

OFFICE OF LEGAL AFFAIRS

**MEMORANDUM**

**TO:** The LSC Board of Directors

**THRU:** Victor M. Fortuno, Vice President & General Counsel

**FROM:** Rebecca Weir, Assistant General Counsel

**DATE:** October 6, 2011

**SUBJ.:** Summary of Public Comments on the Fiscal Oversight Task Force Report

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By notational vote on August 20, 2011, the Board directed Management to publish the Fiscal Oversight Task Force Report in the Federal Register for the purpose of soliciting public comments. The Report was published on August 31 for a thirty-day comment period ending on September 29 (several requests for extensions of time were received and granted, however). In total, Management received 8 comments, each of which are briefly summarized below for your convenience. This summary is not intended to be a substitute for the full-text comments, which are enclosed herein and can be viewed online at <http://www.lsc.gov/about/mattersforcomment.php>.

**Comments of John Meyer**, Director of LSC's Office of Information Management (September 26, 2011):

- **The Report does not effectively address the OIG's role in fiscal oversight of grantees.** OIG has the lead role in fiscal oversight (oversees IPAs), the most staff (25), and a large amount of unused funding (50%) that could be used to for "robust program visits", but is not. The Board should exercise its "general supervision" authority over OIG and encourage it to do more fiscal oversight visits in conjunction with OCE. This would not impede OIG's independence; they could still perform other visits and investigate any matter as they see fit.
- **The IPAs should not review regulatory compliance matters.** IPAs do not have expertise in regulatory compliance matters, but are expected to oversee them. Focusing IPA reviews on fiscal matters would more effectively combat fraud and other defalcations. This may require Board action/a legislative change.
- **Combining OPP/OCE/OIM into one office will not improve LSC's fiscal oversight of grantees.** There is a fundamental and historical tension between the grant management functions of fostering programmatic innovation and performing oversight activities. Each

function needs its own, zealous advocate. This will not occur if these functions are combined. It will also be difficult to find a leader who has ties to and understands the needs of the grantee community, but is sufficiently removed from that community to effectively oversee it.

- **A reorganization is not necessary to ensure that fiscal matters are taken into account at all stages of the grant process.** Instead, OCE could be more involved in each stage of the grant administration and more interoffice Task Forces could be created to address fiscal oversight shortcomings.
- **OIM should not be combined with OPP/OCE.** OIM collects and analyzes data for all LSC offices, not just OPP/OCE. This collection and evaluation is best performed independently, so it is not unduly influenced by the programmatic and oversight priorities of the day.
- **Retraining of staff/hiring of additional staff with auditing and accounting backgrounds is “an excellent proposal” and would improve fiscal management of LSC funds.**

**Comments of Mary Higgins**, former Director of LSC’s Office of Field Services in the 1980s (September 27, 2011):

- **Effective fiscal oversight must include onsite monitoring**, conducted by teams that include accountants and attorneys who have been briefed by accountants on the hallmarks of fiscal irregularities.
- **The proposed reorganization does not include the OIG.** To be effective, any office charged with fiscal oversight must have “a clear description of functions that are complementary of the OIG,” and the OIG must “clearly spell out the scope of its reviews and what actions would be its responsibility.”
- **The proposed reorganization dilutes OCE’s strong focus on compliance.** Combining grant administration/support and oversight functions has been tried before, and failed.
- **A reorganization is not necessary to ensure that fiscal matters are taken into account at all stages of the grant process.** Training grant administration staff in basic fiscal management concepts would be sufficient to achieve this goal.

**Comments of Bertrand Thomas**, a current Program Counsel III in LSC's Office of Compliance and Enforcement (September 28, 2011):

- **Consolidating OPP/OCE/OIM will not increase coordination, strengthen fiscal oversight, enable a more effective evaluation and monitoring of internal controls, or enhance LSC's oversight processes.** The Report fails to address how a consolidated office would simultaneously promote and regulate grantee activity.
- **The Report makes incorrect assumptions about OCE's current oversight activities and staff qualifications.** For example, OCE onsite work plans require staff to share information with other team members and the team leader. Assessment of internal controls is *not* limited to evaluating segregation of duties; it also includes testing compliance with LSC regulations, instructions, guidelines, and OMB guidance. Further, the expertise of OCE staff is not primarily derived from having previously worked for grantee programs, but from a variety of sources.
- **All OPP/OCE staff should be trained on the legal authority governing the use of LSC funds, including the LSC Performance Criteria, Accounting Guide, and CSR Handbook.**
- **LSC should institute a "cradle-to-grave" approach to grants management,** including the collection of information sufficient to assess the applicant's capacity for financial management at the application stage and tailored grantee reviews that incorporate risk assessment factors.
- **Instituting an organizational culture that balances program quality with fiscal and compliance obligations is necessary.** Hiring a leader with a grants management background is important to fostering this culture change.

**Comments of Chuck Greenfield**, a current Program Counsel III in LSC's Office of Program Performance (September 29, 2011):

- **The Report makes many helpful recommendations,** including developing protocols for Management/OIG coordination; instituting an LSC-wide risk assessment process; enforcing the LSC Accounting Guide; improving information sharing between LSC offices; creating "best practice" resources and training opportunities for grantees; and encouraging the appointment of accountants and other fiscal experts to grantee Boards, among others.
- **The Board should evaluate LSC's obligation to promote quality legal services before making broad organizational changes "in the name of fiscal oversight".** Although the Report did not evaluate LSC's program quality obligations, it nevertheless makes

sweeping recommendations that will affect them. Had the Task Force also reviewed program quality, its recommendations may have been very different, especially with respect to organizational structure. Thus, a variety of alternatives need to be considered, including the creation of a “properly staffed fiscal oversight unit within LSC”, instead of simply merging OPP/OCE/OIM.

- **The Report lacks input and perspective from key stakeholders, e.g. grantees, other legal services funders, etc.** The interests of LSC and its grantees are aligned with respect to reducing fraud, waste, and abuse and improving fiscal management. Grantee CFOs could have provided input on how LSC could best assist the field in combating fiscal irregularities. Because of this void, the Board should give careful consideration to any comments submitted by these stakeholders before taking action on the Report recommendations.
- **The Report fails to adequately assess the OIG’s role in LSC’s fiscal oversight of grantees,** despite the “significant programmatic role that Congress has given the OIG when it comes to fiscal oversight of grantees”, *i.e.* overseeing the IPA process, and missed “an opportunity to comprehensively address the issue of fiscal oversight.”

**Comments of Charles Crittenden**, a current Program Analyst III in LSC’s Office of Compliance and Enforcement (September 30, 2011):

- **The Report does not fully appreciate LSC’s fiscal oversight history.** Before the OIG was established in 1988, LSC Management performed all of the oversight activities that the Report now recommends. LSC had policies and procedures, called Fundamental Criteria Review, to review, assess and evaluate grantees’ internal controls and financial management of LSC grant funds. The focus changed to regulatory compliance after several reorganizations and management turnover.
- **The Report fails to mention the importance of OCE’s “desk reviews” of grantee audited financial statements,** which have uncovered various frauds and resulted in appropriate corrective actions.
- **The Report’s assessment of LSC’s fiscal oversight activities is incomplete because the FOTF Consultants interviewed the least-experienced staff, who lack institutional knowledge.**

**Comments of the ABA’s Standing Committee on Legal Aid & Indigent Defendants (SCLAID)**, submitted by Robert E. Stein, Chair (September 30, 2011):

- **It is important to strike a proper balance between accountability and client service when considering the FOTF Report recommendations.**

- **The Board may find the ABA’s *Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor* helpful** as it considers the FOTF Report recommendations (FYI—LSC contributed to the creation of those standards back in 1989). The ABA enclosed with its comments a copy of this 106 pg. publication. Basically, it sets forth the “best practices” for initiating compliance visits, requesting documents from grantees, and conducting fair and balanced reviews, but does not provide detailed instruction on how to assess a grantee’s financial health or internal controls.

