

## Standard 3.6 on the Provision of Legal Information

### STANDARD 3.6 ON THE PROVISION OF LEGAL INFORMATION

#### STANDARD

*A provider may offer general legal information that is not based on particular facts and does not establish an attorney-client relationship.*

#### COMMENTARY

##### General considerations

Informing members of the low income community of their legal rights and responsibilities by providing legal information can be a cost effective way to supplement the provider's overall legal work effort. Legal information may be offered either through community legal education to groups and the low income population at large or to individuals to help them address their legal problems.

There are many issues associated with the provision of legal information of which a provider should be aware, particularly in relation to the difference between legal information and legal advice. These issues are particularly germane in the context of interactive websites and court-based projects to guide pro se litigants.

Providing legal information to members of the low income community has great potential benefit for that community. Through legal information, individuals can learn about their legal rights and responsibilities both to assert their interests and to avoid legal problems. They might also recognize that a problem they are facing has a legal remedy and learn how to seek help or take steps to address it. Such efforts may also increase the ability of members of the low income community to take a more active role in decision-making processes that affect them. In addition, legal information can increase general awareness of problems facing clients, improve public opinion regarding the poor, and enhance the provider's institutional credibility.

Based on its ongoing interaction with low income communities and its understanding of their needs,<sup>1</sup> a legal aid provider should make an informed decision about areas where it is beneficial to provide community legal education to groups or legal information to individuals. The provider should periodically assess the effectiveness of each in helping members of the low income community to address their legal problems.

##### What constitutes legal information, as opposed to legal advice?

The continuum from legal advice to individual legal information and community legal education involves many gray areas in which there are not sharp differences among the three. The

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<sup>1</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

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distinction between legal information and legal advice, however, is an important one. The giving of legal advice creates an attorney-client relationship with its attendant protections and responsibilities. Providing legal information does not. There are useful guidelines that a provider should bear in mind in designing and administering a program to offer legal information to individuals.

*Legal information* is aimed at helping the recipients of the information understand their rights and responsibilities and the appropriate procedures for redressing those rights and fulfilling those responsibilities. It is general in nature and not tailored to the unique facts of the individual's situation, although when legal information is offered to individuals, the provider may have enough knowledge about the person's situation to choose generally what information is appropriate.

Legal information is neutral and does not recommend a strategic course based on the judgment of the individual offering the information. Thus, the person offering the information might tell the recipient of options that are available in response to the legal problem, but would not suggest what option to take. Similarly, legal information might inform an individual of forms that are appropriate to use and the general information about what to include in a statement of facts or a request for relief. It should not suggest the specific facts to put on the forms. A provider could, for example, explain the different grounds for divorce and let the litigant choose the applicable one.

*Legal advice* in contrast is specific to the unique circumstances of the inquirer. It is strategic in that it offers an approach that is tailored to the fact situation of the asker and goes beyond mere general advice appropriate for all persons who confront the same issue. The giving of legal advice is legal representation and creates an attorney-client relationship.<sup>2</sup>

***Factors associated with the creation of an attorney-client relationship.*** The key issue in distinguishing between legal advice and legal information is whether an attorney-client relationship has been established. The answer is a function of the intent of the parties and the content of the communication. When a provider seeks to limit its assistance to legal information, it is important that it be clearly established and understood that it is not forming an attorney-client relationship with the recipient of the information. It is also important that it guard against offering information that amounts to legal advice, lest it create an attorney-client relationship, in spite of its intent not to do so.

Intent of the participants. The question whether an attorney-client relationship has been formed is generally a function of the intent of the potential client and the practitioner. An attorney-client relationship is formed if a potential client seeks representation, for example, in the form of legal advice, and the practitioner intends to provide it *or does not make clear the intent not to provide it*, and reasonably should have known the potential client relies on the practitioner providing the representation.<sup>3</sup> Thus, if members of the low income community seek legal advice and do not

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<sup>2</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-1 (on Representation Limited to Legal Advice).

