

## First Proposed Standard 7.2 on Client Participation in the Conduct of the Representation

### STANDARD 7.2 ON CLIENT PARTICIPATION IN THE CONDUCT OF REPRESENTATION

#### STANDARD

*Consistent with ethical and legal obligations, a practitioner must abide by the client's decision regarding the objectives of representation, must reasonably consult with the client regarding the means used to achieve those objectives and must keep the client reasonably informed of the status of the matter.*

#### COMMENTARY

##### General considerations

Effective legal representation involves a relationship in which the practitioner brings professional knowledge and skills to bear on a client's legal problem. This special expertise, however, does not empower the practitioner to determine the desired outcome in the client's case. Final decisions regarding the objectives of the representation must remain with the client, who is the person directly affected by the matter and who will live with the consequences of its resolution.<sup>1</sup> The practitioner has authority to determine the appropriate course of action to be taken to accomplish the client's objective, but should reasonably consult with the client.<sup>2</sup> The practitioner has an obligation to keep the client reasonably informed about the conduct of the matter and of important developments in it.

##### Determining the objective

As a general rule, a practitioner must defer to the client regarding the objectives for legal representation undertaken on the client's behalf. Practitioners have a responsibility to identify reasonable outcomes that may be expected and strategic options for achieving them and to let the client decide on the desired outcome. Many legal aid clients have little experience with the legal system and some may lack confidence to make necessary decisions about their case. As a consequence, legal aid practitioners should make an extra effort to explain options and probable consequences to their clients.<sup>3</sup> They should be careful to avoid substituting their judgment for that of clients who are uncertain about what option to choose or who may want to defer to the professional opinion of the practitioner.

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<sup>1</sup> Model Rules of Prof'l Conduct R. 1.2 (2003) reads in part: "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued."

<sup>2</sup> The Comment to Model Rules of Prof'l Conduct R. 1.2(a) (2003) states: "With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) (2003) and may take such action as is impliedly authorized to carry out the representation."

<sup>3</sup> Model Rules of Prof'l Conduct R. 1.4(b) (2003) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

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***Determining the objective in limited representation.*** The general rule that the client determines the objective that the practitioner seeks on the client's behalf does not strictly apply when the provider is only offering limited representation.<sup>4</sup> If a provider is only offering legal advice<sup>5</sup> or limited intervention,<sup>6</sup> such assistance may not be adequate to accomplish all the objectives that a client might otherwise want. The practitioner can, however, consistent with ethical obligations offer a lesser level of service, provided that the service is reasonable in the circumstances and the client consents.<sup>7</sup>

***Other limitations on the objective sought by the client.*** There are circumstances where professional responsibility prohibits a practitioner from pursuing an objective or a course of conduct desired by a client. A practitioner may not pursue a frivolous or malicious claim, allow a client to present false evidence, or aid a client in illegal activity.<sup>8</sup> If a client suggests an improper objective or strategy, the practitioner is ethically obligated to explain the prohibitions against pursuing the objective or conduct.<sup>9</sup> If the client persists, the practitioner may have to withdraw from the case.

### **Client participation in strategic decisions**

Tactical and strategic decisions about the conduct of the case in general are left to the professional judgment of the practitioner, but the client must generally be consulted, particularly about major strategic choices or about actions that may detrimentally affect third parties.<sup>10</sup> There are circumstances when a practitioner may take actions without consulting the client. Some actions are implicitly authorized in order for the practitioner to carry out the representation. At other times, circumstances may call for the practitioner to exercise immediate professional judgment and consulting a client may not be practical. Trial practice, for instance, involves many tactical judgments about which the practitioner would not be expected to consult the

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<sup>4</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

<sup>5</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-1 (on Representation Limited to Legal Advice).

<sup>6</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-2 (on Representation Limited to Brief Service).

<sup>7</sup> Model Rules of Prof'l Conduct R. 1.2(c) (2003). The application of the Rule in legal aid practice is discussed at length in Standard 3.4 on Limited Representation.