**Comments of IFPTE Local 135 (“the Union”)**, submitted by David de la Tour, President (October 4, 2011):

- **The Union supports many of the Report’s recommendations**, including eliminating OPP and OCE’s individual policy and procedure manuals, as they are contradictory and weaken LSC’s overall oversight efforts; having staggered Board terms; providing LSC-sponsored training to the field; providing professional, job-related training to LSC employees; and developing, *in conjunction with LSC staff*, an institutional culture that places equal emphasis on fiscal oversight and program quality, as this will simultaneously improve staff morale and LSC’s ability to function effectively.
- **All three of LSC’s oversight functions, *i.e.* quality, compliance, and fiscal, should be evaluated before deciding on what organizational structure would be most effective.** The Report recommends combining OPP, OCE, and OIM, but admittedly did not review LSC’s quality and compliance obligations or the functions of OIM. It is unclear, therefore, what evidence led the Task Force to conclude that combining these offices would be the most effective organizational structure. This lack of evidence also makes it difficult for the Union to take a position on the proposed reorganization. But it is clear that this kind of structure change will require significant time and resources, and may only yield marginal improvements/changes.
- **From a staff perspective, it is not the structure of LSC divisions that inhibits or enables LSC to effectively perform its oversight functions, but rather a lack of planning, coordination, and consistent direction at the management level.** If the Board adopts the recommendation to reorganize, however, the Union “expects to work collaboratively with management regarding any anticipated changes to terms and conditions of employment.”
- **The Report does not reflect staff’s perspective on fiscal oversight**, as only 5 non-managerial staff members were interviewed by the FOTF consultants (and they were the wrong staff).

- **OIM should not be combined with OPP/OCE.** It is important for OIM to remain independent so that it is not “overly influenced by a subset of management to serve their viewpoint or perspective.”
- **The Board should create a confidential system for staff to directly report “potentially serious” internal problems to the Board,** especially in the absence of a “comprehensive” whistle-blowing policy. While not recommended in the Report, it would be helpful for staff to have a “direct line” to the Board when (1) management has withheld or misrepresented crucial information to the Board, or (2) the OIG has refused to investigate an allegation of fraud, waste or abuse occurring at LSC. When these circumstances have arisen in the past, staff has not felt comfortable approaching the Board, which is one of the reasons they unionized.
- **The Board should require the OIG to share information about grantees with Management as it becomes available.** In the past, the secrecy of pending OIG reviews, audits, and investigations has resulted in duplicative, delayed, or disrupted reviews by LSC. Better communication would greatly reduce these problems.
- **A strong conflicts of interest policy is needed at LSC.** In the past, former members of management and prior Boards have interfered with the work of LSC staff on behalf of a person or program with whom they shared a close relationship, creating a clear conflict of interest. To be effective and SOX-compliant, any conflicts policy adopted must apply equally to all LSC staff, Management and the Board.
- **The IPA system is ineffective at identifying regulatory compliance violations and fiscal defalcations.**
- **Formal union-management bargaining on the recommendation to retrain staff will be necessary, if it is adopted.**

**Comments of the National Legal Aid Defenders Association (NLADA)**, submitted by Deierdre L. Weir, Chair, Civil Policy Group (October 5, 2011):

- **LSC should enhance fiscal oversight of its grantees, while continuing its emphasis on assessing program quality, but NLADA has concerns about how the Report recommendations will be *implemented*.**
- **LSC may need to hire new, as opposed to retraining current, staff to accomplish its fiscal oversight objectives,** as “very few current LSC staff members have expertise or interest in performing fiscal oversight.”

- **In theory, it makes sense for LSC to perform joint quality/compliance/fiscal program visits, but in practice, they are not efficient or effective.** OPP and OCE have attempted to coordinate their visits in the past. Programs that were subjected to those joint visits stated that they were like having “two concurrent, but different, visits at the same time, requiring double preparation and resulting in twice the disruption.” Adding a fiscal component would be like having three separate visits, requiring three sets of program staff to assist LSC reviewers, and would be three times as disruptive. If combined visits are adopted, then LSC must properly plan to ensure that they are truly integrated into one, simplified visit.
- **Frequent visits, *i.e.* one per year, resulting from new risk assessment criteria, would be very disruptive and should be reserved for only the most egregious circumstances.**
- **When adding a financial management section to its grant applications, LSC should ease the additional burdens being placed on new or existing grantees** by making the revised application available earlier than normal, properly explaining and assisting applicants in completing it during the first few grant cycles, and providing additional time and space with which to complete it.
- **Providing fiscal training to grantees—a necessary component of any reorganization—will require considerable effort by LSC staff, most of whom do not have expertise in finance.** Without providing such training to grantees, it is “unrealistic for current program staff to learn, much less master, the intricacies of fiscal analysis.” NLADA is also concerned that programs will have to hire fiscal personnel to implement LSC’s new requirements, which would divert resources from providing legal services.
- **Any conflicts of interest policy that is adopted should be carefully tailored.** NLADA would oppose any policy that would prohibit members of the field with senior program management experience from seeking employment with LSC, but supports shielding and such persons from having oversight responsibilities for their former programs.

Comments on Report of the Fiscal Oversight Task Force  
John C. Meyer, Director, Office of Information Management (OIM)

**Summary**

There are several good ideas in the Fiscal Oversight Task Force Report (hereafter (FOTF Report). It does not, however, either fully discuss and analyze or deal effectively with the major problems as to how LSC resources that should be available for fiscal and other oversight are actually used, because it does not effectively address the role of the Office of Inspector General (OIG) which has the lead role in fiscal oversight and about half of all the staff resources currently tasked for these functions. Instead, its most significant action recommendation is for a reorganization of all LSC Management and Grants oversight (MGO) offices interacting with LSC grantee programs. As analyzed below, this proposal actually dilutes the effectiveness of fiscal and other compliance oversight and does not give due weight to the other aspects of LSC interaction with grantee programs.

**Major Issues Not Effectively Addressed**

The most significant problem with LSC fiscal oversight is with OIG, because OIG has over 25 staff, the responsibility for overseeing the Independent Public Accountant (IPA) annual audit of grantees, and has a large amount of unused funding (50% carryover) that could be used for a robust program of fiscal visits. The major problem in making full and effective use of all LSC resources for fiscal oversight is that OIG resources, OIG information, etc. are not available to LSC.

It is critical to effective fiscal oversight (and other compliance oversight) that the OIG contribute fully to oversight and work as part of LSC. The clear statement that the LSC Board does have, and should exercise, “general supervision” over the OIG, consistent with the statutory requirements for OIG independence, is one of the high points of the FOTF Report. The critical point made is that the Board should actually exercise this general supervisory authority as more than a formality. In my opinion, it should be exercised so as to promote more effective use of all LSC resources, including the OIG, for fiscal oversight.

Office of Compliance and Enforcement (OCE) and OIG together have the resources to do a very much better job of fiscal oversight than is now being done. However, once the FOTF states that the Board has this general oversight authority over OIG, the actual use of this authority to mobilize OIG resources for more thorough and extensive compliance oversight is not an area focused on in the FOTF Report.

The FOTF also did not even mention another major problem -- that the Independent Public Accountants (IPA's) are also tasked with regulatory compliance review which is not their expertise. Not only do they do this job poorly and at significant expense to the grantees, but also, it distracts them from their core job of fiscal oversight. A truly effective reform plan would begin with an effort to change the current system so

the IPA's concentrate on the actual grantee accounts. This is something that the Board could initiate under its general supervisory powers. Granted, it would take some legislative changes, but if those changes are presented as initiatives toward doing a better job of fiscal oversight, there would be a very good chance of their going through.

Furthermore, rather than doing occasional after the fact Audit Service Reviews, all audits should be reviewed rapidly when received (the OIG has the staff for this) and returned to the auditor for more work if they are not thorough and well-done. This is not a theory – the Audit Division of LSC Management used to carry out exactly this process before the function of supervising the IPA's was turned over to OIG in the mid 1990's.

