

Standard 3.5 on Assistance to Pro Se Litigants

STANDARD 3.5 ON ASSISTANCE TO PRO SE LITIGANTS

STANDARD

In appropriate circumstances, a provider may offer pro se litigants assistance or limited representation at various stages of proceedings.

COMMENTARY

General considerations

To an increasing degree in the American legal system, litigants are not represented by counsel. Some courts, hearing matters such as small claims and housing, find that in eighty to ninety percent of the cases at least one party is a pro se litigant.¹ The cost of legal counsel, particularly in litigated matters, has risen to levels where many cannot afford to be represented in litigation.

One result has been an increased focus on the part of courts and court administrators on ways to make courts more friendly to pro se litigants. Courts have increasingly recognized that importance to the effective administration of justice of helping pro se litigants to appear and present their case in a manner that is appropriate to courts' procedures. Some courts have adopted rules that provide leniency to pro se litigants with regard to the pleadings they file and how they proceed in court.

At the same time, many legal aid providers have undertaken a variety of processes to help persons seeking their assistance represent themselves in court. Such efforts are typically grounded in efforts to get the most out of scarce resources by increasing the capacity of individuals to represent themselves in areas where they can obtain the objective they seek. Not surprisingly, an increasing number of legal aid providers are engaged in joint projects with courts in their jurisdiction to assist pro se litigants with appropriately prepared pleadings and knowledge of what they need to do to pursue or defend their case.

Some forms of assistance to pro se litigants involve only providing information about the procedural and substantive requirements to pursue or defend a claim. Many of the approaches to assisting pro se litigants involve various forms of limited representation, as a lawyer helps the litigant with discrete parts of the process from preparation of pleadings to conduct of the litigation. This Standard addresses issues associated with assistance in support of a pro se litigant, both through limited representation where an attorney-client relationship is established and where only legal information is offered.²

¹ See, ABA Standing Committee on the Delivery of Legal Services, *An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants: A White Paper* (2005).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

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Means of assisting pro se litigants

There are a variety of means by which assistance can be provided to pro se litigants. The assistance can be provided in large group settings or in one-on-one interaction with the individual seeking help. It can be provided in person, through written materials and forms or through a website, kiosk or other technological means. Assistance can be provided at the outset of the litigation or at steps along the way as the litigant proceeds and seeks additional guidance.

As technology advances and the need is more widely recognized, no doubt new methods will evolve. The key dividing line among the techniques is between those that involve only the imparting of information regarding how to proceed and those that offer assistance that is a form of limited representation, in which an attorney-client relationship is formed with its attendant professional responsibilities. Possible approaches cover a very broad range as the following list illustrates:

- Provision of brochures and forms in a court or provider based self help center;
- Web-based generalized information about the procedural and substantive requirements for filing and pursuing or defending a claim;
- Web-based assistance that provides online document assembly based on responses of the potential litigant;
- In-court help desks that offer procedural information and guidance to the courtroom;
- In-court help desks that offer one-on-one help regarding both procedural and substantive questions, including how to fill out forms and prepare pleadings;
- Clinics, where information is provided without any interaction with the participants beyond general questions and answers;
- Clinics, where individuals receive general information and then are assisted with specific guidance based on their circumstance;
- Individual interview and counseling sessions in person, on the telephone or by other means.

There is also a range of types of assistance that might be offered to otherwise pro se litigants. Many are designed to provide only general information regarding how to proceed in court or an administrative adjudication. If the assistance is strictly in the form of information with no interaction between the provider and the litigant regarding the litigant's circumstances, then an attorney-client relationship may not have been formed and the assistance would be subject to Standard 3.6 on Provision of Legal Information.

Some forms of assistance involve imparting general information to the pro se litigants, coupled with an opportunity for participants to ask questions and get answers about how to proceed, including how to prepare pleadings. Some systems offer an opportunity for coaching the litigant through the process with ongoing advice and consultation as the matter proceeds. Other systems provide full or partial assistance in drafting pleadings. There are special concerns that attach to the writing of pleadings for unrepresented litigants that are discussed below.

More elaborate forms of assistance might include the provider making a limited appearance on the litigant's behalf for only one aspect of the litigation. This may be difficult to accomplish

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because the rules of court in many jurisdictions will not allow an attorney who has appeared to do so for a limited purpose. The door into the court room generally opens more easily for a lawyer going in than it does going out. In recognition of the burden the rule places on limited representation to pro se litigants, some jurisdictions have carved out exceptions where the lawyer makes a limited appearance pursuant to an agreement with the client to provide limited representation. Some states require the lawyer to file a notice of withdrawal upon completion of the limited representation, but in many jurisdictions the lawyer does not have to seek leave of the court to withdraw. It is the responsibility of the provider to know and adhere to the rules governing this issue in the jurisdiction in which it is located.

