

American Bar Association

Standards *for the* Provision of Civil Legal Aid

**Standing Committee on Legal Aid
and Indigent Defendants**



AMERICAN BAR ASSOCIATION

**STANDARDS
FOR THE PROVISION OF CIVIL LEGAL AID**

**Standing Committee on
Legal Aid and Indigent Defendants**

AUGUST 2006

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Resolution adopted by ABA House of Delegates

August 7, 2006

RESOLVED, That the American Bar Association adopts revised STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID, dated August 2006, including the Introduction; and

FURTHER RESOLVED, That the American Bar Association recommends implementation of these STANDARDS by entities providing civil legal aid to the poor.

Standing Committee on Legal Aid and Indigent Defendants

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William O. Whitehurst
Austin, Texas

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Foreword

The Standing Committee on Legal Aid and Indigent Defendants was gratified that, without dissent, the American Bar Association House of Delegates at the 2006 Annual Meeting adopted revised Standards for the Provision of Legal Aid. These are the fifth set of Association Standards on this topic. The Standing Committee launched the revision process after recognizing that significant changes had occurred in the practice of law and in the environment within which legal aid programs operate since the last set of Standards was adopted twenty years previously. We believe that the revised Standards will be of assistance for many years to come for organizations and practitioners serving the civil legal needs of low-income persons and seeking to provide high-quality legal representation.

Development of Standards

The Committee began the development process by establishing a special Task Force to work in close consultation with the Standing Committee. This group supplemented the expertise brought to the project by its own members and its experienced reporters. The Task Force included all important stakeholders in the civil legal aid community, consisting of national experts, funders, legal aid practitioners and directors, clients and others with knowledge and experience in the topical areas included within the Standards. To assist the Task Force, two reporters were retained who brought many years of experience in legal aid practice to the project. To be as open as possible to views from the community, the Task Force held four hearings at meetings where legal aid practitioners gathered. Extensive testimony and written comments were received from representatives of bar associations, law schools, legal services programs, the Legal Services Corporation, clients and other interested groups and individuals. To facilitate further commentary, drafts of each existing and proposed revised standard were posted on a well-publicized web site, and comments were accepted by e-mail, postal mail and through oral contact with the Task Force chair, members and reporters. All suggested revisions were thoroughly considered and a number of modifications were adopted in order to address concerns which had been expressed.

Acknowledgments

We are grateful to the many people who contributed to the development and adoption of the Standards. The product would not have been nearly as thorough or thoughtful without the many contributions of insight and suggestions from throughout the community.

In particular, the Committee and the ABA owe a tremendous debt to Sarah Singleton who served as chair of our Revisions Task Force, and indeed to all the members of that group. They convened for innumerable conference calls for up to five hours at a time throughout the nearly two year development process. They were guided by two reporters who brought incredible expertise, patience and skill to the writing process. John Tull, as the principal reporter, identified areas where revisions were most needed and with boundless tact and skillful writing, navigated the sometimes conflicting concerns and suggestions relating to very complex issues. Linda Perle joined the project mid-stream as an additional reporter when the completion deadline began to loom. She brought superb writing skill, a sharp eye for detail and a speedy work ethic that enabled us to bring the revision process to closure in time for 2006 ABA House of Delegates review.

I also wish to thank our talented and conscientious staff who brought both substantive insight and deft management to this effort. Terry Brooks as Committee Counsel guided the overall development process, procured and organized the resources needed to bring this project to completion within a remarkably short period of time. Bev Groudine as Associate Counsel to the Committee brought experience as the reporter to the ABA's pro bono standards and a close attention to detail to the development and final review process. Janice Jones as Program Manager handled all the details of publishing these *Standards* and making arrangements for Task Force meetings, while Mickey Glascott as the Committee's Administrative Assistant spent long hours making sure that the layout and formatting were perfect in every way.

Lastly, I must thank the members of the Standing Committee on Legal Aid and Indigent Defendants for their patient review of these Standards. They provided invaluable guidance to the Task Force, insisting that the standards adhere to principles of brevity and clarity that will withstand careful scrutiny.

William O. Whitehurst, Jr.
Chair, Standing Committee on Legal Aid and Indigent Defendants
August 2006

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INTRODUCTION

These *Standards for the Provision of Civil Legal Aid* replace the *Standards for Providers of Civil Legal Services to the Poor* which were adopted by the American Bar Association in 1986.¹ Since 1986, there have been a number of fundamental changes in society, in low income communities, in the legal aid delivery structure and in the practice of law, all of which profoundly affect how legal aid providers function and how they serve low income persons. The Model Rules of Professional Conduct have undergone significant changes, some directly related to legal aid practice. There has been an explosion of developments in the use of information technology that have had a revolutionary effect on society and have reshaped the practice of law. The regular use of limited representation has been expanded in what is sometimes called unbundled or discrete task representation. Courts have significantly increased their efforts to accommodate the needs of unrepresented litigants. These changes have profoundly affected legal aid practice, and in turn have led to delivery techniques that were rare or non-existent when the 1986 Standards were adopted.

Legal aid practice has also witnessed a significant diversification within the delivery system, as the number and complexity of legal aid providers have increased and the sources of funding have expanded, particularly at the state level. These changes have been accompanied by an increased awareness of the need for legal aid providers and others interested in civil justice to work together in a state or region to maximize the collective ability to respond fully to the needs of all low income individuals and communities.

At the same time, communities served by legal aid providers have become increasingly diverse. Many communities have a multiplicity of immigrant populations, many of which have limited facility in English. The legal needs of low income persons and the strategies to respond have also shifted in response to ongoing societal, economic and policy developments that affect low income communities.

These *Standards for the Provision of Civil Legal Aid* reaffirm the important values that underlie effective legal aid work and provide fresh guidance to providers in the face of these changes.

Application of the Standards

These Standards focus on both the responsibilities of legal aid providers as organizations which serve the civil legal needs of low income persons and the role of practitioners who represent low income clients under the aegis of such an organization.

Legal aid providers. The Standards are written to provide guidance to all organizations providing legal aid, whatever their method of delivery or source of funds. There is wide diversity in the form and organization of legal aid providers. Some are large organizations with multiple funding sources that offer a wide range of services across a large geographic area and may serve diverse communities through a number of offices utilizing a variety of delivery techniques. Others are relatively small and may focus on a small geographic area, a specific

¹ The American Bar Association first adopted Standards for the operation of civil legal aid programs in 1961. Those Standards were reviewed and revised in 1966, and again in 1970. The Standards for Civil Legal Aid were revised as *Standards for Providers of Civil Legal Services to the Poor* in 1986.

population or a comparatively narrow legal issue. Other legal aid providers, though relatively large may specialize in one form of assistance, working in concert with other providers to assure that a full range of service is provided to the low income community.

Legal aid providers may have different institutional structures as well. Many operate principally, or exclusively, to provide legal assistance to low income persons and their communities. For some others, legal assistance to low income persons may be incidental to their central purpose. Many providers operate with a core of staff attorneys, supplemented by components that involve other members of the bar working on a volunteer or compensated basis. Some programs, which principally use the volunteer efforts of members of the bar to provide legal assistance, are sponsored directly by bar associations, either as an integral part of the association or as a free-standing operation. Law school clinical programs provide legal services through law students working under the supervision of faculty or outside attorneys. Some providers are operated by church groups, ethnic societies or charitable organizations.

The Standards are intended to apply to all such organizations,² but recognize that a provider's institutional structure and funding will affect how a particular Standard might apply to it. Some legal aid providers will not be able to meet certain Standards for legal, practical and institutional reasons. A legal aid component of a large social service agency, for example, would likely encounter difficulty complying with all of the Standards related to governance. Other Standards may be impractical and unnecessary for some programs and for individual practitioners who participate in a private attorney component of a provider. Where application of a particular Standard is not reasonable or is impractical for some types of providers, it need not be followed. Where possible, the commentary to the Standards acknowledges such limitations and suggests how the provider might seek to serve the underlying principles embraced by a Standard by alternate means.

Practitioners. To facilitate their utilization by practitioners, the Standards pertaining to practitioners are assembled together in the seventh and last section. The Standards found in the first six sections relate primarily to providers but offer guidance with which a practitioner should be familiar as well.

Many attorneys represent poor clients free of charge, independent of any legal aid organization. Because the Standards are written as a guide for representation provided through a legal aid provider, they are not intended to apply to such individual efforts. Nevertheless, the Standards pertaining to the responsibility of individual practitioners may provide practical guidance to effective lawyering by those attorneys.

Use of the Standards

These Standards are presented as aspirational guidelines for the operation of legal aid providers and the provision of service by their practitioners. They are based on the combined and distilled judgment of individuals with substantial experience in the area. The Standards do not create any mandatory requirements and failure to comply with a Standard should not give rise to a

² The American Bar Association has also adopted Standards that apply specifically to pro bono programs, which provide more detailed guidance to those providers. See *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means* (1996).

cause of action or a finding of a legal ethics violation, nor should it create any presumption that a legal aid provider or a practitioner has breached any legal duty owed to a client or to a funding source.

The Standards do not expand, add or change any ethical responsibilities with which a legal aid provider or practitioner must comply and all lawyers are bound by the ethical rules that apply in the jurisdiction in which they practice. The Standards do touch upon issues that are governed by the accepted rules of professional conduct, and elucidate their application in the context of providing civil legal aid to low income persons. In those instances the commentary may make appropriate reference to, but does not alter, the controlling ethical requirement. Because the American Bar Association historically has taken the lead in developing and articulating the ethical norms that govern the practice of law, the commentary to the Standards generally refers to the ABA Model Rules of Professional Conduct in analyzing pertinent professional responsibilities. These Standards do not provide references to every ethical rule that may apply in the representation of a low income person.

Each Standard is accompanied by extensive commentary to explain or illustrate the Standard, and to identify issues that might arise in its application. The analysis in the commentary is critical to full understanding of each standard and, therefore, it is the intention of the drafters of the standards that they always be published with the commentary.

Underlying Principles of the Standards

A number of values that underlie effective legal aid practice have guided the development of these Standards. The broad principles that are reflected throughout the Standards are discussed below. Values that are germane to a particular Standard are discussed in the commentary to that Standard.

Responsiveness to the needs of low income communities and of clients who are served. A legal aid provider has an obligation to be responsive to the low income communities that it serves. On the broadest level, the provider needs to be aware of critical legal needs of the low income communities it serves and to deploy resources to respond. In some circumstances, the provider may be the principal or only organized source of assistance for low income persons with a legal problem. In other cases, the provider may be one of many organizations dedicated to addressing such needs. The Standards assert that in all cases, the provider needs to ground its choices about where it focuses its resources and what delivery strategies it employs on its awareness of the low income communities' critical legal needs.

Achieving results. The Standards also espouse the view that providers should strive both to achieve clients' objectives and to accomplish lasting results that respond to the low income communities' most compelling legal needs. They affirm that the objective of any strategy chosen—whether offering full representation, limited representation or legal information—should be to help the individuals served resolve their legal problems favorably. The Standards also acknowledge that there are often broad issues that affect large numbers of low income persons that can most effectively be addressed through systemic legal work that seeks to create lasting results for the low income community overall.

In representation of individual clients, the Standards note the provider's and practitioner's responsibility to be responsive to the specific needs of the client being represented. The Standards reiterate the ethical requirement that clients must decide the objectives sought by the representation and they emphasize the need for specific efforts at every stage of representation to assure that practitioners consult and communicate with their clients consistent with ethical requirements.

Treating persons served with dignity and respect. The Standards also affirm the responsibility of the provider and its practitioners to treat all persons who seek assistance from the provider with dignity and respect. Proper treatment of persons seeking and receiving assistance requires staff who can interact effectively with low income persons and who can competently relate to culturally diverse communities. It also calls for systems, such as intake, to be accessible and efficient and not inadvertently to demonstrate a lack of regard for applicants' and clients' time and sensibilities.

Access to justice. A core mission of a legal aid provider is to facilitate access to the legal systems for resolving civil legal problems and to help low income persons with legal problems obtain fair and lasting results. The Standards recognize that there are a number of ways in which this responsibility might be carried out. First, is in the direct assistance to individuals to advocate on their behalf or to assist them to do so themselves. The second is in the choice of delivery methods that efficiently use resources to facilitate access for large numbers of people in ways that respond effectively to their legal needs. The third is to work with other providers, the courts, the organized bar and other community organizations to increase the overall responsiveness of the system to the need for effective access to justice.

High quality and effective assistance. The legal work undertaken by a legal aid provider should be of high quality and should be effective in responding to the need it is intended to address. The Standards state that, at a minimum, a practitioner should meet the competency norm that is stated in the Model Rules of Professional Conduct and should aspire to a benchmark of high quality. To this end, the Standards address issues of practitioners' qualifications and training, supervision systems that support quality, specific quality assurance mechanisms and the fundamental elements of effective representation.

Some of the assistance offered by a provider will involve non-representational assistance, such as community legal education and legal information to help individuals avoid legal problems and take steps on their own to address their situation. In all cases, the Standards state that the provider should undertake the activity with commitment to high quality. The Standards also express that strategies should be deliberately chosen and should be evaluated periodically to determine if they are successful in achieving their intended result.

Zealous representation of client interests. All lawyers should pursue their clients' interests with zeal consistent with the law and applicable standards of professional conduct. Zealous pursuit of clients' interests has particular implications for legal aid providers. When effective resolution of individual clients' problems is circumscribed by existing laws and practices, or when existing laws and practices result in the same or similar problems for many low income persons, a practitioner may be called upon to reach beyond the individual problem to challenge the law, policy or practice.

It is a challenge for a legal aid provider to serve all of the values that are important to effective legal aid practice. These Standards and commentary are intended to provide useful guidance regarding how to accomplish this important task.

Definitions of Significant Terms Used in the Standards

The Standards and accompanying commentary use many terms that have unique or particular meaning in the context of legal aid practice. Such terms that are used frequently in the Standards and commentary are defined below.

“Case” refers to legal representation of a low-income individual or group client with regard to a discrete legal matter. It entails the formation of an attorney-client relationship and includes litigation in court or an administrative tribunal as well as other legal assistance, such as counseling, brief service, negotiation, and transactional representation.

“Legal work” refers to all of the work that involves the use of legal skills and knowledge that a provider performs on behalf of the low income community it serves. It includes legal representation of individuals and groups. It also encompasses non-representational services and forms of assistance, such as community legal education and the provision of legal information, pro se clinics and other forms of self help assistance as well as studies and reports on issues of general importance to the low-income communities served by the provider.

“Low income community” refers to a population of persons with limited economic resources who are located in the area served by the provider, but is not limited to those individuals or groups who actually receive legal assistance from the provider. The term is often used in the plural in the Standards to denote the fact that some low income populations served by the provider are comprised of individuals who share a common characteristic, such as race, ethnicity or culture or have some other common interest, and that a provider may serve many such communities within the overall low income community.

“Outside practitioner” and *“outside attorney”* refer to a private attorney, government attorney, corporate counsel or other attorney who is not employed by a legal aid provider but who represents a low-income client referred by a legal aid provider on a pro bono or significantly reduced fee basis.

“Pro se” refers to circumstances in which individuals represent themselves in a court or administrative proceeding without representation by a practitioner or who, primarily represent themselves, while receiving limited representation with respect to discrete parts of the proceedings, such as assistance preparing pleadings. The term includes other terminology such as *“pro per”* and *“self represented litigants.”*

“Practitioner” refers to an attorney, paralegal, law student, lay advocate or tribal advocate who represents a client of a provider and engages in representational activities authorized by federal, state or tribal law. Where an activity requires a particular type of practitioner, such as an attorney, the Standards and commentary use the specific descriptive term rather than the general term *“practitioner.”*

“Legal aid provider” and *“provider”* refer to any not-for-profit organization or distinct part of a not-for-profit organization that regularly makes civil legal assistance available to low income individuals or groups without charge or at greatly reduced cost. The term is intended to be applied broadly to include organizations even if they may not, for practical or legal reasons, be able to meet every Standard. The term does not include outside practitioners or law firms that accept referrals from a legal aid provider for the representation of low-income clients.

Conclusion

A nation that lays claim to being just has a responsibility to make justice available to all regardless of their resources and their status in society. The men and women who labor to bring civil legal aid to low income persons and help them address their legal needs are instrumental to the effort to make justice universally available. These Standards and accompanying commentary are offered to provide thoughtful and practical guidance on how those efforts might best succeed. The drafters hope that the guidance offered herein will play a small part in helping create a more just society.

SECTION 1
STANDARDS FOR GOVERNANCE

STANDARD 1.1 ON OVERALL FUNCTIONS AND RESPONSIBILITIES OF THE GOVERNING BODY

STANDARD

A provider should have a governing body that establishes its mission, sets and oversees implementation of broad general policies to guide the provider and actively participates in planning for its future.

COMMENTARY

General considerations

Each provider should have a governing body or its equivalent that assumes overall responsibility for the success of the organization. The governing body should carry out its responsibilities in a manner that maximizes the provider's capacity to serve low income persons effectively. Individual governing body members should be aware of and sympathetic to needs of low income communities, and the governing body should operate in a manner that enhances engagement with low income communities and the low income persons that the provider serves.¹

The overarching responsibility of the provider's governing body is to establish the mission for the organization and to set broad general policies to guide the provider in its provision of legal assistance to the low income communities it serves. The governing body should also assure that planning takes place to accomplish the provider's mission and that adopted policies are implemented.²

There are a number of functions and duties that fall to a governing body as a part of its overall responsibility for the well-being of the provider. Key responsibilities are treated in separate Standards that follow, including oversight of compliance with legal and contractual responsibilities and with board policies,³ fiscal oversight,⁴ hiring and supervising the chief executive,⁵ serving as a resource for the provider⁶ and fundraising.⁷

Overall responsibilities

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- ¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 1.2 (on Governing Body Members' Responsiveness to the Communities Served); Standard 1.3 (on Governing Body Communication with Low Income and Legal Communities).
 - ² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).
 - ³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-1 (on Governing Body Oversight of the Provider).
 - ⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-3 (on Fiscal Matters).
 - ⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-4 (on Relations with the Chief Executive).
 - ⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-5 (on Serving as a Resource to the Provider).
 - ⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

Standard 1.1 on Overall Functions and Responsibilities of the Governing Body

Mission. The governing body should determine the organization's mission and purpose. It is the governing body's responsibility to create and periodically review a statement of mission and purpose that articulates the provider's goals, ascertains the means that it will utilize to accomplish those goals, and identify the primary constituents to be served. The governing body should clearly articulate the provider's mission, accomplishments and goals in order to help garner support for the provider from the public.

Set policy for the provider. Consistent with the provider's mission and purpose, the governing body has the responsibility to set broad general policies for the organization's operation. These policies include, in the first instance, the provider's articles of incorporation and bylaws. The governing body should adopt such other broad policies that make up the general set of rules under which the provider operates and clarify the roles, responsibilities and duties of the governing body and the provider's staff. These policies establish the standards against which to measure the actions of members of the governing body and the provider's staff and help safeguard the provider's general well-being.

The precise policy role of the governing body will depend upon local judgment about the appropriate division of authority and responsibility between the governing body and the provider's chief executive.⁸ Generally, the governing body has broad decision-making authority on fundamental matters, such as determining delivery structure, adopting priorities, selecting the chief executive, adopting the budget, establishing a salary structure for staff, and overseeing the implementation of these policies. In addition, the governing body may be required to establish policies, such as setting eligibility guidelines,⁹ to comply with requirements of a funding source.

Planning. The governing body should also be engaged in planning efforts called for in these Standards to guide how the provider responds to the legal needs of the low income communities it serves. It should assure that planning furthers the provider's mission and fosters the effective and efficient utilization of its resources to meet the most compelling needs of its clients.¹⁰

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-4 (on Relations with the Chief Executive).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.1 (on Eligibility Guidelines).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

STANDARD 1.1-1 ON GOVERNING BODY OVERSIGHT OF THE PROVIDER

STANDARD

The governing body should regularly review the provider's operations to assure effective operation as well as compliance with its policies and with pertinent legal requirements.

COMMENTARY

General considerations

The governing body should review the provider's operations to assure that the provider is functioning effectively, that its policies are being implemented and that the provider is in compliance with statutory and regulatory requirements. Once the governing body has established broad general policies, it is the chief executive's responsibility to carry them out and manage the provider's day-to-day operations,¹ but the governing body should have a means to assure that established policy is being implemented properly and to identify problems that may require intervention.

Oversight by the governing body

A legal aid provider may be a complex organization. The governing body should regularly review all of the interrelated factors that affect the provider's operations and should watch for early warning signs of problems that, if left unattended, will have repercussions for the entire program. Examples of such warning signs include:

- A lack of success in its representation;
- A sharp change in the number of cases handled;
- Significant deviations from the approved budget;
- Negative audit findings;
- Negative findings by outside reviewers;
- Difficulties in fundraising or a loss of significant grants or other sources of funds;
- An increase in client complaints;²
- An increase in complaints from employees of the provider;
- An increase in complaints from members of the bar, the general legal community or others serving low income communities;
- A decrease in participation by outside attorneys willing to accept referrals of clients from the provider;
- A failure to implement governing body policies and plans.

To perform its continuing review function, the governing body should regularly receive and review internal reports from program management on financial matters, caseload statistics,

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-4 (on Relations with the Chief Executive).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.7 (on Client Complaint Procedure).

Standard 1.1-1 on Governing Body Oversight of the Provider

disposition of cases, funding changes, and major provider undertakings. It should review the provider's annual financial audit. In addition, it should review monitoring and evaluation reports from funding sources. It should determine the cause of any indicated problems or deficiencies in compliance and should assure that management takes corrective action.

Alternative means of oversight. Some legal aid providers operate as part of a larger organization that may have a governing body that is responsible for a variety of organizational activities in addition to making legal services available to the poor. Some are part of organizations that engage in non-legal activities, such as medical clinics or domestic violence shelters, but include a legal assistance component. Others are part of institutions that deal with other aspects of the practice of law beyond legal aid for low income persons, such as bar associations or law schools. The broad range of responsibilities of such organizations may limit the time that their governing bodies can realistically devote to oversight of their legal aid provider activities. In some instances, these boards of directors may find it appropriate to designate or appoint a committee of the board, a separate policy body or advisory board with specific responsibility for overseeing the provider's operations and developing policies. In such situations, the governing body should determine which of its responsibilities to delegate to the oversight committee.

STANDARD 1.1-2 ON PROHIBITION AGAINST INTERFERENCE IN THE REPRESENTATION OF CLIENTS

STANDARD

The governing body and its individual members must not interfere directly or indirectly in the representation of any client by a practitioner.

COMMENTARY

It is improper for the governing body or its members to interfere with the attorney-client relationship. A governing body is permitted to set priorities which may limit a provider's involvement in broadly identified categories of cases, but such limits must be established before a case is accepted.¹ Once representation in a particular case has been undertaken, interference by the governing body is strictly prohibited. The governing body or an advisory committee of its lawyer members cannot have access to the confidences and secrets of the provider's clients, as such bodies stand outside the attorney-client relationship established with the practitioner,² and the members of the governing body do not have an attorney-client relationship with the provider's clients.³ Moreover, lawyers employed, paid or recommended by the provider cannot ethically allow the provider's governing body or its members to direct or regulate the lawyer's professional judgment in providing representation.⁴

An exception to this prohibition may occur in the context of the client grievance procedure where a client explicitly waives protection against disclosure of confidential information in order to obtain review of the provider's actions. In such situations, the governing body or a duly selected committee may inquire into the conduct of a case by a provider's practitioner, but the body cannot specifically direct the practitioner to undertake or to refrain from any action in the case.⁵

¹ See ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

² See ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 334, at p. 7 (1974).

³ See Comment, Model Rules of Prof'l Conduct R. 6.3 (2003).

⁴ See Model Rules of Prof'l Conduct R. 5.4(c) (2003); and ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.3 (on Responsibility for the Conduct of Representation).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.7 (on Client Complaint Procedure)

STANDARD 1.1-3 ON FISCAL MATTERS

STANDARD

The governing body should assure the financial integrity and viability of the provider.

COMMENTARY

General considerations

The governing body should assure that the provider achieves its budget goals¹ and that its funds are spent and accounted for in a way that fully meets the provider's responsibility to its clients, its funding sources and the public. The governing body should rely on a senior manager to help assure that the provider effectively meets its responsibilities for budgeting, financial planning and accountability. Larger providers should consider having a senior manager who is qualified to act as the chief financial officer for the organization.

Budgeting and financial planning

The governing body's fiscal responsibilities begin with the adoption of a budget that commits available resources to the provider's priorities.² Budget responsibilities involve more than mechanical approval of broad spending categories and perfunctory review to assure that income and expenditures balance. The governing body should approach the budget as the mechanism through which it implements major policy decisions on the provider's direction and operation. It should recognize, for example, that decisions about the provider's personnel budget may substantially affect its capacity to serve particular geographic areas or address specific substantive legal issues.

Budget planning also provides the opportunity to monitor the provider's receipt of projected income, assess future resource needs and plan for expected changes in available resources. Foreseeable expansion or reductions in resources should be anticipated in current budget decisions to ease the transition to a new level of operation.

The budget should include adequate resources to assure that the provider's staff is capable of providing high quality legal assistance to its clients and to help the provider strike the appropriate balance necessary as it strives to achieve the goals set by these Standards.³ In order

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

³ These Standards identify a number of provider responsibilities for which it is particularly important to budget adequate resources. See for instance, ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Legal Needs and Planning to Respond); Standard 2.4 (on Cultural Competence); Standard 2.5 (on Staff Diversity); Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar); Standard 2.10 (on Effective Use of Technology); Standard 2.11 (on Provider Evaluation); Standard 4.6 (on Communication in the Primary Languages of Persons Served); Standard 6.5 (on Training); Standard 6.6 (on Providing Adequate Resources for Research and Investigation).

Standard 1.1-3 on Fiscal Matters

to encourage continued service to clients by experienced practitioners and to discourage high staff turnover, sufficient resources should be budgeted to assure that the provider offers adequate salaries and benefits to its staff. The provider's management is responsible for spending resources according to the budget approved by the governing body. Budget decisions, however, cannot always anticipate the precise cost of provider activities or unforeseen contingencies. Some deviations will be unavoidable. The governing body should establish guidelines that give management the flexibility necessary to make reasonable adjustments in response to changing circumstances. Management should provide the governing body with periodic reports on the provider's fiscal situation to permit the governing body to monitor the provider's receipt of revenue and expenditure of funds and anticipate and correct potential resource problems.

Financial accountability

Oversight of the provider's finances carries the responsibility to assure that the provider's funds are spent for the purposes for which they were granted, are properly accounted for and that there is no fraud or misuse of funds. The governing body should act proactively to assure that the financial integrity of the provider is protected. It should adopt policies that require adequate internal controls to assure the reliability and integrity of financial and operating information. It should also assure that the provider is in compliance with federal and state laws governing whistleblower protection and the destruction of documents.⁴ It should assure that management takes appropriate action to correct any shortcomings identified in its fiscal accounting by an audit or other financial review.

A legal aid provider should undergo an annual independent financial audit that measures compliance with sound accounting principles and funder audit requirements. The governing body should adopt procedures that assure the highest level of service from its auditors. It should establish an active audit committee⁵ and should periodically solicit bids from auditing firms to perform the annual financial audit.

The governing body should be certain to hire auditors who are familiar with the special audit requirements that apply generally to non-profits and capable of meeting the specific audit requirements imposed by the provider's funders. The auditing contract should establish the work to be done and should specify the particular requirements imposed by the provider's funders. The contract should include the maximum cost for the audit and should provide for submission of a timely report, usually within 90 days of the close of the fiscal year.

On receipt of the financial report, the governing body's audit committee should meet with the auditors to discuss their findings, their recommendations for responding to identified problems, and their suggestions for improving and updating the provider's fiscal systems. The audit

⁴ The whistleblower protections and document destruction provisions in the Sarbanes-Oxley Act apply to non-profit corporations in certain limited circumstances. The American Competitiveness and Corporate Accountability Act of 2002, Sections 1101 and 1107. Recommendations for nonprofits on the effect of the Sarbanes-Oxley Act are publicly available from BoardSource (www.boardsource.org) and from Independent Sector (www.independentsector.org).

⁵ The American Institute of Certified Public Accountants' offers an Audit Committee Toolkit: Not-for-Profit Organizations, which can be found at www.aicpa.org/Audcommctr/toolkitsnpo/homepage.htm.

Standard 1.1-3 on Fiscal Matters

committee should report to the full governing body, which has ultimate responsibility for the provider's fiscal health.

STANDARD 1.1-4 ON RELATIONS WITH THE CHIEF EXECUTIVE

STANDARD

The governing body has the responsibility to hire the provider's chief executive and should hold the chief executive accountable for the provider's operations.

COMMENTARY

Skills required of the chief executive

The legal aid provider's chief executive is the individual hired by the governing body to manage the provider's operations and carry out its policies. The person selected will have a decisive impact on the provider's capacity to serve clients effectively. The position requires diverse skills including:

- Effective management and leadership skills and the capacity and desire to act decisively and independently to carry out the provider's policies;
- An understanding of and sensitivity to the needs of clients, including problems unique to the provider's service area;
- The ability to interact well with major ethnic and language groups among the client population;
- The capacity to work effectively with the governing body;
- The ability to maintain effective relations with the provider's staff and participating outside attorneys;
- The ability to command the respect of members of the bar, the judiciary, and others in positions of authority in the community;
- The ability to ensure the integrity and accountability of the provider's programs and operations;
- The ability to identify new funding opportunities and the capacity to raise additional resources to support provider's operations;
- The ability to encourage professional development and enhancement of leadership skills in the provider's staff.

No one person will fully possess all of these skills. Different skills may be more important for some providers than for others. Moreover, the balance of the skills the governing body requires in the chief executive will vary from time to time, depending upon such factors as the provider's history, the stability of its finances and personnel, provider priorities, future plans, as well as the skills that are reflected in other members of the provider's management team. It is the job of the governing body to find a chief executive with those management skills that are best suited to running a high quality provider. In most instances the governing body will determine that the chief executive of a legal aid provider should be an attorney. However, the governing body may determine that a non-attorney candidate meets the criteria that the governing body has established and would be the best candidate for the chief executive position. In such instances, the governing body should ensure that attorney members of the provider's management are available to provide appropriate supervision to its practitioners.

Standard 1.1-4 on Relations with the Chief Executive

Recruitment and selection of the chief executive

In selecting the provider's chief executive, the governing body should seek to recruit a variety of qualified candidates. Qualified candidates may be recruited both from within the provider's current staff and from the outside community. To identify qualified outside candidates, it may be necessary to engage in effective local, regional and national recruitment, including advertising in a wide variety of print and electronic media. It is important to engage in affirmative, targeted efforts to reach out to qualified candidates through direct recruitment, personal contacts, and in-person interviews with prospective candidates. To assist in this process, governing bodies may engage search consultants or other experts. Affirmative efforts should be made to ensure a varied pool of candidates that reflect the diversity of the legal profession and the client communities served by the provider.

The governing body should conduct intensive background and reference checks on all finalists to evaluate their experiences and abilities to meet the established requirements of the job. Recommendations from relevant bar associations may help the governing body to assess each candidate's ability to work with the bar to solicit its cooperation and participation in the delivery of legal services. Recommendations from staff members who have worked with the candidates may help to identify those candidates who have the requisite management skills and ability to work effectively with staff to maximize their legal skills. Recommendations from clients can help to identify those candidates who have the sensitivity and skills necessary to relate effectively to the client communities.

Where possible, governing bodies should anticipate potential transitions in executive leadership and engage in succession planning before the need to recruit and select a new chief executive arises. When appropriate, the governing body should work with the current chief executive to help develop a cadre of well-qualified internal leaders as well as to identify a pool of potential outside candidates from whom the next chief executive can be recruited.

The relationship between the governing body and the chief executive

There is a natural tension between the policy-making and oversight authority of the governing body and the chief executive's responsibility for day-to-day operations. This can be overcome if the governing body and chief executive develop an honest, open relationship based on mutual trust and a clear and specific delineation of areas of responsibility and authority of each.

Typically, the governing body articulates the provider's overall mission and retains broad decision-making authority for establishing priorities, adopting the budget and the overall service delivery plan, approving the general salary structure and the salary administration plan, and determining overall personnel and administrative policies, as well as approving major capital expenditures and long-term contracts. The chief executive, in turn, generally has authority for the provider's day-to-day operations, including implementation of the service delivery plan, recruitment of staff and participating outside attorneys, approval of major litigation such as class actions and appeals and of other major representation efforts, approval of significant litigation expenses, as well as administration of established personnel policies, including decisions on individual salaries, on hiring, firing and otherwise disciplining staff.

There are other operational areas where the division of authority between the governing body and the chief executive should be defined, including, for example, the hiring and firing of senior

Standard 1.1-4 on Relations with the Chief Executive

administrative and management staff and major equipment purchases. In addition, there are other areas, such as fundraising, where the responsibility will be shared by the governing body and the chief executive.¹

The specific delineation of authority in all of these areas is a matter of local judgment and decision. The governing body and the chief executive should reach a specific agreement about where responsibility in each area lies and how to resolve questions about who has responsibility to make decisions regarding unanticipated issues that may arise from time to time. In addition, they should agree upon a mechanism for periodic reports from the chief executive to the governing body on appropriate issues.

Oversight and evaluation of the chief executive

The governing body should exercise continuing oversight of the chief executive's work, through ongoing review of program operations and periodic evaluations of the chief executive's performance. Like any staff member, the chief executive is entitled to constructive criticism as well as positive feedback on job performance. The governing body should establish a policy for annual review of compensation for the chief executive and, when appropriate, for salary increases.

The governing body should act directly, fairly and in a timely manner when it detects serious problems in the chief executive's performance. The individual should be advised of the nature of any perceived deficiencies and of the steps, if any, that the governing body determines are necessary to cure them. In the event that appropriate steps are not taken to cure the deficiencies that have been identified and the governing body determines that it is in the provider's best interest to remove the chief executive, the governing body should do so in a manner that minimizes trauma to the provider. Failure to act in a timely manner to remove an ineffective chief executive may leave the provider with long-term problems.

Nevertheless, the governing body should not act precipitously to remove the chief executive, and should ensure that its actions are, and are perceived to be, fair. Before taking such action, the governing body should make sure that it has obtained a full understanding of the facts surrounding the alleged failures of the chief executive and has afforded the chief executive the opportunity for response, explanation and, if possible, corrective action.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

STANDARD 1.1-5 ON SERVING AS A RESOURCE TO THE PROVIDER

STANDARD

The governing body should serve as a resource for a provider, assist in community relations and, when appropriate, engage in forceful advocacy on behalf of the provider.

COMMENTARY

General considerations

Governing body members can serve as a valuable resource for the provider in its provision of legal services, as the following examples suggest:

- Members with special knowledge of the environment in which the program operates can provide valuable insight to committees or task forces of staff, clients and others working on long-term strategies to deal with major issues affecting clients.
- Members may have skills or knowledge about the law or the community that can be used to train the provider's staff.
- Members with special expertise in the law relating to the operation of non-profit organizations can provide legal advice and assistance to the provider.
- Members with particular knowledge of low income communities can help design and establish the provider's service delivery system.
- Members can engage in legislative or administrative advocacy on behalf of the provider.
- Members can assist in the provision of legal assistance by accepting pro bono referrals of cases, acting as co-counsel in cases with the provider or representing low income communities through legislative or administrative advocacy.

Community relations and advocacy for the provider

The governing body and its individual members have an opportunity to assist the provider by explaining the nature and purpose of legal aid to other important elements of society. Attorney governing body members can play an invaluable role through their relationships with other members of the legal profession and with the organized bar. They may also have relationships with other groups or individuals who do not fully understand or sympathize with the problems of low income persons that can prove useful in changing their attitudes toward the provider and client communities. Members may also have relationships with legislators or other government officials that can be helpful in advocating on behalf of the provider or its clients. Client governing body members often serve as effective spokespersons for the provider.

This role can be particularly important given the lack of public awareness of the role played by legal aid providers for their clients. The primary responsibility of the provider is to represent the interests of its clients. The provider's practitioners sometimes represent their clients against influential adversaries, and sometimes may take positions or seek remedies that are unpopular. At such times, effective representation may create controversy and subject the provider to criticism. Governing body members have a responsibility in such circumstances to use their

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influence both publicly and privately to defend the provider's role as an advocate and to help educate the public about the provider's mission to help make the legal system available to all.

STANDARD 1.1-6 ON RESOURCE DEVELOPMENT

STANDARD

The governing body should assure that the provider engages in resource development and should directly assist in those efforts.

COMMENTARY

General considerations

Demand for legal assistance for low income communities almost invariably outstrips the resources available to meet the most compelling civil legal needs of those communities. It is essential, therefore, that a provider pursue assertive strategies to expand available financial resources. The governing body has several key roles to play in helping the provider meet its responsibilities for resource development, including implementing supportive policies, engaging in appropriate planning and assuring adequate staffing and resources to support fundraising efforts.

Governing body members should also participate directly in developing and implementing resource development strategies aimed at private, governmental and corporate funding sources. The governing body's members collectively should have the experience, skills and contacts to be effective in resource development work. The governing body may establish a separate fundraising committee or advisory board to augment its resource development capacity.

Effective resource development is grounded in part on the reputation of the provider as an effective organization. The more stature and credibility a provider has as an institution the more successful it is likely to be in attracting and retaining funding from private organizations, governments and individual donors.¹ The governing body should also assure that the provider's management complies with all grant and contract requirements so that existing funding is preserved.² A reputation for meeting contractual requirements of current funding is one critical component for success in obtaining additional resources.

Governing body responsibilities

Planning. The governing body should adopt a policy that encourages the provider to obtain new resources to support its work. It should assure that the provider's strategic planning includes a component for increasing its financial resources.³ It should work closely with the chief executive who shares fundamental responsibility with the governing body for resource development. Other staff, particularly senior management, are also likely to be called upon to

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.12 (on Institutional Stature and Credibility).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-1 (on Governing Body Oversight of the Provider).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

Standard 1.1-6 on Resource Development

engage in fundraising efforts in a variety of ways, including helping conceptualize and write grant proposals, working cooperatively with other providers in developing joint proposals and making appropriate contacts with potential funding sources.

The governing body should assure that adequate staff capacity exists to identify potential funding sources that may be available and to pursue them successfully. It should also budget adequate resources to cover expenditures associated with resource development, including items such as the cost of developing materials, travel and purchasing and maintaining audio-visual equipment.. Large providers should consider establishing a dedicated resource development department to work with the governing body, the chief executive and others responsible for fundraising. Smaller providers may want to retain a fundraising consultant to work with staff members who are principally responsible for the provider's fundraising. Very small providers may have to rely on the efforts of a resource development committee of the governing body supported by the chief executive or a fundraising consultant for its fundraising efforts. Consultants who specialize in fundraising may be helpful to providers of any size.

Budgeting. In the budgeting process, the governing body should set a target for program revenue that takes current grants and contracts into account and sets goals for new income to meet the provider's commitments and to respond to the needs of the low income communities it serves. The amount set should be based on a thoughtful assessment of potential funding sources. If the provider is not raising sufficient funds to meet current responsibilities and to respond to newly emerging legal needs in the low income community, the governing body needs to increase efforts to raise additional revenue.

The governing body should be aware of available sources of funds and should, in concert with the provider's resource development staff, make deliberate choices among potential funding sources and strategies to tap those most likely to produce income to support the provider's work. Many resource development efforts may be undertaken by the provider by itself. Others, such as efforts to obtain funding from a state legislature or from state bar dues check-offs or attorney registration fees, involve working in concert with others in the state or regional delivery system, including other providers and the organized bar.⁴ Some fundraising efforts may be undertaken jointly with others, for example, to obtain funds that may be shared among a group of participating providers or to establish a multi-provider project to offer services to the low income community.

There are many factors that affect which strategies are appropriate for a provider. An extended discussion of all potential fundraising strategies and their merits and limitations is beyond the scope of these Standards. The provider should take advantage of the many sources of guidance available to identify resource development opportunities and help choose those appropriate for it to pursue.⁵ The provider's resource development staff and key members of the governing body should attend trainings to increase their skill level and knowledge of fundraising opportunities.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁵ An extensive list of potential fundraising approaches and an analysis of their effectiveness and cost to implement and sustain can be found at *Innovative Fundraising Ideas for Legal Services-2004 Edition* (Standing Committee on Legal Aid and Indigent Defendants, Project to Expand Resources for Legal Services), <http://www.abanet.org/legalservices/downloads/sclaid/innovatefund2004.pdf>.

Standard 1.1-6 on Resource Development

Establishing clear responsibilities for members of the governing body and the staff. Many resource development tasks will fall to the staff of the provider. Other responsibilities will be assigned to the governing body or to individual members of the governing body. The provider should clearly delineate staff and board responsibilities for all aspects of its resource development efforts, including:

- Research on potential funding sources;
- Development of funding requests and other materials necessary to support the fundraising effort;
- Recruitment of volunteers to lead, organize and implement fundraising efforts like lawyer fund drives and major gift campaigns;
- Cultivation and solicitation of the potential sources of funding, including public and private organizations and individual donors;
- Follow-up with potential donors;
- Acknowledgement of grants, individual donations and other contributions.

Oversight of the provider's resource development. The governing body should oversee the provider's resource development efforts to assure that it accomplishes its fundraising goals and the resources obtained help the provider to accomplish its mission. Resource development plans should tie fundraising to the provider's strategic plan or to new initiatives consistent with its mission. The resources obtained should not dilute the provider's core capacity by taking on projects that are not related to addressing the most compelling needs of the low income communities it serves. The core capacity can also be diluted if the provider takes on a large number of small projects whose funding does not cover administrative support and other staff costs.

Direct support of resource development by the members of the governing body. Individual members of the governing body should support the resource development efforts of the provider, through direct involvement in fundraising as well as making personal contributions to support the provider's work. The provider should, when seeking new members of the governing body, clearly articulate expectations for participation in resource development. It should recruit members who can assist in the provider's resource development efforts, whether through contacts with potential donors and funders or through active engagement in articulating the needs of the communities the provider serves.

Depending on the provider's resource development plan and strategy, individual members of the governing body may be asked to solicit contributions from associates and friends. Members should be prepared to approach their contacts on behalf of the provider for annual giving campaigns, direct mail contributions, special events such as annual dinners and auctions, major gifts or planned giving. Individual members should also use their contacts in government, corporations, foundations and other potential funding sources to support solicitations of grants and contracts.

The provider should also clearly set forth its expectations that members of the governing body make their own personal financial contributions to the provider to the extent of their capacity. The provider should encourage all members to contribute, even if it is only a nominal contribution from client and community members who cannot afford more. Some foundations and major donors expect a 100 percent giving level from current board members of organizations they fund.

Standard 1.1-6 on Resource Development

Creation of additional fundraising capacity. The governing body may wish to consider creating a separate committee or fundraising board to assist with resource development. While all members of the governing body are expected to support the resource development effort, some members will be better suited than others to the active pursuit of funds from individual donors, foundations and other public and private sources. A governing body should have a balance between those members who can open doors to potential funding sources and those who have been recruited because of their substantive expertise or their connections with the low income communities served by the provider.⁶ A separate fundraising group can supplement the capacity of the governing body by recruiting persons who would be effective in raising resources for a provider, but would not be interested in a policy making role, or might not meet the requirements of major funding sources regarding makeup of the governing body.⁷

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.2 (on Members' Responsiveness to the Communities Served).

⁷ Some funding sources, such as the Legal Services Corporation, set requirements for the selection and make-up of the governing bodies of funding recipients. Legal Services Corporation Act at 42 U.S.C. 2996f(c). See also, 45 CFR 1607.

STANDARD 1.2 ON GOVERNING BODY MEMBERS' RESPONSIVENESS TO THE COMMUNITIES SERVED

STANDARD

A provider should have a governing body whose membership and manner of operating are responsive to the low income communities served.

COMMENTARY

General considerations

A provider's governing body has a responsibility to be aware of the needs of the communities that the provider serves and to make policy decisions that respond to those needs. This responsibility should be addressed as the governing body carries out its responsibilities to support the effective operation of the provider, including oversight,¹ resource development² and serving as a resource for the provider.³ All members should understand the broad needs of the communities served.⁴ To the extent practical, the governing body should have members who are representative of the varied interests of those communities. And, the governing body should operate in a way that fosters effective participation by all its members, so that diverse ideas and interests are considered when policies are adopted.

Diversity of viewpoints

The governing body needs a diversity of interests and perspectives among its membership in order to be responsive to the communities the provider serves. Diversity on the governing body protects against domination by a single group, assures that the needs of important subgroups of low income populations are recognized, and promotes thoughtful debate of diverse points of view before policy is set.

The governing body should include a variety of supportive persons who bring important skills, knowledge and outlook to governance of the provider. Its membership should include persons who reflect the race, ethnicity, national origin and gender of the low income community and are drawn from various geographic locations, including major cities and towns as well as rural areas. The governing body should include persons who are or who have been eligible for the provider's services. Providers that base eligibility for services on income should include governing body members who are or have been financially eligible.⁵

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-1 (on Governing Body Oversight of the Provider).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-5 (on Serving as a Resource to the Provider).

⁴ See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.2-1 (on Individual Members' Commitment to the Provider).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.2-2 (on Board Members from the Communities Served by the Provider).

Standard 1.2 on Governing Body Members' Responsiveness to the Communities Served

All providers will find a variety of interests in the communities for which the provider is responsible. Some providers, particularly large ones, serve diverse communities and it may not be possible for the governing body membership to include representatives of all of these varied communities. Others providers may focus on offering assistance in a limited substantive area or to a specific population, but even they are likely to find that there are varied interests and outlooks among the members of the population served. Having diverse representation can enhance the governing body's awareness and understanding of the interests and needs of all segments of the low income population. It can also improve the provider's understanding of how to respond to unique service delivery and legal problems of particular groups.

The membership of the governing body should include attorneys who support the work of the provider and who can bring their professional experience and perspective to inform policies that affect the provider's operation as a law office. The provider should be aware of any ethical rules in its jurisdiction that affect the operation of a legal organization that has both attorney and lay members on its governing body.⁶

The governing body may also benefit from including among its membership persons who support the mission of the organization and come from sources such as law schools, the business community or social service organizations. Having at least one member with experience in management, business planning or corporate finance can significantly benefit the governing body in carrying out its responsibilities. Choices about whom to include on the governing body should be made in the context of the particular needs of the provider and special skills or knowledge that it would be beneficial to have on the governing body. It is particularly important, for instance, to have governing body members who can assist with fiscal oversight⁷ and resource development.⁸

Each governing body member's knowledge of the community's interests should inform that person's participation in decision-making. At the same time, it is essential that each member recognize that the primary fiduciary duty of a governing body member is to the provider as an organization rather than to interests of communities of which the member is a representative. The responsibility of each member of the governing body is also to consider the legal needs of the entire low income population, not just the particular community with which they may identify. In addition, all members need to be aware of the legal needs of those communities served by the provider that are not represented on the governing body.⁹

For practical reasons associated with the size of its governing body, a provider may find it impossible to reflect the full diversity of the communities it serves and to also include all the skills that would be useful to include within the membership. It is important that all members be individuals who are sensitive to the overall needs of low income communities, who are

⁶ See Model Rules of Prof'l Conduct R. 5.4(d)(2) (2003) which prohibits a lawyer from practicing "with or in the form of a professional corporation or association authorized to practice law *for a profit* [emphasis added], if ... a nonlawyer is a corporate director or officer thereof"

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-3 (on Fiscal Matters).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

Standard 1.2 on Governing Body Members' Responsiveness to the Communities Served

supportive of the provider's mission and who recognize the importance of the provider operating in a culturally competent manner.¹⁰

It may be impractical for a legal aid provider that is part of a larger organization which exists for a variety of purposes, only one of which is related to legal aid, to achieve the desired level of diversity on its governing body. Many factors may dictate the makeup of the governing body of such a multipurpose organization. The provider should nevertheless strive to find other means to seek input from the communities it serves. It may, for instance, create an advisory committee the makeup of which reflects the community's diversity. The staff of the provider should also work directly with organizations and individuals who represent the diversity of low income communities.¹¹

Recruitment and selection

Identification of governing body members. The process for selecting members of the governing body will substantially affect the makeup and operation of that body. Consistent with requirements imposed by funding sources and the practical limitations imposed by its institutional structure, the governing body should seek representation from a broad cross-section of the low income population and from the legal community. The provider should work cooperatively with bar associations and other groups from which members may be drawn to keep them informed of the provider's activities and to encourage the identification of individuals who can serve effectively as governing body members.

Governing body members from rural areas. Providers that serve rural areas should be aggressive in their recruitment of members from those areas and attentive to their ongoing participation in governing body activities. It is particularly important to keep rural members involved in governing body activities because it is often difficult to provide services in rural areas and policy issues arise that affect rural service delivery, including budgeting, priority setting and approval of large capital purchases, such as technology.

The provider should cultivate relations with local community groups serving rural areas for the identification and selection of community and low income members of the governing body. It should similarly maintain positive relations with local bar associations in rural areas that may be the source of appointments of attorney members.

Operation in a manner that fosters effective participation on the governing body by all members

The role of each governing body member is important, particularly since responsiveness to low income communities calls for engagement of diverse viewpoints. The provider should recognize that recruitment of members does not guarantee their engaged participation on the governing body, and that many aspects of the governing body's operation will affect the degree

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 2.5 (on Staff Diversity).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

Standard 1.2 on Governing Body Members' Responsiveness to the Communities Served

to which all members become appropriately involved. There are many aspects of the governing body's manner of operating that will affect how fully members participate.

Remote participation by distant members. Providers that cover a very large service area may find that members of the governing body who are from more distant areas are difficult to recruit and even more difficult to keep involved. Often, input from such individuals is particularly important, however, because of special needs of such remote areas. Allowing for participation by telephone, video conference and other remote means can be essential to the ongoing participation of some members. Rotating locations of meetings, if feasible, to different parts of the provider's service area may help significantly in maintaining interest and participation by members from throughout the service area.

Operation in a culturally competent manner. The governing body should not only be sensitive to the responsibility of the provider to operate in a culturally competent manner, but should also be attentive to its own functioning. The governing body should be conscientious about supporting open communication among attorney and community members and among the governing body's diverse elements. The governing body may find it helpful to engage in training to increase its cultural competence and to enhance good communication.¹²

Maintaining engaged participation by members of the governing body. One aspect of effective governance by the governing body is for it to have well-informed members who are committed to the mission of the organization. The governing body needs to strike a balance between longevity and the insight that long experience brings on the one hand and the need for new ideas and fresh outlooks on the other.

There are several means by which a governing body can seek to strike the appropriate balance to assure that all members actively carry out their duties and are fully engaged in governing body activities. Its nominating committee, if it has one, should recommend individuals to serve as members who are committed and enthusiastic about their participation on the governing body. The committee should recruit new members who meet the varied needs of the organization for responsiveness to the community, oversight, resource development and sound policy making. It should recommend replacement of those members who have lost their enthusiasm or no longer participate effectively. If governing body members are designated by outside organizations, the provider should work with the appointing organizations to recruit engaged and committed members.

A governing body may find it useful to identify a pool of potential new members who can succeed those members whose service on the governing body is ending. Potential members, for instance, may serve on committees or advisory groups and learn about the provider's work and operation.

The governing body should have clear policies on attendance at meetings and participation in governing body activities. Because each seat is important to the governing body being able to respond effectively to the communities the provider serves, no position should be left *de facto* vacant because the individual is disengaged.

¹² See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 1.2-3 (on Training of Members of the Governing Body).

Standard 1.2 on Governing Body Members' Responsiveness to the Communities Served

Some providers have term limits requiring that members leave the governing body after serving a specified period of time. Term limits have the virtue of guaranteeing that new faces will be brought on the governing body at established intervals. On the other hand, they can result in the retirement of key members of the governing body who have invaluable insight into the operations of the provider and have intimate knowledge of how to respond to the legal needs of low income persons.

There is no one best way to assure that a governing body will maintain the enthusiastic, engaged participation of all its members and will find the right balance between maintaining experience and inviting new ideas. The governing body should adopt policies that are best suited to its circumstance to accomplish the goal of this Standard.

Governing Body Size. Governing bodies generally consist of a relatively small number of persons. The appropriate size of the governing body is a function of the specific needs of the organization. Most governing bodies consist of between 15 and 21 members, although some providers operate with governing bodies as small as 9 and as large as 35 or more. A governing body that is too large runs the risk of losing the involvement of some members who may be content to rely on others to carry out governance responsibilities. Inconsistent participation by members can lead to unpredictable outcomes in issues facing the governing body, particularly if different members attend each meeting. A governing body that is too small may not have enough members to share the burden of governance, including committee work and fundraising. Very small governing bodies also have greater difficulty reflecting the diversity of the provider's low income communities for obvious practical reasons.

Use of Committees. Committee work is an integral part of the governing body's decision-making processes. The agenda of governing body meetings is often too full to permit adequate consideration of the full range of details of complex issues. The governing body should appoint committees, when necessary, to consider issues in depth prior to meetings and to make appropriate recommendations for action by the full governing body. It should also have permanent committees that oversee key aspects of the provider's operation, such as audit and finance,¹³ personnel, resource development¹⁴ and planning.¹⁵ Membership on committees should include representatives of the low income community as well as attorney members.

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-3 (on Fiscal Matters).

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

STANDARD 1.2-1 ON INDIVIDUAL MEMBERS' COMMITMENT TO THE PROVIDER

STANDARD

All members of the governing body should be committed to the mission of the provider and devote adequate time to meet board responsibilities.

COMMENTARY

General considerations

The governing body needs to make prudent decisions that are responsive to the needs of low income communities for effective legal assistance. This calls for its members to support the mission of the provider and to commit adequate time and resources to carry out their responsibilities.

Support for high quality, responsive legal assistance. Members of the governing body should be persons who recognize the essential role of assertive advocacy in the American system of justice. They should also be sympathetic to the challenges facing persons without financial means and should support forceful legal representation to respond to their legal problems. They should appreciate how their decisions significantly affect how the needs of low income communities for effective legal assistance are met.

Effective communication with the low income and legal communities. Members should recognize the importance of the provider communicating effectively with the low income population regarding how best to serve low income persons.¹ They should be open as board members to communication with representatives of the low income community and to open discussion among all members of the governing body. All board members should participate fully in deciding important issues.

Members of the governing body should also appreciate the importance of establishing a firm link between the provider and the legal community to develop a more informed understanding of the legal needs of low income communities and to encourage participation by members of the bar in representation of clients.²

Commitment of adequate time and resources. Membership on the governing body of a legal aid provider involves significant responsibilities. The governing body cannot carry out its essential functions without the informed, committed involvement of its individual members. Effective participation begins with a willingness to learn about the provider's mission, how it operates, how it is funded and what the legal requirements are that govern its operation. It also calls for each board member to learn about the important characteristics of the low income communities

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.3 (on Governing Body Communication with Low Income and Legal Communities).

² See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.2 (on Delivery Structure); Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar); Standard 2.8 (on Relations with the Organized Bar).

