

MORRISON | FOERSTER



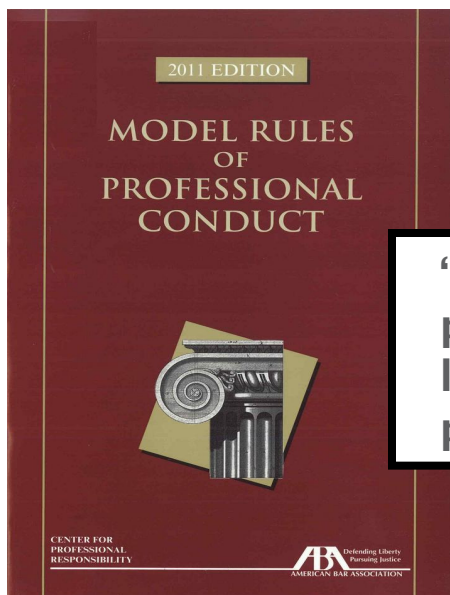
Ethical Considerations for In-House Pro Bono Programs

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 urges local bar associations to adopt similar resolutions:

WHEREAS, there is an increasingly dire need for pro bono legal services to the poor and disadvantaged; and

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

WHEREAS, lawyers should ensure that all members of the public have resolution of their disputes and access to lawyers when legal services are

WHEREAS, the Chief Justice of the California Supreme Court, the Justices and Judicial Officers throughout California have consistently emphasized the importance of lawyers and its importance to the fair and efficient administration of justice

WHEREAS, California Business and Professions Code Section 6068(h) requires every lawyer "Never to reject, for any consideration personal to himself or herself or the oppressed"; now, therefore, it is

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

(1) Urges all attorneys to devote a reasonable amount of time, to provide or enable the direct delivery of legal services, without 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 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 any law firm wishing 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; and

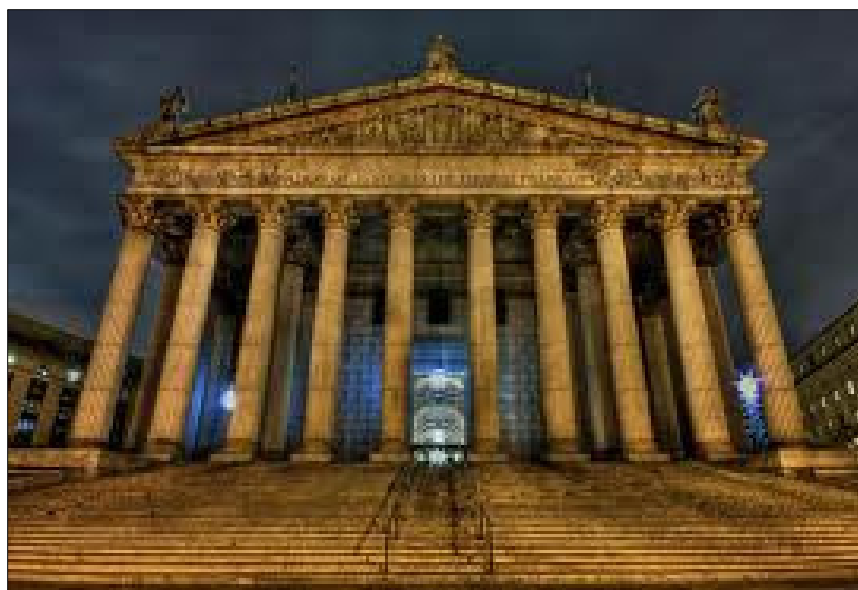
(4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services.