Given the relative ineffectiveness of the IPA's and the fact that the IPA's work for the grantees, and not for LSC, we need "boots on the ground" to strengthen fiscal oversight and other compliance. OCE currently has 23 staff and 3 vacancies. OIG has over 25 staff. If there were a coordinated effort to have OIG and OCE do more frequent on-site fiscal reviews of grantees, this could be accomplished under the general supervisory authority of the Board without in any way infringing on the independence of OIG to go where they want and investigate anything they see fit. There is nothing like the knowledge that someone is coming to take a thorough look at your operations to deter not only theft, but also dubious practices and sloppiness which are much more common.

### **Structural and Conceptual Weaknesses of the FOTF Report's Reorganization Plan**

The FOTF report includes a reorganization proposal that would combine all the elements of LSC that deal directly with grantees into one Office. This plan has been tried before in the mid-1990's, with very poor results, especially for compliance-oriented grantee oversight. In detail, these are some of the weaknesses of the proposed reorganization:

The FOTF sees everything through the lens of fiscal oversight<sup>1</sup>, but that is not the only compliance issue. Their recommendations are designed from this one perspective but in effect change all oversight of and relations with LSC grantees. This leaves a large gap in terms of strengthening legal and regulatory oversight.

The FOTF proposes a reorganization to combine OCE, Office of Program Performance (OPP) and Office of Information Management (OIM) into one new Office of Grantee Assessment (OGA). The proposed OGA combines four functions in two groups: Group 1 is grant-making and normal administration and Office of Program Performance (OPP) functions of development of programmatic ideas, best practices etc.;

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<sup>1</sup> The FOTF does use a broad definition of fiscal oversight to include use of funds in compliance with regulatory and statutory requirements, but it still does not give due weight to the non-fiscal aspects of compliance. Non-compliance that is not essentially fiscal (engaging in restricted activities) can be at least as damaging to LSC as fiscal problems – e.g., the recent cartoon published by a grantee on its website attacking the Bush Administration. While there was an expenditure of funds, it was minor and was not the problem with this activity. The real problem was that it was political activity of a partisan nature that had no place in the LSC program and that seriously undermined our ability to obtain the funding to support legal service to poor people.

Group 2 is fiscal and regulatory/legal oversight. These two groups are not a good match within one Office. There is an unavoidable, historic tension between these functions. This does not mean LSC shouldn't develop some overlapping groups or Task Forces, because there is a lot to do together, but each group needs its own advocate.

In addition to the structural problems of this reorganization, it has the specific effect of eliminating a separate OCE. LSC needs a strong OCE leader who will push these compliance issues. As the FOTF has said, LSC MGO has responsibility in the fiscal oversight area separate from OIG – and the same is true for non-fiscal compliance. Without the institutional concentration of a separate Office with a strong Director focused only on compliance, the compliance job is not going to be done with the necessary vigor.

Similarly LSC also needs an office for grants administration and for the development of new and innovative service delivery approaches. This is currently OPP. OPP also serves as the main communication link with grantees.

Furthermore, if the OPP and OCE are combined, the head of this new OGA needs to be the main communication link with grantees. While the FOTF is right that this leader should have fiscal oversight background, such a person does need a strong background in actual civil legal service delivery and a strong relationship with the grantee community (not a blind advocate of everything grantee groups want, but still strong presence and credibility in this community). But such a person is likely to be a poor choice for fiscal and especially regulatory oversight which needs different background and some distance from the grantee world-view to do that job strongly and effectively.

OIM does not fit into the proposed structure at all. OIM's primary purposes are collection and analysis of data. These OIM activities not only serve OPP and OCE, but also Government Relations and Public Affairs (GRPA), and the Executive Office. This data collection and analysis function is best performed with some separation from both the compliance and the programmatic issues that may arise between LSC and our grantee programs.

### **The “Lifecycle” Misconception**

There is a misconception in the grant lifecycle discussion in the FOTF Report. While there is competition for LSC grants, which does give LSC an opportunity to push for performance improvement, most LSC grantees have been funded for quite a few years and will likely be funded for quite a few more. Active, viable competitors for Service Areas are rare – most Service Areas have only one viable competitor in the (usually 3-year) competition cycle.

Accordingly, we have an ongoing grants administration issue as to fiscal oversight, not a “lifecycle” issue. The competitive grant process does provide an opportunity to take a more thorough look at a grantee's fiscal competence and the adequacy of its internal controls, but this is a difference in degree, not in kind. LSC can

do fiscal oversight at any time and LSC can impose Special Conditions of a fiscal nature on a grantee just as easily in renewal years as in competition years.

Thus, this new “lifecycle” concept is one that does not match up with the realities of the current LSC programs or with any likely future structure of LSC programs.

### **Useful items in the FOTF Report**

There are several good points in this report: The recognition of the Board’s supervisory role over OIG is good. The concept that fiscal oversight and capability should be taken into account at all stages of the grant process is good – but it doesn’t require a reorganization to do this. And regulatory compliance issues should be equally emphasized in a reevaluation of LSC’s oversight activities.

It is a good and valuable point that fiscal oversight background should be given more emphasis in selection of staff who will have oversight duties. LSC MGO not only does not have enough auditors and accountants, but also we do not have enough staff who have the background to be actively conscious of fiscal management issues and to spot indications of likely problems.

The proposal for internal fiscal accountability training for current and future LSC staff who are involved in grantee oversight (including straightforward grants administration) is an excellent one. It would not be difficult to implement. While I believe OCE should take the lead within LSC MGO on this, other staff should know enough to spot possible fiscal problems and, at least, inform OCE of any possible indications of such problems. Without being accountants, such LSC staff should also be able to take precautions to mitigate any danger to LSC funds, pending OCE investigation.

Another good point is that coordination focused on fiscal (and in my view, other compliance) can and should be enhanced. A lot has already been done, but more can be done. In addition to regular coordination and the involvement of OCE at all stages of the evaluation of the grants process, one of more interoffice Task Forces could be formed to address shortcomings in the focus on fiscal oversight.

September 27, 2011

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Re: Comments on the Report of the Fiscal Oversight Task Force Report to the LSC Board of Directors dated July 28,2011

Dear Madam:

By way of introduction, I headed up the Office of Field Services in the late 1980s and participated in on-site monitoring of grantees while at the Corporation.

I reviewed the report with a great deal of interest and applaud the intent to ensure that the Corporation's funds are properly spent. However, I do have some concerns that the proposed plan for reorganization that is part of this Fiscal Task Force Report does not strengthen fiscal oversight and weakens overall compliance. I view effective fiscal oversight to include onsite monitoring. The monitoring teams of which I was a member (before the OIG was established at LSC) included accountants who briefed us attorneys on what they were looking for so we could keep our eyes open for potential fiscal irregularities. I recollect several instances when the monitoring teams found LSC funds that had been misused or embezzled.

With the establishment of the OIG at LSC, overall compliance functions were split up. The Fiscal Task Force Report touched on the large portion of these functions, including the review of Annual Audits by CPA's, delegated to OIG, but did not have the authority to establish the level of integration that would most strengthen overall compliance. Furthermore, an office charged with fiscal oversight can only function with a clear description of functions that are complementary to those of the Office of Inspector General (OIG). The OIG would have to clearly spell out the scope of its reviews and what actions would be its responsibility.

While the Task Force could not fully resolve the coordination of OIG and LSC Management efforts on fiscal oversight, the proposals for coordination between OIG and LSC Management are a step in the right direction.

However, the reorganization portion of the report does not strengthen compliance and is something of a diversion from dealing with the real problem. Melting the current OCE and OPP and OIM into one office is likely to dilute the strong focus on compliance in the current OCE. The grants administration and program support functions require decisions the results of which OCE fiscal and legal compliance effectively review. This has been tried before with the Office of Program Operations (OPO) which had the same set of functions that the proposed Office of Grantee Assessment (OGA) would have.

