

THE RULES AND PRO BONO

By

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Lawyers have a virtual monopoly on access to the legal system. Because of this, the profession has long been understood to bear a corresponding obligation to help the disadvantaged in need of legal services. The fact that lawyers recognize the need to volunteer their efforts — and have consistently acknowledged this obligation as arising from the license to practice law — is an important part of what distinguishes the practice of law as a profession.

PRO BONO EXPECTATIONS

The roots of voluntary pro bono go deep. In the early 19th century David Hoffman framed a code of professional ethics for lawyers commonly referred to as *Hoffman's 50 Resolutions*. Resolution 18 expressed a pro bono obligation:

To my clients I will be faithful; and in their causes zealous and industrious. Those who can afford to compensate me must do so; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are of all others the best entitled to sue or be defended; and they shall receive a due portion of my services, cheerfully given.

The American Bar Association weighed in on the issue of pro bono work in 1908 when it adopted its Canons of Ethics. Canon 12 carried forward the idea that lawyers ought to provide legal services to those who cannot afford them, providing in part:

A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. . . . In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

In the November 1938 edition of *Hennepin Lawyer*, then-HCBA president John C. Benson announced:

The call will soon go out for volunteers who will be willing to render legal services for a non-compensatory fee in order that it may be said of this community that whoever has a just cause

will have that cause adequately reviewed and handled even though he may not be able to pay his attorney more than a fraction of the value of the service. . . . When the call comes, let us have a response which will make each of us proud to say that our association is doing a work which has gone far in educating the public to understand the lawyer's appreciation of his professional and social obligations.

The Code of Professional Responsibility, adopted by the ABA in 1969 and in Minnesota in 1970, addressed pro bono services in the nonmandatory Ethical Considerations, significantly expanding on the philosophy underlying the pro bono obligation. Ethical Consideration 2-25, recognizing the changing times and the increasing pressures on lawyers to produce billable hours, still encouraged service to the disadvantaged. It provided, in part:

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 serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. . . . Every lawyer should support all proper efforts to meet this need for legal services.

Current Rule 6.1, Minnesota Rules of Professional Conduct (MRPC), recognizes the responsibility of all lawyers to render pro bono services. The rule establishes an aspirational goal of 50 hours of pro bono per year, sets forth a definition of what kinds of service may be rendered in fulfilling the aspirational goal, and encourages financial contributions to organizations providing legal services to persons of limited means. The Comment to this rule emphasizes the voluntary nature of its obligations, providing that "the responsibility set forth in this rule is not intended to be enforced through disciplinary process."

The Preamble to the MRPC provides that lawyers, as members of the legal profession, have a special responsibility for the quality of justice. It provides:

A lawyer should be mindful of 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. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic and social barriers cannot afford or secure adequate legal counsel.

The Supreme Court's Professionalism Aspirations, adopted in 2001, also urge lawyers to dedicate and commit themselves to equal access to the legal system.

ENABLING PRO BONO

Recent amendments to the MRPC have made it easier to provide pro bono services without impediment. Rule 6.5, MRPC, has eased slightly the imputation of conflicts of interest so as to permit lawyers to render short-term limited legal services to pro bono clients without fear that so doing will inadvertently disqualify the lawyer's partners or associates from a representation adverse to the pro bono client.

Rule 6.5 applies only in those situations where the services are rendered under the auspices of a program offering pro bono legal services and where there is no expectation by either the client or the lawyer that the lawyer will provide continuing representation. The types of programs contemplated by the rule include legal-advice hotlines, advice-only clinics and pro se counseling programs.

The rule provides that the lawyer may not meet with the pro bono client if the lawyer *knows* that either the lawyer or anyone else in the lawyer's firm either currently represents someone with interests adverse to the pro bono client or previously represented someone whose interests are now adverse to the pro bono client in the same or a substantially related matter.

The lawyer who meets with the pro bono client will be disqualified from subsequently undertaking the representation of someone adverse to that client in the same or substantially related matters. Ordinarily, this disqualification would be imputed to other members of the lawyer's firm pursuant to the operation of Rule 1.10, MRPC. However, Rule 6.5 provides that the lawyer's meeting with the pro bono client will not disqualify the lawyer's partners or associates from representing or continuing to represent someone adverse to the pro bono client. Any information obtained from the pro bono client must, in any event, be held confidential.

Rule 5.4, MRPC, was recently amended to permit and promote pro bono services in matters where court-awarded fees may be available. Rule 5.4(a), MRPC, with certain exceptions, prohibits the sharing of legal fees with nonlawyers. Rule 7.2(b), MRPC, prohibits lawyers from giving anything of value to a person for recommending the lawyer's services. Taken together, these rules were previously understood by some to prohibit lawyers from asking for court awards of attorneys fees if those fees were to be given to the legal services or pro bono organization that employed or recommended the lawyer. On October 1, 2005, Rule 5.4 was amended to permit the sharing of legal fees with legal services and pro bono organizations. The rule provides that, upon full disclosure and court approval, a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

Further changes to the MRPC to promote the provision of legal services to the poor are in the works. The MSBA will soon be petitioning the Supreme Court, requesting an amendment to Rule 1.15, MRPC, for the purposes of promoting legal services to the poor. Most lawyers holding client or third party funds in trust hold those funds in pooled IOLTA (Interest on Lawyers Trust Accounts) accounts. The interest earned on those accounts is paid to the Lawyers Trust Account Board (LTAB). LTAB, in turn, uses those funds to provide grants to legal services and pro bono organizations. Financial institutions have, however, varied

dramatically in the amounts of interest paid on IOLTA accounts. One bank currently pays only .001 percent interest on such accounts, as shown in that bank's reports to the LTAB. This amounts to one cent per year for every \$1,000 on deposit.

In order to increase funding for legal services to the poor, the MSBA will be asking the Court to adopt changes to Rule 1.15 that would require comparability of interest rates or dividends between IOLTA accounts and similar accounts. To comply with the amended rules, an IOLTA account would need to earn no less than the interest rate or dividend generally available on comparable accounts at the same institution when the IOLTA account meets or exceeds the same minimum balance or other account eligibility requirements. As an alternative, the proposed amendments would permit holding IOLTA funds in an account on which a bank would pay a "safe harbor" rate equivalent to 80 percent of the Federal Funds Target Rate. The proposed amendments would also allow IOLTA funds to be held in money market accounts and in sweep accounts and open-end money-market funds invested in or fully collateralized with U.S. Government securities. We anticipate that these amendments, if adopted, will raise significant new funds for use in meeting the needs of those who face serious legal problems but cannot afford the services of a lawyer.