

Effectively Developing & Managing Your Board

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What is governance? Governance is the exercise of authority, direction and control of an organization in order to ensure that its purpose is achieved. Governance includes the structures, responsibilities and processes that the board of an organization uses to direct and manage its general operations.

Governance as Leadership: Legal aid providers work in increasingly complex environments. The central issues they address – housing and homelessness, intake and case triage, employment and training, outreach to the client community, access to health care, creation of new delivery mechanisms for providing legal services – are themselves subject to innumerable forces. As stewards of the organization, legal aid boards are responsible for overseeing their organizations' performance, accountability, fiscal integrity and regulatory compliance.

Beyond these basic fiduciary responsibilities, boards must also work closely with providers to ensure that program resources and services are responsive to evolving community needs and that they “accomplish lasting results¹” for clients. They must also work with providers to anticipate and respond to change. In doing so, they must be able to take in and work with complex and ambiguous data, e.g., factors driving the local, state and national economies; political trends; emerging policy initiatives; changing demographics among eligible clients; the operation of courts, administrative tribunals and client serving institutions, as well as the needs and interests of staff, supporters, opponents and funders. This latter role calls for legal aid boards and senior staff to work collaboratively in ways that are forward-looking and pro-active.

¹ See ABA Standards, Introduction



Section One of the ABA Standards of Practice for Providers of Civil Legal Assistance outline overall functions and responsibilities of legal aid boards of directors from specific responsibilities with regard to fiscal matters, relations with Chief Executive, to conflicts of interest and communications with low-income and legal communications.

A number of core values underlie the development of the revised ABA Standards; these are outlined below.

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

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

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

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

4) *Access to justice.* A core mission of a legal aid provider is to facilitate access to the legal systems for resolving civil legal problems and to help low income persons with legal problems obtain fair and lasting results. The Standards recognize that there are a number

of ways in which this responsibility might be carried out. First, is in the direct assistance to individuals to advocate on their behalf or to assist them to do so themselves. The second is in the choice of delivery methods that efficiently use resources to facilitate access for large numbers of people in ways that respond effectively to their legal needs. The third is to work with other providers, the courts, the organized bar and other community organizations to increase the overall responsiveness of the system to the need for effective access to justice.

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

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

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

Standard 1.1 On Overall Functions and Responsibilities of the Governing Body

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



Standard 1.1-1 On Governing Body oversight of the provider

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

Standard 1.1-2 On Prohibition against interference in the representation of clients

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

Standard 1.1-3 On Fiscal Matters

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

Standard 1.1-4 On Relations with the Chief Executive

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

Standard 1.1-5 On Serving as a Resource to the Provider

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

Standard 1.1-6 On resource development

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

Standard 1.2 On governing body members' responsiveness to the communities served

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

Standard 1.2-1 On Individual Members' commitment to the provider

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

Standard 1.2-2 On Board Members from the communities served by the provider

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

Standard 1.2-3 On Training of Members of the Governing Body

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

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

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

Standard 1.3 On governing body Communication with low income and legal communities

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

Standard 1.1-1 (Role and Responsibility of Governing Body – General Policy Development)

A pro bono program should establish a governing body which adopts broad general policies.

Standard 1.1-2 (Role and Responsibility of Governing Body - Oversight and Review)

The governing body should ascertain that the pro bono program is in compliance with any contractual obligations and applicable laws governing the program and should regularly review the program's operations.

Standard 1.1-3 (Role and Responsibility of Governing Body - Fiscal) The governing body should assume responsibility for the financial integrity of the pro bono program by adopting a budget, monitoring revenues and expenditures in relation to the approved budget and providing for an annual independent financial examination.

Standard 1.1-4 (Role and Responsibility of Governing Body - Fundraising, Recruitment, Recognition and Public Relations) The governing body should support the operation of the pro bono program by assisting in activities such as fundraising, volunteer recruitment, volunteer recognition and public relations.

Standard 1.1-5 (Role and Responsibility of Governing Body - Non-Interference in Attorney-Client Relationship) The governing body and its individual members should not interfere directly or indirectly in the representation of a client by a volunteer attorney.

Standard 1.1-6 (Role and Responsibility of Governing Body - Non-Interference in Specific Acceptance and Referral Decisions) The governing body and its individual members should not interfere directly or indirectly with the decision of the pro bono program staff to accept or reject a specific matter, or to refer a matter to a particular volunteer.

Standard 1.1-7 (Role and Responsibility of Governing Body - Conflicts of Interest)

Governing body members should not attempt to influence any decisions in which they have a conflict with clients served by or through the pro bono program.

Standard 1.2-1 (Membership of the Governing Body - Representation of the Legal Community)

The governing body should include members who represent various segments of the legal community.

Standard 1.2-2 (Membership of the Governing Body - Representation of the Community at Large)

To the extent practicable, the governing body should include members of the community at large, with a special emphasis on participation by the client community.

Standard 1.2-3 (Membership of the Governing Body - Orientation and Training) A pro bono program should strive to assure that all members receive the orientation and training necessary for full and effective participation on the governing body.

Performance Area Four — Criterion 1



Criterion 1. Board governance. The program has effective board oversight and involvement in major policy decisions, including board members who are each committed to the program and its mission, and a board that holds program management accountable for effective performance in the areas delineated by these criteria. The board also meets its affirmative responsibility to help develop resources for the program, promote awareness of the program, enhance its effectiveness and influence, and protect and defend the interests of the organization.

Indicators

- The board is involved in major policy decisions, aware of issues in and performance of the program, while leaving day to day management of program operations to program management personnel.
- The board effectively evaluates the chief executive officer.
- The board as a whole, and members individually, are committed to the program and its mission, are free from organizational or personal conflicts, attend meetings regularly, and as appropriate, assist in fundraising and development activity.
- As a whole, the board is appropriately diverse and representative of the various geographical areas and low-income populations served by the program.
- The board effectively promotes and expands the reach and influence of the program in the communities it serves, and develops additional resources for the program.
- The board exercises effective financial oversight.

Areas of Inquiry

- How are major policy decisions made?
- Is the board supportive of the program?
- Are its individual members?
- Do board members and officers understand the major issues at stake for the program?
- Are board members aware of and accurate in their perception of the requirements of the program's funding sources?
- Is the board aware of any major problems or issues within the program?
- How does the board exercise its oversight of program operations?
- Are board decisions appropriately documented in board minutes?

LSC Performance Criteria related to Governance

- Does the board exercise judgment independent of the executive director, where appropriate?
- How frequently does the board evaluate the executive director?
- Do board members assist effectively in fundraising and development activity?
- Is the board membership diverse and representative of the service area?
- Are client board members actively engaged in board decision making?
- Does the board have a policy or practice that effectively deals with conflicts of interest or potential conflicts of interest? Is the policy or practice in writing?
- Are organizational or individual conflicts addressed quickly and effectively?
- Does the board meet its external responsibilities as delineated in this criterion?
- Are board members given appropriate orientation and continuing training, including training on the role of the board, potential conflicts of interest, and on fiscal, fiduciary, and other responsibilities?
- Does the board have a policy or practice regarding length of service on the board?
- What is the level of attendance at board meetings?
- What systems and procedures does the board have to ensure effective financial oversight?