After several years, that Office was broken up into the current structure because it did not accomplish its various functions well, and, in particular, did not carry out compliance functions effectively.

The proposal to train all LSC personnel who are involved in any area of grantee oversight in basic fiscal issues is a good one. and all such personnel should be expected to be alert to fiscal issues at the grantees they deal with. But a reorganization placing all of them in one Office is neither necessary nor desirable in achieving that end. Changes in training, in the qualifications for all relevant positions to emphasize some fiscal oversight qualifications, even outside of OCE, and in the duties of these positions would be useful. Setting up coordination and task force structures to ensure that fiscal competence and controls are considered in review of proposed grants competition will accomplish the goals of this report, without the downside of eliminating an Office, OCE, tasked specifically to take an independent and critical look at fiscal and legal/regulatory compliance of all grantees.

Finally, the collection and analysis of grantee information should be separated from the operational units, so the information collected is not colored by either compliance issues or grant decisions.

Respectfully,

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September 29, 2011

Board of Directors  
Legal Services Corporation  
c/o Rebecca D. Weir  
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Re: Comments on Fiscal Oversight Task Force Report and Recommendations

Dear LSC Board:

Thank you for the opportunity to comment on the July 28, 2011 report and recommendations of the Fiscal Oversight Task Force (Task Force.)

I would like to commend the Board for studying the issue of LSC's fiscal oversight of grantees and for creating the Task Force comprised of those who understand fiscal oversight. It is clear that the board is taking the issue of fiscal oversight seriously.

I have been fortunate to have had the opportunity to see fiscal oversight from several different perspectives – from overseeing the fiscal affairs of one's own program as the former executive director of two legal aid programs, to a funder overseeing the fiscal affairs of a grantee as a current LSC employee, to working as co-chair of the subcommittee of LSC's Fiscal Operations Advisory Committee in developing the 2010 revisions to the Accounting Guide for LSC Recipients, to overseeing the finances of a small nonprofit as the former chair of the board of directors. But I am not an expert on fiscal oversight and have been happy to learn of good solid internal control suggestions and fiscal practices that have proven effective.

In response to the Board's request for public comments on the report, I offer the following:

- **The Task Force report contains many helpful comments and recommendations.** The Task Force's report contains a variety of helpful comments and suggestions, all with the goal of improving LSC's fiscal oversight of grantees. Particularly helpful recommendations include:
  - “Develop a written set of protocols and guiding principles to govern the working relationship between the OIG and management...” (Recommendation II.C.1, p. 15.)

- Institute an LSC-wide risk assessment process that takes into consideration information from multiple sources, including input of the OGA, OIG, IPA, and GAO audit and assessment results. (Recommendation III.A.1, p. 16.)
- “Increase the focus given to evaluating grantees’ adherence to the guidance and expectations established in the Accounting Guide for LSC Recipients.” (Recommendation III.B.2, p. 17.)
- “Create a common system for the storing and viewing of appropriate information related to grantee operations and oversight, including general grantee demographic information (e.g., payments to date, date of last review) and specific information related to oversight activities (e.g., prior recommendations and status of corrective actions, budget monitoring tools, performance metrics) among all parties involved in fiscal oversight.” (Recommendation III.C.7, p. 18.)
- “Conduct a cost-benefit analysis related to the level of information collected from grantees to determine if additional information would be practical to obtain from grantees and useful for management’s fiscal oversight activities while not placing an undue burden on grantees, and to determine if the information currently collected is necessary.” (Recommendation III.C.8, p. 18.)
- “Identify and communicate expectations and responsibilities to grantees, and the related best practices or recommendations for grantee management, including placing an increased emphasis on the guidance in the Accounting Guide for LSC Recipients and any specific terms and conditions contained in the grant agreement with LSC.” (Recommendation IV.C.1, p. 20.)
- “In particular, set clear expectations with grantees that they are responsible for creating a culture of ethics, compliance, and a system of financial controls designed to deter and detect fraud and promote the effective and efficient use of funds received. Help grantees to achieve this culture and system through training or otherwise, especially when requested. This could include holding simple webinar programs on a rotating basis and providing an increased level of information targeted toward grantees through the LSC website. Also, help grantees to understand the legal and statutory context of LSC’s fiscal oversight activities (e.g., LSC’s responsibilities as a grant maker dispensing public funds).” (Recommendation IV.C.2, p. 20.)
- “Provide a training program or other resources to grantees that are new to LSC funding or have identified risks in their capacity to steward the funding provided.” (Recommendation IV.C.3, p. 20.)
- “Consider the formation of “communities of practice” or networks of support among grantees, to allow grantees to learn from identified strong performers and possibly to receive additional guidance related to designing and implementing an appropriate control and management environment.” (Recommendation IV.C.4, p. 20.)
- “Encourage grantee Boards of Directors to appoint non-Board members with experience in accounting, finance, and internal controls to serve on the grantee’s key financial related committees (such as the finance and audit committees), where needed.” (Recommendation IV.C.5, p. 20.)

- **The task force findings and recommendations should be viewed as preliminary; a number of other areas should be considered prior to LSC making broad changes in the name of fiscal oversight.** The Task Force makes clear that it was not evaluating LSC's role in promoting quality or in conducting non-fiscal oversight and compliance. Yet in making the recommendations that OPP, OCE and OIM be consolidated into a new office called the Office of Grantee Assessment (OGA) and that LSC should appoint a Vice President-level individual to lead OGA whose background includes grants management and internal controls (Recommendations II.A 1 and 2), the Task Force makes broad recommendations that could adversely impact on other important functions of LSC. For example, had a task force been established to make recommendations on how LSC could improve the provision of high-quality legal representation of clients by grantees, recommendations may have been made to reorganize LSC along quality lines with a Vice President who has significant poverty law litigation experience. Similarly, a task force on non-fiscal oversight and compliance may have made recommendations organized around non-fiscal oversight and compliance concerns.

A variety of alternatives to some of the Task Force's recommendations need to be considered. For example, it may very well be more effective and efficient to create a properly staffed fiscal oversight unit within LSC, as opposed to merging OPP, OCE and OIM into one office.

- **The Task Force would have benefited by having key stakeholders.** By not including many key stakeholders on the Task Force, including some chief financial officers (CFO) and executive directors of grantee programs, a broader representation of other legal services funders, and current Federal Government or related agency employees who oversee grant programs, the Task Force's recommendations lack an important perspective of the environment in which grantees and LSC operate. In working with LSC's Fiscal Operations Advisory Committee, which contained eight CFOs from LSC grantees including five grantees whose programs had no negative findings following a GAO visit examining fiscal practices, and representatives from several LSC offices, we found the grantee CFO suggestions particularly helpful. While LSC and its grantees are clearly in different positions, there are considerable similarities of interests when it comes to fiscal affairs. LSC has an interest in ensuring that its funds are properly spent and not misused or stolen. Grantees have the same interest. LSC wants to be assured that its grantees maintain sound fiscal practices that minimize and possibility of the misuse of funds. Grantees have the same interest. LSC clearly is upset when its funds are misused or stolen. The few grantee executive directors to whom I have spoken who had experienced employee embezzlement in their programs were livid.
- **The Board is urged to have an open mind in suggestions received from key stakeholders.** The board's decision to request public comments on the Task Force's report and recommendations is much appreciated. However, while the public comment period allows an opportunity for key stakeholders to offer suggestions, I am concerned that the Task Force's recommendations are essentially set in cement given the representations made to Congress and others that LSC established the Task Force to study fiscal oversight and make recommendations. To now reject or substantially modify

some of the recommendations may prove to be awkward. The Board is urged to have an open mind to suggestions received from key stakeholders. If a small number of comments are received from key stakeholders, an effort should be made to begin a discussion with them about the Task Force's recommendations.

