

## Standard 4.2 on Establishing a Clear Understanding

# STANDARD 4.2 ON ESTABLISHING A CLEAR UNDERSTANDING

## STANDARD

*A provider should establish a clear and mutual understanding with persons seeking its services regarding the assistance, if any, it will provide.*

## COMMENTARY

### General considerations

There are several ways in which a legal aid provider might respond to persons who seek help with their legal problems. Many will be accepted as clients of the provider and be given legal representation. Others will not be accepted as clients but will be given some form of assistance, usually in the form of legal information or referral to another source of help. Others will be denied service and turned away or referred elsewhere for assistance. In all cases, it is important that the provider and the person seeking help have a clear, mutual understanding about the assistance the provider offers, if any, and whether an attorney-client relationship has been formed.

### Establishing a clear understanding with clients

A provider has distinctly higher level of responsibility to a person who has been accepted as a client, than to a person to whom it is offering legal information or referral. The ethical duties that attach to an attorney-client relationship must be met when the individual is accepted as a client, including the responsibility to provide competent<sup>1</sup> and diligent<sup>2</sup> representation to accomplish the client's objective,<sup>3</sup> to preserve the confidentiality of information given by the client,<sup>4</sup> and to meet the strict rules governing conflicts of interest.<sup>5</sup>

***Identifying the client.*** The provider should determine who the client is. In some situations, this may not be immediately clear. For example, legal problems affecting an entire family, a marriage, or a group can involve a number of persons with different interests in the outcome of the matter. To avoid possible conflicts of interest, the provider needs to establish at the outset whose interest it is representing and who has the authority to decide what action to take. An individual who seeks representation for another person, frequently an elderly person or person with a disability, needs to have a power of attorney or other clear authorization to act on behalf of the actual applicant or client.

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<sup>1</sup> See Model Rules of Prof'l Conduct R. 1.1 (2003).

<sup>2</sup> See Model Rules of Prof'l Conduct R. 1.3 (2003).

<sup>3</sup> See Model Rules of Prof'l Conduct R. 1.2 (2003).

<sup>4</sup> See Model Rules of Prof'l Conduct R. 1.6 (2003).

<sup>5</sup> See Model Rules of Prof'l Conduct R. 1.7 to 1.10 (2003).

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Issues affecting a child can raise questions related to a possible conflict of interest with a parent who may claim to speak for the child. Other clients may suffer from a mental or other impairment that affects their ability to speak for themselves. The provider should be aware of and comply with the requirements in its jurisdiction regarding representation of clients with diminished capacity.<sup>6</sup>

Representation of groups raises several issues to which the provider should be attentive.<sup>7</sup> The provider should be aware of and abide by the ethical considerations in its jurisdiction with regard to representation of an organization.<sup>8</sup> An individual who seeks legal aid as a representative of a group should have clear authority to speak for the group. With unincorporated organizations, the basis of the authority may not be clear and the provider should be aware of the group's processes for determining its leaders. The provider should make clear to the group and its members that its basic responsibility is to represent the interests of the group and not of any individual.<sup>9</sup> If the provider will also represent any constituent of the group, in a related or different matter, it should be careful to abide by the pertinent ethical rules in its jurisdiction regarding conflicts of interest.<sup>10</sup>

**Identifying the legal problem.** The retainer agreement or engagement letter should clearly state the legal problem that the provider has agreed to handle for the client. Many clients have a number of interrelated legal problems, and the provider may have agreed to handle only one. Conversely, some providers take a holistic approach to the problems that their clients encounter

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<sup>6</sup> Model Rules of Prof'l Conduct R. 1.14 (2003) reads in part:

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

<sup>7</sup> See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations)

<sup>8</sup> See Model Rules of Prof'l Conduct R. 1.13 (2003) regarding Organization as Client.

<sup>9</sup> Model Rules of Prof'l Conduct R. 1.13(f) (2003) reads:

"In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

See also, Model Rules of Prof'l Conduct R. 1.13(b)-(d) (2003) and ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations).

<sup>10</sup> Model Rules of Prof'l Conduct R. 1.13(g) (2003) reads:

"A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Conflict of Interest: Current Clients]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

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and may agree to assist the client with a range of related issues in addition to the specific problem for which the individual initially sought assistance. In either circumstance, it is important that the client and provider clearly identify the issues on which the provider has agreed to provide representation.