Board Member Roles & Responsibilities

Members of legal services boards of directors are fiduciaries and guardians of their organizations. “Fiduciary” is defined as a “person to whom property or power is entrusted for the benefit of another.” As fiduciaries, board members are entrusted by the public with the responsibility to act for the good of the organization. The legal duties of the non-profit board, governed by both state and federal law, can be summed up in the “three D’s”: duty of care, duty of loyalty, and duty of obedience.

Duty of Care Board members must exercise due care in all dealings with the organization and its interests. **The duty of care is carried out by the following:**

- Consistent attendance at full board and committee meetings;
- Advanced preparation for board meetings, such as reviewing reports and minutes;
- Obtaining information about organizational issues, especially before voting on them;
- Raising questions whenever something is unclear or questionable;
- Using independent judgment;
- Awareness of and compliance with state and federal filing requirements;
- Review of the provider’s finances;
- Review of the credentials and performances of the staff.

Duty of Loyalty The duty of loyalty requires board members to exercise their power in the interest of the provider and not in their own interest or interest of another entity. When acting on behalf of the provider, board members must put the provider’s interests before their personal and professional interests. **The duty of loyalty is carried out by the following:**

- Disclosure of any conflicts of interests
- Adherence to the provider’s conflict-of-interest policy
- Avoidance of the use of opportunities for personal gain or benefit
- Nondisclosure of confidential information about the provider

Duty of Obedience Obedience to the provider’s mission and purpose must guide all decisions. The board must also ensure that the provider functions within the law, both the “law of the land” and its own by-laws and other policies. The board members must remain the guardians of the mission. **The duty of obedience is carried out by the following:**

- Compliance with all regulatory and reporting requirements (e.g., IRS Form 990; requirement to pay employment taxes; reporting requirements related to federal, state, other funders)
- Examination of all documents governing the provider and its operation, such as bylaws
- Making decisions that fall within the scope of the organization’s mission and governing documents

Duties of Care, Loyalty & Obedience: Standards, References & Tools

The **Three D's – Duties of Care, Loyalty & Obedience** – articulate the basis of the board's fiduciary responsibilities.

Duty	Standards, Legal & Compliance	Samples & Tools
<p>Duty of Care Board members must exercise due care in all dealings with the organization and its interests.</p>	<ul style="list-style-type: none"> ● ABA Standard 1.1-1: On Governing Body oversight of the provider ● ABA Standard 1.1-3: On Fiscal Matters 	<ul style="list-style-type: none"> ● Sample board member expectations
<p>Duty of Loyalty Requires board members to exercise their power in the interest of the provider and not in their own interest or interest of another entity. When acting on behalf of the provider, board members must put the provider's interests before their personal and professional interests.</p>	<ul style="list-style-type: none"> ● ABA Standard 1.2-4: On Governing Body Members' Conflicts of Interest ● IRS Form 990 asks whether the organization <ul style="list-style-type: none"> ○ has a written conflict-of-interest policy ○ requires directors, officers, key employees, and others to annually disclose interests that could give rise to conflicts ○ regularly monitors and enforces compliance with the policy 	<ul style="list-style-type: none"> ● Sample conflict of interest policy ● Sample conflict of interest disclosure statement ● Sample Form 990 section related to conflicts
<p>Duty of Obedience Obedience to the provider's mission and purpose must guide all decisions. The board must also ensure that the provider functions within the law, both the "law of the land" and its own by-laws and other policies. The board members must remain the guardians of the mission.</p>	<ul style="list-style-type: none"> ● IRS Form 990 requires disclosure of certain transactions with current or former directors, officers, and key employees ● The Sarbanes-Oxley Act (SOX), Section 1107, makes it a federal crime to retaliate against whistleblowers in certain circumstances. ● IRS Form 990 asks whether the organization has a written whistleblower policy. 	<ul style="list-style-type: none"> ● Sample legal aid program mission statement ● Sample by-laws ● Sample whistleblower policies ● Sample Form 990 sections related to whistleblower policy and transaction disclosures




Within the context of the board’s overall purpose, the board is also expected to fulfill the following roles and responsibilities.

Board of Director Responsibilities	Related ABA Standard
<p>Determine organization’s mission and purpose: The Board is responsible for creating and periodically reviewing a statement of the organization’s mission and purpose that articulates its goals, ascertains the means it will utilize to accomplish those goals, and identifies the primary constituents to be served. Each individual board member must understand and support the organization’s mission.</p>	<ul style="list-style-type: none"> • Standard 1.1: On Overall Functions & Responsibilities of the Board • Standard 1.2-1: On Individual Member’s Commitment to the Provider
<p>Select and support the Chief Executive and assess his or her performance. The Board is responsible for hiring the organization’s Chief Executive and holding the Chief Executive accountable for the organization’s operations. The Board should provide necessary support, oversight, and feedback to ensure that the Chief Executive is able to fulfill the organization’s mission and goals. The board should also conduct periodic formal evaluations to assess the Chief Executive’s overall performance.</p>	<ul style="list-style-type: none"> • Standard 1.1-4: On Relations with the Chief Executive
<p>Determine, monitor and strengthen the organization’s programs and services: The Board is responsible for monitoring the organization’s programs and operations to ensure that they are consistent with the mission, functioning effectively and in compliance with its policies.</p>	<ul style="list-style-type: none"> • Standard 1.1-1: On Board Oversight of the Provider
<p>Ensure adequate resources: One of the Board’s primary responsibilities is to ensure that the organization has adequate resources to fulfill its mission. The board should work in partnership with the Chief Executive and other staff to support those efforts.</p>	<ul style="list-style-type: none"> • Standard 1.1-6: On Resource Development • Standard 1.1-3: On Fiscal Matters
<p>Ensure legal and ethical integrity and maintain accountability: The Board is ultimately responsible for ensuring the organization’s adherence to legal standards and ethical norms. Consistent with the organization’s mission, the board has responsibility to set broad general policies, including, in the first instance, articles of incorporation and</p>	<ul style="list-style-type: none"> • Standard 1.1: On Overall Functions & Responsibilities of the Board • Standard 1.1-7: On Board Members’ Conflicts of

Legal Aid Boards: Roles & Responsibilities

Board of Director Responsibilities	Related ABA Standard
by-laws.	Interest
<p>Ensure effective organizational planning: The board should actively participate with staff in organizational planning that furthers the provider’s mission and fosters the effective and efficient utilization of its resources to meet the most compelling legal needs of its clients.</p>	<ul style="list-style-type: none"> • Standard 1.1: On Overall Functions & Responsibilities of the Governing Body • Standard 2.1: Identifying legal needs and preparing to respond
<p>Recruit and orient new board members and assess board performance: The Board is responsible for building a diverse board that reflects a broad cross-section of the low-income and legal communities as well as other sectors such as business, social service organizations and law schools and that represents the wide range of expertise and skills necessary for overall board and organizational effectiveness. Boards must also orient new members to their responsibilities and to the organization’s history, needs, and challenges.</p>	<ul style="list-style-type: none"> • Standard 1.3: On Training Members of the Board • Standard 1.2-2: On Board members from communities served by the provider • Standard 1.2-1: On Individual Member’s Commitment to the Provider
<p>Enhance the organization’s public standing: The board is the organization’s primary link to the community -- including clients, other constituents, the public and the media. Board members should assist in public relations and when appropriate, engage in forceful advocacy on behalf of the provider.</p>	<ul style="list-style-type: none"> • Standard 1.1-5: On Serving as a Resource to the Provider • Standard 1.1-6: On Individual Members’ Commitment to the Provider • Standard 1.3: On board communication with low income and legal communities

 **Instructions:** With a partner, review each of the core roles and responsibilities outlined below and discuss how and to what extent your board fulfills these responsibilities.