Standard 1.2-1 on Individual Members' Commitment to the Provider

served by the provider and the legal problems they face.³ Such knowledge and awareness is important to the governing body making appropriate decisions regarding service delivery, budgeting, financial management, and other pertinent matters.⁴

Members also need to commit adequate time to carrying out their responsibilities. They should commit to regular attendance at meetings of the governing body and any committees to which they are assigned. They also need to commit time to completing any projects or tasks they agree to take on, including the direct support of the provider's resource development strategies.⁵

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.2-3 (on Training of Members of the Governing Body).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 1.1 through 1.1-6 (on Overall Functions and Responsibilities of the Governing Body).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

STANDARD 1.2-2 ON BOARD MEMBERS FROM THE COMMUNITIES SERVED BY THE PROVIDER

STANDARD

The governing body should include members who are or have been eligible to receive legal assistance from the provider.

COMMENTARY

General considerations

The governing body will have better insights into the legal needs of the communities it serves if its membership includes persons who have directly experienced those needs. For many legal aid providers a primary criterion for eligibility for service will be the applicant's financial means. In order to have board members who understand the challenges of poverty, the governing body should include members who are or have been financially eligible for the provider's services. Other providers may target a particular population, such as the elderly or persons with disabilities, or specific substantive issues, such as access to health care, without regard to the financial means of persons served. Such specialized providers should, if practicable, include members of the population served on their governing body.

Supporting full participation by representatives of the low income community

The governing body should be aware of potential barriers to full participation by representatives of the low income community and should take steps to help overcome those barriers. Board members who have experienced poverty and are from a low income community that the provider is serving will have insights and knowledge that professional members of the governing body may lack. Some low income representatives, however, may feel intimidated by attorneys on the governing body and may be unfamiliar with legal terminology and the operation of the legal system that are germane to decisions that the governing body needs to make. It is important, therefore, that the provider act to overcome any impediments to full communication among board members.

A number of strategies may enhance effective communication and full participation on the governing body of all its members. The provider should provide orientation and ongoing training of community members regarding operation of the provider, regarding the legal system particularly as it affects low income communities and regarding issues affecting the delivery of legal services.¹ Some providers hold separate meetings of community members before regularly scheduled board meetings to answer questions and assure that the members are fully prepared to participate and present their insights.

The provider should consider including members of the governing body in its cultural competence trainings that are designed to facilitate better communication across cultural lines.²

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.2-3 (on Training of Members of the Governing Body).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

Standard 1.2-2 on Board Members from the Communities Served by the Provider

Social events that stimulate informal interaction among board members can also increase familiarity and trust that foster ease of communication in formal meetings.

Low income persons' lack of economic resources may hinder full participation on the governing body if, for example, they cannot pay for child care while they are at meetings, if they cannot take time off work without losing wages, or if they cannot afford transportation to get to meetings. The provider should pay reasonable expenses associated with low income representatives' participation on the governing body and should schedule board and committee meetings to facilitate all members' attendance.

Other means for involvement of low income persons

Some legal aid providers may encounter legal or institutional impediments to having non-lawyers on the governing body. A legal aid provider that is part of a larger organization that exists for a variety of purposes in addition to representing the low income persons in civil legal matters may find it impractical or impossible to include low income persons on its governing body. The provider should nevertheless strive to maintain other means of involving persons from the low income community, so that the provider's policies maximize the effectiveness of its service to its clients. Such a provider may, for example, create a client advisory committee to provide advice about delivery structure, priorities and other policy matters affecting assistance to low income persons.

STANDARD 1.2-3 ON TRAINING OF MEMBERS OF THE GOVERNING BODY

STANDARD

The provider should assure that all members receive orientation and training necessary for full and effective participation on the governing body.

COMMENTARY

Not all new members come to the governing body prepared for full and effective participation at the time they are selected. The provider should, therefore, strive to assure that members obtain the required skills and knowledge by providing orientation and training.

New members should receive orientation that includes information on:

- An historical perspective of legal aid nationally and in the local community;
- The provider's structure, general operations and special programs;
- National and local sources of funding for legal aid;
- The nature of the legal services offered by the provider;
- Important characteristics of the low income communities served by the provider;
- Any limitations or requirements imposed on the provider's operations by statutes, regulations, funders, contracts, and ethical obligations;
- The role, structure and functioning of the governing body and its committees as well as any client or other advisory groups.

In addition, the provider should offer training to its governing body members as needed. Such training should help provide skills and substantive knowledge necessary for effective participation on the governing body. Appropriate topics for training may include: legal requirements governing the operation of the provider, budgeting and accounting oversight; fundraising and resource development;¹ developments in legal services delivery and pertinent substantive legal issues; communication and meeting skills; cultural competence, to increase the governing body's familiarity with issues facing the provider in serving diverse low income communities and to support effective communication with the low income community;² the content of these Standards; and other subjects that relate to effective governing body operation.

Because members of the governing body are volunteers, they may have limited time for formal training apart from regular board activities. The provider should attempt to include necessary training as part of the agenda for regular meetings of the governing body when possible.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

STANDARD 1.2-4 ON GOVERNING BODY MEMBERS' CONFLICTS OF INTEREST

STANDARD

Governing body members must not knowingly attempt to influence any decisions in which they have a conflict with the provider or its clients.

COMMENTARY

General considerations

No member of the governing body should participate in a decision in which the member has a personal, professional, organizational or institutional interest that is in conflict with the interests of the provider or its clients. The governing body has a responsibility to adopt appropriate policies that protect against conflicts of interest and provide appropriate guidance to its members regarding their responsibilities in the event that a conflict arises.

A potential conflict of interest may arise in a variety of ways:

- When a governing body member has a personal or pecuniary interest in a matter that is under consideration by the provider;
- When a member is employed by or associated with an organization that has a competing or adverse interest with that of the provider;
- When a member has a personal or institutional interest that is in conflict with interests of the low income communities served by the provider;
- When a member represents a client whose interests are adverse to the interests of a client of the provider, although the clients are not direct adversaries in a particular case; or
- When a member represents a client who is a direct adversary of a client of the provider in a specific case.

The provider should adopt policies, consistent with the ethical requirements and the law governing conflicts of interest in the jurisdiction in which the provider operates, that assure that any conflicts are effectively managed. The policies should define what constitutes a conflict of interest. Generally, a conflict of interest exists if a governing body member's judgment is – or may be – influenced by considerations of personal gain or benefit, or of gain or benefit to a third party. When the potential conflict of interest involves a client of the governing body member, of the provider or of both, ethical considerations may govern whether there is a conflict and the policy should provide guidance regarding the professional obligations of the provider and the governing body member.

The policies should also instruct the governing body and its members regarding what to do in the event that a conflict does arise. Generally, the fact of a conflict must be disclosed and the member cannot participate in any discussion or vote on any matter that gives rise to the conflict. The policy should make it clear that a governing body member with a conflicting interest also has an obligation to avoid influencing the operation of the provider by any indirect means, such as in decisions regarding priorities, allocation of resources, or provider structure. The policy

Standard 1.2-4 on Governing Body Members' Conflicts of Interest

should also prohibit any governing body member with a potential conflict from informally seeking to influence the conduct of legal work or the operation of the provider.

Conflicts may arise unexpectedly and they are often impossible for the governing body or its individual members to anticipate. Moreover, concern about the risks associated with foreseeable conflicts should not exclude from the governing body every person who might have a conflict. Rather, the policy should provide guidance for management to anticipate potential conflicts and the appropriate steps that the governing body member should take to avoid improper action.

A strict rule that forecloses anyone with potential conflicts from serving as a member of the governing body could exclude individuals with beneficial skills and experience and inhibit establishment of a positive relationship with the legal profession overall.¹ This is particularly true in rural areas and small communities where the pool of potential governing body members may be relatively small and the likelihood of occasional conflicts relatively high.

Concerns associated with different types of conflicts

Governing body member's personal or pecuniary interests. Governing body members may occasionally have conflicts that arise when the member or the member's family has a financial or personal interest in a matter under consideration by the provider. Such conflicts can arise unexpectedly in the normal course of the provider's operation, such as when the lease or purchase of real property may affect a governing body member's own interests. Generally, disclosure of the conflict and withdrawal from any discussion or voting on the matter is adequate to address the conflict.

Organizational conflicts between the provider and competing entities. There may be situations where a governing body member is employed by, on the governing body of, or represents an organization that has a competing, adverse interest with that of the provider. These conflicts may arise, for instance, when the provider and another organization with which the governing body member is associated are competing for the same funding. Often these conflicts can be managed by disclosure and recusal from discussions and decisions that affect both entities. If the conflict is ongoing and involves access to information that may be confidential regarding such things as a long-term fundraising strategy or a confidential business plan, proper protection of the interests of the provider may call for the member to resign from the governing body.

Institutional conflicts with low income communities served by the provider. Circumstances may arise where a governing body member has a professional interest that is in conflict with the interests of the low income communities that the provider serves. A finance company, for example, has economic interests that are served by laws and policies favoring creditors rather than borrowers and a governing body member who represents finance companies may have an institutional conflict with a provider that seeks to challenge those laws or policies on behalf of low income client communities. Similarly, a real estate developer seeking to develop an industrial park in the heart of a low income neighborhood may be fundamentally at odds with

¹ 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); Standard 2.8 (on Relations with the Organized Bar).

Standard 1.2-4 on Governing Body Members' Conflicts of Interest

the interests of the client community in that neighborhood that wishes to preserve the area for affordable housing.

Institutional conflicts with the low income community can be more complicated to manage. Such conflicts can arise unexpectedly with an existing governing body member and should be addressed in accordance with the provider's conflict of interest policy.

In some circumstances, an individual being considered for appointment to the governing body may have such a conflict. In making appointments to its governing body, the provider should consider institutional conflicts on a case-by-case basis. Among the factors to consider are the extent of the apparent conflict and the degree to which the provider's conflict of interest policy will be adequate to prevent inappropriate participation by the member in decisions related to the apparent conflict.

The governing body may also look to factors that suggest the individual will, in fact, exercise independent judgment in serving as a member of the governing body, in spite of the apparent institutional conflict. Such factors could include the degree to which the potential governing body member has a policy making role with the institution with the adverse interest and indicia of the individual's support of the overall mission of the legal aid provider.

Professional conflicts with the provider's clients. A conflict may arise when a governing body member represents an institution that has interests that are inconsistent with the interests of a particular client of the provider, although the provider's client and the governing body member's client are not adversaries in the same case. For example, such a conflict could exist when a governing body member represents a large financial institution that makes sub-prime home mortgage loans, and the provider is suing a different financial institution in a predatory lending case.

The responsibilities of the governing body member are governed in such circumstances by the ethical requirements in the jurisdiction in which the member practices. Generally, the practitioner's professional obligation to the client and fiduciary duty to the provider dictate that the individual not knowingly participate in a decision or action of the provider that would affect either the governing body member's client, the provider, or a client of the provider.² As with general institutional conflicts, the question arises as to whether a person with such a conflict should be invited on the governing body, if the conflict is known at the time that appointment is being considered. The matter should be determined on a case-by-case basis applying the considerations discussed above.

Representation of a client by a member of the governing body against a client of the provider. Occasionally, an attorney member of the governing body represents a client in a case where the adversary is a client of the provider. Generally, because the attorney member of the governing

² See Model Rules of Prof'l Conduct R. 6.3 (2003) on Membership in Legal Services Organization, which provides that: "A lawyer may serve as a director, officer or member of a legal services organization...notwithstanding that the organization serves person having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization: (a) if participating in the decision or action would be incompatible with the lawyer's obligation to a client under Rule 1.7; or (b) where the decision or action would have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer."

Standard 1.2-4 on Governing Body Members' Conflicts of Interest

body does not have an attorney-client relationship with clients of the provider, there is not an impermissible conflict under pertinent ethical rules.³

While such representation may not create an actual conflict, the appearance of a conflict can raise ethical concerns,⁴ and the provider's conflict of interest policy should include provisions to manage such situations.⁵ The policy should clearly prohibit the attorney acting as a governing body member from taking any action to influence the conduct of legal work pursued by the provider on behalf of its client. There must be no infringement of the practitioner's representation of the provider's client and the governing body member must not have access to any confidential information about the case.

The practitioner representing the provider's client has an obligation to assure that the fact that a governing body member is representing an adversary imposes no negative impact on the exercise of the practitioner's independent judgment on behalf of the client. The provider and practitioner should be aware of and abide by the ethical requirements in the jurisdiction in which they practice, including the obligation, if any, to obtain the client's consent to the representation.⁶

³ Paragraph 3 of the Comment to Model Rules of Prof'l Conduct R. 6.3 (2003) states: "Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed." *See also* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

⁴ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 345 (1979).

⁵ Paragraph 2 of the Comment to Model Rules of Prof'l Conduct R. 6.3 (2003) states: "It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances."

⁶ *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 345 (1979).

STANDARD 1.3 ON GOVERNING BODY COMMUNICATION WITH LOW INCOME AND LEGAL COMMUNITIES

STANDARD

The governing body should operate in a manner that invites communication with the low income and legal communities.

COMMENTARY

General considerations

A legal aid provider is an important part of the legal system carrying out an essential function responding to the needs of low income communities for civil legal assistance. It will generally be more successful in establishing its credibility in both the low income and the legal communities in which it operates if its governing body functions openly and invites communication with those communities.¹ Communication with both communities will also enhance its capacity to adopt policies that increase its effectiveness serving low income persons and help it integrate the resources of the bar into its delivery efforts.²

Communication with the low income and legal communities

The governing body should strive to operate in a way that encourages communication with the legal and low income communities. Its members should maintain individual contacts with groups with which they have connections. In addition, the governing body should assure that the provider informs the legal and low income communities of its policies and actions through meetings and publications, such as newsletters and annual reports. The governing body should also communicate with the leadership of the organized bar in its service area and with interested members of the profession.³ Communications should include information on the provider's accomplishments as well as pertinent budget matters and issues such as areas of focus, special projects, priorities for legal work, eligibility and office hours.

Input from communities affected by governing body decisions

There are several ways in which the governing body may invite input from communities affected by its decisions. Some interaction will take place in meetings that are designed to solicit input before significant decisions are made about the operation of the provider. Some such meetings may take place in the context of long-term planning about the focus of the

¹ See also ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.12 (on Institutional Stature and Credibility).

² 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).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.8 (on Relations with the Organized Bar).

Standard 1.3 on Governing Body Communication with Low Income and Legal Communities

provider's legal work and may involve the provider's staff and others.⁴ Sometimes interaction may occur in a regular or special board meeting. The governing body may also invite outside persons to participate on committees and task forces in order to get their insights about important issues facing the provider.

It is important that regular meetings of the governing body be conducted in a way that supports the informed participation of all members. Members of the governing body may be instrumental in soliciting views of outside groups and explaining to those groups significant decisions that have been made and to do so members need to be well informed about the issues. All members of the governing body, therefore, should participate in decision-making and the governing body should meet frequently enough for its members to have a solid working understanding of program operations and issues. Meetings should be held at a time and place that facilitate the participation of board members and others whose input is being sought.

A complete agenda should be made available prior to all meetings and should be sufficiently descriptive to advise governing body members and other interested persons of the matters to be considered. Members should receive as much supportive and explanatory information as possible prior to the meeting to provide an opportunity for review and analysis of significant matters.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

SECTION 2

**STANDARDS REGARDING PROVIDER EFFECTIVENESS –
GENERAL REQUIREMENTS**

STANDARD 2.1 ON IDENTIFYING LEGAL NEEDS AND PLANNING TO RESPOND

STANDARD

A provider should interact with low income individuals and groups serving low income communities to identify compelling legal needs and should implement plans to address those needs most effectively.

COMMENTARY

General considerations

A provider should be aware of the most compelling legal needs of the low income persons that it serves. That awareness enhances a provider's capacity to make sound choices regarding its operation, supports necessary planning, and facilitates the establishment of appropriate provider priorities. A legal aid provider typically has severely limited resources to address the competing demands and overwhelming needs of its client eligible population. It, therefore, needs to allocate its resources to provide assistance that addresses the most compelling, unmet needs of that population. To do so requires having the means to identify the most significant legal problems and to understand how they impact low income individuals as well as the low income population as a whole. It also requires the provider to be aware of other resources available to respond, including those available from the statewide and regional system in which it operates.¹

Provider communication with the low income population.

Effective communication with the low income population a legal aid provider serves is an essential ingredient of the provider's being aware of the legal needs of that population. Day-to-day communication with applicants and clients through intake and other in-person interactions can provide valuable insight into the most pressing needs of the low income population. A provider should have a means to spot patterns among legal problems that are presented at intake, and to detect significant changes that may herald the emergence of new legal issues.

A provider whose contacts with low income persons are limited to the office setting will not be fully aware of or understand the full range of legal needs and objectives of low income persons it serves. Issues that are presented at intake are often a reflection of the kinds of cases the provider already accepts. Low income persons' perceptions of the types of issues the provider handles may limit the nature of the problems for which they seek assistance. Furthermore, many people do not recognize that a problem they face presents legal issues and so may not bring it to the attention of the provider.

To gain deeper insight into the legal problems of the low income community, therefore, a provider should interact with client groups and with groups that serve the low income community and are familiar with its needs. Ongoing communication with such groups helps the provider to recognize the constantly changing circumstances and legal needs of the low

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

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income population it serves in order to adjust its representation efforts to better serve its constituents. Such interaction can take place when a provider represents client groups and works with them in collaborative projects. Meeting with the members as well as the leaders and spokespersons of the groups helps deepen the provider's insights into the low income communities it serves.

Practitioners may also maintain informal contact with client groups and their leaders outside the context of legal representation. Participation on boards and advisory committees as well as attendance at meetings and other community activities are potentially rich sources of information and insight into the needs of the low income community. Working with social service agencies as well as community-based and faith-based organizations that serve low income persons can also give providers valuable insight into the range of issues and the concomitant legal problems that members of the low income community face.

The provider should strive to assure that its contacts are not limited to one segment of its clientele. Open relations with a number of client and community groups can expose the provider to a wide spectrum of problems confronting low income persons and avoid dominance by a single issue group.

It is important for a provider to reach out to the cultural and linguistic groups that make up the low income population. It should be aware of the many sub-groups that may exist in its service area and should be attentive to the arrival of new populations made up of new immigrant groups, or other new categories of client-eligible persons.²

A provider that serves both urban and rural areas should take steps to be aware of issues affecting low income communities throughout its service area, including the more remote areas. Some issues will be unique to persons living outside cities and others will impact very differently on the rural poor or the urban poor. Rural communities also typically have fewer resources available to help respond to recurring legal problems and to alleviate their impact.

Other pertinent information. In addition to interacting with groups of low income persons, a provider should use other means to stay aware of developments in its service area that might affect low income people. News reports of economic, social and political events may portend the development of legal problems or of new opportunities for the low income population. Participation in bar and judicial activities may offer insight into developments in the administration of the courts and changes in local legal practice that might have an impact on low income persons, particularly low income pro se litigants.

Formal legal needs assessments. A more formal assessment of the legal needs of the low income community conducted periodically by the legal aid provider on its own or in concert with others in the statewide or regional system, may serve to identify issues that might be missed with ongoing interaction with the same set of client and community groups. More formal assessments can also establish a baseline regarding the relative importance attached by individuals in the low income community to recurring legal problems. Such assessments should be designed to obtain the views of persons eligible for legal aid and of people or

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

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agencies that work with or know the situations of low income persons including social service agencies, community organizations, community leaders and the judiciary.

When conducting a legal needs study on its own or as part of a collaborative effort with others, it is important that the provider select a design that will reach isolated persons in the client eligible population. Persons without telephones or without published telephone numbers, such as those who rely exclusively on a cell phone, may be missed entirely if the design does not account for them. Similarly, the views of people who are homebound or institutionalized as well as people who exclusively speak and write a language other than English will be lost without special efforts to reach out to them. Legal needs studies should also be designed to take into account the needs of low-wage workers. Data can be gathered from the eligible population by using a variety of methods including interviews, surveys, focus groups of persons from the low income community including clients and meetings with community groups.

Application of the Standard

Different legal aid providers will have differing needs and capacities to communicate with potential clients through avenues other than intake. Some providers operate primarily or exclusively to represent the poor, while others undertake such work as one of a number of diverse activities. Some providers have a large central staff with full time employees, while others operate with a small workforce of staff attorneys or volunteers or partially compensated private lawyers who devote only a small portion of their time to legal aid work.

Some providers are organized for a very specific purpose, such as to provide representation in a discrete, predetermined area such as consumer debt or divorce. Others may serve a specifically targeted population, such as the elderly or persons with HIV/AIDS. Providers organized for such focused purposes need to tailor how they maintain awareness of the changing needs of their client population based on the nature of the work.

Some providers may serve as an adjunct to a larger organization whose work they seek to supplement. A bar sponsored pro bono program, for instance, may work exclusively with a larger, full service organization and may rely on it for maintaining awareness of the changing needs of client communities and determining the focus of its work.

To the extent that a provider has a central staff engaged in the direct delivery of services, and operates as the primary provider of legal services to the poor in its service area, it should establish a variety of means for communicating with clients to meet the objectives of the Standard. If a smaller organization does not have sufficient resources, it should, nonetheless, seek to be as engaged as possible with the low income communities it serves. In addition, it should participate in statewide and regional systems and draw on the insights of other organizations that have a greater capacity to engage with clients and client groups outside of the office.

The availability of other resources to serve clients. In addition to being aware of the legal needs facing its client communities, each provider should be aware of the resources available to respond to those needs. The provider should participate in statewide and regional systems for responding to client needs so that it can tailor its response to the needs in the context of other

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resources that might be available to respond. It should also support development and deployment of resources in the system to assure the availability of a full range of services, responsive to the most pressing needs of low income persons in its service area. It should make its choices both about the substantive focus of its legal work and the delivery mechanisms it employs in order to complement and take advantage of other resources that are available to the same population.³

Comprehensive planning to meet identified legal needs

The provider's knowledge of the most pressing legal problems facing its low income population is crucial to planning how best to meet those needs. Effective planning serves several important purposes. First, it enhances the likelihood that a provider will utilize its resources in ways that are most appropriate to serving its clients. Second, planning that sets clear objectives for a provider's efforts facilitates its evaluation of its efforts on behalf of clients.⁴ Third, planning offers a solid basis for internal policies that set case acceptance standards, determine internal needs such as training and formally set priorities.⁵

The approach to planning may vary among legal aid providers, but each provider should be rationally organized and effectively administered to achieve its objectives. To that end, deliberate decisions need to be made about what the provider aspires to accomplish for its low income population and how it proposes to accomplish it.

There are a variety of ways that a provider may go about planning how best to serve its low income population and no one way is always best. At times, a formal process is appropriate, and, at others, planning may happen implicitly in the course of ongoing management decisions about the provider's operation.

Formal planning processes may involve face-to-face discussion among potential clients, the governing body, staff and outside attorneys engaged in delivering services. Key interests of the community should be represented, if possible, with regard to culture, language, race, gender, age, disability, national origin, religion and geographic location. Particular efforts should be made to obtain representation of the interests of individuals who are physically unable to participate in a planning process, such as the institutionalized, the homebound, children and low-wage workers. It is useful to obtain input from other organizations that serve the poor, such as public defender offices, employment services, churches and other faith-based organizations and social service agencies.

Whatever its form, planning should help establish or affirm key aspects of the provider's operation:

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.5 (on Training); Standard 5.2 (on Policy for Acceptance of Applicants for Service); Standard 2.2 (on Delivery Structure); and Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities). See also, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334, pp. 8-9 (1974); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1359 (1976).

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- The provider should have a clear sense of its focus and what it hopes to accomplish overall for its clients. It should take steps to ensure that all staff have a clear, shared sense of the mission and vision of the organization and how it will accomplish that mission.
- The provider should determine the substantive areas in which it will represent its clients. The decision may include broad determinations of the areas in which it will assist clients and may set specific objectives for its legal work in each area. Setting long-term goals and objectives for the provider's substantive legal work can be a valuable tool for maximizing the effectiveness of that work.
- The provider should determine broad strategic approaches, including the degree to which it will engage in efforts to accomplish systemic change.
- The provider needs to make an intentional choice regarding its overall delivery approach, including what types of assistance⁶ and what delivery mechanisms⁷ will best serve the needs of its low income population.
- The provider should plan in the context of its role in the regional or statewide delivery system of which it is a part. To the degree possible, its role and the focus of its legal work should be selected to foster the capacity of the overall delivery system to provide a full range of services to the low income community.⁸

Effective planning has an evaluation element built into it. It is important that a provider's efforts to identify the legal needs of the low income community it serves and to engage in planning to meet those needs be regularly assessed by it to determine if its efforts have been successful and if its objectives have been met.⁹

⁶ See Section 3, ABA Standards for the Provision of Civil Legal Aid (2006), Standards 3.1 to 3.6.

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.2 (on Delivery Structure).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

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

STANDARD 2.2 ON DELIVERY STRUCTURE

STANDARD

Within the context of its regional and statewide delivery system, a provider should establish delivery mechanisms that effectively and efficiently meet its low income communities' legal needs.

COMMENTARY

General considerations

A legal aid provider should establish an overall delivery structure and choose the delivery mechanisms that utilize limited resources effectively to respond to the most compelling, unmet legal problems facing members of the population it serves. The provider's approach to delivery should be appropriate to the particular circumstances in which it operates and should balance four goals:

- To be effective in responding to the most compelling, unmet legal needs of the low income population it serves;
- To assure the delivery of high quality assistance;
- To utilize its resources efficiently; and
- To facilitate access for members of its client communities to assistance appropriate to their legal needs.

Decisions about each provider's delivery structure should be made in the context of the local, regional and statewide systems of which the provider is a part. The provider should work with other providers to establish a unified delivery structure in which participating organizations complement and support each other's efforts to respond fully to the legal needs of the low income population.¹

The provider also needs to determine how technology will be used as part of its efforts to meet the needs of clients. Technology is important as a tool to support effective work on behalf of clients and efficient administration of the provider. Information technology is also an increasingly important component of methods employed to provide assistance directly to members of low income communities.²

There are a number of delivery mechanisms that a provider can utilize to serve its constituents. The provider should be familiar with new delivery techniques and should determine if they are appropriate to meet the needs of the low income population it serves. Delivery techniques evolve with changes in the practice of law, with the adoption of new advocacy strategies, with the advent of new technologies and with successful experiments in reaching out to and serving low income clients. Each provider should stay abreast of such changes and should take

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

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advantage of new delivery approaches that may increase its capacity to serve its clients effectively and efficiently.

There are many examples of such changes and more will no doubt evolve over time. A few examples illustrate the point:

- High volume, legal advice offered by telephone, sometimes referred to as hotlines, evolved rapidly when information technology make it possible to establish and supervise such systems more easily.
- Some providers with large, sparsely populated rural areas use video conferencing as a way to reach out to persons in isolated hard to reach places.
- Technology has increased the capacity of providers to support complex advocacy in isolated offices.
- Websites and kiosks impart legal information to members of low income communities and provide useful guidance in areas of the law that lend themselves to such assistance.
- Various strategies aimed at community economic development have developed in the face of increasing need for members of client communities to find and keep employment.

As the delivery of legal services has evolved, many providers have experimented with new techniques that offer limited representation or legal information to large numbers of persons who have commonly occurring legal problems. The techniques take advantage of developments in technology, changes in how courts operate and other changes in the practice to reach large numbers of people in need. One feature of these models is that they can provide services to large numbers of clients with a smaller expenditure of the provider's resources than is required by many forms of full representation.

The four goals of 1) effectiveness responding to legal needs, 2) high quality, 3) efficiency and 4) access are important for a provider to keep in mind when deciding how to fold new delivery techniques into its overall delivery approach. On the one hand, many of the approaches economically provide access to assistance for large numbers of client eligible persons. On the other hand, some legal problems cannot be effectively resolved without costlier form of representation.

All approaches need to be measured against the standard of whether they effectively respond to compelling, unmet legal needs of low income persons. Efficiency should be measured in terms of cost-effective use of resources to accomplish a meaningful result. Providers, therefore, should not choose an approach based only on the number of persons able to be served – which can be a temptation if a provider feels pressure, real or imagined, to show funders and others results in terms of quantity of cases closed.

Designing its delivery structure also entails the provider making choices about what types of representation³ are appropriate to respond to the needs of the client population it serves,

³ Issues associated with full and limited representation are discussed at length in the commentary to Standards that pertain to such representation. *See* ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.1 (on Full Legal Representation); 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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including whether it will engage in legislative and administrative advocacy⁴ or community economic development.⁵ The provider also needs to determine the degree to which offering community legal education and legal information will be part of its approach to serving the low income communities in its service area.⁶

Design of the structure and selection of the mechanisms for the delivery of legal aid involves many decisions about who will perform legal work – staff attorneys, outside attorneys⁷, and non-attorney practitioners⁸ – and how those practitioners will be deployed in the provider's service area. Issues associated with deployment and utilization of personnel are discussed in the commentaries to a number of Standards.⁹

Delivery in Rural Areas

Rural areas present special challenges to be addressed in establishing a delivery structure and allocating resources. Substantial distances and transportation costs may mean a central office is physically accessible only to those who live within a short radius; yet widely dispersed small offices can be costly and relatively inefficient. A legal aid provider is not likely to have enough resources to staff branch offices adequately in each community within its service area, although in some communities, it may be able to establish minimally staffed satellite offices supported from a larger office.

Providers serving sparsely populated rural areas should establish contact with client and community groups, bar associations, social service agencies, employment services and others familiar with the legal needs of the low income population throughout its service area in order to stay informed about serious issues affecting clients to enable them to respond with effective legal services where appropriate.

Providers should consider a variety of means to provide services in rural areas and should explore new opportunities for use of technology and other developments that may facilitate access for rural clients. A number of techniques are available and more are likely to evolve with advances in information technology:

- Centralized telephone intake and the provision of legal advice and limited intervention by phone can increase the provider's capacity to reach otherwise isolated clients. Advances in technology can help overcome some of the limitations of serving clients

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

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

⁷ 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).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.9 (on Use of Non-attorney Practitioners).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 2.5 (on Staff Diversity); Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar); Standard 2.9 (on Use of Non-attorney Practitioners); Standard 4.6 (on Communication in the Primary Languages of Persons Served); Standard 6.1 (on Characteristics of Staff).

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remotely by telephone, particularly with regard to the transfer of documents important to a case.

- Private attorneys in local communities who are willing to represent eligible clients for no or limited compensation can substantially improve a provider's capacity to make services available where clients live.¹⁰ The provider should address how matters will be handled when there are conflicts of interest or substantive issues with which the local attorneys are unfamiliar.
- Use of circuit-riding and mobile vans can provide periodic, temporary presence in local communities. Appropriate use of technology may ameliorate the potential loss of efficiency resulting from practitioners' travel time and their lack of ready access to items such as client files and legal research materials.
- Some isolated rural clients can be served through video conferencing in which computers and other necessary equipment are located in local organizations, such as social service agencies, churches and libraries. Such systems do permit a full interview and something akin to face to face contact. They do not resolve problems associated with the need for a court appearance on behalf of the client, although some courts have experimented with video appearances. As technology and rural internet access improve such approaches are likely to increase in effectiveness.
- Local paralegals and lay advocates working in a satellite office can provide intake and refer cases to a fully staffed office for representation, when necessary. They can also provide advice, under the remote supervision of a lawyer, and represent clients directly in circumstances where non-attorney assistance to clients is permitted by law.¹¹
- Community legal education offered through websites, limited access television channels and other electronic media may advise clients of their rights and responsibilities and provide them legal information to help them to avoid incurring problems or to respond without direct representation. The provider may also offer self-help materials to assist persons with pro se representation, when it is appropriate. The provider should be aware of the limitations that exist to access to the web because of limited bandwidth in many rural areas and the lack of access to computers among many low income persons living in rural areas.

The number, size and location of offices

Decisions about the number, size and location¹² of provider offices are closely related to decisions about the types of practitioners and the extent of specialization. Such decisions will be influenced by considerations of cost-effectiveness, the availability of private attorneys throughout the service area, staff recruitment issues and the need for staff development and

¹⁰ 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).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.9 (on Use of Non-attorney Practitioners).

¹² For a lengthy discussion of office location issues, see ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.5 (on Access to Services).

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quality assurance. A balance needs to be struck between direct physical access for clients and the provider's need to address priorities efficiently and with high quality representation.

Experience indicates that in many cases clients may be served more efficiently and effectively through large offices that serve large areas. Such offices may facilitate the supervision and training of staff and the implementation and operation of law practice systems. The provider has greater flexibility regarding specialization, and patterns of work assignment. Having practitioners work in close proximity with others sharing the same goals may stimulate creativity and proficiency. The cost of maintaining small offices is relatively high, because of disproportionately higher overhead and the loss of economies of scale.

These considerations need to be balanced against the important fact that having a physical presence in the communities makes a significant difference in access for clients and the capacity of the provider to engage the low income communities that it serves. Experience indicates that the number of clients that use the services of a legal aid provider is higher in communities in which it has an office.

The physical presence of practitioners may be significant to clients who are unaccustomed to dealing with lawyers. Particularly when a provider is reaching into areas it has not previously served, it may need to encourage clients to seek out legal services. Moreover, the physical presence of a legal aid provider often results in more oversight of agencies that affect the low income population, such as housing authorities, departments of social services and social security agencies.

Staff in small offices are likely to find it easier to learn about the communities they serve, to develop constructive relationships with the bar, courts and social service agencies, and to become familiar with local practice customs.

Thus, a major disadvantage of centralization is the danger of the provider's isolation from distant segments of its service area. For rural legal aid providers serving extremely large geographic expanses, consolidation may be infeasible. Some providers serve client eligible populations that are hundreds of miles from any large office. The resources available, however, may only support offices with a small staff. Such offices often face problems recruiting advocates because of their remoteness from large population centers. Loss of even one staff member, particularly a lawyer, can disrupt services significantly while the person is being replaced.

There are no easy answers regarding how a provider should structure itself in terms of the size, number and location of offices. Whatever choices are made, it is important that the provider seek to mitigate the disadvantages that the option presents.

If a provider disperses staff in small offices, it should adopt a variety of strategies that will help to overcome the isolation of the staff. Failure to do so may lead to staff frustration, stifle the incentive for professional growth, and contribute to turnover. Strategic use of technology may ameliorate such consequences. Web-based case management systems offer the possibility of effective long distance supervision and oversight of the legal work of an inexperienced practitioner. E-mail lists and other electronic means of linking experienced practitioners with those who are less experienced can significantly reduce a debilitating sense of isolation.

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Training modules that rely on long-distance learning similarly can help support the professional development of staff in remote offices.

Conversely, a provider with consolidated offices should take positive steps to reach out to isolated parts of its service area and to assure wide distribution of information about legal aid. Contact with client groups, with other organizations concerned with the interests of the poor, and with persons familiar with the legal problems in those areas can help the provider identify and respond to legal needs in areas without an office.¹³ Technology also offers support for contact with individual clients through video conferencing.

Effective utilization of private attorneys can greatly facilitate a provider's efforts to provide services directly to clients in the communities and neighborhoods where they live. In many large rural areas, the only practical way to provide service in some isolated communities may be through the volunteer or compensated efforts of private attorneys. There may be practical limitations to this, however, as some rural areas and some urban neighborhoods have few or no practicing private attorneys located in or near them.

Specialization

One choice that a provider faces in organizing its delivery structure is the degree to which it will have its staff specialize in specific substantive areas of the law, such as housing, or on discrete representation tasks, such as appellate work, legislative representation, or community education. There are gradations from absolute specialization in which practitioners focus on a relatively narrow issue to generalists who address whatever issue they encounter.

The choice between specialization and a generalist practice is not absolute and there are a number of models that may be appropriate for a provider. Practitioners, for instance, may be expected to develop special expertise in one or two substantive areas, while occasionally taking on a matter outside their field of concentration. Some experienced practitioners may function as generalists, supervising the work of less experienced staff who concentrate on one or two areas of focus in order to develop pertinent expertise quickly.

The degree to which provider relies on specialists or generalists should be guided by its priorities, how its resources are deployed and the nature of its service area. Narrow specialization, for instance, presupposes a staff of sufficient size for it to be practical. A small funding base or geographic factors, such as a very large rural service area, which dictate small offices will likely not permit narrow specialization in those offices.

There are advantages and disadvantages to whatever structure is chosen. Specialization offers a number of advantages for providers. It allows inexperienced practitioners to master an area of law relatively quickly. Experienced specialists may be more able to fashion far-reaching and creative responses to specific legal issues in substantive areas with which they are deeply familiar.

Organizing into specialty units can facilitate supervision and mentoring of new practitioners. Specialized practitioners can usually handle cases more efficiently and intake and case handling

¹³ 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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procedures in a specialty unit can be streamlined to expedite the handling of common aspects of repetitive matters. A specialty unit may develop standard forms and procedures for cases in which routine and narrow issues regularly appear. Standard case handling techniques are appropriate if they do not result in important issues being overlooked. Their use should be reevaluated periodically to assure that standardized treatment is still justified by circumstances and that the creativity of practitioners is not stifled in out-of-the ordinary cases.

Specialization can also have disadvantages. Specialization may inhibit identification of problems that fall outside the specialty areas of an office. It may also inhibit change by the provider to respond to new areas of the law that emerge and call for substantive knowledge and strategic approaches that are unfamiliar to the specialists. Practitioners who narrowly specialize and do not get effective oversight and supervision may become isolated in their practice specialty, treating cases in a routine fashion.

Utilization of generalists also has benefits. Generalist practitioners develop a wider range of experience and may be better able to identify ancillary issues in a client's overall circumstances. They are more likely to recognize the interconnection among different substantive areas. Offices that operate with generalists can more easily adapt to personnel changes, particularly in a smaller office where loss of a specialist can severely disrupt office operations.

In a non-specialized practice, however, inexperienced practitioners may be less efficient and effective because they are required to research a broader range of unrelated and unfamiliar issues. They may miss subtle aspects of important legal issues and may be less able to address an unusual legal problem with dispatch.

Whatever structure a provider adopts, it should be aware of the advantages and disadvantages and should take appropriate steps to address any weaknesses. A large provider with many small offices, for example, may create internal substantive task forces or program-wide substantive units that support the capacity of practitioners in small offices to stay current in new developments in substantive areas in which they represent clients. Inexperienced generalists should be supported by readily accessible research materials, including electronically based manuals that can quickly point them to the appropriate law and strategy. Generalist should have access to e-mail lists and other sources of guidance from more experienced practitioners. A well organized regional or statewide system can substantially widen the pool of available experts for such devices.¹⁴

Providers need to have effective systems to supervise specialists, especially those functioning in a narrow area, to make certain that they do not fall into a routinized approach to their cases and can identify issues, particularly ones that are newly emerging in their area of law. They should also create mechanisms for specialists to interact across substantive lines in order to foster cross fertilization.

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

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A provider should periodically review how it deploys its staff and adjust how it relies on specialists and generalists to reflect changing client needs and staff capabilities.¹⁵

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

STANDARD 2.3 ON PARTICIPATION IN STATEWIDE AND REGIONAL SYSTEMS

STANDARD

A provider should participate in regional and statewide delivery systems to improve the systems' capacity to deliver a full range of services that address the legal needs of low income communities.

COMMENTARY

General considerations

Legal aid providers are part of a system of legal services, social services and other organizations concerned with the legal needs of low income people. Each provider should actively work in concert with pertinent organizations in the system to be better able to meet the needs of low income persons with civil legal problems and to provide relatively uniform access for all persons who seek legal assistance.

There are different levels of the system in which a provider operates that may be relevant to its efforts to respond to the needs of the low income population it serves. Most providers operate within a single state and the statewide system is central to its work. At times, particularly in very large, populous states, a provider may also be part of delivery system that has a regional focus. To the extent that some providers administer special programs in more than one state, such as service to migrant farm workers, they would be participants in the delivery systems in multiple states. Some issues, like immigration and aspects of consumer protection, are national in scope and providers may participate in networks designed to address systemic concerns associated with the issue.

In some cases, legal aid providers and other organizations may operate as a system in a locality, such as a city or county. This Standard addresses the issues associated with state and regional delivery systems. Participation in local delivery system is discussed in the commentary to Standards where such systems are particularly relevant.¹

There are many types of legal aid providers as defined in these Standards, as well as other entities that are relevant to a statewide or regional delivery system. In addition to legal aid providers, public interest law firms and similar legal advocacy groups often address issues that are pertinent to the legal needs of low income communities. Private attorneys often volunteer to respond to the legal needs of low income persons as a part of a firm's commitment to pro bono services, through panels organized by bar associations, Older Americans Act programs and other organizations, as well as participating directly with legal aid providers.

Some entities that are organized to serve non-legal needs of a specific population, such as the elderly or victims of domestic violence, may have a small staff of lawyers or a panel of volunteer attorneys to address the legal needs of persons whom they serve. Law schools and law school clinics frequently offer support and assistance to low income persons with legal

¹ See for example, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

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problems. Court-based programs may offer legal information to pro se litigants. There are also low income advocacy organizations and groups that do not represent clients directly, but who advocate on issues that are pertinent to low income persons.

In addition, there are a variety of other entities that do not provide legal services directly, but do offer services and resources that may help low income persons respond to their legal problems more effectively. They include non-profit human services organizations, ecumenical and community based institutions, and governmental or quasi-governmental institutions. In addition, many states have access to justice commissions that help raise funds for legal aid and generally support the system overall. The judiciary and state bar committees in many states are actively involved in state planning for the legal aid system and support statewide fundraising efforts on its behalf.

Some participation in the overall delivery system involves planning principally with other legal aid providers to coordinate key aspects of the delivery system, such as regional or statewide intake and substantive focus. On other issues, participation with the larger network that includes non-legal aid providers may be called for.

All legal aid providers should actively participate in their statewide system, and where appropriate, in their regional system. A number of purposes may be served by such participation:

- The efficiency and effectiveness of the system can be enhanced in many instances by joint planning to coordinate approaches to delivery issues and common substantive problems and to avoid duplication.
- Some providers are better situated than others to provide particular services to low income persons in need of legal assistance. Some providers, for instance, may not be able to offer assistance in certain substantive areas or to certain populations because of resource limitations or restrictions on their funding. Joint planning and coordination of services should take place to assure that a full range of services is available.
- In any system for the delivery of legal services, it will be easier for some to gain access to the system than others. Cooperation among providers is important for the system to be able to offer relatively uniform access to all persons in need of legal assistance.
- Resources available to respond to the legal needs of low income persons are generally insufficient to meet the need. Participation in the larger delivery system should identify strategies to expand available resources, particularly resources that can be used to engage in representation that is restricted by other funding sources and to deploy those resources rationally throughout the system.

Effective and efficient use of resources

It is incumbent on legal aid providers to work in concert so that maximum use is made of the resources that are available. There are a number of ways in which providers working together can make the most of available resources:

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- *Coordination in the use of delivery mechanisms to assure their efficient use.* A group of providers might agree that responsibility for one aspect of the service delivery system should reside with one organization. Providers working together, for instance, might decide to create a centralized capacity for intake. Some states or regions operate with a centralized hotline or other mechanism for providing all clients in an area with advice and brief services through one provider or a coalition of organizations. All organizations serving the low income community might jointly create and support a referral system to assure that persons in needs of assistance are sent to the best available source of help.
- *Coordination and collaboration to facilitate the effective use of technology, including joint approaches when appropriate.* Through statewide technology planning, legal aid providers can share software development costs, centralize training development and implementation and avoid expensive duplication of effort. Thus, for example, providers may pool resources and cooperate to develop a single website to link low income persons to an appropriate source of information and assistance and to inform the general public about legal aid. Some providers have found that jointly selecting and implementing case management software can reduce overall costs and facilitate the referral of cases among providers.²
- *Assignment to one organization among participants in a statewide delivery system the primary responsibility for conducting legislative and administrative advocacy with state level entities, including the legislature.* Not all providers are in a position to conduct legislative and administrative advocacy and such advocacy before the state legislature and state level administrative bodies is sometimes best carried out by one organization that can devote its resources to establishing the presence that is often necessary for successful advocacy in legislative and rule-making processes.³
- *Pooling of resources by participants in a larger system so as to centralize development of materials and approaches for community legal education.* Joint planning can help determine what can be disseminated at the state or regional level and what needs to be employed locally.⁴
- *Development of a joint capacity to provide support for advocates and others essential to the system.* The statewide system should facilitate practitioners getting training in pertinent substantive areas and learning appropriate skills to serve their clients. Training and task forces should be available, as appropriate, to assure effectiveness communication and coordination among practitioners in key areas of law and practice pertinent to the legal needs of the low income community. Providers should also assure that there is a capacity in the system to keep practitioners informed of new and ongoing developments in the law and policy that affect low income persons.⁵ Cooperative planning should

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.5 (on Training).

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consider areas in which practitioners from different providers can jointly develop and execute strategies on broad legal issues that affect large numbers of low income persons.

- *Working together to realize economies of scale in connection with administrative needs, such as bulk purchasing, pooling employee benefits and sharing space.* Providers joining together can sometimes obtain a more favorable price for goods and services because they offer a larger number of potential users or can cost-effectively share costs.

Full range of service

One goal of a delivery system should be to offer a full range of services to low income persons in need of legal assistance. By coordinating how resources are deployed legal aid providers in a system should seek to increase the reach of the resources that are available so a full range of services can be offered.⁶

There are practical limitations that prevent some providers from offering a full range of services themselves. The funding of some providers comes with restrictions that may affect the substantive issues that can be pursued, the remedies that can be sought or the populations that can be served. Small providers are generally limited by size with regard to the substantive areas they can undertake and the populations to which they can reach out. Providers working cooperatively in a statewide or regional delivery system should develop and support strategies to fill the gaps caused by such limitations.

All appropriate forms of representation. A full range of services includes all appropriate forms of assistance, in all substantive areas necessary to respond to the compelling needs of the low income population. The forms of representation include:

- Legal advice and referral;⁷
- Brief legal services;⁸
- Assistance to pro se litigants;⁹
- Representation in negotiation;¹⁰
- Representation in the judicial system and in administrative adjudicatory processes using all forms of representation appropriate for the individual, group or class being represented;¹¹
- Community economic development;¹²

⁶ See discussion on effective and efficient use of resources, *supra*.

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-1 (on Representation Limited to Legal Advice) and Standard 7.8 (on Legal Counseling).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-2 (on Representation Limited to Brief Service).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.9 (on Negotiation).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.1 (on Full Legal Representation); Standard 7.11 (on Litigation); Standard 7.12 (on Administrative Hearings).

¹² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

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- Transactional assistance;¹³ Representation before state and local legislative, administrative and other governmental or private bodies that make law or policies affecting the legal rights and responsibilities of low income persons;¹⁴
- Assistance to clients using mediation and other alternate dispute resolution mechanisms;¹⁵
- Community legal education, including providing legal information to low income groups and individuals.¹⁶

Service to all populations. A full range of services also means access to legal services is available to all low income populations in the provider's service area. Some funding sources proscribe the use of their funds to serve certain populations, such as undocumented immigrants and incarcerated persons. Where a major funding source imposes limitations on serving a specific population, it is particularly important for providers to plan together to make legal services available to those who are barred and to reach out to them. Undocumented persons, for instance, are particularly vulnerable to exploitation and may also be chary of seeking assistance. Persons who are in jails and prisons may have legal issues associated with the conditions of their incarceration and also have difficulty responding to personal legal issues that arise while they are incarcerated.

In addition, there are many populations that are isolated by geography, language, culture, race, disability or institutionalization as well as restrictions imposed by employment. Without intentional effort to reach out and to overcome the barriers that exist for populations isolated by circumstance, their access to and utilization of available legal aid is likely to be limited. Providers should work with others in the system to assure that there is access to all such populations and that there is a substantive capacity to respond to their special legal needs. Both legal aid providers and non-legal entities, such as social service agencies and faith based organizations, may plan and work cooperatively to serve such isolated populations. In some instances, one provider may specialize in reaching out to and serving these and other isolated populations and other providers may work in concert with such organizations to support them and take advantage of their special expertise.

The challenge of reaching and serving isolated populations varies among the populations in question. There also often are legal issues that relate directly to the factors that isolate certain populations. To respond may require special outreach efforts and specialized delivery approaches. To serve populations that are isolated by culture and language, for instance, calls for a high level of linguistic and cultural capacity in providers that need to respond to their legal needs.¹⁷ Work requirements for low wage workers often limit their capacity to visit or even call a legal aid office during working hours, so that special hours for intake and assistance may be necessary. Some workers, such as migrant workers, many of whom may be

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.15 (on Transactional Representation).

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.2 (on Legislative and Administrative Advocacy); Standard 7.13 (on Legislative and Administrative Advocacy by Practitioners).

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.10 (on Alternative Dispute Resolution).

¹⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

¹⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Cultural Competence).

Standard 2.3 on Participation in Statewide and Regional Systems

undocumented may be deliberately cut off from legal assistance by their employers and require special outreach in locations spread throughout a state.

The institutionalized may be hard to reach and in addition may have legal problems that arise out of the circumstances that led to their institutionalization. Persons in nursing homes may have significant issues associated with the care they receive and the conditions in the facility. The homebound elderly may encounter a number of legal problems that are a function of their circumstance.

Relatively uniform access to legal aid

Providers should also work with other relevant organizations in the delivery system to assure that access to the legal aid that is offered is relatively uniform across geographic lines and among all low income populations. Many factors affect who may have greater access to legal aid. Providers should seek to overcome known barriers, both in their own planning as a provider and in their interaction with the statewide and region delivery systems.

Office location can have a significant impact. Experience demonstrates that low income persons in large rural areas, particularly in relatively underfunded states are less likely to seek and obtain services than those in towns and cities that have an office. On the other hand, in very large cities, distance and poor transportation systems can affect who actually seeks and obtains services.¹⁸

Disparate funding opportunities may also have an impact on the uniformity of access across a provider's service area. Higher levels of funding may be offered for service to a particular population, such as persons with HIV/AIDS or the elderly, or in specific substantive areas, such as home foreclosures or child support that result in a higher level of service in those areas.

As has been noted, the isolation of many people because of the particular circumstance significantly affects who gains access to available services. Communities that are isolated culturally and linguistically, in particular, may have limited access to the system.

Providers and others should work together to establish and support systems that will expand the capacity of the system to respond to those who are not receiving services. Providers, in cooperation with others, may establish delivery mechanisms, such as centralized telephone intake to increase the capacity of people who are isolated geographically to gain access to needed help.

Resource development and allocation

Many providers have found that working together to raise funds can be a successful way to address the relative lack of resources available to serve the legal needs of the low income community.¹⁹ More importantly, all providers should support statewide and region-wide

¹⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.2 (on Delivery Structure).

¹⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

Standard 2.3 on Participation in Statewide and Regional Systems

strategies to allocate funds so as to overcome disparities in the availability of resources in different parts of the state. They should also join in efforts to increase the amount of funds that do not restrict services that can be offered or the populations to which they can be provided.

STANDARD 2.4 ON CULTURAL COMPETENCE

STANDARD

A provider should ensure that its staff has the skills, knowledge and resources necessary to provide assistance in a culturally competent manner.

COMMENTARY

General considerations

Each legal aid provider has a fundamental responsibility to establish a relationship of confidence and trust with the clients whom it represents and to understand and respond to the needs of all of the low income communities that it serves, including those that are culturally and linguistically diverse. There are many factors that can impede a provider meeting those fundamental responsibilities, including physical and institutional barriers to access, clients' personal conditions and circumstances and cultural and linguistic differences. This Standard and commentary address the specific responsibility for the provider to reach across cultural lines and to overcome the impediments to effective representation that might arise because of cultural differences. Other Standards address providers' responsibilities associated with overcoming barriers to access,¹ establishing an effective relationship with clients, including those with challenging personal circumstances or conditions,² and communicating in the client's primary language.³

To be culturally competent in legal aid means having the capacity to provide effective legal assistance that is grounded in an awareness of and sensitivity to the diverse cultures in the provider's service area. A cultural group is identified by shared beliefs, values, customs and behaviors that define what it is. Cultural competence is particularly important with racially, ethnically and culturally distinct communities, and with persons who primarily use a language other than English. Cultural competence is also important with persons with disabilities for whom there are barriers to communication that might impede the formation of a relationship of trust necessary for effective representation, and with others who share distinct characteristics that call for heightened awareness and sensitivity.

The shared beliefs, values and customs that define a cultural group often have a subtle, but deeply significant impact on communication with the provider, on how the attorney-client relationship is formed and on the conduct of the representation. It is important to recognize different cultural norms and provide assistance in a non-judgmental way that honors and respects those values. Cultural competence involves more than having the capacity to communicate in the language of persons from each community and involves more than an

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.5 (on Access to Services).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

Standard 2.4 on Cultural Competence

absence of bias or discrimination. It means having the capacity to interact effectively and to understand how the cultural mores and the circumstance of persons from diverse communities affect their interaction with the provider and its practitioners and govern their reaction to their legal problems and to the process for resolving them.

A lack of cultural competence may result in miscommunication and misunderstanding between a provider and client, undermining the attorney-client relationship and defeating the client's objective. Moreover, it may deter others in the client's community from seeking assistance, if a failure of communication or – to the client – inappropriate response is reported back to the affected community through its informal channels.

An essential component of cultural competence is recognizing and resisting the temptation to stereotype individual members of the cultural group. All clients, regardless of cultural or linguistic identity or background, should be treated with respect.

Provider responsibilities with regard to cultural competence

A legal aid provider should demonstrate cultural competence in its operations and should have a culturally competent and a diverse staff so that all groups of clients will be welcomed and well represented. Offering culturally competent legal services implicates how representation is conducted. It also involves how the provider operates, including how it hires and trains its staff. Finally, it calls for the provider periodically to assess the utilization of its services by the distinctive communities in its service area and the effectiveness of the services provided to persons from those communities.

The impact of cultural competence on representation of clients

A provider needs to be aware of how the cultural values of its clients can affect their representation. A number of areas in which cultural competence is important are discussed in Standards related to individual representation⁴ and the provider's responsibilities regarding various forms of representation.⁵

Generally, effective representation depends on a practitioner's capacity to form a trusting relationship with the client and to understand the intended meaning of the client's words, behavior and expressions. Subtle gestures that might have little meaning to a practitioner may have great significance to the client. For instance, it is considered insulting in some cultures to touch a person's head or to point one's feet at another. Or, for example, some cultures consider it impolite to have eye contact with someone who is older or someone who is considered a superior.

Cross-cultural understanding should help the practitioner communicate more effectively in order to establish trust and to understand the client's objectives. An underlying premise of all representation is that the client sets the objective.⁶ In explaining alternatives and their potential

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Section 7.

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Section 3.

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client); Standard 4.2 (on Establishing a Clear Understanding).

Standard 2.4 on Cultural Competence

consequences,⁷ a practitioner may be called upon to accept a decision by a client that in the practitioner's value system seems imprudent. It is important for practitioners to listen carefully to their clients' stated objective and not to insist on outcomes that reflect the practitioner's – not the client's – judgment of what constitutes success in a case.

It is also important that the practitioner be aware of how cultural values can affect a client's reaction to conflict. A cultural value to avoid conflict, for example, can significantly affect how a case proceeds as well as the communication between the client and practitioner. In many cultures, there is a strong value of not directly disagreeing with others in conversation or only indirectly addressing sensitive matters. A practitioner who is unaware of such a value may not be able easily to discern the client's actual desired objective, if the client, out of a sense of propriety, simply agrees with what the practitioner says about possible outcomes to the case. Some cultures also place a very high value on informal means of conflict resolution and may find the adversarial system to be alien and even offensive.