***Identifying any limitations on the scope of the representation.*** At the outset of representation, the provider needs to make certain that the client understands any limitations on the scope of the representation that will be provided. Under the Model Rules of Professional Conduct, a lawyer may limit the scope of the representation, if the limitation is agreed to at the outset of the representation, is reasonable under the circumstances and the client agrees.<sup>11</sup> Assistance offered by a legal aid provider often involves limited representation in the form of legal advice,<sup>12</sup> brief service<sup>13</sup> or assistance to pro se litigants.<sup>14</sup> Cases that are accepted for litigation generally are not automatically handled on appeal.<sup>15</sup>

***Retainers and other written agreements.*** When the individual has been accepted as a client, the provider and client should clearly establish who the client is, what problem will be addressed and if there are limitations on the scope of the representation. In most cases, the agreement should be reduced to writing. The writing may be in the form of a retainer agreement, signed by the client, which sets out the basis understandings regarding the representation. The provider may also want to send the client an engagement letter that sets out the specific commitments and expectations, when, for instance, the scope of the representation being offered is limited or when the provider is only agreeing to handle one of multiple legal problems. In some circumstances, the provider may use both a retainer agreement and an engagement letter. From time to time, in ongoing representation, the provider may want to send follow-up correspondence confirming any changes that have been agreed to in the undertaking.<sup>16</sup>

If the provider is only offering limited representation in the form of telephone advice, or other limited, brief interaction with the client that is not face to face, it may be impractical to obtain a signed retainer agreement. In such cases, the provider should orally state significant limitations on the scope of the representation and, to the extent practicable, should follow-up in a writing sent to the client memorializing the advice given.<sup>17</sup>

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<sup>11</sup> Model Rules of Prof'l Conduct R. 1.2(c) (2003). See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation). See also American Bar Association Formal Opinion 334 (1974), pp. 5-6.

<sup>12</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-1 (on Representation Limited to Legal Advice).

<sup>13</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-2 (on Representation Limited to Brief Service).

<sup>14</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

<sup>15</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-7 (on Appeals).

<sup>16</sup> See also, ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.2 (on Client Participation in the Conduct of Representation); Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client); Standard 7.9 (on Negotiation).

<sup>17</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-1 (on Representation Limited to Legal Advice).

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*Clients' rights and responsibilities.* Clients' should be informed of their rights and responsibilities as well as the responsibilities of the provider on their behalf. The client should understand that the provider will protect the confidentiality of the information the client provides consistent with its ethical obligations.<sup>18</sup>

- Both client and provider should understand the client's right to be kept informed of the progress of the case and to participate in key decisions regarding its conduct.<sup>19</sup>
- Clients should be encouraged to initiate contacts with the provider and should know how to do so.
- They should recognize the importance of keeping the provider informed of changes in circumstances affecting the case and advising the provider of their whereabouts so that they can be contacted when necessary.
- Clients should understand their responsibility to assist in preparing the case by locating witnesses, documents, or physical evidence; by cooperating with discovery requests; and by keeping appropriate records, when necessary.
- If the practitioner who will undertake the representation is a volunteer, Judicare or contract attorney, the relationship among the provider, the outside practitioner and the client should be made clear.<sup>20</sup>
- The client and the provider should agree who is to pay costs which may arise in the course of the case.<sup>21</sup>
- Clients should understand if the provider will retain attorneys' fees in the event they are obtained from an adversary.<sup>22</sup>
- The provider should explain to clients what they should do in the event of dissatisfaction with the handling of their legal problems.<sup>23</sup>

### **Establishing a clear understanding with persons who are not clients**

*Persons who receive assistance.* There are circumstances when a provider may not intend to enter an attorney-client relationship and seeks to provide only legal information and general guidance to the applicant. Such assistance may be offered in a number of ways. The provider may offer a brochure or other writing broadly explaining the person's rights and

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<sup>18</sup> See Model Rules of Professional Conduct R. 1.6 (2003) and ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

<sup>19</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.2 (on Client Participation in the Conduct of Representation).

<sup>20</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar).

<sup>21</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.5 (on Policy Regarding Costs of Representation).

<sup>22</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.4 (on Client and Attorneys' Fees).

<sup>23</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.7 (on Client Complaint Procedure).

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responsibilities.<sup>24</sup> It may refer the individual to a community legal education presentation or provide general information in a clinic designed to help pro se litigants.<sup>25</sup> It might offer general guidance on-line through a website or at a publicly available kiosk. It is important that the provider communicate clearly to applicants who will be given only legal information or a referral that it is not accepting them as a client and has not entered into an attorney-client relationship with them. Absent clear communication to the contrary, it is possible that an attorney-client relationship may be inferred from the fact that the applicant sought representation and the provider responded with some form of assistance.<sup>26</sup> The provider should clearly indicate to the individuals being assisted that it is not assuming responsibility for the person's legal problem and that the individual may have to take steps, including seeking other counsel or self representation in order to protect important rights.

***Persons denied service.*** Some persons will not be offered any assistance and may be referred elsewhere. The provider should notify such persons promptly and state clearly that it will not be assisting them so that they do not unduly rely on the provider and can take appropriate steps to seek assistance elsewhere or otherwise address their legal problem.<sup>27</sup>

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<sup>24</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

<sup>25</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

<sup>26</sup> This issue is discussed at length in the commentaries to ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.4-1 (on Representation Limited to Legal Advice); Standard 3.6 (on the Provision of Legal Information).

<sup>27</sup> See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.1 (on Provider's Intake System) regarding the importance of preserving goodwill among rejected applicants.