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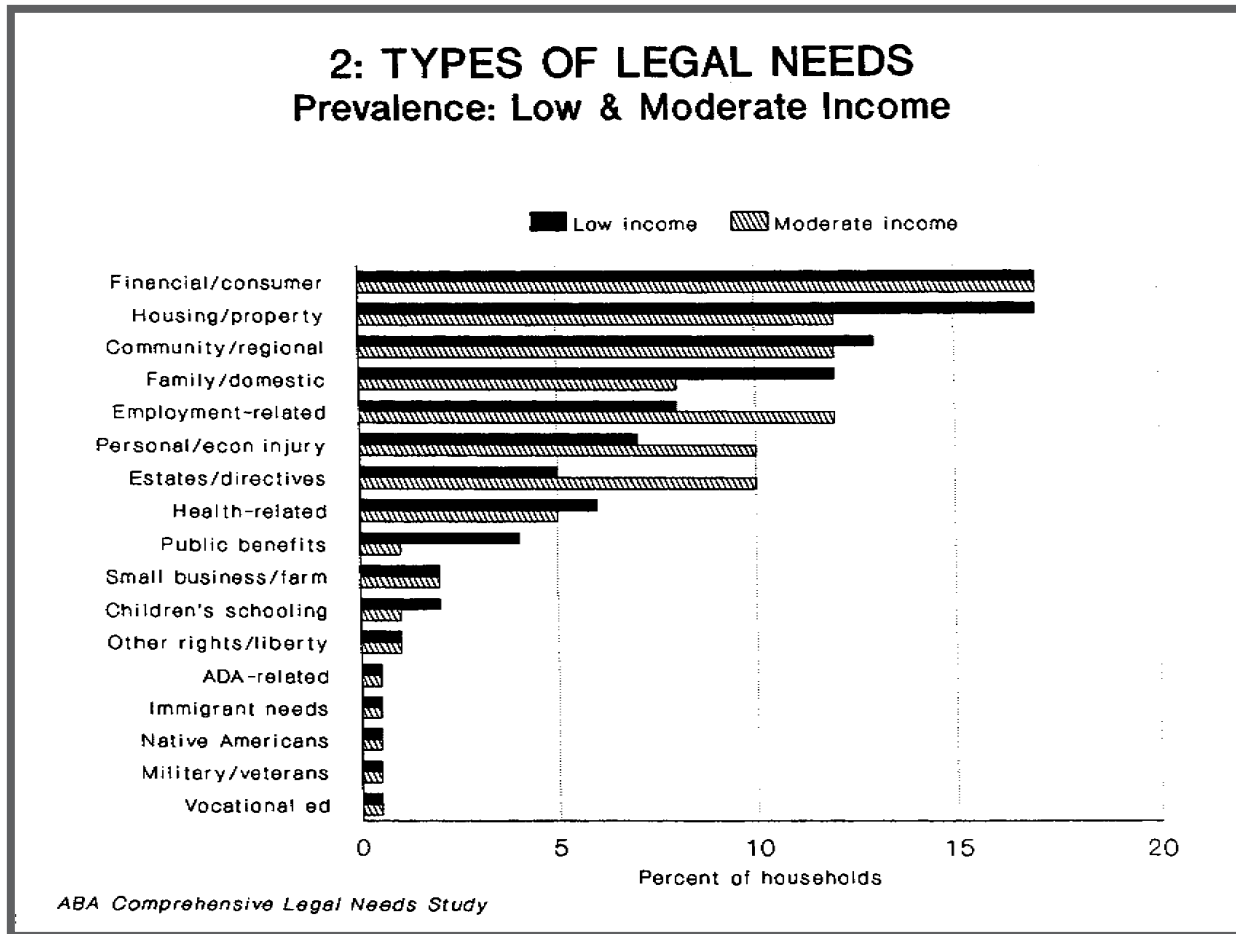
(2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their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

If No Binding Obligation, Why Do It?