Factors determining whether the assistance offered creates an attorney-client relationship

An important issue for providers that offer assistance to pro se litigants is whether the assistance is legal representation in which an attorney-client relationship is formed. It is essential for providers to clearly understand the factors that would give rise to an attorney-client relationship.

Whether or not an attorney-client relationship has been formed is a function of the nature of the interchange between the provider and the pro se litigant. The crucial distinction is whether the litigant receives advice about how to proceed that is based on information provided by the litigant and is tailored to the litigant's circumstances. If specific advice is offered, generally there is an attorney-client relationship and the assistance is a form of limited representation.³

It is important to note that the establishment of an attorney-client relationship may be implied from the circumstances of the interaction with the individual seeking assistance regardless of the intent of the provider offering the assistance. The expectation or reasonable belief of the person being assisted that the provider is providing representation may be deemed to create an attorney-client relationship, even if the provider intends otherwise. If there is any ambiguity regarding whether there is an attorney-client relationship, the potential client's understanding of the relationship is likely to prevail.⁴ A number of state ethics opinions have found this to be the case, even where the provider has explicitly disclaimed the intention to establish an attorney-client relationship.⁵

This has practical implications where the particular system for supporting pro se litigants involves a lawyer giving advice in person, even of a general nature. The fact that participants are in the presence of a lawyer who is explaining the law may give rise to the belief on the individual's behalf that the lawyer is providing legal advice tailored for them. The fact that

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

⁴ Restatement (3rd) of the Law Governing Lawyers, Section 26 (1998) states that:

“A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”

⁵ See e.g., Kan. Bar Ass'n Committee on Ethics/Advisory Services Op. 93-08 (1993); N.J. Supreme Court Committee on Unauthorized Practice, Op. 17 (1994); Utah State Bar Ethics Advisory Opinion Committee, Op. 96-12 (1997).

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assistance is provided in a group setting does not preclude the establishment of an attorney-client relationship.

Web-based systems that offer general information regarding how the user should proceed substantively and procedurally, generally do not establish an attorney-client relationship, if there is no intervention by an attorney based on the input of the user. This is true, even though the web-based system produces a pleading, based on the user filling in blanks or responding to computer generated inquiries. On the other hand, e-mail responses to an inquiry posted to a bulletin board or e-mailed to a provider might well establish an attorney-client relationship, if the advice offered is tailored to the specific facts presented by the inquirer.

Different but equally valuable purposes may be served by those systems that offer legal representation and those that offer only legal information. With some systems for assisting pro se litigants, it may be essential for legal reasons that an attorney-client relationship *not* be formed and that the assistance not be deemed to be representation. Some court-based systems, for instance, are required by their enabling statute to remain legally neutral and only to provide legal information to the persons whom they assist. The goal of such programs is to help assure that all pro se parties are equally informed about the steps they should take to protect their interests.

Other providers will have the goal of assisting the individuals they aid to resolve their legal problem and to maximize the capacity of the individuals helped to obtain their objective. If that is the goal, the assistance should be in the form of legal advice and not be limited to providing neutral information. Simply recounting the law and procedure will not be adequate for many pro se litigants. Many clients need an analysis of the law and its relevance to their circumstance in order to present a convincing case, and specific advice that takes that into account is often what is necessary to help them succeed.

Responsibilities of providers that offer assistance to pro se litigants that does not involve legal representation and in which no attorney-client relationship is formed

Providers' operating systems that offer only legal information have responsibilities to the users of the system.⁶ The information offered must accurately set forth the relevant law and procedural requirements that the user will rely on.

Even when an attorney-client relationship has not been formed, the provider still should avoid disclosing to others the information provided by participants, even though the provider may not be able to protect it from involuntary disclosure by asserting the attorney-client privilege. The provider should avoid gathering more information about participants' specific circumstances than is necessary to assure that appropriate legal information is offered. First, the gathering of such information could lead to a responsibility to offer specific advice that will establish an attorney-client relationship.

Second, unless the information was deemed to have been given in the course of seeking representation⁷ or because an attorney-client relationship has in fact been formed, it may not be

⁶ See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

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protected from involuntary disclosure, should a third party seek it through a court order or other proceeding. Furthermore, the fact of having gathered the information might give rise to a conflict should another party seek representation on the same or a related matter.⁸

Responsibilities of providers who offer limited legal representation in support of a pro se litigant with whom there is an attorney-client relationship

The requirements set forth in Standard 3.4 on Limited Representation apply to assistance offered to pro se litigants, when an attorney-client relationship has been formed. In addition, there are particular considerations that apply.

Confidentiality. As with all representation, there is a duty to preserve the confidentiality of the information given by the client. That means that participants in clinics or other group settings should not be put in the position of asking questions or disclosing personal information in the presence of others who are not personnel of the provider offering the assistance. Public disclosures might be embarrassing to the client, or the individual might limit what is disclosed to avoid embarrassment, with the result that the advice given might not be apt to the client's situation. In addition, there is a risk that others hearing advice that is specific to the circumstance of the questioner might erroneously believe that it applies to them as well.

