

## Pro Bono May Be Collateral Damage Of Blocking DOJ Nominee

*Law360, New York (March 19, 2014, 10:40 PM ET)* -- The second rule of professional conduct reads as follows:

A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

American Bar Association Model Rule of Professional Conduct 1.2(b).

The ABA Model Rules were adopted in 1983, but this principle predates the U.S. Constitution. John Adams, a staunch patriot and opponent of the British occupation of Boston, nonetheless represented nine British soldiers who took part in the infamous Boston Massacre of 1770. He won acquittal for seven of the men, including their captain, and two were found guilty of manslaughter. Adams later wrote: "The part I took in defense of captain Preston and the soldiers, procured me anxiety, and obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country."

Adams went on to become the first president of the United States Senate, as Washington's vice president. It is a sad irony that on March 5, 2014, this very same body dishonored the principle for which he stood, when 52 United States senators voted to reject the nomination of Debo Adegbile to head the U.S. Department of Justice Civil Rights Division. See "Senate Rejects Contentious DOJ Civil Rights Chief Nominee," *Law360*, March 5, 2014. A few senators nodded toward Rule 1.2(b) in their public comments, even as they faulted Adegbile for the representation — successful representation, in fact — of Mumia Abu-Jamal.

Abu-Jamal was convicted in 1982 of the murder of a Philadelphia police officer. Many years later, the NAACP Legal Defense Fund, which Adegbile headed, argued that Abu-Jamal's death sentence was tainted by erroneous jury instructions. In 2007, the U.S. Court of Appeals for the Third Circuit agreed and vacated the death sentence. Despite (or perhaps because of) the NAACP's successful advocacy, the U.S. Senate rejected Adegbile's nomination. Sen. Mitch McConnell, R-Ky., was particularly vocal in connecting Adegbile to his client, condemning him for "[c]hampioning the cause of an extremist cop-killer." The fact that Adegbile did what any lawyer is required to do — zealously represent his client — was apparently beside the point.

As lawyers at major U.S. law firms, we have serious concerns about the message that this Senate vote sends to the pro bono community, and in particular to those lawyers who volunteer to represent convicts on death row or other unpopular clients. Many of these cases already require an extraordinary commitment of time and effort, and the number of lawyers willing and able to take these cases is

already too small. The lawyers who do sign up for this important work should not have to worry about their own guilt by association or the detrimental effect their service may have on other opportunities to serve their country.

We do not argue here whether Adegbile was qualified to head the Civil Rights Division, though leading the NAACP Legal Defense Fund surely appears to be a good background for such a post. Nor do we have too much worry that lawyers like Adegbile, employed by public interest organizations specifically in order to take on sometimes controversial civil rights matters, are likely to be dissuaded by the stance of 52 senators. But we are concerned that such an unjustified backlash against core principles of the legal profession will discourage at least those among us who are interested in carrying those principles into government service.

Those 52 senators should be aware that the Rules of Professional Conduct include a pro bono mandate that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” ABA Model Rule of Professional Conduct 6.1. In the last two decades, lawyers at large U.S. law firms have responded to this call. Total pro bono hours at the largest 200 U.S. firms have increased from less than 1 million in 1994 to nearly 5 million in 2012.

Even with these impressive gains, there remains an urgent and desperate need for pro bono representation in all areas of public interest law, not just criminal defense matters. From clients facing eviction to those seeking asylum, many of these individuals in need of pro bono lawyers are courageous, honest and hard-working, but some are not model citizens. Nonetheless, they all deserve to have a lawyer; in fact, our system of justice demands no less.

Death row inmates, no matter how heinous or notorious their crimes, are in particular need of pro bono representation. As our colleagues Lisa Borden and Kevin Curnin recently pointed out, exonerations have been growing at an alarming rate, with 40 individuals convicted of murder exonerated in 2013 alone. “As Exonerations Grow, States Make Them Harder To Win,” Law360, Feb. 12, 2014. And, of course, the innocent are not the only convicts who merit representation.

Death row inmates need pro bono lawyers if they are to have any meaningful access to the courts, as individuals convicted of murder have no constitutional right to counsel to help them seek post-conviction relief in state or federal court. Moreover, nearly two decades ago, Congress eliminated all federal funding for post-conviction representation, defunding the 20 capital post-conviction defender organizations. The ABA Death Penalty Representation Project estimates that there are approximately 3,300 death row inmates in the United States and 99.5 percent of them are indigent, meaning that many death row prisoners are without access to counsel.

Large U.S. law firms, with significant financial resources and large staffs, are particularly well positioned to take time consuming and expensive post-conviction appeals in death penalty cases. What will the Senate’s treatment of a distinguished lawyer like Debo Adegbile mean for death penalty representation? We fear that any law firm lawyer deciding whether to volunteer for such a matter might now think twice, particularly if she or he has hopes for a judicial or political post that requires Senate confirmation.

As pro bono counsel and leaders of our law firms, it would be hard to distinguish a typical death row client from Abu-Jamal when trying to convince one of our colleagues to take a death penalty case. Even those convicted of the most deplorable crimes are still allowed to pursue all direct appeals and post-conviction relief — as long as they can find a qualified advocate.

Indeed, the database of the National Registry of Exonerations reveals a long list of individuals who, until they were exonerated, were serving sentences for murdering innocent men, women, children and, yes, police officers. The attorneys representing Texas death row inmate Randall Adams, for instance, championed the cause of a “cop killer” — at least until he was exonerated after 12 years behind bars. If these lawyers’ quest to exonerate Adams had failed, their dedication to their client and their professional responsibility would have been no less honorable.

Thankfully, not all segments of American society are as dismissive of the mandates of Rule 1.2(b). In 2007, the same year that the NAACP secured the Third Circuit judgment setting aside Abu-Jamal’s death sentence, Charles “Cully” Stimson, deputy assistant secretary of defense for Detainee Affairs, went on the radio and read the names of law firms representing Guantanamo detainees, urging corporate America “to make those law firms choose between representing terrorists or representing reputable firms.”

The response from corporate America was fast and firm in defense of Rule 1.2(b): Verizon Communications Inc., General Electric Co., Boston Scientific Corp. and other major companies expressed unreserved support for the law firms representing the detainees. Likewise, the Association of Corporate Counsel issued a statement that “[c]orporate counsel reward firms for engaging in important public service projects, including pro bono projects that sometimes tackle unpopular issues or causes.”

It is both heartening and critically important that corporate law departments recognize that those accused (or even convicted) of heinous crimes — like Abu-Jamal and Guantanamo detainees — deserve competent lawyers. If only the U.S. Senate could follow their lead, and the example of John Adams, and understand that those who volunteer to represent unpopular clients on a pro bono basis should not be tarred by association.

—By Heidi Naasko and Steven H. Schulman, Association of Pro Bono Counsel, and Derek S. Whitefield, Dykema Gossett PLLC

*Heidi Naasko, pro bono counsel in Dykema Gossett’s Ann Arbor, Mich., office, is an APBCo member.*

*Steven Schulman, pro bono partner at Akin Gump Strauss Hauer & Feld LLP, is the president of APBCo.*

*Derek Whitefield, a trial lawyer in Dykema Gossett’s Los Angeles office, is an executive board member at the firm and has handled a case from the ABA Death Penalty Representation Project.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*