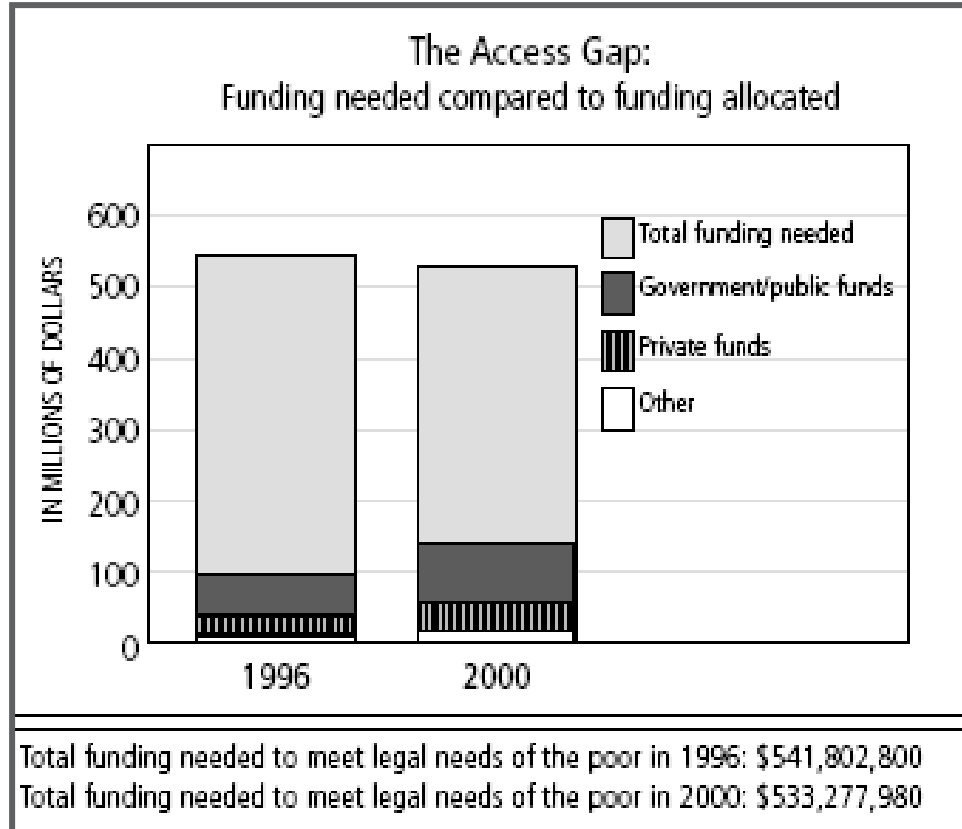
- **Lawyers who do pro bono work are upholding the highest standards of the legal profession.**
 - “If the motto ‘and justice for all’ becomes ‘and justice for those who can afford it,’ we threaten the very underpinnings of our social contract.”
Former California Chief Justice Ronald M. George, State of the Judiciary speech, 2001



The Need For Pro Bono Help is Great

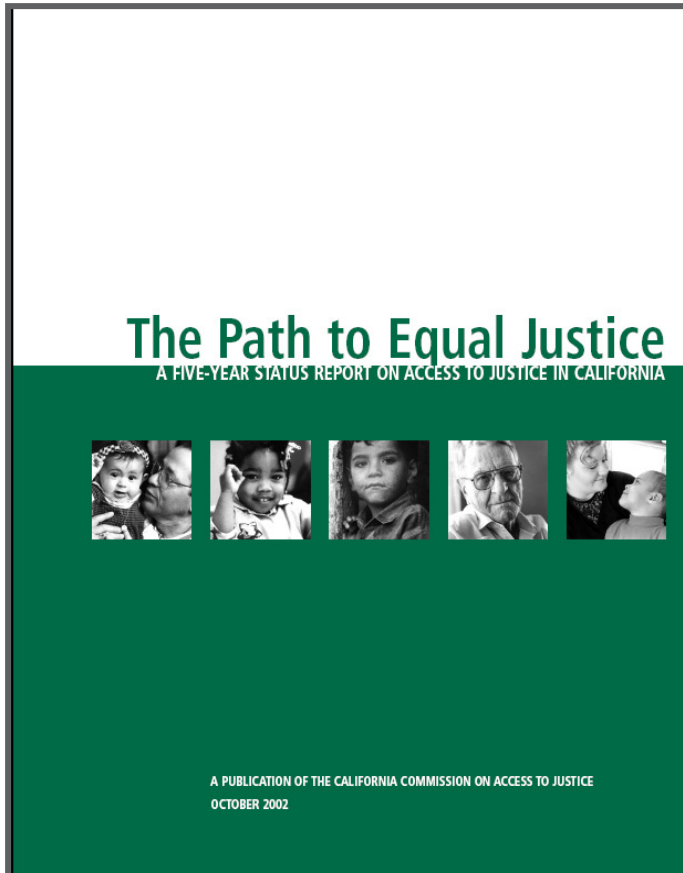


Those Needs Go Largely Unmet



- **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



Multijurisdictional Practice Rules by State

Multijurisdictional practice issues a number of in-house corporate counsel licensed in the states in which these corporate counsel, other authorize such practices.

