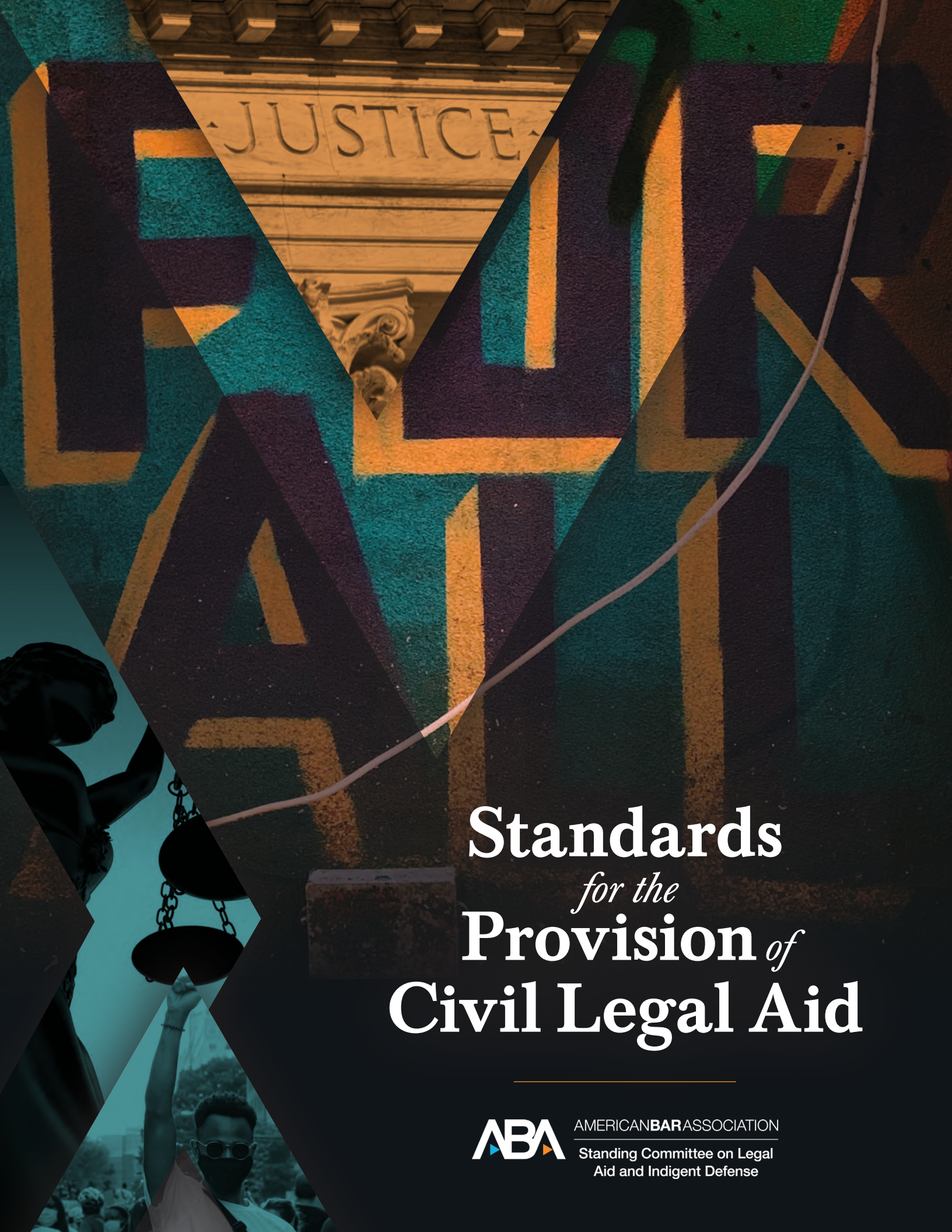

Standards *for the* Provision *of* Civil Legal Aid

AMERICANBARASSOCIATION
Standing Committee on Legal Aid and Indigent Defense

AMERICAN BAR ASSOCIATION

STANDARDS
FOR THE PROVISION OF CIVIL LEGAL AID

Standing Committee on
Legal Aid and Indigent Defense

AUGUST 2021

Resolution Adopted by the American Bar Association House of Delegates

August 9, 2021

RESOLVED, That the American Bar Association adopts revised black letter Standards for the Provision of Civil Legal Aid, dated August 2021, and the Introduction and Preamble; and

FURTHER RESOLVED, That the American Bar Association recommends appropriate implementation of these Standards by Legal Aid Organizations, as such organizations are defined by the Standards.

American Bar Association
Standing Committee on Legal Aid and Indigent Defense

2020-2021

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Washington, DC

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Forward

The Standing Committee on Legal Aid and Indigent Defense (SCLAID) was pleased and gratified that the American Bar Association House of Delegates adopted, on a virtually unanimous vote, the revised Standards for the Provision of Civil Legal Aid at the 2021 ABA Annual Meeting. This is the sixth iteration of these Standards, which were first adopted and promulgated in 1961. They were most recently revised in 2006.

The fifteen years since then have been a period of enormous change for American society and for the legal system in which civil legal aid practitioners function and provide services. The ethical rules pursuant to which lawyers in general and legal services lawyers in particular practice have evolved significantly, and there has been an ongoing alteration in the use of information technology that has had a revolutionary impact on the practice of law. New and innovative methods of providing legal services by non-attorney practitioners have emerged, and the courts have significantly expanded their efforts to increase access to justice and better accommodate the needs of unrepresented litigants. Against this backdrop of sweeping transition, SCLAID, after internal discussions and the conducting of several listening sessions to obtain input from civil legal aid practitioners and stakeholders from across the entire legal services community, concluded that the time for another comprehensive revision of the Standards had arrived.

The revision process could not have been accomplished without the selfless commitment and dedication of a group of energetic volunteers from all corners of the legal aid community who brought enormous experience, expertise, passion and insight to their work on this project. The work was overseen and coordinated, skillfully and seamlessly, by Committee Counsel Jason Vail and Committee Member Nikole Nelson. The ABA and SCLAID owe an enormous debt of gratitude to this entire team for the countless hours that they all devoted to the collaborative effort which yielded a fully revised, up-to-date set of Standards of which all involved can be extremely proud.

As was made clear throughout the entire process, the Standards have been, and continue to be, widely referred to and relied upon as aspirational guidelines for the operation of civil legal services organizations and the provision of the critical assistance that their practitioners afford to their clients, constantly striking a balance between the need for high-quality representation and the reality of insufficient resources. For this reason, it is of critical importance that the Standards maintain currency, credibility, and relevance for those for whom they serve as a resource. SCLAID believes that the newly revised Standards meet those objectives and appreciates the opportunity to have played a role in their development.

Theodore A. Howard
Chair, Standing Committee on Legal Aid and Indigent Defense
August 2021

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ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID

August 2021

INTRODUCTION

These Standards for the Provision of Civil Legal Aid replace the Standards that were adopted by the American Bar Association (ABA) in 2006.[1]

These revised standards attempt to recognize the changes experienced by legal aid organizations, client communities, and society at large since the last revision in 2006. Technology has advanced, professional rules have changed, and the country has experienced a reckoning with racism. The Standards have been updated herein to reflect these changes. Legal aid organizations have become more complex in order to respond to the changing environments in which they operate. For this reason, a Standard for Leadership and Management has been added. Wherever possible, the Standards reference external guidance, such as those that govern the practice of law, best practices for board governance, and rules that govern accounting practices. Legal aid organizations do not operate in a vacuum and must often rely on external guidance. The Standards highlight where expectations of legal aid organizations should be different from those governing other types of lawyers or nonprofit organizations because of legal aid organizations' unique missions and relationships with their clients.

These Standards apply to legal aid organizations, as defined below. They also include appendices that provide guidance to legal aid practitioners. The Standards relate primarily to legal aid organizations, but they offer guidance with which a practitioner should be familiar as well.

Many attorneys represent indigent 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 organization, they are not intended to apply to such individual efforts.[2] Nevertheless, the Standards and appendices pertaining to the responsibility of individual practitioners may provide practical guidance to effective lawyering by those attorneys.

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

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[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.

[2] For guidance in this context, *see* ABA Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means (2013), https://www.americanbar.org/groups/probono_public_service/policy/standards/.

Application of the Standards

These Standards focus on both the responsibilities of legal aid organizations as those that serve the civil legal needs of clients, who are most often low-income, and the role of practitioners who represent such clients under the aegis of such an organization.

***Legal Aid Organizations*.** The Standards are written to provide guidance to all organizations that:

1. Provide legal representation or other legal assistance to clients; and
2. Offer that representation for free or at a reduced cost.

They do this because the clients have insufficient income to obtain legal counsel otherwise, face other barriers to accessing legal counsel, or have some other special need.

These organizations are referred to in the Standards as "legal aid organizations."

Legal aid organizations are generally not-for-profit organizations or a distinct part of a not-for-profit organization that regularly makes civil legal assistance available to low-income individuals or groups or other underrepresented groups, without charge or at greatly reduced cost. The term is intended to be applied broadly and is meant to include organizations even if they may not, for practical or legal reasons, be able to meet every Standard, as noted below.

These Standards also apply to legal aid organizations providing representation to individuals pursuant to a constitutional or legislative right to counsel, whether those organizations are directly appointed by the court or contracted by a government agency. Every state in the country has a right to counsel in one or more civil legal areas, and some cities do as well. In 2021, as these Standards are updated, the movement for a civil right to counsel, particularly in the context of evictions, is surging. As more jurisdictions enact a right to counsel in various civil legal areas, legal aid organizations must be supported, fully funded, and ready to carry out that obligation in compliance with these Standards. A right to counsel is a step toward justice in civil proceedings where basic human needs are at stake. Still, organizations carrying out that right have to be consistent in their provision of services and, therefore, comply with these Standards.

The term "legal aid organizations," as used here, does not include outside practitioners, as defined below; law firms that accept referrals from a legal aid organization for the representation of low-income clients; issue-focused organizations; or organizations that provide legal assistance on a contingent fee basis. While not written for these outside practitioners and other entities, however, they may find these Standards useful.

Legal aid organizations share a history of growth from the legal aid movement of the late 19th and early 20th centuries, often comprised of volunteer attorneys serving the needs of immigrant communities. These organizations then grew in size and number with the introduction of federal funding through the U.S. Office of Economic Opportunity and the Legal Services Corporation, as well as state-based funding through Interest on Lawyers Trust Accounts, filing fees, and state appropriations. There is wide diversity in the form and organization of legal aid entities. They utilize a variety of delivery methods and sources of funds. They may provide a range of services or focus on specific substantive areas. They may be contracted by the state or local government as a designated organization for purposes of a right to counsel or be appointed directly by the court in certain civil proceedings.

Today, what legal aid organizations have in common, in addition to this history, is that they provide free or low-cost civil legal assistance to people who face barriers, economic or otherwise, to obtaining legal assistance. They take on the representation of cases that, in many cases, would not find a home in the legal marketplace because the clients do not have sufficient funds to pay and the cases are not viewed as economically viable for the private market. They pursue both access to justice and justice for clients who, without them, would likely have neither.

Legal aid organizations may have different institutional structures. 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 organizations 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 organizations, 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 aid through law students working under the supervision of faculty or outside attorneys. Some organizations are operated by faith groups, ethnic societies, or charitable organizations.

The Standards are intended to guide all such organizations, but also recognize that an organization’s institutional structure and funding will affect how a particular Standard might apply to it. Some legal aid organizations will not be able to meet certain Standards for legal, practical, or 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 organizations and for individual practitioners who participate in a private-attorney component of an organization. Where application of a particular Standard is not reasonable or is impractical for some types of organizations, it need not be followed. Wherever possible, the commentary to the Standards acknowledges such limitations and suggests how the

organization might seek to serve the underlying principles embraced by a Standard by alternate means.

Use of the Standards

These Standards are presented as aspirational guidelines for the operation of legal aid organizations 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 mandatory requirements, and failure to comply with a Standard should not give rise to a cause of action or finding of a legal ethics violation by a lawyer in and of itself. Legal aid organizations are encouraged to check their consumer regulations to understand how failure to comply with any Standard will be interpreted under local consumer protection statutes and rules. As the Standards are aspirational, not meeting them does not create any presumption that a legal aid organization or a practitioner has breached any legal duty owed to a client or funding source.

The Standards do not expand, add, or change any ethical responsibilities with which a practitioner must comply, and all lawyers are bound first and foremost by the rules of professional conduct that apply in the jurisdiction in which they practice. The Standards do touch upon issues that are addressed in the Model Rules of Professional Conduct and elucidate their application in the context of providing civil legal aid. In those instances, the commentary may make appropriate reference to, but does not alter, the controlling ethical requirement. Because the ABA has historically 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 ethical responsibilities. These Standards do not provide references to every ethical rule that may apply in the representation of a legal aid client.

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.

Institutional stature and credibility. Compliance with these Standards will result in a strong legal aid organization with institutional stature and credibility in the communities in which it operates. In turn, effective representation of clients is enhanced if the

organization establishes a positive institutional presence in the communities in which it operates. In order to achieve institutional stature and credibility, the organization should operate in ways that command respect both in client communities and among public leaders and others who make decisions that may affect client communities. Such esteem will in part be gained by the organization 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. Institutional stature and credibility also promote high morale and discourages turnover as staff and others providing service to clients find increased satisfaction in being part of an institution that commands the respect of clients and the community at large. Finally, establishing institutional stature and credibility is an important ingredient of successful fundraising.

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

Allocation of resources. The Standards are drafted with an understanding that at the current time, legal aid organizations do not have enough resources to meet the legal needs of communities they serve. This lack of guaranteed sufficient funding has galvanized the right to counsel movement, because where there is a right, the government has an obligation to fund it. In addition, legal aid organizations have a responsibility both to clients they represent and client communities at large. This means legal aid organizations must wisely allocate resources, both with regard to what matters they agree to take on, and to how they manage the matters they commit to handle. In the fee-paying market, the amount of time and resources a lawyer puts into a case is often limited by the clients' choices of how much money to spend. Legal aid organizations do not have this same control mechanism because client fees are not the primary source of funding for the work. Therefore, legal aid organizations must, in consultation with and with the informed consent of their clients, make resource allocation decisions that influence each client matter. How much time and costs should be expended on any particular matter should be determined by considering the potential outcome that can be expected for the client and/or client community. It is reasonable, and in fact required, that legal aid organizations put limits on the resources they will commit to any individual matter. These allocation decisions must be made in consultation with and with the informed consent of each individual client and must ensure quality of services provided.

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

In representation of individual clients, the Standards note the organization's and practitioner's responsibilities 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 ensure 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 organization and its practitioners to treat all persons who seek assistance from the organization with dignity and respect. The organization and its practitioners must respect the dignity and worth of all people, and the rights of individuals to self-determination. Proper treatment of persons seeking and receiving assistance requires staff who can interact effectively with those seeking legal assistance and who can competently relate in a manner reflecting the values of racial equity, cross-cultural sensitivity, and cultural humility. It also calls for systems, such as intake, to be accessible and efficient and to not inadvertently demonstrate a lack of regard for applicants' and clients' time or unique circumstances or barriers.

Accessing justice and achieving justice. A core mission of a legal aid organization is to facilitate access to the legal systems for resolving civil legal problems and to help clients with legal problems obtain fair and lasting results. Opening the doors to the courthouse does not in itself achieve justice. Accessing the systems that resolve problems is not enough. Those systems must also operate in ways that meaningfully deliver justice and those entering through the doors must have the support they need to realize justice. 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 in doing 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 organizations, 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 organization should be of high quality and 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 an organization will involve nonrepresentational assistance, such as community legal education and legal information to help individuals avoid legal problems and take steps on their own to address their situations. In all cases, the Standards state that the organization should undertake the activity with commitment to high quality. The Standards also express that strategies should be deliberately chosen and evaluated periodically to determine if they are successful in achieving their intended result.

Diligent representation of client interests. All lawyers should pursue their clients' interests, as defined by the client, with diligence consistent with the law and applicable rules of professional conduct. Diligent pursuit of clients' objectives has particular implications for legal aid organizations. When effective resolution of an individual client's problems is circumscribed by existing laws and practices, or when existing laws and practices result in the same or similar problems for similarly situated 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 organization 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 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 an organization 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 organization. Finally, it includes advocacy in legislative, administrative, and civic settings, done on behalf of clients and/or their communities.

"Client community" refers to a population of persons with limited economic or other resources who are located in the area served by the organization but is not limited to those individuals or groups who actually receive legal assistance from the organization. It also includes individuals who are part of a larger group that shares a significant barrier to access to justice, such as people with disabilities or those with language barriers. This term is often used in the plural form in the Standards to denote the fact that some populations served by the organization are comprised of individuals who share a common characteristic, such as race, ethnicity, or culture, or have some other common interest, and that an organization may serve many such communities.

"LGBTQ+" is an acronym for "lesbian, gay, bisexual, transgender, and queer/questioning."[3]

"Outside practitioner" and *"outside attorney"* refer to an attorney in private practice, a government attorney, corporate counsel, or other attorney who is not employed by a legal aid organization, but who represents a client referred by a legal aid organization on a pro bono or significantly reduced-fee basis.

"Practitioner" refers to an attorney, paralegal, law student, lay advocate, or tribal advocate who represents a client of an organization and engages in representational activities authorized by federal, state, or tribal law. Where an activity generally 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."

"Self-represented" refers to circumstances in which individuals represent themselves in a court or administrative proceeding either without representation by a practitioner at all, or who primarily represent themselves while receiving limited representation with respect to discrete parts of the proceedings, such as the assistance preparing pleadings. The term includes other terminology such as "*pro se.*"

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. All of those who labor to bring civil legal aid to those in need of assistance and help them to 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

[3] Further definitions of these and related terms may be found on the website of the ABA Commission on Sexual Orientation and Gender Identity at https://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi-lgbt-lexicon-terminology.pdf.

how those efforts might best succeed. The drafters hope the guidance offered herein will play a small part in helping create a more just society.

PREAMBLE

Justice is foremost in the preamble of our nation's Constitution. The very intent of the United States Constitution is to "establish justice." As a justice system, we recognize the barriers that limit the ideal of justice for all, including the legacy of racial discrimination in our institutions, from the courts to legislatures to administrative agencies. Our mission as lawyers, legal professionals, and legal aid organizations is to provide high-quality, accessible, and responsive legal service to people impacted by poverty and oppression. To do this, we must understand the history of racial oppression in our country and how it continues to be embedded in our laws and legal institutions.

Both governmental and private funders of legal aid organizations have a direct and fundamental responsibility to ensure that sufficient resources are made available so that equal access to justice is available to all individuals. Citizenship or incarceration status should not limit someone's access to life-changing legal services. Adequate funding for such services should be available to all communities without exclusion, restriction, or preference.

Legal aid organizations must treat everyone with fairness, dignity, and respect, including recognition and inclusion of their culture, background, identity, or national origin. As a justice system, we must constantly evaluate and address institutional and systemic racism and our own implicit biases. Ensuring equal justice requires constant vigilance and examination of individual and institutional approaches, processes, and cultures to address their impact on the communities we serve and the community partners who facilitate those services.

The phrase "*Equal Justice Under Law*" is permanently affixed above the entrance to the United States Supreme Court. Many of these Standards for the Provision of Civil Legal Aid are designed to recognize that far too often in our history, bias, prejudice, and oppression have been ongoing barriers to this ideal. While we cannot change the past, we can acknowledge it and change the future. We hope that together we can approach this work with zealous action, fortitude, and hope, and not fear and resistance. These Standards were written in this spirit.

SECTION 1: STANDARDS FOR GOVERNANCE

STANDARD 1.1 ON OVERALL FUNCTIONS AND RESPONSIBILITIES OF THE GOVERNING BODY

STANDARD

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

COMMENTARY

General Considerations

Each organization should have a governing body or its equivalent that assumes overall responsibility for the success of the organization.[4] The governing body should carry out its responsibilities in a manner that maximizes the organization's capacity to serve persons effectively. Individual governing body members should be aware of and sympathetic to needs of communities served, and the governing body should operate in a manner that enhances engagement with the communities and the persons the organization serves.[5]

The overarching responsibility of the organization's governing body is to establish the mission for the organization and to set broad general policies to guide the organization in its provision of legal assistance to the communities it serves. The governing body should also ensure that planning takes place to accomplish the organization's mission and that adopted policies are implemented.[6]

A number of functions and duties fall to a governing body as a part of its overall responsibility for the well-being of the organization. Key responsibilities are treated in separate Standards that follow, including oversight of compliance with legal and contractual responsibilities and with governing body policies,[7] fiscal oversight,[8] hiring

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[4] A state or local government agency tasked with administering a legal aid organization, such as a civil right to counsel program, is not the "governing body" as defined in this section.

[5] *See* Standard 1.2 on Governing Body Members' Responsiveness to the Communities Served; Standard 1.3 on Governing Body Communication with Client and Legal Communities.

[6] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

[7] *See* Standard 1.1-1 on Governing Body Oversight of the Organization.

[8] *See* Standard 1.1-3 on Fiscal Matters.

and supervising the chief executive,[9] serving as a resource for the organization,[10] and fundraising.[11]

Overall Responsibilities

Define and review the 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 organization'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 organization's mission, accomplishments, and goals in order to help garner support for the organization from the public.

Set policy for the organization. Consistent with the organization's mission and purpose, the governing body has the responsibility to set broad general policies for the organization's operation. These policies should include, in the first instance, the organization'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 organization operates and clarify the roles, responsibilities, and duties of the governing body and the organization's staff. These policies establish the standards against which to measure the actions of members of the governing body and the organization's staff and help safeguard the entity's general well-being.

The precise policy role of the governing body will depend upon local judgment about the appropriate division of authority and the responsibility between the governing body and the organization's chief executive.[12] 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,[13] to comply with requirements of a funding source.

Engage in planning efforts. The governing body should also be engaged in planning efforts, including strategic organizational planning with leadership and staff, called for in these Standards to guide how the organization responds to the legal needs of the communities it serves. It should ensure that planning furthers the organization's mission and fosters the effective and efficient utilization of its resources to meet the most compelling needs of its clients.[14]

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[9] *See* Standard 1.1-4 on Relations with the Chief Executive.

[10] *See* Standard 1.1-5 on Serving as a Resource to the Organization.

[11] *See* Standard 1.1-6 on Resource Development.

[12] *See* Standard 1.1-4 on Relations with the Chief Executive.

[13] *See* Standard 5.2 on Eligibility Guidelines.

[14] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

STANDARD 1.1-1 ON GOVERNING BODY OVERSIGHT OF THE ORGANIZATION

STANDARD

The governing body should regularly review the legal aid organization's operations to ensure effective operation and compliance with its policies and pertinent legal requirements.

COMMENTARY

General Considerations

The governing body should review the organization's operations to ensure that the legal aid organization is functioning effectively, that its policies are being implemented, and that it is in compliance with statutory and regulatory requirements. Once the governing body has established broad general policies, the chief executive holds primary responsibility to execute them and manage the organization's day-to-day operations.[15] The governing body should have a means to ensure that established policy is being implemented properly and to identify problems that may require intervention.

Oversight by the Governing Body

A legal aid organization may be a complex organization. The governing body should regularly review all of the interrelated factors that affect the organization's operations and should watch for early warning signs of problems that, if left unattended, will have repercussions for the entire organization. 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, including failure to appropriate funding (or sufficient funding) for a civil right to counsel;
- An increase in client complaints;[16]
- An increase in complaints from employees of the legal aid organization;
- An increase in complaints from members of the bar, the general legal community or others serving communities the legal aid organization serves;
- A decrease in participation by outside attorneys willing to accept referrals of clients from the legal aid organization;

[15] *See* Standard 1.1-4 on Relations with the Chief Executive.

[16] *See* Standard 5.8 on Client Complaint Procedure.

- Technology failures or security breaches; and
- 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, disposition of cases, funding changes, and major projects undertaken by the organization. It should review the organization's annual financial audit and monitoring and evaluation reports from funding sources. It should determine the cause of any indicated problems or deficiencies in compliance and should ensure that management takes corrective action.

Alternative means of oversight. Some legal aid organizations 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 those in need. Some are part of other types of organizations, such as a medical clinic or domestic violence shelter, 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 activities. In some instances, these boards of directors may find it appropriate to designate or appoint a committee of the governing body, a separate policy body, or advisory board with specific responsibility for overseeing the organization'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 of the legal aid organization.

COMMENTARY

Neither a governing body nor its members should interfere with the attorney-client relationship. A governing body is permitted to set priorities for the organization which may limit an organization's involvement in broadly identified categories of cases, but such limits must be established before a case is accepted.[17] Once representation in a particular case has been undertaken, interference by the governing body is strictly prohibited. The governing body cannot have access to confidential information relating to the representation of the organization's clients, as such bodies that stand outside the attorney-client relationship established with the practitioner,[18] and the members of the governing body do not and cannot have an attorney-client relationship with the organization's clients.[19] Moreover, lawyers employed, paid, or recommended by the organization cannot ethically allow the organization's governing body or its members to direct or regulate their professional judgment in providing representation.[20]

An exception to this prohibition on sharing confidential client information may occur in the context of the client grievance procedure where a client gives informed consent to the disclosure of confidential information for the limited purpose of allow the complaint to be reviewed.[21] In such situations, the governing body or a duly-selected committee may inquire into the conduct of a case by an organization's practitioner, but the body cannot specifically direct the practitioner to undertake or to refrain from any action in the case.[22]

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[17] *See* ABA Standing Committee on Ethics and Professional Responsibility [hereinafter SCEPR] Formal Op. 334 (1974).

[18] *See* SCEPR Formal Op. 334, at p. 7 (1974).

[19] *See* Comment, ABA Model Rules of Professional Conduct R. 6.3 (2020) [hereinafter MRPC]. This prohibition on access to confidential information extends to any entity created by the governing body, such as a committee of the governing body, a separate policy body, or advisory board, as described in Standard 1.1-1.

[20] *See* MRPC R. 1.8(f) and 5.4(c); and Standard 6.4 on Responsibility for the Conduct of Representation.

[21] *See* Standard 5.8 on Client Complaint Procedure.

[22] *Id.*

STANDARD 1.1-3 ON FISCAL MATTERS

STANDARD

The governing body should ensure the financial integrity and viability of the legal aid organization.

COMMENTARY

General Considerations

The governing body should ensure that the organization achieves its budget goals[23] and that its funds are spent and accounted for in a way that fully meets the organization's responsibility to its clients, its funding sources, and the public. Budgeting and fiscal policy should consider relevant state and federal guidance as well as funder requirements and basic accounting principles.[24] The governing body should rely on a senior manager, or the equivalent, to help ensure that the organization effectively meets its responsibilities for budgeting, financial planning ,and accountability. Larger organizations should consider having a 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 organization's priorities.[25] Budget responsibilities involve more than mechanical approval of broad spending categories and perfunctory review to ensure that income and expenditures balance. The governing body should approach the budget as the mechanism through which it implements major policy decisions on the organization's direction and operation. For example, decisions about the organization's personnel budget may substantially affect its capacity to serve particular geographic areas or address specific substantive legal issues.

Budget planning provides the opportunity to monitor the organization's receipt of projected revenue, 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 ensure that the organization's staff provides high-quality legal assistance to its clients and strikes the appropriate balance necessary as it strives to achieve the goals set by these Standards. In order to encourage continued service to clients by experienced practitioners and to discourage high staff turnover, sufficient resources should be budgeted so that the organization

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[23] *See* Standard 1.1-6 on Resource Development.

[24] *See* Standard 2.2 on Effective Leadership.

[25] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

offers adequate salaries and benefits to its staff. The organization'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 organizational activities or unforeseen contingencies. Some deviations will be unavoidable. The governing body should establish a fiscal policy or other guidelines that give management the flexibility necessary to make reasonable adjustments in response to changing circumstances. Management should provide the governing body reports on a defined, periodic basis on the organization's fiscal situation in order to assist the governing body in monitoring the organization's receipt of revenue and expenditure of funds, as a way to anticipate and correct potential resource problems.

Financial Accountability

Oversight of the organization's finances carries the responsibility to ensure that the organization's funds are spent for the purposes for which they were granted, are properly accounted for, and show no evidence of fraud or misuse of funds. The governing body should proactively ensure that the financial integrity of the organization is protected, adopting policies and procedures with adequate internal controls to ensure the reliability and integrity of financial and operating information. The governing body should ensure that the organization, its employees, and outside practitioners comply with federal and state laws governing whistleblower protection, and such laws and professional conduct rules relating to the retention and destruction of files and documents, including in electronic format.[26] The governing body should ensure that management takes appropriate action to correct any shortcomings identified in its fiscal accounting by an audit or other financial review.

Budgets must include enough resources to keep hardware and software updated and secure, as well as to update and maintain any technology tools used by lawyers, staff, and self-represented litigants sponsored by the organization. Technology budgets must be proportional to the size of the budget and staff. Because technology changes rapidly, the budget should contain a reserve for unexpected technology changes to core tools used by the organization.

A legal aid organization 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 ensure the highest level of service from its auditors. It should establish an active audit and/or financial oversight

[26] The whistleblower protections and document destruction provisions in the Sarbanes-Oxley Act apply to non-profit corporations in certain limited circumstances. *See* 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).

committee[27] and should periodically solicit bids from auditing firms to perform the annual financial audit.

The governing body should hire auditors who are familiar with the special audit requirements that apply generally to non-profits and are capable of meeting the specific audit requirements imposed by the organization's funders. The auditing contract should establish the work the auditors will perform and should specify in detail the particular requirements imposed by the organization's funders. The contract should include the maximum cost for the audit and should require the auditor to submit a timely report, usually within 90 days of the close of the fiscal year.

On receipt of the financial report, the governing body, or the governing body's audit committee if one has been designated, should meet with the auditors to discuss the findings, the recommendations for responding to identified problems, and the suggestions for improving and updating the organization's fiscal systems. The audit committee should report to the full governing body, which has ultimate responsibility for the organization's fiscal health.

[27] The American Institute of Certified Public Accountants' offers an Audit Committee Toolkit: Not-for-Profit Organizations (Third Edition, 2015), https://competency.aicpa.org/media_resources/208301-the-aicpa-audit-committee-toolkit-not-for-profit-e.

STANDARD 1.1-4 ON RELATIONS WITH THE CHIEF EXECUTIVE

STANDARD

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

COMMENTARY

Skills Required of the Chief Executive

The legal aid organization's chief executive is the individual hired by the governing body to manage the organization's operations and carry out its policies. The person selected will have a decisive impact on the organization'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 organization's policies;
- An understanding of and sensitivity to the needs of clients, including problems unique to the organization's service area(s);
- 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 organization'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 organization's programs and operations, including technology;
- The ability to identify new funding opportunities and the capacity to raise additional resources to support the organization's operations; and
- The ability to encourage professional development and enhancement of leadership skills among the organization's staff.

No one person will fully possess all of these skills. Different skills may be more important for some organizations 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 organization's history, the stability of its finances and personnel, the organization's priorities, future plans, and the skills reflected in other members of the organization's management team. It is the job of the governing body to find a chief executive with those management skills best suited to running a high-quality organization. In most instances, the governing body will determine that the chief executive of a legal aid organization should be an attorney. The governing body, however, may determine that a non-attorney candidate meets the criteria established by

the governing body and would be the best candidate for the chief executive position. In such instances, the governing body should ensure that attorney-members of the organization's management are available to provide appropriate supervision to its practitioners.[28]

Recruitment and Selection of the Chief Executive

In selecting the organization's chief executive, the governing body should seek to recruit a variety of qualified candidates, including those of diverse backgrounds, such as persons with disabilities, and LGBTQ+ and historically underrepresented candidates. If the client community is made up mostly of communities of color, the leadership and staffing needs to reflect the communities being served. Qualified candidates may be recruited both from within the organization's current staff and from the outside the community. To identify qualified outside candidates, the governing body may engage in an effective local, regional, and national recruitment search, advertising the need for a chief executive 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 organization.

The governing body should conduct intensive background and reference checks on all finalists to evaluate their experiences and abilities to ensure they meet the established requirements of the job. Recommendations from relevant bar associations may help the governing body 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 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 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 which the next chief executive can be recruited.

[28] Standard 1.1-2 sets forth the prohibition on governing board members' interference in representation undertaken by the organization's practitioners. Similarly, a chief executive who is not an attorney should be prohibited from interference in the attorney-client relationships and professional judgment of the organization's practitioners.

The Relationship Between the Governing Body and the Chief Executive

A natural tension exists between the policymaking 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.

The chief executive typically has authority for the organization'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; and approval of significant litigation expenses, as well as administration of established personnel policies, including decisions on individual salaries, hiring, firing, and otherwise disciplining staff. The chief executive is also often the public face of the legal aid organization.

Other operational areas should define the division of authority between the governing body and the chief executive, including, for example, the hiring and firing of senior administrative and management staff and the purchase of major equipment. In other areas, such as fundraising, the responsibility will be shared by the governing body and the chief executive.[29]

The specific delineation of authority in all 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 the chief executive to make reports on a defined, periodic basis to the governing body on appropriate issues.

Oversight and Evaluation of the Chief Executive

The governing body should exercise continued oversight of the chief executive's work through ongoing review of the organization's operations and evaluations, conducted on a defined, periodic basis 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 or additional benefits.

The governing body should act directly, fairly and in a timely manner when it detects serious problems in the chief executive's performance. The chief executive should be advised of the nature of any perceived deficiencies and of the steps, if any, that the

[29] *See* Standard 1.1-6 on Resource Development.

governing body determines are necessary to cure them. If appropriate steps are not taken to cure the deficiencies that have been identified and the governing body determines that it is in the organization's best interest to remove the chief executive, the governing body should do so in a manner that minimizes trauma to the organization, its staff, or its clients. Failure to act in a timely manner to remove an ineffective chief executive may leave the organization 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, correction. As personnel discussions, these evaluations should remain confidential in order to support the chief executive who may remain in that role following the evaluation.

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

STANDARD

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

COMMENTARY

General Considerations

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

- Members with special knowledge of the environment in which the organization operates can provide valuable insight to committees or task forces of staff and others working on long-term strategies to deal with major issues affecting client communities.
- Members may have skills or knowledge about the law or the community that can be used to train the organization'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 organization.
- Members with particular knowledge of client communities can help design and establish the organization's service delivery system. This is particularly important when adopting new technologies that provide basic services, like triage, online intake, information and referrals, online dispute resolution, and the like.
- Members can engage in legislative or administrative advocacy on behalf of the organization when not otherwise prohibited.
- Members may be aware of potential donors or other resources that could support the legal aid organization.

Community Relations and Advocacy for the Organization

The governing body and its individual members have an opportunity to assist the organization 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 client communities that can prove useful in changing their attitudes toward the organization and client communities. Members may also have relationships with legislators or other government officials that can be helpful in advocating on behalf of the organization or its clients.

Client-eligible governing body members often serve as effective spokespersons for the organization within the community and for the communities they represent. Organizations are also encouraged to develop relationships with academics who supplement the substantive expertise of the organization, as well as bring value skills like data analytics; diversity, equity, and inclusion (DEI) training; design; sociology; and evaluation skills. This can be particularly important given the lack of public awareness of the role played by legal aid organizations for their clients. The primary responsibility of the organization is to represent the interests of its clients. The organization’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 organization to criticism. Governing body members have a responsibility in such circumstances to use their influence both publicly and privately to defend the organization’s role as an advocate and to help educate the public about the organization's mission.

STANDARD 1.1-6 ON RESOURCE DEVELOPMENT

STANDARD

The governing body should ensure that the legal aid organization engages in resource development and should directly assist in those efforts.

COMMENTARY

General Considerations

Demand for legal assistance for communities served by organizations almost invariably outstrips the resources available to meet the most compelling civil legal needs of those communities. An organization must pursue assertive strategies to expand available financial resources to meet these needs. The governing body has several key roles to play in helping the organization 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 in the reputation of the organization as being effective. The more stature and credibility an organization has as an institution, the more successful it is likely to be in attracting and retaining funding from private organizations, government agencies, and individual donors. The governing body should also ensure that the organization's management complies with all grant and contract requirements so that existing funding is preserved.[30] A reputation for meeting contractual requirements of current funding is one critical component for success in obtaining additional resources.

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

[30] *See* Standard 1.1-1 on Governing Body Oversight of the Organization.

Governing Body Responsibilities

Planning. The governing body should adopt a policy that encourages the organization to obtain new resources to support its work. It should ensure that the organization's strategic planning includes a component for increasing its financial resources.[31] 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 engage in fundraising efforts in a variety of ways, including helping conceptualize and write grant proposals, working cooperatively with other organizations in developing joint proposals, and making appropriate contacts with potential funding sources.

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

It is important that the governing body assess organizational budgets with an eye toward revenue diversity to avoid overreliance on a particular source, as well as to provide adequate resources and support for diversification of funding.

Establishing clear responsibilities for members of the governing body and the staff. Many resource development tasks will fall to the staff of the organization. Other responsibilities will be assigned to the governing body or to individual members of the governing body. The organization should clearly delineate staff and governing body 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; and
- Ensuring sufficient staffing and other capacities to identify, procure, and implement grants and grant-funded projects.

Oversight of the organization's resource development. The governing body should oversee the organization's resource development efforts to ensure that it accomplishes

[31] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

its fundraising goals and the resources obtained help the organization to accomplish its mission. Resource development plans should tie fundraising to the organization's strategic plan or to new initiatives consistent with its mission. The resources obtained should not dilute the organization's core capacity by taking on projects that are not related to addressing the most compelling needs of the communities it serves. The core capacity can also be diluted if the organization takes on a large number of small projects whose funding does not cover administrative support and other staff costs. Decisions to pursue funding for these smaller projects should include consideration of both the tangible and intangible benefits to the organization, the sustainability of such projects, and whether they may lead to future larger funding opportunities.

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 organization, through direct involvement in fundraising and personal contributions to support the organization's work. The organization 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 organization's resource development efforts, whether through contacts with potential donors and funders, or through active engagement in articulating the needs of the communities the organization serves.

Depending on the organization'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 organization for annual giving campaigns, direct mail contributions, special events such as annual dinners and auctions, major gifts and/or planned giving. Individual members might also be asked to use their contacts in government, corporations, foundations, and other potential funding sources to support solicitations of grants and contracts. Such contacts should be in accordance applicable law and ethics rules.

The organization should also clearly set forth its expectations that members of the governing body make their own personal financial contributions to the organization to the extent of their capacity. The organization 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 governing body members of organizations they fund. Consider the equity of this request and its impact on all governing body members before implementing such an obligation.

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 communities served by the organization.[32] A separate fundraising group can supplement the capacity of the governing body by recruiting persons who would be effective in raising resources for an organization, but who would not be interested in a policymaking role, or might not meet the requirements of major funding sources regarding the makeup of the governing body.

[32] *See* Standard 1.2 on Governing Body Members' Responsiveness to the Communities Served.

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

STANDARD

A legal aid organization should have a governing body whose membership and manner of operating are responsive to the communities served.

COMMENTARY

General Considerations

An organization's governing body has a responsibility to be aware of the needs of the communities that the organization 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 organization, including oversight,[33] resource development[34] and serving as a resource for the organization.[35] All members should understand the broad needs of the communities served.[36] To the extent practical, the governing body should have members who are representative of the varied interests of those communities. The governing body should operate in a way that fosters effective participation by all its members, so 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 organization serves. Diversity on the governing body protects against domination by a single group, ensures that the needs of important subgroups of 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. Its membership should include persons who reflect the broad diversity of the community served by the legal aid organization 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 organization's services. Organizations that base eligibility for services on income should include governing body members who are or have been financially eligible for them.[37]

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[33] *See* Standard 1.1-1 on Governing Body Oversight of the Organization.

[34] *See* Standard 1.1-6 on Resource Development.

[35] *See* Standard 1.1-5 on Serving as a Resource to the Organization.

[36] *See also*, Standard 1.2-1 on Individual Members' Commitment to the Organization.

[37] *See* Standard 1.2-2 on Board Members from the Communities Served by the Organization.

All organizations will find a variety of interests in the communities for which the organization is responsible. Some organizations, particularly large ones, serve diverse communities and it may not be possible for the governing body membership to include representatives of all these communities. Other organizations may focus on offering assistance in a limited, substantive area or to a specific population, but even they are likely to find 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 population. It can also improve the organization'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 organization and who can bring their professional experience and perspective to inform policies that affect the organization's operation as a law office. The governing body members, in particular its lawyer members, should be aware of any professional conduct rules that apply to lawyers' participation on legal organization's governing body with both attorney and lay members.[38]

The governing body may also benefit from including among its membership persons who support the mission of the organization and come from places 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 which individuals to include on the governing body should be made in the context of the particular needs of the organization and the special skills or knowledge that would be beneficial to have on the governing body. The governing body should include members who can assist with fiscal oversight[39] and resource development.[40]

Each governing body member's knowledge of the community's interests should inform that person's participation in decision-making. At the same time, each member should recognize that the primary fiduciary duty of a governing body member is to the organization rather than the 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 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 organization that are not represented on the governing body.[41]

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[38] *See* MRPC R. 6.3.

[39] *See* Standard 1.1-3 on Fiscal Matters.

[40] *See* Standard 1.1-6 on Resource Development.

[41] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

For practical reasons associated with the size of its governing body, an organization 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 governing body's membership. It is important that all members be individuals who are sensitive to the overall needs of the communities, who are supportive of the organization's mission and who recognize the importance of the organization operating in a manner that reflects an understanding of race equity, cross-cultural communication, and cultural humility.[42]

It may be impractical for a legal aid organization that is part of a larger organization that 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 organization should nevertheless strive to find other means to seek input from the communities it serves. It may, for instance, create an advisory committee that reflects the community's diversity. The staff of the organization should also work directly with organizations and individuals who represent the diversity of the communities served.[43]

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 organization should work cooperatively with bar associations and other groups from which members may be drawn to keep them informed of the organization's activities and to encourage the identification of individuals who can serve effectively as governing body members.