Responsibilities	My board supports this responsibility by:	My board could improve this responsibility by:
Determine organization's mission and purpose		
Select and support the Chief Executive and assess his or her performance.		
Determine, monitor and strengthen the organization's programs and services		
Ensure adequate resources		
Ensure legal and ethical integrity and maintain accountability		
Ensure effective organizational planning		
Recruit and orient new board members and assess board performance		
Enhance the organization's public standing		

Membership on the governing body of a legal aid provider involves significant responsibilities.



ABA Standards 1.1-2 and 1.1-5 outline the following expectations of individual board members:

- 1) **Adequate Time:** Members need to commit adequate time to carrying out their responsibilities. They should commit to regular attendance at board of director meetings and any committees to which they are assigned. They also need to commit time to completing any projects or tasks they agree to take on, including the direct support of the provider's resource development strategies.
- 2) **Serving as a Resource to the Provider:** Standard **1.1-5** outlines the following concrete ways in which board members can serve as a resource to the provider.
 - Provision of pro bono assistance – in individual cases, co-counseling cases in litigation or through legislative or administrative advocacy.
 - Explaining the nature and purpose of legal aid to other important elements of society.
 - Making connections between the provider and other members of the legal profession and with the organized bar.
 - Increase understanding about and sympathy towards problems of low income persons
 - Advocate on behalf of the provider or its clients in the legislature and within organized bar.
 - Defend the provider's role as an advocate and help educate the public about the provider's mission
 - Provide training to provider's staff
 - Provide assistance in matters related to non-profit organizations
- 3) **Understand and Support Legal Aid Mission:** In addition to the member responsibilities outlined above, civil legal aid boards also seek board members who understand and support the general mission of civil legal aid.
- 4) **A Willingness to Learn:** Effective participation begins with a willingness to learn about the provider's mission, how it operates, how it is funded and what the legal requirements are that govern its operation. It also calls for each board member to learn about the important characteristics of the low income communities served by the provider and the legal problems they face. Such knowledge and awareness is important to the governing body making appropriate decisions regarding service delivery, budgeting, financial management, and other pertinent matters.

Sample Board of Directors – Responsibilities and Expectations



XYZ Legal Services and the clients it serves benefit from the generous and dedicated service of its Board of Directors. The Board recognizes that its responsibilities include ensuring:

- Delivery of high quality legal services to the client community;
- Sound planning and policies;
- Good management;
- Sound resources and financial dealings;
- Compliance with legal requirements; and
- Good governance.

A person who joins the Board of Directors commits to:

- Attend board meetings and planning retreats.
- Be an informed participant in program planning, policy making and oversight. This includes:
 - It is expected that board members will seek, and XYZ will provide, training and information so that members can fulfill these responsibilities.
- Actively assist in raising funds for XYZ by:
 - Making personal financial contributions to the extent of his or her capacity.
 - Soliciting contributions from friends, relatives and colleagues.
 - For lawyer board members in law firms, ensure the firm's financial support;
 - Recruiting new members of the board who can help ensure the success of the fundraising effort.
- Participate in at least one board committee.
- Assist with marketing and public relations.



Instructions: On a scale of 1 (strongly agree) to 5 (strongly disagree), assess the extent to which you fulfill your general responsibilities as a legal aid board member.


	Expectations of Individual Board Members	Assessment	Comments
Adequate Time	I allocate adequate time to fulfill board member roles.		
	I regularly attend board meetings.		
	I prepare fully for board meetings by reviewing all materials in advance.		
Providing Resources	I provide resources to the provider in the following ways:		
	•		
	•		
	•		
Mission	I fully understand and support the provider's mission		
Willingness to learn	I am adequately knowledgeable about:		
	• How the provider operates		
	• How the provider is funded		
	• Legal requirements governing the provider		
	• Characteristics of low-income communities served by the provider		
	•		
•			



Recruit and orient new board members and assess board performance

The Board is responsible for building a diverse board that reflects a broad cross-section of the low-income and legal communities as well as other sectors such as business, social service organizations and law schools and that represents the wide range of expertise and skills necessary for overall board and organizational effectiveness. Boards must also orient new members to their responsibilities and to the organization's history, needs, and

The ABA Standards address issues of board recruitment, orientation, training and assessment through multiple individual Standards.

- **Standard 1.2: On Governing Body Members Responsiveness to Communities Served**  states that "A provider should have a governing body whose membership and manner of operating are responsive to the low income communities served" and outlines various dimensions of diversity to be reflected in legal services governing bodies, suggested strategies for recruiting diverse board members and the importance of "fostering effective participation of all members."
- **Standard 1.2-3: On Training Members of the Board** states that "the provider should assure that all members receive orientation and training necessary for full and effective participation on the governing body" and outlines specific areas in which board members should receive training.
- **Standard 1.2-2: On Board Members from Communities Served by the Provider** states that "the governing body should include members who are or have been eligible to receive legal assistance from the provider" and provides suggestions for how to orient and support such board members.

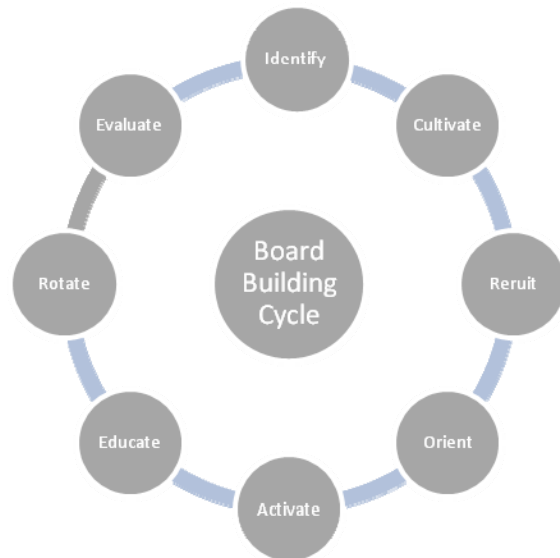


The **Legal Services Corporation** also addresses board development issues through its **Regulation 1303: on Composition**.

The Board's Role in Board Building

Building diverse, strong and engaged boards requires a thoughtful and intentional process. Following are suggested steps in board development; each of these will be addressed in more detail on the following pages.