The difference between collective and individualistic cultures can also affect who the client feels should be involved in decisions about a legal problem. For example, in some cultures, clients may expect their parents to play an important role in deciding what should happen in a custody case. What the practitioners might see as inappropriate control, the client might see as necessary, respectful behavior. In such circumstances, the practitioner should find a culturally appropriate way to avoid any detrimental impact on the confidentiality of communications with the client, which may be impaired if third parties, such as parents are present.

Practitioners need to recognize when an appropriate level of trust and confidence has not been established with a client and how the practitioner may have contributed to misunderstanding. The practitioner may in such circumstances need to reach out to others to have a frank conversation about how cultural differences may have played a part. Staff should feel comfortable seeking such advice in order to create a productive multi-cultural workplace and a better understanding of clients.

A practitioner's ability to present clients' cases to adversaries, agency personnel, hearing officers and judges is enhanced when a practitioner is knowledgeable about and attentive to possible cross-cultural misunderstandings. To be an effective advocate for a client, the practitioner is called upon to present the client's reality in a convincing way in the legal process. It may also involve being a bridge to explain to the client the requirements of the legal system that may seem strange or threatening. For example, a client's reluctance to participate in counseling that is ordered by a court may occur where language or cultural issues make communication with a therapist difficult or where there is a cultural mistrust or rejection of therapists. Understanding the client's resistance, the practitioner may seek to create a culturally friendly alternative that satisfies the court.

Provider operation

A provider should function in ways that convey its openness to the cultural diversity in its service area and its competence responding to that diversity. To the degree possible, its staff should reflect the diversity of the population that it serves. The provider should have delivery

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.8 (on Legal Counseling).

Standard 2.4 on Cultural Competence

strategies that respond to cultural factors that impede some populations from seeking and effectively utilizing the services offered. It should have a staff that is well trained in the skills and insight necessary to serve its diverse populations.

Diversity of the staff and board. The legal aid provider should ensure that its staff and board are both diverse and capable of relating to clients who are from a culture different than their own.⁸ Having a visibly diverse workforce and board conveys to potential clients that the provider understands and is open to people from different backgrounds.

While hiring and retaining racially, ethnically and linguistically diverse staff is an important component of a welcoming environment for diverse client populations, such diversity does not necessarily ensure cultural competence. Differences in geography, education, immigration status, country of origin, and family background are other cultural differences that may create cross-cultural communication challenges despite other demographic similarities. Hiring people who are from the actual community being served is one way to equip the provider with deeply ingrained cultural knowledge and language skills important to that client population.

For practical reasons, providers serving very diverse populations with many sub-groups will not be able to hire staff from all such groups. Often, there will not be enough staff positions to accommodate every sub-group. Some groups, such as newly arrived immigrants, may not have many members with the skills needed by the provider. Providers should consider different staffing patterns, such as employing community outreach workers from culturally isolated communities in order to establish a presence with those communities and to support persons from them who do seek help.

Training of staff and board. Training is a vital element of a provider's efforts to function in a culturally competent fashion and to have staff who are able to serve a diverse low income population effectively. Because the Board of Directors adopts policies which will affect the capacity of the provider to operate in a culturally competent manner, it should also receive appropriate training in important features of a culturally competent organization. Training should be planned and taught by a diverse range of trainers and should introduce culture-specific knowledge in the context of the communities that the provider serves and in legal issues particular to each of the communities.

Given its limited resources, a provider's efforts to assure cultural competence among its staff should first focus on training about cultural awareness and the basic skills to be more culturally competent. General cross-cultural competence involves understanding that the decisions that a practitioner makes during representation are shaped by the practitioner's own culture as well as the legal culture. Training should offer advocates an opportunity to gain insights into their own cultural norms and values as well as to develop cultural-general and cultural-specific information about the various low income communities served by the provider. Staff should also be trained to understand that shared norms are expressed in a variety of ways within each culture and that it is important that knowledge about a culture's values and norms not lead to stereotyping individuals from that culture.

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.5 (on Staff Diversity); Standard 1.2 (on Governing Body Members' Responsiveness to the Communities Served).

Standard 2.4 on Cultural Competence

Culture-specific training efforts should be prioritized according to the size of a particular cultural community, or group of communities. Programs that serve a large range of cultures should assess the size and legal needs of particular cultural communities within the low income population in order to prioritize the training and services it offers. The provider should offer staff and board tools such as web-based and written materials regarding the cultures in its service area.

In addition, providers should train staff in the skills and perspectives needed to work cross-culturally. Providers should offer advocates training in cross-cultural communication skills, such as the ability to focus deeply on content, to read verbal and non-verbal behavior and to adapt to differing conversational and behavioral styles. What communication style and gestures are appropriate, for instance, may vary depending on culture. For example, nodding in some cultures means, “yes,” while in others it means, “I’m listening.” Clients from a culture with a direct communication style are more likely to respond to direct questioning than those whose cultural norm is to communicate indirectly.

Staff should also be trained in the importance of non-verbal communication signals, visual aids, gestures and physical prompts that will make interactions with clients more culturally appropriate. Staff should know how to communicate respect in the culture. In some cultures, for example, a handshake is appropriate, while in others it is not.

Access and outreach. The provider should strive to make its services accessible to all the populations that it serves. Issues associated with physical access for persons with disabilities and isolated populations are addressed in the Standard on client access.⁹ Providers should take steps to address cultural isolation that may limit utilization of its services by some populations in its service area and should undertake sustained outreach to culturally isolated or culturally independent communities in its service area.

Effective outreach requires building respectful relationships with community-based organizations that serve culturally diverse client communities. For example, the well developed network in Mandarin and Cantonese-speaking communities is essential to (and a ready source of help in) reaching out to those communities. Some cultures with a strong patriarchal tradition look to elder males in the community to resolve problems informally and so outreach may need to be conducted through patriarchs to whom the community goes for guidance.

Strong relationships with community-based organizations can also help providers better serve small minority groups not currently represented among program staff. Such organizations can also be the source of culture-specific information and valuable community contacts. Providers should institutionalize their culture-specific information by including it as part of general orientation or training in specific substantive law areas.

Providers should also strive to provide legal information and community legal education through media that are accessible to diverse communities, including persons with disabilities and persons who speak a language other than English. Information should be offered in the major written languages of the various communities that a provider serves. Some cultures have written languages that are known primarily to scholars and are not widely used by members of

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.5 (on Access to Services).

Standard 2.4 on Cultural Competence

the community. To the extent practical, the provider should try to use audio and video to convey legal information to members of such cultural groups.¹⁰

A provider should strive to make legal information offered on websites accessible to the various populations that it serves. There may be subtle cultural sensitivities to the format and colors used on a website and different cultures will have varying receptivity to modern technology. The provider should seek to be aware of such issues and if practicable should design its website to be useful to the predominant cultures in its service area. Information should be available in the major written languages spoken among the communities the provider serves.

Websites should be accessible to persons who have a disability that may limit their ability to make use of the information provided. Sites should display graphic and visual information with a text alternative in formats accessible to screen readers for people who are blind and be coded to allow for keyboard-only navigation for persons unable to use a mouse. Providers should be aware of potential accessibility problems with complex websites that use multimedia applications that rely on sound, visual display and a high level of interactivity with the user.

Provider appearance. There are many small, but important details that convey a multi-cultural environment to persons contacting a provider. The provider's physical environment, staff dress, materials and resources on display for clients should reflect respect for the cultures and ethnic backgrounds of the clients served by the provider. This could include signage, printed materials, toys and other play accessories in the reception areas. Signage should show that different languages and American Sign Language are available. Intake forms should provide options that recognize alternative family structures, including domestic partners.

Acquisition and institutionalization of cross-cultural knowledge. It is important to note that developing and maintaining cultural competence is an ongoing process. The many communities in a provider's service area change and the provider needs to be aware of such changes and adjust to them. Providers serving communities with many culturally distinct communities will not be able immediately to develop equal competence with each. It should concentrate first on the largest communities in its service area, while striving to develop cultural fluency appropriate to all. Successful interaction with isolated communities will continuously increase the knowledge and insight into those communities and allow for a deepening understanding of how best to serve them. The provider should develop ways to record that developing body of insight and make it available to new staff as they join the organization.

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

Standard 2.4 on Cultural Competence

Evaluation

It is important for a provider periodically to assess the degree to which it is successfully reaching out to and serving its diverse communities. It should examine rates of utilization of all of its services by the diverse populations in its service area in comparison to their percentage in the overall low income population. It should also assess the degree to which it has been effective in providing services, including seeking comments and feedback from leaders and others in the affected populations.¹¹

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

STANDARD 2.5 ON STAFF DIVERSITY

STANDARD

A provider should take affirmative measures to hire and retain a diverse staff that enhance its ability to respond effectively to the legal needs of low income communities.

COMMENTARY

General considerations

Concerted efforts by a provider to recruit, hire and retain a diverse staff enhance its ability to respond effectively to the low income population it serves. Diversity is an important value for a provider to pursue for a variety of reasons. Diversity in racial, cultural and ethnic backgrounds and varied perspectives and beliefs among the provider's staff can give the provider insights that may lead to creative strategies in its daily operations. When a provider operates in a racially, ethnically or culturally diverse area, having a staff that includes people who have similar backgrounds to those in the service area can communicate that the program is committed to diversity internally and thus may have the knowledge, skills and abilities to engage with diverse populations, effectively.

When a provider operates in an area with a highly diverse low income population, or with a large percentage of low income persons of color, it is important that the provider reflect the low income population it serves. Relationships of mutual trust may be developed more readily when clients encounter a staff that reflects the community's diversity. It is also important to provide support for all staff to develop the appropriate skills to provide service in a culturally competent manner.¹ Hiring persons from culturally and linguistically isolated communities can also enhance a provider's capacity to reach out to and serve those communities.

Diversity serves an important function in strengthening a legal aid provider, independent of its value in improving the provider's capacity to respond effectively to the low income communities it serves. Thus, even in areas that do not have an ethnically or racially diverse population, a provider should seek to have a diversity of background, experience and outlook on its staff.

The provider should appreciate that diversity encompasses a range of characteristics. The most important of these involves race, ethnicity, national origin and gender, which the provider should take affirmative steps to address in its recruitment and hiring. The provider should also recognize the value of diversity with regard to disability, age, religion and sexual orientation. There are also many other characteristics, such as economic class, educational background and experience outside of legal aid that can bring a range of ideas and outlooks that will strengthen the provider.²

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

² Diversity experts note that there is a very wide variety of "secondary characteristics" such as those listed as well as employment experience, military experience, marital and parental status and regional background to name a few, all of which can add to the richness of the provider.

Standard 2.5 on Staff Diversity

The provider should create a work environment that is open to all such aspects of diversity, which can serve to strengthen a provider in a number of important ways. Persons who work with colleagues from different backgrounds and experiences and different cultural values often gain a higher level of knowledge about other cultures, empathy for a range of diverse experiences and skills for engaging people from different backgrounds. This knowledge, awareness and skill may enhance their ability to serve a diverse client base. The ability to interact across differences is important not only in relating with individuals from the low income community, but also in interactions within the office. It can also help in the design and implementation of important systems such as intake.

Affirmative efforts to sustain a diverse staff also have an intrinsic value as a conscious effort to overcome unequal treatment of different segments of the society based on race, ethnicity, national origin, religion, disability, age, gender and sexual orientation. A legal aid provider is engaged in a practice aimed at countering injustice and assuring fair and equal treatment for low income persons and communities. The provider's own recruitment, employment, and contracting practices should reflect that commitment to fairness and equality and should make opportunities available to persons who are subject to discrimination.

Recruitment and retention of a diverse staff

Recruitment of an appropriately diverse staff takes a concerted effort by the provider. It can be particularly challenging to assure racial and ethnic diversity among practitioners and managers, because the pool of available candidates may be small and competition for them intense. The difficulty of recruitment and retention may be exacerbated by the levels of salaries and benefits. It can also be challenging to recruit for and retain a diverse staff in isolated and remote rural offices.

Several factors can assist in the recruitment and retention of a diverse staff. It is important for a provider to have a reputation for effective interaction with the various communities that are served by the provider.³ A potential recruit who recognizes that the provider makes a significant and successful effort to serve the population with which the person identifies is more likely to want to join that effort.

The provider should also establish effective relationships with potential recruits from law school early in their career. It should interact with law school student associations that are formed by various affinity groups in law schools from which the provider regularly draws applicants. Intern programs that make opportunities available for law students from targeted populations can also enhance the organization's ability to attract such students for permanent employment. A provider may increase the pool of available candidates from diverse backgrounds by pursuing vigorous national and regional recruitment policies.

The provider should recognize that many economic factors affect its ability to retain staff, including offering competitive salaries and benefits and providing retirement benefits for those who make legal aid their career. The provider should also consider a policy to help alleviate the pressures that student loan payments place on recent law graduates, including supporting the

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

Standard 2.5 on Staff Diversity

creation of loan forgiveness programs in its jurisdiction and adopting its own internal policies to address the problem, if necessary.

The provider should also recognize the importance of maintaining a positive work environment that draws on the strengths of a diverse workforce and consciously works to overcome potential divisions among staff based on difference. While the provider should recruit persons who have the skills and awareness to work effectively in a diverse work environment, it should also recognize that effective management is called for to foster and maintain positive relationships among personnel from diverse backgrounds. The provider should provide training to improve communication skills, strengthen mutual understanding and increase sensitivity among all staff to each other and to the persons served by the provider.⁴ The provider should also pursue internal practices, such as mentoring programs, diversity committees and affinity support groups, that respond to the needs of staff members from diverse backgrounds. These kinds of practices will also support recruitment of staff from diverse backgrounds because they help the provider establish a positive reputation for proactively addressing issues of difference within the workplace

Equal employment opportunity

Pursuing diversity in its staff is important for a provider because of the positive impact on its efforts to serve low income persons in its service area. In seeking diversity on its staff, a provider should be aware of and fully comply with federal, state and local laws regarding equal employment opportunity and affirmative action. The provider should also comply with federal and state laws governing the accommodation of persons with disabilities who are otherwise qualified to perform a job.

A provider should pursue appropriate steps, including self analysis of its work force, to assure equal employment opportunity at all levels of the organization. It should act deliberately to assure equal employment opportunity, affirmative action and to comply with laws regarding the hiring of persons with a disability and should assign responsibility to a person with authority and responsibility to monitor its efforts in meeting its responsibilities.

⁴ See also the discussion of training in the commentary to ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

STANDARD 2.6 ON ACHIEVING LASTING RESULTS FOR LOW INCOME INDIVIDUALS AND COMMUNITIES

STANDARD

A provider should strive to achieve both clients' objectives and lasting results that respond to the low income communities' most compelling legal needs.

COMMENTARY

General considerations

The effectiveness of a provider can be measured by the tangible, lasting results of its efforts on behalf of its clients and the low income communities it serves. Each provider should strive to accomplish meaningful results in all of the legal assistance activities it undertakes. Lasting results can be achieved in several ways: by favorably resolving individual legal problems; by teaching low income persons how to address the legal problems that they face; by improving laws and practices that affect low income persons; and by assisting members of the low income community to become economically self-sufficient.

The legal problems of individual clients often involve the most basic issues of survival. Problems that merely inconvenience persons who have an economic cushion can have enormous long-term consequences for low income persons and can disrupt every aspect of their lives. An unlawful delay or termination of social security benefits may leave a low income person with no money for food, medicine, shelter or utilities. Unlawful repossession of a car may mean a low income person cannot get to work or to necessary medical care. The provider should be able to respond quickly with high quality assistance that favorably resolves these individual problems in a substantial percentage of cases.

Strategic focus

A provider should establish a clear focus for its legal work and for what it seeks to accomplish for and with its clients. Having a strategic focus starts with making intentional choices about what legal work it will undertake, how it will deploy its resources and how it will deliver service.¹ The provider should know what it hopes to accomplish with its legal work so that it can measure if it is successfully achieving desired results for clients.

There are a number of ways in which a provider may maintain a strategic focus that enhances the results achieved for clients. It calls for deliberative decision-making and intentionality at all levels of the provider regarding what the program's legal work is intended to accomplish. At a program level, the provider may set broad goals for its legal work, such as protecting low income persons' access to shelter, or fostering the stability and safety of the family. Many providers set broad priorities that provide the basis for making more specific choices about the acceptance of legal work and the focus in broad substantive areas affecting its clients.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Legal Needs and Planning to Respond); Standard 2.2 (on Delivery Structure).

Standard 2.6 on Achieving Lasting Results for Low Income Individuals and Communities

The focus of legal work undertaken by a provider is sharpened if the provider deliberately identifies the broadly stated results it seeks to achieve in major substantive areas, or through its projects or specialty units. Thus, a domestic violence unit might identify an objective in its work to be to help its clients find and retain a safe environment in which to live. Identifying a longer term goal than simply obtaining a protective order focuses the unit on more long term results and provides a basis for measuring the success of the work in terms of those results.

In each individual case, the client sets the objective and the practitioner representing the client has a responsibility to pursue that objective.² In addition, some providers establish benchmarks regarding what the provider deems to be the most desirable, realistic outcome in cases of a certain type. The benchmarks might vary among offices based on what is realistic, given local circumstances. Experience suggests that setting benchmarks for results in recurring cases tends over time to improve the results achieved.

All types of legal assistance should accomplish results for clients of the provider. A clear strategic focus on the intended results forms the basis for a periodic evaluation of the success of the efforts, and provides the basis making appropriate adjustments, as necessary. In community economic development, for instance, it is important that the provider clearly articulate the objectives intended for the work. The provider should know whether the intended outcome of the work is to create jobs, housing or goods and services, and if a goal is to foster client self sufficiency and independence. Strategies that employ various forms of limited assistance, such as advice lines, community legal education and assistance to pro se litigants should also be examined to determine the degree to which those who are assisted learn how to help themselves and accomplish meaningful results with the assistance offered.³

When a provider engages in a periodic evaluation of its operation, it should measure the degree to which it is accomplishing meaningful results for its clients. A provider that has clear objectives for its work has a solid basis for a meaningful assessment of the results it achieves.⁴

Systemic advocacy

In the course of serving its clients, a provider is likely to identify laws, policies and practices that have a detrimental effect on low income persons and that deter it from accomplishing desired results. It will also encounter the efforts of others to change policies and laws in ways that harm the interests of low income persons. A provider should engage, when appropriate, in advocacy that addresses such systemic problems. Advocacy to accomplish systemic change is called for when an issue is likely to recur, affects large numbers of clients and is unlikely to be resolved favorably for individual clients on a one-on-one basis. Advocacy is appropriate to defend the status quo when proposed changes will erode the rights of low income persons or harm the interest of low income communities.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.2 (on Client Participation in the Conduct of Representation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.4 to 3.4-2 on various forms of limited representation; Standard 3.5 (on Assistance to Pro Se Litigants); Standard 3.6 (on Provision of Legal Information).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

Standard 2.6 on Achieving Lasting Results for Low Income Individuals and Communities

Systemic advocacy involves many potential strategies, some of which are relatively low cost and others of which may be costly and long-term:

- ***Non-representational strategies.*** There are a number of ways outside of direct legal assistance to clients in which a provider may achieve systemic results for the low income community it serves. It might, for instance, participate in bar and judicial committees to improve the accessibility of the courts to low income persons.
- ***Systemic impact in individual cases.*** At times, representation in any individual case may have a result which has an impact beyond the interests of the parties, including in matters that are appealed. Systemic advocacy is generally based on a deliberate strategy, however, that targets an offending law, policy or practice. A provider may, therefore, deliberately focus representation in many individual cases on a particular policy or practice, with an eye to bringing attention to a particular issue and to compel a change over time.
- ***Informal intervention.*** It is not uncommon for a practice that is harmful to clients to result from a failure of an agency to apply the law as it is intended or from it establishing procedures that limit low income persons' access to services offered by the agency. A legal aid provider that is attentive to patterns of decision-making by administrative agencies may be able to identify misapplications of the law or procedures that limit access and bring about a change in the practice by intervening informally with higher placed officials in the agency.
- ***Working with coalitions.*** A provider might work with a coalition of organizations to address policy issues that affect the low income population.⁵ Not all systemic advocacy is adversarial. Providers working with community economic development, for instance, often find that forming alliances with other interests is the most successful way to bring about fundamental economic changes that positively affect a low income community.
- ***Media advocacy.*** To help create a climate that is favorable to change, some systemic advocacy involves a media strategy that seeks to inform the general public or the low income community of harmful or unfair policies and practices.
- ***Affirmative litigation.*** There are many laws, policies and practices that if unchallenged, rule out positive resolution of clients' legal problems. Sometimes they involve laws that on their face are detrimental to the interests of low income persons. Other times, a law or policy, even one designed to protect the interests of the poor, may not be applied uniformly or consistently in accordance with its terms. Sometimes laws and policies that are favorable to clients' interests are challenged in litigation and need to be defended. To challenge an unfavorable law or to enforce or defend a favorable one on behalf of clients may require complex litigation, sometimes involving complex statutory or constitutional questions.
- ***Legislative and administrative advocacy.*** Some systemic change can only be accomplished by seeking a legislative change or a change in agency policies, rules, regulations and practices of general application. In addition, many proposed changes in

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

Standard 2.6 on Achieving Lasting Results for Low Income Individuals and Communities

statutes and administrative rules will, if adopted, significantly harm the interests of low income persons and call for advocacy to oppose such changes.⁶

Some legal aid providers concentrate their efforts on broad challenges to legal problems confronting many clients. Such efforts can be the most cost-efficient way to utilize the limited resources available to meet the legal needs of low income persons. Repetitive representation of individuals to obtain a limited remedy that does not ultimately resolve a recurring legal problem can be costly and time-consuming. Representation that addresses the basic cause of such legal problems may, on the other hand, ultimately expend fewer resources with more lasting benefits for large numbers of low income persons.

Nevertheless, some systemic representation requires a substantial commitment of resources. A decision to undertake costly systemic advocacy should be made deliberately by the provider and the client, taking into consideration the potential for success; the resources necessary to proceed, balanced against the potential benefit or risk; and the provider's priorities.

All providers should be alert to areas in which they can have a positive impact on policies and practices that have a detrimental impact on the low income communities they serve. Not all providers are organized, however, to undertake complex – and potentially costly – representation that involves broad constitutional challenges, or to engage in administrative and legislative advocacy. Even for those that are able to, resource limitations will preclude undertaking every major case which is presented.

A provider that does not engage in costlier forms of systemic advocacy should, nonetheless, assure that its practitioners undertake adequate research and investigation to advise and counsel their clients regarding the options open to them under the law, and to refer them to other sources of representation, if necessary. The provider should participate in regional and statewide systems to help assure that all types of representation are available and to be aware of the appropriate place to refer clients it is unable to assist.⁷

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

STANDARD 2.7 ON INTEGRATING THE RESOURCES OF THE LEGAL PROFESSION AND INVOLVEMENT OF MEMBERS OF THE BAR

STANDARD

A provider should integrate the resources of the legal profession and individual members of the bar¹ into its delivery of services, including in direct representation of clients.

COMMENTARY

General considerations

A legal aid provider should fully recognize the legal profession as a valuable resource in addressing the needs of the low income community it serves. The resources of the legal profession should be integrated to the greatest extent possible into a provider's efforts to respond to its clients needs and other members of the bar should be involved in the direct representation of clients.

Members of the legal profession play a critical role in the justice system's response to the legal problems of low income persons. Lawyers who do not work for a legal aid provider supply a significant amount of free and low cost assistance to low income persons through free standing pro bono programs and those that are a component of a legal aid provider. Private practitioners also provide significant pro bono services to low income people who are not referred by legal aid programs.

The adoption of Model Rule of Professional Conduct 6.1 in many jurisdictions has formalized the long-standing commitment of all lawyers to the provision of pro bono services to persons of limited means.² Most states that have not adopted the language of revised Model Rule 6.1

¹ The term, "members of the bar," as used in this Standard includes governmental lawyers, corporate counsel, retired lawyers and lawyers in non-profit organizations other than legal aid providers, as well as lawyers in private practice with a firm or as a sole practitioner. It is recognized, of course, that attorneys working for a provider are also members of the bar, but for the sake of convenience, the term is used in this Standard and commentary to refer to attorneys other than those employed by a legal aid provider.

² Model Rules of Prof'l Conduct R. 6.1 (2003) provides:

"Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - (3) participation in activities for improving the law, the legal system or the legal profession.

Standard 2.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar

operate under the former version or their own rule, which generally state an obligation for lawyers to render *pro bono publico* legal services.³ It is incumbent on legal aid providers to make effective use of this valuable resource. Providers should seek assistance from members of firms, sole practitioners, government attorneys, corporate counsel and lawyers working for non-profit organizations other than legal aid providers.

Integration of the resources of the legal profession

Each legal aid provider should take full advantage of the resources of the legal profession to support its effort to respond to the needs of the low income communities it serves. There are a variety of ways, in addition to the direct representation of clients, in which the resources of the legal profession can be utilized by a provider to support its efforts.

- ***Access to justice projects.*** Providers may work jointly with the leadership of the organized bar and with prominent members of the legal profession to plan and implement strategies to enhance access to justice for low income persons. Often such efforts are formalized into access to justice commissions that support the overall system for delivering legal aid to low income persons. Such efforts may focus on increasing resources available to the system, increasing public awareness of the legal needs of low income communities and serving as a resource in the design and implementation of the legal aid delivery system.
- ***Policy advocacy.*** Individual practitioners and the organized bar can be important and powerful partners engaging in advocacy on policy matters that affect the provider or the low income communities it serves. Such engagement may include advocating before a legislative or administrative body on behalf of or in partnership with a legal aid provider. It may also involve informal efforts to convey to the public and to policy-makers the importance of issues that affect low income persons and their access to the legal system.
- ***Joint projects.*** The resources of the legal profession can also be tapped in the creation and implementation of joint projects that address the needs of low income persons. The organized bar or prominent members of the profession may join with a provider to galvanize a broad response to a widespread problem that confronts many members of the low income communities served by the provider. Thus, a project might be developed to respond to a natural disaster or to recruit private practitioners to respond to a commonly recurring problem that affects many low income persons. Large law firms will sometimes take on a signature project on which to focus their pro bono efforts.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”

³ The prior version of Model Rules of Prof'l Conduct R. 6.1 (1983) read: “A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.”

Standard 2.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar

- ***Filling gaps in service.*** Working with members of the bar often offers an opportunity for a provider to serve clients and respond to issues that may be difficult or impractical to address because of limited funding, restrictions by a funder or other practical impediments. Outside practitioners may, for instance, make it possible to provide services in geographic areas that would otherwise be difficult for a provider to serve. In rural areas, private attorneys may be available to serve remote communities where it is not economically feasible to maintain a staff office. In urban areas, offices of private attorneys may be located in neighborhoods that are convenient to clients.

Collaboration with members of the bar may also provide an opportunity for a legal aid provider to address issues or serve populations that it is unable to serve because of funding restrictions. A provider, for instance, may be prohibited by a funder from representing undocumented persons or from seeking attorneys' fees. It may in concert with members of the bar establish a project for the referral of such cases to help assure that important needs of the low income community are served. It may also co-counsel with other members of the bar who can handle portions of a case that the provider is prohibited by funder restrictions from addressing.

- ***Responding to cultural and linguistic diversity.*** A provider may call upon members of the bar who can help it in its efforts to reach out and serve diverse cultural and linguistic communities in its service area. Where possible, it should work in partnership with lawyers who speak a language of or have an affinity with various cultural groups not only to serve individual clients from those communities but also to reach out and establish credible connections with them.⁴
- ***Training and mentoring.*** Experienced private practitioners can assist providers by participating in training and mentoring of staff advocates and other staff. Such support can be particularly helpful in areas such as trial and appellate advocacy in which staff practitioners may not have experience. Assistance might be offered through training offered generally to staff practitioners, or in assistance to an advocate preparing for trial or an appellate argument. An experienced private practitioner might be enlisted to help prepare an effective cross examination or to critique and moot court an oral argument. Private practitioners might also provide training and mentoring in new areas of the law, such as community economic development, in which a provider might embark in response to changing needs of the low income community.
- ***Resource development.*** A provider may also work with the leadership of the organized bar and prominent members of the bar to increase resources available to serve its clients. Such assistance may include support for campaigns to raise funds from members of the legal profession and others as well as efforts to obtain funding from governmental sources and from private foundations.
- ***Funding fellowships.*** Law firms can support a provider by funding fellowships in whole or in part that place a lawyer in the provider's offices for one or two years to represent clients or to work on a special project that benefits low income communities.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

Standard 2.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar

- ***Assistance from non-attorney staff of law firms.*** Some providers obtain the assistance of paralegals, legal assistants and support staff from law firms with projects, even when no lawyer from the firm is helping. Paralegals, for example, can help prepare deposition digests, create demonstrative exhibits, or conduct initial reviews of document productions in major cases that have been undertaken by the provider.
- ***Information technology.*** Small providers that find it difficult to maintain an internal capacity to support their information technology needs may enter into a collaborative relationship with a local firm to help meet such needs. Such assistance might be offered in the form of technical assistance, network administration and staff training in the effective use of software.⁵
- ***Provision of legal information and community legal education.*** Attorneys who do not work for a provider can also assist with efforts to provide legal information to the low income community, either in community legal education presentations offered to groups or in clinics.⁶ They may participate in the drafting or review of legal information that is posted on a website or published in self help materials.

Representation of clients

A provider should seek to expand its resources by involving as many other members of the bar as possible in the direct representation of low income clients. Providers should have a wide variety of ways to engage other members of the profession in order to best use their skills and expertise as well as to take advantage of their different motivations and to meet the needs of each lawyer. Some lawyers want to control the length of their commitment, and can do so by assisting clients with short term problems that can be addressed by advice or brief service. Many lawyers who lack expertise in the legal problems of indigent persons will only volunteer if they are properly supported. Other attorneys will be attracted to complex or high profile issues that will challenge their legal skills and raise their profiles in the community.

There is a range of ways to involve members of the bar in representing clients and a provider should seek to make as many as possible available to participating members of the bar.

- ***Limited representation.*** Many practitioners are more willing to participate as volunteer attorneys if they know what the commitment of their time will be – a calculus that cannot be certain in cases involving the full representation of a client. Various forms of limited representation, therefore, lend themselves to participation by members of the bar who have such a concern. An attorney might, for instance, be asked, under a limited scope agreement, to represent a client with a discrete portion of a legal problem, such as child support, or obtaining a restraining order.

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

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

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Providers should also consider involving members of the bar in periodically staffing an advice clinic or a telephone advice line.⁷ Members of the bar can also assist in clinics to give advice to pro se litigants and to help them evaluate their case and prepare appropriate pleadings.⁸ They can also conduct intake and an initial assessment and offer preliminary advice to persons at locations such as homeless shelters and community and senior centers.

- ***Individual representation.*** A provider should offer the opportunity for members of the bar to provide full representation for clients in individual cases. Many attorneys not working for a provider are familiar with consumer and family law and regularly take referrals in those areas. Lawyers who have previously worked for a legal aid provider are often familiar with other areas of the law that affect low income persons, including landlord-tenant and public benefits.

Practitioners not employed by legal aid can also be recruited to handle cases in areas of the law with which they are not familiar. Lawyers who are just starting out in their practice are often attracted to taking cases when they are offered proper training and an opportunity to be mentored by a staff or other practitioner with expertise in the area. Experienced lawyers can also be recruited to work in unfamiliar areas that involve compelling issues such as service to the homeless or persons affected by HIV/AIDS.

- ***Complex legal work.*** A provider should offer opportunities to those members of the bar who prefer more complex legal work and are willing to engage in advocacy that involves multiple clients and complex legal issues. Members of the bar should be encouraged to co-counsel with a provider, particularly when a private attorney's firm has special expertise and resources to support complex and costly litigation. In some cases, a volunteer attorney may handle part of a case or represent one of a group of clients that the provider cannot because of restrictions by a funder. Private practitioners can also present the interests of client groups before legislative and administrative bodies.
- ***Special projects.*** Members of the bar not working for legal aid can also be called upon to assist in projects where their special expertise may be helpful. Providers that are undertaking community economic development, for instance, may find that attorneys whose practice consists largely of corporate clients can assist in the representation of groups and non-profit organizations regarding issues such as incorporation and compliance with local, state and federal requirements.
- ***Representation by compensated private attorneys.*** Although all lawyers have a responsibility to render pro bono legal services to low income persons or to support organizations and entities that are designed primarily to address the needs of persons of limited means,⁹ there are a number of circumstances in which it is appropriate for a legal

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 3.4, 3.4-1 and 3.4-2 on various forms of limited representation.

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

⁹ See Model Rules of Prof'l Conduct R. 6.1 (2003).

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aid provider to compensate private attorneys to represent clients. In many remote and sparsely populated rural areas, for instance, there is not a sufficient number of private practitioners to support a pro bono effort and it is impractical to serve the area with staff practitioners. In other circumstances, staff practitioners may not have sufficient expertise in an important area of legal need for clients and no lawyers may be available to serve as volunteers to address the need. Such representation should be compensated at a reduced rate.

It should be noted that in many communities, private practitioners represent a number low income persons for a full or somewhat reduced fee, but do not participate in the organized efforts of the provider. Such lawyers often have expertise in the same substantive areas as the provider and may be an important resource to the low income community. In its planning, the provider should be aware of the degree to which such private practitioners are responding to the legal needs of the low income community.¹⁰ Where appropriate, the provider should seek to target them in its recruitment efforts to represent its clients or to provide support, such as training and mentoring of staff and other participating attorneys.

Provider responsibilities in involving members of the bar

Conformity with pertinent standards and guidelines. Specific guidelines that relate to the involvement of volunteer attorneys in the representation of legal aid clients have been developed over the years. In 1996, *Standards for the Providers of Pro Bono Civil Legal Services to the Poor* were adopted by the American Bar Association. Those Standards cover governance, relationship with clients, relationships with volunteers, financial responsibility, ethical and professional issues and effectiveness of the delivery system. Providers that involve pro bono lawyers in the representation of clients should be familiar with the Standards and should strive to adhere to their aspirational goals and guidelines.

Integration with the provider's delivery system. The efforts of members of the bar, whether on a volunteer or a compensated basis, should be integrated into the provider's overall service delivery approach. The resources should be focused on the identified, most compelling needs of the low income community served by the provider.¹¹ To accomplish that calls for the provider to match the identified legal needs of low income persons it serves with the skills and knowledge offered by its participating practitioners.

Because members of the bar may come from diverse backgrounds and many may not have experience in areas directly pertinent to the legal needs of the program's clients, the provider needs to be deliberate in the design of its private attorney component. Several factors need to be considered.

- ***The interests of the participating attorneys.*** Most attorneys prefer to be referred cases that involve procedural and substantive issues with which they are familiar. Cases that

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

¹¹ *Ibid.* and see ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.2 (on Delivery Structure).

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disrupt the routine of a lawyer's practice by requiring a substantial commitment of time to research the background law governing the matter may discourage some attorneys from accepting more cases. On the other hand, repetitive referrals of routine cases can cause burnout, inadvertently devaluing the lawyer's time and commitment. Some attorneys prefer diversity and the opportunity to be exposed to new and challenging legal issues, if they are offered adequate support. To be most effective, the provider should be sensitive to the particular interests of its panel and should keep records that reflect each lawyer's specific interests.

In some cases, a lawyer who is volunteering may have expertise in an area pertinent to a legal need in a client community, but not in an area in which the provider focuses. A trusts and estates lawyer, for instance, may be available to serve clients who wish to write a will—a legal need which the provider may have decided not to address. If the provider is able to link the volunteer attorney with a person eligible for its services without significant cost, it may use such volunteers in their area of expertise. It should not, however, incur significant costs in setting up a system to identify and refer clients whose legal need falls outside what has been identified as the most compelling needs of the low income community.

- *The need for quality assurance in the part of the provider.* Referral of cases to attorneys who have expertise in the substance of the case can assist the provider to meet its responsibility to assure that cases are assigned to lawyers competent to handle them. Referral of matters that are unfamiliar to an attorney requires a commitment to support, including training and backup to assure that competent work is done for the client.
- *The needs of clients.* The provider should also make certain that the cases it refers to its outside attorneys have significance for the clients referred. If volunteer attorneys continually see cases that seem trivial or relatively inconsequential, they may lose interest in assisting further and may draw a faulty conclusion about the nature of legal problems that low income persons face.

A legal aid provider should maintain ongoing, effective communication with the lawyers on its panel and strive to fashion a policy that responds to the interests of the lawyers, while maximizing the service offered to clients. The provider should periodically reassess its utilization of members of the bar and should adjust its approach as appropriate to reflect the changing interests of the attorneys and the changing needs of its clients.¹²

Appropriate institutional support. A legal aid provider should dedicate resources to support the infrastructure necessary to support its efforts to integrate the resources of the legal profession in its work. It should make an adequate commitment of its own resources to be used in conjunction with those available from the bar to recruit, train and provide backup assistance to members of the bar who represent legal aid clients. That calls for support from both the governing body of the organization and from senior management. The provider should make certain that adequate financial resources are provided to support the effective operation of its private attorney component. Staff of the component should be well trained and should have

¹² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

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the skills and capability to interact effectively private practitioners and with the leadership of the bar. The provider should assure that it has sufficient staff to recruit members of the bar, to assign cases properly, to follow-up on referrals and to provide appropriate support.

There are a number of activities that are necessary to carry out an effective project to involve members of the bar in representing clients of the provider.

Establishing a clear understanding with the client. It is very important that the provider establish a clear understanding with clients whom it refers to an outside attorney for representation. Clients should know that an outside attorney, and not the provider, will be representing them.

It should be clear whether the provider retains an attorney-client relationship with the referred client. It is a matter of contract among the client, the outside attorney and the provider as to whether the provider is included in the attorney-client relationship, once the referral has been made. The existence—or absence—of an attorney-client relationship between the provider and the client is significant since it directly implicates whether the provider can receive confidential information to provide support for the outside attorney, or to oversee the representation and to intervene if a problem arises between the client and the attorney.

Clients to be represented by a practitioner who is not employed by the provider should be advised how to contact their attorney, and of the importance of following up with the lawyer. Clients should be informed that although they will be represented by an outside attorney, they will not be charged a fee.¹³ The provider should also let the client know that the attorney has agreed to represent the individual only with regard to the matter referred and that clients who encounter other legal problems for which they seek uncompensated representation should contact the provider and not the outside attorney to seek new assistance. The client should also be told what to do in the event of a complaint about the representation.¹⁴

Establishing a clear understanding with the attorney to whom a case has been referred.

Whenever a case is referred to a lawyer who is not employed by the provider, there should be an explicit determination of the level of responsibility the provider assumes for the case and of its authority to oversee the representation. A number of factors should be resolved by specific agreement between the legal aid provider and the outside attorney:

- The extent to which the attorney-client relationship includes the provider within its purview;
- Who is responsible for costs that may be incurred in the course of the representation;
- The extent of involvement of the provider's staff in strategic decision making prior to referral and during the course of the representation, particularly if the provider has agreed to pay costs;

¹³ ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.4 (on Client and Attorneys' Fees) prohibits collection of a fee from the client, unless agreed to by the provider and the client prior to the representation.

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.7 (on Client Complaint Procedure).

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- Who is responsible for determining if the client will be represented in a possible appeal in the case;
- The level of back-up and support that will be offered and how to access it;
- The reports that the provider will request during the course of the representation and at its end; and
- The procedures that will be followed in the event of a complaint by the client regarding the representation.

Supervision of referred cases. The extent to which the provider can directly supervise the conduct of each case is a function of the extent to which it stands within the attorney-client relationship that is created. If the provider stands outside the relationship between the client and the outside practitioner, it cannot ethically obtain confidential information about the case without the client's consent, nor can it interfere with the professional judgment of the lawyer.¹⁵ Its authority to supervise the representation is, therefore, necessarily circumscribed. If on the other hand, the provider and the outside practitioner share in the attorney-client relationship, the provider has both greater responsibility and greater authority to supervise the handling of each case matter.

The degree of responsibility that a provider assumes for a case referred by it and the nature of the quality assurance procedures that it employs, will vary among different types of providers. In some instances, a full range of quality assurance measures, including requiring the submission of progress and close-out reports may be appropriate. In other cases, the staff of the provider may engage in substantial preparation of the case, including legal research, investigation, and preliminary counsel and advice to the client, but may relinquish further direct responsibility for the matter on consummation of the referral. In such circumstances the provider may offer research and other support, as well as discussing strategy with the outside attorney.

A few providers, because of budget and staff limitations may simply forward cases to participating volunteer attorneys in accordance with the policies and procedures agreed upon between the provider and its panel of attorneys, and may explicitly delegate all responsibility for the case to the outside practitioner. When a legal aid provider does not directly supervise the work of participating attorneys it, nevertheless, should offer training, take reasonable steps to assure that referrals are made to lawyers of known competence, and provide backup and support.

In all cases, the provider should ask for a close out report indicating that the case has terminated and whether the client's objective was achieved. The information should be reviewed by the provider to gauge the effectiveness of its plan for using other members of the bar.

Backup and support. The provider should offer back-up and support to its participating attorneys. The type of support that is possible will vary depending on whether the provider

¹⁵ See Model Rules of Prof'l Conduct R. 1.6 and 5.4 (2003)

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falls within the attorney-client relationship and on practical considerations, such as staff size in relation to the number of participating outside attorneys.

A provider can offer guidance through printed and on-line manuals covering the law and procedure in commonly occurring cases. The provider can assign a staff lawyer to provide advice and support to the outside practitioner, when requested. Some providers have paired less experienced attorneys with more experienced ones for consultation and assistance.

Training. To the extent that outside practitioners are called upon to represent clients in areas such as public benefits, or indigent health care with which they may not be familiar, they should be offered appropriate training. Training can be in substantive areas or regarding issues related to representing low income clients generally, as well as what is necessary to work with a particular low income population. A project, for example, to work with members of the bar to represent homeless persons or persons with HIV/AIDS, should include training in the challenges associated with serving those populations. Many members of the bar will not have had significant experience working with low income clients, although training may have the ancillary effect of encouraging them to represent other low income clients who seek their assistance directly. The provider should also make its cultural competence training available to its participating attorneys.¹⁶

Recruitment of attorneys. The provider should have an ongoing capacity through its own organization or by agreement with another to recruit new attorneys. To the extent possible, it should work closely with the judiciary and bar leadership to support its efforts to engage volunteer attorneys in assisting clients and to increase the pool of attorneys available to assist the low income community. The provider should also recruit in-house corporate counsel and government attorneys to the extent to which their participation is allowed.

The provider should take appropriate steps to show appreciation for volunteer attorneys who have assisted clients. Appreciation can be shown through bar luncheons, favorable articles in bar publications and the local press and a simple thank you letter.

¹⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

STANDARD 2.8 ON RELATIONS WITH THE ORGANIZED BAR

STANDARD

A provider should encourage the active participation of its attorneys in bar organizations and work collaboratively with bar associations¹ in its service area.

COMMENTARY

General considerations

There is a strong community of interest between a legal aid provider and the organized bar in its state and in the localities in which it operates. It is important, therefore, for a legal aid provider and its practitioners to participate in the affairs of bar associations in the communities in its service area.² Legal aid practitioners should participate so that their insights into the needs of low income persons are a part of the deliberations of the bar. The legal aid provider should collaborate as an institution with the organized bar with which it shares common interests related to the effective operation of the legal system and in access to justice. State bar associations in many states have statutorily assigned responsibilities related to legal practice in the state.

Participation by staff practitioners in local and state bar associations

The provider should encourage participation by its staff practitioners in the full range of activities of bar associations. Participation in the bar association by a provider's practitioners will serve as an avenue for concerns associated with legal aid practice to be voiced in the formal and informal deliberations of the bar. It will also provide a forum for legal aid practitioners to develop personal relationships with other members of the bar that can enhance representation of clients. This is particularly true in bar associations that operate in small communities.

Some bar associations have sections or committees that cover broad substantive areas such as housing and family law, as well as matters such as court administration and legal practice. They also often have standing committees on ethics and disciplinary matters, as well as committees on legal aid and indigent representation. Providers should encourage participation by their practitioners in a full array of bar sections and committees.

When appropriate, legal aid practitioners should seek leadership positions including as officers of the bar. Such participation can establish legal aid practitioners as bar leaders with the attendant professional stature that can benefit both the practitioner and the provider that employs the individual.

¹ The term, "bar associations," in this Standard and commentary refers to state and local bar associations, as well as other bar organizations, including those which represent the interests of women attorneys and attorneys of color.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

Standard 2.8 on Relations with the Organized Bar

Some bar associations have a special section for paralegals and other non-licensed practitioners and the provider should support participation in such sections by relevant members of its staff. Many local bar associations perform a variety of important functions in their jurisdiction, many of which may affect the operation of a legal aid provider and its practitioners. Some local bar associations, on the other hand, are not as active on a wide agenda of issues, but do serve as a forum for their members to interact professionally and socially.

Collaboration with the organized bar

A legal aid provider should work closely with the organized bars in its service area, including local bar associations and bars of color. The organized bar is likely to be an important focus of how the provider integrates the resources of the legal profession in its efforts on behalf of the low income community.³ A number of such efforts – including seeking to improve access to justice, engaging in joint projects and developing increased financial resources – should involve the formal leadership of the bar association as well as prominent members of it. The legal aid provider should also work in partnership with local and statewide bar associations to develop and implement strategies to enhance recruitment of volunteer attorneys and to foster their participation in serving low income persons. It should also consult with the organized bar regarding its priorities and means of delivering service to its clients.⁴

Local and state bar associations are often involved through committees in issues such as how the judiciary responds to the needs of pro se litigants and how the court is organized to address cases such as family law and domestic violence. The provider should work actively with the bar as it addresses such issues. It should also bring matters that implicate how the legal system responds to the legal needs of low income persons to the attention of the organized bar.

The organized bar may serve as an important ally on policy issues that affect the operation of the provider or the low income communities it serves. The state bar association and some local bars generally represent the interests of the profession before the legislature and administrative bodies. The provider should work with local and state bar associations to identify and support policies that will foster increased responsiveness of the legal system to low income persons and should seek to have the bars' policy advocates speak out on issues involving equal access to justice. The organized bar can also be an influential ally supporting requests from state and local legislative bodies for provider funding.

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.7 (on Integrating Resources of the Private Bar and Utilization of Private Practitioners).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Legal Needs and Planning to Respond); Standard 2.2 (on Delivery Structure).

STANDARD 2.9 ON USE OF NON-ATTORNEY PRACTITIONERS

STANDARD

A provider should consider using paralegals, tribal advocates, lay advocates, law students and other legal assistants, when authorized by state, federal or tribal law and appropriate ethical rules.

COMMENTARY

General considerations

Paralegals, tribal and lay advocates, law students and other legal assistants supervised by an attorney to assist clients have long played an essential part in legal aid practice. There are many circumstances in which properly supervised non-attorneys may assist clients directly or may support the work of an attorney in serving clients.¹

The provider should determine the nature and extent of non-attorneys' use based on consideration of cost and effectiveness of the assistance. A provider should meet the needs of its clients in the most cost-effective manner possible. The costs of representation by non-attorneys are generally well below that of lawyers and, therefore, use of non-attorney practitioners can often be an economic way to serve clients in appropriate areas.

Assistance by non-attorneys is only appropriate, however, if clients' need for effective representation will be met. Many legal matters require a level of professional skill and knowledge that calls for formal legal education and professional licensing. Laws prohibiting the unauthorized practice of law foreclose non-attorneys participation in many areas of practice. There are areas, however, in which non-attorney practitioners can, under the supervision of an attorney, properly and effectively assist clients.

Appropriate use of non-attorney practitioners

The level of responsibility that is appropriate for a non-attorney to take on depends on the experience of the practitioner and the nature of the matter. Practitioners with significant experience will have an understanding of a broader range of legal issues, and can take greater responsibility, commensurate with the experience.

Representation by a non-attorney practitioner is appropriate where the law and procedure relative to recurring issues can be learned without a formal legal education and where the problem is unlikely to involve ancillary legal issues that would require formal legal training to identify and address. Representation by non-lawyers is authorized in many circumstances by state, federal or tribal law. Federal entitlement programs, such as welfare and food stamps, specifically authorize non-attorney practitioners to appear on behalf of clients in administrative hearings. Many states permit non-attorney practitioners in unemployment compensation

¹ The use of paralegals has been addressed at length in the American Bar Association's *Model Guidelines for the Utilization of Paralegals* (2004).

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hearings and agency rules permit non-lawyers to represent clients in certain immigration matters.

Tribal courts generally require advocates appearing before them to be members of the tribal bar, and allow members of the tribe who have passed a competency exam to appear and practice, even though they have not attended law school. Licensed tribal advocates are traditionally used in many tribal courts to handle a wide variety of cases. Some tribal courts rely exclusively on tribal advocates, allowing only limited participation by lawyers who are not members of the tribe. Such advocates are entitled to represent clients in the jurisdiction in which they are licensed, subject to the rules of the tribal court. They are subject to the general Standards regarding supervision of legal work.²

Non-attorney practitioners can also assist attorneys in the preparation of cases. Such assistance can take many forms, including: 1) initial interviewing of clients; 2) the preparation of documents and drafting of pleadings in repetitive and relatively straightforward cases, such as family law or eviction matters; 3) contacting witnesses; and 4) assisting in the coordination of complex representation involving multiple clients and client groups.

Paralegals can also effectively assist licensed attorneys in clinics and other projects to provide legal information to pro se litigants. They should not, however, give any legal advice except as specifically authorized by a licensed attorney familiar with the case.

Many providers use intake paralegals to conduct interviews of persons seeking assistance to determine eligibility and the general nature of the legal problem. Providers should make certain that paralegals who conduct an initial problem diagnosis have the training and experience necessary to identify the applicant's problem accurately and that their work is supervised by a licensed attorney.³

Law students may properly be used in a variety of ways to assist in the delivery of legal services to eligible clients. Providers may invite participation of law students as interns practicing under the direction of staff and participating outside attorneys. Local rules of court may permit closely supervised court appearances by such students.

Many law students participate in student programs or in law school clinics that provide representation to low income clients. To the extent that a principal purpose of such enterprises is to represent the poor, they are legal aid providers, and, to the extent possible, should operate in conformance with the Standards. Law student providers should utilize, when appropriate, the assistance and expertise available from other local legal aid providers, and should work in close cooperation with such programs to coordinate referral practices and to set service priorities. Student programs have a responsibility to address the limiting factors that are unique to them, and that may affect the quality of work performed:

- Student programs experience frequent turnover requiring special efforts to ensure continuity in the representation of clients.

² See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 6.4 (on Review of Representation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.4 (on Initial Exploration of the Client's Legal Problem).

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- Students require closer supervision than attorneys to ensure high quality representation.
- Students have academic obligations that compete for their time.

Provider responsibilities in the use of non-attorney practitioners

While use of non-attorney practitioners can be a cost-effective way to serve clients, the provider must be aware of the many areas of legal practice where non-attorney representation is foreclosed because of restrictions on the unauthorized practice of law. The law regarding what constitutes the unauthorized practice of law varies by state and the provider should be aware of the requirements in the jurisdictions in which it operates and abide by them.⁴ The provider must avoid implicitly or explicitly giving the impression that its non-attorney practitioners are lawyers.

Legal work by non-attorney practitioner should be under the supervision of a licensed attorney and subject to strict quality controls.⁵ The provider should assure that all non-attorney practitioners receive adequate training to be proficient in the work which they are assigned.

⁴ See Model Rules of Prof'l Conduct R. 5.3 and 5.5 (2003).

⁵ See Model Rules of Prof'l Conduct R. 5.3 (2003).

STANDARD 2.10 ON EFFECTIVE USE OF TECHNOLOGY

STANDARD

A provider should utilize technology to support efficient operations and the provision of high quality and responsive services.

COMMENTARY

General considerations

A legal aid provider should utilize technology to operate efficiently and to respond to the legal needs of the low income communities it serves. The rapid and ongoing changes brought about by technology have a dramatic impact on how low income persons interact with their environment and with the legal system. At the same time, technology continues to transform legal aid practice and a provider's operations as well as the options available for providing services to the low income community. How low income persons are served by legal aid providers, how providers operate, how legal work is produced and managed and how staff are trained and provided essential support have all undergone significant transformation in response to technological advances.

Technology also plays an increasingly central role in how the legal system operates as more courts and administrative agencies rely on computer and web-based methods of operating. Increasing numbers of courts are moving to mandatory electronic filing and administrative agencies, including those who deal with low income persons, require on-line applications for services.

The tools for effective practice and for responding to the legal needs of low income communities thus are grounded more and more in modern technology. Each provider has a responsibility to plan effectively how it will use technology in providing assistance to low income persons in its service area and in supporting its internal operations, including the production and management of legal work and the training and support of its staff.

Technology planning

A provider should examine all aspects of its operation for opportunities to increase the quality and range of its service through technology. There are many ways in which technology can be used by a provider and new methods will evolve over time as technology continues to advance. There are a number of broad areas regarding which the provider should plan.

The production and management of legal work. Technology plays an increasingly important role in relation to the production and management of legal work. The provider should be aware of emerging uses of technology directly in the conduct of representation. There are also a number of applications that support efficiency and effectiveness, including case management software,¹ document assembly capabilities and tools for legal and factual research. The provider should also be aware of the opportunities for using technology to collaborate with

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.3 (on Maintenance of Records).

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others including outside practitioners, other legal aid providers and non-legal organizations that serve clients.

Training and support of staff. The provider should consider ways in which technology can facilitate training of staff members in advocacy skills and substantive law and keeping them up to date on developments in the law and emerging strategies.² Technology can be used to provide training materials such as manuals, background memos and sample pleadings to pro bono attorneys.³ The provider should consider uses of technology to link with networks of advocates and with national support and advocacy organizations to support the legal work of its practitioners.

Internal operations. The provider should also address opportunities that technology may provide to increase the efficiency of its internal operation, including software for accounting, human resources and personnel management and other such tools that may evolve. The provider should consider use of technology to enhance its internal communications through e-mail, e-mail lists, intranets, video conferencing and other similar technologies as they evolve. It should be aware of ways that technology can support its resource development and marketing efforts.

Provider policies. The provider should be attentive to the development and implementation of policies regarding the use of technology by staff and others, including issues such as use of e-mail, personal access to the web and downloading of software programs. The provider should have clear policies with regard to back-up and disaster recovery plans as well as security policies and procedures for protecting client and case data.

Expanding the range of services to clients and others in the community. Each provider should stay informed of new developments and analyze the degree to which new strategies for serving low income communities may be possible as a result of technological innovations. A provider should cultivate a commitment to innovation and should take advantage of technology that can increase the scope of services it offers to its constituents. The provider should be aware, for instance, of technologically based techniques to provide general legal information to low income persons,⁴ to support limited representation of clients⁵ and to assist pro se litigants.⁶ Technology may also support remote intake and remote representation of clients, particularly for persons with whom face to face interaction is impractical. Technology planning should include an assessment of the effectiveness of the provider's current technology and of new technological advances that would enhance its operation and delivery of services.

Expertise to meet technology needs. The provider should assess whether its information technology needs can best be met by using staff or by outsourcing the responsibility to others.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.5 (on Training).

³ 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).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 3.4 to 3.4-2 on various forms of limited representation.

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

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The provider should also consider areas appropriate for upgrading its technological capability to increase the efficiency and effectiveness of its delivery strategies.