Governing body members from rural areas. Organizations 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 providing services in rural areas is often difficult and policy issues arise that affect rural service delivery, including budgeting, priority setting, and approval of large capital purchases, such as technology. The organization should cultivate relations with local community groups serving rural areas to assist with identifying and selecting community members of the governing body. Similarly, the organization should maintain positive relations with local bar associations in rural areas that may be a source of appointments of attorney members.

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[42] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility; Standard 4.5 on Staff Diversity.

[43] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

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 responding to communities calls for engagement of diverse viewpoints. The organization 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 to which all members become appropriately involved. Many aspects of the governing body's manner of operating will affect how fully members participate.

Technology support. Technology, such as the use of board portals, should be used to allow governing body members to better serve the organization and interact with each other. Such portals facilitate engagement and the ability to review materials on demand. Organizations should be mindful that some members, such as those who are client-eligible or who may be retired, may not have access to necessary technologies personally or through their employment, so the organization should accommodate their technology needs in order to ensure equal participation. For governing body members who do not prefer English as their primary language, the organization should provide on-time language accommodations, during meetings and in the sharing of documents so they can vote on matters and fully participate. Machine translation of board materials is not acceptable, as it is not accurate and or effective.[44]

Remote participation. Organizations that cover a large service area may find that members of the governing body from more distant areas are difficult to recruit and even more difficult to keep involved. Often input from such individuals is particularly important because of the special needs of such remote areas. Allowing for participation by conference call or video conferencing, and providing the tools to access these systems, can be essential to the ongoing participation of some members. Rotating locations of meetings, if feasible, to different parts of the organization's service area may help significantly in maintaining interest and participation by members from across the service area.

Operation in a culturally competent manner. The governing body should not only be sensitive to the responsibility of the organization to operate in a manner that reflects the values of race equity, cross-cultural communication, and cultural humility, 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 should engage in training to increase its cultural competence and to enhance good communication.[45]

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[44] *See* Standard 5.7 on Implementing Language Justice.

[45] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility; Standard 1.2-3 on Training of Members of the Governing Body.

Maintaining engaged participation by members of the governing body. One aspect of effective governance is for the governing body 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 with the need for new ideas and fresh outlooks.

A governing body can use several means to strike an appropriate balance to ensure 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 policymaking. 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 organization 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 initially be invited to serve on committees or advisory groups and learn about the organization'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's ability to respond effectively to the communities the organization serves, no position should be left de facto vacant because the individual is disengaged. Some organizations have term limits requiring members to leave the governing body after serving a specified period of time. Term limits have the virtue of guaranteeing that new faces will be brought to the governing body at established intervals. On the other hand, term limits can require retirement of key members of the governing body who have invaluable insight into the operations of the organization and intimate knowledge of how to respond to the legal needs of persons being served.

No best way exists to ensure that a governing body will maintain the enthusiastic, engaged participation of all its members and that it 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 a governing body depends upon the specific needs of the organization. Most governing bodies consist of 15 to 21 members, although some organizations operate with governing bodies as small as nine individuals and as large as 35 or more. A governing body that is too large risks 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 organization's 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 so they can make appropriate recommendations for action by the full governing body. It should also have permanent committees that oversee key aspects of the organization's operations, such as audit and finance,[46] personnel, resource development,[47] and planning.[48] Membership on committees should include representatives of the community served as well as attorneys.

[46] *See* Standard 1.1-3 on Fiscal Matters.

[47] *See* Standard 1.1-6 on Resource Development.

[48] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

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

STANDARD

All members of the governing body should be committed to the mission of the legal aid organization and devote adequate time to meet governing body responsibilities.

COMMENTARY

General Considerations

The governing body needs to make prudent decisions that are responsive to the needs of communities being served in order to deliver effective legal assistance. This calls for its members to support the mission of the organization 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 U.S. 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 client communities for effective legal assistance are met.

Effective communication with the client and legal communities. Members should recognize the importance of the organization communicating effectively with the client population regarding how best to serve the client communities.[49] Governing body members should be open to communicating with representatives of the client community and to open discussion among all members of the governing body. All governing body 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 organization and the legal community to develop a more informed understanding of the legal needs of communities being served and to encourage participation by members of the bar in representation of clients.[50]

Commitment of adequate time and resources. Membership in the governing body of a legal aid organization 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

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[49] *See* Standard 1.3 on Governing Body Communication with Client and Legal Communities.

[50] *See* Standard 4.2 on Delivery Structure; Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar; Standard 4.8 on Relations with the Organized Bar.

organization's mission, how it operates, how it is funded, and what the legal requirements are that govern its operation. It also calls for each governing body member to learn about the important characteristics of the communities served by the organization and the legal problems they face.[51] Such knowledge and awareness is important to the governing body making appropriate decisions regarding service delivery, budgeting, financial management, and other pertinent matters.[52]

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 organization's resource development strategies.[53]

[51] *See* Standard 1.2-3 on Training of Members of the Governing Body.

[52] *See* Standards 1.1 through 1.1-6 on Overall Functions and Responsibilities of the Governing Body.

[53] *See* Standard 1.1-6 on Resource Development.

STANDARD 1.2-2 ON GOVERNING BODY MEMBERS FROM THE COMMUNITIES SERVED BY THE ORGANIZATION

STANDARD

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

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 organizations, a primary criterion for eligibility for service on the governing body will be the applicant's financial means. In order to have governing body members who understand the challenges of poverty, the governing body should include members who are or have been financially eligible for the organization's services. Other organizations may target a particular population, such as the elderly, persons with disabilities, or specific substantive issues such as access to health care, without regard to the financial means of the persons served. Such specialized organizations should, if practicable, include members of the population served on their governing body.

Supporting Full Participation by Representatives of the Client Community

The governing body should be aware of potential barriers to full participation by representatives of the client community and should take steps to help overcome those barriers. Governing body members who have experienced poverty or are from a client community that the organization is serving will have insight and knowledge that professional members of the governing body may lack. Some client 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 germane to decisions that the governing body needs to make. As a result, the organization and the governing body must act to overcome any impediments to full communication among governing body members.

A number of strategies may enhance effective communication and full participation on the governing body by all members. The organization should offer orientation and ongoing training of community members about its operations, explaining the legal system, particularly as it affects client communities, and discussing issues that affect the delivery of legal services.[54] Some organizations hold separate meetings of community members before regularly scheduled governing body meetings in order to

[54] *See* Standard 1.2-3 on Training of Members of the Governing Body.

answer questions and ensure that all members are fully prepared to participate and present their insights during the governing body meeting.

The organization should consider including members of the governing body in its cultural competence trainings, which are designed to facilitate better communication across cultural lines.[55] Social events that stimulate informal interaction among governing body members can also increase familiarity and trust that foster ease of communication in formal meetings.

A person's lack of economic resources may hinder full participation in the governing body if a person cannot pay for childcare while attending meetings, take off work without losing wages, or afford either the necessary technology tools or transportation to attend meetings. The organization should adopt clear policies that provide for reimbursement or other means of paying reasonable expenses associated with client representatives' participation on the governing body and should schedule governing body and committee meetings to facilitate all members' attendance, and the policy should set forth the criteria to determine eligibility for such compensation.

Other Means for Involvement of Client-Eligible Persons

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

[55] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

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

STANDARD

The legal aid organization should ensure 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 organization should, therefore, strive to ensure 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 organization's structure, general operations and special programs;
- National and local sources of funding for legal aid, including local/statewide cases or laws (such as a right to counsel law) that may impact the provision of and funding for legal aid in the region;
- The nature of the legal services offered by the organization;
- Important characteristics of the client communities served by the organization;
- Any limitations or requirements imposed on the organization's operations by statutes, rules, regulations, funders, contracts, and lawyer and other professional or organizational ethical rules or obligations;
- The role, structure, and functioning of the governing body and its committees as well as that of any client or other advisory groups;
- Training on basic technology concepts and how to use technology safely and stay safe online, as well as training on all the technology tools and applications the organization's program uses and sponsors, and how to report problems and concerns with technology tools and applications. These trainings could be available online or in-person, as appropriate.

Generally, the organization should offer training to its governing body members as needed to be sure they have the skills and substantive knowledge needed to effectively participate in the governing body. Appropriate topics for training may include: legal requirements governing the operation of the organization; budgeting and accounting oversight; fundraising and resource development;[56] developments in legal services delivery and pertinent substantive legal issues; communication and meeting skills; cultural competence in order to increase the governing body's familiarity with issues it faces while serving diverse, client communities and to support effective communication

[56] *See* Standard 1.1-6 on Resource Development.

with the client community;[57] the content of these Standards; and other subjects related to effective governing body operation.

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

[57] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

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 of interest.

COMMENTARY

General Considerations

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.

No member of the governing body should participate in a decision in which the member has a personal, professional, organizational, or institutional interest in that is in conflict with those of the legal aid organization or its clients.

A conflict of interest may arise in a variety of ways. Some examples of conflicts are:

- When a governing body member has a personal or pecuniary interest in a matter that is under consideration by the organization.
- When a member is employed by or associated with an organization that has a competing or adverse interest with that of the organization.
- When a member has a personal or institutional interest that is in conflict with interests of the communities served by the organization.
- When a member, particularly a lawyer member, represents a client whose interests are adverse to the interests of a client of the organization, although the clients are not direct adversaries in a particular case.[58]
- When a lawyer member represents a client who is a direct adversary of a client of the organization in a specific case.[59]

The organization should adopt policies that ensure that any conflicts are effectively managed. The policies should define what constitutes a conflict of interest, and for those governing body members who are attorneys, the policies should be consistent with the ethical requirements and the law governing conflicts of interest in the jurisdiction in which the organization operates.

The policy should also provide that the governing body instruct its members regarding what to do in the event that a conflict does arise. Generally, a conflict must be

[58] *See* MRPC R. 6.3.

[59] *Id.*

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 organization by any indirect means, such as participating in decisions regarding priorities, allocation of resources, or the organization's structure. The policy should also prohibit any governing body member with a potential or actual conflict from informally seeking to influence the conduct of legal work consistent with Standard 1.1-2,or the operation of the organization.

Conflicts may arise unexpectedly and 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 in the future. Rather, the policy should provide guidance for management to anticipate potential conflicts and suggest 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.[60] 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 organization. Such conflicts can arise unexpectedly in the normal course of the organization's operation, such as when the lease or purchase of real property may affect a governing body member's personal interests. In some instances, disclosure of the conflict and withdrawal from any discussion or voting on the matter may be adequate to address the conflict, but jurisdiction-specific rules pertaining to conflicts of interest—and, depending on context and circumstances, perhaps other professional conduct rules as well—may apply and must be followed to appropriately resolve the conflict.[61].

[60] *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar; Standard 4.8 on Relations with the Organized Bar.

[61] *See, e.g.,* MRPC R. 6.3.

Organizational conflicts between the organization and competing entities. Situations may arise 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 organization. These conflicts may arise, for instance, when the organization and another organization with which the governing body member is associated are competing for the same funding. Often these conflicts may 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, such as a long-term fundraising strategy or a confidential business plan, proper protection of the interests of the organization may call for the member to resign from the governing body.

Institutional conflicts with communities served by the organization. Circumstances may arise where a governing body member has a professional interest that is in conflict with the interests of the communities that the organization 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 an organization that seeks to challenge those laws or policies on behalf of 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 the interests of the client community in that neighborhood that wishes to preserve the area for affordable housing. Institutional conflicts with the 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 organization's conflict of interest policy and applicable law and professional conduct rules to which governing body members are subject.

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 organization 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 organization'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 policymaking role with the institution with the adverse interest and indicia of the individual's support of the overall mission of the legal aid organization.

Concerns Specific to Attorney Members of the Governing Body

Professional conflicts with the organization's clients. A conflict may arise when a governing body member represents an institution that has interests that are adverse with the interests of a particular client of the organization, although the organization's

client and the governing body member's client are not adversaries in the same case.[62] 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 organization is suing a different financial institution in a predatory lending case.

The responsibilities of the governing body member may be governed in such circumstances by the ethical requirements in the jurisdiction in which the member is part of a profession subject to such requirements. Should that not be the case, the organization's conflicts policies should address this issue. As with general institutional conflicts, the question arises as to whether a person with such a conflict should be invited onto the governing body, if the conflict is known at the time the 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 lawyer member of the governing body against a client of the organization. Occasionally, an attorney member of the governing body represents a client in a case where the adversary is a client of the organization. Generally, because the attorney member of the governing body does not have an attorney-client relationship with clients of the organization, there is not an impermissible conflict under pertinent ethical rules.[63]

While such representation may not create a multiple-representation conflict, there could be a material limitation conflict,[64] and the organization's conflict-of-interest policy should include provisions to manage such situations.[65]

The policy should clearly prohibit the attorney acting as a governing body member from taking any action to influence or interfere with the conduct of legal work pursued by a practitioner of the organization on behalf of its client.[66] There must be no interference, directly or indirectly, on the practitioner's representation of the organization's client and

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[62] For governing body members who are lawyers, s*ee, e.g.,* MRPC R. 6.3 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."

[63] Paragraph 3 of the Comment to MRPC R. 6.3 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* SCEPR Formal Op. 334 (1974).

[64] SCEPR Formal Op. 345 (1979).

[65] Paragraph 2 of the Comment to MRPC R. 6.3 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."

[66] *See* Standard 1.1-2 on Prohibition Against Interference in the Representation of Clients.

the governing body member must not have access to any confidential information about the case.

The practitioner representing the organization's client has an obligation to ensure that a governing body member's representation of an adversary does not interfere with the practitioner's independent professional judgment on behalf of the client. The organization 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 informed consent to the representation.

STANDARD 1.3 ON GOVERNING BODY COMMUNICATION WITH CLIENT AND LEGAL COMMUNITIES

STANDARD

The governing body should operate in a manner that invites communication with the client about matters unrelated to the subject matter of the representation and legal communities.

COMMENTARY

General Considerations

A legal aid organization is an important part of the legal system carrying out an essential function by responding to the needs of client communities for civil legal assistance. It will generally be more successful in establishing its credibility in both the client and the legal communities in which it operates if its governing body functions openly and invites communication with those communities. Communication of information about with both communities will also enhance its capacity to adopt policies that increase its effectiveness of serving client communities and help it integrate the resources of the bar into its delivery efforts.[67]

Communication with the Legal and Client Communities

The governing body should strive to operate in a way that encourages communication with the legal and client communities. Its members should maintain individual contacts with groups with which they have connections. In addition, the governing body should ensure that the organization informs the legal and client 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.[68] Communications should include information on the organization'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

The governing body may invite input from communities affected by its decisions in several ways. Some interaction will take place in meetings that are designed to solicit input before significant decisions are made about the operation of the organization. Some such meetings may take place in the context of long-term planning about the focus of the organization's legal work and may involve the organization's staff and

[67] *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

[68] *See* Standard 4.8 on Relations with the Organized Bar.

others.[69] Sometimes interaction may occur in a regular or special governing body meeting. The governing body may also invite outside persons to participate on committees and task forces to get their insights about important issues facing the organization.

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 the organization's operations and issues. Meetings should be held at a time and place that facilitate the participation of governing body members and others whose input is being sought.

A complete agenda should be made available prior to all meetings and should sufficiently describe topics 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.

[69] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

SECTION 2: STANDARDS FOR LEADERSHIP AND MANAGEMENT

STANDARD 2.1 ON BOARD GOVERNANCE

STANDARD

Overall responsibility for the conduct, effectiveness, and impact of the legal aid organization rests with its board of directors, and the board must embrace that responsibility.

COMMENTARY

As indicated in Standard 1.1, the governing body (which may also be known as the governing board or the board of directors) creates a clear mission for the legal aid organization; selects and supports the executive director; engages in strategic organizational planning with leadership and staff; determines, monitors, and strengthens programs and services; makes major policy decisions; holds organizational management accountable for effective performance of responsibilities; develops and maintains resources for the organization; and promotes public awareness of the organization in the community to enhance the organization's overall effectiveness and influence.[70]

[70] *See also* Legal Services Corporation Performance Criteria, Performance Area Four, Criterion One: Board Governance,http://www.lsc.gov/media-center/publications/lsc-performance-criteria. Other helpful resources may be found at BoardSource, www.boardsource.org.

STANDARD 2.2 ON EFFECTIVE LEADERSHIP

STANDARD

Legal aid organizations must have effective leadership that establishes and maintains a shared sense of vision and mission. Organization leadership emphasizes and models teamwork, transparency, excellence, and innovation, along with commitment to, and achievement of, the organization's goals and objectives. Organization leaders must also ensure that the many systems required for a complex organization are in place and functioning.

COMMENTARY

General Considerations

Good leadership and strong internal operations are vital to organizational effectiveness. Organizational instability and problems, in contrast, distract from, reduce, and can ultimately destroy effective advocacy for the legal aid organization's clients and communities, not to mention organizational existence. As indicated in Standard 1.1, the most important responsibility of the governing body, collectively and individually, for a legal services organization is the selection and support of an effective leader and/or leadership team. The following commentary presents and discusses many of the organization's—and its leaders'—responsibilities, and categorizes those that are critical, unavoidable, and legally required with the command "must." In the interest of recognizing that some small organizations do not possess the financial and human resources that they need, responsibilities that do not rise to critical, unavoidable, and legally required will be characterized with the recommendation "should."

Strategic Plan

The governing body should develop and implement a concise, comprehensive, and compelling strategic plan built around its mission. The plan should detail aspirational goals, measurable objectives and strategies, key performance indicators (KPIs), timelines, revenue strategies and projections, and indicate the persons or teams responsible for achievement. The governing body should deploy resources strategically to best serve organizational goals and constituencies in case acceptance, with transparency in the factors considered and how frequently the factors are evaluated to accommodate changing demographics and legal needs. The organization's case acceptance policy should allocate resources to the legal problems identified as priorities in the organization's planning process and should control demands on the organization's resources and its practitioners' available time to ensure high-quality assistance provided to persons served.[71] Leadership staff should present quarterly one - to three-page dashboards using graphs, icons, and visuals to all board and staff

[71] *See* Standard 6.1 on Ensuring Delivery of High Quality Legal Services.

members that highlight KPIs around objectives for case and project outcomes, financial health, and revenue metrics.

Technology Infrastructure and Administration

Organizational leadership is responsible for ensuring the organization obtains and maintains an appropriate technology infrastructure as recommended in Section 3.10 on "Effective Use of Technology." They should provide up-to-date technology tools for practitioners, outside practitioners, advocates, and administrative staff that maximize efficiency and speed of operations, effectiveness in meeting demands, and confidentiality and data security of client and administrative information. Many state supreme courts have amended their professional conduct rules relating to lawyers' competence obligations to provide that lawyers' obligations to keep abreast of changes in the law and its practice includes the risks and benefits of relevant technology and that lawyers have an obligation not only to take reasonable steps to avoid the inadvertent and unauthorized disclosure of confidential client information, but also unauthorized access to it. [72] The organization's leadership must ensure that those standards are met by practitioners. The organization's employees who are accessing confidential client or organizational information online, and are using their personal devices to do so, present additional opportunities for unauthorized disclosure, and the governing body should put in place policies to address that so its practitioners can meet their ethical obligations.[73]

An organization should have internal file maintenance and calendaring systems and clear policies to help manage its legal work, note important deadlines, check for potential conflicts of interest, and properly account for client trust funds.

Organizations must have technology policies advising employees how to adequately protect client data on their work and personal devices and when communicating with people outside of the organization, including on use of public Wi-Fi, as well as how to respond in the event of a security breach. [74]

The technology tools available to legal aid organizations are more common and prolific than ever before. Legal aid organizations need to do their due diligence before acquiring or using such tools, and they should also develop their own standards for the acquisition of such technologies. Factors to be considered should include security, privacy, record retention, data sharing, ADA accessibility, feedback loops, transparency and bias issues relating to artificial intelligence tools, and willingness of the company that creates the technology to modify their tools based on the organization's input or end-user feedback input. Practitioners also need to be able to describe to clients, when relevant, the

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[72] *See* MRPC R. 1.1, Comment 8 and MRPC 1.6(c).

[73] *See* SCEPR Formal Opinion 477R (2017).

[74] The Legal Services National Technology Assistance Project (LSNTAP) has many resources and trainings available to support legal aid organizations with technology-related issues, including cyber-security policies. *See, e.g.,* LSNTAP Webinar, Managing Security Risks, https://www.lsntap.org/node/187/webinar-managing-security-risks.

benefits and risks of using those tools, including those that might pose a risk or threat of harm if used by clients.[75]

Financial Administration

The organization's financial policies and procedures must comply with Generally Accepted Accounting Principles (GAAP), requirements of funding sources, and federal, state, and local government regulations. The organization must have internal controls and effective budget planning, monitoring, and reporting. Staff and board financial leaders should develop multi-year budget forecasts, approved by the board, which include detailed income and expense projections, and review these projections regularly with the board of directors' finance committee. The board should also have financial reserve policies requiring prudent reserves for each year of the multi-year budget forecast.

An important aspect of financial administration is the management and protection of client funds; the organization's practitioners and outside practitioners have duties to comply with applicable professional conduct and other court rules and laws to protect client and third party funds and property.[76] As the organization falls under the definition of law firm in the Model Rules of Professional Conduct[77] its lawyers must ensure that the organization's funds are not commingled with client funds. The organization should establish separate client trust accounts for money received from or on behalf of clients or third parties. Examples include funds deposited by a client toward possible settlement (e.g., for payment of past due rent), or funds received from a settlement that are due to a client. The organization should participate in the Interest on Lawyer Trust Accounts program that exists in each state.

The organization 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.[78] An organization should have a system to ensure that all funds belonging to the client and being held by the organization are returned to the client when appropriate and follow applicable state laws regarding the disposition of funds that cannot be returned because the client cannot be located. Assuming no costs are advanced by the client, costs paid by an organization on behalf of a client should be paid from the organization's budget.

Revenue and Fundraising

[75] *See* National Network to End Domestic Violence, Technology Safety, https://www.techsafety.org/appsafetycenter.

[76] *See* MRPC R. 1.15, and ABA Model Rules on Client Trust Account Records

[77] *See* MRPC 1.0 (c).

[78] *Supra* note 73.

Organizations should create and implement grant and fundraising plans that support the strategic plan and effectively leverage all appropriate revenue domains—individuals, corporations, foundations, government at all levels, the United Way, Area Agencies on Aging, and faith communities—using dedicated staff and effective volunteers. Attorney's fees should be sought when available and appropriate, and staff should be given clear guidance on when and how to seek and negotiate attorney's fees. To the extent that clients are asked to contribute to case expenses or the costs of representation within applicable law and funder requirements, the practice of charging and collecting fees must not influence the mission, priorities, case selection, and ethical and moral responsibilities of the organization and its attorneys regarding their clients.

The organization should ensure that adequate staff capacity exists to identify potential funding sources 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 the necessary technology. Large organizations should consider establishing a dedicated resource development department to work with the governing body, the chief executive, and others responsible for fundraising. Smaller organizations may want to retain a fundraising consultant to work with staff members who are principally responsible for the organization's fundraising. Very small organizations 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 organizations of any size.

The organization should be aware of available sources of funds and the organization's resource development staff should make deliberate choices among potential funding sources and strategies to tap those most likely to produce income to support the organization's work. 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 organizations and the organized bar.[79] Some fundraising efforts may be undertaken jointly with others, for example, to obtain funds that may be shared among a group of participating organizations or to establish a multi-organization project to offer services.

Human Resources Administration

The organization should promote organizational excellence through competitive salaries and the recruitment, management, and retention of a high-performing, diverse workforce that achieves its mission and goals.[80] The organization develops and communicates sound policies and procedures that ensure compliance with applicable federal, state, and local human resources laws and has a knowledgeable, accessible, and professional staff in the areas of recruitment and retention, training, professional

[79] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

[80] *See* Standard 4.5 on Staff Diversity.

development, compensation and benefits, performance appraisal, and the diversity of client populations and languages.[81]

Training for Intake Personnel

Standard 6.6 addresses training for all staff members. Personnel involved in intake should receive special attention in training, including technology systems, trauma-informed care, and interviewing skills, because they are often laypersons who conduct each organization's vast majority of client and potential client interactions. Their effective interviewing of applicants and operation of technology systems are vital to the timely processing of applications and provision of appropriate triage, advice, brief service, and internal or external referral. Training should emphasize the importance of not providing legal advice (for non-attorney personnel) and reinforce the importance for all personnel of treating applicants with dignity and respect. Feedback opportunities for applicants should be clearly visible and enabled. Feedback will be important if intake and triage, whether based on trained personnel or on rule-based decision tools and apps, are to operate correctly and quickly, and should identify any biases or problems to be corrected.

Overall Management and Administration

All aspects of organizational administration should be well-managed; these aspects include management structure, processes, and systems to ensure compliance with all funder requirements and state and federal law, capacity to address problems quickly and effectively, robust intra-staff and staff-management communications, effective administrative procedures, allocation of appropriate resources to management functions, and evaluations on a defined periodic basis of administrative operations.

[81] *See* Standard 5.7 on Implementing Language Justice.

STANDARD 2.3 ON PROMOTING LANGUAGE JUSTICE

STANDARD

A legal aid organization must ensure language justice for all legal services clients, including language assistance that incorporates different tools and strategies (e.g., a bilingual staff, interpretation, translation, signage, and outreach). The organization's management should evaluate whether all language groups have meaningful and equitable access to critical services, programs, and civic participation, including service on the organization's governing body.

COMMENTARY

General Considerations

Linguistic inclusion and language accessibility affects every part of the organization's interactions with its client communities. Staffing, planning, training, use of interpreters, program evaluations, governing body composition, and community interactions should all reflect careful assessment of and response to client population language needs. The organization's leaders should ensure that the organization complies with Standard 5.7.

Hiring

Staffing should reflect the diversity of the communities served. Recruitment and retention of bilingual staff is critical in providing improved language access to non-dominant language users. Bilingual ability should be highly valued in hiring for all positions involving public contact. These positions should require proficiency in languages commensurate with the needs of local communities. To enhance its capacity for bilingual representation, a legal aid organization should make fluency in pertinent languages a preferred or, where appropriate, required skill when evaluating applicants for employment. Organizations should be certain to periodically assess the written and spoken linguistic proficiency of staff members who communicate directly with clients in a non-dominant language and compensate them appropriately.

Responsibilities to Promote Language Justice

In planning its service delivery methods, a legal aid organization should identify contact points where language barriers may exist for persons seeking and receiving services, and it should develop strategies, plans, and protocols to respond. Some means of delivering services, such as centralized/coordinated telephone or online intake, the availability of online information, and pro se clinics, may be of little use to persons who use non-dominant languages 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 non-dominant language users are addressed by the organization, as are issues of clients who are proficient in English. Organizations should consider targeting outreach to underserved language populations and developing partnerships with community-based organizations that serve such groups. Furthermore, the non-profit law firm or organization should have a policy of adapting materials to plain language before translation and ensuring that translated materials are readable, understandable, and accessible by community members. Organizations should go beyond the default of having services materials in English and Spanish only, as many other language groups are often significant, but excluded from language services.

The organization should budget adequate resources to meet the needs of persons who use non-dominant languages. This means that the organization must have systems to accurately track how much is expended on interpretation and translation services (language assistance services) so that the organization can include language assistance services as a line item in grant proposals and attorney fee requests when applicable, and when assessing budget needs for the upcoming fiscal year. When these costs are not anticipated, resources may be unavailable for staff to provide adequate language assistance services.

The organization must have a clear protocol for how it will respond to the needs of those who do not use English as their dominant language and should train its staff in its proper application. Some legal aid organizations will operate in an area with few non-dominant language users who are not proficient in English. Such organizations should, nevertheless, have a protocol for responding to the needs of individuals who do not use English as their dominant language and are seeking services from the organization. Organizations must be aware of and abide by statutory provisions that exist under state and federal law that prohibit discrimination against persons based on English language ability when providing services and benefits.[82]

Training of Staff to Promote Language Justice

Staff should be trained in the fundamental importance of responding effectively to their communities' language needs and serving clients in their preferred language. This could include training on the organization's written plan for working with clients who do not use English as their dominant language. The organization should appoint a language coordinator or working group with the responsibility of bilingual/multilingual staff, language justice principles, legal mandates, language-specific vocabulary/grammar to enhance language skills, and language rights advocacy. Organizations must be certain

[82] *See, e.g.,* Title VI of the Civil Rights of 1964, 28 C.F.R. § 42.405(d)(1); Title III of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and their implementing regulations. *See also,* 2004 DOJ Agreement with Gregg Tirone Esq., https://www.ada.gov/tirone.htm. 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.

that staff communicating directly with clients in a non-dominant language have appropriate knowledge of legal terms. It is also very important that the organization's management ensures bilingual staffing is properly resourced in relation to demand to avoid having bilingual staff members imposed with excess workloads as compared to non-bilingual staff members.

Interpreter Training and Requirements

The organization must have ready access to qualified interpreters and translation services to supplement bilingual staff and staff interpreters/translators. Competent interpreting and translating requires individuals with a range of skills. They need to be proficient in both languages, be familiar with legal terms and their meaning, and understand their role as an interpreter/translator. Furthermore, they must understand the need for neutrality, accuracy, completeness, and techniques that facilitate effective communication. Translating and interpreting are different tasks and require different skills. Interpreters and translators also need to be aware that they are agents of the legal aid organization and are bound by its duty to maintain communication confidentiality. These objectives can be achieved by ensuring that the organization's interpreters and translators adhere to the Code of Professional Conduct authored by the National Association of the Deaf (NAD) and the Registry of Interpreters for the Deaf, Inc. (RID).[83]

Additionally, management should commit to best practices, including providing accurate and high-quality interpreting, with the ability to do so through the utilization of technology (onsite, video-remote (VRI) with a strong internet connection, and over-the-phone interpreting (OPI); hiring qualified, trained interpreters who are compensated fairly; and providing high-quality training to staff on working with interpreters and translation of vital documents. While on-demand remote interpreting services are essential to meet the needs of callers and walk-ins, interpreting services should be pre-scheduled whenever possible in order to ensure the best match with the interpreter's expertise and the demands of the assignment (e.g., needing interpreters with legal training), and to allow time to provide interpreters with materials so they can prepare appropriately before the assignment. Pre-scheduling also provides time for the organization to arrange a "variant check" call between the interpreter and client to confirm that they use mutually intelligible linguistic variants in advance of the appointment.

Avoiding use of ad hoc interpreters such as family members or minors is very important. The organization should not allow the use of minors as interpreters. The use of family and friends to interpret gives rise to serious risks that the interpretation will not be neutral, and that the interpreter will not fully understand or be able to translate the legal options available. Further, a practitioner who uses a client's family member or friend as

[83] The National Association of the Deaf (NAD) and the Registry of Interpreters for the Deaf, Inc. (RID), Code of Professional Conduct, https://drive.google.com/file/d/0B-_HBAap35D1R1MwYk9hTUpuc3M/view.

an interpreter should act consistently with their responsibilities under the Model Rules of Professional Conduct, including Rules 1.4 and 1.6, so that clients can understand any risks to privilege and confidentiality.

The organization must maintain a preference for in-person interpreting whenever feasible, unless there are other exigent factors, such as a public health crisis, and should have a plan for providing alternatives such as video interpreting or telephonic interpreting in those situations. Telephonic interpreting often loses the nuance and non-verbal aspects of communication and should not be a default unless no other alternatives are available.

Evaluation

The organization should evaluate, on a defined, periodic basis, its effectiveness in responding to its population's language needs. It should gather data regarding the languages used in the populations in its service area and by the persons it serves. The data should be used to identify emerging and underserved language groups, assist in prioritizing the languages most frequently encountered, and help the organization measure progress in responding to the various language groups in its service area. If significant language groups are identified that are not being adequately served, the organization should develop and implement a plan to address the deficiency. The organization should evaluate its plan annually by measuring changes in demographics, effect on services, response to language needs as they arise, response to unexpected languages, anticipated changes for the next year, and how to assess and measure service to clients.

Other Policies to Promote Language Justice

Organizations should establish relationships with local organizations with experience working with diverse communities and collaborate with trained interpreters and translators. The organization’s management should also determine specific strategies about how to respond to and ensure meaningful access at all points of contact. As noted above, the organization should appoint a language coordinator or working group with adequate time, capacity, and authority to perform these functions well.[84] If the language coordinator or working group does not have some degree of authority or ongoing support from leadership in the organization, staff may disregard the language access plan and protocols. Additionally, organizations should offer community education and information to client communities on their language rights and how to enforce them.

[84] For an example of duties of the language coordinator, *see, e.g.,* U.S. Department of Justice, Considerations for Providing Language Access in a Prosecutorial Agency at 22, https://www.lep.gov/sites/lep/files/resources/092111_Prosecutors_Planning_Tool.pdf.

STANDARD 2.4 ON STEWARDSHIP OF HUMAN RESOURCES

STANDARD

A legal aid organization 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 ensure high-quality representation and legal work, the organization should have lawyers in management positions assign cases and other legal work to those individuals who are authorized and best able to handle them. In controlling workloads and assigning cases, these managers should consider, among other things, the individual's available time, experience, and substantive expertise. Managers should provide necessary oversight and caseload management, consistent with their and other practitioners' ethical obligations.[85]

Given limited resources, a legal aid organization 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 communities it serves. Some organizations 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 communities served as a whole. Each organization needs to develop a policy for legal work management that is first and foremost consistent with practitioners' obligations under applicable professional conduct rules and that also strives to reach an appropriate balance between the 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 organization. The appropriate balance is a function of the organization's mission and its obligations to its funding sources, but all full-service organizations should achieve a balance that ensures the overall needs of the communities are met, including the needs both of individual clients and of the communities it serves as a whole.[86]

All work of a legal aid organization should be undertaken with the intention of obtaining meaningful results,[87] and the organization's policies should help it guard against the temptation to emphasize the production of case numbers. The organization's policies and systems to allocate practitioners' time and resources should also protect staff from

[85] *See, e.g.,* MRPC R. 5.1, 5.3.

[86] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

[87] *See* Standard 3.4 on Service Delivery to Effect Systemic Change.

being overwhelmed by the press of ongoing representation and should permit them to undertake work that will have a broader impact on client communities as a whole.

Considerations Regarding Case and Workload Assignment

The availability of adequate time to represent the client competently. Model Rules of Professional Conduct 1.1 and 1.3 provide that lawyers must ensure devote adequate time to the representation, possess requisite knowledge and skill to handle a matter, and act diligently.[88] Practitioners also have a responsibility to reject cases unless they are able to meet their ethical obligations, including that of competence.[89] In making case assignments, the lawyer manager should take into consideration the amount of time a practitioner has available and will need to handle the case competently.

Not every applicant for services will necessarily receive full representation from a legal aid organization. Many organizations offer applicants limited-scope representation in the form of advice or brief service or non-representational assistance.[90] The organization's practitioners and other staff members who provide such limited-scope assistance must nevertheless be able to devote adequate time to the work to ensure that the assistance is provided in a competent and timely manner.

The practitioner's level of experience, training, and expertise. Decisions regarding assignment of cases to staff practitioners should take into account the level of their training and experience and their individual caseloads. 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. Whenever possible, the organization should make training opportunities available to increase its practitioners' level of practical skills and substantive expertise.[91] Policies should be in place to ensure compliance with continuing education requirements, and where failure to abide by those requirements may result in discipline or administrative suspension. 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 organization should take into consideration the time

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[88] *See* MRPC R. 1.1, 1.3.

[89] *See* MRPC R. 1.3, Comment 2. A lawyer's workload must be controlled so that each matter can be handled competently, though association with competent counsel may address competency concerns. *See also*, SCEPR Informal Op. 1359 (1976).

[90] *See* MRPC R. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

[91] *See* Standard 6.6 on Training.

required to handle each case competently. The organization 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.

In managing their practitioners' workloads, the organization 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 time commitment, including those in litigation, particularly where there is extensive discovery or where a trial has been set; cases on appeal; 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 organization'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 client communities. In addition, some practitioners work on collaborative projects and the planning with others in the state and regional delivery systems of which the organization is a part.[92] All such activities may require substantial time commitments that should be considered when assignments are made to ensure that practitioners have adequate time for such essential activities in addition to their case work.

The organization'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 organizational resources and through outside sources of assistance. Wherever possible, organizations 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 organization should encourage its practitioners to participate in online communities and with groups that can provide substantive support and to take full advantage of research and support resources that are available online while also being mindful of ethical concerns such as client confidentiality.[93] The organization should also consider the availability of research and co-counseling assistance from outside the organization

[92] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

[93] MRPC R. 1.6.

through private firms, 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 organization and its practitioners operate will influence the amount of time required to represent each client. Factors such as time required for travel and court practices, as well as docket congestion, may increase the time needed to conduct a case. Rural and urban practices have different logistical problems. Each organization should consider the impact of its particular environment in managing workloads. Organizations should also use technology for remote supervision of staff across offices in order to enable and support more collaborative efforts between staff in different offices, and to expand the geographic reach of staff. The organization should also consider these logistical factors in the design of a delivery system.[94]

Effective utilization of technology can help make efficient use of a practitioner's time, particularly when using remote services to represent clients who live a far distance from the practitioner, office, or court.[95] Finally and not least, organizations should anticipate and provide ongoing support to staff in order to avoid or mitigate the stress, secondary trauma, and burnout that can accompany many areas of legal aid work with clients at risk of or experiencing loss and emotional injury.

Workload management for non-practitioner staff. In addition to attorneys and paraprofessionals authorized to provide legal services directly to clients, organizations 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, pro bono coordinators, outreach workers, community educators, social workers, and others. Organizations 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 the time needed to complete administrative and other organization responsibilities.

[94] *See* Standard 4.2 on Delivery Structure.

[95] *See* Standard 4.10 on Effective Use of Technology.

STANDARD 2.5 ON REPRESENTATION EXPENSES

STANDARD

A legal aid organization should establish clear policy and procedure regarding budgeting and payment for appropriate costs and expenses in the representation of clients.

COMMENTARY

General Considerations

A legal aid practitioner should be able to use all tools necessary for effective representation of client interests, including discovery, investigation, and use of expert witnesses that may be costly. The organization should also budget for interpreter and translator services when necessary to successfully represent a client.[96] Because clients of legal aid organizations can rarely pay such costs themselves, the organization should ensure that, where necessary and appropriate, sufficient funds are budgeted and available for these purposes.[97]

The funds available should be sufficient to permit the organization, in appropriate instances, to make significant, but necessary litigation expenditures in major cases. The organization 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 organization, adequate funds will be available to pursue the case appropriately.

At the same time, the organization 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 organization from fiscal problems caused by excessive expenditures for representation costs. Wherever clients can and want to contribute to these costs, their contributions should be accepted.

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[96] *See* Standard 2.3 on Promoting Language Justice

[97] The American Bar Association has issued an opinion indicating that a legal aid organization 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* SCEPR Informal Op. 1361 (1976). Nevertheless, jurisdictional rules of professional conduct may place limits on the payment of such expenses and an organization should be aware of the pertinent rules in its jurisdiction. In addition, under certain circumstances, a legal aid organization or practitioner "may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses." *See* MRPC R. 1.8(e).

Early Identification

The organization 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.

Budgeting, Payment, Application

Among the appropriate criteria for determining budgeting and payment for costs and expenses 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;
- The potential for recovering the costs;
- The potential for benefiting other members of the low-income community as well as the client; and
- Access to the internet if the case and representation require that and the client does not have affordable access to it. This might include setting up local hotspots, lending laptops to clients, and making other reasonable accommodations.

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 organization management, should have the discretion to incur necessary costs in accordance with the established criteria. In major cases requiring significant expenditures, the organization 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 organization's policy regarding reimbursement of representation costs.

Insufficient Funds

In situations where the organization can anticipate at the outset that it will not have sufficient funds to fully litigate a case, the organization 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.
- Engage outside co-counsel who agrees to pay for necessary costs.
- Refer the case to another organization or an outside practitioner with the resources to pursue the case fully.
- Limit the scope of the representation to a less-costly alternative.[98]
- Reject the case entirely.

Recovery of Costs

The organization should maintain complete records of all costs, and practitioners should routinely seek and enforce orders awarding costs. When the organization is successful in litigating the client's case, it should make every effort to recover these costs from the opposing party in the case.

[98] *See* Standard 4.2 on Service Delivery to Individuals. *See also* MRPC R. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

SECTION 3: STANDARDS REGARDING ORGANIZATION EFFECTIVENESS – GENERAL REQUIREMENTS

STANDARD 3.1 ON EFFECTIVE AND EFFICIENT DELIVERY SYSTEMS

STANDARD

A legal aid organization should deploy its legal resources strategically, consistent with its mission, to deliver effective and efficient legal services to individuals and communities and to create positive change in the systems that impact those communities.

COMMENTARY

General Considerations

Virtually every legal aid organization faces the same central dilemma: How to balance high—sometimes overwhelming—demand for service with limited financial resources. Whether the agency's mission is to provide a broad range of legal assistance over a wide geographic area or a more narrowly focused service to a limited client base, demand inevitably exceeds capacity. As a result, the organization must make difficult choices about how much work it can do within its resources, the type of work it can do, and who will receive its services. To offer high-quality legal services, the organization must make these choices strategically and thoughtfully and in a manner that ensures that limited resources do not impair the highest-quality representation and advocacy from staff.[99] The organization should employ best practices and cutting-edge resources to ensure effective and efficient delivery of legal services in a manner that ensures equitable access to all populations within its service area. The organization must regularly reassess these choices to adjust to the inevitable changes that occur in the legal needs and demographics of its constituents, the development of new delivery methods, and the scope of its available resources.