- **Step 1: Identify board needs.** This step begins with the careful assessment of the kinds of **qualities, skills, affiliations and perspectives** needed to round out an effective board and, where applicable, ensure compliance with board composition requirements.
- **Step 2: Cultivate potential board members.** This step involves outreach to prospective members and providing opportunities for them to get to know the organization and for existing board members and staff to get to know prospective board members.
- **Step 3: Recruit prospects.** This step involves three sub-steps: assessing the prospect's interest and fit; determining whether they would serve; and then nominating and electing new members.
- **Step 4: Orient new board members to the organization.** This step involves orienting new members to the organization and to the board itself.
- **Step 5: Activate all board members.** This step involves identifying particular areas of interest and skill among board members and providing them with opportunities to contribute knowledge and skill through committee work or other activities.
- **Step 6: Educate the board.** This step involves regularly assessing educational needs of the overall board as well as of individual board members and offering learning opportunities to respond to those needs.
- **Step 7: Rotate board members.** This step involves the intentional rotation of board members to ensure a balance of continuity and turn-over.
- **Step 8: Evaluate.** This step involves regularly assessing the board on its own performance.



Officers of the Board are in the service of the Board. Individual officers may not act in place of the Board except when acting together as an Executive Committee in accordance with the bylaws.

- 1) **Board Chair.** The board chair's primary role is to lead the board of directors and guide the board's work and actions; an effective board chair serves as a partner to the chief executive. Good governance starts and ends with a strong and effective chair. At a minimum, the board chair must be a strong advocate for the organization and able to articulate the organization's vision and mission and the many reasons why others should support it. The chair is responsible for convening and running board meetings, developing meeting agendas in partnership with other officers and the chief executive and ensuring that board committees are chaired and operating effectively. The chair is also responsible for ensuring that board members fulfill their collective and individual responsibilities.
- 2) **Vice Chair.** The vice chair should possess many of the same characteristics as the chair since the vice chair assumes the chair's responsibilities in his/her absence. Fulfilling the vice chair role is often a vehicle for developing the next board chair.
- 3) **Secretary.** The secretary is responsible for maintaining board minutes and ensuring that accurate records are kept of all board and committee meetings. The secretary is also responsible for ensuring timely notice of all full board and committee meetings.
- 4) **Treasurer.** The treasurer chairs the organization's finance committee and, with finance committee members, is responsible for the board's review of and actions related to the board's financial responsibilities. The treasurer works with the chief executive to ensure that proper financial reports are made available to the board on a timely basis.



Committee work is an integral part of the governing body's decision-making processes. The agenda of governing body meetings is often too full to permit adequate consideration of the full range of details of complex issues. The governing body should appoint committees, when necessary, to consider issues in depth prior to meetings and to make appropriate recommendations for action by the full governing body. It should also have permanent committees that oversee key aspects of the provider's operation, such as audit and finance, personnel, resource development and planning. Membership on committees should include representatives of the low income community as well as attorney members. From **ABA Standard 1.2** On Governing Body Members' Responsiveness to the Communities Served

What standing committees should your organization consider? Here are some traditional committees that many legal aid providers use:

Executive Committee

MEMBERS: Officers or chairpersons of other standing committees and a specified number of at-large board members.

AUTHORITY AND CHARGE: This committee manages the business of the organization to the extent determined by the board. It should act only in the intervals between meetings of the full board and at times as directed by the board. Executive committees can be problematic in smaller organizations, as they tend to concentrate power in a few people. If board members live geographically close, executive committees are best avoided.

Finance Committee

MEMBERS: Treasurer, staff, and other board members.

CHARGE: This committee considers the details of the budget, monitors financial condition and reports, approves of major purchases, etc. It ensures that the organization employs generally accepted accounting principles based upon uniform accounting procedures. It also is cognizant of and seeks out available funds.

Personnel Committee

MEMBERS: Chair of the board, board members, Executive Director, others.

CHARGE: This committee establishes policies and procedures regarding salaries, fringe benefits, hours, and working conditions that permit employment and retention of qualified staff and foster high productivity and quality of service.

Nominating Committee

MEMBERS: General board members, staff, others.

CHARGE: This committee nominates officers and candidates for membership, recommends criteria for selection of new members, provides orientation of new members, analyzes attendance at meetings, and recommends action regarding inactive members.

Program Committee

MEMBERS: General Board members, Executive Director, Staff, others.

CHARGE: This committee provides board with detailed information about the provider's services that cannot be given in board meetings, examines the provider's services, (i.e. how the program relates to the purposes and goals of the provider and to other programs in the community), gives the Executive Director and appropriate staff opportunities to discuss with the board how effectively provider services reflect changing trends, formulates policies for board action.

Development Committee

MEMBERS: General board members, knowledgeable community members, staff.

CHARGE: This committee assumes the primary responsibility for matters pertaining to the quality and quantity of volunteer participation, financial support, internal and external image.

ABA Standards of Practice

Section One on Governance

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STANDARD 1.1 ON OVERALL FUNCTIONS AND RESPONSIBILITIES OF THE GOVERNING BODY

STANDARD

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

COMMENTARY

General considerations

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

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

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

Overall responsibilities

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 1.2 (on Governing Body Members' Responsiveness to the Communities Served); Standard 1.3 (on Governing Body Communication with Low Income and Legal Communities).

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

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-1 (on Governing Body Oversight of the Provider).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-3 (on Fiscal Matters).

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-4 (on Relations with the Chief Executive).

⁶ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-5 (on Serving as a Resource to the Provider).

⁷ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 1.1-6 (on Resource Development).

Standard 1.1 on Overall Functions and Responsibilities of the Governing Body

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

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

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

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

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

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

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

STANDARD 1.1-1 ON GOVERNING BODY OVERSIGHT OF THE PROVIDER

STANDARD

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

COMMENTARY

General considerations

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

Oversight by the governing body

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

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

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

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

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

Standard 1.1-1 on Governing Body Oversight of the Provider

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

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

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

STANDARD

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

COMMENTARY

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

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

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

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

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

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

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

STANDARD 1.1-3 ON FISCAL MATTERS

STANDARD

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

COMMENTARY

General considerations

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

Budgeting and financial planning

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

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

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

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

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

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

Standard 1.1-3 on Fiscal Matters

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

Financial accountability

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

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

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

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

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

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

Standard 1.1-3 on Fiscal Matters

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

STANDARD 1.1-4 ON RELATIONS WITH THE CHIEF EXECUTIVE

STANDARD

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

COMMENTARY

Skills required of the chief executive

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

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

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

Standard 1.1-4 on Relations with the Chief Executive

Recruitment and selection of the chief executive

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

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

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

The relationship between the governing body and the chief executive

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

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

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

Standard 1.1-4 on Relations with the Chief Executive

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

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

Oversight and evaluation of the chief executive

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

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

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

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

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

STANDARD

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

COMMENTARY

General considerations

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

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

Community relations and advocacy for the provider

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

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

Standard 1.1-5 on Serving as a Resource to the Provider

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

STANDARD 1.1-6 ON RESOURCE DEVELOPMENT

STANDARD

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

COMMENTARY

General considerations

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

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

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

Governing body responsibilities

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

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

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

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

Standard 1.1-6 on Resource Development

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

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

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

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

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

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

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

Standard 1.1-6 on Resource Development

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

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

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

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

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

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

Standard 1.1-6 on Resource Development

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

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

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

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

STANDARD

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

COMMENTARY

General considerations

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

Diversity of viewpoints

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recruitment and selection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD

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

COMMENTARY

General considerations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD

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

COMMENTARY

General considerations

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

Supporting full participation by representatives of the low income community

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

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

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

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

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

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

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

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

Other means for involvement of low income persons

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

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

STANDARD

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

COMMENTARY

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

New members should receive orientation that includes information on:

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

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

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

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

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

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

STANDARD

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

COMMENTARY

General considerations

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

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

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

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

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

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

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

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

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

Concerns associated with different types of conflicts

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

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

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

¹ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar); Standard 2.8 (on Relations with the Organized Bar).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD

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

COMMENTARY

General considerations

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

Communication with the low income and legal communities

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

Input from communities affected by governing body decisions

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

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

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar).