<sup>3</sup> "A relationship of client and lawyer arises when:

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know that the guidance offered is only legal information not tailored to their situation and are not informed that the practitioner offering it is not representing them, an attorney-client relationship might be inferred.

The issue is one of intent and understanding. In community legal education that is offered to groups, it is usually clear from the setting that there is no attorney-client relationship being sought or being offered. In some cases, there will be no individual interaction at all between the recipient of the information and the persons providing it, and a participant would generally not reasonably believe that an attorney-client relationship has been formed. Public seminars and presentations to groups that are intended as community legal education, however, can sometimes lead to circumstances in which it is less clear. Participants in such events may press questions particular to their situation. The provider should assure that practitioners leading such events are aware that responding to such inquiries may inadvertently result in a response that is based on the specific facts of the inquirer and may be deemed to be legal advice.

When a provider offers legal information to individuals, it is important that its intent *not* to form an attorney-client relationship is clear. Such a disclaimer should preferably be in writing or in some other conspicuous form.<sup>4</sup> In some situations, it may be prudent to have the individual sign a statement acknowledging that no attorney-client relationship is being created. Written notice may not be possible in a telephone inquiry, or if communicating with the person in writing might jeopardize the individual. On the other hand, when legal information is offered on-line or at a kiosk or assistance is offered in person at clinics and seminars, there is normally ample opportunity for appropriate disclaimers to be given. At a minimum, the provider should make a clear oral statement to the effect that the guidance provided does not constitute legal advice and that it is not acting as the inquirer's attorney.

In most circumstances, the disclaimer should also inform the individual that while information provided by the inquirer will be treated as private, the provider cannot protect it from disclosure if properly subpoenaed. It may also be important to advise the individual that the other party may also receive the same type of assistance, if sought. In the case of court sponsored projects to help unrepresented litigants, for example, where the chance of both sides seeking assistance is high, such disclosures are essential.

It is important for the provider to know how disclaimers of the intent to create an attorney-client relationship are treated in its jurisdiction. While such a disclaimer would generally be valid under the traditional understanding of the attorney-client relationship as one of contract, in some jurisdictions, more significance is given to the conduct of the lawyer and the expectations of the client than to a general written warning.

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- (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.”

American Law Institute, *The Restatement (Third) of the Law Governing Lawyers*, Section 14 (1998).

<sup>4</sup> The California Family Court Facilitator Act requires “conspicuous notice” that no attorney-client relationship is established, and that the information is not privileged and that the facilitator may provide legal information to the other side. *California Family Code, Section 10013*.

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The content of the communication. The content of the information is important in determining whether an attorney-client relationship has been established. If the information is, in fact, legal advice, specifically tailored to the factual circumstances of the inquirer, an attorney-client relationship may be created, regardless of any disclaimers of the provider. The law in the jurisdiction of the legal aid provider will determine how the issue is treated, but ethics opinions in a number of jurisdictions have found that where legal advice is offered, the provider of the services cannot obviate the creation of an attorney-client relationship and by doing so avoid professional responsibilities and liabilities for improper advice.<sup>5</sup>

#### **Responsibilities of the provider with regard to legal information**

Although there is no attorney-client relationship formed in the provision of legal information, the provider still has certain responsibilities in offering the information.

***Accurate information.*** The provider must use reasonable care that the information given is accurate. The recipient of the information may take some action, or choose not to do so, based on the information provided. If the information is incorrect, the individual may be damaged by the course of action pursued. Where printed or electronic materials are offered, the provider should exercise care in their preparation and periodically review them to assure that they properly reflect changes and new developments in the law. If a provider uses materials prepared by others, it should be certain that the producer of the materials has adequate quality control procedures in place, or should review them to assure their accuracy.

***Accessible materials.*** The provider should also make certain that legal information materials can be understood by the intended users. Materials should be written at a level of readability that is appropriate to the educational level of the target audience and its likely lack of familiarity with legal terms. Materials that are translated into languages other than English should be tested for readability in those languages.