To make informed choices about innovative uses of technology and to embrace those changes that will in fact help it serve its clients more effectively, a provider needs access to expertise that can help it. Not every provider has the resources to hire or contract for the technological expertise needed for it to plan creatively. For many providers, therefore, it is particularly important to participate in regional and statewide technology task forces and formal statewide and regional technology planning efforts in order to stay abreast of rapidly changing developments. A provider may be able to hold down costs by collaborating with others to plan and pay for the development and implementation of technology, such as case management software.

Responsibilities of the provider regarding its utilization of technology

Responsibilities to members of the low income community. A provider should be aware of the degree to which members of the low income communities it serves have access to the technology they will need to take advantage of technologically based service strategies. While it appears that access to and use of computers is on the rise among many low income communities, there are still many low income persons who have limited or no access to the internet. Others may have access to computers but will lack training or the interest in using technology. To the degree practical, a provider should support strategies that increase access of low income persons to technology and should cooperate with other organizations that seek to increase technology's availability and usability.

The provider should also be careful not to utilize technology in ways that limits or deters access to its services by persons in need of assistance. It should provide alternative means for access to assistance for persons who are resistant to the use of computers and other forms of modern technology.⁷

A provider that obtains information on a website from users of the site needs to publish and abide by a privacy policy regarding how it will treat information it obtains from persons who use its systems. It must also be careful to protect from disclosure any confidential data obtained from applicants, clients and other users of its services. It should have security measures in place to protect all its electronic data from unauthorized intrusion. It should also address the special risks associated with interactions over the internet. Sensitive and personal data should be appropriately encrypted. The provider should have a policy regarding retention and deletion of data.

The provider should determine whether information that is provided by persons who use a kiosk or web-based system to obtain legal information is confidential under the ethical rules in its jurisdiction.⁸ Personal information given by a client or an applicant for service is confidential under pertinent ethical rules.⁹ However, persons who provide personal information in the course of obtaining legal information from the provider through the web or a kiosk, and who

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

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

⁹ Model Rules of Prof'l Conduct R. 1.4 and 1.18 (2003).

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had no expectation or intention of becoming a client of the provider may not be subject to the same protections.¹⁰ The provider should protect the information from disclosure, but may not be able to resist a subpoena or other official request for disclosure. It should, therefore, have a policy regarding whether it will retain the personal information, and should avoid doing so in a form identifiable to the individual, unless necessary. If it does keep information that would not be deemed to be confidential under the ethical rules in its jurisdiction, it should notify the individual to whom the information pertains.

Budgeting adequate resources for technology. A provider should budget to meet its technology needs as part of the annual budgeting process. Funds should also be allocated for planned major expenditures to implement significant new technology initiatives. The budget should provide for purchase, maintenance and support of technologies used in the delivery of services to low income persons. It should provide adequate funds for internal technology needs, including: 1) regular upgrade and replacement of equipment and software, 2) personnel necessary to maintain networks and equipment, and 3) training and support of staff in the use of technology. Technology investments should be planned on a multi-year basis and should include reserve funds to allow for flexibility in taking advantage of new developments.

Using Technology to serve low income persons. A provider should be alert to the ways that emerging technologies can be used to serve low income persons directly, either by supporting their access to representation or by directly providing legal information and other needed assistance. The provider should budget not only for the equipment and software to support such efforts, but also for the non-technical expenses, such as personnel necessary for the development and updating of content.

It is also important that a provider work with others in regional and statewide systems to explore ways that technology may be used collaboratively to strengthen the overall system.¹¹ A provider should also work with courts and administrative agencies to make certain that their technological requirements, such as mandated electronic filing, function in ways that facilitate access for low income persons.

Regular upgrade and replacement of equipment and software. One result of the rapid changes in the design and capability of technology is that both hardware and software suffer from speedy obsolescence that can only be addressed by regularly updating equipment and software. Budgeting should provide for upgrading equipment on a rotating basis so that all equipment is replaced approximately every three years, or as needed. An upgrade schedule for software might be shorter, depending on the product's development cycle. The actual roll-out schedule should be determined based on the number of persons affected and the likely impact of the upgrade. For example, it might be ill-advised to implement new software applications that have system-wide impact on a rotating basis. Failure to upgrade equipment and operating systems can result in a computer system that is unable to operate newly developed software that might be instrumental in helping the provider to serve its clients more effectively.

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

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Personnel necessary to maintain networks and equipment and manage databases and other complex software. The persons who are responsible for the provider's technology need to be well qualified for their role. The provider's leadership needs to understand the business requirements of the organization and the related technical applications so that it can effectively hire and manage appropriate technology staff.

There are multiple responsibilities that technology personnel need to address, including: 1) management of the servers and network infrastructure; 2) management of desktops and related hardware and software; 3) support and training of users of the technology; 4) management of organizational databases and system-wide applications; and 5) management of technologies that are used to assist low income persons. The provider should consider whether it would be cost-effective to outsource the development, hosting, maintenance or support of some or all of these technological needs.¹²

The staff or contractors who are responsible need to have knowledge and skills necessary to keep networks functioning and available to staff who rely on them. Equipment and networks that fail frequently can paralyze a provider's capacity to operate effectively as a law office and unnecessarily undermine confidence in the technology that is in place.

Technology personnel also need to be capable of managing the provider's databases as well as accounting and other software, so that staff can make maximum use of the provider's knowledge base and so that critical data is not lost. Staff who are appropriately skilled and knowledgeable about the provider's software applications should be available to provide support to staff members who struggle with use of the applications.

Training and support of staff in the use of technology. As technology becomes more integral to the functioning of a provider and to the production and management of legal work, it becomes increasingly important that the provider plan and budget for training and support of staff who will use the technology. Many systems call for all necessary staff to participate in their use for them to be successful. A computerized system for checking for conflicts of interest, for instance, will not work unless the data necessary for the conflict check is uniformly entered into the system. A supervisory system in a multi-office provider that relies on case notes being entered in the case management system will not function unless there is widespread participation in entering the data.

Because some persons find it easier to adapt to technological changes than others, it is important that the provider budget adequate funds to train staff to use the technology effectively and to support those who have difficulty adapting to it.¹³

¹² Some providers outsource some aspects of the technology needs to private law firms, which may provide the service on a pro bono basis. 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).

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.5 (on Training).

STANDARD 2.11 ON PROVIDER EVALUATION

STANDARD

A provider should regularly evaluate the efficiency and effectiveness of its operations and its response to the legal needs of the low income communities it serves.

COMMENTARY

General considerations

A legal aid provider should regularly review its operations to determine if it is functioning efficiently and effectively, is producing high quality legal work and is accomplishing its objectives on behalf of low income persons. The overall goal of its assessments should be to support forward-looking and judicious management which attends to the organization's weaknesses and reinforces its strengths.

The provider has a primary responsibility for the ongoing evaluation of itself and should conduct its own assessments consistent with this Standard and commentary. The provider's funding sources also have an interest in assessing whether their funds are being used effectively and in compliance with the terms of the grant of contract. Evaluations conducted by a funder can be an important source of information for a provider and it should cooperate in such evaluations and take advantage of the insights derived from them.¹

Evaluation purposes

There are several potential purposes which evaluations can serve:

- ***To improve the provider's operations.*** A fundamental purpose of evaluation is to examine how effectively the provider or a specific project or initiative is functioning in order to make informed decisions about adjustments that might be appropriate. To meet this purpose, assessments should examine whether the provider or its projects are operating according to stated plans, whether they are accomplishing the objectives set out for them, or whether staff and others involved have the requisite skills and substantive knowledge for them to succeed.
- ***To determine if its delivery approaches are succeeding.*** To be effective, a provider has a responsibility to learn about new delivery techniques and to experiment with new approaches to serving its low income communities.² In determining its approach to serving its constituents, the provider will make a number of choices regarding the appropriate balance between limited and full representation,³ assistance to pro se

¹ Evaluations conducted by funding sources are subject to the guidelines set forth in the ABA *Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor* (1991).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.2 (on Delivery Structure).

³ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.1 (on Full Legal Representation); Standards 3.4 to 3.4-2 on various forms of limited representation.

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litigants,⁴ community legal education,⁵ and various models for delivering each. It should regularly assess whether its efforts are accomplishing useful and lasting outcomes for those whom it assists and if it is successfully responding to the most compelling needs of the low income communities it serves.⁶

- ***To test the success of innovative delivery techniques.*** An effective provider will engage in innovative approaches to serving its clients utilizing a number of techniques, including new technologies.⁷ The provider should evaluate its innovative efforts to determine if they are accomplishing the intended outcomes and are cost-effective. Such an evaluation is particularly valuable when the provider is considering whether an innovative approach should be made permanent or expanded.
- ***To inform planning and budgeting.*** Evaluations also can be important to inform planning and budgeting, and to guide the allocation of the provider's resources. Many strategies for serving clients or for using technology involve significant choices for a provider in terms of deployment of staff and expenditure of funds. Evaluations are an important source of information to the organization about the effectiveness of its allocation of these resources and to guide future choices.
- ***To inform training plans.*** A number of factors help shape a provider's training plans, but conclusions of an evaluation are one useful source. Evaluations may identify needs for training in substantive knowledge and practice skills as well as other areas a provider might not otherwise identify, such as management skills, cultural competence, effectively dealing with diversity and utilization of technology.
- ***To demonstrate accountability.*** External and internal self evaluations are often the key to demonstrating that a project or initiative has met its goals and accomplished its objectives. This may be required by a funding source or initiated by the provider to support requests for additional funding.
- ***To obtain and increase funding.*** Innovative initiatives that attract funding are often based on claims regarding the results that they will achieve. Measuring and demonstrating the actual benefits and results are often key to obtaining future grants from the same or other sources.
- ***To help build a constituency.*** Evaluations can sometimes be instrumental in demonstrating the benefit of a project or initiative to community organizations or key individuals in order to gain their support or collaboration.

Approaches to self evaluation

A variety of techniques may be employed to assess a provider's operations. These range from internal reporting systems that regularly supply management and the governing body with

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

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information about provider activities to internally conducted formal evaluations of projects and initiatives to formal review by outside evaluators. An evaluation may involve a full assessment of every aspect of the provider's operation or may focus on specific projects or components.

The frequency and scope of an evaluation is a function in part of the purpose it is designed to serve. Full evaluations of the provider are costly and need to occur only every several years. Some projects or special initiatives, on the other hand, may call for ongoing monitoring by the provider. Many funding sources periodically review the operation of their recipients. Reports from such evaluations serve as a useful source of information to a provider regarding its effectiveness.⁸

Evaluation of internal operations. A provider should regularly conduct internal evaluations as a management tool. Many aspects of provider operation addressed in these Standards call for the provider to assess the effectiveness of its efforts in the area. This is particularly important with regard to the delivery approaches that the provider adopts to respond to the needs of the low income communities that it serves. A provider should regularly assess whether its staff, particularly its practitioners have the necessary skills and substantive knowledge. It should assess the effectiveness of its delivery approaches involving full representation,⁹ limited representation,¹⁰ assistance to pro se litigants,¹¹ and community legal education.¹²

Other facets of its operation should also be assessed by the provider, including intake,¹³ its effort to integrate the resources of the legal profession and to involve members of the bar,¹⁴ its cultural competence,¹⁵ its capacity to serve persons with limited English proficiency,¹⁶ its relations with clients,¹⁷ its accessibility to potential clients,¹⁸ its internal systems and procedures,¹⁹ and its methods for quality assurance.²⁰

⁸ Evaluations conducted by funding sources are subject to the guidelines set forth in the *ABA Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor* (1991).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

¹⁰ See 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).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

¹² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 4.1 (on Provider's Intake System); Standard 4.2 (on Establishing a Clear Understanding).

¹⁴ 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).

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

¹⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

¹⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 4.1 to 4.7 on Relations with Clients.

¹⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.5 (on Access to Services).

¹⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 5.1 to 5.5 on Internal Systems and Procedures.

²⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 6.1 to 6.6 on Quality Assurance.

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A provider may also choose to assess the degree to which it is conforming to these *Standards for the Provision of Civil Legal Aid*. While these *Standards* are aspirational, they do provide a guide that can be used as the basis of an evaluation, regarding systems that should be in place and what those systems should accomplish.

Evaluation of the provider's responsiveness to the legal needs of the low income communities it serves. Strategies that rely on clients taking action to assist themselves—as is the case with limited representation and assistance to pro se litigants—call for the provider to assess the extent to which users are able to take advantage of the assistance and the extent to which it benefits them.²¹ Follow up with persons served is an effective way to determine if they understood the information or advice provided, if they acted on it, if the action improved their situation and if it led to a just result. Similarly, providers should periodically assess whether their legal education efforts succeeded in conveying the information intended and whether persons who received it were able to act favorably based on the information offered.²²

A provider should also periodically assess the effectiveness of its legal strategies that utilize various forms of full representation.²³ Such assessments should consider both whether the provider is achieving clients' objectives in a significant number of cases and whether it is accomplishing meaningful outcomes for its clients.²⁴

The provider should also examine the long-term outcomes of the provider's legal work for the low income community overall measured against the compelling legal needs identified in the provider's planning process.²⁵ It should also examine unexpected long-term results that may have been achieved.

Types of evaluation. There are different types of evaluations that can be beneficial to a provider and that should be utilized where appropriate.

Process evaluations assess the extent to which a provider is operating as it was intended. They typically assess conformance with established norms and standards, with a work plan or with contractual, statutory and regulatory requirements. Such evaluations focus on whether the provider has processes in place which it is presumed will lead to quality, or another positive result. Such an evaluation might, for instance, examine the processes for supervising legal work as a way of forming and opinion about the quality of the provider's legal work.

Outcome evaluations assess what has been accomplished by a project or component of a provider and whether it has achieved its objectives. They focus on the intended and unintended results of a project to judge its effectiveness. They may involve techniques to follow up with clients

²¹ See 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); Standard 3.5 (on Assistance to Pro Se Litigants).

²² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

²³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

²⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

²⁵ 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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and others to determine what has transpired since the assistance was provided. They also can focus on long-term outcomes achieved for clients and the low income communities that the provider serves.

Client satisfaction assessments can be useful to measure a provider's treatment of clients. They can provide useful information regarding whether clients are being treated with dignity and respect, are being kept informed and properly consulted regarding the conduct of the representation and are satisfied with the outcome in their cases. Client satisfaction surveys do not offer reliable data about the quality or effectiveness of representation.

Evaluation techniques. There are a number of evaluation techniques that a provider can utilize to assess its operation and the effectiveness of its legal work:

- Regular internal reporting that provides data about a provider's operations and productivity, such as budget reports, case counts, outcome tracking, major case activity reports and telephone switch reports;
- A desk audit using an internally administered checklist to confirm that the provider complies with appropriate legal and contractual requirements;
- Review of the work of practitioners and other staff through both supervisory and internal peer reviews to assure that it is of high quality and meets the provider's standards;²⁶
- Staff performance evaluations;
- A peer review in which outside persons who are knowledgeable and experienced in legal aid review the provider's operation and the quality and effectiveness of its legal work;
- Periodic follow-up interviews of a small sample of clients at intervals following the close of the case;
- Surveys and interviews of personnel of courts and agencies that work with the provider and with the low income population;
- Focus groups of low income persons, clients, agency personnel and other stakeholders;
- Review of court files to determine case outcomes.

²⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.4 (on Review of Representation).

STANDARD 2.12 ON INSTITUTIONAL STATURE AND CREDIBILITY

STANDARD

A provider should actively seek to achieve institutional stature and credibility in the communities in which it operates.

COMMENTARY

General considerations

Effective representation of clients is enhanced if the provider establishes a positive institutional presence in the communities in which it operates. Like the good will that attaches to a business name, the provider's reputation belongs to the institution. It persists despite changes in personnel and provides the backdrop against which all its practitioners practice.

In order to achieve institutional stature and credibility, the provider should operate in ways that command respect both in the low income community and among public leaders and others who make decisions that may affect low income persons. Such esteem will in part be gained by the provider producing high quality legal work that is responsive to the needs of its constituents, as described in these Standards. It also derives from the organization being a visible presence in the communities in which it operates. The provider should be actively engaged with bar associations, with other legal aid providers, community groups and with social service agencies and civic organizations that serve low income communities.

There are important indicia of a provider's having established institutional stature and credibility. A legal aid provider that has acquired a positive reputation in the community gains influence in the communities in which it operates. Decision-makers are more likely to seek input from a well regarded provider. Elected officials, for instance, are more likely to include representatives of a respected provider on task forces and planning commissions that are addressing issues of community-wide significance. Local and state legislators see such an organization as an appropriate place from which to seek input on legislation being considered. Policy-makers are more apt to confer informally with the leadership and other recognized experts from the provider on issues of importance to low income communities. Newspapers may seek the comment of the provider on pertinent issues, offering an opportunity to foster a more accurate public view of low income communities and the challenges they face.

Institutional stature and credibility can also assist in legal strategies and increase success in achieving lasting results for clients. Adversaries may be more inclined to settle favorably with the provider's clients if the provider has a solid reputation for legal work. Decision-makers may be more attentive and responsive to positions presented by the provider on behalf of its clients.

Institutional stature and credibility also promote high morale and discourage turnover as staff and others providing service to clients find increased satisfaction being part of an institution that commands the respect of clients and the community at large. The recognized success of a provider can also enhance its recruitment of new staff. Top-flight candidates for employment are more likely seek to work for a well regarded organization than for one with an uncertain

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reputation. Outside Attorneys are also more likely to volunteer to work with a highly respected organization, particularly when the provider seeks assistance with complex work calling for a commitment of significant resources.

Finally, establishing institutional stature and credibility is an important ingredient of successful fundraising. Private and public funders are attracted to organizations with proven capability and a positive reputation for accomplishment. Funders need to have confidence that issues identified by a provider are important to address and that the provider has the capacity to respond.¹

Means of achieving institutional stature and credibility

Decision-makers. The provider should understand the community in which it operates and be aware of the key decision-makers who affect low income persons. This will include judges, other lawyers, legislators, hearing officers, and public and quasi-public officials. It will also include others who may be less obvious, such as financial, business, labor, medical and religious leaders.

The most important way to establish a presence with key decision-makers is through the consistent production of high quality legal work that accomplishes lasting results for low income persons. Attorneys and judges who are familiar with the provider's legal work should know that it handles all cases thoroughly and expertly. Legal work should be conducted skillfully with the demonstrable purpose of remedying significant problems for clients. Practitioners should be known for their willingness to represent their clients forcefully and competently to accomplish meaningful results for them.

Relations with all decision-makers should be honest and forthright. Where appropriate, the provider should reach out to decision-makers to foster a reputation as a knowledgeable and mature resource on issues that affect the low income community.

The low income community. The provider's stature with the low income population is developed through legal assistance that is responsive to low income person's legal needs and that is successful in achieving lasting results on their behalf. Its stature and credibility also depend on the provider operating in ways that are respectful of clients. The provider should have established its presence in the communities it serves by effective outreach and by offering a range of assistance that is responsive to identified needs of low income persons.

Many aspects of a provider's operation over time affect its reputation and its ability to command respect in the low income community. Its intake system needs to be accessible and responsive,² and it needs to deal with all the low income communities it serves in a culturally competent manner.³ Its offices and other facilities should project an appearance that conveys

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.1 (on Provider's Intake System) and Standard 4.5 (on Access to Services).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

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competence and professionalism to clients and others. Managers and practitioners should realize that mundane aspects of daily operation, such as unconventional dress by staff, may be seen as deliberate challenges to community standards and may undermine respect for the institution.

SECTION 3

**STANDARDS REGARDING PROVIDER EFFECTIVENESS - DELIVERY STRUCTURE
AND METHODS**

STANDARD 3.1 ON FULL LEGAL REPRESENTATION

STANDARD

A provider should offer full legal representation or actively participate in a delivery system in which such representation is available.

COMMENTARY

General Considerations

This Standard addresses the responsibility of the provider in determining the areas in which it will offer full representation and in assuring that such work is of high quality and responds to the pressing needs of its client communities.¹

There are many issues that clients confront that cannot be resolved favorably without full representation. Full representation involves 1) identifying the client's legal problem, 2) determining the client's objective and 3) pursuing that objective rigorously throughout the matter at hand. Full representation is distinguished from limited representation, as set forth in these Standards, in which the scope of what the provider and its practitioners will do for the client is limited at the outset of the attorney-client relationship.²

Full representation is called for when the clients would be likely to prevail only if fully represented. Full representation is called for when the facts and law are complex, the forum is particularly challenging for litigants or the client is unlikely to be able to handle the issue alone because of language or cultural barriers, emotional factors or a disability. The importance of full representation also increases in relation to the potential gravity of the loss in the event that the client is not successful, or the significance of the benefit to be gained with success. Cases that threaten permanent loss of shelter, or income, or that threaten the stability and safety of the family, for instance, call for full representation because of the potential harm that may befall clients. In other circumstances, there may be potentially valuable affirmative gains, such as significant economic benefit to an individual or to the low income community that require full representation to be realized.

Not all full representation involves dedication of significant time and resources. If the nature of the case warrants it, a commitment to full representation of a client may be met with relatively brief service.³ In some circumstances, the matter may be resolved with a phone call or a letter and the client and practitioner determine that no more assistance is necessary. A client may decide after consulting with the practitioner not to pursue further action in a case. Such assistance differs from limited representation where the decision is made *a priori* that the

¹ Standards governing how practitioners should carry out various types of full representation are set forth in Section 7 of these Standards.

² See 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).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.8 (on Legal Counseling).

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representation will be limited regardless of the full range of advocacy that might be possible in the matter.

The most frequent forums for full representation in the legal aid context are court litigation⁴ and administrative hearings.⁵ Such representation may range from negotiating a settlement to appearing in a hearing or trial, to pursuing an appeal on behalf of a client. Litigation may also range from simple, somewhat repetitive procedures to highly complex advocacy calling for sophisticated legal analysis and significant provider resources.

Representation of a client before a legislative and administrative body generally involves full representation.⁶

Full representation is not always adversarial. Some involves transactional work on behalf of a group or individual.⁷ A provider may, for example, help a group incorporate and obtain the appropriate permits and approvals to engage in a business to benefit a low income community. Such work often takes place in the context of community economic development, which can involve a commitment to a long-term strategy which involves full representation.⁸

Responsibilities of the provider

Making an informed decision about what types of full representation will be offered. Every provider should either have the capacity to provide full representation that is needed by the low income population or be part of an overall delivery system in which appropriate forms of full representation are available.⁹ Full representation is often the most effective way to help achieve a client's objective. If resources permitted, many providers would opt to offer full representation to all clients whom it represents. Unfortunately, however, legal aid providers seldom have sufficient resources to fully represent every person seeking their services, and so must choose those areas in which they will offer full representation and those in which they can only offer limited representation as defined by these Standards.¹⁰

Two choices are involved in a legal aid provider's determination of the most effective way to deploy and allocate its resources to provide full representation. The first is to identify the

⁴ For the Standards addressed to practitioners' participation in litigation, see ABA Standards for the Provision of Civil Legal Aid (2006), Standards 7.7 to 7.7-11.

⁵ For the Standard addressed to practitioners' participation in administrative hearings, see ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.12 (on Administrative Hearings).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006): Standards 7.15 (on Transactional Representation); 7.16 (on Representation of Groups and Organizations).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006): Standards 3.1 (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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substantive areas in which it will offer full representation. The second is to determine the types of full representation that will be offered.¹¹ Only a few providers are likely to offer every possible mode of full representation.

Some providers are organized to provide only limited representation, for instance, providing intake, advice and referral for a regional or statewide legal aid delivery system. Providers that do not themselves offer full representation should have cooperative arrangements with other entities that provide such representation and to which they can refer clients. All providers should participate in and support statewide and regional systems that have the capacity collectively to offer a full range of services, including full representation as described in this Standard and commentary. In a geographic area in which there is only one provider, that provider should offer full representation.

In order to maximize the effectiveness of its resources, a provider may identify those legal issues in which it will offer full representation and may utilize other delivery methods, including limited representation for others. A provider may also determine that a particular group of clients, for whom limited representation would not be appropriate because of language or cultural barriers or mental or physical limitations (including those who are employed and have inflexible workplace hours and policies) will be afforded full representation in specific areas, where other clients might be offered more limited representation.

In determining areas in which it will offer full representation a provider may consider the degree to which it seeks to accomplish systemic change that will benefit the low income communities it serves, as well as individual clients. Some issues affect large numbers of people and are rooted in policies and practices of governmental agencies and businesses that frequently interact with low income persons. Such issues sometimes require advocacy aimed at changing the underlying policy or practice. Systemic work is often capable of producing a long-term favorable remedy that affects a large number of people and is an important part of the panoply of strategic approaches that may be employed to meet the needs of the low income population. Not all providers elect to undertake systemic work. On the other hand, some providers are organized specifically for the purpose of accomplishing systemic change for a particular population, or with regard to a particular issue.

Providers that adopt a policy of seeking systemic change through their work generally find that addressing such issues requires long-term strategies. While there are a number of ways in which a provider might seek systemic change, direct representation of clients is the most common and generally calls for some form of full representation.¹²

A focus on systemic change affects two important choices that a provider makes in determining its approach to service delivery. The first relates to the substantive areas in which it will offer full representation. A provider that offers only limited representation in a substantive area is unlikely to be able to mount a strategy to have a long-term systemic impact in the area.

¹¹ Standards governing how practitioners should carry out various types of full representation are set forth in Section 7 of these Standards.

¹² This is not to say that the only way to have a systemic impact is through full representation. A provider may, for instance, effect significant systemic change by participating in court or bar association committees on issues that relate to the administration of justice.

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The second factor that may be affected is the types of representation that will be offered. A serious commitment to systemic work, for example, might lead a provider to undertake legislative and administrative advocacy, or a significant appellate practice. It should be noted, however, that systemic impact can be obtained by strategically focused individual representation in trial or administrative practice. Similarly, community economic development and group representation can have a significant systemic impact.

Providing adequate support for full representation. A legal aid provider has several responsibilities with regard to full representation. As noted above, initially the provider should make an informed decision about the substantive areas in which full representation is most appropriate to meet the pressing needs of the low income population. It should assure that adequate resources, particularly staff, are deployed to support the full representation to which it is committed. It should adequately budget to meet the expense of full representation, including cost of discovery and experts.¹³ If the provider engages in systemic work, it should reduce the other workload requirements of practitioners who take on such work, if necessary.¹⁴

A provider that undertakes appellate work should have a policy regarding the approval of appeals challenging adverse rulings and defending lower court victories against appeals pursued by the adverse party. The policy should reflect factors such as the likely outcome on appeal, the potential benefit and risk to the client, the resources of the provider required for prosecution of the appeal, and the relationship of the issue to the provider's substantive goals and objectives.

A provider needs practitioners who are versed in the law and process that is necessary for effective, full representation. Providers have a responsibility to assure that staff receive the necessary training to improve the advocates' practice skills and to keep them current in the substantive law so that they may represent their clients effectively.¹⁵

They should be familiar with the practice expectations in the various forums in which they operate, including state and federal trial and appellate courts, as appropriate. Providers that appear in tribunals with highly specialized procedures, such as public utility commissions or zoning boards should assure that their practitioners are able to practice effectively in those settings.

The provider also has a responsibility to make certain that its practitioners understand the low income communities in its service area. They should be aware of any cultural values that might affect a client's reaction to some forms of full representation, such as litigation and similarly lengthy and adversarial processes.¹⁶

It is important that the provider encourage its practitioners to stay abreast of changes among the issues that affect the low income communities it serves, including: 1) changes in the

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.5 (on Policy Regarding Costs of Representation).

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.2 (on Assignment and Management of Cases and Workload).

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.5 (on Training).

¹⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

Standard 3.1 on Full Legal Representation

economy; 2) changes in patterns of racial and ethnic discrimination; 3) new governmental policies and practices of agencies that affect the low income population; and 4) the development of new technologies. Such changes can give rise to new legal issues and to new strategies to address old and new legal problems. The provider should encourage its practitioners to participate in various forums in which such issues and strategies are discussed. Appropriate opportunities include state, regional and national trainings; e-mail lists and other computer-based discussions, as well as publications of national and state advocacy entities pertinent to the practitioners' work.

A provider should constantly strive to increase the effectiveness of the strategies that it pursues. It should examine whether established strategies are still effective at achieving successful individual outcomes and lasting results for the entire low income community and should explore new approaches to advocacy that evolve as new issues arise.¹⁷

Methods for evaluating the effectiveness of full representation will vary depending on the type of representation and the provider's overall objective. A provider might, for instance, record the degree to which clients' objectives have been met in individual cases and periodically assess the overall effectiveness of its individual representation. In some circumstances, it might be valuable periodically to follow up with clients to determine the long-term impact of the assistance they received. This would be particularly true if the provider has articulated a long-term goal for its work in a particular area. Thus, for instance, a provider might set a goal for its domestic violence work of helping its clients find a stable and safe environment in which to live, and would find it useful to know if it has succeeded in the goal over time.

Evaluation of the success of systemic work can be challenging, but it is also important that the effectiveness of such work be examined periodically. Systemic work should have a clear long-term objective for the effort. The proper evaluative technique will be a function of what the long-term objective is. Periodic assessments of whether the intended beneficiaries of systemic work have taken advantage of a remedy obtained can be important to guiding future efforts and in making choices regarding which strategies are most beneficial.¹⁸

¹⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

¹⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

STANDARD 3.2 ON LEGISLATIVE AND ADMINISTRATIVE ADVOCACY

STANDARD

A provider should advocate before legislative and administrative bodies or actively participate in a delivery system which includes such advocacy.

COMMENTARY

Legislative and administrative advocacy as effective responses to client problems

Legislative and administrative processes are an essential part of the legal system that affect the low income population. Many administrative agencies adopt rules, regulations, policies and orders of general application that have lasting impact on low income persons. Some recurring problems affecting clients can only be resolved by legislative action or through a rule change by an administrative agency.

Legal aid providers, because of their knowledge of the legal problems of low income persons, may provide an important perspective regarding laws, regulations, rules and policies that are being considered for enactment. Advocacy before legislative and administrative bodies at local, state and federal levels may prevent adoption of laws and policies that could have a long-term detrimental impact on the communities the provider serves. Such advocacy can be a more efficient way to address important issues than costly and complicated litigation that challenges or seeks to interpret an adverse statute, appropriation, rule, regulation or policy after it is adopted. In some cases, advocacy may be necessary to protect favorable court decisions or to assure continued access to the courts on issues that affect low income persons.

Providers often have an important advocacy role with administrative agencies regarding the interpretation and implementation of laws, policies and regulations after they are adopted. To name only a few examples, such advocacy may apply to local housing authorities administering federal housing programs, welfare departments implementing public benefit programs, school districts meeting federal special education requirements and federal agencies implementing federal statutes. Advocacy may take the form of representation of individual clients and client groups or of general intervention with an agency regarding the interests of low income communities affected by the programs for which the agency is responsible.

It is important that members of low income communities have a means to assert their interests before both legislative and administrative bodies. All providers should monitor legislative and administrative developments and should keep members of the low income communities they serve informed of issues that may affect them. Each provider should decide if it is the appropriate organization to advocate on legislative and administrative issues, or if other organizations are better able to address some or all of the need. A provider that does not offer legislative and administrative advocacy directly should participate in local, regional and statewide systems to assure that such advocacy is available. Providers that do not advocate directly should make certain that organizations that do advocate before legislative and administrative bodies are aware of the needs of the provider's low income community and, to the extent possible, undertake advocacy that responds to those needs.

Standard 3.2 on Legislative and Administrative Advocacy

Accountability to the low income community. Legal aid providers should be accountable to the low income population they serve for the direction and conduct of advocacy before legislative and administrative bodies. Such accountability may take place in a number of ways, some direct and others indirect.¹

The provider often will directly represent a client or a group of clients before a legislative or administrative body on a relatively narrow and specific issue. In other circumstances, a provider may have a general retainer to advocate before a legislative or administrative body on all issues that might affect the interests of the client. In either case, there is an attorney-client relationship and the provider's accountability to the client is a function of its ethical duty. Where a provider operates with a general retainer agreement, however, it is unlikely that it will be able to report to and seek guidance from its client on each strategic decision that is made in the course of the advocacy. The provider should have a means to consult with its client about advocacy priorities and to keep the client informed about key developments.

Other times, it will be impractical or impossible for the provider to have an attorney-client relationship with an individual or group with respect to advocacy before a legislative or administrative body. In such circumstances, the provider is responsible for assuring that there are appropriate indirect means to be accountable to the low income population it serves. Such accountability may be accomplished by processes that keep members of the low income community informed of public policy developments and that periodically seek guidance on priorities for legislative and administrative advocacy.

There is an array of ways in which legislative and administrative advocacy may take place, whether directly representing a client or client group or not. Each presents its own opportunities and challenges in assuring that the touchstone principle of accountability is met.

- Some advocacy will be based on representation of an individual client or client group on a specific issue being considered by a legislative or administrative body.
- Some providers have found that policy advocacy is most successful when it is conducted as part of a community-based coalition that jointly decides on and executes the advocacy strategy. When the provider's participation in the coalition is not on behalf of a client, the coalition, if grounded in the low income community, can assure that the objectives sought are responsive to the needs of that community.
- In some regional and statewide systems, a group of providers may look to one organization to carry out legislative and administrative advocacy. Priorities for the advocacy may be set by the coalition of providers representing the interest of their client communities with which they have generally consulted and which they keep informed.
- Advocacy in a budget process that will affect the administration or funding of programs that affect low income persons often involves a complex array of decisions on which no one client's interest is paramount. Moreover, the rapid and sometimes unpredictable pace and direction of developments in the appropriations process often require immediate action without any opportunity for consultation with a client. Providers participating in such efforts under a general retainer agreement or as spokespersons for

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

Standard 3.2 on Legislative and Administrative Advocacy

the general interests of the low income communities they serve should keep their constituents informed of significant developments.

- At times a legislator or a legislative committee may ask a provider to comment on proposed legislation, to provide information about a problem that might be solved legislatively or to draft legislation or rules that might be considered. Some rule-making procedures request comments on proposed rules and policies. It is important for the provider to respond to such requests when the proposed policy is likely to impact on people whom it serves.
- There are also times when legislative and administrative bodies consider measures that impact upon operations or funding of the provider itself. It is appropriate for a provider to appear in such proceedings on its own behalf. The provider has an obvious interest in such deliberations and will have unique insight into the potential effect of the measure under consideration.

The provider should be alert to the degree to which its fundraising interests might compete with the interests of its clients or undermine its capacity to advocate on their behalf.² In a legislative budget and appropriations process, for example, there may be direct or indirect competition for limited funds, or the provider may be compelled to choose among issues to which it devotes its time and resources. A provider may feel subtle pressure to moderate its substantive advocacy in order to protect its own appropriation. If the provider determines that there are competing interests that affect its capacity to advocate effectively on all the issues for which it is responsible, it should take appropriate steps to eliminate the tension, including referring to another organization, either the advocacy on its own behalf or that on behalf of the interests of the low income community.

Considerations in deciding whether to pursue legislative and administrative advocacy

As with all choices that a provider makes regarding how best to serve the low income community in its service area, it should determine the degree to which legislative and administrative advocacy is necessary to respond to the compelling legal needs of the low income community. Based on its knowledge of the legal needs of the low income communities it serves,³ it should determine the substantive areas in which legislative and administrative advocacy should be undertaken by it or by other providers in the delivery system of which it is a part.

Not all providers are able to undertake legislative and administrative advocacy. Some legal aid providers will elect not to engage in legislative representation and administrative rule-making because they do not have the expertise necessary for such representation, funder or legal restrictions impede them from being able to do it effectively or there are other organizations that are better able to undertake such work.

² See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

³ 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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The geographic location of a provider will also influence the type of legislative or administrative advocacy it undertakes. Geographic distance from the state capital or other site of legislative or administrative proceedings may make it improvident for a provider to devote resources to state-level legislative or administrative advocacy. On the other hand, there are many local legislative and administrative bodies, such as city and county councils, local public welfare agencies and various local boards located in close proximity to the provider that make decisions that have significant local effect.

Participation in local, regional and statewide delivery systems

Local and regional systems. Some legislative and administrative advocacy will need to respond to local or regional issues before decision-making bodies at those levels. A provider should be aware of local issues that may affect the population it serves. It should be in contact with groups and organizations that have an interest in the matters in order to decide if its participation in the advocacy is necessary and appropriate. Often, a provider located in the affected jurisdiction will be the most effective advocate before such decision-makers.

Statewide systems. Because the factors of geographic location, the need for specialized staff and resource limitations might make it imprudent for many providers to undertake state-level legislative and administrative advocacy, it is particularly important for all providers to participate in statewide efforts to establish an integrated, full service delivery system.⁴ A provider that is unable or elects not to provide state-level legislative and administrative advocacy should be certain that organizations that can provide such advocacy are available to the low income communities it serves. The provider should also be aware of how to bring the needs of these communities for legislative and administrative advocacy to the attention of organizations that provide it, and where appropriate to make referrals to such organizations.

Responsibilities of the provider

Communication with clients and with the low income population. Because both administrative and legislative advocacy affect the interests of the low income population as a whole, it is important that the provider communicate with the low income population it serves regarding such advocacy. Such communication should take place in the context of its ongoing assessment of the needs of its low income communities.⁵ A provider may learn through a variety of avenues about proposed and adopted policies, rules, orders and statutes that affect that population's interests. To the degree practicable, a legal service provider should keep its clients and the low income population informed of such matters and communicate their interests to those conducting advocacy before legislative and administrative bodies. The provider may also advise clients about the legislative and administrative advocacy process in the event that they wish to advocate for themselves.

Appropriate training and experience. Legal aid providers that elect to engage in administrative and legislative advocacy have a responsibility to assure that the advocacy is conducted proficiently and in compliance with legal requirements. Advocacy before a legislature has

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁵ 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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distinctive practice norms, procedural rules and entails understanding the unique factors that affect the outcome of the legislative process. Administrative rule-making may vary significantly based on the rules and customs of each administrative body. It is the provider's responsibility to ensure that its practitioners are experienced or trained to be effective in the forums in which they operate.⁶

Providers should be aware of the time requirements often required for effective legislative advocacy. During the period when the legislature is in session, legislative advocates may be deeply engaged in the advocacy – including long, daily hours – and may not be available for other work. While the legislature is out of session, there may be a reduced call for legislative work, but advocates' time may still be necessary. A provider that engages in legislative advocacy should deploy its staff in ways that assure that practitioners engaged in the advocacy have adequate time to carry out the advocacy effectively.

Ethical considerations. Providers should ensure that its practitioners know and meet appropriate ethical requirements in representing clients before legislatures and administrative bodies. Model Rule of Professional Conduct 3.9 requires that a lawyer who represents a client before a legislative body or administrative agency in a nonadjudicative proceeding “disclose that the appearance is in a representative capacity.” It also requires the lawyer to conform to certain aspects of Model Rules pertaining to candor toward the tribunal,⁷ fairness to the opposing party and counsel,⁸ and impartiality and decorum of the tribunal,⁹ even if such requirements would not apply to a non-lawyer who is engaged in the same activity. Advocacy that does not involve the representation of a client is not subject to Model Rule 3.9.

Other legal requirements. Providers should also be aware of the requirements of the Internal Revenue Code and accompanying regulations that relate to lobbying by tax exempt organizations, and should understand the range and level of activities that are permitted such organizations. In addition, they should be aware of and comply with the requirements in the jurisdiction in which they operate regarding the registration of persons who advocate before administrative and legislative bodies. Providers should also make certain that their practitioners are aware of rules that govern how the legislature operates and their participation in it.

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.13 (on Legislative and Administrative Advocacy by Practitioners).

⁷ Model Rules of Prof'l Conduct R. 3.3(a) through (c) (2003).

⁸ Model Rules of Prof'l Conduct R. 3.4(a) through (c) (2003).

⁹ Model Rules of Prof'l Conduct R. 3.5 (2003).

STANDARD 3.3 ON COMMUNITY ECONOMIC DEVELOPMENT

STANDARD

A provider should consider representing clients in community economic development aimed at strengthening low income communities.

COMMENTARY

General considerations

Many of the challenges facing clients result from the lack of affordable housing, the paucity of goods and services to meet their needs and the lack of available employment to provide needed income. Low income communities often do not have an adequate economic and social infrastructure to meet the needs of their members. Lack of employment opportunities in and near low income communities add to the difficulties encountered by their residents, particularly as an increasing number of low income persons rely on employment for income. In other circumstances, the needs of low income residents will arise in the context of economically diverse communities in which the challenge is to increase the degree to which existing services are available and affordable for low income persons.

To respond to these problems, a legal aid provider may decide to undertake community economic development [CED] on behalf of low income clients. Community economic development seeks to increase assets able to produce needed housing, goods and services and provide employment opportunities for low income persons. Community economic development attempts to build institutions that directly involve members of the low income community in their design and operation. It seeks to build capacity in communities in ways that place the tools of beneficial community change in the hands of low income persons. In some circumstances, building capacity to serve and create opportunities for low income persons may involve working entirely with low income clients. In others, it may involve working with partners to develop and implement strategies that benefit many, including low income persons.

Community economic development may involve a number of representational activities:

- Addressing legal aspects of the formation of community and business organizations;
- Counseling clients regarding the legal conduct of business activities;
- Providing transactional support, including acquisition of property, financing, development, and compliance with land use and zoning requirements;
- Assuring compliance with business licensing and employment laws;
- Providing representation on issues related to taxation;
- Negotiating and drafting loan agreements, leases and contracts;
- Serving as corporate counsel, and
- Examining and monitoring legislation that could affect clients' projects.

A wide and varied range of objectives might be accomplished through community economic development. A project might, for example, seek to create child care centers in low income communities to serve low income workers, including persons with early or late shifts for whom

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child-care is especially problematic. Clients might identify the lack of adequate long-term health care facilities for the elderly and seek to create an enterprise to provide home health care for persons who need it. A project might develop housing for purchase or rental by low income families or transitional housing for homeless persons. A job placement program might be developed to locate jobs that pay a decent wage and provide benefits. Or a provider might seek to increase individual assets by setting up a matched savings account fund in which each deposit by a low income participant is matched by the fund.

Community economic development often has more intangible objectives associated with building capacity in the community. It can help in the development of informed and effective leaders. Clients may develop a firmer understanding of how laws create order and opportunity, creating a framework and the insight necessary to bring about change. It can also impart planning and business skills that can lead to broader change.

Responsibilities of the provider

A decision to undertake economic development should be made in the context of the provider's planning regarding how best to respond to the needs of its clients.¹ The provider should be attentive to the degree to which there may be fundraising opportunities to support community economic development work.²

A provider that undertakes economic development has a number of responsibilities. The provider needs to hire practitioners who have expertise in pertinent substantive law and the requisite skills to achieve client objectives. If its practitioners are not experienced in the field, it needs to assure that those who undertake the work receive appropriate training. The practitioners should understand the operation of businesses and corporations, as well as banking and financial markets, and should be familiar with the agencies, boards, major corporations, and other decision-makers that play an important role in local and regional development.³ They also need to be effective working with groups and understanding the dynamics of relationships within and among groups.⁴

Community economic development is an area where private attorneys can be helpful, particularly if their practice involves related issues. Private attorneys whose practice consists largely of corporate clients, for example, can make an important contribution to such representation. They can also assist the provider to gain access for clients to institutions and individuals who can provide assistance.⁵

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Legal Needs and Planning to Respond); Standard 2.2 (on Delivery Structure).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.15 (on Transactional Representation).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations).

⁵ 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).

Standard 3.3 on Community Economic Development

The provider needs to have policies that address the unique nature of the attorney-client relationship with CED clients. Because engagement may be through many phases of development and often involves client groups with limited business experience, it is important for the provider to define the practitioner's role clearly at each phase of development. It is important that the practitioner and client both understand that the practitioner's role is to be a legal advisor to the effort, not its principal organizer.

Community economic development generally involves working with groups. Many ethical challenges can arise in working with groups, particularly in the early phases of organizational development. It is important to identify clearly who the client is. To ensure that conflicts are avoided, the provider needs to assure that its practitioners are careful to identify who has decision-making authority, an identified leader or the group through an agreed process.

It is also important for the provider to be alert to possible conflicts among its organizational clients that may not be as obvious as conflicts among individual clients. Such conflicts could range from assistance to groups seeking grants from the same revenue stream to conflicts over the ultimate goals of various CED projects.⁶

The provider should also be alert to potential conflicts with individuals who have an interest adverse to an organization created through economic development effort. To identify any such conflicts, the provider should be certain that its organizational clients are listed in its conflict management system. The provider should also recognize the possibility that it may on occasion need to represent its organizational clients as an employer or a landlord of a low income person.

The provider also has an ongoing responsibility to determine with the practitioners engaged in CED work, the level of ongoing commitment to the clients. Because development projects can be of long duration and with successful groups can lead to new projects, the long term commitment of resources can be significant. The provider needs to be alert to the point when an organization is self-sustaining, one of the goals of CED work, and no longer needs free legal assistance. In like vein, the provider needs to be judicious in determining when to become general counsel, since the obligations can easily exceed the capacity of the provider.

As with other delivery strategies, a legal aid provider engaged in community economic development should periodically assess the effectiveness of its effort and if they are accomplishing their intended objectives. The assessment should address both success in creating capacity that produces intended goods and services and the often less tangible outcome of building community infrastructure and supporting leadership development.⁷

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

STANDARD 3.4 ON LIMITED REPRESENTATION

STANDARD

A provider may limit its representation to specific tasks and activities undertaken on a client's behalf, if the limited representation is reasonable under the circumstances and the client knowingly consents to the limitation.

COMMENTARY

General considerations

Limited representation has been increasingly used in the legal profession generally and in legal aid practice in recent years. Such representation is known by various names: “discrete task representation,” “limited scope legal assistance” and sometimes, “unbundled legal services.” Discrete task representation involves a lawyer providing assistance with only a portion of what a client might need to fully resolve a legal problem. Such limited representation is based on the concept that the activities necessary to address a problem that a client encounters can be broken down into separate steps and that assistance of an attorney may be offered with regard to some, but not all of those steps. The limited service, therefore, might be only to offer legal advice regarding the actions that the client should take without the assistance of the lawyer.¹ Or the lawyer may agree to undertake only the discrete task of intervening informally by making a phone call or writing a letter on behalf of the client.² Limited representation may also be in the form of assistance drafting a document or preparing pleadings that the individual would use as a pro se litigant.³ Some forms of limited representation involve the practitioner “coaching” the client through a proceeding, such as litigation or mediation, without the attorney appearing for the client.⁴ Finally, in some jurisdictions, limited representation may encompass a lawyer making a limited appearance only for one or more specific hearings, such as for custody, but not for the divorce.⁵

The large number of pro se litigants appearing in courts has caused many courts to alter their procedures and environment to be more accessible to pro se litigants. As a result, the level of service required for effective resolution of a client’s problem will vary based on the degree to which court procedures are tailored to the needs of unrepresented litigants.

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

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

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

⁴ The degree to which such assistance is accepted by courts varies considerably across state and federal jurisdictions, with some courts having rejected the propriety of such assistance. The provider should be aware of the requirements under its state’s ethics rules, and of any local court rules that may impinge on the practice. 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* (February, 2005). See also, ABA Section of Litigation, *Handbook on Limited Scope Legal Assistance; A Report of the Modest Means Task Force* (2003).

⁵ See the commentary to ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

Standard 3.4 on Limited Representation

Legal aid providers often decide to offer limited representation in designated areas of practice where, in the judgment of the provider, the client can competently handle the matter with limited assistance or the relative benefit to the client of full representation will be limited. Limited representation can be an effective way to maximize the use of provider resources and to assist large numbers of clients efficiently. Its use may free up legal staff to engage in more extended representation.

Limited representation in the context of legal aid has been specifically recognized in Model Rule of Professional Conduct 6.5, the Comment to which states in part: “Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services-such as advice or the completion of legal forms-that will assist persons to address their legal problems without further representation by a lawyer.”⁶

This Standard is written to provide guidance to legal aid providers, since the decision to offer limited representation should be made by the provider in determining the most appropriate means to meet the needs of the low income communities they serve. Limited representation in the context of legal aid for low income persons differs in a significant way from limited representation for paying clients. The concept of “unbundled legal services” was developed and expanded in response to the need for moderate income persons who could not afford full representation by an attorney to be able to purchase that level of service needed by them to help resolve their legal problems. It is the client in such circumstances who decides what services to purchase based on the client’s judgment of the need and the ability to pay.

In the case of free legal aid, limited representation is often offered through systems, such as hot lines, or pro se clinics. Other innovative ways to offer limited representation may evolve in response to changes in the practice generally and in how courts operate as they seek to facilitate pro se representation by litigants. In addition, new technologies may offer fresh ways to serve clients, including new forms of limited representation. In practice, in such systems, it is the legal aid provider, not the client that decides what level of service will be provided. That fact places a special burden on the provider to decide prudently when limited representation will be offered and creates special considerations with regard to the meaning of informed consent.

While the comments that follow focus primarily on the high volume limited scope delivery systems such as hotlines and pro se clinics, they apply as well to lower volume limited scope models, where more individualized service may be offered.

Responsibilities of the Provider

What constitutes “reasonable under the circumstances.” A provider’s decision to offer limited representation is reasonable when the assistance is likely to benefit clients by helping them to take steps to resolve their problem or to understand their situation, and the types of cases in which limited representation is offered are appropriate. The provider also has the responsibility to assure that the underlying ethical requirements governing the provision of limited

⁶ Model Rules of Professional Conduct R. 6.5 (2003) limits the conflict of interest requirements of lawyers assisting clients in such programs.

Standard 3.4 on Limited Representation

representation are met in practical ways that allow it to serve its clients effectively and efficiently, while assuring that its practitioners satisfy their professional responsibilities.

The decision to offer limited representation should be made in the context of the provider's understanding of the legal needs of low income communities and its decisions concerning the delivery methods that will best respond to those needs.⁷ Offering limited representation in certain areas of practice can be an effective way to deploy resources efficiently to augment the number of clients served. A decision to offer limited representation should not be based solely on the fact that the provider has limited resources.

The decision should be made in the framework of the regional or statewide delivery system. Some providers may operate a statewide or regional hotline and rely on other providers to offer full representation in individual cases and systemic advocacy. A provider should not confine its assistance to limited representation, unless it participates in a regional or statewide delivery system in which a full range of assistance is offered.⁸ Because limited representation usually relies on clients taking action to assist themselves, it is important that the provider assess the extent to which clients generally are able to take advantage of the assistance and that it benefits them.

Substantive areas appropriate for limited representation. Cases in which limited representation is offered should be in substantive areas in which clients are likely to be able to assist themselves with the help of the provider's limited representation. One aspect of the decision involves prospective judgment, based on the provider's knowledge of the recurring problem, of the law and procedure pertinent to resolving the problem and of the low income communities it serves. A number of factors are appropriate to consider:

- *The complexity of the law that affects resolution of the matter.* Simpler legal matters that are more easily understood by a broad range of clients are more likely to be susceptible of resolution through some form of self-help.
- *The complexity of the processes necessary to resolve or respond to the problem.* Matters that involve straightforward procedures and do not typically involve the adverse party being represented by an attorney are more likely to lend themselves to effective client self-help. As courts modify their systems to facilitate pro se litigation, more legal matters may become more susceptible of effective resolution by pro se litigants, especially if they receive limited assistance.
- *The risk to clients if the matter is not resolved favorably.* Some matters present a graver risk to clients than others. For instance, issues that involve clients' or their families' basic health or safety might require full representation for all or most clients, if most clients ultimately will not be able to resolve the issue without direct assistance.
- *The relationship between the potential benefit of full representation and the potential loss if clients are unable to represent themselves effectively.* With some issues, there may be little likelihood of the client ultimately prevailing on the merits even with full representation.

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Client Needs and Planning to Respond); Standard 2.2 (on Delivery Structure).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

Standard 3.4 on Limited Representation

In such cases, limiting representation to advise the client of the likely outcome so that the individual can plan accordingly may be an appropriate response.

- *Factors that render limited representation inappropriate for a set of clients.* There may be groups of clients for whom limited representation would not be appropriate because of language or cultural barriers or mental or physical limitations that would prevent them from following through without assistance. The provider should be aware of such groups and be cautious that they are not excluded from assistance because the only service offered would realistically not be useful to them.

Benefit to providers' clients. Because it is generally the legal aid provider, not the client, that decides when limited representation is an appropriate response to recurring legal problems, the provider has a responsibility to assess the potential benefits and limitations of such assistance to its clients. Decisions about substantive areas appropriate for limited representation should be informed by knowledge of the actual use clients have in fact been able to make of such limited representation.

The provider should periodically assess the actual outcomes for its clients that have received limited representation. The provider can, for instance, periodically follow up with a small number of clients by phone to determine what happened. Were clients able to take the steps necessary to follow through on the limited representation and were they in fact able to resolve the problem for which they sought assistance? Did clients' understanding of their legal problem allow them to take steps to avoid or ameliorate negative consequences?

Providers should be cognizant of the evolving legal culture and of changes in how courts respond to pro se litigants. It should also be aware of technological developments and innovative techniques for offering limited representation and self-help resources to clients. Periodically, based on the assessment of the environment and of the benefit to clients of the limited representation being offered, the provider should re-examine how it utilizes limited representation. It should make an informed judgment that the benefit that the client obtains justifies the cost of maintaining its systems as designed. If it finds only limited benefit from the limited representation, the provider should either end the service, expand the level of representation offered or redesign the approach to respond to identified deficiencies.⁹ The provider should be innovative and devise new ways to deliver legal services to the changing needs of their client populations.

Ethical considerations. Limited representation is authorized by Model Rule of Professional Conduct 1.2(c) which reads: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The comment to the Rule specifically notes that such limited assistance may include telephone advice:

"Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstance. If, for example, a client's objective is limited to securing general information about the law the client needs to handle a common and typically uncomplicated legal problem, the lawyer and the client may agree that the lawyer's services will be

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

Standard 3.4 on Limited Representation

limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice on which the client could rely.”

Limited representation does not mean low quality representation. An agreement to limit the scope of representation does not exempt the lawyer from the duty to provide competent representation¹⁰ and to protect the client’s interests.¹¹ The practitioner offering the representation has an obligation to inquire fully into the facts particular to the client’s situation and apply the law with a full understanding of those facts. If advice or a form of limited service is being offered based solely on an interview of the client, the practitioner should assure that the interview probes appropriately into the facts to obtain as complete a picture as possible and to identify detrimental details that may not be presented in the client’s initial recitation of the facts.

It should be noted that, while most states have adopted the 2002 revisions to Model Rule 1.2(c), some have made changes that significantly affect how the rule applies. Moreover, some courts have reacted negatively to limited representation such as “ghost-writing” pleadings for a pro se litigant.¹² Other states have enacted specific rules that authorize and encourage ghostwriting.¹³ A provider that offers limited representation needs to assure that its practitioners are doing so in a manner that conforms to the specific ethical standards governing such assistance in its state.¹⁴

Informed consent. This Standard reflects the requirement in Model Rule of Professional Conduct 1.2(c) that the client “must give informed consent” to a limitation on full representation. In the context of providing legal aid for low income persons, this requirement raises practical difficulties. Consent implies that the client can choose not to accept the limited representation and seek full representation elsewhere. In fact, however, there is often no realistic possibility of obtaining representation beyond the limited assistance that is offered by the legal aid provider. The actual option, therefore, is often between limited representation and no representation at all.