Strategic Choices

A civil legal aid organization must have a clear and intentional strategy for how it will deploy its limited resources. The organization must, as much as possible, make its resource allocation decisions proactively, rather than only reacting to external demands. Strategic decision-making must encompass the full range of factors that impact the provision of legal services:

- The size and geographic distribution of the organization's target communities.

[99] *See* Standard 6.1 on Ensuring Delivery of High-Quality Legal Services.

- The demographics of the organization's target client base, with a particular focus on marginalized communities, primary languages, and other factors that impact access to services.
- The legal needs of the target communities.
- The resources, including staffing, overhead, technology, and support services, needed to meet those needs.
- The resources actually available to the organization, and how those resources may be developed and expanded.
- The resources available to meet those needs offered by other service organizations, and the systems available to coordinate services between agencies.
- How the organization's intake and referral systems are designed to direct community members to appropriate and effective services.
- How the organization's internal systems are designed to deliver those services.

Strategic deployment of services requires coordinated effort across the organization. The organization's leadership must make thoughtful and intentional decisions about which services will be provided and the criteria for how they will be deployed to meet community needs. Leadership must ensure ongoing and effective communication among agency staff and with outside partners to ensure that decision-makers have accurate and up-to-date information about the factors that impact resource allocation. All staff must be trained and supervised to ensure the coordinated implementation of these strategic decisions.

Fulfillment of Mission

Legal aid organizations differ significantly in the types of service they are designed to provide. Many organizations are large, general service agencies whose mission is to offer a broad range of legal assistance to all client-eligible individuals in its target region. Other organizations focus on a specific demographic community or legal problem. Some organizations may be the sole legal aid entity in a region for its type of service, while other organizations operate within a system of multiple legal aid entities. No matter the size and goal of the organization, it is imperative that it have a clearly defined mission statement that identifies both its target communities and the type of service it will provide. This mission should be clearly and publicly stated. The mission should be developed in coordination with other similar organizations to avoid unnecessary duplication of efforts. The mission should be inclusive of the full range of diverse populations within the organization's service area. The mission statement should then become the basis for all strategic decision-making about the delivery of legal services by the organization.

Efficient Delivery

Given the limited funding faced by civil legal aid organizations, a central consideration of effective service provision is efficiency—getting the most impact out of the available

resources. Strategic decisions around efficiency can take many forms. Deploying large amounts of staff time to individual cases means that fewer people may be served as clients, but those resources may be needed to achieve outcomes that impact a broad sector of the organization's target community. Provision of limited-scope representation or referral through a helpline may be an effective alternative solution to serving the legal needs of many people, but efficient service delivery does not simply mean talking to more people or taking more cases. Instead, strategic efficiency means using a range of deliberate strategies to create the greatest positive impact for constituent communities within the organization's means.

The organization must ensure that it has systems in place to promote the efficient delivery of services. For individual representation, systems must ensure timely and equitable screening and intake of new clients, assignment to practitioners, and initiation of legal assistance, especially for time-sensitive legal matters. Organizations must deploy technologies to promote easy and efficient case management and supervision.[100] Systems must be in place for effective communication both within the agency and with clients and community partners. Technology is also a central method of efficient delivery and outreach to constituent communities, through websites and social media. Organizations must stay abreast of new developments in technologies to support their work and ensure efficient use of resources. While technology can be expensive to acquire and maintain, outdated and ineffective systems ultimately cost more to the agency in lost time and wasted effort.

Effective Delivery

Whatever the scope of service it determines to offer, the organization must focus on delivering competent and effective legal service. Effective legal assistance can mean many things: The client "won" the case; a negative outcome was averted; the client received information to improve the ability to self-advocate; the agency provided assistance to historically underserved groups; a supportive law was enacted, or a harmful policy removed; or a community's resources were enhanced and its members empowered to improve their lives.

To maximize the effectiveness of its resources, an organization must identify those legal issues for which it will offer full representation, and which can be provided by other delivery methods, including limited-scope representation, information and referral, community outreach and education, and advocacy in various arenas. An organization must identify the types of clients for whom limited-scope representation would not be appropriate because of barriers related to language, culture, ability, lack of access to technology or transportation, family and work barriers, or similar factors. The organization similarly must identify legal issues where individual representation may have less impact than various types of short-term service or systemic advocacy.

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[100] *See* Standard 4.10 on Effective Use of Technology.

Advocates should utilize all available means of technology to ensure equitable access to effective legal services within a territory. For example, rural areas should not be limited to phone representation or limited-scope representation simply because of the cost or time associated with travel. The ability to conduct meetings and hearings remotely should be supported by the organization and encouraged by practitioners with their clients when appropriate so that legal services may be more efficiently and effectively provided to clients.

Service Delivery and Funding

Effective service delivery requires that the organization have sufficient resources to support those services. In determining what level of service to provide in any area, the organization must identify and deploy the resources to that area sufficient to support the work. For example, some jurisdictions have mandated civil "right-to-counsel" organizations to guarantee representation to tenants in eviction cases or have enacted legislation to require representation for respondents in involuntary guardianship cases.[101] In some cases, though, these initiatives turn into unfunded mandates, where the right to counsel does not come with funding to pay for those lawyers. If an organization determines to take on such a project, it must ensure that it will receive sufficient funding to hire enough staff to fulfill the mandate, and not be forced to divert resources from other important projects or rely only on volunteers to perform the work.

Similarly, an organization must consider how the strategic choices around service provision intersect with the availability of funding. For most organizations, the ideal is to have a substantial base of "general funding"—grants or other funding sources that may be used to support a broad range of legal services, with minimal restrictions regarding the demographics of the client or the subject matter of the representation. Historically, many agencies were founded with this kind of general support, through federal or state funders or client trust fund dollars intended broadly to support the legal needs of low-income communities. Over time, however, these funding sources have not kept pace with inflation, and agencies have been forced to seek other funds to maintain adequate service levels to clients.

These alternate funding sources, however, often are available only to provide a certain kind of legal service or to serve a particular community. Such funding is also typically time-limited, with no guarantee of ongoing support. Organizations must then decide whether this targeted funding fits within its mission and service delivery strategy, and whether it will be able to continue the work supported by the grant once the money runs out. The danger faced by organizations is that the desire for increased funding may drive decisions about what kinds of service to deliver. It is critical that, in considering any new funding source, the organization makes decisions within the framework of its mission and overall service delivery plan, to ensure that the agency maintains an

[101] A national index of such programs and requirements has been developed by the National Coalition for a Civil Right to Counsel, http://civilrighttocounsel.org/.

effective system for the provision of legal services and does not drift from that mission, or constantly adjust the kind of cases it will take on, simply because a particular grant becomes available.

Continual Assessment

Each of the ways that legal services can be "effective" needs to be measured by the organization. The only way for an organization to know that its services are having the desired result is to implement methods of observation and data collection to measure the impact of its services.[102] The organization must, as part of its strategic decision-making, implement methods to measure the impact and outcomes of its work. An organization 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.

Management should encourage staff to stay abreast of changes among the issues that affect the communities it serves, including: 1) changes in the economy; 2) changes in patterns of discrimination across protected classes; 3) new governmental policies and practices of agencies that affect the client 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 organization must participate in the various forums in which such issues and strategies are discussed, both locally and nationally. The organization must then account for these developments in its periodic self-assessment and adjust its delivery methods to address these changes.

Part of a Statewide System of Service Delivery

No organization can deliver every type of service to every eligible client or community. Some organizations are organized to provide extensive individual representation over a broad range of areas. Other organizations may offer only limited-scope representation, short-term advice or pro se assistance, or intake and referral for a regional or statewide legal aid delivery system. Organizations that do not themselves offer full representation should have cooperative arrangements, consistent with professional conduct rules relating to confidentiality of information, with other entities that provide such representation and to which they can refer clients. All organizations should participate in and support statewide and regional systems that have the capacity collectively to offer a full range of services to all relevant constituent communities.[103] In a geographic area in which there is only one organization, that organization should offer full representation as part of its strategic service delivery system, along with a range of other service delivery models, to ensure broad and effective response to the community's legal needs.

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[102] *See* Standard 4.11 on Organization Evaluation.

[103] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

STANDARD 3.2 ON SERVICE DELIVERY TO INDIVIDUALS

STANDARD

A legal aid organization should deploy its resources for legal representation and assistance to individuals in a manner designed to achieve positive legal outcomes, reach a broad and diverse population, and further the organization's mission.

COMMENTARY

General Considerations

Most legal aid organizations focus their resources on the provision of assistance to individual people in their service regions. While the form of this assistance may vary among organizations, or from one legal situation to another, the mission of most organizations is to get legal help to individuals and families. Even organizations whose primary focus is community development or systemic advocacy typically achieve these goals through some form of individual assistance. An organization's strategic decisions about service delivery, therefore, will almost always focus on how best to provide such individual service.

Historically, "legal aid" has meant not only providing assistance to individuals, but also representing individuals and families in a set of "core" legal areas that typically affect low-income communities: Defense against eviction and foreclosure; denial of subsidized housing; debt collection defense and bankruptcy; denial or termination of public benefits; divorce; custody and domestic violence cases; and access to health care. But those served by legal aid also face a broad range of other legal problems that they cannot resolve because of the inability to retain an attorney. Organizations must make strategic determinations about what kinds of individual service they will offer and how they will coordinate their work with other regional organizations to meet these needs.

Legal aid organizations should avoid a "one-size-fits-all" approach to individual service provision. The "client community" is not a monolithic entity, but rather a complex and diverse range of individuals, families, and communities with differing legal needs, capacities, and resources. As it develops strategies for individual service delivery, the organization must look to the broad range of individuals within its service area and ask how their needs can best be met. Are some individuals more deeply impacted by lack of affordable housing? How do language barriers impact domestic violence survivors? When does limited pro se assistance (such as ghostwriting) allow for effective legal outcomes? What community partners can facilitate getting assistance to underserved individuals? The organization should tailor its service delivery models for individuals to account for these types of considerations.

In most cases, in order to address these needs, the organization must employ a range of service delivery modes, incorporating some combination of full representation, limited-scope representation, and information and referral. Unless the organization focuses on a narrowly defined legal area that demands a specific type of service, the organization should have multiple, coordinated service delivery strategies. The type of service deployed for a particular community or legal issue must balance the effectiveness of the service for the individuals served with the limitations of the organization's resources in order to maximize the equitable access to assistance and the effectiveness of the legal outcomes for those individuals served.

Modes of Assistance

Historically, most legal aid organizations have viewed the legal assistance provided to individuals as a spectrum, ranging from full representation on one end to very brief information and referral on the other. In this analysis, the "full representation" mode looks most like the traditional private attorney-client model of taking a case on an unrestricted retainer, while "limited-scope representation," "brief service," or "pro se assistance" means that the practitioner provides a more circumscribed service.

In developing strategies for service delivery, the organization should view these delivery options from several different perspectives. Each of these lenses provides useful information to the organization as it determines how to deploy its limited resources to serve individuals. Below are items to consider:

- **Time spent per contact:** An organization has a finite number of work hours to devote to individual client service. In assessing what modes of service to provide in certain case types or to specific cases, the organization must balance the most effective service for the case type, the number of individuals who may be served, and the available hours to provide the service.
- **Scope of assistance:** Will the practitioner and organization staff only speak with the client, or will there be contact with other parties, including opposing parties, opposing counsel, or non-adversarial parties? This consideration differs from time spent (a practitioner may spend a great deal of time only talking to a client), speaking to the types of interventions the organization chooses to employ.
- **Strategies for assistance:** Practitioners may provide written or oral advice to clients. The organization may offer to draft legal documents, under a practitioner's name or for the client to submit pro se, if ghostwriting is ethically permitted in the jurisdiction.[104] The organization's practitioners may engage with adversarial parties informally, in alternative dispute resolution settings, or in formal proceedings. Each strategy of assistance requires not only differing amounts of staff time, but also differing ways that staff will engage with clients.
- **Infrastructures for assistance:** Some delivery methods, such as hotlines and clinics, require extensive infrastructures and a commitment of resources by the

[104] *See, e.g.,* SCEPR Formal Op. 07-446 (2007).

organization to ensure effective assistance. Online self-help resources require technology support to ensure that tools such as guided interviews, triage portals, or fillable forms provide effective legal assistance. Other methods, such as quick advice cases, coaching or drafting, more typically happen through individual advocates, and may need little support other than a computer and a telephone, and perhaps some templates for commonly used pleadings. The organization must consider the resources needed to support its chosen delivery modes.

While some service delivery modes, such as traditional "full representation" or phone-based quick advice, tend to remain essentially the same over time, new modes of service delivery are constantly evolving, especially in light of the needs of underserved communities and the opportunities provided by rapidly evolving technology. In the appendix to these Standards, there is a more detailed discussion of the range of service delivery modes and the specific ways that practitioners may employ them to promote competent, effective, and efficient service delivery to individual clients.[105]

Determining Levels of Assistance

Along with deciding what modes of assistance the legal aid organization will offer—the "how" question—the organization must also determine the level of assistance—the "how much" question. The organization's decisions on how much time and effort to put into its response to an individual application for service should be guided by a coordinated strategy rooted in a range of factors, such as:

- **Broad priority decisions.** Strategic allocation of services starts by examining the legal needs of the organization's service area. In most cases, this process will require a formal assessment of community legal needs, conducted at regular intervals. The organization's governing body, legal management staff, or both in combination, then outlines its case handling priorities to respond to those needs. The organization may determine that there are many important case areas, devoting equivalent resources to each. The organization may decide to devote a large percentage of its staff time to in-depth representation in a small number of high-priority areas, a lesser amount of time to less-involved cases for other clients in the same areas, and an even smaller percentage of staff time to brief assistance in lower-priority areas. Priority decisions must account not only for the organization's own resources, but also the resources of partner organizations, to ensure effective coordination of resources among organizations. The organization should have a clear, readily accessible outline of its priorities to guide case handling decisions.
- **Resource decisions.** The organization must examine the type of legal resources necessary to achieve an effective outcome for clients, and then make resource deployment decisions to budget staff time and energies accordingly. Some case areas, due to their legal complexity or broad community impact, may demand a

[105] *See* Appendix B: Guidelines for Practitioners on Providing Advice and Representation to Individual Clients.

team of experienced attorneys devoting substantial time with a small number of clients. Other advocates may more effectively handle a higher number of shorter-term cases to achieve positive outcomes. Paraprofessionals and lay advocates may be well-suited to provide effective assistance in certain administrative matters.[106] The organization can look to partner organizations or pro bono resources to take on cases beyond the organization's means.[107] In each case, the decision to expend staff time should reflect the organization's defined priorities.

- **Case impact decisions.** The organization may determine to put more resources into an individual case, or type of case, because of the potential positive impact for the client of a successful outcome, or the detrimental impact of a negative outcome. Cases that threaten permanent loss of shelter, income, or health care, or that threaten the stability and safety of the family, for instance, often call for more extensive representation because of the potential harm that may befall clients. In other circumstances, there may be valuable affirmative gains in economic benefit to an individual or community, or vindication of civil and constitutional rights based on race equity, that merit extensive litigation. Similarly, the organization may take on a particular type of case to pursue a legal precedent or educate the judicial system about the legal perspectives of the organization's constituent community.
- **Technology decisions.** The organization must include available technology in making its resource deployment decisions.[108] A supervisor's day-to-day decisions about deployment of legal resources tend to focus on personnel matters: Who is going to take the case; and how much time will be spent on that matter. But the organization must also ensure that it has invested in resources to support its service delivery strategies, including remote staff work and remote delivery of services. These investments support the effective and efficient delivery of legal assistance at all levels. Technology is also vital to support equitable access to services, through language supports, ADA-compliant websites, and remote access tools. For more information, see Standard 3.10 on Effective Use of Technology.
- **Individual case decisions**. As with all legal representation, practitioners must tailor the level of service to the individual case. Case management should be used across all the organization's work to triage the merits and potential impact of cases and to maximize the organization's impact.
- **Emergent Circumstances.** As recent history has shown, the circumstances that impact the legal needs of low-income communities can change with alarming speed. Legal aid organizations must have systems in place that allow for the quick redeployment of staff resources to meet emergent legal needs. While such decisions must ensure that the organization maintains its core mission and

[106] *See* Standard 4.9 on Use of Other Practitioners.

[107] *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

[108] *See* Standard 4.10 on Effective Use of Technology.

equitable delivery of services, it must also stay aware of its changing landscape and be willing to revise its resource allocation models to address these changes.

Equity in Limited-Service Delivery

The greatest challenge in making decisions about level of service is when the organization decides to restrict that assistance in some way. While not all effective service requires heavy expenditure of resources, organizations never can do as much as they would like to for all cases. Putting more time into some cases inevitably means putting less into others. Limited-scope representation of a client, with the client's informed consent, is only useful if the assistance provided furthers the clients objective in seeking the legal help. If the success of the ultimate assistance provided depends on the client taking steps that are unlikely to occur due to the complexity of the law or the procedures that must be followed by the client, then the limited-scope representation may not be appropriate. In making decisions to engage in limited-scope representations to individuals, the organization must ensure equity and access to the full scope of its client base.

An organization may determine that there is a particular client or group of clients for whom limited representation would not be appropriate because of language or cultural barriers, disabilities, inflexible work schedules, or other limitations. That said, when deciding to limit the scope of service in a particular matter, it is up to the practitioner must consider whether the client can competently handle the matter with limited assistance or the relative benefit to the client if the services will be limited. Organizations must also ensure that clients who receive full representation are not just those whom the organization can access easily, or who require less staff time to bring a case to conclusion. Organizations must create systems that enable the full range of service modes to be provided as needed to all its constituent communities. Organizations should use available technologies and creative strategies to serve unserved communities that are not easily connected to the organization's offices. For instance, organizations serving large, sparsely populated rural areas should be aware of the challenge of reaching some parts of their service area. Some rural areas, for example, may not have high-speed access to the internet or other technologies, so website access may be of limited use.

Organizations should train those making resource allocation decisions on implicit bias and be clear that limited-scope representation should only be considered when the client can clearly complete a legal process on their own, and not at the convenience of the attorney or organization.[109] Such decisions should not disadvantage clients because of the need for deployment of additional resources. For example, a lawyer should not recommend limited-scope representation to a non-English speaking client because the organization wants to limit the costs of an interpreter. The organization must ensure that if its lawyer provides limited-scope representation, that there is not an adverse impact,

[109] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

in a disproportionate manner, on clients of color or those who are non-English speaking, disabled, and/or identify as LGBTQ+, and, if so, the legal aid organization must take steps to remedy any such disparities. Organizations must determine through evaluation data that clients benefit from the representation and that such service is provided without negative race and gender equity implications.

It is important that the organization encourage its practitioners to stay abreast of changes in the issues that affect the equitable provision of services to the communities it serves, including: 1) changes in the economy; 2) changes in patterns of racial, ethnic, gender, and identity discrimination; 3) new governmental policies and practices of organizations that affect underserved communities; 4) the development of new technologies; and 5) changes by courts and major systems that impact clients. This consideration includes changes in how to submit requests for assistance, e-filing, remote hearings, use of artificial intelligence tools for practitioners and self-help tools for clients, mandatory online dispute resolution tools, and use of social media to monitor clients and their activities. Such changes give rise to new legal and ethical issues and to new strategies to address old and new legal problems, particularly at the interface of civil and criminal law. The organization should encourage its practitioners to participate in educational and professional activities in which such issues and strategies are discussed and create relationships with groups doing advanced legal research on surveillance of poverty and the criminalization of poverty in their regions.[110] Appropriate opportunities include state, regional and national trainings; online communities; as well as publications of national and state advocacy entities pertinent to the practitioners' work.

Ensuring Effective Communication

No matter the mode or scope of service, a practitioner must be able to communicate with individual clients effectively. In a legal aid context, effective communication can be especially challenging. High-volume legal practice puts pressure on practitioners not to spend the time or resources it may take to ensure the level of effective client communication required by professional conduct rules. Organizations must account for language barriers and the time needed for effective interpretation and translation. Organizations and their practitioners must accommodate clients with cognitive limitations and ensure they have effective supports in place.

Many organizations offer limited-scope services or brief consultations with clients. For a client to meet their obligations in a limited-scope representation, the practitioner must make sure that the client understands what the lawyer is responsible for doing and the actions for which the client will be responsible. 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 gave rise to the legal problem. Reducing the key points of the advice to writing in the form of a letter, brochure, or prepared form may

[110] *See* Standard 4.8 on Relations with the Organized Bar.

help to ensure clear communication. Translation of written materials should be available to clients who use a primary language other than English.[111]

It will not always be appropriate for a practitioner 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 a client, who as a victim of domestic violence, would be vulnerable to dangerous, possibly life-threatening retaliation if written advice were intercepted. Similarly, circumstances may be present that require advice 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.

Because it is difficult in advice-only systems to determine if the advice offered is actually benefiting each client, it is essential that an organization have processes in place for ensuring the quality of the advice given.[112] A system should also be in place to review common issues and patterns to determine if other forms of assistance might be appropriate, including systemic advocacy. Organizations should consider short client surveys (consider using text or email to increase response rates) or follow-up interviews to determine the efficacy of the advice provided. A review of court files can uncover invaluable information about the actual outcomes for clients.

If the organization 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. The organization should not continue to expend scarce resources operating in a way that does not actually benefit clients. The alternatives might include: 1) changing the way its practitioners give advice and follow up on it; 2) offering a higher level of limited-scope representation, such as assistance preparing documents, making a phone call on the client's behalf, or coaching; or 3) offering full representation to some or all clients in the substantive area. Or the organization might decide it is not a prudent use of its resources 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.

If the organization's engagement with the client requires them to use a cell phone or an online tool, the practitioner should let the client know of any dangers or what could happen if they use a specific tool to communicate or access other resources. The practitioner will be aware of risks to undocumented clients when referring them to tools or platforms that might have agreements or standing court orders with government or law enforcement platforms. The practitioner should also advise the client if their using that tool will report their file to a credit bureau or to a data aggregator.

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[111] *See* Standard 5.7 on Implementing Language Justice.

[112] *See* Standard 4.11 on Organization Evaluation.

Informed Consent

In making decisions to limit the scope of legal services offered to an individual, a central factor and one addressed by applicable rules of professional conduct is effective communication. Practitioners are required to clearly communicate the types of services they will provide and those for which the client is responsible.[113] Before commencing a limited-scope representation, the client must provide informed consent to it and so it is particularly important for practitioners to study and follow applicable professional conduct rules.[114] In the context of providing legal aid, there are often practical difficulties, because informed consent implies that the client can choose not to accept the limited-scope representation and seek full representation elsewhere. In fact, usually there is no realistic possibility that the client will obtain representation beyond the limited assistance offered by the organization. The actual option, therefore, is often between limited representation and no representation at all.

Informed consent should be based on plain language explanations in the most accessible format and language to the client. 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 organization should make certain that its practitioners know to advise the client of what is likely to happen.

Ethical considerations require that the client be apprised of the limitations of the representation, including necessary actions for which assistance is *not* being provided and the practical risks for the client if these actions are not taken. Care should be taken to determine whether applicable rules of professional conduct require clients to consent in writing in the event that the representation is the subject of a retainer agreement, the limitations on the representation being offered must be listed or described in the agreement.

Informed consent does not only apply to initial agreements about limited-scope representation. As a case evolves, any changes in the level of service being considered by the practitioner must be explained to the client and should be documented. The organization should build systems to ensure that clients are consulted regularly and meaningfully about the objectives of the representation and potential outcomes of decisions, including, for example, for settlement discussions and the potential impact on a client's eligibility for benefits consistent with practitioners' ethical obligations.

Attorney-Client Relationships

A persistent consideration in negotiating the different modes of service delivery is whether, in any particular instance, the organization has entered into an attorney-client

[113] *See* Standard 5.3 on Establishing a Clear Understanding and MPRC 1.2.

[114] *See, e.g.,* MRPC R. 1.2. and 1.4

relationship. Whether an attorney-client relationship has been formed depends upon the nature of the interchange between the practitioner and the person seeking assistance. The crucial distinction is whether the individual receives advice about how to proceed that is based on individual information and is tailored to the person's circumstances.

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 organization offering the assistance. The expectation or reasonable belief of the person being assisted that the organization is providing representation may be deemed to create an attorney-client relationship, even if the organization intends otherwise. If any ambiguity is present regarding whether an attorney-client relationship exists, the potential client's understanding of the relationship is likely to prevail. Consulting state ethics opinions and other law on this topic is advisable.

Public seminars and presentations to groups that are intended as community legal education, however, can sometimes be less clear. Participants in such events may press questions particular to their situation. The organization should be sure that practitioners leading such events are aware that answering inquiries about specific situations may inadvertently result in providing a response based on specific facts of the inquirer that may be deemed to be legal advice.

Webpages and other consumer-facing applications providing general information explaining how a user should proceed substantively and procedurally generally do not establish an attorney-client relationship if an attorney has not provided advice based on the input of the user.[115] This is true even if 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 electronic bulletin board or e-mailed to a user might well establish an attorney-client relationship, if the advice offered is tailored to the specific facts presented by the inquirer. Organizations need to be aware of ethical duties to prospective clients that require information obtained during the course of intake not to be treated as disclosed and be kept confidential.[116] This applies to data gathered through online tools and apps sponsored and in use by the organization.

When an organization offers legal information to individuals, the organization's intent *not* to form an attorney-client relationship must be clear. Such a disclaimer should preferably be in writing or in some other conspicuous form. In most circumstances, the disclaimer should also inform the individual that, while information provided by the inquirer will be treated as private, the organization cannot protect it from disclosure if properly subpoenaed. The organization may also need to advise the individual

[115] Appropriate disclosures to this effect should be conspicuously present on the website. See ethics opinions in the relevant jurisdiction for guidance.

[116] *See, e.g.*, MRPC R. 1.18.

that another party may receive the same type of assistance, if sought, assuming such assistance is permissible under the relevant jurisdiction's conflict-of-interest rules. These disclosures are essential in court-sponsored projects to help unrepresented litigants where the chance of both sides seeking assistance is high.

The organization must 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.

Other Ethical Obligations

Competence and Diligence. Limited-scope representation does not mean low-quality representation. An agreement to limit the scope of representation does not exempt the organization from the duty to provide competent representation and to protect the client's interests. The organization and practitioner must be diligent about responding to the client's needs and interests, which includes a responsibility for assuring clients can make reasonable use of the advice that is offered. Comment [7] to the ABA Model Rule of Professional Conduct 1.2 authorizing limited-scope 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." The organization must put systems in place to ensure the ethical requirements for competence and diligence are met for all modes of service, and periodically review its methodologies (including studying outcomes of clients receiving limited representation) to ensure ongoing compliance.

Due diligence. The practitioner offering representation in any form 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 limited-scope representation is being offered based solely on an interview of the client, the practitioner should ensure 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. This inquiry is especially important for any letters written on behalf of the client based on a single conversation without any opportunity for independent verification, where the organization must still comply with the ethical obligation to present truthful statements.

Accuracy. Organizations that offer legal information in printed materials on websites, or through form-completing document assembly tools must regularly review these materials to ensure that all information is accurate and represents the current state of the law.

Conflicts. Legal aid organizations must generally comply with all conflict-of-interest obligations. However, potential conflicts may be addressed differently in different delivery systems such as hotlines, advice clinics, and counseling organizations where there is a high volume of interaction and usually only one relatively brief contact with the client.

In these high-volume, brief contact situations, it is often not feasible for a practitioner to screen systematically for conflicts of interest. The 2002 revisions to the ABA Model Rules of Professional Conduct added Rule 6.5 which states: "… under the auspices of an organization 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 organizations in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed organization.

An organization sponsoring such an effort should be aware of whether the same or similar language has been adopted in its jurisdiction and how it applies to its operation.

Confidentiality. As with all representation, a duty exists with respect to confidentiality.[117] Even when an attorney-client relationship has not been formed and legal information, not legal advice, is given to the client, the organization cannot voluntarily disclose to others information provided by participants. Per Rule 1.6, an organization must treat the information as confidential even if the organization may not be able to protect it from involuntary disclosure by asserting an attorney-client privilege. The organization should avoid gathering more information about participants' specific circumstances than required to evaluate whether to undertake a representation or offer appropriate legal information. They should operate under the assumption that less information is better and have clear data retention policies by type of relationship with the person seeking assistance.

Prospective Clients. If an organization 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 organization as "prospective clients" under applicable rules of professional conduct.[118] These rules often require generally that the lawyer "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.

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[117] *See, e.g.,* MRPC R. 1.6.

[118] *See, e.g.,* MRPC R. 1.18.

Limited-scope Document Preparation or "Ghostwriting." It should be noted that, while most states have adopted the language in ABA Model Rule of Professional Conduct 1.2(c), some have made changes that significantly affect how the rule applies. An organization that offers limited representation needs to ensure that its practitioners are doing so in a manner that conforms to the specific ethical standards governing such assistance in its state.

Resources to Support Individual Assistance

A legal aid organization must ensure that adequate resources, including advocacy staff, support staff, infrastructure, and technology, are deployed to support the full range of services to which it is committed. It should adequately budget to meet the expense of full representation, when offered, including cost of discovery, e-discovery, witnesses, data analysis for the purpose of litigation, as well as experts. It should invest in the support systems needed to provide shorter-term forms of service, including the case management, and telephone, web, and other technologies that support these modes of client service delivery.

An organization must similarly invest in its staff, with practitioners who are trained in the law and process that is necessary for effective service delivery. Organizations have a responsibility to ensure 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. Practitioners 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. Organizations that appear in tribunals with highly specialized procedures, such as public utility commissions or zoning boards, should ensure that their practitioners are able to practice effectively in those settings.

An organization, as well as lawyers with managerial authority, have a responsibility to ensure its practitioners and other staff understand their professional responsibilities.

The organization should invest resources to ensure that its services and materials are accessible and make certain that legal information materials can be understood by the intended users. See Standard 3.10 on Effective Use of Technology and Standard 2.3 on Promoting Language Justice for more information on these topics.

Assessment and Quality Assurance

An organization 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 client community and should explore new approaches to advocacy that evolve as new issues arise. For guidance on evaluation of different forms of advocacy, refer to Standard 3.11 on Organization Evaluation.

Organizations should be cognizant of the evolving legal culture and of changes in how courts, administrative offices, and nonprofits work with legal aid client communities, how they respond to those without lawyers and are using technology to work with unrepresented parties. 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-scope representation being offered, the organization should reexamine how it utilizes limited-scope representation and technology to serve these groups. The organization should be innovative and devise new ways to deliver legal services to the changing needs of their client populations.

Organizations should act quickly to correct disparities in providing services; for example, by shifting to the use of text or email surveys as a means of follow-up where telephonic contact has proven ineffective. If a disproportionate amount of assistance is going to English speakers in areas where the client community population has a high percentage of individuals of limited English proficiency (LEP), or where there are racial or other disparities in services rendered to the self-represented, the organization should correct that quickly. Disability should also be included in evaluations of potential disparities in service delivery.

STANDARD 3.3 ON SERVICE DELIVERY TO COMMUNITIES

STANDARD

A legal aid organization should deploy its resources beyond individual client services to provide legal supports designed to strengthen and develop the organization's constituent communities.

COMMENTARY

General Considerations

Many of the challenges facing clients of civil legal service organizations 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. Legal aid client 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 client communities adds to the difficulties encountered by their residents, particularly as an increasing number of low-income persons rely on employment for income. Patterns of systemic discrimination continue to reinforce patterns of marginalization. Systemic inequities also pervade community infrastructures such as transportation and access to communication and broadband networks. Rural areas and marginalized urban communities face additional hurdles when inferior systems do not allow equal access to the means of addressing economic inequity.

These economic disparities, in turn, inevitably increase the number of legal problems facing individuals and families. These problems most clearly arise in legal needs directly related to income, such as increased rates of eviction and foreclosure, debt collection, repossession, and bankruptcy, but also can impact many other areas of need, such as family disputes, access to health care, discrimination, and many other areas. While a legal aid organization can attempt to mitigate the effects of economic disparity one case at a time, a broader approach is to put efforts into addressing the root causes of these problems.

Legal aid organizations can use several different tools to address community-wide legal issues. One approach is to engage in community economic development (CED), working to remove barriers to economic opportunity and reverse systemic disparities. Another approach is community lawyering, which attempts to reduce barriers by placing legal services directly into community settings and adapting service delivery models to recognize the needs of each community. Community legal education seeks to support communities by providing access to legal information in settings that are readily available to marginalized communities and empowers them to reverse these systemic barriers. Organizations may also engage in impact litigation and systemic advocacy as outlined in Standard 3.4.

Community Economic Development

Community economic development seeks to increase the assets a community needs in order 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 into 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 several different 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.
    - Providing representation and advocacy on the expansion of affordable broadband and other utility infrastructure issues.
    - 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.
- 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 childcare centers in low-income communities to serve low-income workers, including persons with early or late shifts for whom 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 organization might be developed to locate jobs that pay a decent wage and provide benefits. Or an organization 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. In many areas, there are likely to be access issues to affordable broadband and electricity. Both are essential components to economic development work for low-income communities. In rural areas there might be a lack of secular non-church-based nonprofits able to house or feed those in need, including trans or divorced women, making it hard for them to obtain services. In

addition, the lack of nonprofit infrastructure in rural America and the suburbs makes it harder for those with low earnings to stay safe, fed, and employed, or able to access education and training.

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 on individuals that can lead to broader change.

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

An organization that undertakes economic development has a number of responsibilities. The organization 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 ensure that those who undertake the work receive appropriate training.[119] The practitioners should understand the operation of businesses and corporations, as well as banking and financial markets, and should be familiar with the organizations, boards, major corporations, and other decisionmakers that play an important role in local and regional development. They also need to be effective working with groups and understanding the dynamics of relationships within and among groups.

Community economic development is an area where private attorneys can be helpful, particularly if their practice involves related issues.[120] Private attorneys whose practice consists largely of corporate clients, for example, can make an important contribution to such representation. They can also assist the organization to gain access for clients to institutions and individuals who can provide assistance.

The organization needs to have policies that address the unique nature of the attorney-client relationship with community economic development clients. Because engagement may be through many phases of development and often involves client groups with limited business experience, it is important for the organization 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.

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[119] *See* Standard 6.6 on Training.

[120] *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

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 organization needs to ensure that its practitioners are careful to identify who has decision-making authority—an identified leader or the group through an agreed process.[121]

It is also important for the organization 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 community economic development projects.

The organization 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 organization should be certain that its organizational clients are included in its conflict management system. The organization 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 (who is not otherwise a client of the legal aid organization).

The organization also has an ongoing responsibility to determine with the practitioners engaged in community economic development 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 organization needs to be alert to the point when an organization is self-sustaining—one of the goals of community economic development work—and no longer needs free legal assistance. In like vein, the organization needs to be judicious in determining if to transition to role of general counsel, since the obligations of such a role may place demands on organization resources that conflict with the organization's client-service priorities.

As with other delivery strategies, a legal aid organization engaged in community economic development should periodically assess the effectiveness of its efforts 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.

Community Lawyering

[121] There are a number of ethical concerns arising when an organization is the client. See MRPC R. 1.13 and jurisdiction-specific rules for guidance.

Besides the systemic legal barriers targeted by community economic development, another persistent problem is the difficulty many potential clients of legal aid organizations have in accessing legal assistance. As discussed in several places in Standard 4.2, individual potential clients frequently find it hard to connect with an organization. Telephone or online intake systems can deter people whose primary language is not English, or who have mental health or cognitive challenges. Physical distance from an organization and lack of transportation can create daunting barriers. Family obligations and inflexible work schedules prevent many from accessing services. The huge volume of demand for services puts anyone facing these problems at a competitive disadvantage in just getting in the front door. And, as many recent studies have shown, many people who wrestle with the challenges of limited income have many problems that they do not identify as having a legal solution or they choose not to deal with them because they are just too busy or exhausted by more pressing needs.

One response to this problem is for the organization to try to adapt its existing service delivery models to bridge some of these gaps. Another way to respond to these barriers is for the legal aid organization to engage in community lawyering. Community lawyering is an evolving concept that can mean many things, but primarily refers to the placement of lawyers directly in client communities, often in settings where members of the community typically gather. Rather than forcing potential clients to identify their own legal issues and seek assistance from the organization, community lawyering brings legal services more directly to communities and allows for facilitated access to services. Examples of this work may include walk-in legal clinics located in easily accessible locations, placement of attorneys in a medical-legal partnership, attendance by organization staff at community meetings, or the presence of mobile legal aid offices.

An important focus of community lawyering is to reframe an organization's service delivery models to acknowledge the realities of how client community members work and live. For example, an organization's service area may include a concentration of recently arrived refugees. Because of language barriers, the organization may make its phone intake message available in that community's language, and post language-appropriate outreach fliers in the community with its intake number. But this kind of access, while important, does not address more daunting barriers—the community may have wide discomfort with using telephones, or even deeper mistrust of bureaucratic organizations and legal systems, and only a basic knowledge of legal rights and potential remedies. Rather than trying to modify existing service delivery systems to accommodate certain underserved groups, community lawyering aims to rethink those systems to meet those communities on their own terms and find ways to bring lawyers where the community lives.

Community lawyering models generally begin with some process of getting an organization's staff outside of the legal aid office and into community settings. This change of venue can take a wide range of forms, depending on the needs of the community. It is important when devising these models to start by asking the community members themselves what will work for them, rather than the organization assuming

what might be an effective or convenient strategy. Any design of service delivery for community lawyering needs to be client-centered and based on information provided by the community about their own needs and challenges. With that information, the organization can identify the specifics of what types of locations might be used, at what times, by what modes of service delivery, and ultimately what support structures might be needed to ensure effective assistance.

One important strategy for community lawyering is for the organization to target resources to a specific underserved community. For example, an organization may set up special organizations to provide service to new refugee populations, or to groups with a racial, ethnic, or gender identity, who may have previously had difficulty accessing legal services. A targeted community legal project can bridge historical barriers to obtaining service by hiring staff that shares that group's identity, speaks their language, and understands their traditions and cultural norms.[122] Targeted community lawyers can build trust with the community by establishing a regular presence with community members and obtaining a deeper understanding of the community's legal needs and the advocacy strategies appropriate to resolve them. Such organizations can also help to bridge gaps between these communities and the organization's other service offerings.

Another important consideration for community lawyering is for the organization to think outside the traditional models of lawyer-client interactions. Some community lawyering employs similar strategies to other out-of-office service models, such as community-based advice clinics, but placed in a more convenient setting for community access. But other modes of service delivery can reach further to bridge barriers to access. The legal aid organization may partner with other community support services and agencies to incorporate legal assistance into the spectrum of supports that the community might access. For example, a community support agency for refugee populations might include an organization's attorney as part of the support team to wrap legal services into housing and employment supports. Many organizations have joined medical-legal partnerships, where an advocate partners with community medical organizations to assess an individual's or family's legal needs within the context of a regular health assessment.

These kinds of community partnerships are essential to this type of service provision. As most legal aid advocates know, even in traditional models of legal service delivery, the lines between legal work and social work can get blurred. The settlement of a legal issue may often require coordinating non-legal support services for the client to help ensure a successful outcome of the case. A client in an "lawyer-for-the-day" eviction clinic who is looking to leave sub-standard housing may be more apt to resolve their case if a community housing specialist is involved to assist in locating new housing. Legal debt issues may be resolved more readily by getting a client access to affordable transportation, and thus access to employment, rather than litigating the debt collection

[122] *See* Standard 4.5 on Staff Diversity.

case or filing bankruptcy. A lawyer in isolation will attempt to resolve a legal problem using legal tools. A lawyer in the community can help to identify legal issues, and then use a broad range of partnerships—including, but not limited to, litigation—to improve the client's position. And in doing so, the legal aid organization becomes much more closely integrated into the community, and more responsive to its needs.

Community Legal Education

The term "community legal education" refers to educating members of the community and the public served by the organization about their rights and responsibilities under the law. Community legal education may offer information on a broad spectrum of issues and then relies on the individual to determine what aspects of the educational materials are germane to their needs. Community legal education often involves no individual interaction with the recipient of the educational materials.

A variety of ways are available to deliver community legal education to its target audience, including:

- Public presentations to groups and organizations;
- Written brochures and pamphlets distributed through the offices of the organization or other organizations;
- Radio and television presentations;
- Columns and articles in print media and social media;
- Information available to the public on a website;
- Information made available through other technological means, such as kiosks, chats, bulletin boards, social media, and others that develop with the advent of new technologies; and
- Virtual town hall meetings to provide legal information in both live and recorded forms.

Community legal education is an important tool and should be integrated into an organization's service delivery scheme to complement the direct representation of clients in priority areas. The following are examples of such integration:

- On matters where the organization elects not to provide representation, community legal education may be part of a strategy to help members of the community take steps themselves to resolve their problems.
- Community education may empower the community by increasing members' knowledge and understanding of their legal rights and responsibilities in chosen, substantive areas.
- An organization may adopt a strategy for an issue that involves both direct client representation and community legal education. For example, community legal education may advise members of the 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 community that a specific problem not traditionally recognized as having a legal remedy is amenable to a legal solution.
- Community legal education may be designed to help self-represented litigants navigate the court system effectively.
- Community legal education may keep members of the community informed of the organization's activities and its services.

Most legal aid organizations have developed, alone or in partnership with other organizations, extensive legal information websites to provide that information and self-help tools to users in their service areas. In many cases, these sites are evolving into legal portals that not only provide information, but also referral and online intake services to organizations, fillable court forms, instructional videos, and other forms of assistance. The range of these community support tools has expanded rapidly in recent years and will continue to proliferate as new tools are developed.

