

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

### 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.

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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 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.<sup>1</sup> 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.

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<sup>1</sup> 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).

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### ***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 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

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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.<sup>2</sup> 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.***

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<sup>2</sup> 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."

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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 body does not have an attorney-client relationship with clients of the provider, there is not an impermissible conflict under pertinent ethical rules.<sup>3</sup> While such representation may not create an actual conflict, the appearance of a conflict can raise ethical concerns,<sup>4</sup> and the provider's conflict of interest policy should include provisions to manage such situations.<sup>5</sup> 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.<sup>6</sup>

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<sup>3</sup> 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."

<sup>4</sup> *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

<sup>5</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 345 (1979).

<sup>6</sup> 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."

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