Notwithstanding, this practical limitation, if a legal aid provider has informed the client of the limited nature of the assistance being offered and the client has agreed to proceed, the client should be considered to have consented to the limitation. Ethical considerations require that the client be apprised of the limitations of the representation, however, including necessary actions for which assistance is *not* being provided and the practical risks for the client if the actions are not taken. In practice, this information is usually offered as a logical part of giving advice and explaining alternatives.

¹⁰ Model Rules of Prof’l Conduct R. 1.1 (2003).

¹¹ Model Rules of Prof’l Conduct R. 1.3 (2003).

¹² See for example, *Johnson vs. Bd. of County Commissioners*, 85 F.3rd 489 (10th Cir. 1996). But see also, Colorado Ethics Opinion 101 (1998). See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

¹³ See, for example, California Rule 5.71.

¹⁴ 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).

Standard 3.4 on Limited Representation

The Model Rule does not require clients to consent in writing; consent is implied if a client, having been informed of the limitations, continues with the interaction. In the event that the representation is subject of a retainer agreement, the limitations on the representation being offered should be in the agreement.¹⁵

Responsibility to individual clients

One of the more challenging issues that arises in the context of limited representation involves the responsibilities of the provider and the individual practitioner providing the assistance to the individual client. An attorney-client relationship is formed and the ethical duties of providing competent representation and protecting the client's interests must be met. In some instances, targeted limited assistance, such as coaching, limited intervention, or ghostwriting, may be sufficient to meet the needs of the client. In others, no amount of limited representation will be sufficient to resolve the problem. Many factors, such as the client's language capability, cultural values, level of education, emotional stability, self confidence and ability to communicate will affect the degree to which the individual can take steps to resolve the presenting problem with only limited assistance. In addition, some clients will not be able to assist themselves through self help efforts, without jeopardizing their employment, because of severe restrictions on their taking time off or even making phone calls during business hours.

The provider has a responsibility to assure that each practitioner responds appropriately when it is apparent that because of personal circumstances, a client will not be able to follow through on the limited assistance offered. The hard reality is that often because of resource limitations, the practitioner will not be able to offer the kind of assistance necessary to resolve the client's problem. In all cases, the provider should make certain that its practitioners know to advise the client of what is likely to happen.

There is a range of responses that may be appropriate depending on available resources in the regional or statewide delivery system.

- The provider may set aside resources to offer full representation for those individuals who are not likely to be able to assist themselves. This is typically done if the potential risk to the client is high, such as permanent loss of shelter or family income.
- If resources do not allow for full representation by the provider, they might support the provision of a more extended form of limited representation. Thus, for example, the provider might design its system so that a practitioner providing assistance limited to advice may offer to make a phone call, prepare pleadings or court forms (if permitted in the jurisdiction), provide coaching on court procedures, or draft a letter for clients for whom such extra assistance is necessary.
- If the provider is unable to offer representation, it should assure that its practitioners are aware of other sources of assistance that might be available:
 - There may, for instance, be other providers that have the resources to provide more extensive representation. If, for instance, the client speaks limited English, there

¹⁵ While the Model Rule does not require consent in writing, some states have modified the Rule to require written consent (*see*, for example, Florida Rule of Professional Conduct 4-1.2(c)). Each provider should assure that limited representation it offers comports with the specific ethical requirements in its jurisdiction.

Standard 3.4 on Limited Representation

may be organizations established to meet the needs of clients from that cultural or linguistic community. A provider's participant in statewide and regional systems may help foster the development of appropriate alternative resources to help clients it cannot.¹⁶

- Practitioners should also be made aware of sources of legal assistance short of full representation, such as websites and pro se clinics that might be available to help clients in appropriate circumstances.
- Practitioners should know of sources of non-legal assistance to which clients might be referred to help them respond to the underlying problem. In an eviction matter, for example, the practitioner might refer the client to a housing assistance organization to help the individual find suitable replacement housing or provide emergency financial assistance to avoid the eviction.

When none of these resources is available, the provider should make certain that its practitioners at least advise the client of what is likely to happen, so that the individual can prepare for predictable developments.

¹⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

STANDARD 3.4-1 ON REPRESENTATION LIMITED TO LEGAL ADVICE

STANDARD

A provider may limit its representation to providing legal advice if, in its judgment, clients will potentially benefit from the advice offered and the advice is based on the facts and the law pertinent to each client.

COMMENTARY

General considerations

Legal aid providers frequently limit representation in selected practice areas to giving legal advice. Generally, advice clinics and hotlines are adopted because they offer an effective way to respond quickly and economically to the needs of large numbers of persons. Several kinds of legal advice may be offered:

- Preventive advice to help clients avoid legal problems by advising them of appropriate steps to take;
- Defensive advice regarding steps that might be taken in the face of threatened litigation or other adverse action;
- Affirmative advice regarding how to proceed to assert a right or a claim.

This Standard governs those circumstances in which as a matter of policy, a provider determines that it will only offer legal advice about particular issues, or in selected substantive areas.¹ It is focused on the provider's responsibilities, which arise at three levels. The first level involves the factors that are appropriate to consider in deciding to adopt delivery techniques for offering representation limited to legal advice to serve clients. Some mechanisms will be designed to offer high volume, legal advice, and others will offer more extensive advice and coaching to a smaller number of clients. How such techniques are deployed will be affected to some degree by the nature of the regional or statewide system of which the provider is a part.²

The second level of responsibility entails assuring that the mechanisms operate effectively to serve clients and to meet their needs. The third is to ensure that practitioners offering the service do so consistent with their professional responsibilities and are aware of the options available to assist clients.

A number of delivery techniques are covered by this Standard. Those include: 1) hotlines;³ 2) specialized components of a provider that are set up specifically to give legal advice, either as part of the intake process or as a free standing unit of the provider; and 3) web-based advice where the advice is given after an inquiry into the facts and circumstances of the individual

¹ This is distinguished from individual cases in which either because of the merits of the matter, or because it is all that the client is seeking, all that is offered in that matter is legal advice.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

³ Hotlines are subject to the ABA Standards for the Operation of a Telephone Hotline Providing Legal Advice and Information (2001).

Standard 3.4-1 on Representation Limited to Legal Advice

seeking the assistance, either by means of an on-line interview with a practitioner or by the inquirer posting a question that is answered by return e-mail.⁴

Ethical considerations

As with all limited representation, when assistance is limited to legal advice, clients need to be informed of the limitations of the representation, including what assistance is not being provided and the risks if the advice is not followed. It is essential that clients be advised of the steps they are expected to perform, and that the provider will not undertake on their behalf.⁵ The giving of legal advice creates an attorney-client relationship when the advice given is tailored to the specific facts and circumstances of the person making the inquiry.⁶

The provider and practitioner, therefore, have the same responsibilities that are owed to any client.⁷ The representation offered must be competent; that is, it must be based on the requisite legal knowledge, skill, thoroughness and preparation reasonably necessary to be responsive to the client's situation.⁸ The advice must be based on an interview that probes adequately into each client's situation to determine the pertinent facts. The advice must be given by an attorney or paralegal with appropriate training or experience in the provision of legal advice. A paralegal giving legal advice must do so under the direction of an attorney.

There is also a responsibility to be diligent about responding to the client's needs and interests.⁹ That means that the provider and practitioner also have a responsibility for assuring clients can make reasonable use of the advice that is offered. The Comment to Model Rule of Professional Conduct 1.2 authorizing limited representation specifically notes that a brief telephone consultation is appropriate for "a common and typically uncomplicated legal problem," but that such a limitation "would not be reasonable if the time allotted was not sufficient to yield advice on which the client could rely."

How potential conflicts are addressed may vary in systems such as hotlines, advice clinics and pro se counseling programs where there is a high volume of interaction and usual only one

⁴ Systems that use document preparation software on line or at kiosks generally do not offer legal advice and would therefore generally not be subject to this standard. See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

⁶ The expectations of the inquirer are as important as the intentions of the provider in determining whether an attorney-client relationship has been formed. If a person seeks assistance from a provider with regard to a legal problem and receives advice on which the inquirer would be expected to rely, then an attorney-client relationship has been established. See *Restatement (Third) of the Law Governing Lawyers*, (1998), which states an attorney-client relationship is established if a person shows an intent to obtain the services of a lawyer and the lawyer either demonstrates consent to provide the services, or fails to demonstrate a lack of agreement to provide the service and reasonably should know that the person relies on the lawyer to provide the services.

⁷ An attorney-client relationship is formed when legal advice is offered that is tailored to the specific circumstances of the client as opposed to neutral legal information offered to all persons with the same issue. Some methods of service, including web-based systems for offering information about the law, are generally designed only to offer generalized information in response to broad questions and are governed by ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁸ Model Rules of Prof'l Conduct R. 1.1 (2003).

⁹ Model Rules of Prof'l Conduct R. 1.3 (2003).

Standard 3.4-1 on Representation Limited to Legal Advice

relatively brief contact with the client. Generally, it is not feasible to screen systematically for conflicts of interest and the person giving the advice would not, in fact, have access to information from or about the other party. Unless the practitioner knows that giving the advice does involve a conflict of interest, therefore, the fact that an adverse party was a client of the provider does not disqualify the provider from offering the legal advice, as long as it is given in the context of short term, limited representation.¹⁰ This is an area of evolving law and the provider should be aware of the ethical requirements in the jurisdiction in which it operates and abide by them.

Responsibilities of the provider

The underlying duty to offer advice on which clients can rely generates two important responsibilities for providers. The first is to make an informed decision that clients generally can take advantage of the advice offered. The second is to have systems in place to increase the likelihood that each client will be able to act effectively on the advice that is given.

Establishment of high volume, advice only systems. The provider has a responsibility to make an informed decision that offering advice on a large scale will be beneficial to the client communities it serves. The considerations set forth in the commentary to Standard 3.4 on Limited Representation¹¹ apply here. In particular, based on its knowledge of client communities, the provider needs to exercise sound judgment regarding which recurring substantive issues will be appropriate for advice only. Some broad categories of substantive issues may be selected as areas in which only advice will be offered. Thus, for example, a provider might decide that it will only offer advice in all matters involving uncontested divorces. Or a provider might determine that in some areas, it will decide to limit its assistance based on the actual circumstances of the persons seeking help. It might determine, for instance, that in eviction matters for non-payment of rent, it will only offer advice if the client does not have any way to pay the arrearages, because of the small likelihood of prevailing on the merits, even with full representation. To identify which matters are appropriate for advice only, based on the specific, though common, situations of clients, the provider needs an intake system that is able quickly to obtain the pertinent facts in each applicant's situation, so that the appropriate disposition of each matter can be made.

¹⁰ Model Rules of Prof'l Conduct R. 6.5 (2003) states:

- a) A lawyer who, 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:
 - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
 - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Paragraph 1 of the Comment to the Rule notes: "Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation."

¹¹ Unless otherwise noted, references to any specifically numbered Standards in the text of this document are to Standards contained in the ABA Standards for the Provision of Civil Legal Aid (2006).

Standard 3.4-1 on Representation Limited to Legal Advice

A variety of factors should be weighed in determining areas that are appropriate for representation limited to advice only. The factors include the complexity of the pertinent law and procedure, the likelihood that its clients will be able take steps necessary and the potential loss to clients if not fully represented.

The provider should also periodically evaluate the degree to which clients it has served have been able to follow the advice offered and have benefited from it. Periodic follow-up interviews of a small sample of clients, or a review of court files, for example, can uncover invaluable information about the actual outcomes for clients.¹²

If the provider finds that clients generally have not been able to take advantage of the advice they have been given, it needs to consider changes in its approach. It should not continue to expend scarce resources operating in a way that does not actually benefit clients. The alternatives might range from 1) changing the way it gives advice and follows up on it; 2) to offering a higher level of limited representation, such as assistance preparing documents, making a phone call on the client's behalf or coaching; or 3) to offering full representation to some or all clients in the substantive area. Or the provider might decide it is not a prudent use of its resources to continue to provide assistance in that substantive area. The decision whether to change, expand, or abandon assistance in a substantive area should be determined by the relative importance of the issue to clients, the relative cost of increasing the level of service offered, the availability of other resources to the clients, and the gravity of the risk to clients, if assistance is not offered in the area.

In some circumstances, the process for interviewing clients and offering them advice is integral to the intake process. The resources will be expended, in any case, to interview applicants and analyze their situation, so that the costs of offering advice for clients that will not be fully represented may be marginal. The provider could, therefore, appropriately decide to continue to offer advice to clients whom it does not fully represent. Clients should not, however, be given advice that they are unlikely to be able to follow. Rather they should be advised regarding likely developments in their situation and the steps they should take to mitigate the possible loss.

Quality assurance systems. Because it is difficult in advice only systems to determine if the assistance offered is actually benefiting each client, it is essential that a provider have processes in place for assuring the quality of the advice given. The provider should have supervisory systems that routinely review notes which set forth the facts and legal conclusions pertinent to the client's circumstances and the advice given, to confirm that the advice is appropriate.¹³ There should also be a system for review of common issues and patterns to determine if other forms of assistance might be appropriate, including systemic advocacy.

Reducing the advice to writing. For a client to act on legal advice, it is essential that the individual understand the advice and the steps that need to be taken. Advice that may seem simple to a practitioner may be confusing to a client who is unfamiliar with the law and is apt to be anxious about the circumstances that give rise to the legal problem. Reducing the key points

¹² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of the Representation); Standard 6.4 (on Review of Representation).

Standard 3.4-1 on Representation Limited to Legal Advice

of the advice to writing is the best way to assure that there is clear communication. Such writings may be in the form of a letter to the client, a brochure or a pre-prepared form that covers the key points of the advice given orally.

It will not always be appropriate for a provider to give the advice to the client in writing. Circumstances in which it would not be appropriate to send a follow-up letter or otherwise communicate in writing with a client, include when the client who is a victim of domestic violence would be vulnerable to dangerous, possibly life threatening retaliation if written advice were to be intercepted. Similarly, providers offering advice on domestic relations matters need to be conscious of the fact that the parties may still live together, and the danger of interception would be extremely high, with potentially serious consequences.

Similarly, there may be circumstances when advice would have to be acted on before it could be provided to the client in writing. Some clients may have no practical way to receive the writing by mail or other means.

Responsibilities to individual clients

As with all forms of limited representation, some clients will be better able to take advantage of advice that they are given than others. Many factors, including education, culture, language, employment circumstances, emotional stability and personal self confidence will affect that degree to which each client is able to act on the proffered advice. In many circumstances, the practitioner giving the advice will not be able to know the extent to which the individual being advised will be able to follow the advice successfully. In other circumstances, it will be apparent in the course of the interview that the client will be unable to follow through as necessary.

A provider has a responsibility to ensure its practitioners understand their professional responsibilities and are proficient in giving advice that is appropriate to the client's circumstance and the objective that the individual seeks. The practitioner should inform the client about the likely developments that the individual will face and practical steps that should be taken to mitigate their effect. It calls for sound professional judgment on the part of the advising practitioner to decide what advice will be most useful, based on the client's objective, the pertinent law and the client's ability to act on the advice.

The practitioner should also be aware of alternatives that are available for clients who appear unlikely to be able to act on the advice given. The commentary regarding "Responsibility to individual clients" in Standard 3.4 on Limited Representation is appropriate here.¹⁴ Possible alternatives are a function of available resources and range from offering full representation, if possible; to offering more extended, though still limited representation; to referring the client to other sources of legal and social help.

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

STANDARD 3.4-2 ON REPRESENTATION LIMITED TO BRIEF SERVICE

STANDARD

A legal aid provider may choose to provide brief service on clients' behalf if, in its judgment, clients will benefit from the representation that is provided.

COMMENTARY

General considerations

Based on its understanding of the needs of the low income population it serves, a legal aid provider may decide that it will only offer brief service in certain types of legal matters. This Standard applies to circumstances where a provider makes such a policy decision. Limiting representation to brief service is appropriate in matters where the limited intervention is likely to be successful and where the risk of loss to the client is relatively small if the representation is not successful.

The Standard is not meant to apply to decisions made in the course of representation that limited intervention is all that is called for in that particular matter.¹ A practitioner, for instance, may determine in the course of a case that the likelihood of the client prevailing on the merits is small, even if full representation, including representation in litigation, were pursued. Or a client might decide against a long-term strategy that includes litigation or other potentially protracted approaches and might seek more limited assistance. Such individual case decisions are based either on the lawyer's responsibility not to pursue an unmeritorious claim² or the client's right to determine the objectives for the representation.

The benefits of representation that is limited to brief service

The practice of law is evolving rapidly. There is a growing recognition that legal representation that is directed only to certain aspects of a legal matter can help clients resolve their legal problems and take advantage of legal rights to which they are entitled. Limited representation that involves brief interventions on the clients' behalf can result in significant costs savings by focusing attorneys' time on those aspects of a case where their expertise or advocacy skills can make the crucial difference, leaving the client to undertake the rest. The costs savings can be crucial for a paying client to be able to afford the assistance of a lawyer. For legal aid providers, they can stretch limited resources by identifying areas in which limited intervention, short of full representation, on clients' behalf may be sufficient to help clients to obtain favorable outcomes with their legal problems.

Brief service has the advantage of allowing practitioners to vary the level of intervention based on a judgment regarding the capacity of each client to take the necessary steps. Thus, for one client, it may be adequate for the provider to help draft a letter for the client's signature, leaving it to the client to send the letter and make a follow-up call. For another client, on the other

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

² Model Rules of Prof'l Conduct R. 3.1 and 4.1 (2003).

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hand, in a practitioner's judgment, it may be necessary to write and sign a letter on the client's behalf and to follow up with a phone call.

The provider should make certain that practitioners making such judgments are properly trained to make them. That involves both knowledge of the law and the ability to assess each client's capability.

There are several factors that determine the level of intervention that is appropriate. First is the capacity of the client to take appropriate steps without the assistance of the provider. Each practitioner needs to be sensitive to the client's level of education, language capability and emotional strength. The practitioner should be aware of any cultural and linguistic barriers to a client taking self help steps.³

The second factor is complexity of the law and procedures that relate to the legal problem. Limited intervention on behalf of a client is only useful if it furthers the client's objective in seeking the legal help. If the success of the ultimate intervention is dependent on the client taking steps that are unlikely to occur because of the complexity of the law or the procedure that would need to be followed by the client, then the brief service offered is not an appropriate level of assistance.

A third related factor that should be considered is the risk to the client if the individual is not successful with the steps that are left to be accomplished. Some legal problems carry graver risk of loss to clients than others and those that present the gravest level of risk may require full representation. For the provider to meet their responsibility to clients, it should provide full representation in such circumstances, or if it cannot, it should refer the client to another organization that will.⁴

Types of brief service⁵

This Standard covers a number of forms of limited representation that go beyond merely providing advice, but which fall short of full representation. The actual representation offered may involve a combination of the following activities.

- ***Offering guidance and information regarding the preparation, filing and serving of documents.*** A common form of brief service is to assist the client in understanding and filling out various documents, such as applications, that need to be prepared and filed. Such assistance might, for instance, be provided to clients who will appear on their own in an administrative proceeding. Guidance might range from explaining procedural steps to helping the client include the appropriate information.

³ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 4.6 (on Communication in the Primary Languages of Persons Served).

⁴ See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁵ Many of these activities may also be undertaken in support of pro se litigants in court proceedings. See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

Standard 3.4-2 on Representation Limited to Brief Service

- *Helping clients prepare documents and letters to send in their own name.* The provider may assist the client to prepare a letter or document to assure that it effectively conveys what is appropriate to further the client's interest. It is particularly appropriate not to have the letter signed by the practitioner who helped prepare it when the provider wants to assure that responses are directed to the client.
- *Preparing and sending documents and letters signed by the attorney on behalf of the client.* In some circumstances, the intervention of a lawyer is sufficient to obtain an objective sought by a client because of the respect and, occasionally, fear accorded them. For that reason, a practitioner might agree to prepare correspondence on behalf of the client in order to add to the apparent gravity of the missive. It is important that the practitioner recognize the professional responsibilities that attach to formally speaking on behalf of the client. These are discussed below.
- *Legal research and analysis.* A practitioner may agree to research a legal issue and provide the benefit of the attendant legal analysis to a client who wants to understand the options that are available with a legal matter. A practitioner might also prepare a legal memorandum to a client regarding the legality of a course of action the client contemplates taking. Such assistance might be particularly germane to an organization that is being represented in the context of a long-term strategy of economic development.
- *Intervening informally to obtain a favorable agreement, a benefit or other services for a client.* A common form of intervention by an attorney is to communicate on behalf of a client to seek an agreement to settle a dispute or to obtain a benefit for the client. This can be helpful, for instance, where the other party is represented by an attorney and the client feels intimidated about dealing with the adversary's lawyer. Similarly, many legal aid clients seek assistance obtaining or maintaining some form of a government benefit that has been denied or is threatened with termination. At times, because of their familiarity with such programs and the personnel who administer them, an informal communication, such as a phone call on behalf of the client will facilitate the client getting or keeping the needed assistance.
- *Factual investigation for the client (such as interviewing witnesses and conducting searches) to assist them to take appropriate steps to address their situation.* There may be times when a client is capable of self help but needs assistance gathering appropriate facts to support the claim. A client may have difficulty, for instance, obtaining the name and address of a registered property owner that is necessary to pursue a claim.
- *"Coaching" – being available at the initiation of the client to answer questions and provide guidance regarding how to proceed at various steps in a case.* Coaching involves the practitioner operating behind the scenes to answer questions and offer strategic advice to the client upon the client's request. While coaching often takes place in the context of limited representation to pro se litigants in court,⁶ there may be circumstances not involving litigation in which coaching is offered. A provider may, for example, determine that it is appropriate for its practitioners to coach a community

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

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group in making a presentation before a zoning commission, rather than providing full representation before such a body. Or it may have its practitioners available to coach clients about how best to represent themselves in administrative proceedings, such as a welfare or unemployment compensation hearing.

Responsibilities of the provider and practitioners offering brief service

The provider and practitioner need to clearly convey to their clients the level of assistance that is being offered. As with all limited representation, it is essential that the client is aware of the limitations and consents to it.⁷ It is particularly important that the client be made aware of the steps that may be necessary to resolution of the issue and that will not be undertaken by the practitioner. It is also important that the client and provider agree on whether it is the client or the practitioner who is to communicate with and receive communications from the other party as well as others interested in the case.

The provider and practitioner also should be aware of what is communicated to other parties, including potential adversaries, courts, administrative tribunals and others involved with the issue. A question is whether there is a duty to disclose to other parties the fact of the limited representation of the client. Writing a letter on the client's behalf, for example, may imply that the lawyer will represent the client in any litigation that ensues, even though that may not be true.

There are ethical concerns that arise with regard to representation that involves only brief service on a client's behalf. Model Rule of Professional Conduct 4.1, which requires candor to third parties, raises the question of what level of disclosure is necessary regarding limited representation on behalf of a client. Absent an ethical ruling to the contrary in the jurisdiction of the provider, a practitioner can appropriately not disclose the limited nature of the representation if it would jeopardize the client's interests. On the other hand, it would appear to violate the requirement of truthfulness in statements to others to actively misstate the nature of the lawyer's assistance. Thus, in a letter implying further action if necessary, a practitioner could be silent on the fact that representation of that client has been limited to drafting the letter. On the other hand, it would be wrong to affirmatively state that the provider and practitioner will represent the client, if such is not the case.⁸

Two other issues should be considered with regard to communication to other parties where the provider is offering only brief service. The first has to do with the veracity of facts that the practitioner asserts on the client's behalf based on the assertions of the client. In full representation, there is generally an opportunity for the practitioner to investigate the facts so that there is some confidence that assertions in letters and pleadings are accurate. Letters written in the course of representation involving limited intervention may be based on a single conversation with the client without any opportunity for independent verification. The Comment to Model Rule 4.1 regarding Truthfulness in Statements to Others notes that: "A

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

⁸ The duty to disclose and special responsibilities associated with communication by the limited-service attorney supporting a pro se litigant are discussed in depth in the commentary to ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

Standard 3.4-2 on Representation Limited to Brief Service

misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.”

The ethical rule is violated if the practitioner *knowingly* incorporates a false statement of another. A practitioner, however, does not have a duty to confirm the veracity of a client’s assertion in drafting a letter as part of a limited intervention on the client’s behalf. Such a requirement would render brief service of this type impractical to offer. On the other hand, if a client asserts a set of facts that on their face are not credible, the practitioner should avoid reasserting such facts as if they are true, lest knowledge of their falsity be imputed because of their inherent incredibility.

A second issue arises where the provider is coaching or otherwise advising the client regarding communication with another party. If the other party is represented by counsel, the practitioner could not ethically communicate directly with the adverse party. The question arises whether a lawyer who is representing a pro se litigant under an agreement to provide limited representation can ethically “script” a communication with the other party if the party is represented by counsel. A practitioner is not prohibited from advising a client concerning a communication that the client is legally entitled to make, but the practitioner should not “script” the client to make a communication that the practitioner would be prohibited from making.⁹

Legal aid providers should be aware of applicable ethics requirements in their own jurisdiction regarding these matters. Absent another ruling, it appears that any advice to the client about communication with the other party should be limited and should not be initiated by the lawyer.

⁹ Paragraph 4 of the Comment to Model Rules of Prof’l Conduct R. 4.2 states: “A lawyer may not make a communication prohibited by this Rule through the acts of another.”

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).

Standard 3.5 on Assistance to Pro Se Litigants

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 because the rules of court in many jurisdictions will not allow an attorney who has appeared to

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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.

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

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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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 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

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 Prof’l 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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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).

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,¹ 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 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

¹ 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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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.²

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.³ Thus, if members of the low income community seek legal

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

³ "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."

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

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advice and do not 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.⁴ 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.

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

⁴ 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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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.⁵

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.⁶ If the provider serves a large low income population in which there is not a commonly used written language or in which most speakers 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

⁵ 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).

⁶ 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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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.⁷

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

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

⁸ Model Rules of Prof'l 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.

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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.⁹

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.

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.

(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).

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

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- 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 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.¹⁰

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.¹¹ Many such projects are established so that they can

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

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

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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...”¹² 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.¹³

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 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.¹⁴ 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;¹⁵

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

¹³ 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.

¹⁴ 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.

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

Standard 3.6 on the Provision of Legal Information

- Newspaper columns and radio and television shows that answer questions posed by an inquirer;¹⁶
- 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;
- 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.

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

SECTION 4
STANDARDS FOR RELATIONS WITH CLIENTS

STANDARD 4.1 ON THE PROVIDER'S INTAKE SYSTEM

STANDARD

A provider should design and operate an intake system that treats all persons seeking assistance with respect, accurately identifies their legal needs and promptly determines the assistance to be offered.

COMMENTARY

General considerations

The first contact a person seeking services has with a provider is likely to be through its intake system. It is important that the system foster confidence - among those whom the provider agrees to help as well as those it turns away - that the organization is professional and capable and that it is considerate of persons seeking and utilizing its services. The logistical challenges associated with intake systems can be significant. They typically process large numbers of applicants and need to identify accurately the nature of each applicant's legal problem and make a prompt decision regarding who will be helped and the type of assistance that will be offered. A provider needs to design its intake system to accomplish these tasks in a way that does not inadvertently convey a lack of respect for applicants' time or sensitivities.

Persons seeking assistance from a provider will be offered different levels of assistance. Some applicants will be accepted as clients and offered assistance that may range from full representation¹ to representation limited to advice or brief service.² Others will not be accepted as clients, but will be given legal information about their problem.³ Still others will be given assistance to represent themselves through pro se clinics and other methods that teach self help.⁴ A number will be denied any form of assistance because they are ineligible or seek help in an area that the provider does not handle. Regardless of the service they ultimately receive, all persons seeking services need to be treated respectfully and professionally.

For those who will be accepted as clients, the initial experience with the provider may well set the tone for the subsequent representation. Because effective legal representation calls for a relationship of mutual trust and candor between the client and the practitioner, it is particularly important that the client's experience in intake inspires confidence in the provider and the practitioner.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

² See ABA Standards for the Provision of Civil Legal Aid (2006): Standards 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).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

Standard 4.1 on the Provider's Intake System

Operation of intake systems

There is a range of ways that persons may initially contact the provider. Some will walk into the provider's offices or another intake site. For others, initial contact may be by telephone or on-line through the internet. Some forms of intake may involve submission of an application on-line in which there is no initial personal contact. In some cases, all of the assistance provided may be offered on-line and without any personal interaction. All aspects of a provider's intake system should be respectful of applicants' time and resources and should facilitate prompt decision-making regarding the applicants' legal needs and what the provider commits to do on their behalf.

Applicants should be interviewed promptly to determine eligibility and to identify the nature of their legal problem. Applicants should not be subjected to unnecessarily repetitive intake interviews.⁵ Telephonic intake and advice systems should avoid long waits on hold and long delays for call backs. The provider should be sensitive to the perceptions of persons using its services and should strive for a professional atmosphere in its offices. Intake procedures should assure the confidentiality of the information that is offered in support of the application.⁶

Different types of intake process—telephonic, walk-in, or on-line—will impact differently on different persons in need of help. For many isolated persons, telephone intake may be the only viable option to seek help. For others, face to face contact may be very important, and for some cultures may be essential. Others may work hours that make any contact during normal business hours extremely difficult. A provider should strive, therefore, to offer multiple avenues for persons to seek assistance, or should actively participate in a delivery system that provides such opportunities.⁷

Training. Personnel who are involved in intake should receive training to support their effective interaction with applicants and to assure the efficient operation of the system. Personnel should be trained in how the intake system operates and in the appropriate use of technology that is integral to the intake process. Training should reinforce the importance of all personnel treating applicants with dignity and respect. Interviews should be conducted by personnel who have been trained in effective interviewing.⁸

Overcoming impediments to effective communication with applicants

The provider should be sensitive to cultural, linguistic and personal issues that may impede effective interaction with persons seeking its assistance. Many applicants may be anxious about contacting a legal aid provider, may be intimidated by attorneys and other legal professionals and may misunderstand what constitutes a legal problem or what remedies are available through the legal system. The provider's intake processes should be capable of responding

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.4 (on Initial Exploration of the Client's Legal Problem).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁸ See also, ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.2 (on Practitioners' Responsibilities in Establishing an Effective Relationship and a Clear Understanding with the Client).

Standard 4.1 on the Provider's Intake System

effectively to the diverse communities it serves and of overcoming differences in culture.⁹ Intake should also have appropriate language capacity for persons with limited English proficiency.¹⁰ The intake system should be designed to be open and responsive to persons with physical impairments that impede access or hinder communication.¹¹

The provider should also be attentive to the many different personal circumstances that low income persons face that can impede communication. Persons who are homeless, for example, confront a number of obstacles, including the lack of a telephone, lack of a permanent address and ongoing disruption of their lives. A person with a diminished capacity because of mental or emotional impairments may call for specially trained staff to obtain the necessary facts to determine eligibility and conduct an initial analysis of the individual's legal problem.¹² Persons who are institutionalized may require specific outreach efforts to make initial contact possible.

Identification of applicants' legal needs and prompt determination of the assistance to be offered

Intake procedures should be designed to act quickly on applications for service. The process should gather pertinent facts regarding the applicant's legal problem so that the provider can make a prompt decision regarding whether to accept the matter for representation or another form of assistance. Applicants for service should not be subjected to a lengthy wait to find out if the provider will assist them. The provider should communicate clearly with each applicant regarding what services, if any, it will offer.¹³ If the provider offers assistance short of legal representation, it should clearly inform the individual that it is not entering into an attorney-client relationship.¹⁴

Denials of service

The provider should strive to preserve good will among those who are denied service. Reasons for rejecting a case should be explained clearly and promptly, and applicants who desire a review of the decision should be given immediate assistance to pursue their grievance.¹⁵ The provider should refer rejected applicants to other sources of assistance, if available. Such referrals should be made as quickly as possible to allow rejected applicants to seek other assistance if necessary to protect their rights.

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.5 (on Access to Services).

¹² See also Model Rules of Prof'l Conduct R. 1.14 (2003) on Client with Diminished Capacity.

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.6 (on Provision of Legal Information).

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.7 (on Client Complaint Procedure).

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 competent¹ and diligent² representation to accomplish the client's objective,³ to preserve the confidentiality of information given by the client,⁴ and to meet the strict rules governing conflicts of interest.⁵

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.

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

¹ See Model Rules of Prof'l Conduct R. 1.1 (2003).

² See Model Rules of Prof'l Conduct R. 1.3 (2003).

³ See Model Rules of Prof'l Conduct R. 1.2 (2003).

⁴ See Model Rules of Prof'l Conduct R. 1.6 (2003).

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

Standard 4.2 on Establishing a Clear Understanding

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.⁶

Representation of groups raises several issues to which the provider should be attentive.⁷ The provider should be aware of and abide by the ethical considerations in its jurisdiction with regard to representation of an organization.⁸ 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.⁹ 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.¹⁰

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 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

⁶ 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.

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

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

⁹ 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).

¹⁰ 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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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.¹¹ Assistance offered by a legal aid provider often involves limited representation in the form of legal advice,¹² brief service¹³ or assistance to pro se litigants.¹⁴ Cases that are accepted for litigation generally are not automatically handled on appeal.¹⁵

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.¹⁶

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.¹⁷

¹¹ Model Rules of Professional 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.

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

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

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

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

¹⁶ 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).

¹⁷ 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.¹⁸

- 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.¹⁹
- 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.²⁰
- The client and the provider should agree who is to pay costs which may arise in the course of the case.²¹
- Clients should understand if the provider will retain attorneys' fees in the event they are obtained from an adversary.²²
- The provider should explain to clients what they should do in the event of dissatisfaction with the handling of their legal problems.²³

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 responsibilities.²⁴ It may refer the individual to a community legal education presentation or

¹⁸ See Model Rules of Prof'l Conduct R. 1.6 (2003) and ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

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

²⁰ 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).

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

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

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

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

Standard 4.2 on Establishing a Clear Understanding

provide general information in a clinic designed to help pro se litigants.²⁵ 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.²⁶ 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.²⁷

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

²⁶ 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).

²⁷ 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.

STANDARD 4.3 ON PROTECTING CLIENT CONFIDENCES

STANDARD

Consistent with its ethical and legal responsibilities, a provider must protect information relating to representation of a client from unauthorized disclosure.

COMMENTARY

General considerations

The attorney-client relationship depends upon the free and candid flow of information between client and practitioner. This will occur only if clients are certain that the information they provide will be protected from unauthorized disclosure. The provider must make certain that all personnel understand and abide by their ethical obligation to protect client confidences.¹

Specific considerations

Intake. The responsibility to assure confidentiality begins at intake. Persons who are seeking representation are entitled to the same level of protection as clients regarding confidentiality of communications.² The provider's responsibility to protect information from disclosure does not diminish because an applicant is not accepted as a client.

Applicants for service must be guaranteed a private interview, whether it is conducted in person or by phone. Interviews need to be conducted in a setting where confidential information provided by the applicant cannot be overheard by persons who are not employed by the provider and where notes from the interview as well as confidential documents provided by the applicant are not visible to anyone other than appropriate provider personnel. The identity of each applicant and confidential information supplied in support of the application should be protected from improper disclosure to third parties, including other applicants for service or other clients of the provider.

Authorized disclosure. The provider and its practitioners should be familiar with the ethical rules in its jurisdiction regarding the authorized disclosure of confidential information and what information is deemed to be protected. Generally, information relating to the representation cannot be disclosed unless the client gives informed consent, the disclosure is implicitly authorized in order to carry out the representation or the disclosure is permitted in special circumstances set out in the ethical rule.³

¹ See Model Rules of Prof'l Conduct R. 1.6 (2003) regarding Confidentiality of Information. American Law Institute's *Restatement Third, The Law Governing Lawyers*, Section 59, states that "Confidential client information consists of information relating to representation of a client, other than information that is generally known."

² See Model Rules of Prof'l Conduct R. 1.18 (2003) regarding Duties to a Prospective Client, which reads:

"(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."

³ See Model Rules of Prof'l Conduct R. 1.6(b) (2003).

Standard 4.3 on Protecting Client Confidences

Disclosure of confidential information is often essential as part of representation of a client. Client approval of a particular course of action implicitly may authorize disclosure of information to courts or other tribunals, opposing counsel or other third parties in order to carry out the representation. When particularly sensitive information is involved, the provider should explicitly discuss the disclosure with the client, and consent should be obtained before the information is disclosed.

Risks of unauthorized disclosure. The provider needs to be particularly sensitive to several risks of unauthorized disclosure. The first risk involves inadvertent disclosure of confidential information. Such disclosure can occur when practitioners or other staff engage in casual conversations inside and outside the provider's office. Information about applicants and clients should never be discussed among the provider's staff when there may be other applicants for service, clients of the provider or non-provider personnel present. Hard-copy documents containing confidential information should not be left where they can be seen by anyone other than the appropriate staff, and confidential client information should not be displayed on computer screens that are visible to persons who should not have access to the information.

Confidential client information can also be inadvertently disclosed when intake records or materials from case files, including attorney work product such as drafts of confidential memorandum and other documents, are disposed of improperly. The provider should shred paper records that contain confidential information when disposing of them. Providers should make certain that electronic records that contain confidential information are removed from computer hard drives, storage disks, servers and other devices when the provider disposes of such devices.

A second risk to client confidences arises when judges or opposing counsel, seek information about the legal services which are provided to a particular client, or about the basis on which a client was found to be eligible. The provider should take appropriate steps to protect confidential client information from such disclosure, including challenging the request in court and, if necessary, on appeal.⁴

Requests for confidential information by funding sources. There can be a tension between the legitimate interest of funding sources to account for the proper expenditure of funds, and the need for providers to protect the confidences and secrets of their clients. Providers should be careful not to reveal confidential information to a funding source, unless the provider is required by law to disclose the specific information requested to the funding source.

In an early opinion the American Bar Association specifically ruled that a legal aid provider could not ethically give a funding source access to confidential information in the absence of

⁴ See Comment to Model Rules of Prof'l Conduct R. 1.6(b)(4) (2003), Par . 11 which states "A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order."

Standard 4.3 on Protecting Client Confidences

willing and informed consent by the client.⁵ However, in February 2002, the American Bar Association adopted revisions to Model Rule on Professional Conduct 1.6(b) to state that a "...lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to comply with other law or a court order."⁶ Approximately half of the states have adopted some variation of Model Rule 1.6 and other states are considering the revision. Some states ethics opinions interpret their rules of professional responsibility to incorporate the "other law" exception.

While the rule may not require client consent to such disclosures, where providers are operating under state ethics rules that are based on Model Rule 1.6(b)(4) or where ethical opinions permit disclosure based on other law, they should inform clients at the outset of the representation that confidential information may be disclosed to a funder, if the law requires it. The provider should be careful not to disclose more information than is specifically required by law and should resist disclosing information that could potentially compromise the client's representation without the client's consent.⁷

Ultimately, the scope of the protection for information relating to representation of a client is a matter of federal and state law⁸ as well as state ethical rules ethics. Providers and their practitioners should be familiar with the relevant state and federal law and ethics requirements, as well as any other law that is applicable, and they should examine them carefully to determine what, if any, information may be disclosed to a funding source without client consent. There may be instances where federal or state laws mandating disclosure of client information conflict with ethical rules or other law.⁹ In those instances providers should make every effort to negotiate with funding sources over disclosures that may violate ethical rules or

⁵ ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 1394 (1977).

⁶ The Comment to Model Rules of Prof'l Conduct R. 1.6(b)(4) (2003) states in Paragraph 10 that "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law."

An example of "other law" is Section 509(h) of the Appropriations Act which provides funds for the Legal Services Corporation (LSC). The provision states that, notwithstanding state ethical considerations, LSC recipients are required to make available to LSC and certain auditors "...retainer agreements, client trust fund and eligibility records, and client names..." unless they are covered by the attorney-client privilege. Courts have interpreted this provision to require disclosure of these items even when the recipient argues that the information sought by LSC is protected by state ethical rule. *See, e.g., United States v. Legal Services for New York City*, 249 F. 3d 1077 (DC Cir. 2001).

⁷ The Comment to Model Rules of Prof'l Conduct R. 1.6(b)(4) (2003), Par . 11 states in part "...Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."

⁸ While statutes that require disclosure are clearly "other law," it is arguable that regulations adopted by agencies to implement such statutes also constitute "law." It is far less clear that other documents stating agency policy or practice would constitute law for purposes of Model Rules of Prof'l Conduct R. 1.6 or the comparable state ethical provision.

⁹ For example, state law may prohibit the disclosure of the identity of clients who are suffering from AIDS or who are victims of domestic violence, while federal statutes may require disclosure of the names of all clients who receive legal services from a recipient of federal funds.

Standard 4.3 on Protecting Client Confidences

other laws, to protect both the clients involved and the provider's resources. In some instances, the provider may have to seek opinions from state ethics bodies or courts in order to resolve the issue.

Use of interpreters. Special confidentiality concerns arise when dealing with applicants and clients who are hearing impaired or have limited proficiency in English and who require the services of interpreters who are not provider employees.¹⁰ The provider should be aware of the potential impact on confidentiality when a third party acts as an interpreter in a communication between an applicant or client and the provider. The provider should, whenever possible, use the services of a professional or qualified volunteer interpreter, who is responsible to the provider so that the confidential and privileged nature of the communication is preserved. The provider should assure that all such interpreters are aware of the responsibility to protect from disclosure any information communicated between the applicant or client and the provider.

The provider should discourage use of third party interpreters who are friends or family members or non-professional volunteers from client communities. Not only does such a situation potentially jeopardize the confidentiality of the communication between the applicant and the provider, it also potentially compromises the accuracy and quality of the interpretation. However, there may be circumstances where the client or applicant insists that such a person be used, or there is an emergency and no professional interpreter is immediately available. In such a situation, the provider should impress upon the interpreter the need to keep the communication confidential.¹¹

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

¹¹ The ABA Section on Litigation has published *The Attorney-Client Privilege and the Work-Product Doctrine* by Edna Selan Epstein (Fourth Edition 2001) which provides at page 160: "The client may use an agent for communicating with the attorney. As long as the client reasonably expects the agent to keep the communication confidential from third parties and does not, by entrusting the communication to the agent, indicate a lack of concern for keeping the communication secret, the privilege should apply. Thus, when...a Spanish-speaking client asks a translator to come along when consulting an English-speaking lawyer, the privilege should not be lost."

STANDARD 4.4 ON CLIENT AND ATTORNEYS' FEES

STANDARD

A provider should establish a policy governing any fees and costs for which a client is responsible and any attorneys' fees that may be recovered from an adverse party.

COMMENTARY

General considerations

Legal aid providers are organized for the purpose of assisting persons who are unable to afford legal representation. Nevertheless, clients may be asked to pay certain costs of representation, such as filing fees, if they are able to pay them and a waiver cannot be obtained. In addition, some providers may charge greatly reduced fees or may charge clients on a sliding fee scale to help defray the costs of representation. Some private practitioners may agree to accept referrals in certain types of cases and to charge the client a substantially reduced or nominal fee.

While such charges may help to increase the resources that are available to provide legal assistance to members of low income communities, providers should take into consideration the impact of any fees or costs on those applicants who would be denied legal assistance if they cannot afford to pay them. In addition, providers should be aware of private practitioners who regularly provide low-cost representation in certain categories of cases and determine whether it is more appropriate to refer applicants to such practitioners. In any event, clients should be fully advised at the outset of representation of any costs or fees that they will be expected to pay.¹

Specific considerations

Representation of clients by outside practitioners. An outside practitioner who represents a legal aid client should not charge an additional fee to a client referred by a provider beyond that agreed to by the provider and the practitioner prior to the initiation of representation. To do so could defeat the purpose of providing service to those who cannot otherwise afford an attorney. Staff practitioners who also have a private practice should not charge a fee to a client of the provider or otherwise receive any money directly or indirectly from such an individual. If a staff practitioner leaves the employment of a provider to engage in the private practice of law, the provider may permit the practitioner to continue to represent clients the individual represented while a member of the provider's staff, but the practitioner should do so either on a pro bono basis or at a pre-established contractual rate where the fee is paid by the provider.

Fee-generating cases. Fee-generating cases are those in which a fee is likely to be available either from an award to the client, such as in plaintiffs' tort actions, or from the opposing party, such as cases where statutory attorneys' fees are available. Providers should consider whether to expend limited provider resources on cases in which other competent counsel would be available, and should adopt policies to guide the provider in determining whether to undertake

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).

Standard 4.4 on Client and Attorneys' Fees

representation in particular fee-generating cases. In setting and applying such policies providers should consider a range of factors, including the following:

- Whether private practitioners are generally available and willing to undertake representation in such cases;
- Whether the case is one where the provider's practitioners have specialized experience and expertise;
- Whether the case is one where private practitioners have experience and expertise;
- Whether there are issues in the case that are of particular importance to low income communities;
- Whether the case fits within the mission or strategic focus of the provider;
- Whether the recovery would be so diminished by a private practitioner obtaining a fee as to significantly harm the client;
- Whether the case would require the expenditure of significant provider resources without any substantial likelihood of recovering those expenditures in a timely manner.

Recovery of attorneys' fees. In some circumstances, a claim for attorneys' fees may be an important strategic tool to encourage the adverse party to settle the case rather than risk the obligation to pay a significant attorneys' fee award.² The amount of attorneys' fees can become a major issue in settlement negotiations, however, because there can be tension between the client's desire to settle the matter favorably to the client and the provider's interest in recovering a reasonable fee. The provider and client should agree in the retainer or engagement letter at the outset of any representation about how attorneys' fees will be treated in settlement negotiations.

At a minimum, the client should be apprised of potentially competing interests, and the provider and practitioner should consider ways to meet the client's objective without unreasonably limiting the provider's opportunity to recover a reasonable fee. The law and ethical considerations governing how this inherent conflict should be treated is evolving and the provider and practitioner should be familiar with how it is treated in their jurisdiction and seek solutions consistent with that law that meet their underlying responsibility to protect the client's interests while preserving the reasonable capacity to recover fees.

Attorneys' fees awarded to a practitioner employed by the provider, or to a client of such a practitioner, should be remitted to the provider. The provider and a private practitioner who is representing a client as co-counsel or on referral from the provider should agree prior to the initiation of representation regarding the disposition of any attorneys' fees that may be

² In order to preserve this tool for clients, an LSC recipient or other provider that is prohibited from seeking attorney's fees may want to consider associating co-counsel who can seek such fees for their work or may decide that the client would be better served by referring the case to an outside practitioner.

Standard 4.4 on Client and Attorneys' Fees

awarded in the case. The client should be advised when representation is undertaken of the intended disposition of such fees.³

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).

STANDARD 4.5 ON ACCESS TO SERVICES

STANDARD

A provider should operate in ways that facilitate access to its services.

COMMENTARY

General considerations

A legal aid provider has a responsibility to operate in ways that facilitate access to its services for all members of the low income population it serves. Many aspects of its operation affect the accessibility of its services: the provider's over-all delivery strategy, including areas of specialization and practice concentration; office location; utilization of technology; intake hours; design of facilities; outreach; and the involvement of contract and volunteer attorneys.

A provider also needs to be attentive to the access needs of specific populations for which there are particular barriers to seeking and to utilizing services that are offered. Some persons encounter geographic barriers, particularly in sparsely populated rural areas or in urban and rural areas that lack public transportation. Others, such as persons with disabilities, the institutionalized and the elderly, encounter physical and other barriers. Migrant farm-workers housed in farm labor camps may not be able to reach or easily communicate with legal aid providers and legal aid providers may not easily access labor camps. Other low income employed persons may not be able to leave employment to seek or follow up on service. Some low income persons may come from cultures that frown on seeking the assistance of a lawyer, or seeking any free services,¹ while others may be impeded by limited proficiency in English.²

Factors affecting access

Delivery strategy. The overall delivery structure³ and priorities of a provider will impact on its accessibility to clients and the access issues it encounters. Some providers are organized entirely to offer intake and advice by phone and issues such as office location would not be relevant to them, whereas access issues associated with use of the telephone and other communication's technology would. Small providers may have only one office and limited choices regarding multiple points of contact. Providers that specialize in work such as appeals or legislative and administrative advocacy and rely on referrals from other providers have different access issues than a large full service provider. Similarly, the limits a provider places on the legal issues on which it will offer assistance limits access for individuals with legal problems that fall outside of those areas, particularly if there is no alternative to which the applicant can be referred.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.2 (on Delivery Structure).

Standard 4.5 on Access to Services

Each provider should be aware of and address the particular access issues that it encounters given its delivery system and should be an active participant in a delivery system that assures that all persons in need of assistance have access to services.⁴

Office Location. Where a provider locates its service offices will affect how people utilize its services. Offices where clients are seen should be in locations that are accessible to the low income population. Office locations will be determined in the context of the overall delivery structure of the provider. How resources are deployed – particularly in multi-county service areas, in large rural areas and in large cities – will significantly affect office location decisions. A decision, for example, to establish large offices to facilitate specialization may reduce the opportunity to locate offices in or near the various low income communities served by the provider. Mechanisms, such as centralized telephone intake, on-line services and outreach offices will reduce the need for physical access and may diminish the importance of location of main offices. There will be times, however, when applicants or clients will need to come to the office and location will matter.

In locating its service offices, a legal aid provider should be sensitive to many countervailing factors. There may be many benefits to locating in close proximity to courthouses and other state and local institutions before which the provider's practitioners regularly represents clients. On the other hand, it may be significantly more convenient for potential clients for the provider to be located in or near low income neighborhoods. To the degree possible, inexpensive public transportation and free or low-cost parking should be available. The provider should be open to all low income populations in its service area and should avoid locating its offices in a way that identifies it with a particular segment of the low income population, if it would deter persons from other cultural groups from seeking service.

Some providers will have institutional needs that determine where they locate their service offices. For law school clinics, for example, proximity to the law school may be a significant factor. A legal aid provider serving a specific population, such as persons with HIV/AIDS, might locate in a facility offering other services to the same population.

There are obvious financial considerations to be weighed as well. These include rental or ownership costs of particular sites. Supportive local governments, bar associations, or service organizations may be willing to donate free or reduced-cost space to a provider. Cost advantages of such arrangements should be carefully weighed against the potential disadvantages of identifying the provider with particular institutions.

Utilization of technology.⁵ Technology can have a significant impact on the access issues. Technologically based systems for intake,⁶ to offer legal information⁷ and other assistance can significantly increase the capacity of a provider to serve large numbers of low income persons. They can also directly overcome barriers to access that some encounter. Telephone intake, for

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.1 (on Provider's Intake System).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

Standard 4.5 on Access to Services

example, can significantly increase access for isolated rural populations, as well as homebound and the elderly. It may be the only reasonable alternative for a person who cannot take time off from work to physically go to an office.

The provider needs to be sensitive to the fact that restricting intake to the telephone may create impediments for some and that telephone intake systems are not equally accessible to all. Some low income persons may have only limited access to a phone. Some rural people have a deeply ingrained preference for face to face contact and may balk at initial contact by telephone. Some persons have difficulty with complex, answering systems with branching options and will not persevere to get the help they need. Persons who do not speak English are likely to be weeded out of a telephone system that does not immediately offer interaction in their language.⁸

In all cases, the provider's telephone system needs to be accessible. Automated systems should provide for quick access to a live operator for first time callers or to a voice-mail box for persons trying to reach a particular individual. They should accommodate persons who speak a language other than English. The provider should have the capacity to address the needs of the deaf and hearing impaired.

As technology continues to develop, it is likely that use of on-line access to services will increase. Such techniques can make services available to large numbers of persons, but they also create their own access questions. Some low income persons will not have access to a computer, or will not have the skills necessary to use one for on-line, self help service. Web-based assistance should be available in the frequently used written languages of the low income person served by the provider.⁹

Access to technology for persons with a disability. Technology needs to be accessible to persons who have disabilities. Services that are only offered on the web should have appropriate adaptive technology to make the website usable by low vision and blind persons, including displaying graphic and visual information with text alternatives and using formats accessible to screen readers. Computer stations that are established by the provider to access its services should, if practicable, offer a means for interface with the computer which will work for persons who have problems with physical control and impaired mobility.

Intake and office hours. Intake and office hours should be established to accommodate the needs of the low income communities served by the provider. Clients who are employed may not be able to take time off during regular business hours. Caretakers of small children or persons with a disability may have little time when they can be absent from the home. Available public and private transportation may determine when some can come to an office. The hours set by staff and intake offices should accommodate such needs and to the degree possible, the provider should offer intake and access to services outside of normal working hours and at lunch time.

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.6 (on Provision of Legal Information); Standard 4.6 (on Communication in the Primary Languages of Persons Served).

Standard 4.5 on Access to Services

Physical Facilities. Service offices should provide a professional atmosphere that reflects respect for clients. They should be clean, pleasant and physically comfortable. Offices should provide privacy for applicants and clients and easy access to personnel. There should be comfortable waiting space, with accommodations, if possible, for children who accompany clients to the office. The location of a staff office should be marked clearly with an easily readable sign. The sign identifying the office should be printed in major languages spoken by the low income communities the provider serves.

Elimination of physical barriers for persons who are disabled. A provider should be highly sensitive to the need to eliminate barriers that limit access for persons with disabilities. A provider should at a minimum comply with federal and state legal requirements regarding access to its services by persons with disabilities.¹⁰ The provider should recognize that many legal problems arise for individuals with a disability as a direct result of their condition or status. Lack of easy access to public and private institutions frequently exacerbates those problems. Failure by a provider to address its own access barriers may leave important legal issues unattended as the provider becomes another part of the problem persons with disabilities confront.

Buildings in which the provider is housed should offer wheel chair access and elevators if services are offered in multi-level facilities. Toilet facilities and parking should accommodate persons with disabilities. Offices in which clients meet practitioners should be accessible to persons in wheelchairs. The provider should accommodate persons who rely on service animals to assist them.

Outreach and Publicity. Legal aid providers should take affirmative steps to inform eligible persons of their services in a manner that encourages them to seek assistance. One of the goals of community legal education should be to publicize the nature of available legal aid and the steps an individual should take to obtain them.¹¹

Effective outreach to the elderly, the physically handicapped and the institutionalized requires more than information. Lack of mobility or physical access barriers may keep such persons from legal aid even when they are aware of it. Providers should establish outreach to groups and organizations that work with persons with disabilities, know how to handle their mobility problems, and can refer them to legal aid. The provider should consider bringing services to the institutionalized and others who cannot travel to the office, but are eligible for service.

Outreach should be tailored to address special access barriers encountered by some because of their culture or unique circumstances. The provider should reach out to community organizations in isolated cultural and linguistic groups to facilitate establishing a presence in those communities. Specialized delivery strategies should be directed to groups of clients such as migrant farm workers and Native Americans.

¹⁰ See The Americans with Disabilities Act and Section 504 of the Rehabilitation Act governing nondiscrimination under federal grants and programs.

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

Standard 4.5 on Access to Services

*Involvement of other members of the bar.*¹² Involvement of volunteer and contract attorneys offers a valuable opportunity to provide service in areas that might otherwise be difficult to serve. In urban areas, offices of private attorneys may be located in neighborhoods that are convenient to clients. In rural areas, private attorneys may be available to serve communities where it is not economically feasible to maintain a staff office. Effective involvement of outside attorneys may increase the flexibility of a provider's service hours. Some providers, for instance, engage outside attorneys in advice clinics that operate in the evening or on Saturdays. If a client who has a disability is referred to an outside attorney, the provider should make certain that the attorney to whom the case is referred is fully able to accommodate the client's disability.