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

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

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

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

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

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

Excerpt from ABA

**STANDARDS FOR PROGRAMS
PROVIDING CIVIL PRO BONO LEGAL SERVICES
TO PERSONS OF LIMITED MEANS**

February 1996

On Governance

Standard 1.1-1 (Role and Responsibility of Governing Body - General Policy Development)

A pro bono program should establish a governing body which adopts broad general policies.

COMMENTARY

Every pro bono program should establish a governing body¹ to provide it with guidance, oversight and support. The precise form of the governing body will vary, depending upon the structure of the program. For pro bono programs that are separately incorporated, state law

generally mandates a board of directors. For those programs that are part of a larger organization, such as a legal services program or a bar association, often the organization's board is unable to devote sufficient time and oversight to the program, due to its many other responsibilities. In such cases, a subcommittee of the organization's board is often responsible for the oversight of the pro bono program. Alternatively, the board of the larger organization may appoint an advisory board for the program. Although an advisory board usually is not given the authority either to make policy or to regulate fiscal matters, the governing board may request that it comment on such matters as well as assign to it the responsibilities of providing advice to program staff and oversight to program operations.

Those who serve on the governing body should be committed to fulfilling the purposes of the program. In addition, they should be willing to commit adequate time to obtain the necessary understanding of the program's operations to meet their board responsibilities. Because serving as a board member can demand much time and energy, the program may want to consider instituting term limits for its members. Such a system not only creates a finite commitment for board members, but it also provides a means for regularly adding new members who can bring fresh perspectives and new energy to the governing body. To avoid a governing body made up of entirely new members, however, a program may want to consider staggering the terms of its board members. A program may also want to consider developing a method for removing board members for failure to consistently and actively participate in program governance, or for other cause.

One of the main functions of the governing body is to set broad general policy for the program. The exact policy role of the governing body will depend upon local judgments as to the appropriate role of the governing body and the pro bono manager. Generally, the governing body has broad decision making authority on fundamental matters, such as determining the delivery design, adopting priorities, establishing eligibility guidelines and a grievance procedure, determining the salary structure for staff and adopting a budget². For those programs that are separately incorporated, usually the governing body has the additional responsibility of hiring the program's director and periodically evaluating his or her performance.

Standard 1.1-2 (Role and Responsibility of Governing Body - Oversight and Review)

The governing body should ascertain that the pro bono program is in compliance with any contractual obligations and applicable laws governing the program and should regularly review the program's operations.

COMMENTARY

The governing body should regularly review the program to determine that policy decisions are being properly implemented and that the program is in compliance with all contractual, statutory and regulatory requirements³. To ascertain that the program is in compliance with

applicable laws, the members of the governing body should have a working knowledge of the various statutes and regulations governing the program. To assist the governing body members in understanding those laws, program management should schedule relevant training events⁴.

Although the pro bono manager is responsible for the day-to-day operations of the program, the governing body should regularly review those operations to determine that established policy is being implemented properly, to ascertain that the program's mission and goals are being achieved and to identify problems that may require intervention⁵. To properly fulfill this review function, the governing body should regularly obtain and review internal program reports regarding financial matters, number of clients served, disposition of matters handled, recruitment data, budget data, funding changes and major provider undertakings. In addition, it should review both the program evaluations provided by funding sources or other entities and the report of the annual financial examination⁶. The board should also make certain that it is aware of new developments in pro bono delivery so that it can evaluate the program's ability to recruit and utilize volunteers effectively and efficiently. The board should also ascertain that the program is making its best effort to coordinate with other providers to maximize the delivery of service to clients⁷.

In the commentary to the ABA's Standards for Providers of Civil Legal Services to the Poor, several "warning signs" requiring the attention of the governing body are enumerated, the following of which should be of particular concern to pro bono program governing bodies: a sharp change in the number of cases handled; significant deviations from the approved budget; an increase in client grievances; an increase in complaints from employees of the provider; an increase in complaints from participating volunteers or entities, the private bar or the legal community; and a decrease in participation by the private bar in assisting clients⁸. In addition, the governing body should take special note of any substantial decrease in the number of volunteers recruited and any significant turn-over of the governing body's members. If the governing body does discover any problems in the course of its review, it should take proper steps to remedy them.

Standard 1.1-3 (Role and Responsibility of Governing Body - Fiscal)

The governing body should assume responsibility for the financial integrity of the pro bono program by adopting a budget, monitoring revenues and expenditures in relation to the approved budget and providing for an annual independent financial examination.

COMMENTARY

A basic responsibility of the governing body is to adopt a sound budget that enables the program to meet its responsibilities to its clients, its volunteers and its funding sources. To fulfill these responsibilities, the governing body should devote sufficient resources to meeting

program priorities, to furnishing training and support to volunteers and to providing adequate salaries to qualified, experienced staff.⁹ In addition, the governing body must ascertain that the budget is in compliance with the terms and conditions set by its funders.¹⁰

As is pointed out in the commentary to the ABA's Standards for Providers of Civil Legal Services to the Poor, "budget responsibilities involve more than mechanical approval of broad spending categories and perfunctory review to assure that income and expenditures balance."¹¹ Rather, the budget is the mechanism through which the governing body implements major policy decisions regarding the program's direction and operation. Budget planning also provides the governing body with the opportunity to assess future resource needs and to plan for expected changes in available resources.¹²

The pro bono manager is often the individual responsible for spending funds based upon the budget established by the governing body.¹³ To enable the manager to perform this responsibility, the governing body should develop written procedures regarding that individual's role in and authorization for purchasing, payroll, cash disbursements, cash receipts, entering into monetary obligations and maintenance of pro bono or contractual services. The governing body should also create internal controls to ensure safeguarding of the programs's assets by, for example, requiring dual signatures (e.g. program manager and governing body member) on all checks or on checks drawn above a certain amount.

There will be times when deviations from the established budget will occur due to unanticipated costs or unforeseen circumstances. The commentary to the ABA's Standards for Providers of Civil Legal Services to the Poor address this issue in the following manner:

The governing body should establish guidelines which give management flexibility to make reasonable adjustments in response to changing circumstances. Management should provide the governing body with periodic full reports of income and expenditures which permit the body to anticipate potential problems and keep apprised of activities as they are reflected in the expenditure of resources.¹⁴

To assure that the program is in compliance with both sound accounting principles and the terms and conditions set by its funders, the governing body should authorize an annual audit. Among other things, it should include a report on existing assets¹⁵ and liabilities of the program, delineating material contingencies (including claims and contracts) and development of recommendations on internal controls and procedures. For programs that are a component of a larger organization, such as a legal services program or a bar association, that financial review usually will be part of the larger organization's annual audit. However, there may be some programs such as those with very small budgets, for which conducting a full scale audit would be unduly burdensome. In those situations, a less extensive form of an annual independent financial review may be appropriate.