- **LSC should be involved in providing fiscal oversight training and support to grantees.** I strongly support the Task Force's recommendations concerning LSC providing training and assistance on fiscal oversight to grantees. (Recommendations IV.C, 2-4, p. 20.) Section 2996e (a)(3) of the LSC Act specifically authorizes LSC "to undertake directly, or by grant or contract ... (B) training and technical assistance and (C) to serve as a clearinghouse for information." I have been involved as a presenter in several training sessions on the 2010 Accounting Guide for LSC Recipients, including sessions on internal controls, at national legal aid conferences and have found keen interest from LSC and non-LSC grantees in financial oversight issues. Unlike in the area of the reporting of cases, LSC has not taken on the role of extensive fiscal oversight training for grantees. Grantees are LSC's partners in the provision of legal assistance. Providing fiscal internal control training and support to grantees is an important step towards advancing the shared interest of fiscal oversight and safeguarding funds.
- **LSC's Office of Inspector General (OIG) has a critical programmatic role in the oversight of independent public accountants' duty to oversee grantee internal controls.** It is clear that Congress intends that independent public accountants for grantees, under guidance from the OIG, must report on whether "the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations." See the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (language has been incorporated in each subsequent appropriations bill.) It is also clear that Congress intends that "only the Office of the Inspector General shall have oversight responsibility to ensure the quality and integrity of the financial and compliance audit process." See the conference report accompanying the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (House Report 104-537.) Thus, the OIG has been given a significant programmatic responsibility by Congress: to oversee independent public accountants who are required to report on the adequacy of a grantee's internal controls and to receive and review the independent public accountant financial statements and reports. OIG requires that independent public accountants submit audited financial statements to the OIG within 120 days of the end of a grantee's fiscal year. See Audit Guide for Recipients and Auditors, I-9B. "As part of the review of internal controls, the auditor is required to evaluate the effectiveness of the recipient's accounting system and internal controls. The primary objectives of this evaluation are to ensure that resources are safeguarded against waste, loss and misuse, and that resources are used consistent with LSC regulations and grant conditions." See Audit Guide, II-2.

Yet, given the significant programmatic role that Congress has given the OIG when it comes to fiscal oversight of grantees, including grantee internal controls, the Task Force fails to adequately consider the OIG's role in fiscal oversight of grantees. By doing so, it lost an opportunity to comprehensively address the issue of fiscal oversight. As noted in the report's cover letter, "[a] comprehensive analysis of LSC's fiscal oversight functions

would be incomplete, however, if it did not also address the role of the OIG. While the majority of this report focuses on the responsibilities of LSC's leadership and management, we encourage the Inspector General and his staff to evaluate and consider the Task Force's recommendations to the extent that they are also applicable to OIG operations." (Letter from co-chairs of Task Force, p. ii.)

As the Task Force report states, "LSC has established the foundation for a strong control environment, creating guidance through the Accounting Guide for LSC Recipients." (p.8.) While fiscal oversight is critical, we should not lose sight of LSC's main mission. As Congress has stated, LSC was established "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel." Section 1001(2) of the LSC Act.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Chuck Greenfield".

Chuck Greenfield  
Program Counsel  
Legal Services Corporation

From: Charles Crittenden (crittendenc@lsc.gov)

Phone: 2022951522

Subject: FOTFR Comments

Message: In response to the request for comments to Fiscal Oversight Task Force Report to the LSC Board of Directors (Report), as an LSC staff member who has performed fiscal oversight for LSC since 1985, I am compelled to comment. I have experienced the changes of this responsibility from LSC management to the Office of the Inspector General to the recommended joint responsibility of LSC management and Office of Inspector General.

In my opinion, the report did not fully analyze fiscal oversight at LSC in that there is no mention of the process before the advent of the OIG. Prior to the OIG, LSC fiscal oversight included most if not all of the key concepts outlined in the report's grant management and fiscal oversight section. LSC management prior to OIG had policies and procedures, called the Fundamental Criteria Review, that reviewed, assessed and evaluated grantees' financial management of LSC grant funds along with internal controls.

Due to reorganizations and changes in management in addition to the OIG and OMB Circular A-133 audit requirements, LSC management's focus on fiscal oversight changed from monitoring grantee financial management and activities to assessing fiscal compliance with the regulations.

The report also does not mention Office of Compliance and Enforcement's desk review of grantees' audited financial statements which assess grantees' financial reporting compliance with LSC regulations and the Accounting Guide. Over the years, numerous findings have been uncovered through OCE's desk reviews of grantees' audited financial statements and the disclosures therein resulting in letters of inquiry and requests for corrective actions.

The report is correct with its recommendations for improvement in LSC fiscal oversight, however, in my opinion, presents an inaccurate picture of LSC fiscal oversight in that the consultants interviewed LSC staff members with the least experience and institutional knowledge of LSC fiscal oversight process and the others who were not directly involved in the process or has never performed fiscal oversight as described in the report on how it should be done. I was not interviewed for this report.

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September 30, 2011

Rebecca D. Weir  
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Re: Report of the LSC Fiscal Oversight Task Force

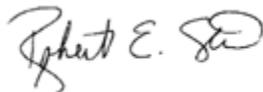
Dear Ms. Weir:

We appreciate the opportunity to comment on the July 28, 2011, LSC Fiscal Oversight Task Force Report to the Board of Directors. We commend the LSC Board and leadership for undertaking this important examination of fiscal controls and accountability.

In 1991 the ABA developed "Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor," which is enclosed. This set of Standards provides useful guidance in balancing the interests in accountability and client service. As LSC moves forward to put new procedures and controls in place to assure fiscal accountability, we suggest that an important focus remain on designing systems and processes that are effective while still ensuring that LSC grantees are able to meet their primary service obligations of providing legal assistance to low-income Americans.

Thank you again for providing this opportunity to comment.

Sincerely,



Robert E. Stein  
Chair

Enclosure

**STANDARDS FOR THE  
MONITORING AND EVALUATION OF  
PROVIDERS OF LEGAL SERVICES  
TO THE POOR**

**2002 Edition**

**FEBRUARY 1991**

Approved by the American Bar Association House of Delegates, February, 1991. The American Bar Association recommends appropriate application of these Standards to the monitoring and evaluation of providers of free legal services to the poor by their public and private funding sources.

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## FOREWORD

The Standing Committee on Legal Aid and Indigent Defendants is pleased that at its 1991 mid-winter meeting the American Bar Association House of Delegates adopted without dissent Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor. For some time, the Committee has devoted its attention to issues related to the monitoring and evaluation of programs which provide legal services to low income persons. Its consideration of these matters was instigated by the complex issues brought to its attention over the years regarding the proper scope and method for review of legal services programs and defender offices by their funding sources. The Committee also recognized that many of the issues which arise in the course of monitoring and evaluation of legal services providers involve questions which the Committee had previously considered in the course of developing Standards for Providers of Civil Legal Services to the Poor (American Bar Association, 1986).

A number of factors have led to debate about monitoring and evaluation. The limitations placed by some funding sources on the uses of their funds at times result in questions regarding the relationship between the professional obligation of lawyers to their clients and the responsibility of the legal services organization to its funding source. In both civil and criminal matters, representation of the poor can spark controversy because of the nature of a case or the notoriety of a client, amplifying the significance of this natural tension.

Recent years have also witnessed a steady increase in the number of entities which fund legal services organizations. New funding sources are occasionally unfamiliar with the professional obligations of lawyers, such as the obligation on service providers to protect confidences of their clients from disclosure to third parties, including a funding source. Such issues directly implicate what constitutes the proper scope of a program appraisal and call for authoritative guidance regarding what constitutes an appropriate inquiry.

While much of the discussion during the past decade has related to monitoring and evaluation in the context of civil legal services, there is an increasing interest among defender programs and funding sources regarding the proper boundaries of such inquiries. The standards, therefore, are written explicitly to apply both to providers of civil legal services and indigent defense services. They encompass the diverse purposes which monitoring and evaluation may serve: 1) to determine if the service provider is in compliance with terms under which its funds were granted, 2) to assess the quality of the work the provider produces, and 3) to examine the efficiency and effectiveness of its operation.