¹² 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).

STANDARD 4.6 ON COMMUNICATION IN THE PRIMARY LANGUAGES OF PERSONS SERVED

STANDARD

A provider should assure that all language groups within its low income communities have access to its services and should assist persons using its services in their primary language.

COMMENTARY

General considerations

A legal aid provider has a responsibility to communicate in the language of persons seeking and using its services. A provider should have the capacity to communicate with all clients who are not proficient in English, either through bilingual staff or qualified interpreters. It should offer legal information and other forms of non-representational services in the predominant languages of the low income communities it serves. Its processes for intake should be accessible to persons from all the language groups in its service area.

The challenge of communicating effectively with members of the low income community in their own language can be complex as many legal aid providers witness diverse immigrant populations settling in their service area. Effectively serving persons with limited English proficiency¹ is often complicated by the fact that many recent immigrant communities are not familiar with the American legal system and distrust lawyers and legal process, because of their experience in their home country. In addition to addressing potential language barriers, therefore, a provider needs to be responsive to cultural issues that may inhibit some persons from accessing its service.²

It requires sustained and comprehensive effort for a provider to be accessible to all persons who have limited proficiency in English, if it is in an area with many language groups. Providers that operate in an area with only a few low income persons who do not speak English also have a responsibility to communicate effectively with the occasional individuals it serves who have limited English proficiency.

Communication with low income persons with limited proficiency in English

Communication with clients. A provider needs to assure that its practitioners have the tools necessary to represent their clients, including being able to communicate effectively with those who are not proficient in English. Clear communication between the practitioner and client is at the core of effective practice. A practitioner has a responsibility to understand the client's circumstances fully and to suggest an appropriate course of action. The responsibility to inquire into the client's circumstance exists whether the provider is offering limited or full

¹ "Limited English proficiency" refers to individuals who do not speak English as their primary language and who have a limited ability to speak, understand, read or write English.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

Standard 4.6 on Communication in the Primary Languages of Persons Served

representation.³ A practitioner who—because of a language barrier—cannot understand fully what the client is saying and asking may not be able to determine the full circumstances of the case. There is an equal risk that the client will not fully understand the practitioner's advice or explanation.

In order for its practitioners to meet their professional responsibilities to provide competent representation to the client, therefore, the practitioner either needs to communicate in the client's language directly or through a competent interpreter. This responsibility attaches both to persons who speak a language other than English and to persons who rely on American Sign Language (ASL) to communicate.

The provider should make certain that its practitioners who are not fluent in the language used by their clients understand their responsibility to use interpreters, unless it is evident that communication will be unimpaired for both the client and the practitioner without an interpreter. Interpreters should generally be provided whenever a client requests one. To ensure accuracy of the interpretation and that no breach of confidentiality occurs, the provider should procure its own interpreter and avoid using interpreters brought by the person being interviewed.⁴

Critical documents, such as correspondence explaining the client's rights and responsibilities, should be translated into the client's language and tested for readability in that language. If the client is unable to read in either language or if requested by the client, oral interpretation of documents should be provided. The provider should also be prepared to accommodate the needs of persons who are sight impaired and should recognize, for example, the need to put essential documents in a readable form, such as in Braille for persons who are blind.

In court and in administrative hearings, a provider representing a client who is not proficient in English or is hearing impaired should assure a competent interpreter is provided by the court or administrative agency. Even when an interpreter is provided by the court or administrative agency, the provider may need to have its own interpreter present to facilitate attorney-client communications. Meaningful participation in legal proceedings generally depends on the person being able to understand what the judge or hearing officer, the witnesses and the advocates are saying, as well as being able to communicate with the advocate in a confidential manner.

Communication with persons receiving non-representational services. Some low income persons seeking assistance will not be accepted as clients but will be given non-representational services in the form of legal information. Legal information may be offered in group settings or to individuals on-line or in writing, such as a brochure or a disposition letter.⁵ The provider may also offer instructions through clinics or other means as to how pro se litigants can represent themselves before a court or administrative body.⁶

³ Model Rules of Prof'l Conduct R. 1.2 (2003). *See also* ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.1 (on Full Legal Representation); Standards 3.4 (on Limited Representation; Standard 3.4-1 (on Representation Limited to Legal Advice); Standard 3.4-2 (on Representation Limited to Brief Services).

⁴ *See* The Ass'n of the Bar of the City of N. Y. Formal Op. 1995-12 (1995).

⁵ *See* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.6 (on Provision of Legal Information).

⁶ *See* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.5 (on Assistance to Pro Se Litigants).

Standard 4.6 on Communication in the Primary Languages of Persons Served

A provider should make its non-representational assistance available in the principal languages used by persons in the low income communities it serves. Written and on-line legal information should be translated into the predominant languages used by low income persons in the service area. To the degree possible, the provider should have the capacity to hold community legal education sessions and pro se clinics in the principal languages of the communities served.

The provider should be cognizant of the degree to which the lack of capacity in English will be a factor in the course of self-representation and should instruct the person receiving the pro se support in how to obtain the participation of a competent interpreter. In some cases, a provider may determine that it will represent persons with limited knowledge of English in matters in which it would instruct others who are proficient in English to represent themselves.

It will not be possible in all instances to translate legal information materials into every language spoken in the low income community. Some persons who are not proficient in English will speak a language that is not spoken by a significant number of individuals in the low income community. In addition, some languages are not written or are read and written primarily by scholars so that translation is not practical. If legal information materials are not available in the language of a person whom the provider seeks to help, they should be orally translated, if possible.

Intake. The provider should be accessible at intake to all persons regardless of their primary language. The degree to which a provider is capable of communicating in the language of persons who are not proficient in English may determine whether such persons seek assistance in the first place and whether they follow through to get the assistance they need. It is important, therefore, that the provider signal its openness to all language groups. Signs identifying the provider should be in the major written languages of the communities it serves. The provider should have language capability among its intake personnel either in the form of bilingual staff or readily accessible interpreter services. Telephone intake systems should offer options for major languages that are identified early in any menu of options, so that non-English callers will learn that services are available in their language and not be discouraged by lengthy announcements in a language they do not understand.

Responsibilities of the provider

Provider planning to serve persons with limited proficiency in English. In planning its service delivery methods,⁷ a legal aid provider should identify the points of contact where language barriers may exist for persons seeking and receiving services and should develop strategies, plans and protocols to respond. As noted, some means of delivering services, such as centralized telephone intake, computers and pro se clinics, may be of little use to persons with limited English proficiency unless appropriate adjustments are made to provide meaningful services to them. Program priorities, methods of providing services, and outreach programs should be designed so that legal issues of importance to language minorities are addressed by the provider at least as well as issues of English proficient clients. Providers should consider targeting outreach at underserved language populations and developing partnerships with community based organizations that serve such groups. The provider should budget adequate resources to meet the needs of persons with limited English proficiency.

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Legal Needs and Planning to Respond); Standard 2.2 (on Delivery Structure).

Standard 4.6 on Communication in the Primary Languages of Persons Served

The provider should have a clear protocol for how it will respond to the needs of persons who are not proficient in English and should train its staff in its proper application. Some providers will operate in an area with few low income persons who are not proficient in English. Such providers should, nevertheless, have a protocol for responding to the needs of the occasional person who seeks services and who has limited proficiency in English. Providers should be aware of and abide by statutory provisions that exist under state and federal law that prohibit discrimination against persons on the basis of English language ability in the provision of services and benefits.⁸

Staff should be trained in the fundamental importance of responding effectively to the language needs of its low income communities and serving clients in their own language if they are not proficient in English. The provider should assure that a person with appropriate authority is assigned responsibility for assuring the effective application of the language protocol.

Bilingual services. The most effective way to communicate is directly in a language that is mutually understood by both the person being served and the provider's staff. Bilingual staff capable of providing services without the need for interpreting are, therefore, the preferred method of communicating with persons with limited proficiency in English. With appropriate training, bilingual staff may also be utilized to act as interpreters for other staff. To enhance its capacity for bilingual representation, a legal aid provider should make fluency in pertinent languages, a preferred or, where appropriate, required skill in evaluating applicants for employment. Providers should be certain that staff who communicate directly with clients in a second language have appropriate knowledge of legal terms.

Interpreter services. It is generally not possible to hire bilingual staff in every language used by persons eligible for the provider's services or to have enough bilingual practitioners to serve every client with limited proficiency in English. The provider, therefore, needs to have ready access to competent interpreter services to supplement bilingual staff and staff interpreters. Competent interpreting requires individuals with a range of skills. They need to be proficient in both languages, to be familiar with legal terms and their meaning and to understand the role of an interpreter, the need for neutrality, accuracy and completeness and the techniques that facilitate effective communication. They also need to be aware that they are an agent of the provider bound by its duty to maintain the confidentiality of the communication.

Interpreter services can be provided in several ways. Trained, bilingual staff can provide interpreting for other staff members who are not proficient in the language of the person being served. The provider can use professional in-person and telephone interpreters when bilingual staff are not available. In-person interpreting is preferable to telephone based interpreters.

The provider should avoid the use of informal or untrained interpreters, including family members and friends of the person being served. In particular, the provider should not allow the use of minors as interpreters, absent exigent circumstances. Informal interpreters often lack fluency in one or both languages, and rarely use proper interpreting techniques. Use of family and friends to interpret gives rise to serious risks that the interpretation will not be neutral and

⁸ See e.g., Title VI of the Civil Rights Act of 1964 and the regulations promulgated thereunder. In addition, there may be non-statutory requirements, such as funding source guidance, contractual non-discrimination provisions and ethical standards in the provider's jurisdiction that apply to it.

Standard 4.6 on Communication in the Primary Languages of Persons Served

that the interpreter will not fully understand or be able to translate the legal options available. Furthermore, there may be times when the person doing the interpreting will have an unexpected conflict with the person being served by the provider.

Training. The provider should train staff regarding the fundamental importance of responding effectively to the language needs of its low income communities and serving clients in their own language if they are not proficient in English. They should be trained as well regarding how to assess the need for language services by clients and others, how to work with interpreters and how to access interpreting and translation services. Bilingual staff who act as interpreters for others should receive training in interpreting skills, ethics and the role of an interpreter.

Evaluation. The provider should periodically evaluate its effectiveness responding to the language needs of its low income population. It should gather data regarding the languages used in the low income populations in its service area and by the persons actually served by it. The data should be used to identify underserved language groups, to assist in prioritizing the languages most frequently encountered and to help the provider measure progress responding to the various language groups in its service area. If significant language groups are identified that are not being adequately served, the provider should develop and implement a plan to address the deficiency.

STANDARD 4.7 ON CLIENT COMPLAINT PROCEDURE

STANDARD

The provider should establish a policy and procedure for individuals to complain about a denial of service or about the quality and manner of assistance.

COMMENTARY

General considerations

Legal aid providers generally serve many clients. Over time, therefore, they will encounter persons who are denied service or who are dissatisfied with the assistance offered by the provider. The provider should establish policies and procedures for handling such complaints.

The nature of the policies and procedures will vary based on the nature of the provider. It is preferable for a provider to have an internal procedure to give it an opportunity to correct any errors without disruptive intervention by outside entities. Such a procedure can also provide a sympathetic forum for an aggrieved client or applicant who may have no other means to complain about perceived improper or inadequate service. The existence of a complaint procedure, however, should not be used to deter aggrieved persons from seeking other appropriate remedies from bar grievance committees or from private counsel for alleged malpractice.

Provider responsibilities

Resolution of complaints by a supervisor. All applicants and clients who express a complaint, whether in person, on the telephone or through other means, should be promptly informed of how to pursue their complaint. Each provider should have a system for prompt complaint resolution by a person with supervisory authority. The provider's policy should address issues related to the nature and quality of service as well as a review of denials of service to applicants.

The provider should recognize that the complaint procedure is an important tool for maintaining positive relations with the low income communities it serves and for identifying when a staff member may not be meeting the standards of the organization or when aspects of its operation are not functioning properly. The provider should seek to resolve complaints expeditiously and fairly. Often, a complaint can be resolved by a person in authority correcting the problem or providing an explanation to the person complaining of why a particular action was taken or refused.

The complaint procedure should be known by all staff so that they can promptly refer the dissatisfied individual to a supervisor with authority and responsibility to review the complaint and to resolve it, when appropriate. Participating outside attorneys and clients whose cases are referred to them should be informed of the nature of the policy and procedure.

Notice of the procedure. The provider should have a prominently displayed sign or handout at its intake office that advises persons seeking assistance of the complaint procedure. The notice should be written in the predominant languages in the provider's service area. A provider does

Standard 4.7 on Client Complaint Procedure

not have an obligation to provide written notice to persons whose only contact with the program is by phone or in writing. If the only contact is in writing, on-line, or through a website, the provider should use its judgment regarding when it is appropriate to provide written notice of a complaint procedure. A web page, for instance, that provides legal information, might not call for such a notice, although the provider might for evaluative purposes solicit feedback on the user's experience with the page. An on-line application process, on the other hand, should inform users of the procedure for expressing dissatisfaction with the services provided.

Grievance Committee. Individuals who are dissatisfied with the actions of the provider in response to a complaint should be advised of any further recourse they may have. Complaint procedures may offer the person complaining the opportunity for further review by a grievance committee of the governing body. The procedure may exclude from review straightforward matters, such as the proper application of established eligibility guidelines or of case acceptance policies that strictly exclude certain types of cases. A board level grievance committee should include both attorney and client members of the governing body.

Complainants should be offered assistance submitting their complaint to a board grievance committee, if necessary. Complainants in formal hearings should be allowed assistance presenting their complaint by a person of their choice, other than provider personnel. A written explanation of the grievance committee's decision should be given to each grievant.

Complaints regarding representation

A complaint that challenges the quality or manner of representation can pose difficult problems. If the grievance involves a practitioner for whom the provider is responsible and if there is a potential malpractice claim, the provider faces a conflict between its duty to the client and the risk of jeopardizing its insurance coverage if it admits malpractice. Similarly, if the complaint involves a possible ethical violation by a practitioner, the provider may have an obligation to report the matter to the appropriate authority and to advise the client regarding the individual's rights, which may be adverse to the provider. If it appears that a complaint involves possible malpractice or an ethical violation, the provider should consult counsel regarding how it is proper to proceed under the rules of its jurisdiction.

When a complaint concerns the conduct of a lawyer, ethical constraints prohibit the governing body or its grievance committee from ordering a practitioner to take or refrain from specific action.¹ In addition, the governing body is normally restricted from access to confidential client information which it is likely to need for effective review of the grievance.² The complainant should be advised, therefore, of the prohibition against disclosure of client confidences and that in order for the grievance to proceed, the client may have to waive the protections that attach to the information that has been given to the provider.³

¹ See ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 334 (1974) and ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-2 (on Prohibition Against Interference in the Representation of Clients).

² *Ibid.*

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

Standard 4.7 on Client Complaint Procedure

Different issues are involved when a client complains about an outside practitioner to whom the provider has referred a case. How the complaint can be treated will differ depending on the agreement among the client, the provider and the outside practitioner.⁴ The degree to which the provider can take direct action, such as looking into the facts and suggesting what action should be taken in the case or assigning the matter to another attorney, is a function of its being a party to the attorney-client relationship with the client. If there is no attorney-client relationship between the provider and the client, the provider should notify the outside practitioner of the concerns raised and informally seek to resolve the matter. If informal resolution is not possible and the complaint involves a possible ethical violation, the provider should consider whether the matter should be referred to the appropriate bar disciplinary authority.

⁴ 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).

SECTION 5
STANDARDS FOR INTERNAL SYSTEMS AND PROCEDURE

STANDARD 5.1 ON ELIGIBILITY GUIDELINES

STANDARD

A provider should establish written guidelines to determine an applicant's eligibility.

COMMENTARY

General considerations

Different kinds of providers will have differing kinds of guidelines for eligibility. Most sources of funding for legal aid set eligibility limits based on income or other financial criteria. Others may use guidelines that relate to the applicant's status or personal characteristics, such as age, place of residence, or membership in a particular targeted population. Still others determine eligibility based on the kind of legal problem that the applicant for service is facing, where the provider only handles a limited range of legal problems. In some situations, eligibility criteria are determined by restrictions imposed by the provider's funding sources, which may exclude specific populations or problem types or restrict the provider to representation in only certain types of cases. Whatever its specific criteria, a provider should establish a written policy governing eligibility.

In setting eligibility guidelines that are based on financial criteria, a provider should take into consideration local economic conditions, as well as the provider's available resources and established priorities.¹ The guidelines should encourage common sense judgments at intake about the applicant's eligibility, consistent with provider guidelines and funders' requirements. Specific written guidelines should cover a variety of objective criteria, including prospective income, available assets, family debts and work related expenses, as well as other factors that affect the applicant's financial situation at the time services are requested.

Eligibility policies should make it clear that a determination of financial or other eligibility does not guarantee that the provider will represent the individual. In addition to the provider's case acceptance policies,² the provider may also consider factors such as the availability of other assistance to resolve the problem or the consequences to the applicant if service is denied.

Eligibility guidelines should be adopted by the governing body and, if practicable, should be developed with client participation. The governing body should reevaluate the guidelines periodically, particularly when there are changes in economic conditions in the community, or when there are changes in provider resources.

¹ See also, ABA Standards for the Provision of Civil Legal Aid (2006): Standard 5.2 (on Policy for Acceptance of Applicants for Service); Standard 6.2 (on Assignment and Management of Cases and Workload).

² *Ibid.*

Standard 5.1 on Eligibility Guidelines

Eligibility determinations

The provider should have systems in place to assure that it obtains sufficient information during the intake interview to permit fair and thoughtful application of established eligibility guidelines. If a provider's eligibility is based on financial factors, the provider should have systems to record sufficient data about an applicant's financial status to make an appropriate eligibility determination. If eligibility for program services is based on other criteria, such as the applicant's type of legal problem, status or membership in a targeted population, the provider should also have systems to record information about the applicant or the legal problem for which assistance is sought to enable the provider's staff to make a determination of the applicant's eligibility for the provider's services.

Data should be obtained in a manner that protects confidentiality,³ demonstrates respect for the applicant for service, and encourages the development of a relationship of trust between the applicant and the provider. For example, questions about family size and domestic or marital status should account for non-traditional family structures of gay and lesbian applicants and others.

Information should be recorded in sufficient detail to document compliance with the eligibility guidelines and to provide a record for review in the event that the decision regarding eligibility is challenged. A decision regarding the applicant's eligibility should be made as quickly as circumstances permit to allow those who are ineligible for service adequate time to take other steps to protect their interests. Applicants who are ineligible for assistance should be referred to other sources of help, if available.

If there is substantial reason to doubt the accuracy of the information the applicant gives, the provider should make appropriate efforts to verify that information. Any inquiry to third parties must protect confidential information the applicant provides.⁴ The provider should inform the applicant of any attempt to verify eligibility information and should provide an opportunity for the applicant to explain or rebut any additional information obtained before a final eligibility determination is made.

Some providers may delegate eligibility screening to persons or agencies other than its own staff or volunteers. In such circumstances, the governing body should establish specific procedures for making eligibility determination, consistent with this Standard, and should closely monitor the third party for compliance.

³ See Model Rules of Prof'l Conduct R. 1.18 (2003), Duties to a Prospective Client, which provides that even when no lawyer-client relationship is formed with a prospective client, "a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation..." except as permitted in Model Rules of Prof'l Conduct R. 1.9 (2003).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

STANDARD 5.2 ON POLICY FOR ACCEPTANCE OF APPLICANTS FOR SERVICE

STANDARD

A provider should establish a policy to guide its decisions regarding the assistance it will provide to persons accepted for service.

COMMENTARY

General considerations

Nearly every provider confronts legal needs and demands for services that far outstrip its resources. In order to allocate its resources rationally, the provider should establish a policy and procedures for determining whom it will serve. The policy should focus resources on the identified priorities of the provider, consider the maximum amount of legal work the provider can reasonably handle and allocate available resources to assure high quality representation and assistance. For many providers, the decision also involves determining whether it will provide persons accepted for service with full¹ or limited legal assistance² or will offer non-representational assistance that does not establish an attorney-client relationship.³ Such decisions are separate from the determination of an applicant's financial eligibility.

The term typically used to describe such a policy is “case acceptance policy” and for purposes of clarity the term is used in this commentary, although the policy for many providers will encompass assistance that is not strictly a “case,” since it does not involve the creation of an attorney-client relationship. Not every provider will offer the full range of options from full representation to non-representational assistance. Some will offer full representation exclusively, while others may be established to offer only limited representation in the form of advice, and then refer cases that call for full representation to other providers. Some providers will not offer any non-representational assistance. Most providers will offer some mix of these various levels of service.

Whatever services a provider offers, its case acceptance policy should guide it in determining whom it agrees to serve, and the level of service offered. Providers that do not provide a full range of service should be aware of sources of assistance from other providers and should actively participate in state and regional delivery systems to support a full range of services.⁴

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

³ Non-representational assistance includes services such as the provision of legal information, community legal education or assistance to pro se litigants where legal assistance is provided to members of low income communities but where no attorney-client relationship is created between the applicant and the provider. See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.5 (on Assistance to Pro Se Litigants); Standard 3.6 (on Provision of Legal Information).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

Standard 5.2 on Policy for Acceptance of Applicants for Service

The provider's case acceptance policy should meet the following objectives:

- To allocate resources to the legal problems identified as priorities in the provider's planning process;
- To control demands on the provider's resources and its practitioners' available time so that the assistance that is provided to persons served is of high quality.

Focusing resources on identified needs

The goals and priorities established by a provider will identify a broad outline of issues affecting clients and will determine which categories of legal problems the provider should address.⁵ The provider's case acceptance policy should be designed to provide further guidance in implementing the priorities by stating, in general, the type or level of service that the provider will offer, if any, to address different kinds of legal problems. A provider may decide, for instance, generally whether it will consider full representation, limited legal representation or non-representational services for different kinds of problems.

In determining the level of service that will be offered for various types of legal problems, the provider should consider a variety of factors, including the following:

- The degree of importance accorded the issue in the provider's priorities;
- The potential benefit to the low income community in general, if the issue is successfully pursued with full representation;
- The potential consequences to individuals with that type of legal problem if only limited representation or non-representational assistance is offered;
- The availability of non-representational services from the provider or elsewhere that might help individual applicants resolve that type of problem;
- The existence of collaborative relationships with other organizations, such as domestic violence shelters, that work with the provider to support individuals with the type of legal problem;
- The availability of new sources of funds to support the provider in addressing the legal problem.

The policy should also guide the evaluation of the specific legal problems presented by each applicant to determine if the individual will be accepted for service. Considerations that are appropriate for determining how to treat each applicant's legal problem include:

- The likelihood of success, based on the merits and the facts at hand;
- The existence of sufficient provider resources to assure high quality representation if the case is accepted for full representation;⁶

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

⁶ Model Rules of Professional Conduct R. 1.3 (2003) requires a lawyer to "...act with reasonable diligence and promptness in representing a client." Paragraph 2 of the Comment to the Rule states: "A lawyer's work load must be controlled so that each matter can be handled competently."

Standard 5.2 on Policy for Acceptance of Applicants for Service

- The availability of other legal resources to assist the provider in handling the case, including the availability of outside attorneys who may be willing to co-counsel or provide other support;
- The applicant's capacity to benefit from limited legal assistance if full representation is not offered, including personal factors, such as the individual's understanding of the legal system, language facility or the ability to take time off from work;
- Whether the individual has additional, related legal problems that also need to be addressed in order for the individual to resolve the underlying problem.⁷

In addition, it is important for the provider to have the capacity to observe trends in the legal needs of low income communities and to identify newly emerging legal issues that it may not be addressing currently.⁸ Case acceptance policies should be flexible enough so that they can be periodically adjusted to take account of such trends and identified changes in client need.

Maximization of available resources

The provider's case acceptance policy should be designed to minimize the pressures on practitioners to accept legal work⁹ they cannot handle.¹⁰ Case acceptance policies serve the legitimate purpose of limiting the cases that the provider accepts in order to permit it to address its priorities and provide high quality legal assistance.¹¹ Case acceptance policies should be adjusted when necessary to avoid such drastic measures as having to close intake completely. A provider should also reevaluate its case acceptance policies periodically, taking into consideration changes in its priorities, its staffing, its financial resources, its other legal work, the restrictions imposed by its funders, as well as changes in the law, public policies and socio-economic conditions that impact client communities.

A legal aid provider and its practitioners face a constant tension between the desire to help every eligible person who comes to it with a critical legal problem and the realization that resources are inadequate to provide quality help for all who seek it. Case acceptance policies are important tools to help the provider focus resources on the most important issues. They should be developed in the context of other strategies to encourage efficient program operations

⁷ Some providers operate on a model known as "holistic legal services," which involves broadly identifying the interrelated legal problems of a client and seeking to respond to all of those problems in order to afford the client a more permanent solution.

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

⁹ The legal work that a provider undertakes encompasses not only the cases that it undertakes for clients and the non-representational work that it offers to applicants who are not accepted as clients. It also includes work such as lobbying and administrative advocacy that is not done on behalf of a specific client, reports and special projects relating to issues that affect low income communities in general or other work that does not involve the representation of specific clients. Such legal work can place significant demands on the provider's resources and the time of its practitioners and other staff that need to be taken into account when determining whether to accept clients for representation or to offer non-representational services.

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.2 (on Assignment and Management of Cases and Workload).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

Standard 5.2 on Policy for Acceptance of Applicants for Service

to maximize the amount of time and resources that are available to support high quality representation. Providers should consider the utilization of technology¹² and non-attorney practitioners to improve the efficiency of their operations.¹³ They should consider the use of limited legal assistance¹⁴ and non-representational services¹⁵ that make less intensive use of staff resources. They should seek ways to increase the funds available to support their work.¹⁶ Providers should encourage other members of the legal profession to participate in the representation of clients in order to increase the pool of attorneys and resources available to serve low income client communities.¹⁷

Agencies that work with the low income communities in the provider's service area, particularly those with which it collaborates on a regular basis, should be kept informed of the services the provider offers and the kinds of cases it will accept. Outreach and education about the provider's case acceptance policy may save needless efforts by applicants in seeking services that are not offered by the provider. The provider should be careful to draft its legal information materials and its community legal education presentations so as to be informative about available services, but not to discourage contacts by potential applicants with new and emerging legal problems that it should consider in its planning efforts.

Procedures in applying the provider's case acceptance policy

Every individual who interviews prospective clients to determine whether or not to accept them should be thoroughly skilled in interviewing techniques and should have the ability to elicit appropriate facts in order for the provider to make an informed decision about whether the applicant should be accepted for representation or should be offered non-representational services. Such individuals should be fully versed in the kinds of services that the provider offers and should have access to information regarding outside resources that are available for referrals for those applicants who are not accepted for service.

¹² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.9 (on Use of Non-Attorney Practitioners).

¹⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

¹⁵ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.5 (Assistance to Pro Se Litigants); Standard 3.6 (on Provision of Legal Information).

¹⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

¹⁷ 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).

STANDARD 5.3 ON MAINTENANCE OF RECORDS

STANDARD

A provider should have internal file maintenance and calendaring systems to help manage its legal work, note important deadlines, check for potential conflicts of interest and properly account for client trust funds.

COMMENTARY

General considerations

A legal aid provider should have a system for keeping track of all its legal work. In particular, the provider should have a case management system that tracks its cases and preserves data regarding clients and activities undertaken on their behalf, as well as information on their adversaries. For providers that serve large number of clients, perform a high volume of legal work and face periodic staff turnover, it is essential to have systems that assure continuity in recording and retaining case information and facilitate its retrieval. Such systems should assist the provider in avoiding unnecessary paperwork and disruption of legal work. The exact nature of the systems adopted to meet the Standard may vary widely based on the needs, resources and structure of the provider, as well as applicable ethical rules and requirements of funders.

Providers commonly use computer and web-based case management systems. These systems offer providers and their practitioners simple tools to keep track of case information, deadlines and conflicts of interest. They may also be coordinated with timekeeping, accounting, personnel records systems and client trust accounts to ensure accountability in the use of program and client resources.

Although electronically based systems may be particularly beneficial in large offices where the scale of practice and available resources are greater, even the smallest providers will benefit by incorporating technology into their operations.¹ The cost of such technology continues to decline and is within reach of virtually all providers. Each provider should familiarize itself with technological advances and incorporate appropriate technology into its operations when it is cost-effective to do so and will increase the provider's efficiency and expand its capacity.

The systems required by a provider that uses staff practitioners will differ significantly from those required for a provider that relies exclusively or substantially on outside practitioners to represent clients. Where representation is provided primarily by staff practitioners, the provider has significantly greater responsibility for developing and implementing systems that cover all the areas that are addressed by this Standard. To the extent that representation is provided by outside practitioners, the provider's record keeping system should, at a minimum, be sufficient for it to maintain accurate records of referrals and their disposition, to provide statistical data necessary for its own management needs, and to meet any reporting requirements of its funding sources.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

Standard 5.3 on Maintenance of Records

An efficient system for maintaining client files

The provider should have a case management system that facilitates easy location and speedy retrieval of files for its cases, whether they are maintained electronically or in hard copy. The exact nature of such systems will vary based on such factors as the number and size of the provider's offices, and the organization of the provider's staff. Computer and web-based case management systems have become common and are economically feasible for even those providers with small staffs and limited resources. They enhance the provider's operations in innumerable ways, including the following:

- Supporting and simplifying the provider's intake process;
- Providing for contemporaneous entry of case notes;
- Reducing paperwork and the need for storage space for paper files;
- Keeping track of case and client information;
- Monitoring deadlines and maintaining tickler systems;
- Checking for conflicts of interest;
- Permitting sharing of case and client data among the members of the provider's staff;
- Supporting staff supervision, including off-site supervision;
- Supporting timekeeping;
- Recording contact information;
- Providing systems for calendaring, including office-wide and provider-wide calendars;
- Keeping track of, supporting and following up on referral;
- Tracking recurring legal issues;
- Generating reports for provider's management and outside funding sources.

In addition to the initial costs for software and hardware upgrades that may be necessary to implement an electronic case management system, there is a need for staff training, both initially and on an ongoing basis, to ensure that all staff can fully and effectively use the system, including the contemporaneous entry of case notes and timekeeping data.

The system for opening electronic case files should produce accurate, current, and easily accessible records for all clients. It should allow the practitioner and other personnel to quickly locate those case files that are pertinent to specific clients and to automatically check for potential conflicts of interest.

The extent to which a provider should maintain separate files for persons referred to outside practitioners² depends upon the degree to which it retains responsibility for the conduct of the representation,³ and regularly collects information regarding the progress of the matter.⁴

² 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).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.3 (on Responsibility for the Conduct of Representation).

⁴ Some providers make referrals of applicants to panels of outside practitioners when the applicant presents a potential conflict of interest for the provider. Under these circumstances, providers may need to further circumscribe the information that it keeps with regard to such referrals.

Standard 5.3 on Maintenance of Records

Client case files should be distinguished from intake records for applicants for service who do not become clients but receive some form of non-representational assistance as well as those who are turned away with no assistance at all. Information obtained at intake is subject to the same protections from unauthorized disclosure as information provided by clients accepted for representation and can give rise to a conflict of interest, even though the individual was not represented.

The provider should be aware of the ethical rules in its jurisdiction regarding prospective clients.⁵ It should have policies regarding the level of information obtained from applicants at the outset and the maintenance of records relating to those who are not accepted as clients in order to address concerns relating to conflicts of interest and potential malpractice claims. Providers should be mindful of the need not to create avoidable conflicts of interest, and should not collect or retain more information than is reasonably necessary to determine whether to represent the prospective client.⁶

When client files are closed, they should be reviewed and evaluated, and a case closing memorandum should be prepared to summarize succinctly the outcome of the case, and to identify case closure and other information that needs to be recorded in the electronic case management system or other appropriate place.

The provider's case management system should be designed to assure that closed files are retained to the extent necessary and that they are reasonably accessible. The provider should develop standards and procedures for the disposal or archiving of unnecessary materials in closed files and for the return of clients' personal documents. The closed file should include sufficient material to assure that an individual reviewing the file can accurately and completely reconstruct the case.

The provider should develop additional internal standards for storage and disposal of paper files⁷ and the archiving of electronic files⁸ where there is little likelihood of further need for the file. Stored paper files should contain only critical information and documents. Standards for

⁵ See Model Rules of Prof'l Conduct R. 1.18 (2003) on Duties to Prospective Clients.

⁶ Model Rules of Prof'l Conduct R. 1.18 (2003) provides in part:

- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation [of a person with an adverse interest to that of a prospective client] is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;
 - (2) the lawyer who received the information *took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client*; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

(Emphasis added).

⁷ Proper disposal of paper files should involve shredding or other complete destruction of the documents contained in the files to prevent inadvertent disclosure of confidential information.

⁸ Providers that use electronic case management systems should ensure that confidential information that is no longer needed is fully purged from the system. Providers should also make sure that confidential information is removed from hard drives prior to the disposal of computer equipment that is no longer being used by the provider.

Standard 5.3 on Maintenance of Records

closed and archived files should take into consideration federal, state, and local rules on maintenance of records, requirements of funders, the statute of limitations for malpractice or any other action that might be filed in relation to a particular case. The provider should keep files accessible in cases that by their nature may continue to have significance over a long period of time.

The provider should have a policy, which comports with the law in its jurisdiction, regarding the disposition of closed files in the event of the discontinuance of the provider's program. Consistent with the provider's ethical obligations, a provider that is terminating its operations should notify its clients, provide for completion of ongoing representation and return all important documents to clients, if possible.⁹ Provision should be made for storage or appropriate disposal of all files that cannot be returned to the client. Custody of closed files may be transferred by agreement to a responsible institution such as another legal aid provider or a bar association.

A system for noting and meeting deadlines in the representation

The provider should have a docket control and tickler system to assure that its staff practitioners meet all deadlines and scheduled appearances. The system should have the capacity to notify both the practitioner and pertinent office staff of all important dates and deadlines and identify any conflicts in scheduling.

Most of the provider's practitioners handle a number of individual cases, and even the most diligent may overlook an important action that must be taken in a particular case. The tickler system should regularly remind the practitioner of key planned activity in a case so that the adopted strategy is implemented according to the proposed timetable, and so that appropriate contact is maintained with the client. Technology offers a wide variety of efficient docket control and tickler systems. Many of these systems are incorporated into the comprehensive case management systems used by many providers.

Outside practitioners representing clients referred by the provider should generally maintain docket control and tickler systems in conformance with the established procedures of their firms. Outside practitioners or law firms that represent a large number of clients under contract with a provider may find that it is efficient to participate in the provider's docket control system.

A system for handling client trust funds

A provider may not commingle funds that belong to a client with its own funds.¹⁰ In accordance with the client trust fund rules of its jurisdiction, the provider should establish separate trust funds for money received from or on behalf of clients that may include such things as filing fees, funds deposited by a client toward possible settlement, or funds received from an adversary for payment to a client. The provider should participate in the Interest on Lawyer Trust Account program that exists in each state.

⁹ See for example, Model Rules of Prof'l Conduct R. 1.17 (2003).

¹⁰ See Model Rules of Prof'l Conduct R. 1.15 (2003).

Standard 5.3 on Maintenance of Records

The provider should maintain records of all client funds that provide immediate and accurate information on the amount held and expenditures made to and on behalf of each client. A provider should have a system to ensure that all client funds held by the provider are returned to the client if appropriate. Providers should take into consideration applicable state laws regarding the disposition of funds that cannot be returned because the client cannot be located. Costs paid by a provider on behalf of a client should be paid from the provider's budget, and should never be paid from funds held in trust for other clients.¹¹

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.5 (on Policy Regarding Costs of Representation).

STANDARD 5.4 ON CASE FILES

STANDARD

A provider should establish and maintain an electronic file in its case management system or a hard-copy file for each of its cases that records all material facts and transactions, provides a detailed chronological record of work done and sets forth a planned course of action.

COMMENTARY

General considerations

Electronic or hard-copy case files should organize critical elements of a case in a logical and coherent fashion. Each should contain the following essential information:

- An indication of the options available to and selected by the client, and a statement of the client's objective;
- A full chronological record of client interviews, adversary contacts, witness interviews, field investigations and records searches, including dates, names of persons contacted, important facts ascertained and important statements, concessions and allegations made;
- For clients with limited English proficiency, an indication of their primary language, interpreters and translators used and copies of translated materials;
- Copies of all written correspondence, pleadings, legal memoranda, legal research and other documents representing work done on the case, organized systematically for ready reference;
- For electronic correspondence, either a hardcopy or an electronic version of such communications;
- Consistent with the complexity of the case, a specific plan with a clear delineation of tasks and a timetable with deadlines for completion of each task;
- A record of time spent on the case adequate to support any request for attorneys' fees, if appropriate, and to meet the provider's management needs as well as any requirements imposed by the provider's funding sources;
- For closed cases, a closing memorandum that summarizes the work done for the client and the results achieved.¹

Standard client files

For those cases for which it has direct ethical and professional responsibility, a provider should maintain standard case files that facilitate transfer of cases among the provider's practitioners and encourage good lawyering habits. A thorough, self-contained file that records progress on each case in a standardized fashion eases review of the representation by supervisors. New

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.3 (on Maintenance of Records) for discussion of record retention policies for closed files.

Standard 5.4 on Case Files

practitioners should be fully trained in the established procedures to ensure uniform file maintenance.

Electronic case management systems ensure uniform file maintenance and provide the capacity for quick retrieval of files from any location. These systems also permit easy access to files to facilitate supervisory review of a practitioner's work and sharing of files among multiple practitioners who may be working together on a case.²

A provider should integrate electronic and hard-copy files so that all documents and records, including records of telephone conversations and e-mail messages, can either be found in one place or are appropriately linked to assure that all practitioners working on the case have immediate access to all pertinent information. Providers should also have systems in place to assure that all electronic files are backed-up on a regular basis to protect against accidental loss.

Outside attorneys providing representation for clients referred by the provider should organize files for clients referred to them in conformance with the established procedures of the practitioner or firm handling the case. Outside attorneys or law firms that represent a large number of clients under contract with a provider may be expected to conform to the provider's policy regarding standard case files.

Transfer of cases

Staff practitioners often find themselves responsible for cases they did not initiate. This occurs because of staff turnover, program restructuring,³ or temporary absences for illness or vacation. Complete, current files make it possible for a new practitioner to take up a case with minimum delay or disruption to the client relationship. Electronic case management systems and integration of electronic and hard-copy files make the transfer of cases to a new practitioner relatively simple and seamless, and help ensure that the new practitioner has all of the case information necessary in order to effectively represent the client.

Procedures for case transfer should be designed to minimize the impact of the transfer on the client and the quality of the work. Whenever possible, the person who previously handled the case should prepare a succinct transfer memorandum analyzing the case, directing attention to the next steps to be taken and targeting dates to be met. Clients should be notified immediately of transfer of their cases and should be assured that their interests are fully protected. They should be told the name and contact information for the new practitioner with whom they should communicate and be given an opportunity to meet with the new practitioner as soon as feasible.

Case protocols

A provider may wish to develop case protocols, benchmarks and checklists to guide practitioners in handling repetitive, routine legal problems. Protocols set forth the basic issues

² See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.10 (on Effective Use of Technology); Standard 5.3 (on Maintenance of Records).

³ The provider should comply with the ethical rules in its state regarding the transfer of cases when a law firm ceases to function. See Model Rules of Professional Conduct R. 1.17 (2003).

Standard 5.4 on Case Files

to be addressed and the essential steps to be taken in routine cases. While helpful, protocols should only be used by the practitioner as a road map to evaluate the client's particular objectives in a positive and creative way, given the circumstances in the case, and to test for new and unique issues. Protocols may also be designed to draw attention to common fact situations or legal issues, so that the provider may consider such problems in the priority setting process and direct the allocation of its resources to the efficient and economic resolution of such recurring problems.⁴ Benchmarks set out expected, realistic outcomes that should be achieved in addressing commonly recurring legal issues. Benchmarks may vary among offices, given the law and practice in each jurisdiction. Checklists can be helpful in ensuring that all steps have been taken and all required documents have been prepared, submitted and included in the client's file.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.1 (on Identifying Legal Needs and Planning to Respond); Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

STANDARD 5.5 ON POLICY REGARDING COSTS OF REPRESENTATION

STANDARD

A provider should establish a clear policy and procedure regarding budgeting and payment for appropriate costs and expenses in the representation of clients.

COMMENTARY

A legal aid practitioner should be able to use all of the tools necessary for effective representation of client interests, including those, like discovery, investigation and use of expert witnesses that may be costly. The provider should also budget for interpreter and translator services when necessary to successfully represent a client. Because low income clients can rarely pay such costs themselves, the provider should assure that, where necessary and appropriate, sufficient funds are budgeted and available for these purposes.¹

The funds available should be sufficient to permit the provider, in appropriate instances, to make significant but necessary litigation expenditures in major cases. The provider should budget sufficient money to permit the routine use of some form of discovery in all cases where it is appropriate. Practitioners should have some assurance that once a case is accepted by the provider, adequate funds will be available to pursue the case appropriately.

At the same time, the provider should ensure that extraordinary and unanticipated expenditures for representation do not undermine its fiscal integrity. Management should continually monitor total expenditures of funds for costs of representation so that timely steps can be taken to adjust the budget, seek new resources, restrict commitments to new cases, or otherwise protect the provider from fiscal problems caused by excessive expenditures for representation costs.

The provider should establish a clear policy and criteria for spending provider funds for significant representation costs. Among the appropriate criteria for such a policy are:

- The likelihood of success in the matter;
- The need to incur costs in order to pursue the matter successfully;
- The relationship between the cost and the potential benefit to the client;
- The availability of less costly alternatives;
- The availability of processes to waive costs for low income litigants;
- The availability of pro bono assistance for costs;

¹ The American Bar Association has issued an opinion indicating that a legal aid provider may use its funds to pay litigation costs not otherwise waived for an indigent client without violating ethical rules against an attorney advancing costs in litigation. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1361 (1976). Nevertheless, ethics rules of particular jurisdictions may place limits on the payment of such expenses and a provider should be aware of the pertinent ethical rules in its jurisdiction. On a related issue, the Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee has recently issued an opinion that provides that lawyers may assist their clients in obtaining cash advances from a litigation funding organization that provides funds for living expenses in exchange for an interest in the plaintiff's lawsuit. See Pa. Bar Ass'n Formal Op. 2005-100 (2005).

Standard 5.5 on Policy Regarding Costs of Representation

- The potential for recovering the costs;
- The potential for benefiting other members of the low income community as well as the client.

The criteria should be applied consistently in committing funds to major cases and in developing case strategy in routine cases. In routine cases, practitioners, in consultation with provider management, should have the discretion to incur necessary costs in accordance with the established criteria. In major cases requiring significant expenditures, the provider should determine before the case is accepted that it has available sufficient resources to effectively pursue the case. Outside attorneys should be informed of the provider's policy regarding reimbursement of representation costs.

In situations where the provider can anticipate at the outset that it will not have sufficient funds to fully litigate a case, the provider should consider taking one or more of the following actions:

- Seek outside sources of funds to cover the required costs, including bar associations and private donors;
- Associate outside co-counsel who agrees to pay for necessary costs;
- Refer the case to another provider or an outside practitioner with the resources to pursue the case fully;
- Limit the representation to a less costly alternative;²
- Reject the case entirely.

The provider should have a clear procedure for early identification of cases that may require significant expenditures. Practitioners should estimate the costs of litigation at the earliest opportunity, as an integral part of case strategy, and should select the strategy that will best achieve the client's goals at the least expense. For example, interrogatories and requests for admissions may be adequate for some discovery purposes, at a fraction of the cost of depositions. Similarly, the practitioner may be able to find expert witnesses who will testify at no cost or at a reduced fee, and court reporters who may offer their services on a pro bono or reduced fee basis.

Complete records of all costs should be maintained, and practitioners should routinely seek and enforce orders awarding them costs. When the provider is successful in litigating the client's case, it should make every effort to recover these costs from the opposing party in the case.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

SECTION 6
STANDARDS FOR QUALITY ASSURANCE

STANDARD 6.1 ON CHARACTERISTICS OF STAFF

STANDARD

A provider's staff should be diverse, well-qualified and competent, sensitive to low income persons and their legal needs, and committed to providing high quality legal services.

COMMENTARY

Legal aid for low income persons should be provided by staff members who are professionally well-qualified and competent, are sensitive to persons they are serving and cognizant of their legal needs, and are committed to high quality legal work to address the problems of low income persons. To this end a legal aid provider should recruit and strive to retain diverse staff¹ with the professional skills and knowledge to provide high quality assistance to persons served, committed to providing such assistance and capable of communicating effectively with members of the low income communities served by the provider.²

Providers should take steps to facilitate high quality work by its staff practitioners by offering training in professional skills and substantive law and assuring that staff members have meaningful opportunities for professional development.³ It should supervise its staff members to foster their professional growth and assure effective assistance to clients.⁴ The provider should strive to retain staff by providing fair compensation, benefits and satisfactory working conditions. A provider's capacity to attract and retain high quality staff will be enhanced by the degree to which it is engaged with the low income communities it serves,⁵ accomplishes meaningful results for them⁶ and has institutional stature and credibility.⁷

High quality representation also calls for practitioners who can communicate effectively with their clients and who are aware of and sensitive to the cultural diversity that exists in the low income communities that the provider serves.⁸ The provider should seek out practitioners who have the capacity to empathize with the concerns of low income clients and bridge differences that may exist regarding their understanding of their legal problems and the legal system in

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.5 (on Staff Diversity).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.5 (on Training).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 6.4 (on Review of Representation).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.12 (on Institutional Stature and Credibility).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 2.5 (on Staff Diversity).

Standard 6.1 on Characteristics of Staff

general.⁹ Providers should recruit bilingual practitioners and staff who can effectively communicate with applicants and clients who may have limited proficiency in English or who are hearing-impaired.¹⁰ Providers should conduct training for its staff to assure that they are equipped to provide services to members of diverse client communities in a culturally competent manner.¹¹

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client); Standard 6.5 (on Training); Standard 7.8 (on Legal Counseling); Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

STANDARD 6.2 ON ASSIGNMENT AND MANAGEMENT OF CASES AND WORKLOAD

STANDARD

A provider should assign and manage cases and individual workloads for practitioners and other staff to promote high quality representation and legal work.

COMMENTARY

General considerations

To assure high quality representation and legal work, the provider should assign cases and other legal work to those individuals who are best able to handle them. In controlling workloads and assigning cases, the provider should consider, among other things, the individual's available time, experience and substantive expertise. The provider should manage open caseloads and other legal work assigned to individual staff practitioners to assure that both the provider and the practitioner meet their ethical responsibilities to clients.

Given limited resources, a provider also faces the tension among its ongoing responsibilities to existing clients, the demand for service from new applicants, and the fundamental obligation to address the overall needs of the low income communities it serves. Some programs or their funding sources place an emphasis on the numbers of clients served or the number of cases closed. Others emphasize results, including the number of persons who benefit from the representation or the impact of the legal work on the low income communities as a whole. Each provider needs to develop a policy for legal work management that strikes an appropriate balance between resources allocated to service to individual clients and resources allocated to work designed to have a broader impact on the client communities served by the provider. The appropriate balance is a function of the provider's mission and its obligations to its funding sources, but all full-service providers should achieve a balance that assures the overall needs of the low income communities are met, including the needs both of individual clients and of the low income communities it serves as a whole.¹

All the work of a provider should be undertaken with the intention of obtaining meaningful results,² and the provider's policies should help it guard against the temptation to emphasize the production of case numbers. The provider's policies and systems to allocate practitioners' time and resources should also protect staff from being overwhelmed by the press of ongoing representation and should permit them to undertake work that will have a broader impact on low income communities as a whole.

Factors governing assignment of work

The availability of adequate time to represent the client competently. Professional ethics recognize the need to assure that practitioners devote adequate time for preparation of a case

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

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

Standard 6.2 on Assignment and Management of Cases and Workload

and for acquiring sufficient knowledge and skill to handle every case with professional competence.³ Ethical considerations also suggest that practitioners have a responsibility to reject cases unless they are certain they can provide service at least at the minimal level of professional responsibility.⁴ In making case assignments, the provider should, therefore, take into consideration the amount of time a practitioner has available and will need in order to handle the case competently.

Not every applicant for services will necessarily receive full-representation from a provider. Many providers offer applicants limited representation in the form of advice or brief service⁵ or non-representational assistance.⁶ The provider's practitioners and other staff members who provide such limited assistance must nevertheless be able to devote adequate time to the work to assure that the assistance is provided in a competent manner.

The practitioner's level of experience, training and expertise. Assignment of cases to staff practitioners and their individual caseloads should reflect the level of their training and experience. Practitioners should be encouraged to work deliberately and carefully, and the number of cases and other legal work assigned to them should allow for thorough preparation at all stages. Each case undertaken by a less experienced practitioner provides an opportunity to expand professional skills, and adequate time for development of good work habits should be factored into the workload. Wherever possible, the provider should make training opportunities available to increase its practitioners' level of practical skills and substantive expertise.⁷ As practitioners' skill levels and knowledge increase, they should be able to efficiently handle an increasing number of cases and legal work of greater complexity.

The status and complexity of pending cases. In managing case assignments and workload for staff practitioners, the provider should take into consideration the time required to handle each case competently. The provider should evaluate the status and complexity of its practitioners' pending cases to predict time demands of the existing caseload, including cases that are routine in nature and those that are more complex and involve full representation. A case management system and an efficient case planning process will facilitate this evaluation.⁸

In managing their practitioners' workloads, the provider should consider the following factors: the number and types of cases being handled by a practitioner; the number of cases being handled by a practitioner that require a substantial commitment of time, including those in litigation, particularly where there is extensive discovery and or where a trial has been set, cases

³ See Model Rules of Prof'l Conduct R. 1.1 and 1.3 (2003).

⁴ The Comment to Model Rules of Prof'l Conduct R. 1.3 (2003) specifically states: "A lawyer's workload must be controlled so that each matter can be handled competently." See also, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1359 (1976).

⁵ See 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).

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

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 6.5 (on Training).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.7 (on Case Planning).

Standard 6.2 on Assignment and Management of Cases and Workload

on appeals and other complex cases on behalf of clients; and the predicted dates for completion of each major step in more complex cases.

Review of practitioners' workloads will identify their future time commitments and capacity to accept new assignments. It should also enable supervisors to identify patterns that require adjustments in case assignments and to evaluate the progress on open cases.

Non-representational legal work and other responsibilities. Some practitioners have responsibility for training, administrative and supervisory duties. Others have responsibility for the provider's non-representational work, including such activities as running clinics to provide legal information, providing community legal education and participating in special projects of benefit to low income communities. In addition, some practitioners work on collaborative projects and planning with others in the state and regional delivery systems of which the provider is a part.⁹ All such activities may require substantial time commitments that should be taken into account when assignments are made to assure that practitioners have adequate time for such essential activities in addition to their case work.

The provider's capacity for support. The nature and amount of legal work a practitioner can handle effectively is affected by the support that is available both through provider resources and through outside sources of assistance. Where possible, providers should have on staff substantive law specialists and litigation directors who can co-counsel and provide other assistance to improve the productivity of individual practitioners.

The provider should encourage its practitioners to participate in e-mail lists and task forces that can provide substantive support and to take full advantage of research and support resources that are available through the internet. The provider should also consider the availability of research and co-counseling assistance from outside the provider, through outside attorneys, the organized bar, state and national support centers and other public interest organizations that can provide support in substantive legal areas.

Other relevant factors that affect the performance of legal work. Other factors related to the environment in which the provider and its practitioners operate will influence the amount of time required to represent each client. Factors such as time required for travel, court practices and docket congestion may increase the time needed to conduct a case. Rural and urban practices have different logistical problems. Each provider should consider the impact of its particular environment in managing workloads.

The provider should also give appropriate consideration to such logistical factors in the design of a delivery system.¹⁰ Effective utilization of technology can help make efficient use of a practitioner's time.¹¹ In some instances referring cases to outside attorneys in areas that are difficult to serve because of distance can alleviate such problems, increasing the amount of staff practitioner time that is available for legal work.

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.2 (on Delivery Structure).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

Standard 6.2 on Assignment and Management of Cases and Workload

Workload management for non-practitioner staff

In addition to attorney and paralegal practitioners who represent clients, providers employ a variety of other staff whose workload is influenced by client need and whose time is devoted to working with applicants for service, clients and members of the client communities. These staff members may include intake workers, hotline personnel, outreach workers, community educators, social workers and others. Providers should ensure that the workload of these staff members is assigned on the basis of appropriate criteria including their available time, level of experience, training and expertise, the complexity of their assigned tasks and time needed to complete administrative and other program responsibilities.

STANDARD 6.3 ON RESPONSIBILITY FOR THE CONDUCT OF REPRESENTATION

STANDARD

A provider is responsible for the conduct of representation undertaken by its practitioners and should supervise the work to assure that each client is competently represented.

COMMENTARY

The responsibility and authority for supervision of representation are grounded in the ethical and legal responsibility the provider assumes for each accepted case. For staff providers, this institutional responsibility arises from the relationship that is created as a contract between the provider and the client.

“It must be recognized that an indigent person who seeks assistance from a legal services office has a lawyer-client relationship with its staff of lawyers which is the same as any other client who retains a law firm to represent him. It is the firm, not the individual lawyer, who is retained Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers, the chief lawyer, or the executive director (if a lawyer), as the case may be, just as associates of any law firm are subject to the direction and control of their seniors. Such internal communication and control is not only permissible but salutary. It is only control of the staff lawyer's judgment by an external source that is improper.”¹

In 2002, the Model Rules of Professional Conduct were amended to clarify that lawyers who possess “comparable management authority” to law firm partners are required to “make reasonable efforts” to ensure that the provider has measures in effect to give reasonable assurance that all practitioners conform to the rules of Professional Conduct.² The fact that primary responsibility for cases rests with the provider does not absolve the individual practitioner from the duty to represent clients competently. Rather, it creates the obligation for the provider to assure reasonable supervision and for the practitioner to accept that supervision. Supervision of work by senior attorneys of the provider is not improper interference with the independent judgment of individual practitioners, but is mandated by ethical considerations.³

Supervision of less experienced practitioners is necessary to assure that clients' interests are not jeopardized by inexperience and to facilitate development of proficient practitioners. Effective supervision includes the obligation to withdraw legal work assignments from ineffective practitioners and to assign the work elsewhere, if necessary.

The most valuable use of supervision is to teach. Effective supervision by experienced managers can help less experienced practitioners operate in an efficient manner and competently handle increasing levels of work. More experienced practitioners also benefit from

¹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334, p.7 (1974).

² See Model Rules of Prof'l Conduct R. 5.1 (2003).

³ *Ibid.*

Standard 6.3 on Responsibility for the Conduct of Representation

supervision to assure the most effective use of their skills and expertise to assist clients. Supervisors can help direct practitioners to appropriate sources of support and training.