STANDARD 3.4 ON SERVICE DELIVERY TO EFFECT SYSTEMIC CHANGE

STANDARD

A legal aid organization should deploy its resources in a manner designed to effect long-term systemic change to support its constituent communities and enhance the lives of client populations in its service area.

General Considerations

In a very real sense, all work done by legal aid organizations has the broad goal of systemic change. The cumulative impact of thousands of legal challenges to evictions, debt collections, and abusive family relationships has a powerful impact on the legal system and the communities the organizations serve. However, some legal problems cannot be addressed by individual, largely defensive, casework alone. Some problems come from fundamentally unjust statutes that litigation alone cannot change. Other issues come from deeply entrenched social and economic structures and pervasive biases that prevent low-income and marginalized communities from escaping poverty or accessing legal remedies. In order to address such large-scale problems, organizations may access a range of legal strategies, including targeted litigation and identified case priorities, impact litigation, and legislative and administrative advocacy.

Not all organizations will be well-positioned to employ each of these legal tools. Smaller organizations may not be able to devote sufficient legal resources to impact litigation without sacrificing other important priorities. Organizations with narrowly targeted missions may not be able to focus on deeper underlying social forces. Some funding sources may restrict an organization's ability to engage in certain types of systemic advocacy. In all cases, though, organizations should consider, as part of their strategic deployment of legal resources, how the work they do impacts the communities they serve and identify long-range goals for how they can contribute to the achievement of this impact within their means.

Organizations engaging in impact litigation and legislative and administrative advocacy must factor in the time and resources required by this work as part of the overall strategy for resource deployment. Management must allocate staff time and resources required for impact work in balance with other types of representation and outreach and include this work within stated priorities.

Impact Litigation and Case Priorities

In determining areas in which it will offer full representation, an organization may consider the degree to which it seeks to accomplish systemic change that will benefit the 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 the client community. 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 many people and is an important part of the panoply of strategic approaches employed to meet the needs of the client population. Not all organizations elect to undertake systemic work. On the other hand, some organizations are organized specifically for the purpose of accomplishing systemic change for a particular population, or for a particular issue.

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

Effective impact litigation requires sufficient commitment of staff resources. Impact litigation often requires extended client and community contacts, coordination with local, regional, and national stakeholders, extensive legal research, and protracted litigation strategies. An organization undertaking such work must ensure that staff attorneys engaged in impact litigation have adequate time and access to supporting resources. Supervisors may need to adjust staff attorney caseloads and provide additional supervision and supports to ensure effective outcomes.

A focus on systemic change affects several important choices that an organization makes in determining its approach to service delivery. The first relates to the substantive areas in which it will offer extended representation. An organization that offers only limited-scope representation in a substantive area is unlikely to be able to mount a strategy to have a long-term systemic impact in the area. 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 an organization 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. The third factor is figuring out a service model. See Standard 4.2 for examples of different service models available.

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.

An organization 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 potential for an adverse impact on the broader low-income community, the resources of the organization required for prosecution of the appeal, and the relationship of the issue to the organization's substantive goals and objectives.

Legislative and Administrative Advocacy

Legislative and administrative processes are an essential part of the legal system that affect the client 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 organizations, because of their knowledge of the legal problems of their client population, 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 organization 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 ensure continued access to the courts on issues that affect the client community.

Legal aid organizations 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 organizations, public benefits agencies determining eligibility for certain benefits, 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 in an agency proceeding regarding the interests of communities affected for which the agency is responsible. Legal aid organizations are also encouraged to interact with and participate in statewide Access to Justice Commissions and to be part of the groups working to fund or manage self-help law centers and services, including law libraries and community libraries.[123] As with impact litigation, organizations should ensure that staff engaging in legislative and administrative advocacy have sufficient time and resources to pursue this work effectively.

[123] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

It is important that members of client communities have a means to assert their interests before both legislative and administrative bodies. All organizations should monitor legislative and administrative developments and should keep members of the communities they serve informed of issues that may affect them. This includes privacy laws and consumer protection laws for online platforms and vendors; for example, those pushing for use of client biometric data, laws about assisted technology requirements, or use of facial or voice recognition or new or emerging emotion recognition systems or predictive-type systems by government agencies, health care providers, or other service organizations. Each organization should decide if it is the appropriate one to advocate on legislative and administrative issues, or if other organizations are better able to address some or all of the need. An organization that does not offer legislative and administrative advocacy directly should participate in local, regional, and statewide systems to ensure that such advocacy is available.[124] Organizations 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 organization's client community and, to the extent possible, undertake advocacy that responds to those needs.

Certain funders limit or prohibit lobbying for policies or legislation, which includes Legal Services Corporation per 45 CFR 1612, "Restrictions on Lobbying and Certain Other Activities." Without engaging in lobbying where prohibited, organizations should educate legislators and policymakers about their clients, their needs, how organization services address those needs, and the harm or exposure to clients without such services.

Legal aid organizations should be accountable to the populations they serve for the direction and conduct of advocacy before legislative and administrative bodies. Such accountability may take place in several ways, some direct and others indirect. The organization 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, an organization 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 practitioner's accountability to the client is a function of his or her ethical duty. Where an organization 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 during the advocacy. The organization should have a means to consult with its client about advocacy priorities and objectives and to keep the client reasonably informed about key developments.

Other times, it will be impractical or impossible for the organization 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 organization is responsible for assuring that appropriate indirect means exist to be accountable to the population it

[124] *See id.*

serves. Such accountability may be accomplished by processes that keep members of the low-income community informed of public policy developments while periodically seeking guidance on priorities for legislative and administrative advocacy.

Legislative and administrative advocacy may take place in many ways, whether or not a client or client group is directly represented. Each presents its own opportunities and challenges in assuring that the touchstone principle of accountability is met.

- Some advocacies 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 organizations have found that policy advocacy is most successful when conducted as part of a community-based coalition that jointly decides on and executes the advocacy strategy. When the organization's participation in a coalition is not on behalf of a client, a coalition grounded in the client community can ensure that the objectives sought are responsive to the needs of that community.
- In some regional and statewide systems, a group of organizations may look to one organization to carry out legislative and administrative advocacy. Priorities for the advocacy may be set by the coalition of organizations 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 organizations that affect the client community 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. Organizations participating in such efforts under a general retainer agreement or which act as spokespersons for 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 an organization 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 organization to respond to such requests when the proposed policy is likely to impact the people it serves.
- When legislative and administrative bodies consider measures that impact operations or funding of the organization itself, it is appropriate for an organization to appear in those proceedings on its own behalf. The organization has an obvious interest in such deliberations and will have unique insight into the potential effect of the measure under consideration.

The organization should recognize when its fundraising interests might compete with the interests of its clients or undermine its capacity to advocate on their behalf, thereby raising conflict of interest concerns that should be addressed via policy and applicable

professional conduct rules. In a legislative budget and appropriations process, for example, there may be direct or indirect competition for limited funds, or the organization may be compelled to choose among issues to which it devotes its time and resources. An organization may feel subtle pressure to moderate its substantive advocacy to protect its own appropriation. If the organization determines that competing interests 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 client community.

As with all choices that an organization makes regarding how best to serve the 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, an organization should determine the substantive areas in which legislative and administrative advocacy should be undertaken by it or by other organizations in the delivery system of which it is a part.

Participation in Local, Regional and Statewide Legislative, and Administrative Advocacy

Local and regional advocacy. Some legislative and administrative advocacy will need to respond to local or regional issues pending before decision-making bodies at those levels. An organization 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 to decide if its participation in the advocacy is necessary and appropriate. Often, an organization located in the affected jurisdiction will be the most effective advocate before these decision makers.

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

Responsibilities of the Organization

Communication with clients and with the client population. Because both administrative and legislative advocacy can affect the interests of the client population as a whole, it is important that the organization communicate with the population it

serves regarding such advocacy. Such communication should take place in the context of its ongoing assessment of the needs of its client communities. An organization 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 organization should keep its clients and the client population informed of such matters and communicate their interests to those conducting advocacy before legislative and administrative bodies. The organization's practitioners may also advise their clients about the legislative and administrative advocacy process in the event that they wish to advocate for themselves.

Appropriate training and experience. Legal aid organizations that elect to engage in administrative and legislative advocacy have a responsibility to ensure that the advocacy is conducted proficiently and in compliance with legal requirements. Advocacy before a legislature has distinctive practice norms and procedural rules, and entails understanding the unique factors that affect the outcome of the legislative process. Administrative rulemaking may vary significantly based on the rules and customs of each administrative body. It is the organization's responsibility to ensure that its practitioners are experienced or trained to be effective in the forums in which they operate.

Organizations should be aware of any time requirements required for effective legislative advocacy. 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, the time required for legislative work may be reduced, but still be necessary. An organization that engages in legislative advocacy should deploy its staff in ways that ensure practitioners engaging in this advocacy have adequate time to carry out the advocacy effectively. Finally, organizations have an obligation to know with precision what legislative/agency activities are prohibited by funders, and which are permitted.

Ethical considerations. Organizations should ensure that its practitioners know and meet appropriate ethical requirements in representing clients before legislatures and administrative bodies. Applicable rules of professional conduct based upon the ABA Model Rule of Professional Conduct 3.9 require that a lawyer who represents a client before a legislative body or administrative agency in a non-adjudicative proceeding "disclose that the appearance is in a representative capacity."[125] Other applicable professional conduct rules apply to candor toward the tribunal, fairness to the opposing party and counsel, and impartiality and decorum of the tribunal,[126] even if such requirements would not apply to a non-lawyer who is engaged in the same activity. Organizations and practitioners must take care when sharing aggregate data about their

[125] Note that the Model Rule speaks to when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. *See* MRPC R. 3.9, Comment 3.

[126] *See* MRPC R. 3.3, 3.4, 3.5.

clients as a part of this advocacy as it may be possible to still connect it to a user's identity in violation of applicable professional conduct rules.

Other legal requirements. Organizations 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. Organizations should also make certain that their practitioners are aware of rules that govern how the legislature operates and their participation in it. Finally, more states have moved to create consumer protection requirements for online services and tools, and organizations should be aware of such statutes.

SECTION 4: STANDARDS REGARDING ORGANIZATION EFFECTIVENESS – DELIVERY STRUCTURES AND METHODS

STANDARD 4.1 ON IDENTIFYING LEGAL NEEDS AND PLANNING TO RESPOND

STANDARD

A legal aid organization should interact with the individuals it serves, as well as other groups serving similar client communities, in order to identify compelling needs and to implement plans to address its clients' basic human needs through legal representation in a most effective manner. The organization should also access and analyze data in order to help shape implementation of plans to address the legal needs of client communities.

COMMENTARY

General Considerations

A legal aid organization should be aware of the most compelling needs of the clients it serves. That awareness enhances the organization's capacity to make sound choices regarding its operation, supports necessary planning, and facilitates the establishment of appropriate organizational priorities. A legal aid organization typically has 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, and must be prompt in adjusting as emerging issues are identified and prioritized.

To do so requires having the means to identify the most significant legal problems and to understand how they impact clients as individuals, as well as the client-eligible population as a whole. Organizations are encouraged to build internal capacity to benefit from modern data analytics to evaluate their work and the impact of it. This includes routinely monitoring use of their online tools and products, as well as social media. Organizations are encouraged to analyze program data in the context of census data and other data sources, within their evaluation work and planning. The organization should also be aware of other resources available to respond, including those available from the statewide and regional system in which it operates.[127]

Organization Communication with the Client Population

Effective communication with the client population the legal aid organization serves is an essential ingredient of the organization being aware of the legal needs of that population. Day-to-day communication with applicants and clients through intake and other interactions can provide valuable insight into the most pressing needs of the client

[127] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

population. An organization should have the means to spot patterns among legal problems that are presented at intake and to detect changes that may herald the emergence of new legal issues. For example, analysis of compiled data, such as that from a case management system, may assist with this, as might social media platforms. Legal aid organizations need to include Facebook and other popular social media tools as part of their communication strategy with client communities and those who serve them.

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

To gain deeper insight into the problems of the client community and how legal representation can be used to address them, an organization should interact with client groups and with groups that serve the client community and are familiar with its needs. Ongoing communication with such groups helps the organization recognize the constantly changing circumstances and legal needs of the population it serves in order to adjust its representation efforts to better serve its constituents. Such interaction can take place when an organization 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 organization's insights into the 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 client community. Working with social service agencies, as well as community-based and faith-based organizations that serve the same or similar populations, can also give organizations valuable insight into the range of issues and the concomitant legal problems that members of the client community face.

The organization should strive to ensure 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 organization to a wide spectrum of problems confronting client-eligible persons and avoid dominance by a single-issue group.

It is important for an organization to reach out to the cultural and linguistic groups that make up the client population. The organization should take steps to reach out particularly to those within the community who may have distinctive networks with

limited overlap with other community networks, such as LGBTQ+ community members, youth, and speakers of non-dominant languages. 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.[128]

An organization that serves both urban and rural areas should take steps to be aware of issues affecting 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 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 client-eligible persons, an organization should use other means to stay aware of developments in its service area that might affect client communities. News reports of economic, social, and political events may portend the development of legal problems or of new opportunities for the client population. Organizational interactions with social media may be useful in achieving this goal. 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 client-eligible persons, particularly self-represented litigants, such as those in right-to-counsel initiatives in a particular civil legal area.[129] Other important information may come from widely available data sets, such as the American Communities Survey of the U.S Census Bureau,[130] the Eviction Lab at Princeton University,[131] and others.

Formal legal needs assessments. A more formal assessment of the legal needs of the client community conducted periodically by the legal aid organization, 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 community to recurring legal problems. Such assessments should be designed to obtain the views of persons eligible for legal aid and of people or agencies that work with or know the situations of client-eligible persons, including social service agencies, community organizations, community leaders, and the judiciary.

The views and needs of people who are homebound, disabled or institutionalized, as well as people who prefer to speak and write a language other than English, will be lost

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[128] *See* Standard 4.4 on Race Equity, Cross-Cultural Sensitivity, and Cultural Humility.

[129] The National Coalition for a Civil Right to Counsel maintains a comprehensive online clearinghouse of resources related to these initiatives, http://civilrighttocounsel.org.

[130] American Community Survey (ACS), www.census.gov/programs-surveys/acs.

[131] Eviction Lab, https://evictionlab.org.

without intentional efforts to communicate with them in effective ways. 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 by phone, text message, website, or social media; focus groups of persons from the client community, including clients themselves so long as applicable professional conduct rules and privilege concerns are not implicated; and meetings with community groups and others.

Organizations are expected to learn and incorporate data analytics, using the materials and resources shared through Legal Services Corporation (LSC) and Legal Services Network Technology Assistance Program (LSNTAP) for the community at-large[132]. As the capacity to obtain and use data from multiple sources to better understand client needs increases, legal aid organizations are encouraged to develop in-house expertise to benefit from such advances in this area. They are also encouraged to find local resources at universities, in research groups, or at other nonprofits, as well as national resources that might be able to help them become familiar with such approaches.

The availability of other resources to serve clients. In addition to being aware of the legal needs facing its client communities, each organization should be aware of the resources available to respond to those needs. The organization 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 resources that might be available to respond. It should also support development and deployment of resources in the system to ensure 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. The model of one client to one lawyer, though laudable, will be hard to achieve without significant resources, thus legal nonprofits need to learn how to move to more enterprise-driven models of providing services, with a mix of skillsets and tools that increase the ability of attorneys to increase their reach and impact. See Standard 3.3 for a more detailed analysis of an organization's obligation to participate in statewide and regional delivery systems.

Application of the Standard

Different legal aid organizations will have differing needs and capacities to communicate with potential clients through avenues other than intake.

To the extent that an organization has a central staff engaged in the direct delivery of services and operates as the primary organization of legal aid in its service area, it should establish a variety of means for communicating with clients to meet the

[132] *See*, for example, LSC's Civil Legal Aid Data https://lsc.gov/what-legal-aid/data; as well as data analysis resources at LSNTAP.org.

objectives of this standard. If a smaller organization does not have sufficient resources, it should, nonetheless, seek to be as engaged as possible with the communities it serves. In addition, it should participate in statewide and regional systems and draw upon the insights of other organizations that have a greater capacity to engage with clients and client groups outside of the office. [133]

[133] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

STANDARD 4.2 ON DELIVERY STRUCTURE

STANDARD

A legal aid organization should establish delivery mechanisms that effectively and efficiently meet its client communities' legal needs consistent with applicable rules of professional conduct within the context of its regional and statewide network.

COMMENTARY

General Considerations

A legal aid organization should establish an overall delivery structure and choose the delivery mechanisms that utilize limited resources most effectively. The organization's approach to delivery should balance five goals:

- To be effective in responding to the most compelling, unmet legal needs of the population it serves.
- To ensure the delivery of high-quality assistance.
- To utilize its resources efficiently.
- To facilitate access for members of its client communities to assistance appropriate to their legal needs.
- To be fully remote-enabled, as the assumption should no longer be that the client will come to the office for legal services, or that the advocate will always work from the office.

Decisions about each organization's delivery structure should be made in the context of the local, regional, and statewide systems of which the organization is a part. The organization should work with other organizations 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 client population.[134]

The organization also needs to determine how technology will be used as part of its efforts to meet the needs of clients consistent with practitioners' ethical duties. Technology is a critical tool to ensure effective work on behalf of clients and efficient administration of the organization. Information technology is also an important component of the methods employed to provide assistance directly to members of client communities, whether by remote methods when in-person meetings are impossible, impractical, or unnecessary.[135] This is in part due to the advent of disaster-driven responses, causing legal aid organizations to move toward regular engagement in remote legal services. Having enough resources, training, and bandwidth to be able to

[134] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

[135] *See* Standard 4.10 on Effective Use of Technology.

fully go online whenever the next disaster happens is no longer a theoretical question. All organizations need to be fully capable of providing online remote services on short notice, so that clients can continue to communicate and work with staff despite closures of offices, courts, and agencies.

There are several delivery mechanisms that an organization can utilize to serve its constituents. 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 clients. Each organization should stay abreast of such changes and should take advantage of new delivery approaches that may increase its capacity to serve its clients effectively and efficiently.

Some popular delivery methods include:

- High-volume legal advice offered by telephone or through secure audio and visual remote legal services platforms;
- Use of live chat, email, and SMS texting with clients when that is a safe, available, and appropriate form of communication for the client;[136]
- Mobile-first designed legal information websites;
- Use of Natural Language Processing tools in triaging portals to help direct members of the public to the best-matched resource available to them, depending on their legal problem and location;
- Online intake and email/text communication to enable asynchronous remote communication with clients;[137] and
- Use of document assembly tools to enable broader use of limited-scope representation and enable pro bono attorneys to provide assistance in areas of the law that are not their expertise.

In order to take advantage of innovative delivery methods, legal aid organizations should consider:

- If the organization can help clients overcome the digital divide by providing internet access to clients via hotspots and other equipment to enable them to participate in remote hearings and attorney services;[138] and
- Adopting electronic “e-sign” signature options for lawyers and clients, utilizing document coproduction through secure tools and platforms that enable secure file-sharing.

[136] These methods and potential risks to confidential client information should be discussed with the client and informed consent obtained.

[137] *Id.*

[138] Subject to preservation of confidentiality. *See, e.g.*. MRPC R. 1.6.

Enterprise service delivery through remote tools allows a switch from having one lawyer to one client to a model in which there is one lawyer for 100 clients with paraprofessional and other supports.

These goals are important for an organization to keep in mind when deciding how to fold new delivery techniques into its overall delivery approach: 1) effective response to legal needs, 2) high-quality service, 3) efficiency, and 4) access to services. 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 a costlier form of representation. Triage can help separate clients and legal problems into the appropriate buckets of delivery needed.

All approaches need to be measured against the standard of whether they effectively respond to compelling, unmet legal needs of clients. Efficiency should be measured in terms of cost-effective use of resources to accomplish a meaningful result as defined by the client, not the lawyer. Organizations, therefore, should not choose an approach based only on the number of persons able to be served. However, this can be a temptation if an organization 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 organization making choices about what types of representation are appropriate to respond to the needs of the client population it serves, including whether it will engage in legislative and administrative advocacy or community economic development. The organization also needs to determine the degree to which offering community legal education and legal information will be part of its approach to serving the communities in its service area.

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 attorneys, and/or non-attorney-practitioners—and how they will be deployed in the organization's service area. Issues associated with deployment and utilization of personnel are discussed in the commentaries to a number of these Standards.

Comprehensive Planning to Meet Identified Legal Needs

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

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

There are a variety of ways that an organization may go about planning how best to serve its client 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 organization'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 people residing in institutions, the homebound, children, and low-wage workers. It is useful to obtain input from other organizations that serve similar client communities, 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 these key aspects of the organization's operation:

- The organization 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 organization should determine the substantive areas in which it will represent its clients. This 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 organization's substantive legal work can be a valuable tool for maximizing the effectiveness of that work.
- The organization should determine broad strategic approaches, including the degree to which it will engage in efforts to accomplish systemic change.
- The organization needs to make an intentional choice regarding its overall delivery approach, including what types of assistance and what delivery mechanisms will best serve the needs of its low-income population.
- The organization 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.

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

Delivery in Rural Areas

Rural areas present special challenges to be addressed in establishing a delivery structure and allocating resources. It is well documented that poverty is growing in suburban and rural areas at high rates. Substantial distances and transportation costs to and from a central office may mean it is physically accessible only to those who live within a short radius of it, yet it can be costly and relatively inefficient to have widely dispersed small offices. A legal aid organization 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.

Organizations 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 population throughout its service area in order to stay informed about serious issues affecting clients and to enable them to respond with effective legal services where appropriate.

Organizations 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, noted below, are available and more are likely to evolve with advances in information technology:

- Centralized intake and the provision of legal advice and limited legal assistance remotely can increase the organization's capacity to reach otherwise isolated clients. Advances in technology can help overcome some of the limitations of serving clients remotely by telephone and online, particularly with regard to the secure creation, review, and sharing of transfer of documents important to a case and opportunities to appear in court remotely via phone or video.
- Private attorneys in local communities who are willing to represent eligible clients for no or limited compensation can substantially improve an organization's capacity to make services available where clients live. The organization 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. Remote work preparedness can also alleviate these burdens.

- Organizations could consider partnering with others engaged in similar efforts, particularly courts and other non-profits—if there are no conflicts in the mission or diminution in the advocacy role of the organization, and no potential issues with practitioners' ethical duties (client confidentiality, conflicts of interest, etc.) or other funder restrictions.
- Local paraprofessionals 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 or directly to the client without such supervision if authorized by law or rule.
- Community legal education offered through websites, apps, and other means that are designed to be mobile-first may be used to provide clients with information about their rights and responsibilities and provide them with other legal information, as well as self-help legal form preparation tools to help them to avoid incurring problems or to respond without direct representation.

Some isolated rural clients can be served through remote service platforms that include secure video conferencing, document sharing, scheduling, and online communication. If not directly available to the client, computers and other necessary equipment can be located at local entities, such as social service agencies, churches, and libraries. Courts may also conduct online hearings and provide online self-help. As technology and rural internet access improves, such approaches are likely to increase in effectiveness. The organization needs to be aware of digital equity in its service area and make sure that courts and other agencies are not leaving the client community behind, ensuring that clients who cannot appear remotely are still given an opportunity to do so in person.

The Number, Size, and Location of Offices

Decisions about the number, size, and location of an organization's offices are closely related to decisions about the types of practitioners and the extent of specialization to be made available. 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 quality assurance. Emerging technologies and the ability to work remotely will affect the need for office space, as will the ability of clients to access services without the need for those clients to necessarily visit a physical office. Care should be taken, however, to carefully examine the client community's access to technology and ability to use technology to access services.

In some cases, clients may be served most efficiently and effectively by 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 cost of maintaining small offices may be 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 served can make a significant difference in

access for clients and the capacity of the organization to engage with the client communities that it serves. Experience indicates that the number of clients that use the services of a legal aid organization is higher in communities in which it has an office.

Thus, a challenge created by centralization is the organization's isolation from distant segments of its service area. For rural legal aid organizations serving extremely large geographic expanses, consolidation may be infeasible. 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 an organization should structure itself in terms of the size, number, and location of offices, and the decisions will vary greatly depending on the size of the organization and the service area, and the other resources available to clients within that area. Whatever choices are made, it is important that the organization seek to mitigate the disadvantages that the option presents, doing so in part through the best use of technological advancements.

If an organization 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. Many tools and training videos explore how to provide adequate remote supervision in instances like these.

Conversely, an organization with consolidated offices should take positive steps to reach out to isolated parts of its service area and to ensure 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 organization identify and respond to legal needs in areas without an office. Remote work preparedness will enable staff to travel to other parts of the service area to engage in intake, advice, and other services like limited-scope representation clinics.

Effective utilization of private attorneys can greatly facilitate an organization'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 an organization faces in organizing its delivery structure is the degree to which it will have its staff specialize in specific substantive areas of the law 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. Note that the use of the term “specialization” here refers in general to the practice focus of the individual legal aid attorney and not to the formal process of certification of an attorney as a specialist in a particular area of law, such as those programs of certification accredited by the ABA Standing Committee on Specialization.

The choice between specialization and a generalist practice is not absolute and there are a number of models that may be appropriate for an organization. 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 in alignment with their competence obligations. 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 the organization 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, all of which dictate small offices, will likely not permit narrow specialization in those offices.

There are advantages and disadvantages to whatever structure is chosen. Specialization 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 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 should be reevaluated periodically to ensure that standardized treatment is still justified by circumstances and that the creativity of practitioners is not stifled in out-of-the ordinary cases.

Specialization may inhibit identification of problems that fall outside the specialty areas of an office. It may also inhibit change by the organization 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.

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 smaller offices 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. That said, the use of knowledge databases and document assembly tools can increase the efficiency and effectiveness of all advocates.

Whatever structure an organization adopts, it should be aware of the advantages and disadvantages of each and should take appropriate steps to address any weaknesses. An organization 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.

STANDARD 4.3 ON PARTICIPATION IN STATEWIDE AND REGIONAL SYSTEMS

STANDARD

A legal aid organization should participate in regional and statewide delivery systems to improve the systems' capacity to deliver a full range of legal services that address the needs of client communities. Statewide delivery systems should include the regular sharing of information and the utilization of coordinated referral systems to enable all organizations to track common issues and trends indicating a need for systemic work. To the extent possible, a legal aid organization should utilize a single triage and intake portal to ensure a clear point of entry into legal information and assistance.

COMMENTARY

General Considerations

Legal aid organizations are part of a system of legal services, social services, and other organizations concerned with the legal needs of those with barriers to access to justice. Each organization should actively work in concert with pertinent organizations in the system to be better able to meet the needs of those with civil legal problems and to provide relatively uniform access to legal assistance to all persons who seek it.

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

In some cases, legal aid organizations and other entities may operate as a system within 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 these Standards where such systems are particularly relevant.

There are many types of legal aid organizations 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 organizations, public interest law firms and similar legal advocacy groups often address issues that are pertinent to the legal needs of common 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, organizations whose activities are funded by the Older Americans Act, and other entities. Private attorneys also participate directly with legal aid organizations. And in jurisdictions that have enacted a right to counsel, a state or local governmental agency may become part of the statewide or regional delivery system by virtue of being charged with generally administering the program.

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 problems. Court-based organizations may offer legal information to pro se litigants. There are also low-income advocacy organizations and groups that do not represent clients directly but 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 the public respond to 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 organizations 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 organizations may be called for. Where there is a right to counsel, it is essential that legal aid organizations collaborate with community-based groups (for instance, by working with organizers) and social service organizations on implementation of the delivery system.

All legal aid organizations 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 organizations are better situated than others to provide particular services to those in need of legal assistance due to resource limitations or restrictions on their funding. Joint planning and coordination of services should take place to ensure 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 organizations is important

for relatively uniform access to all persons in need of legal assistance. When possible, establishing a single point of entry to the myriad available services, legal and otherwise, can be most effective for clients.

- Resources available to respond to those with legal needs are often insufficient to meet the need. Participation in the larger delivery system should identify strategies to expand available resources, particularly those that can be used to engage in representation that is restricted by other funding sources and to deploy those resources rationally throughout the system.
- Improved knowledge of, and referral to, partner agencies which provide services that your organization does not.

Effective and Efficient Use of Resources

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

***Coordination in the use of delivery mechanisms to ensure their efficient use*.** A group of organizations might agree that responsibility for one aspect of the service delivery system should reside with one organization. Organizations working together, for instance, might decide to create a centralized capacity for intake, consistent with jurisdictional rules of professional conduct and other law. 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 organization or a coalition of organizations. All organizations serving a particular community might jointly create and support a referral system to ensure that persons in need 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 organizations can share software development costs, centralize training, development, and implementation, and avoid expensive duplication of effort. This also ensures that the organizations' resources are compatible and capable of securely sharing data and information in compliance with applicable professional conduct rules and other law. Thus, for example, organizations may pool resources and cooperate to develop a single website to link those in need to an appropriate source of information and assistance and to inform the general public about legal aid. Some organizations have found that jointly selecting and implementing case management software can reduce overall costs and facilitate the referral of cases among organizations.[139]

Assigning one organization the primary responsibility for conducting legislative and administrative advocacy with state level entities, including the legislature.

[139] *See* Standard 4.10 on Effective Use of Technology.

Not all organizations 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.[140]

Pooling of resources 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.[141]

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 ensure effective communication and coordination among practitioners in key areas of law and practice that are pertinent to the legal needs of the client community. Organizations should also ensure that there is a capacity in the system to keep practitioners informed of new and ongoing developments in the law and policy that affect the client population.[142] Cooperative planning should consider areas in which practitioners from different organizations can jointly develop and execute strategies on broad legal issues that affect large numbers in the client population.

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

Full Range of Services

One goal of a delivery system should be to offer a full range of services to low-income persons in need of legal assistance; coordinating how resources are deployed can make this easier.

There are practical limitations that prevent some organizations from offering a full range of services. The funding of some organizations 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 organizations are generally limited by size with regard to the substantive areas they can undertake and the populations to which they can reach. Organizations working cooperatively in a statewide or regional delivery

[140] *See* Standard 4.4 on Service Delivery to Effect Systemic Change.

[141] *See* Standard 4.3 on Service Delivery to Communities.

[142] *See* Standard 6.6 on Training.

system should develop and support strategies to fill the gaps caused by such limitations.

All appropriate forms of assistance. A full range of services includes all appropriate forms of assistance, in all substantive areas necessary to respond to the compelling needs of the client population. These forms of assistance, all addressed in more detail elsewhere in these standards, include:

- Legal advice and referral;
- Brief legal services;
- Assistance to self-represented litigants;
- Representation in negotiation;
- Representation in the judicial system and in administrative adjudicatory processes using all forms of representation appropriate for the individual, group, or class being represented;
- Community economic development;
- Transactional assistance;
- 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 the client population;
- Assistance to clients using mediation and other alternate dispute resolution mechanisms; and
- Community legal education, including provision of legal information to low-income groups and individuals in order to overcome the “knowledge gap” so that people facing life problems understand there may be legal solutions and that legal help is available.

Some “nonlegal” support may be needed and can be effective to overcome client obstacles that have legal consequences; for example, an individual’s trouble in keeping appointments or lack of access to online resources.

Service to all populations. A full range of services also means access to legal services is available to all client populations within the organization’s service area. Where a major funding source imposes limitations on serving a specific population, it is particularly important for organizations to plan together to make legal services available to those who are barred from receiving the service and to reach out to them. Undocumented persons, for instance, are particularly vulnerable to exploitation and may also be wary of seeking assistance. Persons who are in jails and prisons may have legal issues associated with the conditions of their incarceration and 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, and there are restrictions imposed by employment. Without intentional effort to reach out and overcome the barriers that exist for populations isolated by circumstance, their access to, and utilization of, available

legal aid is likely to be limited. Organizations should work with others in the system to ensure that there is access to all such populations and there is a substantive capacity to respond to their special legal needs from both legal aid organizations and non-legal entities. In some instances, one organization may specialize in reaching out to and serving these and other isolated populations and other organizations may work in concert with such entities 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.

Relatively Uniform Access to Legal Aid

Organizations should also work with other relevant organizations in the delivery system to ensure that access to the legal aid is relatively uniform across geographic lines and among all client-eligible populations. Many factors affect who may have greater access to legal aid. Organizations should seek to overcome known barriers, both in their own planning as an organization and in their interaction with the statewide and regional delivery systems.

Disparate funding opportunities may also have an impact on the uniformity of access across an organization's service area. Higher levels of funding may be offered for service to a particular population, or in specific substantive areas.

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

Organizations 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.

Resource Development and Allocation

Many organizations 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 their client communities.[143] More importantly, all organizations should support statewide and region-wide strategies to allocate funds so as to overcome disparities in the availability of resources in different parts of the state. They should also join 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.

[143] *See* Standard 1.1-6 on Resource Development.

STANDARD 4.4 ON RACE EQUITY, DISABILITY DIVERSITY, CROSS-CULTURAL SENSITIVITY, AND CULTURAL HUMILITY

STANDARD

A legal aid organization should ensure that its staff and governing body has the awareness, attitude, skills, knowledge, and resources necessary to provide assistance in a culturally competent manner and in order to be responsive to, and aligned with, the interests of those people most affected by poverty, racism, discrimination, and other forms of structural oppression.

COMMENTARY

General Considerations

Each legal aid organization has a fundamental responsibility to establish a relationship of confidence and trust with the clients it represents and to understand and respond to the needs of all the multicultural communities and clients it serves, including those with disabilities or are racially, culturally, or linguistically diverse. Building accountability with the clients and communities served is critical to ensuring that the work of the legal aid organization is responsive to, and aligned with, the interests of those people most affected by poverty, racism, discrimination, and other forms of structural oppression. This Standard encourages legal aid organization to build long-term relationships with clients and communities in ways that acknowledge lived experiences, create partnerships that can shift power to communities, and challenge the structural oppressions and exclusionary practices that created the need for legal services.

This Standard and commentary address the specific responsibility for legal aid organizations to understand the impact of oppression related to race, gender, LGBTQ+ identity, ethnicity, ability, language, and culture on the delivery of legal services and the justice system. A legal aid organization has a responsibility to address impediments that arise on a structural, institutional, and individual level within the organization that prevents effective responsiveness, accountability, and legal representation to individuals. Organizations are encouraged to understand the different types of racism and discrimination and the practices of cultural humility and cultural competence. Standards 2.3 and 5.7 address legal aid organizations' responsibility to promote and implement language justice.

Structural racism is the historical creation through slavery, colonization, and genocide-impacting systems, of educational, economic, and criminal justice systems that create and continue to produce ongoing negative outcomes for underrepresented groups while providing advantages to people who are white. Institutional racism refers specifically to the ways in which institutional policies and practices create different outcomes for different racial groups. Institutional policies may never mention any racial group, but their effect is to create advantages for whites and disadvantages for people from groups

classified as people of color. Individual racism refers to one's own behaviors and beliefs, whether conscious or unconscious, around race.
Disability discrimination is the unlawful treatment of an individual based on that individual's real or perceived disabilities. Discrimination can occur through institutional polices or practices that create barriers to access for people with disabilities. The discrimination does not have to be intentional. The treatment could be a one-off action, the application of a rule or policy or the existence of physical or communication barriers which make accessing something difficult or impossible.

Culture should be defined broadly and refers to the range of similarities and differences in individual and community characteristics including national origin, membership in a tribal group, geographical location, language, race, color, disability, ethnicity, gender, age, religion, sexual orientation, gender identity or expression, social economic status, veteran status, historical and individual trauma, and family structure. In understanding what culture means, it is best to learn what it means in the context of the community that the legal aid organization serves while understanding the organization's own culture and how it impacts the clients and communities it serves.

Cultural competence and cultural humility require more than an absence of bias or discrimination. Cultural humility involves entering a relationship with another person with the intention of honoring their beliefs, customs, and values. It entails an ongoing process of self-awareness combined with a willingness to learn from others. It is a multi-dimensional concept that includes lifelong learning and critical self-reflection to understand and recognize our complexities as human beings. Basic concepts of cultural humility are: (1) acknowledgement of the importance of culture in people's lives; (2) respect for cultural differences; (3) minimization of any negative consequences of cultural differences; and (4) specifically focusing on recognizing and challenging the power imbalances that are inherent in our own institutions, for example, in certain relationships such as that between the attorney and client.

Cultural competence must start with cultural humility and is a skill that can be taught, trained, and achieved. It is often described as necessary for working effectively with diverse clients. 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 legal aid organization's service area. This also includes understanding the impact of the practitioner's own experiences and beliefs on the relationship.

Cultural competence and cultural humility are 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 or accessibility that might impact the formation of a relationship of trust necessary for effective representation, and with others who share distinct characteristics, histories, and cultures that call for heightened awareness and sensitivity, such as identifying as LGBTQ+, those with a

disability, and those from indigenous communities. The shared beliefs, histories, values, and customs that define a cultural group can have a deeply significant impact on communication between the legal aid organization and the client or community group. Cultural competence and the principles of cultural humility must be practiced within the legal aid organization so that authentic relationships can be practiced externally, and authentic, clear communication occurs. An essential component of cultural humility and race equity is recognizing and resisting the temptation to impose one's own cultural values, stereotypes, or ways/methods of communicating onto a group or individual.

Sometimes a legal aid organization may not be aware of its impact on the client, as unconscious bias may be present, or the organization is not aware of its own culture. An organization's culture, values, and beliefs, and those of individual attorneys can impact what legal priorities the organization sets—the way in which clients and issues are valued or devalued, how the attorney-client relationship is formed, and the conduct of the representation. It is important to recognize that imposing dominant cultural (white/colonizer) norms in all these ways can negatively impact the experiences of a legal aid organization's clients. To address these factors, the organization and the attorney should examine their institutional and individual beliefs and values around worthiness, credibility, trust, accountability, and justice, and how they impact the clients and communities being served.

Legal Aid Organizations' Responsibilities with Regard to Cultural Competence and Cultural Humility

A starting point for this work is to conduct an internal assessment to understand internal factors that impede both community-based accountability and client and community access as a result of institutional racism and additional oppressions. These types of assessment tools are widely available.[144]

Prior to working with a multicultural community, the legal aid organization should develop an understanding of the diverse community and the multicultural issues and histories relevant to the client base. Race equity and cultural humility involve how the legal aid organization operates, including how it hires and trains its staff. The organization should engage in recruitment, hiring, and retention practices that create a diverse staff that is representative of the communities it serves. The organization should allocate specific resources to support the ongoing practices of cultural competency, cultural humility, and race and disability equity. Finally, these practices call for the legal aid organization to consistently and deeply connect with communities in its service area to understand their needs priorities and whether the legal aid organization is meeting those needs and focusing on those priorities. Because institutional racism may impact the governing body, it is important to include the governing body in these assessments.

[144] *See, e.g.,* Washington Race Equity & Justice Initiative (REJI) Organizational Race Equity Toolkit, https://justleadwa.org/learn/rejitoolkit/; Racial Equity Tools, https://www.racialequitytools.org/resources/evaluate.

The Impact of Cultural Humility on Client Representation

A legal aid organization needs to be aware of how the cultural values of both its staff and its clients can affect representation. A number of areas in which cultural competence is important are discussed in Standards related to individual representation and the legal aid organization's responsibilities regarding various forms of representation.

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, behaviors, and expressions, as well as the impact of the attorney's own words, behaviors, and expressions. By virtue of the immense number of cultures, it is impossible for one person to understand and know about all cultures. Practicing cultural humility and pursuing effective training is vital for all legal professionals. Practicing cultural humility and having an understanding of the different types of racism or discrimination should help the practitioner communicate more effectively with clients and community groups to establish trust and to understand the client's or community's objectives.

An underlying premise of all representation is that the client sets the objectives of the representation.[145] In explaining alternatives and their potential consequences, a practitioner may be called upon to accept a decision by a client that in the attorney's value system seems imprudent. Or the attorney may advocate for a strategy or position that the client finds unwise. It is important for practitioners to listen carefully to their client's stated objective and not to insist on outcomes that reflect the practitioner's—rather than the client's—judgment of what constitutes success in a case. For example, clients with perceived diminished capacity may have their stated objectives overruled or ignored in favor of others established by the practitioner.

It is also important that the practitioner be aware of how cultural values can affect their own and a client's reaction to conflict. A cultural value to avoid conflict, for example, can significantly affect how a case proceeds and 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. Practitioners who are unaware of their own relationship to conflict or the impact of conflict on a client may not be able easily to discern the client's actual desired objective apart from the attorney's preference.

The legal aid organization and practitioner must be aware that some communities have good reason not to trust the legal system, as it has harmed them in the past or continues to harm them and their communities. Some clients prefer community-based restorative justice practices or other means of resolving an injustice. The difference between collective and individualistic cultures can also affect who the community, client,

[145] *See* MRPC R. 1.2.

or attorney feels should be involved in decisions about a legal problem or how that problem should be approached. For example, some clients may expect their parents or community members to play an important role in deciding what should happen in matter. The attorney may assume that it should be the client's decision alone or may not understand the collective impact of the issue. What the practitioners might see as inappropriate, the client might see as necessary and expected. In such circumstances, the practitioner should seek to find a culturally appropriate way, consistent with the lawyer's obligations under the rules of professional conduct, to meet the client's preferences for decision-making or a collective process and to avoid any potential detrimental impacts on the attorney-client privilege and the duty of confidentiality. If they cannot, the practitioner may need to decline the representation or withdraw from an ongoing one. Communication, creativity, and self-awareness are key in these circumstances.