### **Development of the standards**

To develop the standards, the Standing Committee formally sought the direct involvement of organizations which would be most affected by them and which would have the most insight into pertinent issues. Accordingly, in early 1989, it appointed an Advisory Committee drawn both from the provider and the funding communities to advise its Reporter in the early stage of standards development. A diverse set of organizations appointed members to the Committee: the Legal Services Corporation, the Administrative Office of the U.S. Courts, the National Association of Counties, the National Legal Aid and Defender Association, the

Project Advisory Group, the National Association of IOLTA Programs, the National Association of Pro Bono Coordinators, the Assigned Counsel Network, the Federal Defender Advisory Committee and the United States Administration on Aging.

The advisory committee initially recommended what the scope and focus of the standards should be. It then reviewed successive drafts, offering invaluable insight from the perspective both of providers of the services and of funding sources. The result of their efforts was a draft of proposed standards which was in turn carefully reviewed and further revised by the Standing Committee.

The proposed standards were widely distributed in order to encourage broad review and comment. The Committee solicited written and oral comments regarding the proposed standards. The draft was sent to state and local bar associations, to all ABA sections, divisions and committees, to defender organizations, to legal services programs and to a variety of funding sources and organizations of funding sources. Four public hearings were held regarding the draft standards. Hearings were held in St. Petersburg, Florida (July 1990); in Chicago at the ABA Annual meeting (August 1990); in Monterey, California in conjunction with the annual meeting of the State Bar Association of California (August 1990); and in Pittsburgh at the annual convention of the National Legal Aid and Defender Association (November 1990). In addition to the formal consideration of the standards, the Reporter and various members of the Standing Committee met informally with interested groups of civil and defender providers and with organizations representing the interests of funding sources.

The result of these efforts was the submission of numerous oral and written comments. The great majority of the comments favored the standards. Some suggested areas which the standards did not address which the commentator felt should be included. Others suggested changes in wording. Some comments expressed concern that the standards might be read as requiring monitoring by funding sources which in the past had not done so.

After review of the comments, the standards were revised to adopt many of the suggestions which were offered to the Committee. Changes were introduced to clarify that there is no intention to mandate increased monitoring or evaluation or to encourage a particular form of review. The result of the extensive analysis and review are standards which provide guidance both to funding sources and to service providers regarding the proper means of conducting monitoring and evaluation of providers of civil and defender legal services to low income persons.

## **Acknowledgments**

Many persons contributed to the development and adoption of these standards, and we are indebted to them for their insight and assistance. Special appreciation is due Jim Neuhard, who served as Chair of the Subcommittee which oversaw the development of the standards. Even after his retirement from the Standing Committee, Jim continued to provide invaluable guidance and assistance in the final stages of the development and adoption of the standards.

The members of Advisory Committee also gave selflessly of their time and talent to guide

the early efforts of the Committee's Reporter. Special thanks are due to: *Emilia DiSanto*, Director, Office of Monitoring, Audit and Compliance, The Legal Services Corporation; *Ted Lidz*, Chief, Defender Services Division, Administrative Office of the U.S. Courts; *Meredith McBurney*, Director, Colorado Lawyers Trust Account Foundation; *Howard White*, United States Administration on Aging; *Richard Taylor*, Director Legal Services of North Carolina; *Linda Catalano*, Director, Legal Assistance of North Dakota; *Harrison McIver*, Director, Central Mississippi Legal Services; *Randall Dana*, Ohio Public Defender Commission; *Marshall Hartman*, Lake County Public Defender; *Jay Stevens*, Federal Public Defender (Orlando, Florida); *Judy Cantwell*, Executive Director, Sarasota-Manatee Lawyer Referral Service (Florida); *Jonathan Weiss*, Legal Services for the Elderly (New York); *Amy Berlin*, Assigned Counsel Plan of the Appellate Division; and *Julian Butler*, County Attorney of Madison County, Alabama.

We also recognize the special contribution of those people who testified at the public hearings and who submitted written remarks. Their insight and suggestions immeasurably strengthened the final document which was ultimately adopted.

Finally, the Chair wishes to thank the Reporter, John A. Tull, the efficient and conscientious Staff Director, Lynn Sterman and the entire Committee for their invaluable contributions to the successful completion of this project.

Joanne M. Garvey,  
Chair  
April 1991



# **Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor**

## **Introduction**

During the past several decades, the American legal system has witnessed an increase in the number of organizations which provide free legal services in civil and criminal matters employing funds from federal, state and local governments, from Interest on Lawyers' Trust Accounts (IOLTA), from charitable organizations, from bar associations, and from private contributions. These standards enunciate the principles which should guide the monitoring or evaluation of such organizations.

The standards provide guidance regarding the legitimate purposes and the appropriate scope of monitoring and evaluation. They proceed from the conclusion that there are a number of purposes which monitoring or evaluation may serve,<sup>1</sup> and that it may take many forms from simple review of reports to in-depth on-site assessments.<sup>2</sup> Some of the standards apply to all monitoring or evaluation, regardless of its purpose or form. Other standards only apply to certain types of assessment.

Many of these standards are devoted to issues which arise in the context of on-site review. On-site review calls for a number of separate standards, because of the greater complexity of such procedures. The resulting focus of these standards on on-site review should not be taken as an indication, however, that such review is considered necessary for monitoring or evaluation to be effective. Indeed, the standards explicitly acknowledge that there are a number of ways in which a funding source may satisfy itself regarding how its funds are being used. It is in the discretion of the funding source whether to monitor or evaluate the use of its funds, and by which means it will do so.<sup>3</sup>

The standards state that it is important that the purpose and intent of monitoring or evaluation be clear.<sup>4</sup> A fundamental inquiry, which is at least implicit in nearly all monitoring is whether the service provider's funds are being spent in accordance with the terms and conditions under which they were granted. Some monitoring and evaluation, however, also assess the quality, effectiveness and efficiency of a provider's work, and may be conducted principally to provide constructive feedback to the service provider regarding its operation. While not all monitoring or evaluation will consider matters of quality, efficiency or effectiveness, the standards are written to provide guidance for those which do.

- 
1. See Standard 1.4.
  2. See Standard 1.3.
  3. See Standard 1.3.
  4. See Standard 1.7.

## **To whom the standards apply**

The standards are written to apply to the monitoring and evaluation of organizations established to provide legal representation to indigent clients in criminal or civil matters. They codify the basic principles which govern monitoring and evaluation and which apply regardless of the type of organization which is providing services, or the criteria it applies to determine indigency and, therefore, eligibility for its services. Where factors affect how the standards apply in practice to different types of service providers, such differences are noted either in the standard or the commentary.

## **Differences in application based on whether the service provider is an indigent defense program or a civil legal services program**

Although there are differences between indigent defense programs and civil legal services programs, the standards generally state principles which apply to both. The principal difference between the two in the context of monitoring and evaluation relates to the wider discretion enjoyed by legal services programs regarding the types of cases they will accept and how they will focus their legal work. Indigent defense programs are the organizations which carry out state and federal constitutional obligations to provide an attorney for persons who are threatened with loss of liberty. As such, they generally represent all indigent defendants who are properly referred to them absent a conflict.

Civil legal services programs, on the other hand, generally limit the number of clients whom they represent, often turning away many more than they accept. Moreover, civil legal services programs may adopt very different approaches to their legal work, which in turn affects in profound ways how they deploy their resources. Some civil legal services programs, for example, may focus on complex legal work aimed at accomplishing fundamental change in the laws and institutions which affect clients, while others may focus on representation of individuals in repetitive legal matters.<sup>5</sup>

Such choices can give rise to fundamental disagreements between a funding source and service provider regarding the mission adopted by the provider and regarding who has ultimate authority to determine the provider's basic mission.<sup>6</sup> Similar disagreements may arise because civil legal services programs have more discretion regarding the types of cases they will accept.