The commentary to the ABA's Standards for Providers of Civil Legal Services to the Poor set forth the following guidelines for the audit process:

The governing body should select its auditors in a manner that reflects the provider's commitment to equal opportunity in hiring and assures the highest level of service from them. The contract should establish the work to be done and its maximum cost and should ensure a timely report, usually within 90 days of the close of the fiscal year.¹⁶

Once the governing body receives the financial report, it should meet with the examiners to discuss their findings, their recommendations for responding to identified problems and their suggestions for improving and updating the program's accounting system.¹⁷ The governing body should then take steps to remedy the identified problems and carefully consider any recommendations made for changing the current accounting system.

Standard 1.1-4 (Role and Responsibility of Governing Body - Fundraising, Recruitment, Recognition and Public Relations)

The governing body should support the operation of the pro bono program by assisting in activities such as fundraising, volunteer recruitment, volunteer recognition and public relations.

COMMENTARY

The governing body and its individual members should assume a vital role in a number of activities that are of critical importance to the program including fundraising, recruitment, volunteer recognition and public relations. While it is likely that the pro bono manager will be involved in these activities, given the many demands of directing the day-to-day operations of a program, the manager must look to the governing body for assistance.

Members of the governing body should be called upon to inform bar members and the public of the program's mission, goals and achievements.¹⁸ Important functions such as writing recruitment letters, speaking at recruitment events and writing articles about the program are ones that members of the governing body can easily perform.¹⁹ In addition, they can play a valuable role by speaking at recognition events and by personally presenting the program's awards for outstanding service.²⁰ Fund raising is another area in which members of the governing body can play an active role.²¹ Attorneys and business leaders, for example, who are governing body members can take part in the direct solicitation of funds for the program from their peers. In addition, they can use their contacts and influence with institutional funding sources to try to obtain grants for the program.

Together, the pro bono manager and board members may establish other areas in which the

members of the board can support the operation of the program. The examples provided are meant to be illustrative of the wide range of activities in which the board can provide valuable assistance to the program.

Standard 1.1-5 (Role and Responsibility of Governing Body - Non-Interference in Attorney-Client Relationship)

The governing body and its individual members should not interfere directly or indirectly in the representation of a client by a volunteer attorney.

COMMENTARY

In representing a client, a lawyer has an ethical duty to exercise independent professional judgment.²² Any action by the governing body or its members that interfere with the fulfillment of this duty by a volunteer attorney, therefore, is strictly prohibited.²³

ABA Formal Opinion 334 (1974) addresses the extent to which a governing board of a legal services office may prescribe rules and regulations that limit or restrict the activities of staff attorneys acting on behalf of clients without placing those lawyers in violation of their duty to exercise independent judgment in legal matters. Because the volunteer attorneys of a pro bono program and the staff attorneys of a legal services program serve the same function of providing free legal services to individuals seeking assistance through the program, Formal Opinion 334 is relevant to the governing bodies of pro bono programs.

Formal Opinion 334 permits the activities of the staff attorneys on behalf of their clients to be limited or restricted by the governing body only to the extent necessary to allocate fairly and reasonably the resources of the program and to establish proper priorities in the interest of maximizing available legal services to the poor. Once a case has been assigned to an attorney, however, the governing body cannot interfere with the attorney-client relationship. In addition, neither the governing body nor an advisory committee of its lawyer members can have access to the confidences and secrets of the client because such bodies have not established an attorney-client relationship with the client.²⁴

There may be exceptions to this prohibition, such as when a client explicitly consents to the disclosure of confidential information when filing a grievance against the volunteer lawyer. In that situation, the governing body or a duly selected committee may examine the conduct of a case by the volunteer attorney, but the body cannot specifically direct the volunteer to undertake or to refrain from any action in the case.²⁵

Standard 1.1-6 (Role and Responsibility of Governing Body - Non-Interference in Specific Acceptance and Referral Decisions)

The governing body and its individual members should not interfere directly or indirectly with the decision of the pro bono program staff to accept or reject a specific matter, or to refer a matter to a particular volunteer.

COMMENTARY

Decisions about whether to accept a specific matter for referral to a volunteer must be made on a basis consistent with rules of professional conduct. Two formal ethics opinions of the American Bar Association have addressed the question of case-by-case decisions by the governing body of a legal aid society, Formal Opinion 324 (1970) and Formal Opinion 334 (1974). Those opinions discuss three ethical issues: preservation of client confidences and secrets, the obligation not to decline a matter based on controversy, and non-interference with lawyers' independent judgment. The opinions concluded that the governing board of the legal aid societies "should set broad guidelines respecting the categories or kinds of cases that may be undertaken rather than act on a case-by-case, client-by-client basis."²⁶

Ethical obligations require that lawyers maintain client confidences.²⁷ ABA Formal Opinion 90-358 concludes that the duty to maintain client confidences applies to protect information imparted by a potential client seeking to engage a lawyer's services even though no legal services are performed and the representation is declined.²⁸ The protected information includes not only the underlying facts of the case, but extends to the names, addresses and telephone numbers of potential clients.²⁹ The staff of a pro bono program is prohibited, therefore, from revealing such information to anyone not entitled to such information under applicable ethical standards. Such standards include not only the attorney client privilege, but also the doctrine of non-disclosure of client secrets and information relating to the representation of a client.³⁰ This is true even if an attorney-client relationship is never established between the program and the individual seeking assistance. The program must determine, under applicable ethical standards, whether disclosures to the program's governing body would be permissible.³¹ If such disclosure would not be permissible, then the only information regarding cases that a governing body should receive is that which is necessary to determine if the program's policies are being carried out, unless a client provides knowing, voluntary consent to the disclosure of confidential information.³² If making a an informed judgment to accept or reject a case requires access to information that the governing body would not be entitled to receive under applicable ethical standards, then the governing body clearly cannot insert itself into the referral decision.

A pro bono program often establishes an attorney-client relationship with an individual seeking a pro bono representation prior to the placement of the case with a volunteer. This occurs, for example, when the program staff provides legal advice to the client pending the referral decision.³³ In such cases, the governing body is further restricted from interposing itself in the referral decision because it cannot interfere with a lawyer's independent professional judgment on behalf of a client.³⁴

A board may properly request information regarding the substantive areas of cases referred (i. e. housing, consumer, family law) to ascertain, for example, that the priorities of the programs are being followed. Where communications with the governing body are not protected by the attorney-client privilege, the governing body cannot receive any specific facts regarding those cases without knowing, voluntary client consent.

Another exception may occur when a client files a grievance against program staff for declining to refer the matter to a volunteer or for advice received.³⁵ In such situations, there may be an implied waiver, allowing the governing board to investigate the grievance.³⁶ Absent an implied waiver, if a privilege applies, the client's consent to the disclosure of the confidential information would be necessary before the grievance could be investigated.³⁷

Standard 1.1-7 (Role and Responsibility of Governing Body - Conflicts of Interest)

Governing body members should not attempt to influence any decisions in which they have a conflict with clients served by or through the pro bono program.