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 a misunderstanding. The practitioner may in such circumstances need to reach out to others to have a frank conversation about how cultural differences, racism, or other types of oppression may have played a part, though taking care to preserve client confidentiality. Staff should feel comfortable accepting and seeking such advice and guidance to create a safe and productive multicultural workplace and gain a better understanding of themselves and the power dynamics inherent in client-attorney relationships. These types of conversations should be encouraged and supported by the legal aid organization.

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 broader issues of bias and injustice in these systems, as well as the application of dominant cultural values in decision-making. To be an effective advocate for a client, the practitioner is called upon to address these broad issues and educate the decision-makers about them. The attorney may need to be a bridge to explain to the decision-maker about the client's perspective and how the requirements of the legal system may seem strange, unfair, or threatening, or provide information about historical injustice that impact the client's case. For example, a client's reluctance to participate in counseling that is ordered by a court can be viewed in the context of understanding it as coercive or an attempt at forcing the client to adhere to dominant cultural norms. Many times, oppressed people have been labeled as "mentally ill" in order to control and harm them rather than to help or support them. Understanding the client's resistance, the practitioner may seek to create a client-centered alternative that meets the client's needs and satisfies the court.

Legal Aid Organization Operation

A legal aid organization should function in ways that demonstrate a commitment to equity, inclusion, and diversity, as well an understanding of how racism, discrimination,

and poverty intersect in this country.[146] To the degree possible, its staff and governing body should reflect the diversity of the populations that it serves. The legal aid organization should have delivery strategies to respond to the needs of the community including the language used, accommodation for people with disabilities, diverse ways to connect with advocates, and understanding the history, goals, and culture of the communities and clients served. It should have a staff that is well-trained in principles of cultural humility, cultural competence, anti-racism, and anti-oppression. A legal aid organization should develop practices, policies, and organizational structures that are responsive to the diverse cultures it serves. The organization should regularly assess itself in these areas to understand its progress and areas for improvement.

Legal aid organization appearance*.* There are many small, but important details that convey a multicultural atmosphere to persons contacting a legal aid organization. The legal aid organization's physical environment, staff dress, and materials and resources on display for clients should reflect respect for the cultures and ethnic backgrounds of the clients served by the legal aid organization. A legal aid organization should have appropriately diverse resources and educational materials available and on display and encourage people to use them. Intake forms should provide options that recognize preferred gender identity and pronouns,[147] multiracial identity, and varied family structures, including those of domestic partners, and have accessibility features for persons with disabilities.

Acquisition and Institutionalization of Cultural Humility and Cultural Competence

It is important to note that developing and maintaining cultural competence and humility is an ongoing process. The many communities in a legal aid organization's service area change, and the legal aid organization needs to be aware of such changes and adjust to them. Legal aid organizations with services areas having many culturally distinct communities will not be able to immediately develop equal competence or trusting relationships with each. It should concentrate first on the communities facing the greatest barriers to justice in its service area, while striving to develop cultural fluency and connection with and accountability 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. A legal aid organization should develop ways to record that developing body of insight and make it available to new staff as they join the organization.

Evaluation

It is important for a legal aid organization periodically to assess the degree to which it is successfully reaching out to and serving its diverse communities. Cultural

[146] Standard 4.5 discusses further diversity, equity and inclusion goals and practices the law firm should aspire to.

[147] The ABA has adopted policy on pronoun use, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/106a-midyear-2021.pdf.

responsiveness is an ongoing process; it is not something that is achieved once and is then complete. It should examine rates of utilization of all its services by the diverse populations in its service area, including persons with disabilities, in comparison to their percentage of utilized services by the overall low-income population. It should also assess the degree to which it has been effective in providing services, including the commitment to establish organizational cultural competence, and should involve a commitment to maintain it through periodic reassessments and adjustments.[148] Evaluation should also include usability testing of online resources, along with an assessment of its internal operations and whether they are adequately supporting staff in the areas of cultural humility and competence and understanding racism and its impacts.

[148] *See* Standard 4.11 on Provider Evaluation.

STANDARD 4.5 ON STAFF DIVERSITY

STANDARD

Legal aid organizations should be intentional about hiring, including, and retaining a diverse workforce that mirrors the communities and individuals that they serve. Non-traditional approaches should be considered in efforts to reach and maintain staff and leadership diversity.

COMMENTARY

The Importance of Staff Diversity, Equity, and Inclusion

A legal aid organization should function in ways that demonstrate a commitment to equity, inclusion, and diversity, and competence in responding to that diversity, as well as an understanding of how racism, disability discrimination, and poverty intersect in this country and in its service area. To the degree possible, its staff should reflect the diversity of the populations that it serves.

Diversity recognizes, respects, and values differences based on ethnicity, gender, gender identity, color, age, race, religion, disability, national origin, and sexual orientation. It also includes individual characteristics and experiences, such as life experiences, career path, communication style, educational background, geographic location, income level, marital status, military experience, parental status, and a multitude of other variables that influence personal perspective.[149]

Equity seeks to ensure fair treatment, equality of opportunity, and fairness in access to information and resources for all.

Inclusion is the creation of a sense of being valued and belonging, as well as the elimination of barriers for disabled persons within the legal aid organization so that all staff feel, and are, welcomed. Inclusion is the act of establishing philosophies, policies, practices, and procedures to ensure equal access to opportunities and resources.[150]

Diverse, equitable, and inclusive workplaces can earn deeper trust and more commitment from their employees. Inclusion leads to a happier staff and greater innovation. It is also important that a legal aid organization reflect the diverse population it serves.[151] Having a visibly diverse workforce conveys to potential clients that the organization understands and is open to people from different backgrounds.

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[149] *The Association of Legal Administrators Diversity Toolkit*, IILP Review 2017, https://www.alanet.org/docs/default-source/diversity/toolkit-whitepaper-rev2.pdf?sfvrsn=b55445ab_2.

[150] ASAE, The Center for Association Leadership*, Diversity + Inclusion Strategic Plan (2019-2021)*,at 4, https://www.asaecenter.org/about-us/diversity-and-inclusion.

[151] *See, e.g.,* Legal Services Corporation, LSC By the Numbers: The Data Underlying Legal Aid Programs, https://www.lsc.gov/our-impact/publications/numbers.

Relationships of mutual trust may be developed more readily when clients encounter staff that reflects the community's diversity. Diverse work environments gain knowledge and empathy, enabling the ability to work and act across differences. Without equity and inclusion, it is not possible for a diverse staff to do their best work advocating for clients.

A legal aid organization should have a staff that is well-trained in principles of equity, anti-racism, anti-discrimination, and anti-oppression, and should have the skills and insight necessary to serve its diverse populations. The legal aid organization should develop practices, policies, and organizational structures that are responsive to the diverse cultures and populations it serves.

How to Recruit and Build a Culture of Diversity and Inclusion

The only way to truly build a diverse staff is with intentionality and by taking action-oriented steps. This section is designed as a basic toolbox for legal aid practitioners working toward building a culture of diversity and inclusion. These tools should also be applied to building and retaining a diverse and inclusive governing body.

Leadership must make diversity a priority. This must be articulated in the strategic plans and work plans prepared by the legal aid organization. Emails and other communications sent out to staff that discuss the overall goals and mission of the legal aid organization should articulate the importance of building a culture of diversity, equity, and inclusion, and itemize the specific steps that will be taken to achieve and retain a diverse workforce.

A diversity and inclusion committee should be formed with members coming from several tiers within the legal aid organization. The committee should be tasked with putting together a recruitment strategy that focuses on encouraging applicants with diverse backgrounds to apply for positions within the legal aid organization, reflecting the communities they serve.[152] Welcome letters for new hires should be sent by the committee to orient new staff members about the function of this group.

Recruitment strategies should include effective communication with area law schools, non-profit organizations, diverse bar associations, and organizations that work with persons with disabilities about the priority for hiring diverse candidates that reflect the communities they serve. This would also involve meeting with student affinity groups and hosting events that are geared toward diverse student groups. The recruitment strategy should also include event planning, with participation in and hosting of hiring fairs with an emphasis on diverse candidates.

Recruitment materials (both print and online) should emphasize the legal aid organization's diversity and its willingness and desire to be inclusive. Marketing materials should follow the ADA standards for accessibility. Job descriptions and

[152] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

postings should state that the legal aid organization's hiring goals are inclusive and committed to reflecting the communities that it serves.

Recruitment strategies should seek to remove barriers to obtaining diverse candidates and hires. For example, internal internship programs should be structured with diverse candidates in mind and should be marketed to those prospective applicants. Also, annual training should be done with leadership and hiring committees on unconscious bias and other barriers that preclude hiring a staff that is diverse.

A separate annual training should be done for all staff and leadership with a requirement of 100% participation. Training should emphasize the importance of diversity and inclusion and appropriate communication strategies in order for all staff members to feel comfortable and welcome in the workplace. The diversity and inclusion committee should be heavily involved in the formation and scheduling of these trainings.

It is important for legal aid organizations to have a reputation for effective and open interaction with the various communities served. A potential recruit who recognizes that the legal aid organization makes a significant and successful effort to serve the population with which the person identifies is more likely to want to join that organization.

It can be particularly challenging to ensure diversity within legal aid organizations because the pool of available candidates may be small and competition for them intense. However, diverse candidates tend to gravitate toward legal aid organizations that are structured to be welcoming and to listen to differing voices. In addition, as more diverse candidates are hired, they can play a role in recruiting others, especially if their own experiences within the workplace are positive. Consider how internal mentoring programs may advance feelings of connection and inclusion.

How to Retain Staff Members from Diverse Backgrounds

While it is imperative for legal aid organizations to have an effective recruitment strategy—involving community partners, colleges and universities, provider agencies, and others—it is equally imperative to develop a retention strategy that demonstrates the program's commitment to maintain a staff that is reflective of the community served. Staff retention has been a longstanding issue for legal aid organizations. Developing a messaging strategy explaining why staff retention is an important value can help obtain buy-in from all sectors. This communication should include the message that the client community is well-served when staff, at all levels, is reflective of the community, including through racial and ethnic diversity, gender, age, disability, language, and outward religious affiliation. Being able to bring one's authentic self to the workplace allows one to feel connected to coworkers.

Inclusion goes hand-in-hand with retention. The messaging should include the concept that life experiences are also relevant and important in maintaining a staff that is

reflective of the client community. Communicating these values to staff—and even at the point of recruitment—demonstrates to staff that they will be and are valued and needed.
While competitive salaries and benefits and contributions to a retirement plan are key markers in the effort to retain all staff, program leadership must demonstrate an understanding that these markers are likely even more important to diverse staff due to the historical economic inequities in society. Options such as allowing part- or full-time remote work for certain positions should also be considered.

Developing a strategy to ensure that leadership opportunities are available to staff provides a window for newer staff to see themselves on those paths. This strategy must be intentional, starting with discussions with staff about their own leadership paths, following up with a viable plan.

Another important retention strategy is to have substantive professional development that will ensure staff are able to fully develop. Receiving important assignments, such as handling complex legal matters early in their careers, should be a part of professional development. Being able to make appellate court arguments, handling federal court matters, working on complex administrative cases, and establishing and maintaining key community partnerships are all the kinds of professional development opportunities that send the message that staff are valued in terms of their skill development. If diverse staff see themselves being able to have these kinds of development opportunities, without barriers such as length of tenure on staff, the message is clear: “This is a place where you can grow.”

Legal aid organizations should have plans and policies in place to identify and address the isolation staff may feel. Affinity groups or other opportunities for staff to feel connected should be developed.

Developing a set of communication norms that promote the values of inclusion and respect, as well as regular dialogue about how those norms can help to promote a positive work environment, sends the message that leadership values positive communication. Seeking staff ideas about other inclusion and retention strategies should become routine, and this could be done through regular staff surveys and the development of a recruitment committee.

In addition, organizations should train staff in the skills and perspectives needed to work cross-culturally.[153] Organizations should offer advocates training in cross-cultural communication skills, such as the ability to focus deeply on content, to read verbal and nonverbal behavior, and to adapt to differing conversational and behavioral styles that may vary depending on culture. Training on cultural competency materials related to people with disabilities should also be provided for the development of skills and sensitivity to advocate for persons with disabilities. This will negate habits such as

[153] *See id.*

talking louder to someone who is deaf, pushing someone in a wheelchair or touching assistive technology equipment, grabbing the arm of one who is blind, or petting a service animal.

In summary, legal aid organizations should develop intentional steps and a plan to meet specific goals regarding diversity, equity, and inclusion in hiring, recruiting, and retaining employees. These steps should be taken in conjunction with training and listening sessions with staff members. Goals should be clearly communicated to staff along with the accompanying message about the value of a diverse staff in achieving the overall mission of providing excellent overall client services.

Equal Employment Opportunity

Staff diversity is important for a legal aid organization in and of itself because of the positive impact on its service to its client community. It can also be reflective of compliance with federal, state, and local laws regarding equal employment opportunity and affirmative action. The legal aid organization should also comply with federal and state laws governing the accommodation of persons with disabilities who are otherwise qualified to perform a job.

A legal aid organization should pursue appropriate steps, including self-assessment of its workforce, to ensure equal employment opportunity at all levels of the legal aid organization. The legal aid organization should designate a key staff member, with authority and responsibility, to monitor its work to achieve both compliance and the positive impacts brought by a diverse staff.

STANDARD 4.6 ON ACHIEVING LASTING RESULTS FOR THE INDIVIDUALS AND COMMUNITIES SERVED

STANDARD

A legal aid organization should strive to achieve its clients' objectives. A legal aid organization should also focus on securing systemic changes that respond to its client communities' most compelling legal needs. Legal aid voices should be included in all conversations, including those led by courts, legislators, administrative agencies, and academics, where legal rights and access to justice will be impacted.

COMMENTARY

General Considerations

The effectiveness of an organization can be measured by the tangible, lasting results of its efforts on behalf of its clients and the client communities it serves. Each organization 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 clients how to address the legal problems that they face; by improving laws and practices that affect the client population; and by assisting members of the client community to become economically self-sufficient.

The problems of individual clients often involve the most basic issues of survival. Problems that merely inconvenience persons of economic means can have enormous long-term consequences for low-income persons and others and can disrupt every aspect of their lives. An unlawful delay or termination of Social Security benefits may leave one with no money for food, medicine, shelter, or utilities. Unlawful repossession of a car may mean one cannot get to work or to necessary medical care. The legal aid organization should be able to respond quickly with high-quality assistance that favorably resolves these individual problems in a substantial percentage of cases. Additionally, organizations should strive for sustained positive change in the communities they serve.

Strategic Focus

An organization should establish a clear focus for its legal work and what it seeks to accomplish for and with its clients. Having a strategic focus starts with making intentional choices about what legal work and organization will undertake, how it will deploy its resources, and how it will deliver service.[154] The organization 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.

[154] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

There are a number of ways in which an organization may maintain a strategic focus that enhances the results achieved for clients. It calls for deliberative, empirical-based decision-making and intentionality at all levels of the organization regarding what its legal work is intended to accomplish. At an organizational level, the entity may set broad goals for its legal work, such as protecting access to shelter, or fostering the stability and safety of the family. Many organizations 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.

The focus of legal work undertaken by an organization is sharpened if the organization 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.[155] In addition, some organizations establish benchmarks regarding what the organization 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 meaningful results for clients of the organization. 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 for making appropriate adjustments, as necessary. 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.

Legal aid organizations should participate in conferences and conversations, both at the local and national level, related to the future of civil legal aid, closing the justice gap, and reform of the legal system and practice. Participation in these local and national conversations by new entrants into the access-to-justice field is key to learning and contributing to the designs being promoted at higher levels and at think tanks.

“Access to justice” is no longer just the concern of legal non-profits. As the justice gap becomes better known, and more research is published on this topic, there is now a

[155] *See* MRPC R. 1.2.

cohort of academics, grant-makers, policy groups at the court level, and civil rights advocates now coming forward to offer proposals on how to close the justice gap and improve access to justice. Legal aid organizations need to have a seat at the table and insert themselves into those conversations that will impact those they serve. This can be accomplished in many ways, whether by working collaboratively on special projects with organizations whenever possible, building-up long-term relationships with these entities based on mutual trust and respect, through administrative agency advocacy to convince decision-makers of the value of a legal aid organization's voice at the table, through advocacy by another agency or body on the legal aid organization's behalf, and as part of a settlement agreement reached through litigation, or the other systemic advocacy strategies listed below.

Systemic Advocacy

In the course of serving its clients, an organization is likely to identify laws, policies, and practices that have a detrimental effect on its clients and that deter the organization from accomplishing its desired results. It will also encounter the efforts of others to change policies and laws in ways that harm the interests of the client community. An organization 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 clients or harm the interest of client communities. Use of statewide triage and online intake and sharing data across organizations within a state may help identify and track patterns of legal issues in need of systemic advocacy.

In addition to traditional responses to legal problems and solutions, organizations should consider how technology access and issues can impact community legal needs and how systemic advocacy may address these problems. Examples include working to make e-filing more accessible to litigants, working on court process improvement, advocacy to increase the ability to appear in court remotely where appropriate, providing the necessary internet bandwidth to access critical online services and alternate options for those without access to online services, use of online dispute resolution, elimination of "wet signature" and notary requirements that make it more difficult to access the courts, bans on bringing cell phones into courthouses, and others.

Systemic advocacy involves many potential strategies, some of which are relatively low-cost and others 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 an organization may achieve systemic results for the community it serves. It might, for instance, participate in bar and judicial committees to improve the accessibility of the courts. Participating in Access to Justice Commissions

and getting involved in conversations around self-help delivery funding, options, and technology are also core strategies for legal aid organizations.

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 involved, including in matters that are appealed. Systemic advocacy is generally based on a deliberate strategy, however, that targets an offending law, policy, or practice.[156] An organization may, therefore, deliberately focus representation in many individual cases on a particular policy or practice, with an eye toward bringing attention to a particular issue and compelling a change over time. Using data and empirical data analysis to identify emerging trends and needs to drive systemic advocacy strategies is encouraged.

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 access to services offered by the agency. A legal aid organization that is attentive to patterns of decision-making by administrative agencies, courts, school systems, and government offices 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. In addition, race equity issues can and should be identified and monitored in areas where civil and criminal areas interface, like civil consequences of criminal convictions, over-policing of BIPOC (Black, indigenous, and people of color) communities, in traffic courts or in instances involving drivers' license rules, as well as in practices that criminalize, and/or exclude veterans, the homeless, and disabled community groups.

Working with coalitions. An organization might work with a coalition of organizations to address policy issues that affect client populations. Not all systemic advocacy is adversarial. Organizations working with community economic development, for instance, often find that forming alliances with other interests is the most successful way to bring about fundamental changes that positively affect the client 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 client 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 a community, 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

[156] *See* Standard 4.4 on Service Delivery to Effect Systemic Change.

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 statutes and administrative rules will, if adopted, significantly harm the interests of client communities, and thus call for advocacy to oppose such changes.[157]

Some legal aid organizations 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 clients. 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 client-eligible persons.

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

All organizations should be alert to areas in which they can have a positive impact on policies and practices that have a detrimental impact on the client communities they serve. Not all organizations 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.

An organization that does not engage in costlier forms of systemic advocacy should, nonetheless, ensure 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 organization should participate in regional and statewide systems to help ensure that all types of representation are available and to be aware of the appropriate place to refer clients it is unable to assist.[158]

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[157] *See* Standard 4.4 on Service Delivery to Effect Systemic Change.

[158] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

STANDARD 4.7 ON INTEGRATING THE RESOURCES OF THE LEGAL PROFESSION AND INVOLVEMENT OF MEMBERS OF THE BAR

STANDARD

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

COMMENTARY

General Considerations

A legal aid organization should fully recognize the legal profession as a valuable resource in addressing the needs of the client community it serves. The resources of the legal profession, including individual members of the bar,[159] should be integrated to the greatest extent possible into an organization'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 client communities. Lawyers who do not work for a legal aid organization supply a significant amount of free and low-cost assistance to client communities through free-standing pro bono organizations as well as those that are a component of a legal aid organization. Private practitioners also provide significant pro bono services to low-income people who are not referred by legal aid organizations.

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.[160] It is incumbent on legal aid organizations to

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[159] 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.

[160] MRPC R. 6.1 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,

make effective use of this valuable resource. Legal aid organizations should seek assistance from members of firms, solo practitioners, government attorneys, in-house lawyers, and lawyers working for non-profit organizations other than legal aid organizations.

Legal aid staff should be encouraged and granted time to participate in working groups and conversations related to the delivery of legal services involving the private bar, including Access to Justice Commissions, form-drafting groups, and groups creating or reviewing and testing innovative models and technology that might eventually be used by client populations such as e-filing, remote video conferencing by courts, unemployment application/appeal state systems, and the like.

Integration of the Resources of the Legal Profession

Each legal aid organization 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 an organization to support its efforts.

Access to justice projects. Organizations 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 client communities. Often such efforts are formalized into access to justice commissions that support the overall system for delivering legal aid to client communities. Such efforts may focus on increasing resources available to the system, increasing public awareness of the legal needs of client 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 organization or the client communities it serves. Such engagement may include advocating before a legislative or administrative body on behalf of or in partnership with a legal aid organization. It may also involve informal efforts, such as information-sharing or other educational efforts, to convey to the public and to policymakers the importance of issues that affect clients and their access to the legal system.

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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.

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

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 clients. The organized bar or prominent members of the profession may join with an organization to galvanize a broad response to a widespread problem that confronts many members of client communities served by the organization. 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 clients. Large law firms, law schools, and voluntary bar associations will sometimes take on a signature project on which to focus their pro bono efforts.

Filling gaps in service. Working with members of the bar often offers an opportunity for an organization 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 an organization to serve. In rural areas, private attorneys may be available to serve remote communities where it is not economically feasible to maintain a staffed office. In urban areas, offices of private attorneys may be located in neighborhoods that are more convenient to clients.

Collaborating with members of the bar on technology issues can be an effective approach to addressing service gap. Legal aid online intake and referral systems can be integrated with bar referral systems in a portal approach that reflects no wrong door for litigants and results in no chain of referrals. If possible, legal aid organizations should collaborate on an online pro bono portal to ensure private attorneys can easily be made aware of cases needing representation. Remote practice best practices across legal aid, the private bar, and courts can also ensure geographic equity in terms of access to pro bono representation.

Collaboration with members of the bar may also provide an opportunity for a legal aid organization to address issues or serve populations that it is unable to serve because of funding restrictions. An organization, for instance, may be prohibited by a funder from representing undocumented persons or engaging in class action litigation. It may in concert with members of the bar establish a project for the referral of such cases to help ensure that important needs of the client community are served. It may also co-counsel with other members of the bar who can handle portions of a case that the organization is prohibited by funder restrictions from addressing.

Responding to cultural, linguistic, and disability diversity. An organization may call upon members of the bar who can help it in its efforts to reach out and serve diverse cultural, linguistic, and disability 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 or disability groups not only to serve individual clients from those communities but also to reach out and establish credible connections with them.[161]

***Training and mentoring*.** Experienced private practitioners can assist organizations by training and mentoring staff advocates. Such support can be particularly helpful in areas such as trial and appellate advocacy in which staff practitioners may not yet 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. Private practitioners might also provide training and mentoring in new areas of the law, such as community economic development, in which an organization might embark in response to changing needs of the client community. Such a training may also support recruitment of pro bono attorneys to this area of law.

Resource development. An organization 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. Private firms might be able to assist with design and marketing materials for new projects or initiatives and with fund raising appeals, branding and material creation.

Funding fellowships. Law firms, as well as corporations and their foundations, can support an organization by funding fellowships in whole or in part that place a lawyer in the organization's offices for one or two years to represent clients or to work on a special project that benefits client communities.

Assistance from law firm staff. Some organizations obtain the assistance of law firms. Paraprofessionals, legal assistants, and support staff are highly trained professionals who may volunteer to assist 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 organization. Marketing departments, technology specialists, and social media teams can also provide support and in-kind contributions to legal services groups.

Information technology. Organizations that find it difficult to maintain internal capacity to support their information technology needs may enter into a collaborative relationship with a local firm to help meet such needs.[162] Such assistance might be offered in the form of technical assistance, review of privacy policies and terms of use of systems and tools in use, expertise in technology polices, network administration, and staff training in

[161] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

[162] In so doing, care should be taken to meet ethical concerns, including those related to confidentiality and duty to supervise nonlawyer assistance. See, e.g., MRPC R. 1.6, 5.3.

the effective use of software.[163] Members of the private bar may also be helpful in evaluating complex privacy policies of private tools being promoted to client communities, evaluating the risk of using freeware tools, or understanding how data mining and artificial intelligence, or AI, impact an organization's client communities.

Provision of legal information and community legal education. Attorneys who do not work for an organization can also assist with efforts to provide legal information to the client community, either in community legal education presentations offered to groups or in clinics. They may participate in the drafting or review of legal self-help information.

Representation of Clients

An organization should seek to expand its resources by involving as many other members of the bar as possible in the direct representation of clients. As interdisciplinary approaches to serve clients with other professions and skillsets grow, organizations should become familiar and capable of providing interdisciplinary approaches to solving legal problems. This includes medical-legal partnerships, emerging regulatory innovations that authorize paraprofessionals to provide certain legal services direct to consumers, social work approaches, and the use of client advocates and court navigators, as available, in their states.

Legal aid organizations should have a variety of ways to engage other advocates as representatives 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 practitioner advocate. Some advocates 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 advocates who lack expertise in the legal problems of legal aid clients will only volunteer if they are adequately supported, which may be ethically required.[164] Other advocates 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. A legal aid organization should seek to make as many options as possible available to participating members of the bar.

Limited-scope representation. Many practitioners are more willing to participate as volunteer attorneys if they know what the commitment of their time will be—a calculation that cannot be certain in cases involving the full representation of a client. Various forms of limited-scope 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 where the client has given informed consent to the

[163] *See* Standard 4.10 on Effective Use of Technology.

[164] *See* MRPC R. 1.1.

arrangement, to represent a client with a discrete portion of a legal problem, such as child support, or obtaining a restraining order.[165]

Organizations should also consider involving members of the bar in periodically staffing an advice clinic or a telephone advice line. Members of the bar can also assist in clinics to give advice to self-represented litigants and to help them evaluate their case and prepare appropriate pleadings. 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. Consider the use of technological tools, such as knowledge bases/wikis, document assembly, and training videos, that can be used in clinic or hotline settings to assist pro bono attorneys in providing high-quality and timely advice or limited representation. Online intake portals with guided interviews and legal check-up tools can help pro bono attorneys be more effective at conducting intake and assessments.

Full representation. An organization should offer the opportunity for members of the bar to provide full representation for clients in individual cases. Many attorneys not working for an organization are familiar with consumer and family law and regularly take referrals in those areas. Lawyers who have previously worked for a legal aid organization are often familiar with other areas of the law that affect client communities, including landlord-tenant and public benefits and may be willing to take referrals in these areas.

Practitioners not employed by legal aid can also be recruited to handle cases in areas of the law with which they are not familiar by consulting or associating with a lawyer who has that competency.[166] 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 member or other practitioner with expertise in the area. Experienced lawyers can also be recruited to work in unfamiliar areas that involve compelling issues, but should also be offered training and guidance.

Complex legal work. An organization 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 an organization, 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 organization cannot because of restrictions by a funder. Private practitioners can also present the interests of client groups before legislative and administrative bodies.

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[165] The ABA Standing Committee on the Delivery of Legal Services maintains an Unbundling Resource Center to support practitioners seeking to engage in limited-scope (or "unbundled") representation, https://www.americanbar.org/groups/delivery_legal_services/resources/. *See also* MRPC R. 1.2.

[166] *See* MRPC R. 1.1.

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. Organizations that are undertaking community economic development, for instance, may find that attorneys whose practice consists largely of corporate clients or property developers 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,[167] there are a number of circumstances in which it is appropriate for a legal aid organization 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, usually far under market value, creating an in-kind contribution to the organization.

It should be noted that in many communities, private practitioners represent a number of legal aid-eligible clients for a full or somewhat reduced fee, but do not participate in the organized efforts of the legal aid organization. Such lawyers often have expertise in the same substantive areas as the organization and may be an important resource to the client community. In its planning, the organization should be aware of the degree to which such private practitioners are responding to the legal needs of the client community. Where appropriate, the organization should seek to target those private practitioners in its recruitment efforts to represent its clients or to provide support, such as training and mentoring of staff and other participating attorneys. Some caution is warranted because once a fee is introduced, there is less incentive for that attorney to provide pro bono services.

Interdisciplinary approaches. As our understanding of poverty, systemic racism, and legal problems increases, it becomes evident that working with others who are members of the bar can be beneficial to the clients served, and it can lead to overall improvements in the health, empowerment, and skill-development of chronically underserved and victimized groups. Legal aid organizations will take advantage and lead in the creation of interdisciplinary teams that come together to support the client and the family with the goal of solving long-term problems that might create or exacerbate legal problems. This includes navigators, legal/medical partnerships, and clinics, bringing social work as part of the legal work, education, and training of

[167] *See* MRPC R. 6.1.

specialists and other professions, or skills that lie outside of the legal domain, but complement and can be a part of the legal team's strategy and services.

Organization 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 2013, the ABA adopted the *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means.* These Standards cover governance; organization infrastructure, effectiveness, and delivery design; relationships with clients; and relationships with volunteers. Organizations 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 organization's delivery system. The efforts of members of the bar, whether on a volunteer or a compensated basis, should be integrated into the organization's overall service delivery approach (see Standard 2.2). To accomplish this calls for the organization to match the identified legal needs of the clients 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 organization's clients, the organization 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 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 working on diverse matters and the opportunity to be exposed to new and challenging legal issues, so long as they are offered adequate support. To be most effective, the organization should be sensitive to the particular interests of each participating attorney 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 organization 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 organization may have decided not to address. The organization may link the volunteer attorney with a person eligible for its services without significant cost, effectively using 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 client community or the organization's priorities.

- ***The need for quality assurance in the part of the organization***. Referral of cases to attorneys who have expertise in the substance of the case can assist the organization to meet its responsibility to ensure that cases are assigned to lawyers competent to handle them. Referral of matters that are unfamiliar to an attorney requires a commitment by the organization to support the attorney, including training and backup to ensure that competent work is done for the client as a complement to that lawyer's taking steps to comport with their competence obligations under Model Rule 1.1.

- ***The needs of clients***. The organization 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 the organization's clients face. The organization may consider a component to its volunteer training that shares the impact to the client as a result of the volunteer's work.

A legal aid organization 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 organization 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.

Appropriate institutional support. A legal aid organization should dedicate resources to support the infrastructure necessary 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 commitment calls for support from both the governing body of the organization and from senior management. The organization 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 the skills and capability to interact effectively with private practitioners, the leadership of the bar, and voluntary bar associations. The organization should ensure 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. Organizations should invest in case management systems that enable careful but simple tracking of pro bono cases—assignments, rosters, hours, and the status of cases.

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 organization.

Establishing a clear understanding with the client. Clients should know that an outside attorney, and not the organization, will be representing them.

It should be clear whether the organization retains an attorney-client relationship with the referred client. It is a matter of contract among the client, the outside attorney, and the organization as to whether the organization is included in the attorney-client relationship once the referral has been made. The existence—or absence—of an attorney-client relationship between the organization and the client is significant since it directly implicates whether the organization can receive confidential and privileged 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 organization 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.[168] The organization 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 should contact the organization 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.[169]

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 organization, there should be an explicit determination of the level of responsibility the organization 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 organization and the outside attorney. Those include:

- The extent to which the attorney-client relationship includes the organization within its purview;
- Who is responsible for costs that may be incurred in the course of the representation;
- The extent of involvement of the organization's staff in strategic decision making prior to referral and during the course of the representation, particularly if the organization has agreed to pay costs;
- 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 available from the organization and how to access it;
- The reports that the organization will request during the course of the representation and at its end; and

[168] *See* Standard 5.6 on Client and Attorneys' Fees.

[169] *See* Standard 5.8 on Client Complaint Procedure.

- The procedures that will be followed in the event of a complaint made by the client regarding the representation.

Supervision of referred cases. The extent to which the organization can receive information about the conduct of each referred case is a function of the extent to which it stands within the attorney-client relationship that is created. If the organization stands outside the relationship between the client and the outside practitioner, it cannot ethically obtain confidential information about the case without the client's informed consent, nor can it interfere with the professional judgment of the lawyer.[170] Its authority to supervise the representation is, therefore, necessarily circumscribed. If on the other hand, the organization and the outside practitioner share in the attorney-client relationship, the organization has both greater responsibility and greater authority to supervise the handling of each case matter.

The degree of responsibility that an organization assumes for a case referred by it and the nature of the quality assurance procedures that it employs will vary, and as noted above the organization may have none. 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 organization 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 organization may offer research and other support, as well as a discussion of strategy with the outside attorney.

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

In all cases, the organization should ask for a close-out report indicating that the case has terminated, whether the client’s objective was achieved, and how much time was spent on the matter. The information should be reviewed by the organization to gauge the effectiveness of its plan for using other members of the bar.

Backup and support. The organization should offer backup and support to its participating attorneys. The type of support that is possible will vary depending on whether the organization falls within the attorney-client relationship and on practical considerations, such as staff size in relation to the number of participating outside attorneys.

[170] *See* MRPC R. 1.6 and 5.4

An organization can offer pro bono attorneys' access to knowledge databases, brief banks, and document assembly tools where appropriate. The organization can assign a staff lawyer to provide advice and support to the outside practitioner, when requested. Some organizations 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 and the ability to consult or associate with a more experienced attorney. Training can be in substantive areas or regarding issues related to the representation of low-income clients generally, as well as what is necessary to work with a particular low-income population. Many members of the bar will not have had significant experience working with this type of client. Training may have the ancillary effect of encouraging them to represent similar clients who seek their assistance directly. The organization should also make its cultural humility training available to its participating attorneys.[171] See Standard 3.4 for more information on this training.

Recruitment of attorneys. The organization 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 client community. The organization should also recruit in-house corporate counsel and government attorneys to the extent to which their participation is allowed.

Recognition and appreciation of volunteer attorneys. The organization should take appropriate steps to recognize and show appreciation for volunteer attorneys who have assisted clients or provided other professional support. Appreciation can be shown through bar luncheons, favorable articles in bar publications and the local press, and a simple thank you letter.

[171] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

STANDARD 4.8 ON RELATIONS WITH THE ORGANIZED BAR

STANDARD

A legal aid organization will be more effective when its staff actively participates in bar organizations and other types of professional associations.

COMMENTARY

General Considerations

There is a strong community of interest between a legal aid organization and state and local organized bars. It is important, therefore, for a legal aid organization and its practitioners to participate in the affairs of bar associations in the communities in its service area.[172] Legal aid practitioners should participate so that their insights into the needs of client communities are a part of the deliberations of the bar. The legal aid organization 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. Many state bar associations have statutorily assigned responsibilities related to legal practice in the state. The organization will also benefit from both attorney and non-attorney staff participating in professional associations, affinity groups, and other coalitions that focus on equal justice issues, or other issues specific to the needs of clients.

Participation in Local and State Bar Associations

The legal aid organization should encourage its staff to participate in the full range of activities of bar associations. This includes participating in regulatory reform efforts, including conversations with courts and academia that seek to increase access to legal services and access to justice, and also enhance lawyer practice sustainability. The latter is a stated reason for several innovation efforts at the state level.

Participation in the bar association is an avenue for concerns associated with legal aid practice and/or access to justice and self-represented litigants 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 and bar boards/regulators that can enhance representation of clients, services to those without lawyers, and the shaping of policy changes and innovations undertaken in the name of access to justice or closing the justice gap.

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

[172] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

matters, as well as committees on legal aid and indigent representation. Legal aid organizations 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 those 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 legal aid organization.

Some bar associations have a special section for paralegals and other non-licensed practitioners and the organization 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 organization 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.

A growing number of state bar associations and supreme courts are considering regulatory reform efforts that center on technology and innovation to close the justice gap, especially for unrepresented parties. Organizations need to become aware and conversant in state court rule changes that approve regulatory reforms to allow private funding streams to create and deploy new technology to those without lawyers. Since many of these innovations are technology-driven, legal aid staff needs speak out on behalf of the communities it serves to ensure those new products do not confuse those who might qualify for legal services and end up paying for services and tools that have already been created by nonprofit legal organizations to provide information, advice, and form automation. To the degree that reform efforts affect technology created and designed by legal nonprofits, as well as those that are used by legal aid clients or applicants, legal aid organizations need to develop expertise in the current approaches bar boards and supreme courts are approving and be a part of those conversations.

Similarly, where other regulatory reforms are sought, such as to allow for paraprofessionals to be authorized to engage in providing certain legal services directly to consumers, it is vital that representatives of the legal aid community be engaged in those processes to ensure that such efforts are effective in actually meeting underserved legal needs.

The legal aid organization 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 client-eligible persons. It should also consult with the organized bar regarding its priorities and means of delivering service to its clients.

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 organization 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 its client community 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 organization or the communities it serves. The state bar association and many local bars represent the interests of the profession before the legislature and administrative bodies. The organization should work with local and state bar associations to identify and support policies that will foster increased responsiveness of the legal system to its clients and should seek to have the bar's 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 organization funding.

Participation with Other Associations and Activities

Both attorney and other team members in the organization should be encouraged to participate in other types of professional associations and groups, such as human resource societies, technology listservs, access-to-justice groups, conversations, and commissions, or supervision discussion groups. Other associations may be practice-area specific such as a domestic violence coalitions or tenant rights organizations. The organization's clients and its staff will benefit from involvement with other groups with aligned goals serving the same clients.

In the past three years, academia and philanthropy have taken a welcome role in the facilitation of discussions about the future of access to justice in the U.S. Legal aid groups must be aware of those discussions, standards being discussed, and vision for how the public will interact with public systems like courts or state agencies. If the state has an Access to Justice Commission, legal aid staff should be encouraged to participate in those groups—and any other group that is creating plans for the future of how services will be delivered in the next five to 10 years.

STANDARD 4.9 ON USE OF OTHER PRACTITIONERS

STANDARD

A legal aid organization should consider using paraprofessionals, tribal advocates, lay advocates, law students, social workers, and other professionals when authorized by state, federal, or tribal law, and appropriate court rules, rules of professional conduct, and professional regulatory rules.

COMMENTARY

General Considerations

Paralegals, tribal and lay advocates, law students, social workers, and other legal professionals supervised by an attorney have long played an essential part in legal aid practice. There are many circumstances in which these professionals can assist clients directly and greatly enhance the work of an attorney in serving clients, often in a cost-effective manner.[173]

Representation by other legal professionals is authorized in many circumstances by state, federal, or tribal law. For example, in public benefits matters, other practitioners may be authorized to appear on behalf of clients in administrative hearings. Similarly, many states authorize other practitioners in unemployment compensation hearings, and agency rules permit those who are not lawyers to represent clients in certain immigration matters. Some states also permit other individuals to become licensed to prepare legal documents, and emerging innovative regulatory reforms are being pursued in states to allow licensure of non-attorneys to provide limited forms of legal services.

Laws prohibiting the unauthorized practice of law and professional conduct standards may foreclose such participation in many practice areas and depending on the scope and nature of the work, but there are circumstances where these other legal professionals can and do effectively assist clients.

Appropriate Use of Other Authorized Practitioners

The level of responsibility that is appropriate for another legal professional to assume depends upon the experience of the practitioner, whether supervision by an attorney is required, and the nature of the matter. Practitioners with significant experience will have

[173] The use of paralegals has been addressed at length in the American Bar Association's Model Guidelines for the Utilization of Paralegals (2018), https://www.americanbar.org/content/dam/aba/administrative/paralegals/ls_prlgs_modelguidelines.pdf.

an understanding of a broader range of legal issues and can take greater responsibility commensurate with their training and experience.

Additionally, technology tools can use rule-based coding to embed the expertise of a substantive legal experts into algorithms. Organizations may encourage the use of such expert systems and tools, like document assembly and triage by other legal professional team members to assist clients. However, these tools do not replace the judgement of an attorney and should be considered as a way to enhance the provision of legal services to clients of the organization.

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.[174]

Other legal professionals can also assist attorneys in the preparation of cases. Such assistance can take many forms, including: 1) conducting initial interviews of clients; 2) preparing documents and drafting pleadings in repetitive and relatively straightforward cases; 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, or as otherwise authorized by law.

Many organizations use paralegals to conduct interviews of persons seeking assistance to determine eligibility and the general nature of the legal problem. Organizations 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. To the degree that case management systems now provide full intake modules as part of their offerings, organizations should analyze if intake and eligibility can be done more effectively and accurately online and allocate staff to provide assistance and services in other ways, such as by using live chat for information purposes and referral or monitoring a chatbot.

There are many ways in which social workers can effectively assist in the delivery of legal services. Among the most basic of those is that social workers can be useful with interviews, evaluation, crisis intervention, short-term casework, negotiation, and

[174] *See* Standard 6.3 on Responsibility for the Conduct of Representation; Standard 6.4 on Review of Representation.

referrals. As a result of social workers' training and education, they are better equipped than lawyers are to provide services such as crisis intervention, the evaluation of clients' needs, referrals to appropriate agencies, and direct casework. With respect to evaluation, a social worker's training in assessing personality and mental status contributes significantly to the lawyer's appraisal of the facts. Social workers also can be effective trainers and collaborators, especially to train attorneys and support staff in effective interviewing and counseling techniques.

Law students may properly be used in a variety of ways to assist in the delivery of legal services to eligible clients. Organizations 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 organizations or in law school clinics that provide representation to low-income clients. To the extent that a principal purpose of such enterprises meets the definition of a “legal aid organization,” they should operate in conformance with these standards. Law student organizations should utilize, when appropriate, the assistance and expertise available from other local legal aid organizations and should work in close cooperation with such organizations to coordinate referral practices and to set service priorities.