The structure of indigent defense programs varies among jurisdictions. In some cases, the court actually may oversee the operations of the indigent defense program, although the actual funding source may be the legislative or executive branch of the government. Many indigent defense programs were founded under the authority of the court which, therefore, is the institution with the authority to impose the ultimate sanction of defunding.

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5. See Standards 6.1 and 6.2 of *Standards for Providers of Civil Legal Services to the Poor* (American Bar Association, August 1986).

6. See Standard 4.1.

The entity to whom the Public Defender is accountable is normally responsible for the monitoring of the program's operation, although it may not necessarily be the funding source. For that reason, the standards consistently refer to the "reviewing agency" to distinguish it from the funding source.

### **Application of the standards to legal services programs and indigent defense programs representing clients in juvenile court**

Some civil legal services programs and indigent defense programs represent clients in juvenile matters. Such matters are often a hybrid between civil and criminal proceedings and can give rise to special concerns in the context of monitoring and evaluation. The identities of parties in a juvenile proceeding, for example, are often subject to special protections against disclosure. Such protections may affect how the standards related to access to records and on-site review apply in the case of such representation.

### **Application of the standards to organizations funded by the Legal Services Corporation**

The primary funding source for civil legal services programs in the country is the Legal Services Corporation, which is mandated by provisions of the Legal Services Corporation Act to monitor and evaluate its grantees.<sup>7</sup> The Act sets forth certain provisions regarding what the Corporation is statutorily obligated to insure, which in turn affect the mandated scope of the monitoring and evaluation process.

Among other things, there are a number of substantive restrictions on the operations of civil legal services programs and their representation of clients.<sup>8</sup> The Legal Services Corporation Act also requires the Corporation to insure that recipients of its grants and contracts comply with a number of specific requirements and prohibitions related to matters as diverse as governance,<sup>9</sup> priority setting,<sup>10</sup> attorney hiring,<sup>11</sup> outside practice of law<sup>12</sup> and political activity.<sup>13</sup> In addition, the Corporation is charged with the responsibility to "insure the highest quality of service and professional standards,..."<sup>14</sup> and that its grants and contracts be made so as "to provide the most

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7. Legal Services Corporation Act, §1007(d); see also, §1006(b)(1)(A).

8. See generally, Legal Services Corporation Act, §1006 and §1007.

9. Legal Services Corporation Act, §1007(c).

10. Legal Services Corporation Act, §1007(a)(2)(C).

11. Legal Services Corporation Act, §1007(a)(8).

12. Legal Services Corporation Act, §1007(a)(4).

13. Legal Services Corporation Act, §1006(b)(5)(B), §1006(d)(3), §1006(d)(4), §1006(e)(1), §1006(e)(2), §1007(a)(6), and §1007(b)(4); and see generally, Legal Services Corporation Act, §1006 and §1007.

14. Legal Services Corporation Act, §1007(a)(1).

economical and effective delivery of legal assistance to [eligible clients]...."<sup>15</sup> As a result, monitoring related to compliance issues,<sup>16</sup> necessarily may include inquiry into the quality, efficiency and effectiveness of the service provider.

### **Application of the standards to private attorneys**

These standards apply to organized systems which appoint or select private counsel to represent clients in civil or criminal matters. In assigned counsel arrangements, however, private attorneys may accept cases outside of a system which has a central administration. Such ad hoc systems also should be subject to monitoring or evaluation. Application of these standards in such circumstances, however, will necessarily be affected by practical limitations resulting from the lack of a centralized administrative structure. The principle of reasonableness should guide the interpretation of whether and how each of the standards apply.<sup>17</sup> The reviewing agency should be particularly attentive to the standards which relate to protection of client confidences.<sup>18</sup> It should also be alert to the risk of burdening attorneys with intrusive inquiries if they handle only a small number of cases.<sup>19</sup>

### **Application of the standards based on whether the funding source is public or private**

There are a few significant differences regarding how the monitoring standards apply based on whether the funding source is private or public. When a public agency monitors or evaluates a service provider, if its activities constitute state action, its activities may have due process implications which would not arise in the context of a private foundation. Moreover, there may be state or federal statutes which govern the expenditure of public grant funds which do not apply to private funds. Thus, the scope of inquiry regarding issues such as compliance with conditions of the grant may be different for a public funding source. The standards do not contemplate that an unrestricted gift from a private individual gives rise to any rights on the part of that individual to engage in a general monitoring or evaluation of the service provider's operations.

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15. Legal Services Corporation Act, §1007(a)(3).

16. See Standard 1.1.

17. See Standard 1.2.

18. See Standards 2.3 and 2.4.

19. See the discussion of proportionality in Standards 1.6 and 3.2 and accompanying commentary.

## **Application of the standards to defender resource centers or to state and national support projects**

There are also some differences in how the standards apply to unique programs such as defender resource centers or to state and national support projects. The extent to which state and national support units in both the defender and the civil communities have different fundamental purposes and operating principles than does a service office will affect the way that monitoring is conducted. Some activities of such organizations will be conducted without an immediate client, while in other circumstances, they may provide direct representation to clients. The scope and the nature of the inquiry may, therefore, be very different for such an organization. There also may be significant differences in the ways which monies are granted and in the contractual arrangements which govern the use of the funds.

## **Activities to which the standards do not apply**

The standards are not intended to apply to the monitoring or evaluation of organizations or individuals who represent clients through a prepaid, group or other insurance plan. Some of the standards and accompanying commentary, however, may provide useful insight into questions which arise under such plans.

At times a service provider may undertake on its own to engage the services of a private consultant to evaluate its operation and to provide it advice. These standards do not cover such evaluations, although some commentary may provide insight into how such an activity may be undertaken.

Many service providers are regularly subjected to financial audits as part of fulfilling the requirements of their grant or contract. Most audits are governed by standards adopted by the accounting industry or by a governmental body and are not covered by these standards.



**STANDARDS WITHOUT COMMENTARY**



## **General Principles Governing Monitoring and Evaluation**

### **Standard 1.1 - Definitions**

The following definitions apply to the terms used in these standards:

#### **Assigned Counsel**

A lawyer in private practice appointed by a court or other appropriate authority to represent for a fee indigent defendants charged with a crime.

#### **Audit**

An examination of a service provider's financial accounts in order to verify 1) that the financial statements fairly present the provider's financial position in accordance with generally accepted accounting principles, 2) that an adequate system of internal controls is in place, and 3) that costs are allowable, reasonable and properly allocated.

#### **Complaint investigation**

An investigative inquiry into a specific allegation of a violation of the terms and conditions of a grant or contract, of the law, or of accepted professional standards by a provider or by its personnel, including a staff member, a board member or a private attorney operating on behalf of the provider.

#### **Confidential communication**

Any information provided to a provider or its personnel by a client or applicant for services, which relates to representation of the client or to the client's or applicant's eligibility for service.

#### **Competitive bidding**

A process for awarding grants or contracts to provide civil or criminal representation in which the funding source chooses among competing proposals from more than one potential service provider.

#### **Contract attorney**

A lawyer or group of lawyers in a firm in private practice who contract with a legal services program to provide representation for a fee to indigent clients in civil matters or who contract with an indigent defense program or a state, county or municipality to represent for a fee indigent defendants in criminal matters.

## **Defender**

The chief attorney appointed by the appropriate governing authority to oversee and carry out the representation of indigent persons accused of crimes. (See also, public defender).

## **Evaluation**

For purposes of these standards, the term, "evaluation" means to appraise the efficiency, effectiveness and/or the quality of a service provider through the collection and analysis of data and information related to the provider's operation.

## **Funding source**

Any one of the following entities which funds a service provider to furnish civil or criminal legal services to eligible clients:

1) a federal, state or local government or agency or instrument thereof, 2) a foundation or similar organization which distributes funds derived from Interest on Lawyers' Trust Accounts (IOLTA), 3) charitable organizations and private foundations, and 4) bar associations.