<sup>8</sup> Model Rules of Prof'l Conduct R. 1.2(d) (2003) provides in part: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." See also Model Rules of Prof'l Conduct R. 3.1, 3.3, and 3.4 (2003).

<sup>9</sup> Model Rules of Prof'l Conduct R. 1.4(a)(5) (2003) states that: "A lawyer shall ... consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

<sup>10</sup> Model Rules of Prof'l Conduct R. 1.4(a)(2) (2003) provides: "A lawyer shall ... reasonably consult with the client about the means by which the client's objectives are to be accomplished...."

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client.<sup>11</sup> The practitioner should in such circumstances keep the client reasonably informed of actions taken.

There are circumstances when a practitioner and client may disagree about the means to be used to pursue the client's objective. The comment to Model Rule of Professional Conduct 1.2(a) notes that generally the client will defer to the professional judgment of the practitioner, "particularly with respect to technical, legal and tactical matters." The practitioner generally defers to the client with regard to a course of action that will result in an expense to the client or may adversely affect a third party. In the event that the practitioner and client cannot agree on a proper course, it is permissible for the practitioner to withdraw.<sup>12</sup>

### **Communication with the client**

Clients should receive full and timely information on developments in their case.<sup>13</sup> Because practitioners are familiar with law and legal procedure, they may feel confident about the progress of a case. Clients do not have that experience, however, and are apt to feel anxious unless kept informed of the current status of their case and of future expectations. Clients should be informed immediately of any major developments, particularly if they require decisions about new or revised strategies. Clients generally should be provided copies of major correspondence and pleadings. When a case is inactive for a long time, the practitioner should maintain contact with the client through a simple phone call or letter to ease the client's anxiety and to maintain confidence and trust in the practitioner. The practitioner should respond promptly to reasonable requests from the client for information about the case.

### **Representation of clients with diminished capacity**

Representation of minors or persons who suffer an impairment that impedes their ability to make sound judgments or who are otherwise incapacitated presents special responsibilities to the practitioner. The practitioner should be aware of pertinent ethical and legal obligations in the jurisdiction where the individual practices and should abide by them.<sup>14</sup>

The practitioner should seek to maintain a normal attorney-client relationship with all clients, but should be alert to the degree to which a client's circumstance affects the individual's capability to make legally binding decisions or to make sufficiently well considered decisions related to the representation. The practitioner may seek the assistance of family members or other specialized support to help communication with the client. It is important, however, that to the degree possible, the practitioner defer to the wishes of the client and not to a family member or other person who is assisting the client.

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<sup>11</sup> Paragraph (5) of the Comment to Model Rules of Prof'l Conduct R. 1.4(a)(2) (2003) reads in pertinent part: "...a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

<sup>12</sup> See Paragraph 2 of the Comment to Model Rules of Prof'l Conduct R. 1.2(a) (2003).

<sup>13</sup> See Model Rules of Prof'l Conduct R. 1.4 (2003) regarding Communication.

<sup>14</sup> See Model Rules of Prof'l Conduct R. 1.14 (2003) regarding Client with Diminished Capacity.

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A practitioner who perceives a risk of substantial physical, financial or other harm to the client and who cannot adequately protect the client's interests may take reasonable steps to protect the client, including consulting with others who can protect the client and, if necessary, seeking the appointment of a guardian ad litem, conservator or guardian.<sup>15</sup>

### **Representation of groups**

The practitioner should be cognizant of several factors when representing a group. First, is to clearly establish who is authorized to speak for the group particularly with regard to setting the objectives for the representation.<sup>16</sup> Second, is the importance of clarity regarding how communications are to be maintained with the group. It is often impractical to communicate with every member of a group and communications will generally be with the group's leaders. The practitioner should, be certain to clearly understand, however, the reasonable expectations of the group regarding communication and should abide by them. Finally, practitioners should clearly understand that their proper role is to advise any groups that they may represent, and not to lead them, even if the group seeks to place them in positions of control and authority out of deference to their skills and expertise.

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<sup>15</sup> Model Rules of Prof'l Conduct R. 1.14(b) (2003) states: "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>16</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations). See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).