Organization Responsibilities in the Use of Other Practitioners

The law regarding what constitutes the unauthorized practice of law varies by jurisdiction and the organization should be aware of the requirements in the jurisdictions in which it operates and abide by them.[175] The organization must avoid implicitly or explicitly giving the impression that its other legal professionals are lawyers.

Unless specifically allowed by law, court, or agency rule, when a legal professional, other than a lawyer, provides legal services those services should be under the supervision of a licensed attorney.[176] The organization should ensure that all professionals receive adequate training to be proficient in the work they are assigned.

[175] *See* MRPC R. 5.3; 5.5.

[176] *See* MRPC R. 5.3. Note that some states have adopted rules allowing certain types of nonattorney activities without the requirement of attorney supervision.

STANDARD 4.10 ON EFFECTIVE USE OF TECHNOLOGY

STANDARD

A legal aid organization should utilize technology to support efficient operations and the provision of high-quality and responsive services. Organizations should remain informed and educated about technology tools and systems used by courts, administrative agencies, and others in ways that impact clients, or that clients are required to use when accessing courts or other services. Wherever possible, organizations should strive to participate in the creation of technology tools used by courts and agencies and work toward integration of technology systems with justice system partners to create efficiencies and seamless experiences for clients while also preserving confidentiality of information. Further, information security and data protection are of paramount importance to legal services organizations and organizations should maintain strong practices around information security, backup, and disaster recovery.

COMMENTARY

General Considerations

A legal aid organization should utilize technology to operate efficiently and to respond to the growing and changing legal needs of the communities it serves. The rapid and ongoing changes brought about by technology impact how client communities interact with their environment, access services and government benefits, and how they engage with the legal system. Technology is part of the infrastructure of legal aid practice and the courts and is integral to a legal aid organization's operations in the options available for providing services to the client community.

The tools for effective practice and for responding to the legal needs of client communities must be anchored in safe and reliable technology. Each organization has a responsibility to plan effectively how it will use technology in providing assistance to clients 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. This involves awareness about how government agencies process applications, provide benefits, and deliver court services using and requiring technology from client-eligible groups.

Technology also plays a central role in how the legal system operates as more courts and administrative agencies rely on computer and web-based methods of operating, utilizing e-filing, online applications, remote court appearances, and automated systems for determining eligibility, to name a few. As courts are embracing remote hearings and remote appearances, legal aid organizations will need to be proactive in working with courts to ensure that their clients' substantive and procedural due process rights are not compromised through the use of technology.

As much as possible, organizations will also need to adapt how they represent and advocate for clients and will have to develop internal standards by which to review and implement the technology used to facilitate remote services. This standard setting and review process will force organizations to better understand security, encryption, and the dangers posed by data mining and the subsequent use of gathered information that might be shared with outside agencies—including law enforcement and border patrol—or used to create databases that can be shared with other companies without the legal aid organization's or clients' consent. In addition, before purchasing technology, legal aid organizations need to craft requests-for-proposals that ask for specific requirements.[177]

Special Considerations Related to the Use of Artificial Intelligence

Much research and writing has been done on the uses and impact of artificial intelligence (AI) in the legal field, but too little attention is being paid to it by the legal aid community. AI brings great opportunities for efficiency and expanded services to legal aid, but it also brings potential risks, including around due process and privacy. Legal aid organizations should strive to be educated about and engaged in conversations about the use of AI, both within their own delivery systems as well as those of the courts and agencies with which their clients interact. Whenever possible, organizations should endeavor to be at the table when courts and agencies are planning, developing, and deploying systems using AI that will impact their clients' interests.

Use of AI, like all legal technology, should be evaluated against relevant rules of professional conduct and held to high standards involving transparency, accountability, reliability, and assurance of due process. Organizations are encouraged to work with others in their jurisdictions to develop standards around the use of AI in the legal system and to develop expertise in this field in order to be a resource for evaluating the ethics and legality of these systems and their impact on clients.

Decisions on whether to use AI tools should not be made by technical teams or vendors alone. The assessment should include ethics and privacy experts to ascertain the risk or potential that client-provided data could be used to create indexes or other tools that could eventually harm the communities served.

Technology Planning

A legal aid organization 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 an organization, and new methods will evolve over

[177] For guidance on how to develop guidelines to accomplish these objectives, legal aid organizations may look to examples of ATJ-related technology principles developed by some states. *See, e.g.,* Washington Courts Access to Justice Technology Principles (Washington State Courts 2020), www.srln.org/node/1497/resource-washington-courts-access-justice-technology-principles-washington-state-courts.

time. There are a number of broad areas, as follows, regarding which the organization 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. There are also a number of applications that support efficiency and effectiveness, including case management software, document assembly capabilities, web chat tools, texting platforms integrated with case management tools, risk detectors, knowledge-based tools, videoconferencing, and tools for legal factual research. The legal aid organization should also be aware of the opportunities for using technology to collaborate with others, including outside practitioners, other legal aid organizations, and non-legal organizations that serve clients, but the legal aid organization must be mindful of ethical rules and client confidentiality as they pertain to these activities.[178]

Part of managing legal work requires that the organizations know, understand, and consider how data analysis and analytics are now being used to better understand community needs and organization service penetration rates and impact. Thus, the organization needs to consider developments like mapping, linking data from the Centers for Medicare and Medicaid Services (CMS) to U.S. census data, as well as other data analytics tools, including those from Legal Services Corporation, which are available for all legal nonprofits as part of their needs assessment and internal evaluation of effectiveness, impact, and dispersion of the benefits of legal aid.

Training and support of staff. Technology should be used to provide trainings to staff, pro bono attorneys, and the organization's governing body. The organization should use 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 organization should assess opportunities that technology may provide to increase the efficiency of its internal operations, including software for accounting, human resources and personnel management, and other such tools that may evolve. The organization should use technology to enhance its internal communications as well as its development and marketing efforts. In addition, organizations should consider new ways to sign, share, and co-author documents, and other innovations that support and facilitate remote services and workflows with staff and other team members.

Organization policies and practices. The organization should develop and implement robust policies regarding the use of technology by staff and others, including: 1) backup and disaster recovery plans; 2) security and procedures for protecting client and case data consistent with the duty of confidentiality; actions to take in the event of a security breach; 3) mobile technology use policies for staff, volunteers, and clients; 4) remote work and the remote delivery of services; and 5) other needs as they arise. Technology

[178] *See* MRPC R. 1.6 and 5.3, Comment 3.

policies should be reviewed and updated at least annually to address the fast-changing nature of technological development. In addition, organizations should develop the internal capacity to review technology solutions for needs that arise and to ensure those solutions protect their clients and their data.

Legal aid organizations should adopt policies and practices to ensure protection of key information and systems. Policies and practices such as multifactor authentication, routine staff security trainings, and use of password managers, encrypted hard drives, and up-to-date security hardware and software are important pieces of information security. Organizations should also assess the benefits of vulnerability assessments, penetration testing, and cyber insurance policies. Legal aid organizations should routinely test their backup processes to ensure that data can be properly restored if it is lost. Additionally, organizations should consider a hybrid-cloud approach to backup—where an organization combines on-site backup with a cloud solution. Such a solution greatly increases the likelihood of a quick restoration of program systems and data in the event of a cyberattack or natural disaster.

Expansion of the range of services to clients and others in the community. Each organization should stay informed of new developments and regularly analyze the degree to which new strategies for serving client communities are possible as a result of technological innovations. An organization should cultivate a commitment to innovation and should take advantage of technology that can increase the scope of services it offers to its constituents. Technology can be used to provide legal information, to support limited representation and self-representation, to do remote intake (by clients or referring partners), and do remote representation of clients, among other uses.

Evaluation of technology tools. Technology planning should include an assessment of the effectiveness of the organization's current technology and of new technological advances that would enhance operation and delivery of services. See Standard 3.12 regarding general evaluation. Specific areas of evaluation for technology tools include evaluation of usability, accessibility, plain language efforts in public-facing tools, and others. Resources for such evaluations may be found at LSNTAP.org, on the Legal Services Corporation's website (https://www.lsc.gov/grants-grantee-resources/statewide-website-evaluation-project); and https://wave.webaim.org/.

Expertise to meet technology needs. The organization should assess whether its information technology needs can best be met by using staff, by outsourcing the responsibility to others, or by a combination of these two methods. The organization should also regularly consider areas appropriate for upgrading its technological capability to increase the efficiency and effectiveness of its delivery strategies while maintaining its ethical obligations concerning protection of client data.[179]

[179] *Id.*

To make informed choices about innovative uses of technology and to embrace those changes, an organization needs access to expertise. Not every organization has the resources to hire or contract the technological expertise needed for it to plan creatively. For many organizations, 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. An organization may be able to reduce costs by collaborating with others to plan and pay for the development and implementation of technology, such as case management software.

Responsibilities of the Organization Regarding its Utilization of Technology

Responsibilities to members of the client community. An organization should be aware of the degree to which members of the communities it serves have access to the technology they will need to take advantage of technologically-based service strategies. While internet access is fairly high among low-income communities, there are still many low-income persons and other client communities with limited or no access to the internet.[180] Most low-income users connect online with mobile devices, not desktop computers.[181] Thus, legal aid organizations need to engage in mobile-first design to accommodate their users. Others may have access to computers but lack training to use technology or might be afraid of using it. To the degree practical, an organization should support strategies that increase access of client communities to technology and should cooperate with other organizations that seek to increase technology's availability and usability.

The organization should also be careful not to utilize technology in ways that limit or deter access to its services. It should provide alternative means for access to assistance for persons who are resistant or unable to use of computers and other technology tools. Offering only online services is not recommended; instead, the organization should provide many doors to services to accommodate those who cannot afford legal services and might not have mobile technology or the technical literacy to use online tools.

An organization that obtains user information online needs to publish and abide by a privacy policy regarding how it will treat information it obtains from those using its systems. The policy should define and describe what private, confidential, or privileged information the tool collects, how that information will be used, and who will have access to that information. These policies and terms of use should be in plain language and in the languages prevalent in that region. The system must also be careful to protect from disclosure any confidential information obtained from applicants, clients, and other users of its services. It should have security measures in place to protect all

[180] *See* Pew Research Center, Digital divide persists even as Americans with lower incomes make gains in tech adoption (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption.

[181] *Id.*

of its electronic data from unauthorized intrusion. This includes having clear data retention policies for clients and applicants and requiring vendors to commit to not selling any information without express permission.

The approach organizations are encouraged to take is to assume that clients own the data they share or create and to empower clients to decide what services they want to opt into with full disclosure of how their data—individual or aggregate—will be shared. The policy should also address the special risks associated with interactions over the internet: Sensitive and personal information in electronic format should be appropriately encrypted, and the organization should have a policy regarding retention and deletion of such information. Organizations must also have data-sharing policies reflecting these protections and ensure partners with whom they share data abide by their policies and professional responsibilities, including the duty of confidentiality.[182]

The organization should determine whether information that is provided by persons who obtain legal information online is confidential under the ethical rules in its jurisdiction.[183] Any information given by a client or an applicant for the purpose of receiving legal services is confidential under pertinent ethical rules.[184] Limitation regarding the use of personal information might also be defined by state law, and the organization should be aware of what systems are collecting that data and make sure that the way the data is being used and shared is explained in privacy and terms of use policies. Familiarity with local and state protections on personal information (including consumer protection) needs to be developed by the organization's management teams and decision-makers. Persons who provide personal information in the course of obtaining legal information from the organization and who had no expectation or intention of becoming a client of the organization may be subject to the same protections.

This includes when legal aid organizations use Software as a Service (SaaS) tools when working with clients and applicants. The organization should do a review of key data policies, practices, and terms of use to ensure that client data will not be shared nor sold without specific consent from the client, and not made available to external entities, such as law enforcement or other state actors, without client consent and release. Clients should be informed of the risks of the use of those tools with regard to their data.

The organization should protect the information from disclosure, but it may not be able to resist a subpoena or other official request for disclosure. The organization's terms of use of the technology it uses should explain how it will deal with subpoenas, and whether it will disclose to the client a release of information pursuant to a subpoena. The organization should have a policy regarding whether it will retain the personal

[182] These policies should be reflected in contractual relationships between the organization and other entities with which it shares data (e.g., cloud-based storage providers).

[183] *See* Standard 5.4 on Protecting Client Confidences.

[184] *See* MRPC R. 1.6, 1.18.

information it obtained this way, for how long, and with what organizations or outside data users, including courts or online dispute resolution platforms and the like that it may be shared with. Informed consent by the user is usually required by the ethics rules and, even when not required, should be considered before sharing individual data with anyone outside of the organization, including machine learning systems that are used to train an algorithm. As much as possible, an organization should not use systems that automatically opt clients into to data-sharing, even in a pilot. For nonservice analysis and evaluation, the organization might aggregate data in safe database that only staff persons can access.

Budgeting adequate resources for technology. Technology staff should be part of budgeting and strategic planning processes for every organization. An organization should include its technology needs as part of the annual budgeting process. Funds should be allocated for planned major expenditures to maintain and update technology and adopt emerging practices and initiatives. The budget should provide for purchase, maintenance, and support of technologies used in the delivery of services to clients. 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. This also includes ensuring that data infrastructure, including connections between offices, and, in particular for rural offices, bandwidth and online storage and speed is sufficient and reasonable and does not act as a barrier to using that technology. For organizations that are using cloud-based services and storage, this includes monitoring cloud capacity to ensure that online systems are not slow or lead to disconnects. Technology investments should be planned on a multiyear basis and should include reserve funds to allow for flexibility in taking advantage of new developments and necessary maintenance/upgrades.

Regular maintenance 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 as new technology standards evolve, or as needed. Maintenance, upgrades, and administrative system patches should be done on a routine basis so the systems and software the organization uses remain updated and are not vulnerable to intrusions. Failure to do so can result in a system that is unable to operate newly developed software that might be instrumental in helping the organization serve its clients more effectively and exposes the organization to back-end hacking and virus insertion.

The persons who are responsible for the organization’s technology infrastructure need to be well-qualified for their roles. The organization’s leadership needs to understand the business requirements of the organization, the ethical requirements regarding confidences, state consumer law protection requirements, and 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 all hardware and software; 3) support and training of users of the technology and development of security policies, practices, and protocols; 4) management of organizational databases and system-wide applications, including routine backups and routine system code patches; and 5) management of technologies that are used to assist clients. The organization should consider whether it would be cost-effective to outsource the development, hosting, maintenance, or support of some or all of these technological needs.[185] If outsourcing is considered, the organization should retain technical consultants who have worked with similar organizations and are familiar as much as possible with legal aid obligations, ethics, and practices, and the client community.

The staff or contractors who are responsible for the technology assets of an organization need to have knowledge, skills, and a budget necessary to keep all tools functioning and available to staff who rely on them. Technology personnel need to be capable of managing the organization's databases and case management system as well as accounting and all software in use so staff can make maximum use of the organization's tools and so critical data is not lost.

Using technology to serve clients. An organization should be alert to the ways that emerging technologies can be used to serve clients directly, either by supporting their access to representation or by directly providing legal information and other needed assistance. The organization should budget not only for the equipment and software to support such efforts, but also for the non-technical expenses, such as the personnel necessary for the development and updating of content, end-user support, evaluation, and data analysis of those services.

It is also important that an organization work with others in regional and statewide systems to explore ways that technology may be used collaboratively to strengthen the overall system.[186] An organization should also work with courts and administrative agencies to make certain that their technological requirements, such as mandated remote video trials, conferencing, family mediation, and electronic filing and signatures, for example, function in ways that facilitate access for client populations, including those unable to access them online or with no or little technical literacy or printing capacity.

Training and support of staff in the use of technology. It is critical that the organization plan and budget for technology training and support of all staff, including sufficient support for those who have difficulty adapting to it. Of particular importance is

[185] Some providers outsource some aspects of the technology needs to private law firms, which may provide the service on a pro bono basis. *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

[186] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

training staff and volunteers on security practices and protocols, to avoid falling victim to hacking and virus insertion attempts to ensure the integrity of the organization’s data infrastructure.

STANDARD 4.11 ON ORGANIZATION EVALUATION

STANDARD

A legal aid organization should regularly evaluate the efficiency and effectiveness of its operations and infrastructure in supporting high-quality advocacy, including identifying new or emerging needs. Data, including client feedback, should be regularly compiled and analyzed to support this evaluation.

COMMENTARY

General Considerations

A legal aid organization should regularly review its operations and infrastructure to determine if it is functioning efficiently and effectively, is producing high-quality legal work, and is accomplishing its objectives on behalf of the clients it serves. The overall goal of these assessments should be to support a forward-looking and judicious evolution that addresses the organization's weaknesses and reinforces its strengths, making the most of available resources while remaining good fiscal stewards.

The organization has a primary responsibility for the ongoing evaluation of itself and should conduct its own assessments consistent with this Standard and commentary. The organization'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 or contract. Evaluations conducted by a funder can be an important source of information for an organization, and the organization should cooperate in such evaluations and take advantage of the insights derived from them.[187]

Evaluation Purposes

There are several potential purposes evaluations can serve:

- ***To improve the organization's operations and/or infrastructure***. A fundamental purpose of evaluation is to examine how effectively the organization, or a specific project or initiative, is functioning in order to make informed decisions about possible adjustments. Assessments should examine whether the organization and its projects are operating according to developed plans, whether they are accomplishing the objectives set out for them, whether staff and others involved have the requisite skills and substantive knowledge for them to succeed, and whether those plans can or should be modified to better accomplish the goal. Data reports and analysis are key to these evaluations.

[187] 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, Revised 2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_monitor_eval_providers_legal_svcs_to_poor.authcheckdam.pdf..

- ***To determine if its delivery approaches are succeeding***. To be effective, an organization has a responsibility to learn about new delivery techniques and to experiment with new approaches to helping the communities it serves.[188] In determining its approach to serving its constituents, the organization will make a number of choices regarding the appropriate balance between limited and full representation, assistance to self-represented litigants, community legal education, and other preventative legal services, as well as various models for delivering each.[189] The legal aid organization should regularly assess whether its efforts are accomplishing useful and lasting outcomes for those it assists, and whether it is successfully responding to the most compelling needs of the communities it serves. Again, data reports and analysis, and both the organization's data and available public datasets about the client population should be a part of the analysis.
- ***To test the success of innovative delivery techniques.*** An effective organization will engage in innovative approaches to serving its clients, utilizing a number of techniques, including new technologies.[190] The organization 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 organization is considering whether an innovative approach should be made permanent or expanded. The organization should undertake these approaches knowing that some will not accomplish what was hoped for, taking lessons from each technique to determine next steps. See Standard 3.10 for more information on evaluation of technology tools.
- ***To inform planning and budgeting***. Evaluations can also be important to inform planning and budgeting, and to guide the allocation of the organization's resources. Many strategies for serving clients or for using technology involve significant choices for an organization 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. As much as possible, organizations should include evaluation budgets in their grant requests, which should include work with experts in evaluation in the design and analysis of data collection for new and pivotal projects.
- ***To inform training plans****.* A number of factors help shape an organization's training plans, including conclusions of an evaluation. Evaluations may identify needs for training in substantive knowledge and practice skills, as well as other areas an organization might not otherwise identify, such as management skills, cultural humility, the ability to effectively deal with diversity, trauma-informed care, and the 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

[188] *See* Standard 4.2 on Delivery Structure.

[189] *See* Standard 3.2 on Service Delivery to Individuals.

[190] *See* Standard 4.10 on Effective Use of Technology.

accomplished its objectives. This may be required by a funding source or initiated by the organization 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 an organization's operations. These range from internal reporting systems that regularly supply management and the governing body with information about the organization's 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 organization's operations or may focus on specific projects or components. As much as possible and consistent with client confidentiality, the organization should use client feedback from tools such as online chats, triage portal, text messages, online forms, intake modules, and the case management system to make decisions based on empirical evidence, including those around topics such as hiring, fundraising, office location, outreach, marketing, and similar resource allocation decisions.

The frequency and scope of an evaluation is a function, in part, of the purpose it is designed to serve. Full evaluations of the organization 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 organization. Many funding sources periodically review the operation of their recipients. Reports from such evaluations serve as a useful source of information to an organization regarding its effectiveness.[191] Data, including client feedback, should be regularly compiled and analyzed as a part of this process.

Evaluation of internal operations. An organization should regularly conduct internal evaluations as a management tool. This is particularly important with regard to the delivery approaches that the organization adopts to respond to the needs of the communities that it serves. An organization should regularly assess whether its staff, particularly its practitioners, have the necessary skills and substantive knowledge for their roles. It should assess the effectiveness of its delivery approaches involving full representation, limited-scope representation, assistance to self-represented litigants, and community legal education.

[191] 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*.

Other facets of its operation should also be assessed by the organization, including intake, its effort to integrate the resources of the legal profession and involve members of the bar, its cultural humility, its capacity to serve persons with limited English proficiency, its relations with clients, its accessibility to potential clients, its internal systems and procedures, its board's activities, and its methods for quality assurance. Refer to the various standards relating to all of these aspects of operation for further guidance on factors against which to perform an evaluation. Such evaluation should also center on the user experience, including the client and relevant staff members engaged in those aspects of the operations.

Evaluation of the organization's responsiveness to the legal needs of the communities it serves. Strategies that rely on clients taking action to assist themselves—as is the case with limited-scope representation and assistance to self-represented litigants—call for the organization to assess the extent to which users are able to take advantage of the assistance and its benefits to them. Follow-up with the 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. This can be done with standard tools like secure SMS texting, online chats, chatbots that gather information, and data past the last point of contact with the individual. Similarly, organizations 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.

An organization should also periodically assess the effectiveness of its legal strategies that utilize various forms of full representation in a way that is consistent with the jurisdiction's ethics rules. Such assessments should consider both whether the organization is achieving clients' objectives in a significant number of cases and whether it is accomplishing meaningful outcomes for its clients.

The organization should also examine the long-term outcomes of the organization's legal work for the client community overall, measured against the compelling legal needs identified in the organization's planning process. It should also examine unexpected long-term results and consequences that may have been achieved.

Types of evaluation. There are different types of evaluations that can be beneficial to an organization and that should be utilized where appropriate. Two common examples are:

- *Process evaluations,* which assess the extent to which an organization is operating as it was intended. Where an outcome evaluation asks whether a project or component of an organization was successful, a process evaluation asks, "*Why or why not* was the project successful"? Evaluators are embedded in a project or component of an organization in a process evaluation that allows for real-time analysis and allows the evaluation to influence the project. In this way, process evaluators are not fully external reviewers, but invested participants, and the process evaluation is done in service of the project and the project's staff.

- *Outcome evaluations,* in contrast, are retrospective. Where a process evaluation provides real-time analysis, an outcome evaluation seeks to ask, after project conclusion, if a project or component of an organization was successful and whether it should be replicated. An outcome evaluation is done in service of the funder and audience the project intends to help—in the case of legal aid organization evaluations, this is typically the client.

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

- Client satisfaction assessments can be useful to measure an organization'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 alone do not offer reliable data about the quality or effectiveness of representation and should be paired with more robust outcome evaluations in order to gain a more complete picture of the organization's effectiveness.
- Evaluation of online data tools, like analysis of data gathered by Google Analytics or alternative analytics tools like Matomo, and analysis of data created and generated by SAS platforms, can be executed.
- Data-based evaluation can be performed using the tools and resources the Legal Services Corporation routinely updates and publishes so that legal aid organizations can do more robust data analysis.
- Regular internal reporting can provide data about an organization's operations and productivity, such as budget reports, case counts, outcome tracking, major case activity reports or impact dockets, and data related to requests for service.
- A desk audit using an internally administered checklist to confirm that the organization complies with appropriate legal and contractual requirements can be performed.
- Review of the work of practitioners and other staff, consistent with professional conduct rules, through both supervisory and internal peer reviews to ensure that it is of high quality and meets the organization's standards can be done.
- A peer review can be performed in which outside persons who are knowledgeable and experienced in legal aid review the organization's operations and the quality and effectiveness of its legal work, so long as such review does not violate the duty of confidentiality.[192]
- Periodic follow-up interviews of a small sample of clients at intervals following the close of the case can be executed.
- Surveys and interviews of personnel of courts and agencies that work with the organization and with the client population can be done.
- Focus groups of low-income persons, clients, agency personnel, and other stakeholders can be held.
- There can be a review of court files to determine case outcomes.

[192] *See* MRPC R. 1.6.

- Evaluation in the form of robust usability testing involving members of the client population can be performed.
- A review and use of end-user feedback through online tools and surveys to improve services, instructions, and capacity to use those services can be done.

SECTION 5: STANDARDS FOR INTERNAL SYSTEMS, PROCEDURES, AND CLIENT RELATIONS

STANDARD 5.1 ON THE ORGANIZATION'S INTAKE SYSTEM AND ACCESS TO SERVICES

STANDARD

A legal aid organization should design and operate an intake system that reflects strategic decision-making and treats all persons seeking assistance with respect, accurately identifies their legal needs, and promptly determines the assistance to be offered. It is important that intake systems are developed with user-based design principles, have been tested for accessibility for users, maintain the confidentiality of prospective client information, and have been evaluated through usability studies.

COMMENTARY

General Considerations

A legal aid organization has a responsibility to operate in ways that facilitate access to its services for all members of the population it serves. Many aspects of its operation affect the accessibility of its services: The organization's overall delivery strategy; including areas of specialization and practice concentration; office location; utilization of technology; intake hours and strategy; design of facilities; outreach and community engagement, including community-based intake; coordination with other legal aid organizations; and the involvement of contract and volunteer attorneys.

In furtherance of facilitating access to services, an organization should continue meeting clients where they are in terms of ever-evolving technology by creating and maintaining mobile access, maximizing accessibility and usability of client-facing technology tools, and maximizing access to the organization's resources through strategic, robust outreach, intake, and referral systems with partners. Automated triaging tools and online intake may increase an organization's efficiency in conducting intakes, along with the speed with which individuals are matched with the most appropriate resources and referrals for their situation.

An organization needs to be attentive to how economic and demographic patterns and legal needs are changing in their service areas. It also needs to be attentive to the many barriers that clients face when trying to access services and ensure that they are available in areas of increased poverty and need and are designed to overcome barriers.

Factors Affecting Access

Delivery and intake strategy. The overall delivery structure and priorities of an organization will impact accessibility to clients.[193] Some organizations are structured entirely to offer intake and advice, and issues such as office location might be less relevant to them. However, these organizations may want to consider whether providing community-based or in-person intake services may help them more fully reach and serve their community.

Organizations that specialize in work such as appeals or legislative and administrative advocacy and rely on referrals from other organizations have different access issues than a large full-service legal aid organization does. Similarly, the limits an organization 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.

Individuals may initially contact the organization in a range of ways: In-person (walk-in); by phone; through an online platform; referral from a community partner; or off-site community-based services. While intake could also be via Facebook or social media apps, online forms, a web search page, or through a "warm referral" from a risk detector, organizations should be mindful of confidentiality concerns. Organizations should avoid the use a third party as a conduit for intake unless necessary (not merely convenient), and the client understands and formally acknowledges the risks. Ideally, a lawyer should use online forms to which the lawyer alone has access.

All aspects of an organization's intake system should be respectful of applicants' time and resources and be accessible and user-friendly. They should also facilitate prompt decision-making regarding what the organization commits to do on their behalf. That said, these concerns must be balanced against the organization's need for thoroughness in obtaining the information necessary to ensure appropriate ethical analysis of the matter (e.g., ensuring competency, avoiding conflicts, confirming scope, and the like) and to address other risk-management concerns of the organization. Organizations should evaluate how many different intake options they need, taking into account distance, public transportation availability to the site, hours of operation, and available community-based options, as well as the provision of language and disability accessibility. Ideally, intake should be available through multiple channels. Organizations should factor in the digital divide in their region to ensure that all, even those without access to a phone, the internet, broadband services, or a computer can access them without delay.

Each organization should be aware of and address the particular access issues that it encounters given its community's needs and its own delivery system, and then monitor

[193] *See* Standard 4.2 on Delivery Structure.

the delivery system to ensure that all persons in need of assistance have access to them.

Office Location. Where an organization locates its service offices and the degree to which they offer remote or community-based services will affect how people utilize its services. Offices where clients are seen should be in locations that are accessible to the communities served. Office locations should be determined in the context of the overall delivery structure of the organization. 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 staff specialization may reduce the opportunity to locate offices in or near the various communities served by the organization. Mechanisms such as centralized telephone intake, online services, outreach offices, community locations based at other organizations, or adoption of a remote service delivery model will reduce the need for physical access and may diminish the importance of the location of principal offices. There will be times, however, when applicants or clients will need to come to the office, and location and hours of operation will matter.

In locating its service offices, a legal aid organization should be sensitive to many countervailing factors. There may be many benefits to locating near courthouses and other state and local institutions before which the organization's practitioners regularly represent clients. On the other hand, it may be significantly more convenient for potential clients for the organization to be in or near the neighborhoods they serve. To the degree possible, inexpensive public transportation and free or low-cost parking should be available.

Some organizations 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 organization serving a specific population 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 an organization. Cost advantages of such arrangements should be carefully weighed against the potential disadvantages of identifying the organization with particular institutions.

Intake and office hours. Intake and office hours should be established to accommodate the needs of the communities served by the organization. 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 someone can come to an office. The hours set by staff and intake offices should accommodate such needs, and to the degree possible, the organization

should offer intake and access to services outside of standard business hours and at lunch time. Online intake tools, chatbots, or other apps may make it possible for intakes to be submitted at any time of day or night.

Physical Facilities. Service offices should provide an atmosphere that reflects respect for the communities served. Offices should provide privacy for applicants and clients and easy access to personnel. There should be a comfortable waiting space, with accommodations for people with disabilities, and, 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 communities the organization serves and be accessible to people with disabilities. Organizations may want to include pictures or posters indicating that their space is a welcoming environment for people of all races, ethnicities, cultures, languages, LGBTQ+ identities, ages, and abilities.

Elimination of barriers for people with disabilities. A legal aid organization should be highly sensitive of the need to eliminate barriers that limit access for persons with disabilities. An organization should at a minimum comply with federal and state legal requirements regarding access to its services by persons with disabilities.[194] The organization should recognize that many legal problems arise for individuals with a disability due to agencies', governments', or other actors' failure to meet their needs. Lack of access to transportation, public and private institutions, or other resources frequently exacerbates those problems. Failure of an organization to address its own access barriers may leave important legal issues unattended as the organization becomes another part of the problem persons with disabilities confront.

Organizations should consider the accessibility of the office location and building. This includes the route leading up to the office; for example, there should be accessible curb cuts. Offices in which clients meet practitioners should be accessible to persons in wheelchairs or with mobility impairments. If services are offered in multi-level facilities, elevators, ramps, or other accessible features must be included. Parking should accommodate persons with disabilities. Bathrooms must be accessible to persons with disabilities as well as those within the LGBTQ+ community. The organization should accommodate persons who rely on service animals or emotional support animals to assist them. Other physical features such as fire alarm systems/emergency evacuation plans and related signage should be accessible to people with disabilities so that those who are deaf or hard of hearing, blind, or have mobility impairments can access them. The organization may also consider whether environmental factors of the offices such as air quality or fragrances create access barriers.

Utilization of technology. Technology can have a significant impact on access issues. Technologically-based systems for intake, used to offer legal information, to

[194] *See* The Americans with Disabilities Act and Section 504 of the Rehabilitation Act governing nondiscrimination under federal grants and programs.

communicate, and to provide other assistance, can significantly increase the capacity of an organization to serve large numbers of the client community. They can also directly overcome barriers to access that some encounter. Telephone intake or online intake and triage, clinics, chats, and social media outreach, for example, can significantly increase access for isolated populations and the homebound and elders. It may be the only reasonable alternative for a person who cannot take time off of work to physically go to an office.

Organizations may build online triaging and intake systems to give applicants 24/7 access to applications and to redirect ineligible clients to other resources instead of allowing them to spend time applying for services. As new models of intake and triage emerge, organizations should become familiar with the technologies those new tools use and be in a position to evaluate the implications of using these tools with regard to client information. Organizations should ensure that clients who use those tools consent to the derivative use of their information, if any, have an option to opt out of them and use an alternative means of screening, understand how the identity of clients will be protected by those systems, and understand if the algorithms used by those tools will be distributed at-large and to what type of users, so that clients can make informed choices on how to request services. See Standard 3.10, On Effective Use of Technology, for more information about online intake and triage.

Overcoming barriers inherent in different types of intake. The organization needs to be sensitive to the fact that restricting intake to in-person or over the telephone may create impediments for some and that telephone or online intake systems are not equally accessible by all. Some communities may have only limited access to a phone or internet. Some people have a cultural or personal preference or need for face-to-face contact. Some might not be able to work with text-based online tools, and many will not have secure and reliable access to the internet. Some persons have difficulty with complex systems with branching options and will not persevere to get the help they need. Persons who do not speak English are likely to decline to use a system that does not immediately offer interaction in their language.[195] The organization should regularly review application processes to determine what, if any, barriers are present, who might be disproportionately impacted, and whether eligible clients are being denied services.

The organization should be aware of cultural, linguistic, and personal issues of both clients and staff that may impede effective interaction with persons seeking its assistance. Many applicants may be anxious about contacting a legal aid organization, may be intimidated by or have had negative experiences with attorneys and other legal professionals, and may misunderstand what constitutes a legal problem or what remedies are available through the legal system. The organization's staff may need training on issues of cultural humility, cultural competence, race equity, and related issues. The organization's intake processes should be capable of responding effectively to the diverse communities it serves and of overcoming their own biases and

[195] *See* Standard 5.7 on Implementing Language Justice.

differences in culture.[196] Intake should also be appropriately trained to ensure effective communication with people with mental or emotional disabilities.

Intake should also have appropriate language capacity for persons with limited English proficiency and relevant cultural proficiency. [197] Online intake systems should be available in the frequently used written languages of the communities served by the organization and should be designed and tested to maximize usability. Standard 2.3 provides further guidance on this.

The intake system should be designed to be open and responsive to persons with physical impairments that impede access or hinder communication. Intake staff should also be appropriately trained to ensure effective communication with people with mental, cognitive, or emotional disabilities or who may be neurodiverse. Such an applicant may need the support of specially trained staff to complete the process and provide the necessary facts to determine eligibility and conduct an initial analysis of the individual's legal problem.[198]

Persons living in institutions may require specific outreach efforts to make initial contact possible. The organization may need to set up a collect call line or provide a way to seek assistance through written correspondence for people in jails, prisons, detention centers, or psychiatric facilities.
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Technology needs to be accessible to persons who have disabilities. Services offered online should have appropriate adaptive technology, so they are usable by people with different types of disabilities. For more information, see www.w3.org/WAI/standards-guidelines/wcag/.

Outreach and Publicity. Legal aid organizations 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 it. As the public at-large now uses social media to find information and services, organizations should become more proactive about incorporating social media, Search Engine Optimization (SEO) techniques, and emerging platforms to reach out to specific communities. Effective outreach to elders, people who communicate in languages other than English, people with disabilities, and people living in institutions requires more than information. Organizations should establish outreach to people with disabilities and groups or organizations that work with persons with disabilities and can refer them to legal aid. The organization should consider bringing services to the people living in institutions and community members who cannot travel to the office or are better served in their communities.

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[196] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

[197] *See* Standard 5.7 on Implementing Language Justice.

[198] *See also* MRPC R. 1.14 on Client with Diminished Capacity.

Outreach should be tailored to address unique access barriers encountered by some because of their culture or special circumstances. The organization should conduct ongoing engagement with community organizations with cultural and linguistic connections to the communities the organization serves in order to facilitate establishing trust and a presence in those communities.

Involvement of other members of the bar and other referrals. The involvement of volunteer and contract attorneys offers a valuable opportunity to provide service in areas or at times that might otherwise be difficult to serve. If a client has a disability, speaks a language other than English, identifies as a member of the LGBTQ+ community, or belongs to additional racial or cultural groups, and is referred to an outside attorney, the organization should make certain that the attorney to whom the case is referred is fully able to understand and address the client's unique needs, such as through accommodation of the client's disability, or with access to translation and interpretation services. This same courtesy should be applied when necessary to make any additional referrals for professional services needed by the client that are recommended by the organization.

Level of Service to be Provided

Intake procedures should be designed for quick and effective action on applications for service. The process should gather pertinent facts regarding the applicant's legal problem so that the organization can make a prompt and informed 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 or lengthy interviews (whether in-person or online through forms) to learn if the organization will assist them. The organization should communicate clearly with each applicant regarding what services, if any, it will offer.[199] If the organization offers assistance short of legal representation, it should clearly inform the individual that it is not entering into an attorney-client relationship.

Denials of Service

The organization 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. The organization 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 when necessary to protect their rights.

[199] *See* Standard 5.3 on Establishing a Clear Understanding.

STANDARD 5.2 ON ELIGIBILITY GUIDELINES

STANDARD

A legal aid organization should establish clear written guidelines to determine an applicant's eligibility.

COMMENTARY

General Considerations

Different types of organizations will have different 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, and that organization only handles a limited range of legal problems or only provides a certain level of service. In some situations, eligibility criteria are determined by restrictions imposed by the organization's funding sources, which may exclude specific populations or problem types, or restrict the organization to representation in only certain types of cases. Whatever its specific criteria, an organization should establish a written policy governing eligibility.

In setting eligibility guidelines that are based on financial criteria, an organization should take into consideration local economic conditions, as well as the organization's available resources and established priorities.[200] The guidelines should encourage commonsense judgments at intake about the applicant's eligibility, consistent with organization guidelines and the funders' requirements. Specific written guidelines may cover a variety of objective criteria, including prospective income, seasonal employment, 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 type of eligibility does not guarantee that the organization will represent the individual. In addition to the organization's case acceptance policies, the organization 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 and based on funder requirements. The governing body should reevaluate the guidelines periodically, particularly when changes occur in economic conditions within the community or in the organization's resources.

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[200] *See* Standard 6.3 on Assignment and Management of Cases and Workload.

Eligibility Determinations

The organization should have systems in place to ensure that it obtains sufficient information during the intake interview to permit fair and thoughtful application of established eligibility guidelines. If an organization's eligibility is based on financial factors, the organization should have systems to record sufficient data about an applicant's financial status to make an appropriate eligibility determination. If eligibility for services from the organization is based on other criteria, such as the applicant's type of legal problem, status, or membership in a targeted population, the organization should also have systems to record information about the applicant or the legal problem for which assistance is sought to enable the organization's staff to decide the applicant's eligibility for the organization's services.

Applicant information should be obtained and maintained in a structured intake process that protects confidentiality, demonstrates respect of the applicant for service, follows a process that ensures avoidance of conflicts of interest, encourages the development of a relationship of trust between the applicant and the organization, and conforms to applicable ethical requirements.[201] For example, questions about family size and domestic or marital status should account for nontraditional family structures of LGBTQ+ applicants and others. Applicant information should capture data related to funding and reporting requirements. To the extent practicable, determinations of conflict of interests should be made before gathering case-specific information from an applicant.

Information should be recorded in sufficient detail to document compliance with the eligibility guidelines and to provide a record for review if the decision regarding eligibility is challenged. A decision regarding the applicant's eligibility should be made as quickly as circumstances permit it to be made, allowing 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. Information regarding the referral or resource provided to the applicant should be recorded along with the eligibility information.

If substantial reason exists to doubt the accuracy of the information the applicant gives, the organization should make appropriate efforts to verify that information. The organization should inform the applicant of any attempt to contact a third party to verify eligibility information. The organization should provide an opportunity for the applicant to explain or rebut any additional information obtained before a final eligibility determination is made.

Some organizations may delegate eligibility screening to persons or agencies other than its own staff or volunteers. In such circumstances, the governing body should establish

[201] *See* MRPC R. 1.6, 1.7, and 1.18.

specific procedures for making eligibility determination, consistent with this Standard, and should closely monitor the third party for compliance.

Focusing Resources in Case Selection

The goals and priorities established by an organization should identify a broad outline of issues affecting clients and will determine which categories of legal problems the organization should address.[202] The organization'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 organization will offer, if any, to address different kinds of legal problems. An organization 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 organization should consider a variety of factors, including the following:

- The degree of importance accorded the issue in the organization's priorities;
- The potential benefit to the client 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 nonrepresentational assistance is offered.
- The availability of nonrepresentational services from the organization 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 organization to support individuals with the type of legal problem.
- The availability of new sources of funds to support the organization 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 organizational resources to ensure high-quality representation if the case is accepted for full representation;
- The availability of other legal resources to assist the organization in handling the case, including the availability of outside attorneys who may be willing to co-counsel or provide other support;

[202] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

- 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; and
- Whether the individual has additional, related legal problems that also need to be addressed for the individual to resolve the underlying problem.

In addition, it is important for the organization to have the capacity to observe trends in the legal needs of client communities and to identify newly emerging legal issues that it may not be addressing currently. This may include the use of Geographic Information System (GIS) mapping tools and information from the courts and other human services organizations to help the organization identify areas of need and emerging legal issues in the communities it serves.

Procedures in Applying the Organization's Case Acceptance Policy

Every individual who interviews prospective clients to determine acceptance should be thoroughly skilled in interviewing techniques and should have the ability to elicit appropriate facts that enable the organization to make an informed decision about whether the applicant should be accepted for representation or should be offered nonrepresentational services. Such individuals should be fully versed in the kinds of services that the organization offers and should have access to information regarding outside resources that are available for referrals for those applicants who are not accepted for service.

