pro se or counsel a pro se litigant through an uncontested divorce. However, as Opinion 330 significantly notes, *all* duties that generally attach to the attorney–client relationship apply to such arrangements.[4] The opinion also advises that while the ethics rules do not require disclosure to a court for providing drafting assistance to a pro se litigant (i.e., ghostwriting),[5] lawyers should check other relevant laws and forum rules to determine the extent of their disclosure obligations.

Whether due to mental impairment or other reasons, sometimes clients in need of pro bono legal assistance have diminished capacity to make adequately considered decisions. Rule 1.14(a) reminds lawyers that they should, as far as reasonably possible, maintain a normal attorney–client relationship with such clients. If a lawyer believes such a client is at risk of substantial physical, financial, or other harm unless action is taken, then a lawyer may take reasonably necessary protective action pursuant to Rules 1.14(b) and (c).[6] The comments to Rule 1.14 are extensive and instructive and well worth reading for anyone representing a client with diminished capacity.

*Pro Bono Publico* means "for the public good." Lawyers who undertake pro bono representations for the benefit of those who are unable to afford their services are indeed upholding the highest ideals of the profession. However, those ideals require not only the best of intentions, but also strict adherence to the ethical obligations that arise in the formation of every attorney–client relationship.

### Notes

1 Rule 6.1 provides that "a lawyer should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorney's fees or who are otherwise unable to obtain counsel. … When personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel."

2 Expenses may include court costs, expenses of investigation or medical examination, and the costs of obtaining and presenting evidence. *See* Rule 1.8(d)(1).

3 Allowable expenses under this rule can include medical expenses or even rent. *See* Rule 1.8 cmt. 9.

4 Since the issuance of Opinion 330, the District of Columbia has adopted Rule 6.5, which permits a lawyer to render short-term limited legal services to a client "under the auspices of a program sponsored by a nonprofit organization or court" without undertaking a full-scale conflicts check. The rule is very limited in scope and applies to such services as advice-only clinics and pro se counseling programs. *See* Rule 6.5.

5 Opinion 330 interprets the D.C. Rules of Professional Conduct. The American Bar Association recently reached a similar conclusion under the ABA Model Rules of Professional Conduct in ABA Formal Opinion 07-446.

6 Protective action may include consulting with family members, securing professional services, or conferring with adult protection agencies or other entities that have the ability to protect a client. *See* Rule 1.14 cmts. 5, 6, and 7.

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