However, a large number of states that authorize corporate counsel limited to the representation of in other forms of law practice, specific authorization under the

A brief history

In 2002, the ABA House of Delegates adopted a resolution that encouraged multijurisdictional practice. Many states have since adopted similar provisions. This is in line with the trend in the private bar to allow in-house counsel to provide pro bono services.

State	In-House Registration/Certification Requirement	Rule on Pro Bono Practice	Pro Bono Provision
Alabama	Yes	No	
Alaska	No**	No	
Arizona	Yes	AZ Sup. Ct. Rule 380(A) and Rule 38(a)	Registered in-house counsel may provide assistance as an unpaid volunteer in association with an approved legal services organization that employs at least one Arizona admitted attorney. Must be admitted to practice in another jurisdiction for at least 5 years.
Arkansas	No**	Administrative Order No. 15	Out-of-state attorneys may provide pro bono services to persons of limited means who have been referred to the attorney by an authorized legal aid organization. Representation shall be under the auspices of the authorized legal aid organization.
California	Yes	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.
Colorado	Yes	C.R.C.P. 232	Certified in-house counsel may provide voluntary pro bono service to indigent persons and organizations serving indigent persons.

<p>Cal Rules of Court Rule 9.45 and Rule 9.46</p>	<p>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</p>
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Similar efforts were led in Illinois by a coalition of local legal leaders, as well as in-house counsel, to create a nonprofit legal services organization.

		756(f)	sponsoring entity after each calendar year, but it can be renewed annually.
Indiana	Yes	No	
Iowa	Yes	No	
Kansas	Yes	No	
Kentucky	Yes	No	
Louisiana	Yes	No	
Maine	No**	No	
Maryland	No**	Md. Bar Adm. Rule 15	Out-of-state attorney may be certified to provide pro bono legal assistance, under the supervision of a Maryland Bar member, if associated with an organized legal services program that is sponsored or approved by Legal Aid Bureau.
Massachusetts	Yes	ALM Sup. Ind. Ct. Rule 3.04	Out-of-state attorney may be certified to provide pro bono legal assistance if associated with an organized nonprofit legal services program providing legal assistance to indigents in civil or criminal matters. Limited to 2 years.
Michigan	Yes	No	
Minnesota	Yes	No	
Mississippi	No*	No	
Missouri	Yes	Sup. Ct. Rule 8.105(c) R. 5.3 Mo.	Registered in-house counsel may engage in pro bono work with an organization approved for this purpose by The Missouri Bar.
Montana	No*	No	
Nebraska	No**	No	
Nevada	Yes	No	
New	No**	No	

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RIHC Restrictions

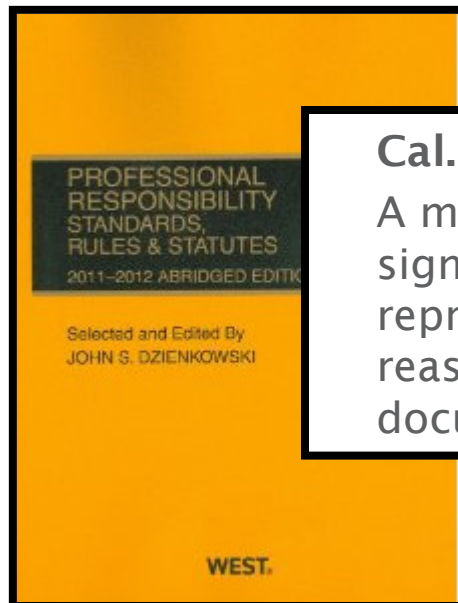
- But restrictions on RIHC doing pro bono work are major barrier
- Options:
 - RINC can proceed with state bar approval process
 - Alternatively, RINC can conduct research, team up with others who are representing a client, etc.