STANDARD 5.3 ON ESTABLISHING A CLEAR UNDERSTANDING

STANDARD

A legal aid organization should establish a clear, mutual, and timely 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 organization might respond to persons who seek help with their legal problems. Many will be accepted as clients of the organization and be given legal representation. Others will not be accepted as clients and will be given some form of assistance, usually legal information or a referral to another source of help. Others will be denied service and referred elsewhere for assistance if that is available in their region. In all cases, it is important that the organization and the person seeking help have a clear, mutual understanding about the assistance the organization offers, if any, whether an attorney-client relationship has been formed (intentionally or inadvertently), and applicable professional conduct rules. It is also critical to establish this understanding in a timely manner.

Establishing a Clear Understanding with Clients

An organization has a distinctly higher level of responsibility to a person who has been accepted as a client than to a person to whom it is offering legal information or referral. The ethical duties that attach to an attorney-client relationship must be met when the individual is accepted as a client, including the responsibility to provide competent[203] and diligent[204] representation to accomplish the client's objective,[205] to preserve the confidentiality of information given by the client,[206] and to meet the strict rules governing conflicts of interest.[207]

Identifying the client. The practitioner 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 several persons with different interests in the outcome of the matter. To avoid possible conflicts of interest, the organization needs to establish policies for its practitioners to use to determine at the outset whose interest is being represented and who has the authority to decide what action to take.

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[203] *See* MRPC R. 1.1.

[204] *See* MRPC R. 1.3.

[205] *See* MRPC R. 1.2.

[206] *See* MRPC R. 1.6.

[207] *See* MRPC R. 1.7 to 1.10.

An individual who seeks representation for another person, frequently an elder or person with a disability, needs to have a power of attorney or other explicit authorization to act on behalf of the actual applicant or client.[208]

Issues affecting a child can raise questions related to a possible conflict of interest with a parent who may claim to speak for the child. Other clients may suffer from a mental or other impairment that affects their ability to speak for themselves. The organization should be aware of and comply with the requirements in its jurisdiction regarding representation of clients with diminished capacity.[209] This means that attorneys should, as much as reasonably possible, treat the client as they would any other. Assessing a client's capacity can be complex and multilayered. Attorneys should not make these decisions in isolation, but rather should seek out consultation with supervisors and other professionals.[210]

Representation of groups raises several issues to which the organization should be attentive. Refer to Appendix C for a thorough discussion of these issues.

Identifying the legal problem. The practitioner should ensure that the legal problem which the practitioner has agreed to handle is clearly stated and should be aware when a retainer agreement or letter of engagement is required under the rules of its jurisdiction. Many clients have several interrelated legal problems, and the organization may have agreed to handle only one. Conversely, some organizations encourage practitioners to 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 important that the client and practitioner clearly identify the issues for which representation will be provided. This clear identification can be done within a retainer agreement, letter to the client, or through other documented methods. Alternative approaches may be considered where there are issues of domestic violence or other situations where traditional written materials may put the client at risk.

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[208] While this recommendation is not required under the Model Rules of Professional Conduct, organizations should consult the specific rules of their jurisdiction to determine whether this is mandatory.

[209] MRPC R. 1.14 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.

[210] *Id.* at 1.14(b); *See* American Bar Association Capacity Assessment Tools, https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/, including the book "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers" (on the same site).

Identifying any limitations to the scope of the representation. At the outset of representation, the practitioner needs to make certain that the client understands any limitations to the scope of the representation that will be provided. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, and the client provides informed consent.[211] Assistance offered by a legal aid organization often involves limited-scope representation in the form of legal advice, brief service, or assistance to unrepresented litigants. Cases that are accepted for litigation generally are not automatically handled on appeal, and this limitation should be clearly communicated to the client. See Standard 4.2 for a through discussion on limited-scope representation.

Retainers and other written agreements. In most cases, the agreement setting for the terms and scope of the representation should be reduced to writing. The writing may be in the form of a retainer agreement, signed by the client, which sets out the basic understandings regarding the representation. Organizations should ensure all electronically signed retainers comply with current requirements concerning advice on how to rescind. The organization 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 organization only agrees to handle one or some of multiple legal problems. In some circumstances, the organization may use both a retainer agreement and an engagement letter. In ongoing representation, the organization should send follow-up correspondence confirming any changes that have been agreed to in the undertaking or scope.

If the practitioner is offering only 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 organization should orally state significant limitations on the scope of the representation and, to the extent necessary, should follow-up in writing sent to the client memorializing the advice given. Organizations may benefit from knowledge-based systems or document-assembly mechanisms within case management systems to more efficiently provide clients these written summaries of advice given.

Clients' rights and responsibilities. Clients should be informed of their rights and responsibilities as well as the responsibilities of the organization on their behalf. The client should understand that the organization will protect the confidentiality of the information the client provides consistent with its practitioner's ethical obligations.[212]

- Both client and organization should understand the client's right to be kept informed of the progress of the matter and to participate in key decisions regarding its conduct.
- Clients should be encouraged to initiate contacts with the practitioner and should receive direction from the organization on how to do so.

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[211] MRPC R. 1.2(c). *See also* SCEPR Formal Op. 334 (1974), pp. 5-6.

[212] *See* MRPC R. 1.6 and Standard 5.4 on Protecting Client Confidences.

- Clients should recognize the importance of keeping the practitioner informed of changes in circumstances affecting the case and advising the organization of their whereabouts so that they can be contacted when necessary. If possible, automated reminders and other technology-based support might be offered to help the client remain on track and comply with their obligations.
- 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 clients do not have the funds to obtain records, or copies of files or the like, the organization will accommodate each client accordingly and in conformity with the jurisdiction's ethical rules.[213] Digital literacy should also be factored in when the client is asked to gather electronic records or use other technology tools to comply with their expected collaboration.
- If the practitioner who will undertake the representation is a volunteer, Judicare, or contract attorney, the relationship among the organization, the outside practitioner and the client should be made clear.
- The client and the organization should agree who is to pay costs that may arise in the course of the case.
- Clients should understand that the organization retains attorneys' fees in the event they are obtained from an adversary.
- The practitioner should explain to clients what they should do in the event of dissatisfaction with the handling of their legal problems.[214]
- If the organization is required under federal law or grant terms to provide information to auditors or those funders, client should be informed of what information may be shared and how and that client's informed consent will be requested.
- Practitioners or staff should inform the client of any client grievance procedure in relation to the various grievance options, if any, that may be available and ensure that the client understands the process and implications, including those related to the giving of confidential information in the context of the grievance proceeding.

Establishing a Clear Understanding with Persons Who Are Not Clients

Persons who receive assistance. There are circumstances when an organization 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 several ways. The organization may offer a brochure or other writing broadly explaining the person's rights and responsibilities. It may refer the individual to a community legal education presentation or provide general information in a clinic designed to help self-represented litigants. It might offer general guidance online or provide self-help tools to

[213] *See* MRPC R. 1.8(e).

[214] *See* Standard 5.8 on Client Complaint Procedure.

prepare forms and other tasks. The organization must 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 organization responded with some form of assistance. The organization 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.

STANDARD 5.4 ON PROTECTING CLIENT CONFIDENCES

STANDARD

Consistent with their ethical and legal responsibilities, a legal aid organization and its lawyers must protect information relating to representation of a client and information relating to the prospective representation of an applicant. They have an obligation to take reasonable steps to prevent inadvertent or unauthorized disclosure and inadvertent or unauthorized access to such information and should have policies in place to respond to a breach of security, including informing clients, funders and individuals impacted by the breach.

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 held confidential, consistent with the applicable rules of professional conduct and any exceptions thereto. The organization must make certain that all personnel understand and abide by lawyers' ethical obligation to protect client information.[215] See Standard 3.10, on Efficient Use of Technology, for important information related to preserving client confidentiality and personally identifiable information collected actively or passively by legal aid organizations and the tools they use.

Specific considerations

***Intake*.** The responsibility to ensure confidentiality begins at intake. Persons who are seeking representation are entitled to the same level of protection as are former clients regarding confidentiality of communications.[216] The organization'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, online, or by phone. Interviews need to be conducted in a setting where the information provided by the applicant cannot be overheard by persons who are not with the organization and where notes from the interview as well as documents provided by the applicant are not visible to anyone other than appropriate organization personnel.

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[215] *See* MRPC R. 1.6 and 1.18.

[216] *See* MRPC R. 1.18 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."

This is a special consideration for employees working remotely. The identity of each applicant and 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 organization.

Authorized disclosure. The organization's governing body, practitioners, and staff need to be familiar with the ethical rules in its jurisdiction regarding the authorized disclosure of confidential information and what information is deemed to be protected.[217] When the organization uses technology tools to collect Personally Identifiable Information (PII) as defined by law, the organization must make sure that information is protected according to law, industry standards, and best practices and is not available to outside parties. 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 exceptions set out in the ethical rule.[218] Any technology tool that the organization requires the client to use in the course of representation should be vetted by the organization. See Standard 3.10, On Efficient Use of Technology, for more guidance on protecting client data.

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 the disclosure of information to courts or other tribunals, opposing counsel, or other third parties in order to carry out the representation. If the data will be used for evaluation, the client should be advised about that use in the retainer or application tool. When particularly sensitive information is involved, the practitioner should explicitly discuss the disclosure with the client and should obtain informed consent before disclosing the information.

Risks of unauthorized disclosure. The organization and its practitioners need to be particularly sensitive to the risks of unauthorized or inadvertent disclosure and unauthorized access to information relating to the representation of clients and must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to it.[219] 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 organization's office. Information about applicants and clients should never be discussed among the organization's staff when there may be other applicants for service, clients of the organization, or non-organization personnel present. Hardcopy 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. Employees accessing case management systems, email, and other

[217] See MRPC R. 1.6, 5.1, 5.3.

[218] *See* MRPC R. 1.6(b).

[219] *See* MRPC R. 1.6(c).

communications on their personal devices present another opportunity for unauthorized disclosure. Organizations must have technology policies advising employees how to adequately protect client data on their personal devices and how to respond in the event of a breach.

Confidential client information can also be inadvertently disclosed when intake records or materials from case files, including the attorney's work product, such as drafts of confidential memoranda and other documents, are disposed of improperly. The organization should shred paper records that contain confidential information when disposing of them. Organizations should make certain that electronic records that contain confidential information are removed from computer hard drives, storage drives, onsite and remote servers, and other devices, including cloud-based storage, when the organization disposes of the storage system(s) and/or any subscription service(s).

Another risk to client confidences arises when judges, opposing counsel, or community partners seek information about the legal services that are provided to a particular client, or about the basis on which a client was found to be eligible to receive help from the organization. The organization should take appropriate steps to protect client information from such disclosure, including challenging the request in court and, if necessary, on appeal.[220]

Requests for confidential information by funding sources. Tension may occur between the legitimate interest of funding sources to account for the proper expenditure of funds and the need for organizations to protect the information relating to the representation of their clients. Organizations should be careful not to reveal confidential information to a funding source, unless the organization is required by law to disclose the specific information requested by the funding source.

In 1977, the ABA Standing Committee on Ethics and Professional Responsibility interpreted the Model Code of Professional Responsibility to prohibit a legal aid lawyer from allowing "inspectors from outside the agency to examine files relating to client matters, when the files contain confidences and secrets within the meaning of DR 4-101, in the absence of the client's understanding consent and waiver after full disclosure."[221] Subsequently, however, the ABA adopted revisions to the Model Rule of Professional Conduct 1.6(b)(6) to state that a "… lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary

[220] *See* comment [15] to MRPC R. 1.6(b)(4), 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."

[221] SCEPR Informal Op. 1394 (1977).

… to comply with other law or a court order."[222] Most states have adopted some variation of Model Rule 1.6. 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 organizations are operating under a jurisdiction's ethics rules that are based on Model Rule 1.6(b)(6), 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 organization 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.[223]

Ultimately, the scope of the protection for information relating to the representation of a client is a matter of federal and state law, as well as jurisdictional ethical rules. Organizations 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. In some instances, federal or state laws mandating disclosure of client information may conflict with ethical rules or other laws.[224] In those instances, organizations should make every effort to negotiate with funding sources over disclosures that may violate ethical rules or other laws, to protect both the clients involved and the organization's resources. In some instances, the organization may have to seek opinions from the jurisdiction's ethics bodies or courts in order to resolve the issue.

Use of interpreters. Special confidentiality concerns arise when working with applicants and clients who are deaf or hard of hearing or prefer to use a language other

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[222] Comment 12 to MRPC R. 1.6 states 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).

[223] Comment 15 to MRPC R. 1.6 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."

[224] 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.

than English and who require the services of interpreters who are not organization employees.[225] The organization 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 organization. The organization should use the services of a professional or qualified volunteer interpreter who is responsible to the organization unless it is a serious emergency and harm will come to the client. The organization should ensure that all such interpreters are aware of the responsibility to protect from disclosure any information communicated between the applicant or client and the organization.[226]

The organization should discourage the use of third-party interpreters who are friends or family members or nonprofessional volunteers from client communities. Not only does such a situation potentially jeopardize the attorney-client privilege between the applicant and the practitioner, but 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 organization should impress upon the interpreter the need to keep the communication confidential.

Translation tools that crowdsource translation or interpretation to untrained or unqualified translators or interpreters, or rely primarily on machine translation, should not be adapted as the main way to accommodate language needs due to their inefficacy in communicating in the legal domain. See Standard 5.7 on Implementing Language Justice for more information about translators, interpreters, and machine translation/interpretation.

[225] *See* Standard 2.3 on Promoting Language Justice.

[226] *See* MRPC R. 5.3.

STANDARD 5.5 ON CASE FILES

STANDARD

A legal aid organization should establish and maintain an electronic file in its case management system or a hard-copy file for each of its cases, which records all material facts and transactions, provides a detailed chronological record of work done, and sets forth a planned course of action. In addition, an organization should have policies regarding retention of client files and information ~~data~~, as well as policies that are consistent with ethical and legal responsibilities regarding whether and how client information may be shared with external entities with clients' informed consent.

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, and concessions and allegations made;
- An indication of the primary language for clients whose preferred language is not English, 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;
- Either a hardcopy or an electronic version of electronic correspondence used;
- A specific plan with a clear delineation of tasks and a timetable with deadlines for completion of each task, including any relevant statute of limitations, consistent with the complexity of the case;
- A record of time spent on the case adequate to support any request for attorneys' fees, if appropriate, and to meet the organization's management needs as well as any requirements imposed by the organization's funding sources; and
- A closing memorandum that summarizes the work done for the client and the results achieved for closed cases.

Standard Client Files

For those cases for which it has direct ethical and professional responsibility, an organization should maintain standard case files that facilitate transfer of cases among

the organization'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 practitioners should be fully trained in the established written 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.[227]

An organization should integrate electronic and hardcopy files so that all documents and records, including records of telephone, text, and email conversations, can either be found in one place or are appropriately linked, so that all practitioners working on the case have immediate access to all pertinent information. Organizations should also have systems in place to ensure 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 organization 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 an organization may be expected to conform to the organization's policy regarding standard case files.

Transfer and Sharing of Case Files and Data

Staff often find themselves responsible for cases they did not initiate. This occurs because of staff turnover, organization restructuring,[228] 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 the integration of electronic and hardcopy files make the transfer of cases to a new practitioner relatively simple and seamless, and they help ensure that the new practitioner has all the case information necessary 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 target dates to be met. Clients should be notified immediately of the transfer of their cases and should be ensured that their interests are fully protected. They should be told the name and contact information

[227] *See* Standard 4.10 on Effective Use of Technology.

[228] The organization should comply with the ethical rules in its state regarding the transfer of cases when a law firm ceases to function. See MRPC R. 1.17.

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

An organization may wish to develop case protocols, benchmarks, and checklists to guide practitioners in handling repetitive, routine legal problems. Protocols set forth the basic issues 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 organization 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. 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.

STANDARD 5.6 ON CLIENT AND ATTORNEYS' FEES

STANDARD

A legal aid organization 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 organizations 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 organizations 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 increase the resources that are available to provide legal assistance to members of low-income communities, organizations 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, organizations 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.[229]

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 an organization beyond that agreed to by the organization 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 organization or otherwise receive any money directly or indirectly from such an individual. If a staff practitioner leaves the employment of an organization to engage in the private practice of law, the organization may permit the practitioner to continue to represent clients the individual represented while a member of the organization'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 organization.

[229] *See* Standard 5.3 on Establishing a Clear Understanding.

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, for example, in cases where statutory attorneys' fees are available. Organizations should consider whether to expend their limited resources on cases in which other competent counsel would be available and should adopt policies to guide the organization in determining whether to undertake representation in particular fee-generating cases. In setting and applying such policies, organizations 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 organization'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 organization.
- Whether the recovery would be so diminished by a private practitioner obtaining a fee so as to significantly harm the client.
- Whether the case would require the expenditure of significant organizational 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.[230] 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 in the client's and the organization's interest in recovering a reasonable fee. The organization should set forth in the retainer or engagement letter at the outset of any representation about how attorneys' fees will be treated in settlement negotiations.[231]

At a minimum, the client should be apprised of potentially competing interests, and the organization and practitioner should consider ways to meet the client's objective without unreasonably limiting the organization's opportunity to recover a reasonable fee. The organization and practitioner should be familiar with how such competing interests are treated in their jurisdiction and seek solutions consistent with that law that meet their

[230] In order to preserve this tool for clients, an LSC recipient or other organization 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. See Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

[231] See MRPC 1.2(a).

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 organization, or to a client of such a practitioner, should be remitted to the organization. The organization and a private practitioner who is representing a client as co-counsel or on referral from the organization should agree prior to the initiation of representation regarding the disposition of any attorneys' fees that may be awarded in the case. The client should be advised when representation is undertaken of the intended disposition of such fees.[232]

[232] *See* Standard 5.3 on Establishing a Clear Understanding.

STANDARD 5.7 ON IMPLEMENTING LANGUAGE JUSTICE

STANDARD

A legal aid organization should ensure that all language communities receive systematic and fair treatment and respect for their fundamental language rights: The human and civil rights of linguistic groups, such as the right to preserve non-dominant languages, to access critical services without language barriers, and to live free from linguistic discrimination in education, workplaces, civic participation, and all other contexts.

COMMENTARY

General Considerations

An organization has the responsibility to promote language justice by providing language access to all language communities, including those using American Sign Language (ASL), as set forth in this standard and commentary.

An organization should have the capacity to communicate with all language communities, either through bilingual staff or qualified interpreters. It should offer legal information and other forms of non-representational services in the languages used and read by the communities it serves. Its intake processes should be accessible to persons from all language communities and ability levels in its service area. Technology and video conferencing services should be employed for the use of off-site interpreters that can benefit from the visual cues critical for effective communication.

The challenge of communicating effectively with members of the client community in their own language(s) can be complex, as many organizations serve diverse immigrant populations settling in their service areas. Effectively serving persons who use non-dominant languages or with limited English proficiency[233] is often complicated by a lack of familiarity with the U.S. legal system and, because of their experience in their home country or as a marginalized community in the U.S., they may distrust lawyers and the legal process. In addition to addressing potential language barriers, therefore, an organization needs to be responsive to cultural issues that may inhibit some persons from accessing its service, as well as limited language ability related to disability.

It requires a sustained and comprehensive effort for an organization to be accessible to all persons who are non-dominant language users or have limited proficiency in English, especially if the firm is in an area with many language groups. Nonetheless, organizations operating in areas with relatively few clients who are non-dominant

[233] "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.

language users still have a responsibility to communicate effectively with the occasional individuals it serves who are non-dominant language users.[234]

Communication with Clients who are Non-Dominant Language Users

Communication with clients. An organization needs to ensure that its practitioners have the tools necessary to represent their clients, including being able to communicate effectively with non-dominant language users or those with disabilities in order to promote language justice for all communities.

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 organization is offering limited or full representation. A practitioner who cannot understand fully what the client is saying or asking of the practitioners 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. The burden of acquiring language services should not fall on the individuals who do not use English as their dominant language. Instead, the organization should be proactive about identifying the needs of people with disabilities or non-dominant language users and providing the necessary services. Federal and state laws may also require services to be provided in certain languages for those who are limited in English proficiency.[235]

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, qualified interpreter.[236] This responsibility attaches both to persons who speak a language other than English and to persons who rely on sign language to communicate. At a minimum, "qualified interpreter" means a person with advanced oral or signing proficiency in their working languages, knowledge of professional practices, and adherence to the interpreter's code of ethics, who has been determined to be qualified by a formal certifying body[237] or based on experience, training, and references.

The organization 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

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[234] *See, e.g.,* Legal Services Corporation (LSC) LEP Guidance Letter, Dec. 6, 2004, https://www.lsc.gov/sites/default/files/Grants/pdfs/progltr04-2.doc.

[235] The federal government has developed a website to reflect the limited English proficient policies of the federal branches and agencies, www.LEP.gov .

[236] See MRPC 1.4; SCEPR Formal Op. 500 (2021).

[237] *See, e.g.,* California Judicial Council, https://www.courts.ca.gov/7996.htm; Certification Commission for Healthcare Interpreters, https://cchicertification.org/.

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 organization should procure its own qualified interpreter and avoid using interpreters brought by the person being interviewed.

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. It is a best practice to do a plain language adaptation of English materials before translating them into other languages to promote accessibility. Machine translation alone is insufficient for translation of critical and complex legal information, so machine translation must only be used in conjunction with a qualified human translator. A qualified translator means a person with advanced written proficiency in their working languages, knowledge of professional practices, and adherence to the translator's code of ethics, who has been determined to be qualified by a formal certifying body such as the American Translators Association or based on experience, training, and references. If the client is unable to read in either language, or if requested by the client, documents should be both sight-translated (i.e., read aloud in the client's dominant language) and explained in plain language. The organization should also be prepared to accommodate the needs of persons who have a vision-related disability and should recognize, for example, the need to put essential documents in a readable form, such as in Braille for persons who are blind or visually impaired.

In court, in administrative hearings, and other proceedings, an organization representing a client who is a non-dominant language user, or is deaf or hard of hearing, should ensure that a competent interpreter and written translations are provided by the court or administrative agency. Even when an interpreter is provided by the court or administrative agency, the organization 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. Similarly, when organizations refer clients to other organizations (such as for social services or case management) or government entities for services, benefits, and relief, organizations should advocate for and ensure that meaningful language access will be provided.

Friends, family, and others accompanying the client should not serve as interpreters or translators. If the client insists on using their own interpreter, there should be protocols and safeguards in place. This could include having the client sign an acknowledgment that is either translated or sight-translated to them that they are choosing to use the person they brought, even though a free interpreter can be provided.

Communication with persons receiving non-representational services. Some persons seeking assistance will not be accepted as clients but will be given non-

representational services in the form of legal information. Legal information such as a brochure or a disposition letter may be offered in group settings or to individuals online or in writing. The organization may also offer instructions through clinics or other means as to how self-represented litigants can represent themselves before a court or administrative body.

An organization should make its non-representational assistance available in the principal languages used by persons in the communities it serves. Written and online legal information should be translated into the predominant languages used by those in the service area using qualified translators. Organizations should not rely on machine translation alone to provide adequate translated written materials. If machine translation is used, a skilled human translator must review and edit the translated material to preserve clear meaning and plain language. Review and translation by this process must also be done any time the materials are updated or changed. To the degree possible, the organization should have the capacity to hold community legal education sessions and pro se clinics in the principal languages of the communities served.

The organization should be cognizant of the degree to which the lack of capacity in English will be a factor during self-representation and should instruct individuals receiving pro se support in how to obtain a competent interpreter. In some cases, an organization 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 client 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 client 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 organization seeks to help, they should be sight-translated and explained orally using plain language, if possible. Organizations should also explore creative methods of relaying such information, such as through multilingual informational videos, the use of various social media platforms, and partnerships with social services agencies serving the client community that may be willing to act as self-help navigators.

Intake. The organization should be accessible at intake to all persons regardless of their preferred language.[238] The degree to which an organization is capable of communicating in the language of persons who are non-dominant language users 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 organization signal its openness to all language groups. Signs identifying the organization should be in the major written languages of the communities it serves. The

[238] *See* Standard 5.1 on the Organization's Intake System and Access to Services.

organization should have language capability among its intake personnel either in the form of bilingual staff or readily accessible interpreter services provided in real-time. Telephone intake systems should offer options for major languages that are identified early in any menu of options or separate dedicated lines for each major language, so that callers who are non-dominant language users will learn that services are available in their language and will not be discouraged by lengthy announcements in a language they do not understand. Options should also be available for ASL interpretation via TTY (teletypewriter) or other video conference service.

Responsibilities of the Organization

Organizations planning to serve non-dominant language users. Organizations need to start by moving from an orientation of providing language access to promoting language justice. Organizations should develop a practical written plan of how they intend to serve individuals whose dominant language is not English or another language commonly spoken by the organization's staff. They should use local data to inform the plan and reach out to multiple sources to understand all language and disability needs in the service area. Local data could be from the U.S. census and from disaggregated demographic data, such as information from local government benefit agencies, schools, and other community-based organizations. Further guidance on the responsibilities of the organization to promote language justice may be found in Standard 2.3.

STANDARD 5.8 ON CLIENT COMPLAINT PROCEDURE

STANDARD

The legal aid organization should establish a policy and procedure for individuals to complain about a denial of service or about the quality and manner of assistance offered including any reporting obligations under the Rules of Professional Conduct.

COMMENTARY

General Considerations

Legal aid organizations generally serve many clients. Over time, therefore, they will encounter persons who are denied service or who are dissatisfied with the organization's assistance. The organization should establish policies and procedures for handling such complaints.

The nature of the policies and procedures will vary based on the nature of the organization. An organization should 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 lawyer discipline agencies or from private counsel for alleged malpractice. In particular, those who complain should not be told that they should defer seeking other remedies until their complaint is resolved by the organization, nor should the organization state or imply that any resolution of their complaint to the organization is in lieu of any other remedy.

Organization Responsibilities

Resolution of complaints by a supervisor. All applicants and clients who express a complaint should be promptly informed of how to pursue their complaint. Each organization should have a system for prompt complaint resolution by a person with supervisory authority. The organization'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 organization should recognize that the complaint procedure is an important tool for maintaining positive relations with the communities it serves and for identifying when a staff member may not be meeting the organization's standards, or when aspects of its operation are not functioning properly. The organization 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 organization should have a prominently displayed sign or handout at its intake office that advises persons seeking assistance of the complaint procedure; if intake is done online, the notice shall be available there. The notice should be written in the predominant languages in the organization's service area. An organization does not have an obligation to provide written notice to persons whose only contact with the organization is by phone or in writing. If the only contact is in writing or online, the organization should use its judgment regarding when it is appropriate to provide written notice of a complaint procedure. Legal information provided online does not call for such a notice***.***

Organization Grievance Committee. Individuals who are dissatisfied with the organization's actions in response to a complaint should be advised of any further recourse they may have within the organization construct. 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 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 organization personnel.[239] 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 organization is responsible and if there is a potential malpractice claim, the organization faces a conflict between its duty to the client and the risk of jeopardizing its insurance coverage if it admits malpractice. The organization should seek advice from its coverage counsel in such situations. Similarly, if the complaint involves a possible ethical violation by a practitioner, the organization may have an obligation to report the matter to the appropriate authority and to advise the client regarding the individual's rights, which

[239] See, e.g., 45 CFR 1621.4 (b)(3).

may be adverse to the organization.[240] If it appears that a complaint involves possible malpractice or an ethical violation, the organization should consult counsel regarding how it is proper to proceed under the rules of its jurisdiction.[241]

Different issues are involved when a client complains about an outside practitioner to whom the organization has referred a case. How the complaint can be treated will differ depending on the agreement among the client, the organization, and the outside practitioner. The degree to which the organization 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 organization and the client, the organization 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 organization should consult counsel and consider whether the matter should be referred to the appropriate lawyer disciplinary authority.

[240] *See* MRPC R. 8.3.

[241] *See id.*

SECTION 6: STANDARDS FOR QUALITY ASSURANCE

STANDARD 6.1 ON ENSURING DELIVERY OF HIGH-QUALITY LEGAL SERVICES

STANDARD

A legal aid organization should ensure that its staff provides high-quality and effective legal assistance to the clients and communities served. This duty extends to all areas in which the legal aid organization's staff provides assistance, including, but not limited to, full representation, limited-scope representation and brief services, advice and counseling, advocacy, and through community legal clinics and legal education efforts.

COMMENTARY

Standards and best practices in the practice of law and in the delivery of high-quality legal aid services are evolving rapidly and will change over time. The guidelines found in the appendices to these Standards reflect current best practices and will be updated as circumstances warrant. In order to meet this Standard, legal aid organizations should strive to ensure that their practitioners adhere to the guidelines contained in the appendices.

The staffs of legal aid organizations and the ways in the which they provide legal services are, in many ways, unique in the legal community. A legal aid organization's staff is often charged with the seemingly impossible task of providing legal help to a client population in numbers greatly exceeding the available resources of the organization. Despite this, legal aid advocates have a long history of rising to this challenge and pioneering innovative delivery methods to help meet the legal needs of their client populations, even when there are more applicants seeking services than the organization has the resources to provide. In so doing, it is important for the organization to ensure that its attorney and non-attorney advocates provide zealous advocacy on behalf of their clients, while also adhering to the highest standards of ethics and client care. Legal aid client communities are typically comprised of those with the fewest resources and, as such, are ill-equipped to weather the outcomes of anything less than the highest-quality legal assistance. The legal aid organization's staff should not seek to accept more clients, or provide more assistance, than can be handled effectively and ethically.

STANDARD 6.2 ON CHARACTERISTICS OF STAFF

STANDARD

A legal aid organization's staff and leadership team should be diverse, well-qualified, and competent, sensitive to people impacted by poverty and their legal needs and committed to providing high-quality legal services. Diversity includes having staff and leadership at all levels who may be disabled, LGBTQ+, bilingual, come from historically underrepresented groups, and have lived experience in common with that of the communities the organization serves.

COMMENTARY

Legal aid 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 immediate problems of their clients and broader systemic issues. To this end, an organization should recruit and strive to retain diverse staff[242] with the professional skills and knowledge necessary to provide high-quality assistance to persons served, a commitment to providing such assistance, and the capability of communicating effectively with members of the low-income and oppressed communities.[243]

Organizations should take steps to facilitate high-quality work by offering training in professional skills and substantive law CLEs and assuring that staff members have meaningful opportunities for professional development.[244] They should supervise staff members to foster their professional growth and ensure effective assistance to clients.[245] Organizations should strive to retain staff by providing fair compensation; benefits; and sustainable, supportive work environments, including the ability to work remotely when possible. An organization's capacity to attract and retain high-quality staff will be enhanced by the degree to which it is engaged with the people it serves in diverse communities, accomplishes meaningful results for them, and has institutional credibility with those communities it serves.

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 the organization serves. The organization should seek practitioners who are from the communities it serves or have the capacity to empathize with the concerns of clients with diverse characteristics and bridge differences that may exist regarding their understanding of their legal problems and the legal system in general. Organizations should recruit bilingual practitioners and staff who can effectively communicate with

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[242] *See* Standard 4.5 on Staff Diversity.

[243] *See* Standard 4.4 on Race-Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

[244] *See* Standard 6.6 on Training.

[245] *See* Standard 6.4 on Responsibility for the Conduct of Representation; Standard 6.5 on Review of Representation.

applicants and clients who may have language preferences other than English or who are deaf or hard of hearing.[246] Organizations should conduct training for staff to ensure that they are equipped to provide services to members of diverse client communities in a manner that reflects the values of race equity, cross-cultural sensitivity, and cultural humility.[247]

Legal aid teams should have staff, leadership, and board members who come from the community they serve or live in close proximity to it. When it comes to the organization, inclusion also means having representative teams, including people with disabilities, and adequate gender representation. For example, in legal aid, men and women of color are underrepresented in professional and leadership ranks as well as on boards. Long-term strategies need to be prioritized with a goal of having staff and leadership representation that matches the composition of clients being served.

[246] *See* Standard 2.3 on Promoting Language Justice.

[247] *See* Standard 4.4 on Race-Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

STANDARD 6.3 ON ASSIGNMENT AND MANAGEMENT OF CASES AND WORKLOAD

STANDARD

A legal aid organization should assign and manage cases and individual workloads for practitioners and other staff to promote competent, high-quality representation and legal work.

COMMENTARY

General Considerations

To ensure high-quality representation and legal work, the organization should assign cases and other legal work to those individuals who are best able to handle them. In controlling workloads and assigning cases, the organization should consider, among other things, the individual's available time, experience, and substantive expertise, as well as how assignments based on subject matter can further enhance substantive expertise in staff. The organization should manage open caseloads and other legal work assigned to individual staff practitioners to ensure that both the organization and the practitioner meet their ethical responsibilities to clients.

Given limited resources, an organization 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 communities it serves. Some organizations 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 client communities as a whole. Each organization 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 organization. The appropriate balance is a function of the organization's mission and its obligations to its funding sources, but all full-service organizations should achieve a balance that ensures the overall needs of the client communities are met, including those both of individual clients and of the communities it serves as a whole.[248]

All the work of an organization should be undertaken with the intention of obtaining meaningful results,[249] and the organization's policies should help it guard against the temptation to emphasize the production of case numbers. The organization's policies and systems to allocate practitioners' time and resources should also protect staff from being overwhelmed by the pressure of ongoing representation and should permit them to undertake work that will have a broader impact on client communities as a whole. In

[248] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

[249] *See* Standard 3.4 on Service Delivery to Effect Systemic Change.

some cases, this may mean assigning a case to more than one practitioner or dividing case components among multiple practitioners.

Factors Governing Assignment of Work

The availability of adequate time to represent the client competently. Professional ethics recognize the need to ensure that practitioners devote adequate time for preparation of a case and for acquiring sufficient knowledge and skill to handle every case with professional competence.[250] Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[251] Ethical considerations also suggest that practitioners have a responsibility to reject cases unless they are certain they can provide service of at least the minimal level of professional responsibility.[252] In making case assignments, the organization should, therefore, take into consideration the amount of time a practitioner has available and will need in order to handle the case competently.

The assigning attorney should determine how many cases in litigation are appropriate at any given time, considering the nature of the cases in litigation (e.g., class action and level of complexity), the extent of participation by co-counsel, and the experience of the attorney to ensure that cases in litigation progress to completion in a reasonable period of time.

Not every applicant for services will necessarily receive full representation from an organization. Many organizations offer applicants limited-scope representation in the form of advice or brief service or non-representational assistance. The organization's practitioners and other staff members who provide such limited assistance must nevertheless be able to devote adequate time to the work to ensure 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 organization should make training opportunities available to increase its practitioners' level of practical skills and substantive expertise.[253] As practitioners' skill levels and knowledge increase, they should be able to efficiently handle an increasing

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[250] *See* MRPC R. 1.1 and 1.3.

[251] MRPC R. 1.1.

[252] Comment 2 to MRPC R. 1.3 specifically states: "A lawyer's workload must be controlled so that each matter can be handled competently." *See also*, SCEPR Informal Op. 1359 (1976).

[253] *See* Standard 6.6 on Training.

number of cases and legal work of greater complexity. Subject matter expertise should be developed whenever possible by assigning specializations to practitioners.

The status and complexity of pending cases. In managing case assignments and workload for staff practitioners, the organization should take into consideration the time required to handle each case competently. The organization 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.

In managing their practitioners' workloads, the organization 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 time commitment, including those in litigation, particularly where there is extensive discovery and/or where a trial has been set, cases on appeal and other complex cases on behalf of clients; and the predicted dates and specific deadlines 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. A case management system and periodic case and file reviews will also help facilitate this evaluation.

Non-representational legal work and other responsibilities. Some practitioners have responsibility for training and performing other administrative and supervisory duties. Others have responsibility for the organization's nonrepresentational work, including such activities as running clinics to provide legal information, providing community legal education, or participating in special projects of benefit to client communities, such as preventive legal services, where community education and outreach is used to help people avoid falling into legal problems, or identifying legal issues sooner so that they don't become harder to resolve or cause more damage. In addition, some practitioners work on collaborative projects and planning with others in the state and regional delivery systems of which the organization is a part.[254] All such activities may require substantial time commitments that should be taken into account when assignments are made to ensure that practitioners have adequate time for such essential activities in addition to their case work. Considerations in balancing legal work with other responsibilities should also include an examination of the effectiveness of these non-representational activities.

The organization's capacity for support. The nature and amount of legal work a practitioner can handle effectively is impacted by the support that is available both

[254] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

through organizational resources and through outside sources of assistance. Where possible, organizations 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.

Other relevant factors that affect the performance of legal work. Other factors related to the environment in which the organization 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 organization should consider the impact of its particular environment in managing workloads. Organizations should also use technology for remote supervision of staff across offices, to enable and support more collaborative efforts between staff across offices, and to expand the geographic reach of staff.

The organization should also give appropriate consideration to such logistical factors in the design of a delivery system.[255] Effective utilization of technology can help make efficient use of a practitioner's time.[256] 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.

Workload Management for Other Professional Staff

In addition to attorney and other authorized practitioners who represent clients, organizations employ a variety of other professional staff members 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. Organizations 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; the time needed to complete administrative or other program responsibilities; and wholistic consideration of the level of clients' needs.

[255] *See* Standard 4.2 on Delivery Structure.

[256] *See* Standard 4.10 on Effective Use of Technology.

STANDARD 6.4 ON RESPONSIBILITY FOR THE CONDUCT OF REPRESENTATION

STANDARD

In addition to a practitioner's ethical duties relating the representation, a legal aid organization also is responsible for the representation and assistance undertaken by its practitioners and should supervise the work to ensure that each client receives high-quality representation or assistance. Supervision can be done in-person, remotely, or using a combination of the two.

COMMENTARY

The responsibility and authority for supervision of representation are grounded in the ethical and legal responsibility the organization assumes for each accepted case. For legal aid organizations, this institutional responsibility arises from the relationship that is created as a contract between the organization and the client.

According to the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 334, "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 that 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."[257]

The ABA Model Rules of Professional Conduct clarify that lawyers who possess "comparable management authority" to law firm partners are required to "make reasonable efforts" to ensure that the organization has measures in effect to give reasonable assurance that all practitioners conform to the rules of professional conduct in their jurisdiction.[258] The fact that primary responsibility for cases rests with the organization does not absolve the individual practitioner from the duty to represent clients competently. Rather, it creates the obligation for the organization to ensure reasonable supervision and for the practitioner to accept that supervision. Supervision by senior attorneys of the organization is not improper interference with the independent judgment of individual practitioners but may be mandated by applicable ethical considerations. Indeed, a lawyer with management authority may be responsible for another lawyer's violation of the rules of professional conduct if (1) the lawyer orders, or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other

[257] SCEPR Formal Op. 334, p.7 (1974).

[258] *See* MRPC R. 5.1.

lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.[259]

Supervision of less experienced practitioners is necessary to ensure that clients' interests are not jeopardized by inexperience and to facilitate development of proficient practitioners. Such supervision is necessary not only to protect the client's interest, but to also enhance practitioners' skills for more effective representation of future clients. 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 supervision to ensure the most effective use of their skills and expertise to assist clients. Supervision at all levels promotes staying abreast of legal concepts and skills as laws change. Supervisors can help direct practitioners to appropriate sources of support and training, including training on issues of client-centered representation, application of race equity principles, and institutionalization of race equity and cultural humility training and practices.

Supervision should include reviewing case intakes to ensure eligibility, ensuring proper documentation of activities is in the case files, setting standard time periods for completing case activities (subject to exceptions), ensuring regular contact with the client, and the timely closing of completed matters.

The degree to which the organization 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 organization and with the client. Generally, an organization 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 organization to assume such responsibility are discussed in the commentary to Standard 3.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

[259] *See id.*

STANDARD 6.5 ON REVIEW OF REPRESENTATION

STANDARD

Consistent with practitioners' duties relating to confidentiality of client information relating to the representation, a legal aid organization should review the assistance and representation provided to clients to ensure that they receive high-quality assistance and to identify areas in which the organization should offer training and support to its practitioners. Utilizing a robust case management system can make supervision through case review more efficient and effective.

COMMENTARY

General Considerations

An organization should review all aspects of the assistance and representation that its practitioners provide to its clients. Case review is one of several valuable methods to ensure that persons assisted by the organization 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 organizations, but each should meet the objectives set forth in this Standard and commentary while also ensuring client confidentiality. A more intensive and systematic review system is appropriate for those organizations 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 organization and the outside practitioner.[260]

File reviews and case reviews should be conducted to learn the status of each case, to guide the practitioner in determining next steps, to develop an understanding of best practices in both file and case management, to judge the quality and quantity of the practitioner's current performance in direct client services, to assess the practitioner's responsiveness to the client and to identify areas of improvement needed, if any. A case review also provides an evaluation of the overall caseload of the practitioner and identifies if reallocations may be needed.

Objectives of Review

A review system should ensure that practitioners provide high-quality assistance and representation, that they identify all pertinent issues and effectively pursue appropriate remedies in accordance with clients' objectives. A review system should also ensure 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. It should allow the organization to identify when

[260] *See* Standard 6.4 on Responsibility for the Conduct of Representation; Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

the quality of work is not up to acceptable standards, to remedy mistakes, and to cure delays so that the organization can act appropriately to protect the clients' interests. A robust case management system may be able to set ticklers and reminders to make supervision of deadlines easier.

Case review and other methods of review of assistance and representation can also serve as effective tools to teach new skills and reinforce old ones. It also can link formal training efforts with specific needs of individual practitioners. Review can also be a significant source of information to the organization about the effectiveness of its practitioners' legal work and provide insight into the effectiveness of organization structure.

Informal reviews can also be impactful. Informal reviews may be in the form of team meetings to discuss cases strategies and ongoing case activities. An organization should encourage informal reviews by practitioners with supervisors and legal directors.

Key Ingredients of Systematic Review of Representation

Where an organization is fully responsible for the conduct of staff providing the assistance or 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. Other more frequent reviews may be done through reviewing reports in the organization's case management system.