Websites should meet standards of accessibility for users who are disabled. Providers should be aware of the current expectations for such access and the changes in technology that increase the capacity of websites to be accessible to persons with disabilities.

Legal information and techniques for propagating it should be appropriate to the languages and the cultures in the provider's service area. Written materials should be available in the prominently used languages in the service area.<sup>6</sup> If the provider serves a large low income population in which there is not a commonly used written language or in which most speakers

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<sup>5</sup> See Ill. State Bar Ass'n Op. 94-11 (1997); L.A. County Bar Ass'n, Professional Responsibility and Ethics Committee Op. 449 (1988); N.J. Supreme Court Committee on Attorney Advertising Op. 17 (1994); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Op. 93-1 (1993); Pa. Bar Ass'n Committee on Legal Ethics and Professional Responsibility Op. 95-52 (1995) and Op. 90-156 (1991); Phila. Bar Ass'n Professional Guidance Committee Op. 91-15 (1991); Utah State Bar Ethics Advisory Opinion Committee Op. 96-12 (1997); Cal.'s State Bar Standing Committee on Professional Responsibility and Conduct Proposed Formal Op. 95-0015; Va. State Bar Standing Committee on Legal Ethics Op. 1328 (1996).

<sup>6</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

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cannot read their spoken language, it should develop community legal education materials, such as video or audio clips and public presentations, which impart the information orally.

The provider should also be sensitive to culture mores of the various low income populations that it serves. Effective community legal education to some culturally isolated groups may require significant outreach efforts to those groups to make the materials available in a meaningful way. Some cultural groups, particular newly immigrated populations may, for instance, be less likely to have access to computers that would offer access to a website.<sup>7</sup>

Providers serving large, sparsely populated rural areas should also be aware of the challenge of reaching some parts of their service area to disseminate legal information materials. Some rural areas, for example, may not readily have high speed access to the internet or other new technologies, so that websites that rely on such access may be of limited use.

***Protection of information from disclosure.*** There are a number of circumstances in which a person seeking legal information might divulge personal information. A person using a website or a kiosk, for instance, might answer a series of inquiries to guide the computer in providing the appropriate information and in preparing a document or pleading based on the data entered by the individual. Applicants for a legal clinic or unrepresented litigants taking advantage of a court sponsored project to assist them may fill out an application or otherwise offer personal data to establish their eligibility for the services.

Because no attorney-client relationship is formed in the giving of legal information, any personal data offered by the inquirer is not subject to the duties and protections afforded confidential communications between an attorney and a client. The information offered is not privileged and, absent a special statute or court rule, the provider cannot protect it from involuntary disclosure in discovery or other lawful inquiry. Nevertheless, the provider should recognize that the information is personal and may involve sensitive matters and should take care not to disclose it to others, except for a legitimate purpose. It should organize its operations so that to the degree possible, personal disclosures cannot be heard by others. This stricture is most relevant in seminars and legal clinics and in court-based projects to help unrepresented litigants.

***Conflicts of interest.*** Generally, the provisions governing conflicts of interest under the Model Rules of Professional Conduct do not apply to recipients of community legal education or legal information since they by definition are not clients. Indeed, some systems for offering legal information advise participants that legal information may be offered to the opposing party as well.

***Prospective clients.*** If a provider offers legal information through a system that is also used for intake of persons who may become clients, it may be required to treat all persons who contact the provider as “prospective clients” under Model Rule of Professional Conduct 1.18. That rule generally requires that the provider “not use or reveal information learned in the consultation.” It

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<sup>7</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

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also applies general conflict rules to representation of parties with interests adverse to the prospective client.<sup>8</sup>

**Evaluation.** Providers should periodically assess whether its legal education efforts are succeeding in conveying the information intended and whether persons who receive it are able to act on the information imparted. Periodic evaluations of community legal education presentations should be conducted to assess the effectiveness of the educational techniques employed. The provider will also find it helpful to follow-up with recipients of legal information to determine if they understood the information they were given and were able to use it to address their legal problem.<sup>9</sup>

#### **Considerations associated with the provision of community legal education**

The term, community legal education, refers to the education of members of the low income community and the public regarding their rights and responsibilities under the law. Community legal education may offer information on a broad spectrum of issues and relies on the individual to determine what aspects of the educational materials are germane to their need. Community legal education often involves no individual interaction with the recipient of the educational materials.