The degree to which the provider is responsible for the conduct of representation by an outside attorney to whom it has referred a case is a function of the contractual relationship between the attorney and the provider and with the client. Generally, a provider is not directly responsible for the conduct of the representation, unless it is by agreement part of the attorney-client relationship between the outside attorney and the client and has agreed to be responsible for the representation. Considerations regarding when it is appropriate for a provider to assume such responsibility are discussed in the commentary to Standard 2.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

STANDARD 6.4 ON REVIEW OF REPRESENTATION

STANDARD

A provider should review representation provided to clients to assure that they receive high quality assistance and to identify areas in which the provider should offer training and support to its practitioners.

COMMENTARY

General considerations

A provider should review all aspects of the representation that its practitioners provide to its clients. Case review is one of several valuable methods to assure that persons assisted by the provider receive high quality, timely service and to promote continued growth in the professional skills of practitioners. The format of a successful review system will vary among providers, but each should meet the objectives set forth in this Standard and commentary. A more intensive and systematic review system is appropriate for those providers that employ staff practitioners, while the level of review of the work of outside attorneys who take cases on referral will vary in accordance with the respective level of responsibility assumed by the provider and the outside practitioner.¹

Objectives of review

A review system should assure that practitioners provide competent representation, that they identify all pertinent issues and effectively pursue appropriate remedies in accordance with clients' objectives. A review system should also assure that the practitioners pursue the clients' objectives in a timely and expeditious manner, keep clients adequately informed of the progress of their cases and consult them regarding important strategy decisions.² It should allow the provider to identify when the quality of work is not up to acceptable standards, to remedy mistakes and to cure delays so that the provider can act appropriately to protect the clients' interests.

Case review and other methods of review of representation can also serve as effective tools to teach new skills and reinforce old ones, and can link formal training efforts with specific needs of individual practitioners. Review can also be a significant source of information to the provider about the effectiveness of its practitioners' legal work and provide insight into the effectiveness of program structure.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.2 (on Client Participation in the Conduct of Representation).

Standard 6.4 on Review of Representation

Key ingredients of systematic review of representation

Where a provider is fully responsible for the conduct of representation, a formal and systematic review process is appropriate. To be effective, it should include periodic formal appraisal of the individual practitioner's work, including, among other things, an examination by the reviewer of an appropriate sample of open case files and a conference between the practitioner and the reviewer to discuss the results of the review.

The frequency of review may vary according to the experience of the person whose work is being reviewed. The work of new and inexperienced practitioners should be reviewed more frequently to assure that their clients are competently represented and to foster each practitioner's development as an effective and highly skilled professional.

Providers should generally review complex legal matters in depth to assure that the practitioner has identified all major issues and considered appropriate remedies. Strategies should be periodically reevaluated during the course of the representation to take account of new developments that may arise in the case. For more routine cases, providers should review randomly selected samples to assure that the practitioner is generally proceeding in a competent and timely fashion, with adequate client contact, and to identify any unacceptable patterns of practice.

The scope and direction of review should be controlled by the reviewer. While practitioners should be encouraged to exchange ideas with their supervisors and with peers on a regular basis, especially in challenging cases, and to identify recurring legal issues, practitioners should not be permitted to limit review to a self-selected portion of their work load. A practitioner may not be inclined to share information on those cases that are most in need of attention and the provider has a responsibility to keep abreast of developments in those cases.

Ideally, reviewers should be successful, experienced practitioners with the demonstrated ability to identify legal issues and with the substantive knowledge and procedural skills to plan and implement effective strategies. Even when experienced practitioners are not available to conduct case reviews, it is nevertheless important for providers to have each practitioner's case work reviewed regularly by other members of the provider's staff. All reviewers should be able to give constructive criticism to practitioners whose work is being reviewed.

Other methods of review

In addition to formal case review, a number of other methods of oversight may be helpful in supplementing the formal review process:

- Day-to-day interaction between practitioners and supervisors, by means of formal conferences or informal discussions regarding pending cases and other legal work;
- Assignment of responsibility for complex representation jointly to a senior practitioner and one or more junior practitioners to assure that the work of the least experienced staff is overseen by someone of proven ability;
- Regular office or team meetings to inform supervisors and peers of the status of an individual's cases and other legal work;

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- Frequent written or electronic case management reports to supervisors on the status of the practitioner's open cases, in sufficient detail to signal a need for further inquiry in the event that a case is not proceeding properly;
- Attendance by the reviewer at proceedings, such as hearings and trials, meetings or other settings where the reviewer has an opportunity to observe the practitioner's performance.

Review of outside attorneys' casework

The degree to which a provider should review the work performed by an outside attorney to whom it has referred a case is a function of the contractual relationship between the attorney and the provider and with the client. Generally, a provider will not review case files of outside attorneys unless such review is provided for under the agreement between the outside attorney and the provider, and the provider has agreed to be responsible for the representation.³

³ For a full discussion of this issue, *see* 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); Standard 6.3 (on Responsibility for the Conduct of Representation).

STANDARD 6.5 ON TRAINING

STANDARD

A provider should provide access to ongoing and comprehensive training for all personnel.

COMMENTARY

General considerations

Training is an essential vehicle for ensuring the effective operation of a legal aid provider and its provision of high quality, effective assistance that responds to the needs of low income communities. It is an effective means for a provider to promote a culture that shares information, retains high quality staff and devises innovative methods to serve low income communities.

A provider should allocate sufficient resources for training to assure that inexperienced individuals become proficient and that more experienced personnel increase their level of competence. A provider should develop and implement entry level and ongoing training activities within the program or assure access to outside training that is timely, relevant and responsive to ongoing professional development needs of all personnel.

Training programs should respond to the provider's specific needs using established instruction methods that promote active, engaged and sequential learning. They should impart knowledge, skills and outlook necessary for all personnel to fulfill their job functions, including managers and supervisors, accounting and human resource personnel, support staff and advocacy staff. Training should also impart key provider values, including ethical obligations, appropriate means of demonstrating respect for clients, and commitment to the provider's mission. The provider's training agenda should be updated regularly in response to emerging staff and client needs.

Training of all personnel

Training should address the full range of substantive practices and skills that all personnel need to carry out their job duties efficiently and effectively. Practitioners should be familiar with the substantive legal matters low income persons face and should possess the skills necessary to assist them effectively.

It is also important that staff not directly involved in assisting clients be skilled and effective at their job function. All aspects of a provider's operation affect its stature and credibility as an effective law firm. The professionalism with which pleadings, letters and e-mails are prepared, for instance, and the courtesy with which people are treated on the telephones reflect on the quality of work that the provider produces. How well the provider's staff address issues such as accounting for its funds and meeting its legal obligations similarly affect its reputation as an effective organization.

Outside practitioners who represent clients on behalf of the provider on a contract or a volunteer basis should also be offered training opportunities, particularly if they are assisting

Standard 6.5 on Training

clients in unfamiliar areas. The provider can also call upon outside attorneys to provide training for its staff in areas in which they have special expertise pertinent to the work of the provider. Participation by volunteer attorneys in the provider's training events, both as trainers and trainees, can enhance recruitment and retention of participating attorneys and facilitate their integration into the program.¹

Areas of training

Training should be tailored to the priorities set by the provider, the delivery methods used and its method of operating and should impart the knowledge, skills and values pertinent to each. The provider's professional development agenda should include a broad range of training offered directly by it as well as by state, regional and national entities that make training opportunities and support available. It should also take advantage of learning opportunities that are available to practitioners and others through their participation on task forces and other substantive networks.

- Training should be offered related to the current substantive work of the provider. Providers that engage in community economic development² or legislative and administrative advocacy,³ for example, should offer instruction in the law and procedures that are pertinent to its work in the area.
- Training should also address basic skills necessary to serve clients and others effectively, including for instance, trial skills,⁴ use of discovery,⁵ fact finding techniques,⁶ negotiation⁷ and interview techniques.⁸
- Through training and other networking opportunities, staff should learn about emerging legal issues and devise creative and new approaches to addressing problems facing low income communities.
- Training should be offered to support the development of emerging and existing leaders. It should also address the various contexts in which leadership is exercised such as in management, advocacy and involvement with community groups. Inviting promising leaders to serve as trainers in areas in which they have expertise can itself serve as a vehicle to further their leadership opportunities.

¹ 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).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-5 (on Trial Practice).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-4 (on Discovery).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.5 (on Investigation).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.9 (on Negotiation); Standard 7.11-1 (on Litigation Strategy).

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.4 (on Initial Exploration of the Client's Legal Problem).

Standard 6.5 on Training

- Accounting and human resources personnel should be given training in the skills and the substantive knowledge pertinent to their work and regarding the internal systems used by the provider in their area of responsibility.
- Training should be provided in the use of technology and the systems that the provider utilizes in its internal operations, including the telephone system and case management and other software that is part of the provider's suite of computer applications.⁹ Staff should be trained in the appropriate use of e-mails and other forms of electronic communication.
- New staff should be offered thorough orientation in program operation as well as the expectations associated with their position in the organization.
- Training should be provided that conveys the knowledge, skills and values that the provider's staff and outside attorneys need to interact effectively with low income persons, including those from culturally diverse communities.¹⁰

Training methods: The provider should use a variety of training techniques that are effective for individuals with different learning styles, including the majority who learn best in interactive settings and with hands-on experience with training materials. The ideal training agenda integrates the learning into practice. Other staff who will be needed to help the recipient of training implement new knowledge and skills, such as supervisors, should be active participants in training and follow-up.¹¹ Mentoring and other leadership roles require specific skills, and training should be available where needed.

The provider should be aware of the many aspects of its operation that offer learning opportunities. Co-counseling and other joint work with more experienced practitioners, for example, are excellent ways for staff to learn through example and direct interchange. Supervision typically offers many opportunities for the supervisor to teach the person being supervised and should be seen as an essential aspect of the provider's training and professional development strategies. Similarly, staff participation in state and regional task forces often provides exposure to informal training opportunities.

The provider should take advantage of the opportunities that technology offers for making training available to staff with different learning styles and to personnel who are isolated by geographic distance and other barriers. Long-distance training techniques and on-line training modules may be helpful to persons who learn better in settings where they proceed at their own pace. Appropriately sequenced distance learning programs also provide opportunities for staff to assimilate course material over time and to apply new knowledge and skills to their actual work. While it may not be cost-effective for staff in distant rural offices to travel many hours for a training that lasts only several hours, participation by video conference or on-line access to the materials may offer access to timely and relevant training.

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

¹¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 6.4 (on Review of Representation).

Standard 6.5 on Training

The provider should regularly evaluate the effectiveness of its training efforts.¹² Training should be evaluated from several perspectives: 1) Did the participants learn the intended skills and knowledge? 2) Were participants able to use the skills and knowledge in their work? 3) Did the skills and knowledge lead to improved outcomes in the work? Ideally, evaluations should be conducted both at the conclusion of each training and after several months in order to assess the extent to which participants have been able to put new learning into practice and have seen positive results.

When used properly, training evaluations can help a provider improve the quality and effectiveness of its strategies for professional development. They are also a vehicle for identifying topics for follow-up seminars and new courses.

Budgeting adequate resources and taking advantage of external training opportunities

A provider should budget sufficient resources for it to develop and implement internal training and to make outside training opportunities available as appropriate. A provider facing budget reductions should resist the temptation to make disproportionate cuts in training. Expertise of current staff is crucial to maintaining a capacity for quality representation, and it is short-sighted and ultimately costly to postpone or eliminate training as a response to limited funding. To maximize the efficient use of available resources to provide high quality training for its staff, a provider should participate in statewide, regional, and national efforts to develop and provide training.¹³ Participation in joint efforts will allow the provider to avoid duplicating the efforts of others in the delivery system and to take advantage of economies of scale. The provider should take advantage of relevant events sponsored by bar continuing legal education programs, national or state advocacy organizations, community or special interest advocacy groups and other outside sources.

¹² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.11 (on Provider Evaluation).

¹³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

STANDARD 6.6 ON PROVIDING ADEQUATE RESOURCES FOR RESEARCH AND INVESTIGATION

STANDARD

A provider should assure the availability of adequate resources for appropriate legal research and factual investigation.

COMMENTARY

Resources for legal research

To provide high quality representation of clients, practitioners should have access to adequate tools for effective legal research.¹ Each practitioner should have ready access to source materials, including pertinent federal and state statutes, state and federal reporters, law review articles, relevant treatises, poverty law reporters and other material on legal issues facing low income persons. The materials should be available in hard copy or through internet research tools and computer assisted legal research services. Websites, e-mail lists and internet-based discussion groups also provide important resources for legal aid practitioners to keep up with rapid changes in poverty law. Providers should budget sufficient funds to assure that their practitioners have access to those tools that they require to assure high quality legal work and should encourage their practitioners to make full use of free resources that are available on-line.

The provider should maintain updated in-house pleading and brief banks with easily retrievable research products so that the cumulative knowledge gained through successive representation of clients with similar issues is available to the provider's current practitioners. In-house pleading and brief banks should be maintained in electronic form for easy searching and retrieval of pertinent materials. Providers should also participate in national, regional and statewide brief banks that permit many providers to share their research products and to give practitioners easy access to up-to-date research, information and knowledge pertinent to assisting low income persons with their legal problems.

Computer assisted research provides practitioners with access to a vast array of legal research tools. Although such services may be relatively costly, providers should weigh those costs against the expense of maintaining up-to-date traditional law libraries. In addition, discounts may be available to legal aid providers that reduce the cost considerably. Providers should budget sufficient funds to assure that their practitioners have access to the computer assisted legal research tools that are necessary to assure high quality representation.

A provider should encourage its practitioners to participate in internet-based discussion groups, e-mail lists and other similar tools that provide up-to-date information on poverty law issues. In addition, substantial information is available for free or for moderate cost from websites maintained by regional, state or national groups that address a range of issues faced by low income communities. Providers should also encourage their practitioners to seek support and assistance from other appropriate sources outside the program. National, regional

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.6 (on Legal Analysis and Research).

Standard 6.6 on Providing Adequate Resources for Research and Investigation

and state research and advocacy groups, public interest law firms and similar organizations often provide co-counseling, research, advocacy coordination, training and other assistance that can significantly enhance the quality of representation for the provider's clients.

All of these tools require providers to have access to technology that is up to date and to assure that provider's practitioners and other staff are fully trained to make full use of the technological tools that are available.²

Resources for factual investigation

Effective and thorough information gathering is essential to the success of any representation.³ Information provided by clients is often incomplete and may contain inaccuracies. Particularly in cases that are factually complex or confusing, practitioners should not have to rely solely on the information provided at the initial interview in order to plan their representation strategies. Practitioners may often be required to investigate claims made by their clients to assure that they are fully apprised of all of the circumstances that may have an impact on their clients' legal problems.

In some instances practitioners may need the skills of experienced investigators to fill out the details of their clients' cases or uncover information helpful to the client's case. The provider should devote adequate resources to permit the use of outside experts when necessary and, when appropriate, to maintain in-house staff who are tasked with doing factual investigations and who are skilled in investigative techniques. The provider should offer training to assure that its practitioners and other staff who may have investigative responsibilities are fully apprised of the techniques that are useful and fully aware of other resources that may be available to help in investigating clients' claims.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.5 (on Investigation).

SECTION 7
STANDARDS FOR PRACTITIONERS

STANDARD 7.1 ON ESTABLISHING AN EFFECTIVE RELATIONSHIP AND A CLEAR UNDERSTANDING WITH THE CLIENT

STANDARD

The practitioner should establish an effective, professional relationship and a clear understanding about the representation with each client.

COMMENTARY

General considerations

When a client is accepted for representation by a legal aid provider, the individual has an attorney-client relationship with both the provider and the practitioner and both practitioner and provider have concomitant duties to meet the professional responsibilities associated with the representation.¹ For practitioners to meet their responsibilities, it is particularly important to establish a relationship of mutual trust and candor with each client and to be certain that both the practitioner and the client clearly understand and agree upon the scope and conduct of the representation and the expectations of the practitioner and the client.²

Establishing an effective, professional relationship

Respect and diligence on behalf of clients. There are many factors that may impede a practitioner's ability to establish an effective, professional relationship with a low income client. The practitioner needs to be sensitive to the personal concerns that clients may bring and that may affect their participation in the representation. Some low income persons mistrust or fear lawyers and see them as part of an unfamiliar legal system or may see them as part of a social services bureaucracy from which they are already alienated. Others may be intimidated by the "professionals" from whom they seek help. Most clients bring significant personal anxiety about the legal problem that caused them to seek assistance. Some may misunderstand what constitutes a legal problem or what remedies are available through the legal system and may harbor doubts about the representation they receive.

To help overcome any such anxieties, it is important that the practitioner treat all clients with courtesy and respect. The initial interview of the client by the practitioner should be conducted

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 4.2 (on Establishing a Clear Understanding); Standard 4.3 (on Protecting Client Confidences). Some institutional responsibilities will be particularly the responsibility of the provider. See e.g., ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 6.4 (on Review of Representation).

The provider also has a responsibility to take steps to overcome impediments to establishing an effective attorney-client relationship with low income persons seeking and using its services. See e.g., ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 2.5 (on Staff Diversity); Standard 4.5 (on Access to Services); Standard 4.6 (on Communication in the Primary Languages of Persons Served); Standard 4.7 (on Client Complaint Procedure); Standard 6.1 (on Characteristics of Staff).

² See 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

in a manner that helps allay unreasonable fears on the part of the client, while eliciting facts relevant to the legal problem.³

To establish a professional relationship grounded in trust and confidence, the practitioner should keep the client informed about the status of the representation and respond promptly to requests for information.⁴ The practitioner should tend to the client's legal problem promptly and with diligence.⁵

Culturally competent representation. The practitioner should also be aware of cultural differences that can affect relationships with low income persons from the diverse communities served by the provider. Some clients have deeply ingrained values that may diverge widely from the values inherent in the adversarial legal process. To be effective, practitioners often need to bridge different value systems and to understand and empathize with their clients, while translating clients' values into the language of the legal process. Practitioners serving culturally diverse communities should receive training in cultural competence.⁶

Establishing a clear understanding

The responsibilities of the provider to establish a clear understanding with a client are treated at length in Standard 4.2 on Establishing a Clear Understanding and the considerations set forth there apply to the practitioner. The practitioner should communicate directly with the client regarding appropriate mutual expectations in the representation. If the representation is limited and will involve only one or two contacts between the client and the practitioner, the primary concern will be that the limitations of the representation are clearly understood by the client.⁷

Particularly in representation that will involve ongoing representation of the client, both the client and practitioner 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.⁸ The client should be encouraged to initiate contacts with the practitioner and should know how to do so. The practitioner should make sure that the client recognizes the importance of keeping the practitioner informed of changes in circumstances that might affect the case and advising the practitioner and provider of changes in contact information. The practitioner should also

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.4 (on Initial Exploration of the Client's Legal Problem).

⁴ Model Rules of Prof'l Conduct R. 1.4(a)(3) and (4) (2003). See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.2 (on Client Participation in the Conduct of Representation).

⁵ Model Rules of Prof'l Conduct R. 1.3 (2003) reads: "A lawyer shall act with reasonable diligence and promptness in representing a client." The comment to the Model Rules of Prof'l Conduct R. 1.3 (2003) notes: "Perhaps no professional shortcoming is more widely resented than procrastination."

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.4 (on Limited Representation); Standard 7.14 (on Practitioner's Responsibilities in Limited Representation).

⁸ See 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

advise clients of their responsibility to assist in preparing the case by locating witnesses, documents, or physical evidence; cooperating with discovery requests; and keeping records.

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.¹ 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.² 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.³ 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.

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

¹ 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."

² 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."

³ 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."

Standard 7.2 on Client Participation in the Conduct of Representation

provider is only offering limited representation.⁴ If a provider is only offering legal advice⁵ or limited intervention,⁶ 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.⁷

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.⁸ If a client suggests an improper objective or strategy, the practitioner is ethically obligated to explain the prohibitions against pursuing the objective or conduct.⁹ 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.¹⁰ 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 client.¹¹ The practitioner should in such circumstances keep the client reasonably informed of actions taken.

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

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

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

⁷ 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.

⁸ 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).

⁹ 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."

¹⁰ 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...."

¹¹ 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."

Standard 7.2 on Client Participation in the Conduct of Representation

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.¹²

Communication with the client

Clients should receive full and timely information on developments in their case.¹³ 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.¹⁴

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.

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.¹⁵

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

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

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

¹⁵ 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

Standard 7.2 on Client Participation in the Conduct of Representation

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.¹⁶ 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.

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."

¹⁶ 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).

STANDARD 7.3 ON THE PRACTITIONER'S RESPONSIBILITIES TO PROTECT CLIENT CONFIDENCES

STANDARD

A practitioner must not disclose information relating to representation of a client except as authorized by the client or by pertinent ethical rules and laws.

COMMENTARY

General considerations

The duty to protect client confidences lies at the heart of effective representation that depends on a high level of trust between practitioner and client. Furthermore, a practitioner cannot effectively represent a client without full knowledge of the facts relevant to the matter, including those that may be detrimental or embarrassing to the client. Candid communication between the practitioner and client about such facts depends on the client being certain that the communication will be kept confidential in keeping with the practitioner's professional responsibilities.

Both the practitioner and the provider have a responsibility to protect confidences of clients from unauthorized disclosure. The duties of the provider with regard to confidential information are discussed in Standard 4.3 on Protecting Client Confidences. The practitioner has an independent and equally strong duty to protect the information obtained in the course of representation from disclosure, unless the client consents to the disclosure, it is implicitly authorized in order for the practitioner to carry out the representation or it is otherwise permitted by law.¹

Scope of the protection

Practitioners must abide by the ethical rule regarding client confidentiality in the jurisdiction in which they practice. Generally, the rule covers the broadest range of information provided by the client, applying "... not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."² The practitioner's duty of confidentiality extends to applicants for service whom the practitioner may have interviewed,

¹ Model Rules of Prof'l Conduct R. 1.6 (2003) regarding Confidentiality of Information.

² Comment to Model Rules of Prof'l Conduct R. 1.6 (2003), Paragraph 3. Informal opinions have found, for example, that protected information includes the identity, address, and telephone number of legal services clients (ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1287 (1974)), and information contained in client trust fund records (ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1443 (1979)).

Standard 7.3 on Practitioner's Responsibilities to Protect Client Confidences

even if the person was not accepted for representation.³ The duty of confidentiality also continues after the attorney-client relationship has ended.⁴

Risks of unauthorized disclosure

There are several risks of inadvertent disclosure of confidential information against which a practitioner should guard. The first is in conversations with a client or applicant in the provider's waiting room or other public space. It is essential that interviews be conducted in a setting where confidential information provided by the applicant cannot be overheard by persons who are not employed by the provider. Second, the practitioner should be certain that notes from interviews, confidential documents and information displayed on computer screens are not visible to unauthorized persons. Third, the practitioner should avoid casual conversations inside and outside the office in which confidences might be overheard by non-provider personnel.

Fourth, the practitioner may encounter requests for information regarding a client's income from opposing counsel, adversaries and others, sometimes in an attempt to challenge the client's eligibility in order to gain tactical advantage in a case. The practitioner should resist requests for such information, unless the client consents to the disclosure, or it is specifically authorized under ethical rules. Occasionally, a funding source may request information about a client. Most such requests will be made to management of the provider, but in the event one is made to a practitioner, the matter should be referred to the appropriate authority within the provider for resolution.⁵

Fifth, special confidentiality concerns arise with regard to clients who are hearing impaired or have limited proficiency in English and who require the services of interpreters.⁶ The practitioner should be aware of the potential impact on confidentiality when a third party acts as an interpreter in a communication between an applicant or client and the practitioner. A practitioner should, whenever possible, use the services of a professional or qualified volunteer interpreter who is responsible to the provider so that the confidential and privileged nature of the communication is clearly preserved. The practitioner should assure that all such interpreters are aware of the responsibility to protect from disclosure any information communicated between the applicant or client and the provider.⁷

³ See Model Rules of Prof'l Conduct R. 1.18 (2003) regarding Duties to a Prospective Client which reads

“(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.”

⁴ Model Rules of Prof'l Conduct R. 1.9(c)(2) (2003) reads:

“A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.”

See also, Paragraph 18, Comment to Model Rules of Prof'l Conduct R. 1.6 (2003).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

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

⁷ See also, the discussion of the use of interpreters in the commentary to ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

Standard 7.3 on Practitioner's Responsibilities to Protect Client Confidences

Authorized disclosure

A practitioner should be familiar with the ethical rules in its jurisdiction regarding the authorized disclosure of confidential information. Generally, information relating to the representation can be disclosed when the client gives informed consent. Disclosure may be implicitly authorized by the client's approval of a course of action that requires the disclosure in order for the practitioner to carry out the representation.⁸ When particularly sensitive information is involved, however, the practitioner should explicitly discuss the disclosure with the client and obtain consent before the information is revealed.

In addition, there are also a number of specific, limited circumstances when a practitioner may disclose otherwise protected information; generally to prevent undue, substantial harm to others, to foster compliance with ethical requirements, to defend against charges leveled at the practitioner or to comply with other law or a court order.⁹ The practitioner should be familiar with state professional requirements and law regarding such disclosure and should consult with the provider on whose behalf the client is being represented regarding whether the disclosure is permitted.

⁸ Model Rules of Prof'l Conduct R. 1.6(a) (2003).

⁹ See Model Rules of Prof'l Conduct R. 1.6(b) (2003):

"(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order."

STANDARD 7.4 ON INITIAL EXPLORATION OF THE CLIENT'S LEGAL PROBLEM

STANDARD

The practitioner should interview each client to explore the legal problem, elicit pertinent facts and circumstances, identify legal issues and the client's objectives and inform the client about the steps needed to address the legal problem.

COMMENTARY

General considerations

From the outset of the representation, the practitioner should work to create an atmosphere of trust and confidence between the practitioner and the client and to preserve the dignity of the client.¹ The practitioner should take all reasonable steps to protect client confidences and information from unauthorized disclosure.²

From the initial contact,³ the practitioners and the client should identify relevant facts and circumstances and explore the nature of the legal problem presented. Some of this initial fact-gathering will have taken place in the process of determining whether the case will be accepted.⁴ This initial contact may be the only opportunity to gather information and identify facts if a decision is made to limit the assistance to advice or brief service. 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.⁵

When more extended representation is offered, additional information can be obtained through subsequent contacts between the practitioner and the client. The practitioner and other staff of the provider who have contact with the client should assure that facts elicited in each client contact are recorded and included in the case record so that the client is not subjected to unnecessarily repetitive interviews.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences).

³ This Standard deals with a practitioner's responsibility to those persons who are accepted for representation by the provider, even if the exploration of the legal matter takes place while the individual is applying for service, so the Standard and commentary use the term "client" throughout.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.2 (on Policy for Acceptance of Applicants for Service).

⁵ 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).

Standard 7.4 on Initial Exploration of the Client's Legal Problem

Obtaining pertinent facts and identifying legal issues

As part of the interview, the practitioner should attempt to identify the facts that give rise to the legal problem or problems that the client seeks to resolve. Effective interviewing requires particular skills to elicit the necessary information in a manner that keeps the flow of information open and assures that the client, not the practitioner, defines the problem. At the same time, the practitioner should keep the discussion focused on relevant facts and should attempt to elicit all important information about the client's circumstances.

The client may not organize the facts in the same manner as the practitioner would for effective presentation of a case. Moreover, the client may not perceive the relevance of some facts and may overestimate the importance of others. The practitioner should be a skilled listener who can draw out facts and discern their importance. A good interviewer will let clients tell their stories in their own words without losing sight of the issues that are truly relevant.

The practitioner should guard against controlling interviews too strictly. Holding clients to a rigid set of questions may serve the practitioner's need to categorize information chronologically or to state essential elements of a case, but in practice may simply shut off the flow of relevant information that could be obtained from the client. The client may feel inhibited by an unfamiliar situation and may be reluctant to volunteer information unless specifically asked, with the result that significant facts are never revealed. The practitioner should encourage the client to talk, but should intervene constructively to flesh out important issues and pursue matters of particular relevance. If necessary, the provider should offer its practitioners and other staff training in interviewing skills.

Interviews should not be narrowly circumscribed by the practitioner's initial definition of the legal problem that is presented. If the problem is categorized too soon, the practitioner may not explore all of the legal issues that may be present. The problem that the client initially describes may be only a symptom of other difficulties that may be amenable to a legal solution. For example, the client may ask for help with an eviction for nonpayment of rent, but that may result from an interruption of income as a result of an unlawful termination of public benefits or employment. By artificially limiting the client interview to the facts that pertain to the eviction, the practitioner may miss the other important legal issue.

The practitioner should be attentive to the risk that some clients may dwell on things that turn out to be irrelevant. It is the practitioner's responsibility to keep the interview focused on pertinent facts and circumstances. On the other hand, the interviews should be flexible enough to allow clients to present their major concerns. An overemphasis on certain facts or circumstances may be a symptom of a client's anxiety or misunderstanding about the case. The practitioner's awareness of and response to that anxiety may be important to effective client communication and involvement in resolving the matter. Moreover, such facts may indicate other legal problems that should be explored by the practitioner, even though they are not related to the problem initially presented by the client.

Helping the client determine the objectives and identifying the next steps to be taken

Initial interviews provide the first opportunity for the applicant who is accepted as a client to understand the risks and possibilities involved in the case and to begin to formulate tentative objectives for the representation, subject to further factual investigation and research of

Standard 7.4 on Initial Exploration of the Client's Legal Problem

potential issues by the practitioner. ⁶ At the end of the initial interview the client should have received a clear explanation in lay terms of the legal issues presented, the steps the practitioner is likely to take in pursuing the case and the steps, if any, that the client should take or avoid to preserve or protect the client's legal rights and interests. The interviewer should understand clearly the types of information or advice that may be appropriately given to clients in an initial interview and should have sufficient legal knowledge to recognize circumstances that require a more expert practitioner to speak with a client. Initial exploration of a legal matter by authorized non-attorney practitioners should be reviewed by a supervising attorney to assure that all legal issues are identified and appropriate steps taken.⁷

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.5 (on Investigation); Standard 7.6 (on Legal Analysis and Research).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.9 (on Use of Non-attorney Practitioners).

STANDARD 7.5 ON INVESTIGATION

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 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.

¹ Paragraph 5 of the Comment to Model Rules of Prof'l 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).

Standard 7.5 on Investigation

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).

STANDARD 7.6 ON LEGAL ANALYSIS AND RESEARCH

STANDARD

The practitioner should conduct a legal analysis of each client's legal problem and research pertinent legal issues, when necessary and appropriate.

COMMENTARY

Legal analysis and research are essential steps in the full representation of clients.¹ They are closely linked to case planning² and information gathering.³ The facts that define the client's problem determine the scope and direction of the initial research. That preliminary research, in turn, forms the basis of tentative legal theories that shape potential case strategy. In many cases, initial legal research will identify alternative theories that require further analysis of the facts and may suggest areas for additional factual investigation and more intensive legal research. Research and analysis should continue as part of the ongoing reevaluation of the strategies and theories of the case, so that representation efforts can be concentrated on those issues that are most relevant and critical to resolving the client's problem.

In cases where the provider offers extended legal representation, it is essential that the practitioner engage in thoughtful legal analysis of the client's problem, even if the issues appear at the outset to be relatively simple. Without adequate legal analysis and research, important legal issues and potentially creative responses may be overlooked. The purpose of research is to formulate the best arguments that can be made on behalf of a client, given the facts. It should also identify an adversary's likely legal position and help shape the client's response. Research should first explore whether existing law can be directly applied to further the client's interests. If necessary, the research should determine if there is a basis for distinguishing law that disfavors the client's position.

The practitioner should be familiar with statutes, regulations, and case law that may have a bearing on the client's case, and should not rely solely on secondary sources such as treatises. The practitioner should use all appropriate tools for legal research, including computer assisted research that can facilitate the efficient and thorough evaluation of all legal issues in the matter. The practitioner should be trained to conduct effective electronic research to assure that the scope of the inquiry is sufficiently broad and is not limited by a search that is too narrowly defined.⁴ The practitioner should also make certain that each source is current by reviewing later interpretations of relevant citations. Legal research and analysis undertaken by authorized

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation). When the provider is offering only limited representation, the practitioner often will not be conducting extensive legal research but should, nonetheless, engage in thoughtful legal analysis of the issues that the client's problem presents. See 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).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.7 (on Case Planning).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.5 (on Investigation).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

Standard 7.6 on Legal Analysis and Research

non-attorney practitioners should be reviewed by their supervising attorneys to assure that legal issues outside the expertise of the practitioners are not overlooked.⁵

Effective representation of a client may require that a practitioner expand the scope of research to determine whether there is a basis for modifying, extending, limiting, or reversing current law, including that which is unfavorable to the client. Research may identify a constitutional basis for striking down a statute or statutory grounds for modifying a regulation. Changing societal norms may provide the argument for modifying or reversing current case law.

Alternatively, research may determine that only a direct statutory or regulatory change by a legislature or administrative agency can adequately resolve the client's problem or serve the needs of the low income community.⁶

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.9 (on Use of Non-attorney Practitioners).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

STANDARD 7.7 ON CASE PLANNING

STANDARD

The practitioner should determine a course of action for handling the client's case that identifies applicable law and available remedies and enables the client and practitioner to make knowledgeable decisions to pursue the client's objectives.

COMMENTARY

Case planning should involve an open-ended evaluation of the facts presented and an identification of the legal issues that arise from those facts. In cases where the practitioner provides limited representation, planning is relatively simple and is based primarily on information provided by the client in the initial interview. In complex cases involving extended representation, several people may be involved in the case planning process to assure that all significant issues and additional important facts that should be obtained are identified.

Case planning in both limited and extended representation cases provides an opportunity to assess the relationship between the problem presented by the individual client and similar problems that affect other clients. If the client's problem is part of a recurring pattern or one aspect of a broader problem affecting other members of low income communities, that fact may be important in charting a case strategy. The pattern may also have important evidentiary value in the individual case. It may also suggest a strategy that seeks a remedy on behalf of a group or class of clients, as well as the individual.

Case planning should consider a number of factors that can affect the outcome of a case, including the following:

- The state of the law regarding the issues involved, the particular facts in the case, and the relationship between the two;
- The client's personal circumstances including, for example, the client's willingness and commitment to pursue a lengthy or uncertain strategy;
- In appropriate circumstances, the existence of other members of low income communities who may have a stake in the outcome of the case.

The extent of such an analysis will vary from case to case. Generally, the more complex the case and the greater its significance, the more critical it is to engage in an expansive strategic analysis that includes a wide variety of factors that may influence its outcome. However, even in cases that present apparently routine issues, the provider and practitioner should consider whether the outcome in the client's particular case will have a significant impact on other members of low income communities. If so the provider should analyze the issues to determine whether it would be beneficial to provide extended representation to the client as part of an effort to modify or clarify the law to assist other members of low income communities who may be faced with the same issue.

Case planning creates a tentative road map for handling a case to achieve the client's desired objective. At its earliest stage, the practitioner presents the client with various options that may be pursued. The case plan should be regularly reviewed and adjusted in response to significant

Standard 7.7 on Case Planning

developments in the case. The client should be consulted when these developments occur and should participate in making key strategic decisions.¹

When a case strategy is adopted, key steps for implementation should be determined, with a firm timetable for their completion. A firm timetable is important so that, to the extent practicable, the practitioner controls the pace and direction of the case, rather than the adverse party. Facts that need further development should be identified, and a plan for investigation and discovery established.² Legal issues to be researched should be noted.³ If more than one individual is involved in handling the case, responsibilities should be specifically assigned. The case planning process should identify the approximate resources necessary to pursue the case. If extraordinary resources are likely to be required, the practitioner should determine whether they will be available.⁴ If not, then another strategy should be developed.

In extended representation cases, an attorney practitioner should be involved in case planning even when non-attorney practitioners, properly supervised, are authorized by law to engage in the representation, to assure that all legal issues and possible courses of action are properly considered at the initiation of representation. Case plans developed for representation by non-attorney practitioners should be reviewed on a regular basis by a supervising attorney to ascertain whether developments in the case warrant a new course of action including ones that can only be undertaken by a lawyer.⁵

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.5 (on Investigation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.6 (on Legal Analysis and Research).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.5 (on Policy Regarding Costs of Representation).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.9 (on Use of Non-attorney Practitioners).

STANDARD 7.8 ON LEGAL COUNSELING

STANDARD

The practitioner should effectively counsel the client throughout the representation to assure the client understands available options and the potential benefits and risks of each.

COMMENTARY

General considerations

One of a practitioner's key functions is to counsel clients to help them understand their legal problem fully and choose how to respond. The client, not the practitioner, must ultimately determine the objective to be sought within the limits imposed by law and the practitioner's ethical obligations.¹ An important role of the practitioner is to utilize legal knowledge and problem solving skills to elicit the client's understanding of the problem and to identify possible outcomes and the options available to accomplish them. Sometimes, a client will have limited expectations and the practitioner can present available options that go well beyond what the client thought possible. In other situations, the law may severely limit what can be done, even though the client may feel entitled to much more.

Responsibilities associated with effective legal counseling

Legal counseling is an essential ingredient of effective legal representation.² It calls for the practitioner to offer candid guidance based on the law and the specific circumstances of the client. The counseling should take into account damaging as well as favorable facts and should honestly convey potential negative outcomes and alternatives as well as positive ones.³ Legal counsel should be expressed in terms that help the client understand the full implications of the issue, not just its narrow legal aspects. It can properly be based on moral, economic, social and political consideration as well as the law.⁴

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.2 (on Client Participation in the Conduct of Representation).

² The term, "advice," is used in Model Rules of Prof'l Conduct R. 2.1 (2003) and covers legal counseling as used in this Standard. The Rule reads: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

³ Paragraph 1 of the Comment to Model Rules of Prof'l Conduct R. 2.1 (2003) reads in part: "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

⁴ Paragraph 2 of the Comment to Model Rules of Prof'l Conduct R. 2.1 (2003) notes: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."

Standard 7.8 on Legal Counseling

In full representation, the practitioner should counsel the client at key stages of the case, particularly when the client is deciding on the objective for the representation and is making important strategic choices.⁵ The practitioner should present potential results and reasonable strategies for achieving them. The practitioner should explain the relative advantages and disadvantages of different options and the potential benefits and risks for the individual and, where pertinent, for others who may be affected by the strategy chosen.

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

STANDARD 7.9 ON NEGOTIATION

STANDARD

The practitioner should conduct negotiations when appropriate to further the client's objective, but should enter into an agreement with the adversary only when specifically authorized by the client.

COMMENTARY

General considerations

Negotiation may be used to further the client's objectives in a variety of ways. In some circumstances, negotiation may be all that the provider anticipates doing on behalf of the client. This can be true in circumstances where representation is limited to brief service¹ as well as those circumstances where the provider is offering full representation² in transactions such as leases or community economic development projects.³ In other circumstances, negotiation may be a preliminary stage of the representation to be followed by further representational strategies if the negotiation fails to achieve the client's objective, such as in pre-litigation negotiation. Or negotiation may be just one tactic within a larger overall strategy, such as litigation. This Standard does not apply to settlement negotiations in the course of litigation.⁴

As with other forms of representation, the basic test of the appropriateness of negotiation is whether it is likely to achieve the client's objective without unacceptable risks. Negotiation may be particularly fruitful when the other parties involved have interests that are different from, but not necessarily hostile to, the client's objectives, such as negotiation of a lease. Even with a hostile adversary, negotiations may be successful in achieving the client's objective, particularly if the negotiations are seen as an alternative to costly litigation. Negotiation should not substitute for a more forceful and possibly time-consuming strategy such as litigation, if the more forceful strategy could yield a significantly better result for the client.

Pre-litigation negotiation

Pre-litigation negotiation is most likely to have positive results if the client's case is particularly strong or the risk of the lawsuit to the adversary outweighs the cost of a pre-litigation settlement, and may be a useful way to resolve the issues in controversy without a significant expenditure of provider resources. In other circumstances, negotiation prior to litigation may be a useful way to limit the issues in controversy, obtain information about the opponent's case and potential strategy, and test the adversary's apparent resolve.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-2 (on Representation Limited to Brief Services).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-1 (on Litigation Strategy).

Standard 7.9 on Negotiation

There are circumstances, however, where pre-litigation negotiations are not appropriate, or where it would be unwise to enter into negotiations until litigation has been filed and the client is afforded the protection of the court. Such circumstances may include:

- When advance notification of a potential lawsuit may subject a client to physical abuse or other retaliation from the adversary;
- When premature notification of the intent to sue may cause a defendant to leave the jurisdiction or to transfer assets in anticipation of an adverse ruling from the court;
- When informing the adversary may lead to preemptive action by the adversary that will impair the client's ability to present the case in the most desirable forum;
- When an immediate court order is necessary to protect the client's rights or interests;
- When a client is seeking relief that cannot be legally obtained through compromise and agreement with the adversary, such as when relief may depend upon resolving the constitutionality of a statute and the defendant does not have the authority to admit the statute's illegality.

The appropriateness of negotiation may also be affected by local prevailing customs or legal practices. In some communities, particularly rural ones, negotiation between parties may be the common and expected practice. Such local practice should be taken into account in developing case strategy. A client's interest should not be compromised, however, simply to conform to local practice or to gain acceptance for the provider or practitioner in the legal community.

Negotiation strategy

The practitioner should have a negotiation strategy that is designed to achieve the client's objectives. The complexity of the strategy will be a function of the legal and factual complexity of the case and should be flexible to respond to new information that may be obtained during negotiation.

Before undertaking any significant negotiation, the practitioner should be aware of:

- The strengths and weaknesses of both the client's and the adversary's case;
- The areas of possible agreement between the parties;
- The client's opening position and potential fall back positions;
- The points of leverage that may dispose the client or the adversary to reach agreement, including the personal, financial and other non-legal considerations, such as the threat of adverse publicity, motivating each party.

The practitioner should pay particular attention to any weaknesses in the client's position and should devise strategies to offset any advantage the adversary may derive from attacking those weaknesses during negotiation.

Authorization by the client

Client authorization to negotiate is not authorization to reach a final agreement. The practitioner must seek specific client approval before a final agreement is offered or accepted on the client's behalf.⁵ At the outset of negotiations, the practitioner should identify and discuss with the client a range of options that the client authorizes the practitioner to accept.

⁵ See Model Rules of Prof'l Conduct R. 1.2(a) (2003).

Standard 7.9 on Negotiation

Alternatively, the client may wish to withhold authorization until there is an opportunity to review each offer. This approach can have strategic advantages, as it gives the practitioner and the client time to analyze each offer and may prevent hasty acceptance of what could prove to be an inadequate proposal. However, in some situations, a lack of specific prior authority to accept an adversary's offer may undermine the practitioner's effectiveness in negotiation and give the appearance of bad faith. The client and practitioner should determine which approach is most appropriate, given the particular situation.

There may be times when the practitioner succeeds in negotiating a proposed agreement that, in the practitioner's professional judgment, represents the best result that could be achieved for the client. In such circumstances, if a client unreasonably withholds authorization to accept the proposed agreement, the practitioner may be put in the position of having to devote substantial resources to further representation that will be futile or subject the client to unwarranted risks. In such circumstances, if consistent with the practitioner's ethical obligations, the practitioner and provider may justifiably withdraw from representation.

Written settlement agreements

The final agreement should be reduced to a clear written statement that covers all material issues and anticipates enforcement problems that are likely to arise. Where appropriate, the agreement should provide for an enforcement mechanism in the event of non-compliance.

STANDARD 7.10 ON ALTERNATIVE DISPUTE RESOLUTION

STANDARD

The practitioner should proficiently and zealously represent clients in alternative dispute resolution processes when they would serve the client's interests or when they are required by law.

COMMENTARY

General considerations

The term, alternative dispute resolution (ADR), refers to a variety of methods to resolve disputes outside of the formal judicial process. Practitioners with clients in ADR processes should proficiently and zealously represent their clients consistent with the procedures and expectations in the process.

A practitioner should consider when ADR may be the best way to resolve a client's legal problem or is mandated by law or applicable rules of procedure. There are many circumstances when the client's legal problem will appropriately be resolved through ADR. The use of ADR is increasing as judicial systems in many states seek methods for resolving legal disputes that are more cost-effective for both the courts and the parties than litigation. In addition, legal reform in some jurisdictions has led to the formation of forums that seek to take decision-making for issues such as child custody out of the adversary process.

Some clients may also prefer to resolve problems in ways that do not involve going to court or engaging in an adversarial process. Some cultures, including some Native American communities as well as many immigrant populations, combine conciliatory problem solving values with a general mistrust of judicial process.¹

Forms of ADR

The most common forms of ADR in legal aid practice are mediation, conciliation and arbitration. Mediation is a process in which persons with a dispute seek to reconcile their differences and reach a voluntary settlement with the help of a neutral third party mediator. The mediator has no authority to impose an agreement, but rather helps the parties to identify issues and explore ways to resolve their differences and to reach an acceptable solution.

Conciliation is a process that also seeks to bring the parties to a voluntary agreement, but in which the third party is not necessarily as neutral as in mediation. A conciliator is sometimes used where important rights are at issue and the conciliator has a responsibility to ensure that the terms of the settlement are compatible with pertinent law.²

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.4 (on Cultural Competence).

² The differences between mediation and conciliation are not sharply drawn and the terms are used interchangeably in some jurisdictions.

Standard 7.10 on Alternative Dispute Resolution

Arbitration involves a generally shortened and less formal version of a trial without formal discovery and with simplified rules of evidence. Arbitration involves a third party who acts as a fact-finder and decides on the appropriate resolution of the legal dispute. The fact-finder is not a judge, although some arbitrations are undertaken under the auspices of the court. Both parties generally agree in advance or are bound by law to accept the decision of the arbitrator.

There are other forms of ADR that are seldom used in legal aid practice, including mini-trials, summary jury trials and summary bench trials. Practitioners should stay aware of new forms of ADR that evolve over time and determine if their use would serve the interests of their clients.

Consideration of when ADR is appropriate

The practitioner should consider when a form of ADR is required or would be in the best interest of the client. The practitioner's first responsibility is to counsel the client on the law regarding ADR and its implications for the client's case. The practitioner should advise the client about the nature of the ADR process and its strengths and limitations. The practitioner should make certain that the client understands the degree to which the outcome of the process is binding or may later be challenged.

Mandatory ADR. Some jurisdictions require arbitration or mediation for some issues or disputes and do not offer the client a choice of whether or not to participate. Arbitration is mandated by law in some jurisdictions when the amount in controversy is below a set amount or in cases that fall in specific substantive areas, such as property disputes or torts. Parties to family law cases are required in some states to seek agreement in mediation or conciliation with regard to some aspects of the matter, such as custody or support. In some states, the court can order ADR in any civil action, based on the judge's determination that there are issues that could be resolved or clarified by ADR.³ At times, a court will mandate that parties to a lawsuit seek to reach a settlement agreement on some or all of the issues in dispute.

At other times, a client may be bound by a contract to submit a dispute to binding arbitration, particularly with regard to consumer and employment matters, with no opportunity to litigate the issues in a court proceeding. Often such requirements work to the disadvantage of the client and limit the amount of recovery that the client might otherwise obtain. The practitioner should consider action seeking to set aside such requirements in a contract if it is in the best interest of the client and a basis exists for doing so.

Voluntary ADR. There are times when a practitioner should consider recommending ADR to a client as the best means to resolve a legal dispute. If ADR is a voluntary option, the practitioner should assess the potential advantages and risks of ADR, of litigation and of other means of resolving the issue and should recommend to the client which is most appropriate.

There are circumstances when ADR may be advantageous to a client. ADR can significantly reduce costs of resolving disputes and can significantly speed up the process, as the parties are not bound by the court's calendar that in many jurisdictions involves long delays in obtaining a court date. ADR procedures also generally take considerably less time than court hearings and trials on the same matter. ADR also often offers an opportunity for the parties to resolve

³ See e.g., Vermont Rules of Civil Procedure, Rule 16.3.

Standard 7.10 on Alternative Dispute Resolution

disputes without inflaming passions on both sides. This can be especially important in family law matters and between persons who will continue to have a business or personal relationship after the dispute is resolved.

On the other hand, there are times when ADR may be disadvantageous to the client, and the practitioner should resist subjecting the client to a process that may damage the client's interests. Often there is unequal bargaining power between an adversary and a legal aid client. Mediation and conciliation will only work if both of the parties are willing to participate in good faith. There are also matters that may not be suited to ADR, including disputes that arise from a disagreement about the interpretation of the law or where the safety of one of the parties is at risk.

A practitioner who believes that a voluntary form of ADR would be appropriate should consider tactical factors regarding when it is best to seek it. In some cases, ADR may be agreed to in lieu of litigation or it may occur as a stage in the litigation process. At times, it may be appropriate to seek an agreement with the adverse party before any of the parties have incurred significant costs. At other times, if the client has a strong case, it may be advantageous to wait to pursue it until after there has been discovery and the adverse party has seen the potency of the client's case and might be more inclined to settle.

Costs of ADR. In some jurisdictions, the court may make ADR available to the parties when requested from a court annexed ADR project. In other circumstances, parties voluntarily seeking to engage in an ADR process may have to agree to the process and seek a private mediator. In most cases, the costs of voluntary ADR must be born by the parties. Because the practitioner is most likely to be representing a party without the means to pay, the practitioner should consider seeking the assistance of a mediator who agrees to provide the services on a pro bono basis or get the other party to bear the costs if it is able.⁴

Responsibilities of practitioners in representing a client in ADR

A practitioner owes the same responsibility to the client for competence,⁵ diligence,⁶ protecting client confidences⁷ and avoiding conflicts⁸ as in a fully litigated matter. In addition, the practitioner owes a duty of candor and truthfulness in statements to others in ADR.⁹ The role of a practitioner representing a client in an ADR process will vary depending on the process.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.5 (on Policy Regarding Costs of Representation).

⁵ Model Rules of Prof'l Conduct R. 1.1 (2003).

⁶ Model Rules of Prof'l Conduct R. 1.3 (2003).

⁷ Model Rules of Prof'l Conduct R. 1.6 (2003). See also Standards for the Provision of Civil Legal Aid (2006), Standard 4.3 (on Protecting Client Confidences) and Standard 7.3 (on Practitioner Responsibilities to Protect Client Confidences).

⁸ Model Rules of Prof'l Conduct R. 1.7 to 1.10 (2003).

⁹ Paragraph 5 of the Comment to Model Rules of Prof'l Conduct R. 2.4 (2003) states: "Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration ..., the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1."

Standard 7.10 on Alternative Dispute Resolution

Mediation or conciliation. It is important for the practitioner to recognize that the success of a non-adversarial procedure is dependent on the parties agreeing and that compromise is essential. The role of the practitioner in mediation or conciliation, therefore, is not necessarily to be rigorously assertive on behalf of the client, but rather to assure the pertinent issues and facts are presented in a manner that is favorable to the client. The practitioner may have to counsel the client regarding what is a reasonable compromise, given the fact that no agreement is possible unless both sides agree. The client should know that the agreement is voluntary and there is no obligation to agree to an unacceptable outcome. At the same time, the practitioner may have to encourage a client to accept a reasonable outcome if the result in an adversarial proceeding is likely to be significantly worse.

The practitioner should prepare for mediation with the same diligence as if the matter were contested, and should recognize that the audience for the presentation of the case is the other party as well as the mediator. The practitioner should, therefore, consider effective ways to present the case in a compelling fashion through exhibits and other media.

In some court mandated mediations, a lawyer is not allowed to participate directly in the process. In such circumstances, the practitioner should prepare the client by explaining the process and coaching the individual on how to make a good presentation of favorable facts. The practitioner should also explore what are reasonable and acceptable outcomes, so the client will not agree to an inappropriate settlement. To the extent permitted under the rules in the jurisdiction, the practitioner should be available to the client during the proceeding to answer questions and provide advice, particularly about any proposed settlement.

If the practitioner feels that the client will be unable to participate effectively in the mandatory mediation because of personal limitations, such as limited proficiency in English, the practitioner should seek permission from the court to assist the client and object on the record if permission is not granted.

Arbitration. In arbitration, the practitioner's responsibilities are more akin to representation of a client in trial, except that there is likely to be only limited discovery or none at all and the presentation of the case is generally shorter and less formal than in a trial. The rules of evidence are also generally relaxed. The target for the advocacy, however, is the arbiter who will make the decision in the matter. The practitioner should explain to the client whether the arbitration is binding and the degree to which there is a basis for challenging an unfavorable finding. Often, under state and federal law, there is only a limited basis for challenging an arbitration award.

Follow-up. The practitioner has a responsibility to make certain that the findings of the ADR process are reduced to writing and are enforced. In the event that mediation fails, or the adversary fails to comply with the terms of the arbitration award or the agreement reached in mediation, the practitioner should take appropriate next steps including pursuing litigation to protect the client's interests.

STANDARD 7.11 ON LITIGATION

STANDARD

The practitioner should proficiently and zealously engage in litigation when it is determined to be the most effective means to resolve the client's problem.

COMMENTARY

Litigation is only one of a variety of forms of representation that may be used to address a client's problem. In many cases, clients seek legal help because they have been sued and are already involved in litigation as defendants. Many recurring legal problems of the poor, such as evictions, consumer fraud, and family law matters, are traditionally the subject of litigation. When there is a choice in the representational approaches that can be used to address the client's problem, the practitioner should consider the advantages and disadvantages of litigation over other modes of representation.

Litigation has the advantage of providing the opportunity to obtain an enforceable order to remedy the client's problem. It often offers the most direct means to seek the client's objective. On the other hand, in litigation, the client and practitioner lose substantial control of the timing of representational efforts. Once the litigation is initiated, it may not be resolved for months or even years. Such a protracted strategy may undermine the opportunity for more timely resolution of the client's problem through other means.

The conduct of litigation involves tactical decisions that make it difficult to lay down specific rules about what a practitioner should do in every case. A practitioner who is defending a client who has been sued will take different actions than one who is bringing affirmative litigation on behalf of a client. In general, before embarking on a course of litigation, the practitioner should be diligent in researching all relevant facts and legal theories in support of the client's claim or defense, should be prepared to undertake necessary discovery, and must be aware of procedural devices available to assert and protect clients' interests.¹

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standards 7.11-1 through 7.11-8 for specific standards that relate to different aspects of the conduct of litigation and litigation tools.

STANDARD 7.11-1 ON LITIGATION STRATEGY

STANDARD

The practitioner should develop a clear, long range strategy for pursuing or defending the client's interest in the litigation and should continually update the strategy in light of new developments in the case and in the governing law.

COMMENTARY

Litigation should be carefully and thoughtfully planned to best serve the client's objectives. Before deciding to affirmatively litigate a case, the practitioner and the client should carefully assess and plan the case.¹ Where possible, the practitioner should develop an overall strategy for pursuing or defending the client's interest well before the pleadings are filed. The practitioner should do sufficient legal research and factual investigation to fully assess the strengths and weaknesses of the case.²

The practitioner should carefully plan the timing of significant steps in the litigation and, to the extent it can be controlled, should plan those steps for maximum advantage to the client. The practitioner and the client should periodically reassess the plan as the case progresses.