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 ensure that their clients are provided with high-quality representation and assistance and to foster each practitioner's development as an effective and highly skilled professional.

Organizations should generally review complex legal matters in-depth to ensure that the practitioner has identified all major issues and considered appropriate remedies. Strategies should be periodically reevaluated during the course of the representation or assistance to take account of new developments that may arise in the case. For more routine cases, organizations should review randomly selected samples to ensure 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 limit review to a self-selected portion of their workload. A practitioner may not be inclined to share information on those cases that are most in

need of attention, and the organization 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 organizations to have each practitioner's case work reviewed regularly by other members of the organization's staff. All reviewers should be able to give constructive criticism to practitioners whose work is being reviewed.

Case reviews should be scheduled well in advance. Case reviews are an important component of quality client services and should not be canceled without simultaneous rescheduling for another date in the near future. Case reviews should be conducted in person, if feasible.

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 ensure 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.
- Frequent 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 an organization 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 organization and with the client. Generally, an organization will not review case files of outside attorneys unless such review is provided for under the agreement between the outside attorney and the organization,

and the organization has agreed to be responsible for the representation or assistance.[261]

[261] For a full discussion of this issue, *see* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar; Standard 6.4 on Responsibility for the Conduct of Representation.

STANDARD 6.6 ON TRAINING

STANDARD

A legal aid organization should provide access to ongoing and comprehensive training for all personnel. Training topics should include, at a minimum, substantive legal topics; ethics, legal representation, and trial skills; and training to ensure competence in current technology used in providing legal services.

COMMENTARY

General Considerations

Training is an essential vehicle for ensuring the effective operation of a legal aid organization and its provision of high-quality, effective assistance that responds to the needs of client communities. It is an effective means for an organization to promote a culture that shares information, retains high-quality staff, and devises innovative methods to serve client communities.

An organization should allocate sufficient resources for training to ensure that inexperienced individuals become proficient and that more experienced personnel increase their level of competence. An organization should develop and implement entry level and ongoing training activities within the organization, or ensure access to outside training that is timely, relevant, and responsive to ongoing professional development needs of all personnel.

Training programs should respond to the organization's specific needs using established instructional methods that promote active, engaged, and sequential learning. They should impart knowledge, skills, and the outlook necessary for all personnel to fulfill their job functions, including managers and supervisors, accounting and human resources personnel, support staff, and advocacy staff. Training should also impart key organizational values, including ethical obligations, the appropriate means of demonstrating respect for clients, and commitment to the organization's mission. The organization's training agenda should be updated regularly in response to emerging staff and client needs.

Training should include non-legal substantive training on organization operations, priorities and values, client eligibility requirements, issues related to client-centered representation, application of race equity principles, and the institutionalization of cultural humility training and practices that impact the quality of services and the ability to effectively serve the entire client community. In addition, when feasible, training should steer away from lecture-based sessions to more engaging, interactive methods that better meet the expectations of new practitioners. Opportunities for e-learning should be considered. Organizations should also consider creating innovative programs

in-house that focus learning on problem-solving exercises and simulations of real-world issues.

Training of all Personnel

Training should address the full range of substantive practices and skills that all personnel need in order to carry out their job duties efficiently and effectively. Practitioners should be familiar with the substantive legal matters the client community experiences and should possess the skills necessary to assist clients effectively.

It is also important that staff not directly involved in assisting clients be skilled and effective at their job functions. The professionalism with which pleadings, letters, and emails are prepared, for instance, and the courtesy with which people are treated on the telephones reflect on the quality of work that the organization produces. How well the organization's staff addresses issues, such as accounting for its funds and meeting its legal obligations, similarly affects its reputation as an effective organization.

Outside practitioners who represent clients on behalf of the organization on a contract or a volunteer basis should also be offered training opportunities, particularly if they are assisting clients in unfamiliar areas. The organization may also call upon outside attorneys to provide training for its staff in order to impart special expertise pertinent to the work of the organization. Participation by volunteer attorneys in the organization's training events, both as trainers and trainees, can enhance recruitment and retention of participating attorneys and facilitate their integration into the organization.[262]

Areas of Training

Training should be tailored to the priorities set by the organization, the delivery methods used, and its method of operating, and should impart the knowledge, skills, and values pertinent to each. The organization's professional development agenda should include a broad range of training offered directly by the organization, as well as by state, regional, and national training and support entities. The organization should also take advantage of learning opportunities that are available through participation on task forces and other substantive networks.

- Training should be offered related to the current substantive work of the organization. Organizations that engage in community economic development or legislative and administrative advocacy, 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, the use of discovery, fact-finding techniques, negotiation, and interview techniques. Basic skills also include interactions with other parties involved in the course of representation, such as

[262] *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

court personnel and opposing counsel, through traditional means of communication, as well as remote interactions.

- Through training and other networking opportunities, staff should learn about emerging legal issues and devise creative and new approaches to addressing problems facing client communities. This may include working with experts in other areas of practice, such as public defenders, and in partnerships that support holistic representation.
- 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 serve as a vehicle to further their leadership opportunities.
- Accounting and human resources personnel should be given training in the skills and the substantive knowledge pertinent to their work. They should also be provided training regarding the internal systems used by the organization in their areas of responsibility.
- Training should be provided in the use of all technologies and the systems that the organization utilizes and that are deemed necessary for the practice of law and the substantive areas of the organization. This includes training on how to safely use technology and the safeguarding of common user mistakes, including recommended computer settings to use and practices to ensure minimum exposure to malicious cyberattacks. The organization should provide staff with IT support in installing and upgrading computer and cell phone/mobile tablets security tools on a regular basis.
- New staff should be offered thorough orientation on program operation, as well as the expectations associated with their positions in the organization.
- Training should be provided that conveys the knowledge, skills, and values that the organization's staff and outside attorneys need in order to interact effectively with the client community, particularly where these communities are culturally diverse.[263]
- All trainings should offer both in-person and remote options, and remote trainings should use all available tools to ensure robust participation, engagement, and learning.

Training methods: The organization 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.[264] Mentoring and other leadership roles require specific skills, and training should be available where needed.

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[263] *See* Standard 4.4 on Race-Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility.

[264] *See* Standard 6.4 on Responsibility for the Conduct of Representation; Standard 6.5 on Review of Representation.

The organization should regularly evaluate the effectiveness of its training efforts.[265] 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? and 4) Did the format and delivery of the training ensure effective learning? 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.

Trainings should be tracked by organizations to ensure that all practitioners are given frequent access to ongoing, relevant training. Training participants should be encouraged to routinely share the newly gained knowledge with other provider-practitioners through follow-up presentations and the sharing of relevant materials. When used properly, training evaluations can help an organization 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

An organization should budget sufficient resources for it to develop and implement internal training and to make outside training opportunities available as appropriate. An organization 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, an organization should participate in statewide, regional, and national efforts to develop and provide training.[266] Participation in joint efforts will allow the organization to avoid duplicating the efforts of others in the delivery system and to take advantage of economies of scale. The organization 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.

[265] *See* Standard 4.11 on Organization Evaluation.

[266] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

STANDARD 6.7 ON PROVIDING ADEQUATE RESOURCES FOR RESEARCH AND INVESTIGATION

STANDARD

A legal aid organization should ensure the availability of adequate resources for appropriate legal research and factual investigation.

COMMENTARY

Resources for Legal Research

To provide clients high-quality representation and assistance, practitioners should have access to adequate tools for effective legal research. 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 experienced by the client community. The materials should be available through online research tools and computer-assisted legal research services, or in hardcopy format. Online discussion groups provide important resources for legal aid practitioners to keep up with rapid changes in poverty law and to share information and resources across jurisdictions. Organizations should budget sufficient funds to ensure that their practitioners have access to those online tools necessary to ensure high-quality legal work and should encourage their practitioners to make full use of free resources that are available online.

The organization should maintain updated, easily searchable knowledge bases that including pleadings and briefs so that the cumulative knowledge gained through successive representation of clients with similar issues is available to the organization's (or group of organizations') current practitioners.

Organizations should also encourage their practitioners to seek support and assistance from other appropriate sources outside the organization. National, regional, and state research and advocacy groups, universities, 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 organization's clients.

All of these tools require organizations to have access to technology that is up-to-date and to ensure that organization's practitioners and other staff are fully trained to make full use of the technological tools that are available.[267]

[267] *See* Standard 4.10 on Effective Use of Technology.

Resources for Factual Investigation

Effective and thorough information-gathering is essential to the success of any representation. 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 ensure 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. Practitioners should be provided access to online databases and other tools necessary for conducting factual investigations in the subject matters they practice. The organization 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 organization should offer training to ensure 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.

APPENDIX

APPENDIX A: GUIDELINES FOR PRACTITIONERS ON ALL ATTORNEY-CLIENT RELATIONSHIPS

GUIDELINE A.1 ON ESTABLISHING AN EFFECTIVE RELATIONSHIP AND A CLEAR UNDERSTANDING WITH THE CLIENT

GUIDELINE

The practitioner should establish an effective, professional relationship of mutual trust and candor and a clear understanding about the representation with each client.

COMMENTARY

General Considerations

Legal aid organizations may provide services that do not create an attorney-client relationship. However, persons who make an inquiry to a legal aid organization should be treated as being within an attorney-client relationship until and unless the organization affirmatively and expressly informs the persons that they are not being accepted as a client. When a client is accepted for representation by a legal aid organization, the individual has an attorney-client relationship with both the organization and the practitioner and both practitioner and organization have concomitant duties to meet the professional responsibilities associated with the representation.[268] 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 to the scope and conduct of the representation and the expectations of the practitioner and the client.[269]

Some service delivery methods, such as self-help clinics, many not undertake individualized consultation on all aspects of the matter. The practitioner should clearly describe the scope of the advice and representation, including any limits or exclusions, at the outset of the clients' involvement.

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[268] *See* Standard 5.3 on Establishing a Clear Understanding; Standard 5.4 on Protecting Client Confidences. Some institutional responsibilities will be particularly the responsibility of the organization. *See e.g.*, Standard 6.4 on Responsibility for the Conduct of Representation; Standard 6.5 on Review of Representation.

The organization also has a responsibility to take steps to overcome impediments to establishing an effective attorney-client relationship with those seeking and using its services. *See e.g.*, Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Competence, and Cultural Humility; Standard 4.5 on Staff Diversity; Standard 5.7 on Implementing Language Justice; Standard 5.8 on Client Complaint Procedure; Standard 6.2 on Characteristics of Staff.

[269] *But see* MRPC 1.2(a), which distinguishes between the client's decisions regarding the objectives of the representation and the attorney's obligation to consult as to the means to achieve those objectives.

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 in a manner that helps allay fears on the part of the client, while eliciting facts relevant to the legal problem.

To establish a professional relationship grounded in trust and confidence, the practitioner should, consistent with the delivery method and the client's reasonable expectations, keep the client informed about the status of the representation and respond promptly to requests for information.[270] The practitioner should tend to the client's legal problem promptly and with diligence.[271]

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 organization. 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.[272]

Establishing a Clear Understanding

The responsibilities of the organization to establish a clear understanding with a client are treated at length in Standard 5.3 on Establishing a Clear Understanding and the considerations set forth there apply to the practitioner. The practitioner should

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[270] MRPC R. 1.4(a)(3) and (4).

[271] MRPC R. 1.3 reads: "A lawyer shall act with reasonable diligence and promptness in representing a client." The comment to the MRPC R. 1.3 notes: "Perhaps no professional shortcoming is more widely resented than procrastination."

[272] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Competence, and Cultural Humility.

communicate directly with the client regarding appropriate mutual expectations in the representation. The discussion of expectations should include how the practitioner will communicate with the client, what platforms and technology the client and practitioner will use to communicate, and boundaries related to the communications. This applies also to pro bono cases. 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.

Particularly in representation that will involve ongoing representation of the client, the practitioner should understand the obligation to keep the client reasonably informed of the progress of the case and to reasonably consult with the client about the means to accomplish objectives. The client should be encouraged to initiate contacts with the practitioner and should know how to do so.

Sometimes the circumstances of legal aid clients require special arrangements for ongoing communications. For example, a client may not have an email address, a telephone number, or a permanent address. The practitioner should consider scheduling periodic calls or meetings initiated by the client, or inquire about arrangements with family members or friends who are likely to be able to contact the client if needed.

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 organization of changes in contact information. The practitioner should also 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.

GUIDELINE A-2: ON THE PRACTITIONER'S RESPONSIBILITIES TO PROTECT CLIENT CONFIDENCES

GUIDELINE

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

Every person who seeks assistance from a legal aid organization should be regarded as a prospective client whose information is entitled to appropriate protection pursuant to applicable rules of professional conduct and other law. Unless and until the legal aid organization has given a person who inquires about assistance a clear explanation that no attorney-client relationship exists, the rules of confidentiality apply.

The duty to protect information relating to the representation lies at the heart of effective representation that depends on a high level of trust between the 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.

The duties of the organization with regard to such information are discussed in Standard 5.4 on Protecting Client Confidences. The practitioner has a responsibility to protect information relating to the representation from unauthorized and inadvertent disclosure and unauthorized access. The practitioner has an independent and equally strong duty to protect the information, including data and metadata collected by communication platforms used by the practitioner and 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 the rules of professional conduct or law.[273]

Scope of the protection

Practitioners must abide by the applicable ethical rules regarding client confidentiality in the jurisdiction in which they practice. Generally, Model Rule 1.6 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

[273] MRPC R. 1.6 regarding Confidentiality of Information and Rule 1.18, Duties to Prospective Clients.

representation, whatever its source."[274] The practitioner's duty of confidentiality extends to applicants for service whom the practitioner may have interviewed, even if the person was not accepted for representation.[275] The duty of confidentiality also continues after the attorney-client relationship has ended.[276]

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 organization'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 organization. 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 of the office in which confidences might be overheard by non-organizational 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 organization, but in the event one is made to a practitioner, the matter should be referred to the appropriate authority within the organization for resolution.[277]

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.[278] 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

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[274] Comment to MRPC R. 1.6, Paragraph 3. Informal opinions have found, for example, that protected information includes the identity, address, and telephone number of legal services clients (SCEPR Informal Op. 1287 (1974)), and information contained in client trust fund records (SCEPR Informal Op. 1443 (1979)).

[275] *See* MRPC R. 1.18 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."

[276] MRPC R. 1.9(c)(2) 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 MRPC R. 1.6.

[277] *See* Standard 5.4 on Protecting Client Confidences.

[278] *See* Standard 5.7 on Implementing Language Justice.

services of a professional or qualified volunteer interpreter who is responsible to the organization so that the confidential and privileged nature of the communication is clearly preserved. The practitioner should ensure that all such interpreters are aware of the responsibility to protect from disclosure any information communicated between the applicant or client and the organization.[279]

Sixth, the practitioner should take reasonable measures to protect communications with clients from cyberthreats and other risks of inadvertent or unauthorized disclosure.[280]

Authorized disclosure

A practitioner should be familiar with the ethical rules in their jurisdiction regarding the authorized disclosure of confidential information. Primarily, information relating to the representation can be disclosed when the client gives informed consent. But, 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.[281] 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. If the client has diminished capacity or is legally subject to decision-making by a parent, guardian, or conservator, the client's own consent may not be sufficient.

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.[282]

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[279] *See also*, the discussion of the use of interpreters in the commentary to Standard 5.4 on Protecting Client Confidences.

[280] SCEPR Formal Op. 477R (2017).

[281] MRPC R. 1.6(a).

[282] *See* MRPC R. 1.6(b):

"(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."

The practitioner should be familiar with state professional requirements and the law regarding such disclosure and should consult with the organization on whose behalf the client is being represented regarding whether the disclosure is permitted.

GUIDELINE A-3 ON THE PRACTITIONER'S RESPONSIBILITIES IN LIMITED REPRESENTATION

GUIDELINE

A practitioner may limit the scope of representation provided to a client, consistent with organizational policy, 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 provides informed consents.[283]

In practice, limited-scope representation is often offered through projects that are established by an organization, such as a hotline or an advice clinic, or under a case acceptance policy 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 organization-adopted policies, it is the organization, 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.

Practitioner Responsibilities for Limited Representation of Individual Clients

With some clients, the practitioner will consider for that particular client whether full or limited-scope representation is appropriate. In such circumstances, the practitioner has the responsibility to determine if the limited-scope representation is reasonable under the circumstances including consistent with organizational policy. 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 factors will also influence the degree to which the client may be able to proceed successfully with only limited assistance from the practitioner. They include the client's language capability, level of education, and self-confidence.

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[283] MRPC 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.

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.

GUIDELINE A-4 ON MAINTENANCE OF PROFESSIONAL COMPETENCE

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.[284] 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.[285]

Practitioners may also take on leadership and management responsibilities within an organization 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 organization 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

Organizations are responsible for making a variety of training opportunities available to practitioners. Standard 6.6 on Training sets out the organization's basic responsibilities in this regard. Other Standards identify specific training needs that support effective fulfillment of those Standards.[286] A legal aid practitioner should take advantage of trainings that are offered and to advocate for training in the event that the organization does not meet its responsibilities to make it available.

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[284] MRPC R. 1.1.

[285] Paragraph 6 of the Comment to MRPC R. 1.1 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."

[286] *See*, for example, Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Competence, and Cultural Humility; Standard 4.5 on Staff Diversity; Standard 4.10 on Effective Use of Technology; Standard 5.3 on Establishing a Clear Understanding),

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 listservs, and other networks that offer educational and skill building opportunities pertinent to the practitioner's work. Some such networks may exist within an organization or group of local organizations. Others exist on a state or regional level and offer a regular menu of trainings, task force meetings and electronically supported networks.[287] 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 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.[288]

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.[289]
- Knowledge and skills to function in a culturally competent manner.[290]
- 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.[291]
- Skills related to effective supervision and mentoring, if required by the practitioner's responsibilities in the organization.[292]
- Leadership capabilities pertinent to the practitioner's role in the organization.

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[287] *See* Standard 4.3 on Participation in Statewide and Regional Systems.

[288] *See* Standard 6.4 on Responsibility for the Conduct of Representation; Standard 6.5 on Review of Representation.

[289] *See* Standard 4.6 on Achieving Lasting Results for the Individuals and Communities Served.

[290] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Competence, and Cultural Humility.

[291] *See* Standard 4.10 on Effective Use of Technology.

[292] *See* Standard 6.4 on Responsibility for the Conduct of Representation; Standard 6.5 on Review of Representation.

APPENDIX B: GUIDELINES FOR PRACTITIONERS ON PROVIDING ADVICE AND REPRESENTATION TO INDIVIDUAL CLIENTS

GUIDELINE B-1 ON CLIENT PARTICIPATION IN THE CONDUCT OF REPRESENTATION

GUIDELINE

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.[293] The practitioner has authority to determine the appropriate course of action to be taken to accomplish the client's objective, but in ongoing relationships should reasonably consult with the client.[294] A practitioner acting on behalf of a client has an obligation to keep the client reasonably informed about the conduct of the matter and of important developments in it.

Some clients may be minors or have limited capacity, or be subject to legal constraints such as conservatorships. The practitioner should consider the applicable ethical and legal obligations that may apply to decision-making about the interests of such clients.

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

[293] MRPC R. 1.2 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."

[294] The Comment to MRPC R. 1.2(a) 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) and may take such action as is impliedly authorized to carry out the representation."

clients have little experience with the legal system and some may lack the 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.[295] 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 organization is only offering limited representation. An organization may also impose resource priorities, according to Standard 3.2. If an organization is only offering legal advice, limited intervention, or if resource constraints are properly imposed, the organization's 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 provides informed consent.[296]

Other limitations on the objective sought by the client. There are circumstances where professional responsibility rules prohibit 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.[297] If a client suggests an improper objective or strategy, the practitioner is ethically obligated to explain the prohibitions against pursuing the objective or conduct.[298] 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.[299] 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

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[295] MRPC R. 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[296] MRPC R. 1.2(c).

[297] MRPC R. 1.2(d) 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* MRPC R. 4.1, 4.3, and 4.4.

[298] MRPC R. 1.4(a)(5) 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."

[299] MRPC R. 1.4(a)(2) provides: "A lawyer shall … reasonably consult with the client about the means by which the client's objectives are to be accomplished**…."**

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.[300] The practitioner should, in such circumstances, keep the client reasonably informed of actions taken. There are circumstances when a practitioner and client may disagree about the means to be used to pursue the client's objective. The comment to Model Rule of Professional Conduct 1.2(a) notes that generally the client will defer to the professional judgment of the practitioner, "particularly with respect to technical, legal and tactical matters." The practitioner generally defers to the client with regard to a course of action that will result in an expense to the client or may adversely affect a third party. In the event that the practitioner and client cannot agree on a proper course, it is permissible for the practitioner to withdraw.[301]

Communication with the Client

Clients should receive full and timely information on developments in their case.[302] 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. The client should know how the practitioner will communicate with them, what platforms and technology the client and practitioner will use to communicate and boundaries related to the communications, and any potential risks of using those tools or platforms. 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.[303]

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[300] Paragraph (5) of the Comment to MRPC R. 1.4(a)(2) 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.

[301] *See* Paragraph 2 of the Comment to MRPC R. 1.2(a).

[302] *See* MRPC R. 1.4 regarding Communication.

[303] *See* MRPC R. 1.14 regarding Client with Diminished Capacity.

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 communicate with the client. It is important, however, the practitioner should defer to the wishes of the client and not to a family member or other person who is assisting the client.[304]

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.[305]

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. Second, is the importance of clarity regarding how communications are to be maintained with the group, including what technology and platforms will be used to share information. 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.

[304] *See* MRPC 1.14, Comment 3.

[305] MRPC R. 1.14(b) states: "When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

GUIDELINE B-2 ON INITIAL EXPLORATION OF THE CLIENT'S LEGAL PROBLEM

GUIDELINE

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. The practitioner should take reasonable steps to protect confidential client information from unauthorized or inadvertent disclosure as well as unauthorized access.[306] From the initial contact,[307] 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. 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 ensure that the advice or brief service will be responsive to the circumstances of the client.[308]

Clients may have multiple problems, including some that the legal aid organization can address and others that it cannot. The practitioner should make such limitations clear, but before excluding subject matters from discussion should take care to understand the facts and circumstances that are relevant to the problems the organization may be able to address.

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 organization who have contact with the client should ensure 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.

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[306] *See* Standard 5.4 on Protecting Client Confidences.

[307] This Standard deals with a practitioner's responsibility to those persons who are accepted for representation by the organization, 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.

[308] The responsibility of the practitioner to investigate beyond the information supplied by the client in situations where the organization 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.

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 ensures 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 organization should offer its practitioners and other staff training in interview 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 of 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 potential issues by the practitioner. 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 taking to preserve or protect the client's legal rights and interests. The interviewer should clearly understand 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 ensure that all legal issues are identified and appropriate steps are taken.[309]

[309] *See* Standard 4.9 on Use of Other Practitioners.

GUIDELINE B-3 ON INVESTIGATION

GUIDELINE

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 enough into the factual and legal elements of the problem to provide competent advice and representation.[310] Resource constraints, discussed in Standard 2.5, apply to investigation, and may mean that some questions may not be fully answered at the outset, but the practitioner should obtain the information in the client's possession that is material at each stage of the matter. For those situations where the organization is offering only limited representation, the practitioner may have to rely on the information that is provided by the client in the initial interview.[311] It is, therefore, crucial for the practitioner to elicit as much relevant information from the client as necessary to ensure that the advice or brief service will be responsive to the circumstances of the client. When the organization 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 organization.

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[310] Paragraph 5 of the Comment to MRPC R. 1.1 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."

[311] The responsibility of the practitioner to investigate beyond the information supplied by the client in situations where the organization 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.

Regardless of whether the organization is offering limited or full representation, the practitioner should understand the legal issues involved in the case in order to determine whether the 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.

If the organization 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 organization 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 adversary[312] to obtain the facts asserted by an opponent and to gain useful insight into the opponent's case strategy;
- 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, if the matter is in litigation;
- 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;
- Review of the opposing parties' social media accounts, when appropriate; and
- 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 organization 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.[313]

[312] Contacts with unrepresented persons must be consistent with relevant ethical norms. *See* MRPC R. 4.3.

[313] *See* MRPC R. 3.7.

GUIDELINE B-4: ON LEGAL ANALYSIS AND RESEARCH

GUIDELINE

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.[314] They are closely linked to case planning and information gathering. 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 organization 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 ensure that the scope of the inquiry is sufficiently broad and is not limited by a search that is too narrowly defined.[315] 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 non-attorney

[314] When the organization 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.

[315] *See* Standard 4.10 on Effective Use of Technology.

practitioners should be reviewed by their supervising attorneys to ensure that legal issues outside the expertise of the practitioners are not overlooked.[316]

Constraints based on the limited resources of a legal aid organization, discussed in Standard 6.7, may apply to the extent of legal research. To the extent feasible, if the initially apparent legal analysis does not support an argument for the client that a practitioner considers appropriate or just, the practitioner should consider expanding 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.

[316] *See* Standard 4.9 on Use of Other Practitioners.

GUIDELINE B-5: ON CASE PLANNING

GUIDELINE

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 ensure 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 organization 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 organization 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 developments in the case. The client should be consulted when these developments occur and should participate in making key strategic decisions.

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. Legal issues to be researched should be noted. 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. 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 ensure 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.[317]

[317] *See* Standard 4.9 on Use of Other Practitioners.

GUIDELINE B-6 ON LEGAL COUNSELING

GUIDELINE

The practitioner should effectively counsel the client throughout the representation to ensure 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. 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.[318] 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.[319] 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.[320]

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[318] The term, “advice,” is used in MRPC R. 2.1 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.”

[319] Paragraph 1 of the Comment to MRPC R. 2.1 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.”

[320] Paragraph 2 of the Comment to MRPC R. 2.1 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

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. 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.

ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."

GUIDELINE B-7 ON NEGOTIATION

GUIDELINE

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 organization anticipates doing on behalf of the client. This can be true in circumstances where representation is limited to brief service, as well as those circumstances where the organization is offering full representation in transactions, such as leases or community economic development projects. 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.

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 or cost 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 the organization's 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.

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; and/or
- 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 organization 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; and
- 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.[321] 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. 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.

If the organization has limited resources for the matter and that is a consideration that makes settlement more advisable, that constraint should be made clear at the outset or as early in the matter as it becomes clear. No such constraint should be raised with the client for the first time during settlement discussions.

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 organization 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.

[321] *See* MRPC R. 1.2(a).

GUIDELINE B-8 ON ALTERNATIVE DISPUTE RESOLUTION AND ONLINE DISPUTE RESOLUTION

GUIDELINE

The practitioner should recommend to clients, and engage in, alternative dispute resolution, or ADR, and online dispute resolution, or ODR, processes when they would serve the client's interests or when they are required by law. When these resources are inappropriate for the clients or cases involved, practitioners should argue against requiring cases to be resolved in this way. Organizations should be actively engaged in local jurisdictional discussions and decisions regarding ADR and ODR, particularly when it is mandated or designed to be "opt-out" to ensure clients' rights are protected.

COMMENTARY

General Considerations

The term, alternative dispute resolution (ADR) refers to a variety of widely practiced methods to resolve disputes outside of the formal judicial process. Online Dispute Resolution (ODR) refers to a variety of ADR methods that take place entirely online, some involving a mediator and some involving only the parties. Practitioners with clients in ADR and ODR processes should proficiently and zealously represent their clients consistent with the procedures and expectations in the process, including advocating for removal from the process where that is feasible and is in the client's best interest.
A practitioner should consider when ADR or ODR 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 or ODR. The use of ADR is well-established and ODR is rapidly 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. ODR has been advocated as a very convenient way for parties to resolve legal disputes, since they may do it at any time of day or night due to designs of asynchronous mediation or discussion.

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.[322]

[322] *See* Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Competence, and Cultural Humility.

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 it is 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.[323]

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

[323] The differences between mediation and conciliation are not sharply drawn and the terms are used interchangeably in some jurisdictions.

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.[324] 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 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

[324] *See e.g.*, Vermont Rules of Civil Procedure, Rule 16.3.

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 borne 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 to do so.

Forms of ODR

There are different situations where ODR may be used and ways to engage in ODR, and each brings unique advantages and disadvantages. Below is a brief discussion of several factors that can have an impact:

- **Government Versus Party:** In these types of cases, individuals can engage in dispute resolution through ODR with a court and a government entity, such as the police, prosecutor's office, etc., to resolve a legal issue such as a traffic ticket, resolution of an outstanding warrant or show cause order, etc.
- **Represented Party Versus Unrelated Unrepresented Party:** These are often landlord/tenant disputes or debt collection cases where represented landlords or debt collectors and unrepresented tenants or debtors try to reach a settlement of their dispute. These are of concern in cases where there may be no true middle ground, or where a legal issue (typically a defense) might be dispositive of the case, in which a settlement is detrimental to the unrepresented party.
- **Party Versus Known/Related Party (Irrespective of Representation):** These are often family law matters, where a settlement is often seen as a better outcome than a judicial decision. Factors such as whether one or both sides are represented, or whether there are power dynamics or domestic violence at play, can make ODR detrimental to one party.
- **Representation of Parties:** Whether one or both parties are represented or unrepresented can impact the dynamics of ODR, as well as the likelihood of reaching a settlement.
- **Mediated Versus Unmediated:** Some ODR systems encourage, allow, or require parties to try to resolve the dispute on their own before introducing a neutral third party to mediate, or allowing a party to request one. Others introduce a neutral third party at the beginning to help the parties resolve the dispute. Use of a mediator increases the likelihood of a settlement, can increase the fairness of the proceedings, and requires more resources from the jurisdiction sponsoring the ODR.
- **During Litigation Versus Before or Outside of Litigation:** Some ODR systems only work after a legal case has been started, while others offer to settle

legal disagreements before or instead of litigation. ODR during litigation can also happen early in litigation or in a later stage, after other options have failed. The stage of the case will determine the format of the writing used to document the agreement.

- **Opt-In Versus Opt-Out ODR:** Some systems automatically enroll litigants in certain case types into ODR and require them to apply to opt-out in order to get out of the ODR system. Other systems offer ODR and encourage litigants to opt-in to those services. These factors impact participation rates, rates of success in reaching an agreement, and rates of user satisfaction with the process.

Consideration of When ODR is Appropriate

In addition to the above considerations, practitioners must evaluate whether clients have the technology tools and skills to participate in ODR, the pros and cons of dispute resolution without a mediator, whether the case involves potentially dispositive legal issues which make a negotiated settlement impossible or unwise, and whether ODR results in an inequitable result. Any ODR, but particularly an opt-in system, can be impossible for litigants without reliable access to the internet and create a barrier to access for those litigants. Similar, but possibly less obvious, barriers exist for people who lack the capacity to engage in online dispute resolution for a myriad of reasons discussed elsewhere in these Standards. Unlike traditional ADR, ODR is one of the only recognized formats of court-sponsored dispute resolution that may not involve a neutral third party. There are potential drawbacks to parties attempting to settle legal disputes without any training in dispute resolution or legal subject matters at issue, but there are also potential benefits in terms of parties reaching creative settlements and not utilizing court resources to resolve their dispute. Similar to ADR, ODR is a bad choice for cases where compromise is not possible or feasible, including when there is a legal question that if decided by a judge, would result in a non-compromise solution. Examples include debt collection cases where the debt owner doesn't legally own the debt, an eviction matter where legal protections exist which prevent a tenant from being evicted, such as a retaliatory eviction, or a family law case where a legal question of paternity would result in one party having no rights to parenting time or custody and no obligation to pay support. These issues and many others, plus a literature review, can be found in the 2021 NLADA publication, “Efficiency is Fine, but Equity is Better: The Civil Legal Aid Community and their Views of Online Dispute Resolution.”

Responsibilities of Practitioners in Representing a Client in ADR or ODR

A practitioner owes the same responsibility to the client for competence,[325] diligence,[326] protecting client confidences,[327] and avoiding conflicts[328] as in a fully litigated matter. In

[325] MRPC R. 1.1.

[326] MRPC R. 1.3.

[327] MRPC R. 1.6. *See also* Standard 5.4 on Protecting Client Confidences.

[328] MRPC R. 1.7 to 1.10.

addition, the practitioner owes a duty of candor and truthfulness in statements to others in ADR.[329] The role of a practitioner representing a client in an ADR process will vary depending on the process.

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 ensure 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,

[329] Paragraph 5 of the Comment to MRPC R. 2.4 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 4.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1."

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.

GUIDELINE B-9 ON LITIGATION

GUIDELINE

If the organization has undertaken to provide services including litigation, the practitioner should engage in litigation when necessary to defend the client or 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. Some organizations do no litigation, as is the case in a community or system where that capacity is available from other organizations, and some organizations accept specific engagements on the understanding that they are not in a position to litigate the matter. 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. Litigation can require a larger investment of organization's resources than other options do. If there may be a question about whether the organization can or will make that investment, that should be clearly disclosed to the client at the outset, and the matter should not be accepted if the client does not agree to a representation subject to that constraint.

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.

GUIDELINE B-9.1 ON LITIGATION STRATEGY

GUIDELINE

In a litigation matter, the practitioner should develop a clear, long-range strategy for pursuing or defending the client's interest, continually update the strategy, and keep the client informed, 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. 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.

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. Discussion of the strategy early and over time can be an effective way of assisting the client in developing realistic expectations.

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; 4) the availability of attorneys' fees; 5) problems of proof; and 6) 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 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.
- Estimate of the organization'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 resolution and can result in favorable outcomes for the practitioner's clients while preserving the organization'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 organization'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. [330]

[330] *See* MRPC R. 1.2(a) and 1.4.

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 handling the case at both the trial and appellate levels should participate in developing strategy, if practicable.

GUIDELINE B-9.2 ON PLEADINGS

GUIDELINE

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 discovery 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.
- Under applicable law, facts alleged in a pleading ordinarily are deemed established as against that party. Leave of court may be required to allow a party to contest what they have alleged or admitted.
- When representing a defendant, the practitioner should raise all appropriate affirmative defenses or compulsory counterclaims that might otherwise be waived.
- The practitioner should ensure that the pleadings adequately reflect the litigation strategy that has been developed for the case.

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.

GUIDELINE B-9.3 ON MOTION PRACTICE

GUIDELINE

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.

GUIDELINE B-9-4 ON DISCOVERY

GUIDELINE

The practitioner should use both formal and informal discovery when appropriate to obtain necessary information in a timely manner and useful format, and ensure timely compliance with discovery requests to the client.

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 organization's resources and to ensure 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 ensure 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 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 organization’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 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.

GUIDELINE B.9-5 ON TRIAL PRACTICE

GUIDELINE

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, including in jurisdictions where court will be conducted virtually.[331] 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 the 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

[331] Different considerations apply in adjudicative administrative hearings.

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 ensure that when they testify, they are able to recall important facts and to reduce any anxiety they may feel about the trial.

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. 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 ensure 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 ensure the reviewability of issues that may affect the outcome of the appeal.

In more complex cases, and if the organization has adequate resources, effective trial practice can be enhanced if more than one of the organization’s practitioners is involved in preparing the case and presenting it at trial. Alternatively, the organization may wish to associate outside attorneys who are experienced trial attorneys to serve as co-counsel.[332] 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.

[332] *See* Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

GUIDELINE B-9-6 ON ENFORCEMENT OF ORDERS

GUIDELINE

The practitioner should take reasonable and necessary steps to ensure 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 ensure 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 ensure 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 toward 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 organization 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 organization.[333]

[333] *See* MRPC R. 1.16(b)(6).

GUIDELINE B-9.7 ON APPEALS

GUIDELINE

The practitioner should counsel the client on whether to pursue or defend an appeal and recommend to the organization whether to represent the client on appeal. Timely notice should be given to the client if the organization 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 organization has the responsibility to decide whether to represent the client on appeal if the individual wishes to go forward.

The practitioner and organization should make clear to the client at the outset of representation that the client will not automatically be represented on appeal.[334] If the client wishes to pursue or defend an appeal, but the organization decides not to provide representation, the practitioner should give the client timely notification of that decision to ensure 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

[334] *See* Standard 5.3 on Establishing a Clear Understanding.

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 organization whether to offer representation.

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 organization 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.[335] 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 organization's office.

Approval by the Organization

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 organization. In making the determination, the organization 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 organization's strategic focus.* The organization has a responsibility to make choices about the expenditure of its resources in order to be most responsive to the compelling legal

[335] MRPC R. 3.1 provides, in part, "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."

needs of the low-income communities it serves. 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 organization 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-income communities served by the organization.[336]

- *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 organization should ensure 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 organization.

- *Availability of other counsel to represent the client.* The organization 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 organization 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 organization. At the outset of the case, the organization 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 organization 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 organization 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.[337]

In any case, the outside practitioner should immediately notify the organization 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 organization 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 organization, the

[336] *See* Standard 4.6 on Achieving Lasting Results for the Individuals and Communities Served.

[337] *See* the discussion of establishing a clear understanding with the attorney to whom a case has been referred in the comment to Standard 4.7 on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar.

organization should make a prompt determination in conformance with this Standard on whether it will undertake the appeal on behalf of the client.

Responsibilities to the Client in the Event the Organization Declines Representation in an Appeal

If the organization 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 ensure 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.

A practitioner who believes there is merit to an appeal that the organization 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 ensure 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 organization should assign practitioners to handle appeals who have substantial appellate experience in order to ensure that the issues are properly addressed. However, if the organization assigns an appeal to a practitioner who is relatively inexperienced in appellate advocacy, the practitioner

should seek assistance from experienced appellate advocates on the organization's staff, from other legal aid organizations; 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.

GUIDELINE B-10 ON ADMINISTRATIVE HEARINGS

GUIDELINE

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 strategy that is based on an appropriate factual investigation, legal analysis and research, as necessary, and a careful assessment of the strength and weakness of the case.

The practitioner should thoroughly understand hearing practice before the agency, including the agency's use of technology for hearings. 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 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.[338]

[338] *See* Standard 5.3 on Establishing a Clear Understanding.

GUIDELINE B-11 ON TRANSACTIONAL REPRESENTATION

GUIDELINE

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 organizations 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 organizations 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 a clear title to property;
- Incorporating groups and drafting bylaws 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; and
- 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. 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.

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 competent[339] and diligent,[340] and the practitioner must protect the information obtained in the representation from unauthorized disclosure.[341] The practitioner must also avoid conflicts of interest, although conflicts in transactional representation may be less immediately apparent than they are in adversarial representation.[342]

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. 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

[339] MRPC R. 1.1.

[340] MRPC R. 1.3.

[341] MRPC R. 1.6.

[342] MRPC R. 1.7 to 1.10.

representation. Moreover, such an organization may just be developing its business plan and may be seeking counsel regarding viable options.

The practitioner and the client need to clearly agree upon the specific tasks that will be undertaken by the practitioner and by the client.[343] 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 organization's 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.[344] 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.[345]

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.

[343] *See* Standard 5.3 on Establishing a Clear Understanding.

[344] *Id.*

[345] *See* MRPC R. 1.13 regarding Organization as Client.

APPENDIX C: GUIDELINES FOR PRACTITIONERS ON REPRESENTATION OF GROUPS AND ORGANIZATIONS

GUIDELINE C-1 ON REPRESENTATION OF GROUPS AND ORGANIZATIONS

The practitioner should proficiently and zealously represent groups and organizations to respond to the legal needs of the communities served by the organization.

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 organization's services or seek to respond to the needs of the communities served by the organization. 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 an organization's strategic planning efforts.[346]

Representation may take many forms. It may involve transactional work to help a community-based group organize and function effectively and accomplish its objectives, 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. 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. 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.

[346] *See* Standard 4.1 on Identifying Legal Needs and Planning to Respond.

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 the 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.[347] 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' bylaws 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.[348] In groups and organizations that are

[347] MRPC R. 1.13(a) regarding Organization as Client states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." *See also*, Standard 4.2 on Establishing a Clear Understanding.

[348] MRPC R. 1.13(f) 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."

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 organization that the practitioner is representing.[349] 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.[350]

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.[351] 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.

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[349] *See* MRPC R. 1.13(b)-(d) 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.

[350] MRPC R. 1.13(g) 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."

[351] Paragraph 6 of the Comment to MRPC R. 1.4 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."

APPENDIX D: GUIDELINES FOR PRACTITIONERS ON LEGISLATIVE AND ADMINISTRATIVE ADVOCACY

GUIDELINE D-1 ON LEGISLATIVE AND ADMINISTRATIVE ADVOCACY

When advocating before legislative and administrative bodies, a practitioner should effectively 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 and other vulnerable communities and defending against those that are detrimental to those interests. Policy advocacy should be conducted consistent with the procedures and practices of the legislative or administrative bodies to which it is directed and grounded in a thorough understanding of the issues involved and guided by client needs.

The responsibilities of organizations 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 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 should address the complex dynamics of the legislative and administrative process. 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 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.[352] 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 organization to seek guidance on priorities for legislative and administrative advocacy and to keep members of the client communities served by the organization informed of public policy developments.

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 communities served by the organization 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

[352] MRPC R. 1.2 and 1.4.

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 an organization. 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. 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.[353] If an appearance is 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,[354] fairness to the opposing party and counsel,[355] and impartiality and decorum of the tribunal,[356] even if such requirements would not apply to a non-lawyer who is engaged in the same activity.[357]

Other legal requirements. Practitioners should comply with the requirements of the Internal Revenue Code and accompanying regulations related to lobbying by tax exempt organizations, understand the range and level of activities that are permissible, 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

[353] MRPC R. 3.9.

[354] MRPC R. 3.3(a) through (c).

[355] MRPC R. 3.4(a) through (c).

[356] MRPC R. 3.5.

[357] Paragraph 1 of the Comment to MRPC R. 3.9 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."

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 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 of 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 members 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.

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