**Ways to deliver community legal education.** There are a variety of ways that community legal education may be delivered to its target audience:

- Public presentations to groups and organizations;
- Written brochures and pamphlets distributed through the offices of the provider or other organizations;
- Radio and television presentations;
- Columns and articles in print media;
- Information that is made available to the public on a website;
- Information made available through other technological means, such as kiosks, chats, bulletin boards and others that develop with the advent of new technologies.

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<sup>8</sup> Model Rules of Professional Conduct R. 1.18 (2003) reads in part:

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

<sup>9</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

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Community legal education is an important tool for a provider to serve the low income community and should be integrated into its service delivery scheme so as to complement the direct representation of clients in priority areas. The following are examples of such integration:

- On matters where the provider elects not to provide representation, community legal education may be part of a strategy to help members of the low income community take steps themselves to resolve their problems.
- It may seek to empower the low income community by increasing members' knowledge and understanding of their legal rights and responsibilities in chosen substantive areas.
- On some issues, a provider may adopt a strategy that involves both direct client representation and community legal education. For example, community legal education may advise members of the low income community of a result achieved through direct representation, so that its benefits reach those to whom it applies.
- Community legal education may advise members of the low income community that a specific problem, which may not traditionally be recognized as having a legal remedy, is amenable to a legal solution.
- Community legal education may be designed to help pro se litigants navigate the court system effectively.
- Community legal education may keep members of the low income community informed of the provider's activities and of the availability of its services.

#### **Considerations associated with the provision of legal information to individuals**

*Provision of legal information to individuals.* Legal information offered to individuals is not specifically tailored to the unique facts of the user's situation, although it often responds generally to a specific issue the person encounters. A purpose of providing the information is to help individuals take steps to solve their problems or assert a legal right. Legal information does not respond specifically to the unique circumstance of each individual, however, and no attorney-client relationship is formed.

There are several factors for a provider to consider in determining whether to develop a capacity to offer legal information to individuals. Legal information to individuals is most useful when the law and procedure associated with the issue are straightforward and uncomplicated so that individuals can assist themselves with only generalized guidance about what steps to take. The provider may also take into consideration the gravity of the potential loss and the degree to which more direct assistance might increase the likelihood of clients achieving their objective. In appropriate circumstances, the legal information offered may include a recommendation that members of the low income community seek legal counsel.

A provider may also decide to engage in a project to offer legal information to individuals because of the availability of resources to do so. Some courts have organized themselves to facilitate unrepresented litigants and, in cooperative arrangements with legal aid providers, offer

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appropriate help at key steps along the way. Participation in such efforts can both offer useful assistance to pro se litigants and foster helpful collaborative relationships with the judiciary.<sup>10</sup>

***When legal information to individuals is appropriate.*** While legal advice has the advantage of providing more specific and strategic guidance to the person advised, there are times when it is inappropriate for a provider to enter into an attorney-client relationship with the recipient of the guidance and so it chooses to limit the assistance to legal information. Some joint court projects to assist unrepresented litigants mandate that the information given be neutral and that no attorney-client relationship be formed.<sup>11</sup> Many such projects are established so that they can provide help to both sides in a dispute—which would be prohibited if the assistance were legal representation.