COMMENTARY

Conflicts of interest may arise for governing body members due to either the clients that they represent or the institutions or individuals with which they are associated. In either case, members should not use their position on the governing body to further interests which are in conflict with the interests and objectives of either clients of the program or pro bono clients represented by the program's volunteers. Lawyer members of the governing body are generally prohibited from knowingly participating in a decision or action of the program if the decision could have a material adverse effect on a client served by or through the program whose interests are in conflict with interests of the lawyer or a client of the lawyer.³⁸ In other situations where conflicts may arise, such as when a board member has a financial interest in a matter under consideration, the law of the jurisdiction regarding disclosure and recusal should be reviewed for guidance.

While a program and its governing body should be sensitive to potential conflicts and address actual conflicts, the program should not exclude from the board every person identified with an institution or individual with a potential adverse interest to a client of the program or a pro bono client represented by a program volunteer. The determination as to whether an actual conflict exists for an individual board member must be made on a case by case basis. As is pointed out in the ABA's *Standards for Providers of Civil Legal Services to the Poor*:

A strict rule could exclude persons with skills and experience of benefit to the provider and could inhibit development of an effective relationship between the provider and the private bar. In rural areas particularly, where

the pool of potential members is relatively small, it may be impossible to avoid all conflicts. The provider, however, should assure that the presence of members with potential conflicts does not inhibit forceful representation of clients.³⁹

Institutional Conflict

A board member's representation of or association with an institution can create particular problems with conflicts. This is because a member's decision on issues such as program priorities, allocation of resources and program structure can affect the availability of counsel to act against that institution. For example, by deciding that consumer issues will not be among the program's priorities, a board member who represents or is otherwise associated with a car dealership located in the client community can assure that volunteers will not be available through the program to represent clients in lawsuits filed by or against that institution.

The commentary to the ABA's Standards for Providers of Civil Legal Services to the Poor provides other examples of institutional conflicts that may arise in this context:

- . An institution, by its nature, may have general interests contrary to those of clients. For example, a finance company has economic interests which are served by laws and policies favoring creditors rather than borrowers.
- . An institution may have a specific interest that conflicts with the interests of clients. For example, a large financial institution seeking to develop an industrial park in the heart of a low-income neighborhood may be fundamentally at odds with the interests of clients in the neighborhood.
- . An institution, such as a welfare agency or housing authority, which perceives itself as acting on behalf of clients, may nevertheless be a frequent adversary of clients of the program or clients represented by the provider.⁴⁰

The fact that a person is employed by or is otherwise significantly connected with an institution that is in conflict with the clients served by or through the program should not automatically disqualify that person from service on the governing body. Rather, a factual determination should be made as to whether an actual conflict exists. The commentary to the ABA's *Standards for Providers of Civil Legal Services to the Poor* provides guidance in this area by listing factors that would evidence the lack of an actual conflict in such situations:

- o The individual is not regularly involved directly or through a supervisory role in cases against provider clients.

- The individual does not have a policy-making role within the institution.
- The individual is not directly engaged in an activity which itself adversely affects client interests.
- It is clear that the individual will exercise independent judgment in serving as a member of the governing body.
- The individual is committed to the provision of legal services to the poor. Examples of such evidence would be previous experience in legal services work; participation as a private attorney in the representation of provider clients; a professional role consistent with legal services work, such as employment in the consumer fraud division of a county attorney's office; or previous experience on the provider's governing body.[41](#)

Individual Conflict

An attorney member of the board may occasionally represent a client who is an adverse party to either a client of the program or a pro bono client of a program volunteer.[42](#) The presence of a board member in such a case may not create an actual conflict because that member does not have an attorney-client relationship with the individual obtaining pro bono assistance. Nevertheless, the situation may raise ethical concerns.

The issue of whether a staff attorney of a legal services program and a board member of that program can represent adverse parties in litigation has been addressed in the American Bar Association's Formal Opinion 345 (1979). Although that opinion does not involve a pro bono program, in analyzing whether a pro bono program's board member can represent a client who is an adverse party to either a client of the program or a pro bono client of a program volunteer, the opinion is relevant and provides some guidance.

Opinion 345 holds that the adverse parties can be represented provided that both clients are advised of the circumstance and consent to proceed, and provided that there is in fact no impact on the exercise of independent judgment by either attorney. It specifically states that "clients and counsel on both sides must feel comfortable that in the particular circumstances neither client will be deprived of independent and uninhibited representation."[43](#)

Application to Situation Involving a Client of the Program

In those situations in which an attorney-client relationship is established between the client and the program, it exists most often due to the case oversight, mentoring and support that the program staff provides to the volunteer during the course of his or her representation of a pro bono client. Given this rather attenuated relationship with the client, it may seem unlikely that

the independent judgment of the pro bono program staff would be affected due to a board member's representation of an opposing party. Yet, because the board member may have input on issues such as staff salaries and promotions, it is possible that the appearance of a board member as opposing counsel in a matter could impede the program staff's independent judgment. For example, the program staff may balk at providing funds from its litigation fund to the pro bono client's attorney, for fear of angering the board member. A factual determination must be made by the program staff in each case, therefore, where the potential for a conflict exists.

In those cases in which the program staff conclude that their independent judgment has not been affected and so they can proceed in their role, the consent of the client should be obtained. If however, the attorney-client relationship should not continue, the program has several alternatives. It may choose to cease providing case oversight, mentoring and support to the volunteer. Alternatively, the program may locate other counsel to provide those services. Another alternative is for the attorney board member to choose not to represent the conflicting client or to resign from the governing board.

Application to Situation Involving a Pro Bono Client of a Program Volunteer

Because a pro bono program's volunteers receive no fee or other economic benefit as a result of the governing body's decisions, it is highly unlikely that their independent judgment would be impeded due to a board member's appearance as opposing counsel in a case. Nevertheless, a factual determination must be made in each case in which the potential for a conflict exists. In those cases in which the volunteer concludes that independent judgment has not been affected and so representation can proceed, the consent of the client should be obtained to do so. If that representation should not continue, the program may attempt to place the matter with another volunteer or find other free counsel for the client. Another alternative is for the attorney board member to choose not to represent the conflicting client or to resign from the governing board.

Standard 1.2-1 (Membership of the Governing Body - Representation of the Legal Community)

The governing body should include members who represent various segments of the legal community.

COMMENTARY

By including representatives of various segments of the legal community on its governing body,⁴⁴ a program can create a sense of ownership in the program by lawyers and judges; it can obtain needed guidance and support; and it can call upon the special talents of the bar and bench to obtain assistance in several critical areas including recruitment, recognition, fundraising and training. Although a program may not be able to include representatives of all

segments of the legal community on its governing body, it should strive to include as broad a cross section as possible.

Bar leaders, legal services representatives, judges and pro bono attorneys can each provide important perspectives and valuable skills to the governing body. Bar leaders can lend their status and prestige to recruitment campaigns, recognition events and fundraising efforts. In addition, due to their considerable experience with the private bar, they can be excellent sources of information on successful ways to recruit, retain and recognize volunteer attorneys, and they can act as sounding boards for program initiatives.