Conflicts of interest. There are exceptions to the usual application of the rules governing conflicts of interest, in the case of some projects to assist pro se litigants. The 2002 revisions to the Model Rule of Professional Conduct added Rule 6.5 which frees a lawyer from rigid application of rule governing conflicts, where the lawyer: "...under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." The Reporter's Explanation of Changes states the reasoning behind the new Model Rule:

"Rule 6.5 is a new Rule in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program."⁹

A provider sponsoring such an effort should be aware of whether this Model Rule has been adopted in its jurisdiction and how it applies to its operation.

⁷ Model Rules of Prof'l Conduct R. 1.18 (2003) affords confidentiality to prospective clients regarding the information divulged while seeking representation, even though no attorney-client relationship is established. Information offered when there is no reasonable expectation that an attorney-client relationship will be formed is not protected by the Rule.

⁸ See Model Rules of Prof'l Conduct R. 1.18(c) and (d) (2003) regarding conflicts of interest involving persons who sought but did not establish an attorney-client relationship.

⁹ Reporter's Explanation of Changes to Model Rules of Prof'l Conduct R. 6.5 (2003) at <http://www.abanet.org/cpr/e2k-rule65rem.html>.

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Communication. There are two questions that may arise with regard to communication with other parties in the context of limited representation in support of a pro se litigant. The first is whether a lawyer representing a client against a pro se litigant who has a lawyer offering limited representation in the matter can communicate directly with the client. Model Rule of Professional Conduct 4.2 states that: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

The question arises, therefore, what is the obligation of the opposing counsel and what do the pro se litigant and the client’s limited-service lawyer need to communicate regarding communication about the matter. This issue is treated differently among the various jurisdictions that have addressed it. One California ethics opinion ruled that the opposing counsel can communicate directly with the partially represented litigant on all matters associated with the litigation, including settlement.¹⁰

The trend among other jurisdictions that have addressed the issue is to put the burden on the limited-service lawyer and the client to notify the opposing counsel of the areas in which the limited representation is being provided and the issues regarding which the opposing counsel should communicate with the limited-service attorney and not the litigant. The legal aid provider offering limited representation to pro se litigants needs to clearly identify the rules that govern the issue in the provider’s jurisdiction and needs to establish a clear understanding with the client regarding with whom opposing counsel should communicate.

The second issue is whether a lawyer who is providing limited scope representation to a pro se litigant can ethically “script” a communication with the other party, if the party is represented by counsel. The question is whether such scripting is tantamount to the practitioner communicating indirectly with the party in contravention of the requirements of Model Rule 4.2, which prohibits a lawyer from communicating directly with a represented party.¹¹ Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. The practitioner should not use the client, however, as a surrogate for the practitioner to communicate with the represented adverse party. Ethics opinions that have addressed the issue suggest that any advice about communication with the other party should be very limited and should not be initiated by the lawyer.¹²

Assistance in the preparation of pleadings. In some jurisdictions, there has been controversy regarding the propriety of a lawyer drafting pleadings for a client, but not signing the pleading nor appearing on the client’s behalf. “Ghost writing” has been rejected in some jurisdictions. In other states, it has been approved and rules have been adopted governing what is required. The trend is to require disclosure of the fact that the pro se litigant was assisted in drafting the

¹⁰ L.A. County Bar Ass’n Professional Responsibility and Ethics Comm. Ethics Op. 502 (1999).

¹¹ Paragraph 1 to the Comment to Model Rules of Professional Conduct R. 4.2 states: “A lawyer may not make a communication prohibited by this Rule through the acts of another.”

¹² For a full discussion of these issues, see ABA Section of Litigation, *Handbook on Limited Scope Legal Assistance; A Report of the Modest Means Task Force* (2003).

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pleading. Some states require that the lawyer's name appear on the pleading, but permit the assistance without the lawyer entering an appearance in the matter. In other jurisdictions, the court must merely be advised that the litigant had the assistance of a lawyer. Some states have also adopted rules that specifically state that a lawyer assisting a pro se litigant can rely on representations made by the client, unless the lawyer has reason to believe that they are false.

Each provider is responsible for being aware of the requirements in the jurisdiction in which it operates. Absent a ruling on the matter, the better practice is to inform the court that the pleading was prepared with the assistance of counsel.

Evaluation

Providers should assess whether its efforts to assist pro se litigants are succeeding. It should periodically follow-up with persons who received assistance to see if they in fact went to court and were able to protect their interests effectively. If the provider finds that the assistance being offered is not in fact helpful to pro se litigants, it should alter the way it provides the service, or find another way to respond to the legal need.¹³

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).