

Standard 7.5 on Investigation

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STANDARD

The practitioner should investigate each client's legal problem to establish accurate and complete knowledge of all relevant facts.

COMMENTARY

Effective representation of a client requires that the practitioner have a full understanding of the relevant facts that relate to the client's legal problem and objectives. In all instances an initial strategy is formulated in response to facts presented by the client. The practitioner has a duty to inquire fully into the factual and legal elements of the problem.¹ For those situations where the provider is offering only limited representation, the practitioner may have to rely on the information that is provided by the client in the initial interview.² It is, therefore, crucial for the practitioner to elicit as much relevant information from the client as necessary to assure that the advice or brief service will be responsive to the circumstances of the client.

When the provider is offering full representation, however, it is generally necessary to conduct further investigation to identify additional facts that may not have been available to the client or the significance of which the client may not have fully appreciated at the outset, including facts that may not support the client's position. The practitioner's strategy should be constantly tested against these new facts. Awareness of unfavorable facts is as critical to the formulation of an effective strategy as is knowledge of favorable ones.

A practitioner should begin gathering information promptly upon undertaking a case for full representation, to prevent committing a client to a strategy that later proves unwise or unproductive. If the practitioner files a lawsuit or defends a client against a claim made by others on the basis of incomplete information, facts may later be discovered that undermine the basis for the client's claim or defense. Valuable time and resources may be squandered, or worse, the practitioner and client may be committed to a losing strategy that worsens the client's problem and undermines the credibility of the practitioner and the provider.

Regardless of whether the provider is offering limited or full representation, the practitioner should understand the legal issues involved in the case in order to determine whether information at hand is relevant and material. Facts should be organized in relation to the legal issues to

¹ Paragraph 5 of the Comment to Model Rules of Professional Conduct R. 1.1 (2003) states in part: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."

² The responsibility of the practitioner to investigate beyond the information supplied by the client in situations where the provider will offer only limited representation may vary depending on the ethical rules of the jurisdiction where the service is provided, and practitioners should be aware of those requirements. *See also*, ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.4 (on Limited Representation); Standard 3.4-1 (on Representation Limited to Legal Advice); Standard 3.4-2 (on Representation Limited to Brief Service).

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enable the practitioner to evaluate their impact on the client's objectives and to identify the need for further investigation or for information necessary to counter adverse facts.

If the provider is offering only advice or brief service, it is unlikely that the practitioner will be able to do substantial fact gathering or investigation beyond the initial client interview. When the provider undertakes full representation, however, the practitioner should investigate all potentially relevant sources of information and should record the results of the investigation in written memoranda for the case file or electronic entries in the case management system while the facts are fresh in mind. Entries may include:

- Informal contacts with opposing counsel or an unrepresented adversary³ to obtain the facts asserted by an opponent and to gain useful insight into the opponent's case strategy;
- If the matter is in litigation, formal discovery to obtain needed information that will not be disclosed voluntarily and to pin the opponent down to a particular version of the facts;⁴
- Documents in the client's possession and those available through discovery, or obtainable as public records or under the Freedom of Information Act;
- Interviews with potential witnesses or other persons with knowledge about the relevant events;
- Personal observations of the scene where key events took place.

It may be preferable to use trained investigators rather than practitioners in certain circumstances. Investigators may be more effective in locating and interviewing witnesses and in obtaining key documents and records because they may have special skills and specific knowledge about the community. The provider may also need to enlist the services of an expert to investigate and analyze specific facts, especially in highly technical areas, such as medicine.

Use of investigators can also free the practitioner to carry out other representation functions. It may also be necessary to avoid the risk of the practitioner having to testify which could prevent the individual from serving as an advocate in the trial.⁵

³ Contacts with unrepresented adversaries must be consistent with relevant ethical norms. *See* Model Rules of Prof'l Conduct R. 4.3 (2003).

⁴ *See* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-4 (on Discovery).

⁵ *See* Model Rules of Prof'l Conduct R. 3.7 (2003).