

Standard 3.2 on Legislative and Administrative Advocacy

STANDARD 3.2 ON LEGISLATIVE AND ADMINISTRATIVE ADVOCACY

STANDARD

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

COMMENTARY

Legislative and administrative advocacy as effective responses to client problems

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

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

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

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

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administrative bodies are aware of the needs of the provider's low income community and, to the extent possible, undertake advocacy that responds to those needs.

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

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

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

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

- Some advocacy will be based on representation of an individual client or client group on a specific issue being considered by a legislative or administrative body.
- Some providers have found that policy advocacy is most successful when it is conducted as part of a community-based coalition that jointly decides on and executes the advocacy strategy. When the provider's participation in the coalition is not on behalf of a client, the coalition, if grounded in the low income community, can assure that the objectives sought are responsive to the needs of that community.
- In some regional and statewide systems, a group of providers may look to one organization to carry out legislative and administrative advocacy. Priorities for the advocacy may be set by the coalition of providers representing the interest of their client communities with which they have generally consulted and which they keep informed.
- Advocacy in a budget process that will affect the administration or funding of programs that affect low income persons often involves a complex array of decisions on which no

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

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one client's interest is paramount. Moreover, the rapid and sometimes unpredictable pace and direction of developments in the appropriations process often require immediate action without any opportunity for consultation with a client. Providers participating in such efforts under a general retainer agreement or as spokespersons for the general interests of the low income communities they serve should keep their constituents informed of significant developments.

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

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

Considerations in deciding whether to pursue legislative and administrative advocacy

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

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

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

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

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

Participation in local, regional and statewide delivery systems

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

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

Responsibilities of the provider

Communication with clients and with the low income population. Because both administrative and legislative advocacy affect the interests of the low income population as a whole, it is important that the provider communicate with the low income population it serves regarding such advocacy. Such communication should take place in the context of its ongoing assessment of the needs of its low income communities.⁵ A provider may learn through a variety of avenues about proposed and adopted policies, rules, orders and statutes that affect that population's interests. To the degree practicable, a legal service provider should keep its clients and the low

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

⁵ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.1 (on Identifying Legal Needs and Planning to Respond).

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income population informed of such matters and communicate their interests to those conducting advocacy before legislative and administrative bodies. The provider may also advise clients about the legislative and administrative advocacy process in the event that they wish to advocate for themselves.

Appropriate training and experience. Legal aid providers that elect to engage in administrative and legislative advocacy have a responsibility to assure that the advocacy is conducted proficiently and in compliance with legal requirements. Advocacy before a legislature has distinctive practice norms, procedural rules and entails understanding the unique factors that affect the outcome of the legislative process. Administrative rule-making may vary significantly based on the rules and customs of each administrative body. It is the provider's responsibility to ensure that its practitioners are experienced or trained to be effective in the forums in which they operate.⁶

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

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

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

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

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

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

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