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

MORRISON FOERSTER	12531 HIGH BLUFF DRIVE SAN DIEGO, CALIFORNIA 92130-2040 TELEPHONE: 858.720.5100 FACSIMILE: 858.720.5125 WWW.MOFO.COM	MORRISON & FOERSTER LLP NEW YORK, SAN FRANCISCO, LOS ANGELES, PALO ALTO, SACRAMENTO, SAN DIEGO, DENVER, NORTHERN VIRGINIA, WASHINGTON, D.C. TOKYO, LONDON, BRUSSELS, BEIJING, SHANGHAI, HONG KONG
July 7, 2011	Writer's Direct Contact 858.720.5159 AAnnestad@mofo.com	
By U.S. Mail		
Maryan Nuur Casa Cornelia Law Center 2760 Fifth Avenue, Suite 200 San Diego, CA 92103		
Re: Engagement to Perform Legal Services Re <i>Maryan Nuur & Jamal Dhoqane</i>		
Dear Ms. Nuur:		
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 review this letter. If it correctly states 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. <u>Scope of Representation.</u> In general, we will represent you and your son in your current removal proceedings in Immigration Court concerning your anticipated 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. <u>Services Pro Bono Publico.</u> 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		

- 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

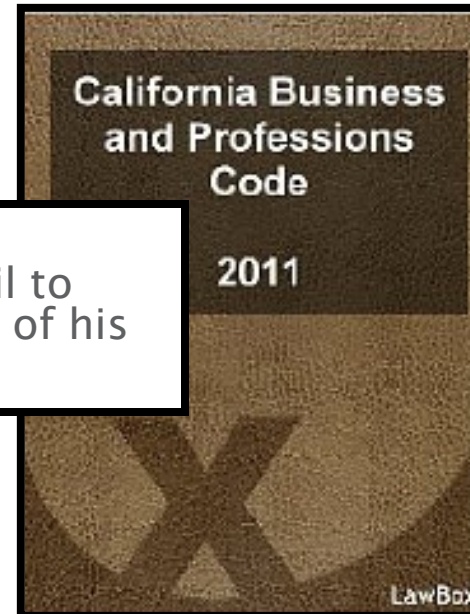
Limited Scope Representation

- **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.”



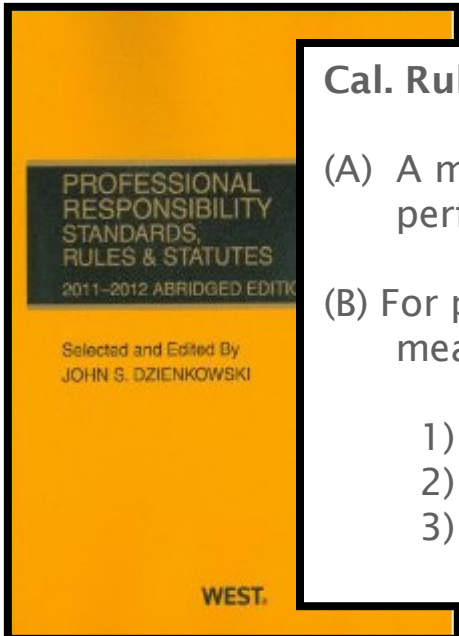
- **Take precautions**

- 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.”

Segal v. State Bar, 44 Cal.3d 1077, 1084 (1988).

The image shows the cover of a legal book. The cover is primarily orange with a dark grey horizontal band across the middle. The text on the cover includes 'PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES' in white on the grey band, '2011-2012 ABRIDGED EDITION' below it, and 'Selected and Edited By JOHN S. DZIENKOWSKI' in white on the orange background. The 'WEST.' logo is at the bottom right. A white box with a black border is overlaid on the right side of the book cover, containing text about Cal. Rule Prof. Conduct Rule 3-110.

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.
 - *Segal v. State Bar*, 44 Cal.3d 1077 (1988).
 - 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

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 *M.P., a student with a disability, and M.P., his parent v. Anchorage School District*, No. 10-36065. 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 Pintner, on their own behalf and as parents of Max Pintner ("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 Eth, Seth Galanter, 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 material 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

1

- **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

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)