Judges also can make important contributions to the program through membership on the governing body. They can play important roles in recruitment campaigns and recognition events,⁴⁵ as well as provide valuable insights and advice to the program. It must be noted, however, that judicial canons exist that may be interpreted as prohibiting members of the judiciary from serving on governing bodies of legal services providers.⁴⁶ In the two states in which the issue of judicial service on a pro bono program board has been addressed, one has held that service may be permissible and one has held that it is not.⁴⁷ However, the same state that found that judicial service on a pro bono program board may be permissible, as well as several other states, have held that judicial service on the board of a staff model legal services program is prohibited.⁴⁸ A program, therefore, should research the issue in its jurisdiction before approaching a judge to serve on its governing body. In addition, it should be noted that even when service by members of the judiciary is permissible, they are generally prohibited from providing legal advice or participating in most fundraising activities of the governing body.⁴⁹

Volunteer attorneys are another segment of the legal community that the program should strive to include on the governing body because they can provide an important perspective as participants in the program. Based upon their experience, they can suggest ways in which program operations may be improved to better serve the needs of volunteers. Furthermore, they can provide valuable insights into why attorneys volunteer, how to attract volunteers and how to retain them.

Representation of a local legal services program on the governing body should also be sought, due to the staff's expertise in the area of the delivery of legal services to the poor. Governing body members who are legal services staff members can provide valuable advice and guidance on issues such as needs identification, priority setting, delivery design, case acceptance policies and case oversight. In addition, they can assist with designing training events involving areas of poverty law, and they can be an excellent source for obtaining trainers for these events. Finally, the inclusion of members of the legal services program on the governing body is likely to create in those members a commitment to the success of the program. This commitment can aid in building a constructive relationship between the pro bono program and the local legal services program: one based upon cooperation, coordination and

collaboration.⁵⁰

From time to time, there may be issues that are presented to the governing board for consideration that may create an actual conflict of interest or the appearance of a conflict of interest for board members who are legal services staff. For example, strategic decisions regarding a funding proposal may be under discussion by the board at the same time that the legal services organization is preparing a competing proposal. As a result, board members who are staff of legal services programs must be sensitive to issues that raise actual conflicts or the appearance of conflicts and may need to recuse themselves from discussion and decision making on such matters.

In identifying members of the legal community to serve on the governing body, the program should strive to reflect the diversity of the profession by including, for example, African Americans, Hispanics, Asian Pacific Americans, women and persons with disabilities. To the extent that constituent-specific bar associations exist within the community, the program may want to consider selecting a representative from each of those bar associations to serve on its governing body. In addition, if the program serves a large geographical area, the program should consider having a representative from the legal communities of the various regions served represented on its governing body.

For those programs that are part of a legal services program or a social service agency, often a subcommittee of the board of directors of the legal services program or the agency is the governing body of the pro bono program. In such cases, many segments of the legal community may be unrepresented on the governing body. To address this problem, the pro bono program may create an advisory board to provide a vehicle through which it can obtain formal input from additional segments of the legal community.

Standard 1.2-2 (Membership of the Governing Body - Representation of the Community at Large)

To the extent practicable, the governing body should include members of the community at large, with a special emphasis on participation by the client community.

COMMENTARY

The value of including members of the client community on the program's governing body is set forth in the commentary to the ABA's *Standards for Providers of Civil Legal Services to the Poor*:

- It can enhance the provider's awareness and understanding of the objectives and needs of all segments of the client population;

- It can improve the provider's capacity to respond to unique service delivery and legal problems of particular groups; and
- It can increase clients' trust of the provider.[51](#)

Including other members of the community at large, such as social workers, bankers and accountants can also provide the board with valuable perspectives on issues that it might otherwise not receive. In addition, those members may have expertise and professional contacts that can be useful to the program in activities such as developing fundraising campaigns, writing grant proposals, organizing training events and recruiting non-attorney volunteers.

A pro bono program that is part of a larger organization, such as a bar association or social service organization may find, however, that it impossible or impractical to include members of the community at large on its governing body. For example, a requirement of membership on the governing body of a bar association may be licensure in the jurisdiction, thereby precluding non-lawyer members. In such situations, the program should strive to attain other means of involving clients and other members of the community at large. It may, for example, create a client advisory committee to provide input on issues such as delivery structure, priorities and other policy matters affecting representation of clients. Likewise, it may establish an advisory committee that could provide input from other members of the community on issues such as fundraising, training or recruitment, depending upon the expertise and skills of those chosen to serve. Alternatively, the governing body may choose to maintain contact with groups that represent various interests within those communities.

Given the number of client groups and other groups that exist in many communities, it is not contemplated that every such group will be represented on the governing body or advisory group. Nevertheless, in identifying members of the client community and the broader community who will serve on the board, the program should strive to reflect the diversity of those communities, particularly with respect to race, ethnicity, age and gender.

To the extent practicable, members of the client community who serve on the governing body or advisory committee should include persons who are financially eligible for the program's services, as well as those individuals who may not be eligible for services, but who are recognized as leaders in the client community. If the program services a large geographical area and a widely dispersed client population, the governing body or advisory committee should include members who live in representative locations and understand client needs particular to those areas.[52](#)

The limited financial resources of clients may make it difficult for them to afford transportation and child care costs associated with attending meetings of the governing body or advisory committee. To facilitate their attendance, the program should consider providing

reimbursement for these and similar expenses.⁵³

Standard 1.2-3 (Membership of the Governing Body - Orientation and Training)

A pro bono program should strive to assure that all members receive the orientation and training necessary for full and effective participation on the governing body.

COMMENTARY

When new members are selected to serve on the governing body, it is likely that each will possess different levels of knowledge regarding the program and the delivery of legal services and pro bono services at the local, state and national level. Because such knowledge is critical to full and effective participation on the governing body, the program should strive to assure that proper orientation and training are provided to all members.

Orientation should include information on a wide range of topics including: an historical perspective of legal services and pro bono services nationally and in the local community; the role, structure and function of the governing body and any advisory groups; the program's structure and operations; the identified legal needs of the client community; the program's priorities; the nature of the legal services offered by the program; any limitations or requirements imposed by statutes, regulations, contracts or ethical obligations; and national and local funding sources for all providers of legal services in the community.⁵⁴ Based upon their experience and expertise, current board members, program staff, staff of other local providers of legal services and clients may be particular good trainers on these topics, as well as other topics to be covered in ongoing training.

In addition to orientation, the program should provide ongoing training to members of the governing body, as needed. Areas that may be of special interest are: budgeting and accounting oversight; developments in legal services and pro bono delivery; developments in substantive legal issues that affect the program; and other matters that relate to effective governing body operation. Due to the many demands for board members' time, the program may want to consider including trainings as part of the agenda of regular meetings or board retreats.⁵⁵

PROGRAM EFFECTIVENESS

Standard 2.1 (Program Effectiveness - Identification of Clients' Needs)

A pro bono program should establish a means of identifying the legal needs of persons of limited means who reside within its service area.