In other circumstances, the medium through which guidance is offered may not permit the kind of inquiry into the facts and an analysis of the factual and legal elements that is ethically required before giving legal advice. Under Model Rule of Professional Conduct 1.1 “...competent handling of a particular matter *includes inquiry into and analysis of the factual and legal elements* of the problem...”<sup>12</sup> In contrast, when providing legal information, the provider is not charged with the responsibility of inquiring into the facts presented by the inquirer, and can rely on any facts as stated.

Websites and kiosks that are designed by providers to help people respond to their legal problems generally do not allow for probing inquiry into the circumstances of the person using the service. Advances in technology create the potential for a computer to analyze the facts presented by the user and to suggest an appropriate strategic response. Such systems, however, do not involve any intervening judgment by a human being trained to analyze the facts, nor do they possess the ability to inquire further about their meaning. Given that limitation, guidance offered by such systems would appear to be legal information.

This is an area of evolving law and the question of whether such computer-based systems are offering legal advice is hotly debated in many jurisdictions. The issue is joined around the concern of whether legal guidance generated by a computer could be legal advice and a non-lawyer offering such assistance would constitute the unauthorized practice of law.<sup>13</sup>

If such assistance were deemed to be legal advice, the duty of inquiry into the facts could be impractical, if not impossible, for the provider to meet, undermining the utility of a promising approach to expanding needed access to legal assistance for low income persons. How technology will evolve in the future that may affect its application in this area cannot be

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<sup>10</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

<sup>11</sup> See e.g., the California Family Court Facilitator Act, California *Family Code*, Section 10013.

<sup>12</sup> Comment to Model Rules of Prof'l Conduct R. 1.1 (2003). (Emphasis added).

<sup>13</sup> A website, kiosk or other technological means to offer legal guidance in the legal aid context should be overseen by a legal aid provider which is staffed by attorneys. Concerns, therefore, that such assistance might constitute the unauthorized practice of law would not be present, even if the help were deemed to be legal advice.

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predicted and as technology advances, there will no doubt be new questions raised. The provider should be aware of the evolving law in its jurisdiction and abide by it.

***Ways to provide legal information to individuals.*** There are a number of ways in which legal information to individuals can be provided, and no doubt more will evolve as new technologies emerge.<sup>14</sup> Examples include:

- One-on-one on-site assistance at a courthouse or other tribunal, to give unrepresented persons general information about the steps necessary to present their case;
- Public seminars and legal clinics in which there is limited one-on-one interchange;<sup>15</sup>
- Newspaper columns and radio and television shows that answer questions posed by an inquirer;<sup>16</sup>
- Responses to questions on a website;
- Response to questions by telephone;
- Information and document building at a kiosk or website;
- Responses to a question on an on-line message board dedicated to legal matters;
- Responses to a question asked on a newsgroup (or e-mail list) devoted to legal issues;
- Other on-line discussions dedicated to legal matters.

***Types of legal information to individuals.*** There are many types of legal information that may be provided. Examples include:

- Information regarding types of relief available for a particular legal problem;
- Information about ways to address a problem, including referral to other sources of assistance;
- Information about steps that a person can take to prevent a legal problem from arising;
- Materials setting forth and answering “frequently asked questions”;
- Information regarding the appropriate forms or pleadings that are necessary to pursue or defend a claim, including information regarding the necessary content of pleadings and other applications for relief or defense, but not about the particular facts that should be included on the pleading;

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<sup>14</sup> The fact that a method is listed here does not automatically render the guidance offered as legal information. Whether such guidance is legal advice or legal information is a function of the intent of the parties and the content of the communication. See the discussion of factors associated with the creation of an attorney-client relationship.

<sup>15</sup> Note that in many jurisdictions, there are controlling ethics opinions that address the propriety of offering advice in public seminars.

<sup>16</sup> Note also that many state ethics opinions address the ethical requirements that attach to a lawyer addressing legal questions in the public media.

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- The process and procedures for seeking relief or defending against a claim, including information about how to serve pleadings and to enforce orders;
- Information to the effect that a legal right or claim may exist and that it would be prudent to seek representation regarding the matter.