Long-range strategy planning should include the following considerations:

- Identification of facts that must be obtained through discovery and other means;
- Identification of the legal issues to be researched;
- Identification of defendants in affirmative litigation who are necessary to litigate the case fully and consideration of their likely impact on such matters as the effectiveness of discovery or breadth of available relief;
- Choice of forum;
- Whether to demand a jury trial;
- Choice of possible causes of action or defenses, considering such factors as 1) their importance to the overall strategy; 2) their potential impact on the court at trial and on appeal; 3) their strategic value in settlement negotiations with the adversary, including the possibility of insurance coverage for a potential claim; 3) the availability of attorneys' fees; 4) problems of proof; and 4) areas of discovery open to both the client and the adversary;
- Choice of potential remedies;
- Assessment of the adversary's probable responses to the client's claim and how they may be countered;
- Thorough analysis of the case from the opponent's point of view so that the practitioner can anticipate the adversary's tactics and plan to counter them;
- Assessment of any collateral matters that may arise and that may impact either the client's or the adversary's willingness to proceed with litigation, including any risk of

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.7 (on Case Planning).

² See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.5 (on Investigation); Standard 7.6 (on Legal Research and Analysis).

Standard 7.11-1 on Litigation Strategy

potential physical or other harm to the client in domestic violence or other domestic relations cases;

- Consideration of the availability of attorneys' fees and their possible impact on the outcome of the litigation;³
- Estimate of the provider's resources that will be necessary and that are available to pursue the client's objective;
- Estimate of the cost of the litigation to the adversary, including non-economic costs such as adverse publicity, and the possible impact of such costs on the adversary's willingness to engage in settlement negotiations or to settle the case in favor of the client.

In reality most litigation is settled after negotiation or through some form of alternative dispute resolution⁴ and can result in favorable outcomes for the practitioner's clients while preserving the provider's resources. A practitioner should not approach litigation, however, with the expectation that the case will end in a settlement, but should be ready to go to trial. Settlement negotiations can always break down and unexpected situations may arise that would make settlement less likely than it might have appeared at the beginning of the case.

A clear commitment to go to trial can also have a positive effect on settlement negotiations. An adversary who wishes to avoid trial may accept a settlement substantially more favorable to the provider's client if the practitioner's resolve to litigate the case fully is clear from the outset. There may be circumstances where the practitioner consciously chooses to push for settlement. In those situations, the practitioner should focus strategically on actions that will strengthen the client's negotiating position. The practitioner may, for instance, aggressively pursue discovery to demonstrate the factual weakness of the adversary's case or file a motion for summary judgment to establish the weakness of the adversary's legal position.

In those circumstances where settlement is unlikely or where it is difficult to predict at the outset whether a settlement that is favorable to the client is likely to be reached, the practitioner should proceed as though the client's claim or defense will have to be established in a full trial, and should base a long-range strategy on a realistic evaluation of likely success at that level.

The practitioner should constantly keep in mind the client's objectives and should consult the client frequently during the planning and conduct of the litigation. All major strategic decisions should be made in consultation with the client. It is essential that the practitioner inform the client of the status of the case at each stage in the litigation. The practitioner must obtain specific client approval before a final settlement offer is made or accepted on the client's behalf.⁵

Practitioners should try to identify as early as possible those cases that may be subject to appeal, either by the client or the adversary, so that a sufficient record can be made from the outset to preserve the issues for appeal. If appellate review is likely, those practitioners who will be

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.4 (on Client and Attorneys' Fees).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.10 (on Alternative Dispute Resolution).

⁵ See Model Rules of Professional Conduct R. 1.2(a) and 1.4 (2003).

Standard 7.11-1 on Litigation Strategy

handling the case at both the trial and appellate levels should participate in developing strategy, if practicable.

STANDARD 7.11-2 ON PLEADINGS

STANDARD

The practitioner should draft pleadings to preserve and advance the client's claims or defenses in accordance with the requirements of court rules and applicable law.

COMMENTARY

Generally, both affirmative and responsive pleadings should be filed only after the practitioner has completed sufficient factual investigation and legal research to determine the factual basis for the legal theory on which the client's position rests and the most effective legal arguments to advance the theory. In certain circumstances, however, it is not possible to make those determinations until factual information is obtained through formal discovery¹ that cannot take place until pleadings are filed. In other circumstances, immediate action may be necessary to protect the client's health or safety or to safeguard important rights. In such situations, pleadings should be prepared and filed based on available facts and preliminary research. If necessary, the pleadings can be amended or supplemented when new facts come to light as a result of discovery or further research.

In certain circumstances, specific elements of the pleadings are required by court rules or applicable law. Other elements should be considered for their strategic and tactical impact on the case. Among other things, the following should be addressed:

- The practitioner should file all required forms and pleadings on a timely basis.
- The practitioner should determine the level of specificity necessary in the pleadings based on tactical considerations and court rules and applicable statutory provisions.
- When representing a defendant, the practitioner should raise all appropriate affirmative defenses or compulsory counterclaims that might otherwise be waived.
- The practitioner should assure that the pleadings adequately reflect the litigation strategy that has been developed for the case.²

At a minimum, pleadings should clearly set forth all necessary elements that are required by applicable law. They should be formatted in compliance with pertinent court rules and should be filed in a timely manner, taking into account statutes of limitations and required response times. Pleadings should never include frivolous claims.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-4 (on Discovery).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-1 (on Litigation Strategy).

STANDARD 7.11-3 ON MOTION PRACTICE

STANDARD

The practitioner should file appropriate motions as part of the litigation strategy.

COMMENTARY

Motion practice is a key ingredient of an overall litigation strategy and can serve a variety of functions. There are procedural and substantive motions. Procedural motions such as motions to compel can be used to gain necessary information in the face of inadequate discovery responses. When appropriate, motions for sanctions can be used to require adversaries to take discovery obligations seriously.

Substantive motions can resolve issues on the merits and can educate the court as to the client's cause of action or defense. Where appropriate, motions can be used to educate the court regarding the factual and legal basis for the case. This can be particularly important if the case involves an area of the law with which the court is unfamiliar or appears unlikely to support the client's position without additional exposure to the legal basis for the client's claim or defense. Motions can also be used to protect the client's interests. For example, a motion to consolidate trial on the merits with a preliminary injunction hearing may be helpful in securing timely relief. Defensive motions, such as motions to dismiss, can protect the client's interests and may end litigation that is filed against the client.

Both substantive and procedural motions can be used to control the pace and direction of litigation and to maintain effective pressure on the adversary. Motions can result in early favorable settlement or in judicial rulings that improve the client's chances for a favorable disposition of the case.

All motions and responses should be well researched and cogently argued. The specific strategic purpose of each motion should be clear. Thought should be given to possible motions by the practitioner and the adversary prior to engaging in discovery so that requests and responses can be drafted with the possible motions in mind. Motions filed for frivolous or insufficient reasons are improper.

STANDARD 7.11-4 ON DISCOVERY

STANDARD

The practitioner should use both formal and informal discovery when appropriate to obtain necessary information in a timely manner and useful format.

COMMENTARY

Both formal and informal discovery are essential tools for fact-finding and should be routinely used in litigated cases, unless there is a specific reason not to do so, such as when there are no disputed facts or when the only issues in the case are interpretations of law.

As part of a successful litigation strategy, a practitioner should include a discovery plan that identifies: the facts and information that need to be obtained in order to effectively litigate the case; from whom the facts and information are most likely to be available; and what is the least costly but still effective method to obtain the necessary facts and information. Practitioners should be aware of the evolving law governing discovery of computer databases, e-mails and other electronically stored information that may be pertinent to the client's case.

In all instances, the practitioner should target discovery both to preserve the provider's resources and to assure that formal discovery requests are defensible in the event they are challenged by the adversary or the practitioner is forced to make a motion to compel in order to get the adversary to respond to the discovery request. The practitioner should establish a tentative time frame for pursuing discovery. Generally, discovery should be undertaken as soon as possible to assure that all pertinent facts and information are obtained well in advance of trial. However, there may be situations where, for strategic reasons, it is appropriate to delay, such as to maximize the possibility of settlement or to avoid premature disclosure of litigation strategy.

Practitioners must be knowledgeable about the rules of procedure and should be well-versed in their local variations and applications. They should be fully aware of how their planned discovery comports with the requirements of court rules. In some jurisdictions it may be the local custom and practice to relax strict compliance with formal rules regarding discovery. If adherence to a more relaxed standard does not prejudice a client's interests, the practitioner may follow local custom or practice. However, if the practitioner determines that an adversary is taking advantage of the local custom or practice to avoid responding to a legitimate request for discovery, the practitioner should insist on strict compliance with all pertinent rules.

Some information is more readily obtained through informal investigation than through formal discovery. There are some disadvantages to formal discovery that limit its effectiveness in obtaining facts. Unless very carefully drawn, formal discovery can yield indirect or deliberately misleading answers. It can also be time-consuming and expensive. If information is not specifically sought, it will generally not be volunteered. On the other hand, the practitioner can take advantage of the casual interchange that may take place during informal investigation to elicit unexpected and helpful disclosures. These disclosures may be useful in settlement negotiations. If important facts or information are obtained through informal investigation that

Standard 7.11-4 on Discovery

may later be disputed, the practitioner should also seek to confirm those facts and information through formal discovery to enhance their utilization at trial.

Informal discovery as well as interrogatories and requests for admissions are relatively inexpensive tools, but they may not be adequate to uncover the information needed to establish all facts that are in dispute. Nevertheless, they may be helpful in isolating those areas where it may be necessary to depose a witness, reducing the overall cost of a deposition. In some situations, it may be adequate and far less costly to simply record or videotape depositions rather than utilizing a stenographer. If the practitioner intends to use the depositions at trial, a videotaped deposition may be the most cost-effective and useful form of recording. Practitioners should be alert to technological advances that allow more cost efficient ways to conduct discovery.

When appropriate, the practitioner should use form motions and other documents appropriate to discovery, as well as model interrogatories and requests for admission that have been developed in cases with recurring issues. The discovery documents that the practitioner has developed should be stored electronically for easy retrieval and adaptation by other practitioners.

As a general matter, document discovery and written interrogatories should precede depositions. Formal discovery can be used to obtain facts and information as well as documents that an adversary or witness would not voluntarily disclose. Because information is supplied under oath, an adversary or witness can be pinned down to a particular version of the facts, and later deviations in testimony can be impeached by the prior sworn statements. Formal discovery can create a more permanent and official record and, in specific circumstances, may be directly admissible as evidence.

Prior to taking a deposition, the practitioner should be fully prepared. The practitioner should decide in advance what purpose the deposition is to serve, including obtaining information, locking in a story or obtaining admissions. The practitioner should also determine if there are areas of inquiry that, based on pleadings or documents, should not be covered.

The practitioner should also decide whether it is more useful to “try the case in the deposition” in order to obtain a more favorable settlement, or to save arguments or issues for trial because the case is not likely to settle. In particularly complex cases, or where the practitioner has limited experience in conducting discovery, it may be useful to associate experienced counsel, either from the provider’s staff or an outside attorney, to assist with the discovery.

Once a deposition is undertaken, the practitioner should be prepared to elicit unambiguous responses to questions that are posed. Information that is obtained should be thoroughly and thoughtfully analyzed. Follow-up should be considered to clarify ambiguities and to pursue new avenues of inquiry that were opened by the questioning. Depositions require the practitioner to be skilled in the oral examination of witnesses and to have the capacity to conduct immediate follow-up questioning.

Prior to defending a client’s deposition, the practitioner should fully prepare the client for what is likely to occur at the deposition. During the deposition, the practitioner should seek to protect the client’s interests by use of appropriate objections that are permitted under the

Standard 7.11-4 on Discovery

governing rules. The practitioner should make strategic decisions regarding whether to question the client during the deposition, including whether to clarify any perceived misstatements or ambiguities in the client's testimony made during the adversary's examination.

The practitioner should also prepare witnesses for the client for depositions to which they may be subjected. When preparing for a deposition of a witness who is not a client, the practitioner needs to bear in mind that anything said during such preparation is not covered by the attorney-client privilege and may be subject to discovery.

The practitioner should be prompt and straightforward in responding to an adversary's discovery requests. Answers should be honest and responsive, but the practitioner should make every effort to prevent inadvertent disclosures and admissions that could be damaging to the client's interests.

STANDARD 7.11-5 ON TRIAL PRACTICE

STANDARD

The practitioner should present a client's case at trial in a manner that is appropriate to the rules, procedures and practices of the court, exhibits full understanding of the facts and the law in the case and reflects thorough preparation.

COMMENTARY

This Standard applies to trials that take place in a court setting.¹ The rigor with which the practitioner will engage in trial is a function of the complexity of the matter. Some matters are routine and typically involve only a relatively brief trial. Others are complex and require considerable preparation and a thoughtful trial strategy. The practitioner should tailor the strategy and trial approach to what is necessary to represent the client's interests fully and effectively. Many of the suggestions in this commentary are appropriate in a complex trial, but might not be necessary in a brief, routine matter. Even in routine cases, however, the practitioner should prepare appropriately for trial and should be well versed in the facts and the law of the particular case.

There are also times when the practitioner has little time to prepare because of last minute notice of the trial. If the matter is factually or legally complex, the practitioner should seek to postpone the trial in order to prepare adequately, consistent with this Standard.

The keys to effective trial advocacy are trial preparation, anticipation of what to expect at trial and presentation of the facts and arguments to support the client's claims. In order to be an effective litigator, a practitioner should be fully grounded in the rules of evidence, procedure, and local practice. The practitioner should also be skilled in jury selection, examination of witnesses, introduction of evidence, oral argument to the judge, presentation of opening and closing statements to a jury, preparation of effective jury instructions and preservation of the record for appeal.

In addition, the practitioner should be thoroughly familiar with all available relevant facts and legal issues in the client's particular case. The practitioner should be fully prepared to present forcefully and cogently all legal arguments that support the client's position and should strive to be the most informed person in the courtroom. A fully prepared litigator should have a clear command of the facts and should be ready to present those that best support the client's position. The practitioner should determine in advance how those facts should be introduced and presented to the judge and to the jury, if applicable. The practitioner should plan the flow of the trial and should determine the timing and sequence for presentation of testimony and other evidence so that the fact finder will have a compelling and cogent picture of the client's case.

The practitioner should fully prepare witnesses in advance to assure that when they testify they are able to recall important facts and to reduce any anxiety they may feel about the trial.

¹ Different considerations apply in adjudicative administrative hearings. See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.12 (on Administrative Hearings).

Standard 7.11-5 on Trial Practice

In addition, the practitioner should be familiar with the environment in which the trial will occur and should make affirmative efforts to establish good working relationships with clerks, stenographers, and other court personnel who can be useful resources in understanding local customs and practices and those specific events that may have an impact on the progress of the litigation. The practitioner should also be fully familiar with the technology available and used in the particular court in which the trial is being held.

The practitioner should be prepared to anticipate those factors that will affect the outcome of the trial. The practitioner should be able to present the facts and arguments that are likely to have the most impact on the judge or jury hearing the case and should present those arguments that will make the client's version of the facts more credible. The practitioner should anticipate the adversary's strategy and should be prepared to counter or rebut any damaging evidence or testimony that the adversary is likely to present. The practitioner should anticipate disputes regarding the admissibility of evidence and should be ready to present appropriate arguments for admission or exclusion.

In addition, the practitioner should be aware of possible factual and legal bases for appeal from an adverse judgment or ruling, and should preserve such issues for appeal in light of the overall litigation strategy.² The practitioner should create a record at the trial level that will sustain positions taken on appeal. The advocate should anticipate factual and legal issues that may be important upon review and should assure that they are raised properly and in a timely manner. New issues will arise during the trial as a result of rulings on motions and on the admissibility of evidence. Practitioners should make timely objections and offers of proof when necessary to assure the reviewability of issues that may affect the outcome of the appeal.

In more complex cases, and if the provider has adequate resources, effective trial practice can be enhanced if more than one of the provider's practitioners is involved in preparing the case and presenting it at trial. Alternatively, the provider may wish to associate outside attorneys who are experienced trial attorneys to serve as co-counsel.³ When more than one attorney serves as trial counsel, expanded opportunities exist for consultation as the case proceeds and the practitioners' capacity to respond to unexpected developments is greatly enhanced. Co-counseling also provides significant training opportunities for less experienced litigators who can benefit from working with practitioners with substantial trial practice.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-7 (on Appeals).

³ 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).

STANDARD 7.11-6 ON ENFORCEMENT OF ORDERS

STANDARD

The practitioner should take reasonable and necessary steps to assure that the client receives the benefit conferred by a favorable judgment, settlement or order that is obtained on the client's behalf.

COMMENTARY

Effective representation of a client usually does not stop when a favorable judgment or settlement is obtained. The practitioner should take reasonable steps to assure that the adversary complies with the order, judgment or settlement and that the client receives any monetary relief ordered by the court or agreed to as part of the settlement. While enforcement of injunctive relief is a significant outcome of litigation, for many low income clients even a small amount of monetary relief may be critical to their well-being. In order to assure compliance with certain orders, especially those issued in family law cases such as visitation, custody or child support, the practitioner may have to bring a separate enforcement or contempt proceeding, without which the relief ordered may be meaningless for the client.

Enforcement strategies should be part of long-range case planning from the outset of any litigation, including consideration of the predictable cost of enforcement. The relief sought in pleadings and at trial should be structured with an eye to enforceability and with specific plans for follow-up.

The practitioner should also recognize those situations in which remedies obtained by litigation may benefit other clients. In such circumstances, steps should be taken to realize the benefits that result from the practitioner's legal work for all clients whose interest may be affected. If an order is obtained that involves a class of persons, the practitioner should seek to have all affected persons notified and should enforce compliance of the class relief.

Occasionally, particularly in complex cases, enforcement of compliance with a remedy will become an extremely costly, long term endeavor that may be beyond the resources of the provider to pursue. At times, it may be necessary for the practitioner and the client to enter into an understanding regarding the limits on what the practitioner will do to enforce an order, judgment or settlement on the client's behalf. If otherwise consistent with the ethical duty owed to the client, a practitioner may withdraw from representation, if the practitioner's continued representation will impose an unreasonable financial burden on the provider.¹

¹ See Model Rules of Prof'l Conduct R. 1.16(b)(5) (2003).

STANDARD 7.11-7 ON APPEALS

STANDARD

The practitioner should counsel the client on whether to pursue or defend an appeal and recommend to the provider whether to represent the client on appeal. Timely notice should be given to the client if the provider decides not to provide representation on an appeal. Appellate advocacy that is undertaken should be conducted proficiently and zealously.

COMMENTARY

General considerations

The decision to pursue or defend an appeal from a judgment at trial involves a number of interests and responsibilities. The client needs to make an informed decision whether to seek or defend an appeal. The practitioner has a professional responsibility to counsel the client regarding the advisability of pursuing or defending the appeal. And the provider has the responsibility to decide whether to represent the client on appeal, if the individual wishes to go forward.

The practitioner and provider should make clear to the client at the outset of representation that the client will not automatically be represented on appeal.¹ If the client wishes to pursue or defend an appeal, but the provider decides not to provide representation, the practitioner should give the client timely notification of that decision to assure that the client has adequate opportunity to seek alternative counsel and take other appropriate steps.

Counseling the client on whether to appeal

When a client is faced with an adverse decision or an adversary decides to appeal a favorable decision, the practitioner should counsel the client on whether to pursue or defend the appeal. In most cases, if the client has prevailed and an appeal has been filed by the adversary, it will be in the client's best interest to defend the appeal. The practitioner may counsel the client, however, regarding the desirability of settling the appeal to expedite the client obtaining needed relief and not having to wait for the appeals process to run its course with a possible negative outcome.

The practitioner should advise the client about the legal and practical implications of appealing an adverse judgment. The practitioner should counsel the client on whether the issues are appealable, the likely outcome on appeal and the length of time the appeal is likely to take. The practitioner should also explain the potential benefits and risks that are entailed, including the risk that an appellate court might reverse findings that were favorable to the client, if the adverse party cross-appeals from a partially favorable judgment. When counseling the client, the practitioner should make sure that the client understands that a separate decision will be made by the provider whether to offer representation.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).

Standard 7.11-7 on Appeals

Practitioner's recommendation on whether to represent the client on appeal

If the client wants to appeal, the practitioner should make a recommendation to the provider on whether to pursue the appeal on the client's behalf. The practitioner should make a professional judgment about the likelihood of success on appeal, including evaluation of pertinent law to determine whether the client's position can be successfully asserted in a higher court. The practitioner should analyze whether there was a misapplication of accepted law or a good faith basis for extending, modifying or reversing current law, if that is necessary for the appeal to succeed.² The practitioner may consider the potential benefit and risk of the outcome of the appeal to low income communities in general from any precedent that could be set.

The practitioner should also estimate the likely costs of an appeal, including personnel costs and out-of-pocket expenses for such things as preparation of transcripts and printed briefs and travel to the appellate court if located at a distance from the provider's office.³

Approval by the provider

Because of the potential resources required to pursue an appeal and the potential for establishing precedent, the decision regarding whether to go forward with an appeal should be made by the provider. In making the determination, the provider should look to several factors:

- *The likelihood of success, based on the assessment of the practitioner.* No appeal should be undertaken unless there is a good faith belief that the client can prevail.
- *The potential loss to the client.* The importance of an issue that may be subject to appeal is in part a function of the significance of the potential loss to the client if the matter is not resolved favorably for the client on appeal. Some cases, for instance, may involve potential permanent loss of custody of a child or access to necessary health care to treat a life threatening illness.
- *The relationship between the issue involved in the appeal and the provider's strategic focus.* The provider has a responsibility to make choices about the expenditure of its resources in order to be most responsive to the compelling legal needs of the low income communities it serves.⁴ It should, therefore, determine how the issues involved in a potential appeal relate to its strategic focus and if it involves a compelling legal issue that affects the low income communities it serves. The provider should also consider whether an appellate decision in the case is likely to establish a precedent that could be beneficial or detrimental to the low

² Model Rules of Prof'l Conduct R. 3.1 (2003) states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.5 (on Policy Regarding Costs of Representation).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

Standard 7.11-7 on Appeals

income communities served by the provider.⁵

- *The resources required to handle the matter.* Appeals may require a significant commitment of staff resources to research, analyze and argue the case fully. The provider should assure that it has the necessary resources available and should consider the resources necessary to pursue the matter, weighed against the importance of the matter to the client and to the low income communities served by the provider.
- *Availability of other counsel to represent the client.* The provider should determine if there are other organizations that may be enlisted to assist with the appeal or to take full responsibility for representing the client on appeal. In some cases, there may be other local, state or national advocacy organizations that specialize in the substantive area in which the matter falls. Sometimes a private law firm may agree to take on an appeal of an important issue as a pro bono matter.

Responsibilities of the provider and outside practitioners. In some cases that are subject to appeal, the client will have been represented at the trial or hearing by an outside attorney who may be a volunteer attorney or may be compensated by the provider. At the outset of the case, the provider and the outside practitioner need to establish who will have responsibility for determining whether the client will be represented on the appeal in the event a possible appeal becomes an issue, whether the provider or the outside practitioner will handle any appeal that is undertaken, and who is responsible for the costs of the appeal. It should also clearly establish whether the provider has authority to assign another practitioner, including a member of its staff, to handle an appeal in a case that was initially referred to the outside practitioner.⁶

In any case, the outside practitioner should immediately notify the provider if a case may be subject to appeal. If an outside practitioner who has assumed full responsibility for a case decides to undertake the appeal on the same basis, then the provider has no additional responsibility except to offer such assistance or support as may be appropriate. If the practitioner declines to represent the client on the appeal, or has a prior agreement to refer cases subject to an appeal back to the provider, the provider should make a prompt determination in conformance with this Standard whether it will undertake the appeal on behalf of the client.

Responsibilities to the client in the event the provider declines representation in an appeal

If the provider declines to represent the client in an appeal that the client wishes to pursue, the client should be notified immediately and in sufficient time to seek other assistance if the individual chooses. If necessary, the practitioner should assist the client in filing a notice of appeal to assure that the right is not lost while the client seeks other counsel. In addition, it may be necessary for the practitioner to take steps to protect the client's interests in the trial court, such as filing or defending against a motion to stay a judgment pending appeal.

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

⁶ See the discussion of establishing a clear understanding with the attorney to whom a case has been referred in the comment to 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).

Standard 7.11-7 on Appeals

A practitioner who believes there is merit to an appeal that the provider has declined to undertake may seek to refer the client to other sources of assistance, such as a national or state organization dedicated to work in the substantive area involved in the case or to an outside attorney willing to pursue the appeal on a pro bono basis. When necessary, the practitioner should also provide assistance to the attorney handling the appeal in such tasks as file gathering and creation or reconstruction of the record.

Responsibility to meet the standards of appellate practice

Appellate advocacy requires particular and special skills to assure careful research and cogent written and oral argument. Appellate courts subject legal argument to rigorous and probing analysis. Issues may be more thoroughly analyzed on appeal than at trial because of their potential significance to the development of the law. New legal issues may arise regarding the authority and jurisdiction of the appellate court to hear the appeal.

In addition, appellate courts strictly enforce their rules of procedure and practice. Many court rules are jurisdictional, and failure to comply may be fatal to pursuit of the client's claim. The practitioner should be fully aware of all deadlines for filing notices of appeal, docketing papers, motions, briefs, and abstracts and transcripts of the record and should comply with the requirements regarding form and style of briefs and other documents.

Because of the high standards of practice involved in appellate advocacy and because rulings of appellate courts have substantially greater precedential value than trial court decisions, practitioners pursuing appeals should be highly skilled and well versed in the intricacies of appellate practice. Ideally, the provider should assign practitioners to handle appeals who have substantial appellate experience in order to assure that the issues are properly addressed. However, if the provider assigns an appeal to a practitioner who is relatively inexperienced in appellate advocacy, the practitioner should seek assistance from experienced appellate advocates on the provider's staff, from other legal aid providers, from state, regional and national advocacy centers or from other members of the bar who may volunteer to assist. Appellate practitioners should practice their oral argument and responses to possible questions with other advocates who have appellate court experience, including outside appellate practitioners who may volunteer to assist.

STANDARD 7.12 ON ADMINISTRATIVE HEARINGS

STANDARD

The practitioner should proficiently and zealously present a client's case in adjudicatory administrative hearings.

COMMENTARY

Because many legal problems of legal aid clients involve disputes with government agencies regarding public benefits, a large number of contested cases are heard first, and often exclusively, in a proceeding before an administrative hearing officer. Practitioners should approach administrative hearings with a dedication to high quality legal work on behalf of the client.

Many of the considerations pertinent to litigation are applicable in administrative hearings. The practitioner should approach the case with a thoughtfully planned strategy¹ that is based on an appropriate factual investigation,² legal analysis and research, as necessary,³ and a careful assessment of the strength and weakness of the case.

The practitioner should thoroughly understand hearing practice before the agency. Administrative practice is often relatively informal with few established rules of procedure. Advocacy should be appropriate to the level of formality and should strive to use the flexibility of such proceedings to the client's advantage. For example, in administrative hearings, the rules of evidence are generally relaxed and practitioners may have wide latitude to affect the scope of testimony and evidence that is introduced on behalf of the client.

The importance of legal argument in administrative hearings may vary widely. Frequently, the person conducting the hearing has limited authority or inclination to apply law beyond the regulations of the agency. The practitioner should cogently present the legal basis for the client's claim and frame the issues in the case in a way that supports a favorable resolution for the client and establishes a record for later review by a court or higher tribunal, if necessary. Often there is no systematized procedure for formally raising legal issues in writing. When it is particularly important to establish the legal basis for the client's position, the practitioner should consider filing a memorandum of law, if permitted, particularly in support of a non-lawyer practitioner who is representing the client.

Adjudicatory administrative hearings generally will not offer the same opportunity for formal discovery as is available in judicial proceedings. Nevertheless, practitioners should obtain as much information as possible pertinent to the client's case. The means available for discovery are usually a matter of local practice with the administrative agency. Some information, such as medical records in disability claims will be crucial to the practitioner presenting the client's case. Sometimes, the pertinent information will be in the hands of the administrative agency

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.7 (on Case Planning); Standard 7.11-1 (on Litigation Strategy).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.5 (on Investigation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.6 (on Legal Analysis and Research).

Standard 7.12 on Administrative Hearings

that is the adverse party. Discussions with a caseworker may also be a valuable source of information regarding key facts and the position asserted by the agency. If the agency refuses to provide information that is essential to the client's case, the practitioner should seek the assistance of the person conducting the hearing to obtain access to the information, if possible.

The client's case should be thoughtfully and clearly presented. The practitioner should thoroughly prepare witnesses who will testify, including the client. The practitioner should explain the process for testifying and should be aware of the favorable and detrimental facts to which each witness might testify. To the degree possible, the practitioner should anticipate adverse facts and law, and should be prepared to counter them.

The practitioner should be aware of the necessary steps to follow-up on the administrative hearing, including the submission of supplemental materials on the client's behalf, if appropriate. The practitioner should be aware of deadlines for seeking a review or reconsideration of an adverse decision. The practitioner should have a clear understanding with the client regarding whether representation will be provided in an appeal or judicial review of the administrative decision.⁴

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.4 (on Limited Representation); Standard 4.2 (on Establishing a Clear Understanding).

STANDARD 7.13 ON LEGISLATIVE AND ADMINISTRATIVE ADVOCACY BY PRACTITIONERS

STANDARD

When advocating before legislative and administrative bodies, a practitioner should proficiently and zealously present the interests of clients and low income communities.

COMMENTARY

General considerations

Legal aid practitioners who advocate before legislative and administrative bodies have an essential role in promoting the adoption of laws and policies that are favorable to the interests and needs of low income communities and defending against those that are detrimental to those interests. Such policy advocacy should be conducted consistent with the procedures and practices of the legislative or administrative bodies to which it is directed. Legislative and administrative policy advocacy needs to be grounded in a thorough understanding of the issues involved and a thoughtful analysis of how to present the most persuasive case in favor of the advocate's position.

The responsibilities of providers in relation to legislative and administrative advocacy are discussed at length in the commentary to Standard 3.2 on Legislative and Administrative Advocacy. Legal aid practitioners should be aware of the considerations set forth in that Standard and commentary when engaging in legislative and administrative advocacy.

General factors associated with legislative and administrative policy advocacy

Skills and abilities. Practitioners engaged in legislative or administrative policy advocacy may encounter a wide array of entities at a local, regional, state or national level. Each is likely to have its own procedures and mores regarding how decisions are made and what motivates the decision-makers. Legislative and administrative policy advocacy, therefore, calls for effective interpersonal and analytical skills and the capacity to relate to different personalities and interests. Practitioners often need to relate effectively with organizations and individuals with divergent interests and motivations in order to form coalitions and partnerships.

The key to effective advocacy is often based on the practitioner's ability to communicate effectively with diverse decision-makers and their staff and to understand their personal and political motivations. With legislative advocacy in particular, a practitioner's effectiveness is significantly enhanced by the advocate's familiarity and knowledge of the legislative system and the regular actors, including lobbyists and other advocates. Having a regular presence and maintaining personal contacts can be particularly important for the legislative advocate to navigate the process effectively and to negotiate compromises with opposing interests.

The advocacy also needs to be tailored to what can be a complex array of dynamics that affect how the various decision-makers will respond to the advocacy. A successful result seldom turns on a narrow legal analysis and frequently requires an analysis of the political, social, economic and moral implications of the law, rule or policy being considered as well as the

Standard 7.13 on Legislative and Administrative Advocacy by Practitioners

immediate and long-term consequences and practical impact of its adoption or rejection. Legislative and administrative policy advocacy also often entail a long-term, persistent presence with the legislative or administrative body and patience to stay engaged with issues that may take years to resolve and in which there may only be partial victories and many losses.

Accountability. Policy advocacy before legislative and administrative bodies sometimes involves direct representation of a client or group of clients. Other times, it involves advocacy in which there is not a specific client or in which there is only a general retainer for representation before the legislative or administrative body. Considerations associated with assuring accountability to a client or to the low income communities affected by legislative and administrative advocacy are discussed in the commentary to Standard 3.2 on Legislative and Administrative Advocacy and should be consulted by the practitioner.

Where a practitioner directly represents a client or a group of clients before a legislative or administrative body on a relatively narrow and specific issue, there is an attorney-client relationship and usually the practitioner's accountability to the client is addressed by meeting the standard ethical duty to consult with the client.¹ At times decisions have to be made quickly and unexpectedly, so that there is not time to consult with the client. The practitioner should be aware of the broad objectives and priorities of the clients and should keep them informed of emerging developments.

At times, the practitioner may not have a client when advocating before a legislative or administrative body. The practitioner should rely on the indirect means established by the provider to seek guidance on priorities for legislative and administrative advocacy and to keep members of the low income communities served by the provider informed of public policy developments.²

Monitoring legislation and administrative policy and regulations. Legislative and administrative policy advocacy frequently requires ongoing monitoring to follow the development and introduction of proposed laws, rules or policies and their progress through the legislative or rulemaking process. A practitioner should be alert to the formal and informal means for keeping track of such developments. The practitioner should help to keep members of the low income communities served by the provider informed of proposed laws and policies that may affect them.

Follow-up on the adoption of legislation, rules and policies. Effective advocacy regarding a matter that is the subject of policy-making through legislation and administrative rule-making often does not stop with the adoption of the law or policy. How the policy is implemented through formal and informal rules, internal agency policies, manuals and instructions to agency workers, for instance, will significantly determine the actual impact of the policy on communities served by a provider. The benefit of a policy or law that is perceived to be favorable can be lost if it is poorly implemented. Similarly, the effects of a bad law or policy may be ameliorated by effective advocacy regarding implementing regulations and procedures.

¹ Model Rules of Prof'l Conduct R. 1.2 and 1.4 (2003).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.2 (on Legislative and Administrative Advocacy).

Standard 7.13 on Legislative and Administrative Advocacy by Practitioners

Legal aid practitioners should also take appropriate steps to inform affected communities of newly enacted regulations, rules and legislation. They should also work with other advocates to seek judicial interpretation and clarification of ambiguities in newly adopted laws and policies in ways that are beneficial to low income persons.

Ethical considerations. Practitioners should also be aware of and comply with the ethical requirements in their jurisdiction regarding representation of clients before legislative or administrative bodies.³ If an appearance is in on behalf of a client, the fact of the representation should be disclosed and the lawyer is bound to conform to certain aspects of ethical rules pertaining to candor toward the tribunal,⁴ fairness to the opposing party and counsel,⁵ and impartiality and decorum of the tribunal,⁶ even if such requirements would not apply to a non-lawyer who is engaged in the same activity.⁷

Other legal requirements. Practitioners should also be familiar with the requirements of the Internal Revenue Code and accompanying regulations related to lobbying by tax exempt organizations, and should understand the range and level of activities that are permissible. In addition, they should be aware of and comply with the requirements in the jurisdiction in which they operate regarding the registration by advocates before administrative and legislative bodies.

Considerations regarding policy advocacy before administrative bodies

Practice appropriate to the procedures of the administrative agency. Procedures and practices vary widely among administrative agencies. Some matters may be governed by longstanding rules of procedure and be relatively formal. Others may be subject to *ad hoc* rules adopted for the particular matter being considered. Some rule-making procedures may offer an opportunity for direct testimony and oral argument, while others will primarily call for written submissions. The practitioner should know the pertinent procedures in the proceeding and consider how to present the most compelling position, consistent with those procedures.

Administrative representation should be tailored to the legal sophistication of the administrative agency and the complexity of the matter being considered. Some matters, such as public utility hearings regarding rate structures, are complex and involve a well-established body of law and financial analysis. A practitioner should enter such proceedings with a full understanding of the conceptual framework in which the matter is being considered and with a strategy that is responsive to the agency's principal concerns. The practices of other

³ Model Rules of Prof'l Conduct R. 3.9 (2003).

⁴ Model Rules of Prof'l Conduct R. 3.3(a) through (c) (2003).

⁵ Model Rules of Prof'l Conduct R. 3.4(a) through (c) (2003).

⁶ Model Rules of Prof'l Conduct R. 3.5 (2003).

⁷ Paragraph 1 of the Comment to Model Rules of Prof'l Conduct R. 3.9 (2003) states: "In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure."

Standard 7.13 on Legislative and Administrative Advocacy by Practitioners

administrative agencies may be informal and the matter being considered may be uncomplicated. Advocacy should be appropriate to the level of complexity of the matter.

Effective relations with staff. To the degree possible, a practitioner should be aware of the agency's informal procedures and should develop cordial relations with key agency staff. Many administrative agencies rely on staff for recommendations and the chances for a favorable disposition will be significantly enhanced by a recommendation that favors the position espoused by the legal aid practitioner.

Some administrative agencies create task forces and study committees to consider issues and make recommendations. Some policies are adopted in a negotiated rule-making process that seeks in a non-adversarial forum to analyze acceptable approaches to complex matters. The practitioner should seek to participate on such bodies or facilitate the participation of others who will forward the positions responsive to the interests of low income communities.

Considerations related to legislative advocacy

Practice appropriate to the procedures of the legislative body. Each legislative body will have its own set of procedures and customs for considering and acting on legislation. Key decisions are often made outside the formal legislative process. Some state legislatures meet for only a few months and much of the analysis that affects the legislation ultimately considered is undertaken in study commissions and other interim processes. An effective legislative practitioner needs to understand and operate effectively in all the formal and the informal processes that are part of legislative decision-making in the pertinent jurisdiction.

A legislative practitioner should seek over time to develop credible relationships with legislators and their staff. Practitioners should be cooperative and immediately responsive to requests for information and assistance. Legislative and committee staff are often key to what happens with the substance of legislation, and practitioners should be aware of who those key staff are and should maintain positive relations with them. The appropriations committee is often key to the legislative process. In addition, the practitioner should be familiar with the role of fiscal or budget agencies that advise legislators and can significantly affect how legislation is developed and implemented.

A legislative practitioner can be particularly effective in analyzing the long-term impact of legislation. Many legislators do not have the time to assess the wide ramifications of legislation being considered. An incisive analysis of proposed legislation on behalf of clients may demonstrate an effect beyond or contrary to the intent of the legislature and can have significant impact on the outcome of the legislative process.

Legislatures respond to a variety of constituencies, some of which are far more influential than others. A legislative practitioner should be aware of other interests that may be affected by legislation being considered and should, when appropriate, align the advocacy efforts with those of groups, institutions, and individuals who share their objectives.

STANDARD 7.14 ON PRACTITIONER'S RESPONSIBILITIES IN LIMITED REPRESENTATION

STANDARD

A practitioner may limit the scope of representation provided to a client if the limitation is reasonable under the circumstances and the client knowingly consents.

COMMENTARY

General considerations

A significant amount of the representation offered to clients in legal aid practice is limited in scope, often in the form of legal advice, brief service or assistance to pro se litigants. It is generally permissible under pertinent ethical rules to limit the scope of representation of a client, if the limitation is reasonable under the circumstances and the client knowingly consents.¹

In practice, limited representation is often offered through projects that are established by a provider, such as a hotline or an advice clinic, or under a case acceptance policy² that identifies substantive issues for which only limited representation will be offered. Because in many circumstances, the decision to offer limited representation is made in the context of provider-adopted policies, it is the provider, not the individual practitioner that determines that the limitation is reasonable in the circumstances for that type of assistance. These Standards, therefore, do not set out separate considerations for the practitioner in providing limited representation in such systems. The practitioner should be aware, however, of the factors that are set out in the Standards and Commentary related to limited representation: Standard 3.4 on Limited Representation, Standard 3.4-1 on Representation Limited to Legal Advice and Standard 3.4-2 on Representation Limited to Brief Service.

Practitioner responsibilities for limited representation of individual clients

With some clients, the practitioner will consider for that particular client whether full or limited representation is appropriate. In such circumstances, it is the practitioner who has the responsibility to determine if the limited scope representation is reasonable. The practitioner should consider the complexity of the legal issues and the processes necessary to resolve or respond to the problem and the risk to the client if the matter is not resolved favorably. A number of personal factors will also influence the degree to which the client may be able to

¹ Model Rules of Prof'l Conduct R. 1.2(c) on Scope of Representation and Allocation of Authority states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

The application of ethical rules is evolving in many states with regard to some forms of limited representation, such as the "ghost writing" of pleadings. Practitioners should be aware of the pertinent rules in their jurisdiction. See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 5.2 (on Policy for Acceptance of Applicants for Service).

Standard 7.14 on Practitioner's Responsibilities in Limited Representation

proceed successfully with only limited assistance from the practitioner. They include the client's language capability, level of education, employment circumstance, physical mobility, emotional stability, cultural values and self confidence.

A practitioner who offers only limited representation to a client should apprise the client of the limitations of the representation, including actions that the client needs to take and the practical risks for the client if the actions are not taken.³

³ For a full discussion of the appropriate considerations including issues associated with knowing consent to the limited representation by the client in the legal aid setting, *see* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4 (on Limited Representation).

STANDARD 7.15 ON TRANSACTIONAL REPRESENTATION

STANDARD

The practitioner should proficiently and zealously represent clients in transactional matters to accomplish their objectives.

COMMENTARY

General considerations

Not all the legal issues facing legal aid clients involve matters in which there is a party with an adverse interest. Some clients seek legal assistance with issues associated with community economic development, with starting a small business or a non-profit organization or with a personal matter, such as drafting a will or power of attorney. The legal work associated with such efforts often involves transactional representation. Such work involves assisting an individual or an organization to comply with legal requirements necessary to pursue a business or personal objective, and often includes drafting or reviewing documents.

Transactional work increases in importance as legal aid providers and their practitioners address issues associated with the creation of employment and the enhancement of economic stability in low income communities. It is also a staple of work for some providers that serve older citizens, or persons with HIV/AIDS, who desire a power of attorney or a will.

Types of transactional representation

Transactional representation encompasses a wide range of work for clients, including:

- Buying, selling, leasing and establishing clear title to property;
- Incorporating groups and drafting by-laws and other necessary corporate documents;
- Meeting zoning and licensing requirements;
- Complying with tax laws;
- Assisting with business planning;
- Helping secure grant money and financing;
- Helping with advance directives;
- Estate planning, including drafting of wills, powers of attorney and similar documents.

Transactional representation is particularly important in community economic development where a practitioner may be assisting an organization to incorporate, to start a business and to obtain funding for its operations and for its projects.¹ The practitioner may also represent the interests of a low income neighborhood with matters such as zoning and creation of enterprise zones. In addition, a practitioner may provide transactional representation to a group or organization related to its operation or to a project in which it is involved. Individuals may need transactional representation connected with the transfer of property or drafting of a will or power of attorney.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

Standard 7.15 on Transactional Representation

Skills and knowledge associated with transactional representation

The skills associated with transactional representation are different from those associated with advocacy, although the practitioner owes the same duties to the client. The representation must be competent² and diligent³ and the practitioner must protect the information obtained in the representation from unauthorized disclosure.⁴ The practitioner must also avoid conflicts of interest, although conflicts in transactional representation may be less immediately apparent than they are in adversarial representation.⁵

Competence in transactional representation requires knowledge about the law related to the area of work. Failure to include a necessary element in a document being prepared for a client may not be noted until later when the omission proves fatal to the objective originally sought by the individual, often long after the error can be corrected. Transactional work also often involves problem solving and negotiation skills to help the client achieve a broad goal consistent with legal requirements that may affect or limit how that goal can be accomplished.

In dealing with complex business matters, the practitioner needs to have knowledge of the legal issues associated with the operation of a business and to understand the business possibilities for the organization. The practitioner may properly assist an organization with the development of a business plan.⁶ Because transactional representation may call for knowledge about the links among many legal and business matters, it is an area in which an inexperienced staff practitioner may find it beneficial to associate with outside counsel familiar with such matters.

Other professional responsibilities of the practitioner in transactional representation

Scope of representation. In transactional representation, there is a particular need for clarity regarding the client's objectives and the scope of the representation. Transactional representation on behalf of an individual to draft a power of attorney is straightforward and involves an easily definable, discrete legal task. On the other hand, an organization that is seeking to pursue housing or economic development will have multiple business objectives, each of which may give rise to a need for legal representation. Moreover, such an organization may just be developing its business plan and may be seeking counsel regarding viable options.⁷

² Model Rules of Prof'l Conduct R. 1.1 (2003).

³ Model Rules of Prof'l Conduct R. 1.3 (2003).

⁴ Model Rules of Prof'l Conduct R. 1.6 (2003). *See also* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.3 (on Practitioner Responsibilities in Protecting Client Confidences).

⁵ Model Rules of Prof'l Conduct R. 1.7 to 1.10 (2003).

⁶ *See* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations).

⁷ *See* ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.8 (on Legal Counseling).

Standard 7.15 on Transactional Representation

The practitioner and the client need to clearly agree upon the specific tasks that will be undertaken by the practitioner and by the client.⁸ For instance, the practitioner may assist the client with preparation of an application for tax exempt status, but expect the client to complete the preparation and filing of the necessary documents.

The practitioner and client should also clearly agree upon the duration of the representation and the understanding should be stated in the retainer agreement. Without such an agreement, an organizational client might assume, for example, that a practitioner assisting it to incorporate will be available to the resulting corporation for a variety of other legal needs associated with its start-up; the practitioner, on the other hand, might see the assistance as a one-time task.

Identification of the client. As in all representation, it is important in transactional work that the practitioner clearly establish who the client is.⁹ When the client is a group or organization, the practitioner should be aware of the importance of knowing who speaks for the entity and who decides on the objectives for the representation.¹⁰

There may be times when two parties ask a practitioner to assist them jointly in a transaction. A community-based organization might, for instance, seek assistance drafting a memorandum of understanding with another organization that is also a client of the practitioner. A practitioner needs to be cautious when considering a request to represent two clients in the same transaction since their interests are different even though they are not hostile. Such representation should only be undertaken if both parties consent in writing and the practitioner is confident both clients' interests can be met, that each is capable of making informed decisions in the matter, and that neither will be harmed unduly if the resolution does not work out.¹¹

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 4.2 (on Establishing a Clear Understanding); Standard 7.1 (on Establishing an Effective Relationship and a Clear Understanding with the Client).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.16 (on Representation of Groups and Organizations) and Model Rules of Prof'l Conduct R. 1.13 (2003) regarding Organization as Client.

¹¹ See Paragraphs 28 to 33 of the Comment to Model Rules of Prof'l Conduct R. 1.7 (2003).

STANDARD 7.16 ON REPRESENTATION OF GROUPS AND ORGANIZATIONS

STANDARD

The practitioner should proficiently and zealously represent groups and organizations to respond to the legal needs of the communities served by the provider.

COMMENTARY

General considerations

Many of the legal needs of low income communities can be addressed effectively by a practitioner assisting groups and organizations that are made up of persons who are eligible for the provider's services or seek to respond to the needs of the communities served by the provider. Representation of groups and organizations is often a central component of strategies to respond to needs of low income communities. Ongoing interaction with community organizations can also serve as an important source of information about needs in the community that help guide a provider's strategic planning efforts.¹

Representation may take many forms. It may involve transactional work to help a community-based group organize and function effectively and accomplish its objectives,² or it may involve advocacy, including litigation to protect or assert the interests of the organization and its members. A practitioner might engage in legislative or administrative policy advocacy on behalf of members and constituents of a group or organization.³ A practitioner might help a group, such as a tenant's association, to organize. The practitioner might also agree to represent both a group and its individual members who have legal problems related to the purpose for which the group was formed. Thus, a practitioner might help a tenant's association to organize and might also agree to represent some or all of its members with their landlord-tenant legal problems.

Representation of groups and organizations is essential to community economic development.⁴ In addition, community-based groups may organize to provide services that respond directly to the needs of low income communities and may seek legal assistance for itself and its members. Representation of groups and organizations may range from a one-time intervention that assists an organization with a discrete legal issue to a long-term commitment that extends over years and involves multiple issues.

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

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.15 (on Transactional Representation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 3.2 (on Legislative and Administrative Advocacy); Standard 7.13 (on Legislative and Administrative Advocacy by Practitioners).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

Standard 7.16 on Representation of Groups and Organizations

Capabilities necessary for effective representation of groups and organizations

Working with community groups requires effective interpersonal skills in addition to the legal skills associated with the particular legal issue for which the group seeks legal assistance. Groups have their own internal dynamic and the practitioner should understand those dynamics and relate appropriately to the group and its leaders. The practitioner should commit adequate time to understand the overall goals of the group as well as the specific objective for legal work that is undertaken. The practitioner should recognize the responsibility to be an organizer, advocate or a counselor for the group, but not its leader, even though at times the group may be overly deferential to the professional judgment of the practitioner. The practitioner should recognize that the goals of a group may lead it to address issues in ways that do not involve legal process.

Representing community groups often calls for an extensive time commitment. The practitioner will often need to be available to the group or organization outside of normal business hours as many groups can only meet at night or on weekends to accommodate members who work.

Professional responsibilities of practitioners working with groups and organizations

A practitioner representing a group or organization needs to clearly understand who is authorized to speak for it.⁵ Organizations that are incorporated will generally have a leadership structure that identifies who has authority to decide on a course of action, including determining the objectives for the representation and approving actions that need to be taken. Some organizations' by-laws may identify situations when approval for a course of action must be made by the members of the group, and not the leadership. Many community groups are not incorporated, however, and it will be less clear who has decision-making authority and what the processes are for making decisions. To avoid conflict in the event of disagreements within the group, the practitioner should reach a specific understanding with the group at the outset of the representation regarding who is authorized to make decisions about the representation and by what process. Depending on circumstances, the practitioner and the group may agree that some decisions need to be decided by the membership.

The practitioner should clearly understand the responsibility to represent the interests of the group and not of individuals within it.⁶ In groups and organizations that are cohesive and clear about their goals and strategies, conflicting internal interests are less likely to be a problem. On the other hand, it is possible in any group or organization that internal disagreements will develop about its control, direction or operation. The practitioner should be familiar with the ethical rules in the appropriate jurisdiction that relate to conflicts within a group or

⁵ Model Rules of Prof'l Conduct R. 1.13(a) (2003) regarding Organization as Client states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." See also, ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.2 (on Establishing a Clear Understanding).

⁶ 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."

Standard 7.16 on Representation of Groups and Organizations

organization that the practitioner is representing.⁷ A practitioner who is asked to represent any constituent of the group, in a related or different matter must be careful to abide by the pertinent ethical rules in its jurisdiction regarding conflicts of interest.⁸

Scope of representation. The practitioner should reach a clear understanding with the group about the scope and duration of the representation. The legal needs of groups and organizations can involve multiple issues that call for many types of representation. Assistance with transactional matters raises a specific set of questions regarding the scope of representation that are discussed in the commentary to Standard 7.15 on Transactional Representation. Direct advocacy on behalf of the group in litigation or another adversarial proceeding is subject to the same considerations with regard to scope of representation as with an individual client and is subject to the considerations set forth in the commentary to Standard 4.2 on Establishing a Clear Understanding.

A general retainer to represent the interests of members or constituents of the group or organization before a legislative or administrative body should identify the group's objectives and means of communication for the practitioner to seek guidance regarding the advocacy and to communicate about its conduct, as discussed in the commentary to Standard 3.2 on Legislative and Administrative Advocacy and Standard 7.13 on Legislative and Administrative Advocacy by Practitioners.

Communication. It is also important for the practitioner to have well understood means for communicating with the group regarding developments in the representation. Communication is often through the designated leads of the group or organization.⁹ In some circumstances, however, depending on the dynamics in the group and the nature of the representation, communication might also be directed to the membership. The practitioner should be sensitive to the dynamics of the situation to determine what is appropriate. For major decisions affecting the individual members in the group, it is often advisable to communicate with the membership directly.

⁷ See Model Rules of Prof'l Conduct R. 1.13(b)-(d) (2003) which relate to the responsibilities of a lawyer with regard to actions that a member or constituent of an organization might take that are adverse to the interests of the represented organization and might do it substantial harm.

⁸ 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."

⁹ Paragraph 6 of the Comment to Model Rules of Prof'l Conduct R. 1.4 (2003) on Communication states: "When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization."

STANDARD 7.17 ON MAINTENANCE OF PROFESSIONAL COMPETENCE

STANDARD

The practitioner should seek ongoing education, training and expertise to meet assigned responsibilities and to keep abreast of changes in the law and its practice.

COMMENTARY

General considerations

A hallmark of the practitioner's responsibility to a client is the duty to provide competent representation.¹ These Standards set a higher benchmark of high quality representation to which practitioners should aspire. To meet the standard of competence and the target of high quality representation, a practitioner should seek legal education, training and other means of professional growth, including effective supervision. In addition, the practitioner should stay current on changes in the law and emerging issues that affect low income persons and their communities as well as strategies for responding to them.²

Practitioners may also take on leadership and management responsibilities within a provider that have an impact on the quality of assistance offered by others. Some supervise and mentor other practitioners and others assume roles communicating with the low income and legal communities about the legal needs of persons served and strategies to respond. Other practitioners will be responsible for the legal work agenda of the provider or one of its components. Practitioners who take on such responsibilities should seek education, training and other sources of expertise to improve their capacity to carry out those responsibilities effectively.

Education, training and other sources of expertise

Providers are responsible for making a variety of training opportunities available to practitioners. Standard 6.5 on Training sets out the provider's basic responsibilities in this regard. Other Standards identify specific training needs that support effective fulfillment of those Standards.³ A legal aid practitioner has a responsibility to take advantage of trainings that are offered and to advocate for training in the event that the provider does not meet its responsibilities to make it available.

In addition to training and education, there are other sources of expertise that can assist a practitioner to grow professionally. A practitioner should participate in task forces, e-mail lists

¹ Model Rules of Prof'l Conduct R. 1.1 (2003).

² Paragraph 6 of the Comment to Model Rules of Prof'l Conduct R. 1.1 (2003) states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

³ See, for example, ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.4 (on Cultural Competence); Standard 2.5 (on Staff Diversity); Standard 2.10 (on Effective Use of Technology); Standard 4.2 (on Establishing a Clear Understanding),

Standard 7.17 on Maintenance of Professional Competence

and other networks that offer exposure to knowledge and skills pertinent to the practitioner's work. Some such networks may exist within a provider or group of local providers. Others exist on a state or regional level and offer a regular menu of trainings, task force meetings and electronically supported networks.⁴ Some issues attract networks of advocates that function at a national level. The practitioner should be alert to where such networks exist and should take advantage of the support that they offer for professional growth and improved quality of legal aid for low income persons.

Another important factor in a practitioner's professional growth is the degree to which the individual is effectively mentored as a new practitioner and is appropriately supervised at all levels of experience. The practitioner has a responsibility to accept supervision and to request it if it is not being provided in a way that supports the development and maintenance of appropriate professional skills and knowledge.⁵

Areas of focus. The practitioner should seek training and other support for professional growth in the following areas:

- Basic skills necessary to serve clients and others effectively, including effective negotiation and interview techniques;
- Specialized skills appropriate to the practitioner's area of practice, such as litigation and trial advocacy, legislative and administrative policy advocacy, transactional representation or community economic development;
- Substantive knowledge in the areas in which the individual is or may become engaged;
- Substantive knowledge related to newly emerging legal issues, including those that result from social, political and economic developments that affect low income communities;⁶
- Knowledge and skills to function in a culturally competent manner;⁷
- Knowledge and skills related to the use of technology to support effective practice, including legal and factual research and the use of case management and practice related software;⁸
- Skills related to effective supervision and mentoring, if required by the practitioner's responsibilities in the provider;⁹
- Leadership capabilities pertinent to the practitioner's role in the provider.

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.3 (on Participation in Statewide and Regional Systems).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 6.4 (on Review of Representation).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.6 (on Achieving Lasting Results for Low Income Individuals and Communities).

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

⁸ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.10 (on Effective Use of Technology).

⁹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 6.3 (on Responsibility for the Conduct of Representation); Standard 6.4 (on Review of Representation).

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