## **Indigent**

A person who is unable to afford legal services and is eligible for free representation under the guidelines of the legal services program or indigent defense program from which the individual seeks assistance.

## **Indigent defense program**

An organization which receives public funding to provide free representation to indigent defendants in criminal matters, either through the use of permanent staff attorneys, or through the use of contract attorneys or assigned counsel.

## **Legal services program**

An organization which receives public or private funds to provide free representation to eligible persons in civil legal matters, through the use of permanent staff attorneys and pro bono or contract attorneys.

## **Monitoring**

For purposes of these standards, the term "Monitoring" means to verify compliance by the service provider with pertinent laws, regulations and all other terms and conditions of a grant or contract through the collection and analysis of data and information related to the service provider's operation.

## **Provider**

For purposes of these standards, the terms "provider" and "service provider" refer either to a civil legal services program or to an indigent defense office.

## **Public Defender**

The chief attorney appointed by the appropriate governing authority to head an indigent defense program.

## **Records**

As used in these standards, the term "records" refers to accounting files, books and documents; administrative files and documents; legal work files and documents not protected by the attorney-client privilege, by rules of professional conduct or by other applicable law; provider publications; and other related materials which pertain directly to a provider's operations.

## **Review**

As used in these standards, the term encompasses both "monitoring" and "evaluation."

## **Reviewing agency**

An entity which engages either in the monitoring or the evaluation of a service provider. In most cases, the reviewing agency will be the funding source for the legal services provider. Where a funding source contracts with a third party to carry out either monitoring or evaluation, the funding source is responsible for compliance with the standards and, therefore, along with the third party is a reviewing agency.

## **Service provider**

For purposes of these standards, the terms "provider" and "service provider" refer either to a civil legal services program or to an indigent defense program.

## **Technical assistance**

Advice, guidance, consultation, expertise or similar support offered to assist a service provider to improve or change its operation.

## **Volunteer or *pro bono* attorney**

A lawyer who volunteers to represent indigent clients of a legal services provider without charging a fee to the client or to the provider.

## **Work product**

Tangible and intangible material which reflects a practitioner's efforts to investigate and prepare a case, to assemble information, to determine relevant facts, to formulate legal theories, to plan strategy, to research the law and to record mental impressions related to the case.

### **Standard 1.2 - Principle of reasonableness**

The actions of both the reviewing agency and the service provider should be reasonable. The service provider and the reviewing agency or funding source should interact with each other in good faith and should demonstrate courtesy and cooperation during the course of monitoring or evaluation. An action of a reviewing agency or a service provider is reasonable if it conforms to these standards.

1. To determine whether an action or request by a reviewing agency is reasonable involves a balancing of its costs against its materiality and necessity to the monitoring and evaluation.
2. An action or a request is not reasonable if it would require a breach of a duty owed to a client, a breach of a collective bargaining agreement or other similar employment contract or a violation of the law.

A service provider should respond accurately to reasonable requests for information.

### **Standard 1.3 - Means of conducting monitoring and evaluation**

Monitoring and evaluation may take many forms including:

1. Ongoing informal interaction between the funding source and the service provider;
2. Periodic review by the funding source or reviewing agency of reports and other information submitted by the service provider regarding its operation;
3. Periodic on-site visits for purposes of an in-depth review of the service provider's operation.

It is in the discretion of a funding source to determine if it will monitor or evaluate the use of its funds, and the means by which such review will be undertaken.

### **Standard 1.4 - The purpose of monitoring and evaluation**

The funding source and reviewing agency should inform the service provider of the purpose which the monitoring or evaluation seeks to accomplish. Monitoring and evaluation may serve a number of purposes, which may be pursued simultaneously, including:

1. Evaluation of program performance in order to provide advice and feedback to the provider to improve its operation and the quality of its work product;
2. Evaluation as a fact-finding step prior to the provision of technical assistance;
3. Monitoring and evaluation to determine if the effectiveness and efficiency of the service provider's operation and the quality of its legal work are adequate, and to assure that its practitioners are complying with relevant professional standards, including the Model Rules of Professional Conduct;
4. Monitoring to assure compliance with legal requirements which the reviewing agency has a duty to enforce, including funding source rules and regulations and the requirements of the grant or contract;

Monitoring and evaluation to assure that a service provider's activities conform to established plans, including any regional or statewide plan, and that such plans are accomplishing the purpose for which they were adopted.

#### **Standard 1.5 - Limitation on inappropriate purposes**

Monitoring and evaluation should never be punitive, nor be intended to disrupt or harass a provider, nor be motivated by ideological considerations.

#### **Standard 1.6 - The scope of monitoring and evaluation**

The scope of inquiry of monitoring and evaluation should be reasonably related to a proper area of focus and to the purposes which the monitoring or evaluation is intended to accomplish.

The inquiry may encompass the activities of a contract attorney or of a subrecipient of the service provider undertaken in furtherance of the grant or contract which is subject to the monitoring or evaluation.

The scope of monitoring or evaluation of a service provider which receives only part of its funds from the funding source carrying out the review should be proportional to the size of the grant in relation to the overall funding of the service provider. Generally, grantors of a small portion of a service provider's funds should confine their review to that necessary to determine that the funds are being spent in accordance with pertinent grant conditions and for the reviewing agency to ascertain the relationship between the activities supported by its grant or contract and the overall operation of the service provider. Smaller funding sources should avoid subjecting service providers to multiple monitorings or evaluations, where they would be duplicative of reviews undertaken by other funding sources whose reports are available and which address matters of concern to the smaller funding source.

### **Standard 1.7 - Improper areas of inquiry**

Except as pertains to the legitimate investigation of possible violations of the law relating to unlawful discrimination, a reviewing agency may not inquire into the following areas:

1. The political or religious beliefs of any staff, board member or client;
2. The sexual orientation or activity of any staff, board member or client;
3. The non-work related activities of any staff or board member, except to the extent that they directly impair the individual's competence to perform assigned duties, constitute a conflict of interest under the Model Rules of Professional Conduct, or are subject to lawful restrictions on off-duty activities.

### **Standard 1.8 - Utilization of accepted performance standards in monitoring and evaluation**

To the extent possible, an evaluation which includes in its scope the efficiency and effectiveness of a service provider's operation and the quality of its representation should measure such factors against accepted performance standards.

### **Standard 1.9 - Investigation of complaints**

The investigation of specific complaints or allegations of improper conduct by a legal services program or indigent defense program or its staff, should be conducted as an independent investigation and not as part of the process of monitoring and evaluation.

## **Access to Records**

### **Standard 2.1 - Submission of reports and other data**

A funding source may require service providers periodically to submit reports and other data regarding the provider's operations which are supported by the funding source. Requests for reports and other data should be reasonable and should be limited to information which the funding source will actually review and for which it has a reasonable use.

### **Standard 2.2 - Requirements related to the production of documents and records**

Subject to the limitations set forth in Standards 2.3 through 2.7, and subject to applicable law, a reviewing agency may have access to records which are in the possession, custody and control of a service provider or a subgrantee or subcontractor, which are properly within the scope of its review and which pertain to:

1. The use of the funds provided by the funding source;

2. A determination of the effectiveness and efficiency of the provider's operation and the quality of its legal work produced with the funds provided by the funding source; or
3. A determination of compliance by the program with the terms and conditions of the provider's grant or contract and with other applicable law which the funding source has the responsibility to enforce.

**Standard 2.3 - Client confidences**

A reviewing agency may not have access to records which contain information protected by the attorney-client privilege or by ethical provisions prohibiting the disclosure of confidential information obtained from a client, or by other statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the reviewing agency. Neither a funding source nor a service provider may require that a client waive the protections against the disclosure of confidential information as a condition of representation.

A reviewing agency may reasonably expect a service provider to delete protected information from a record, if feasible, in order for monitors and evaluators to examine it. Records from which privileged or confidential information cannot be reasonably removed may not be disclosed to the reviewing agency.

**Standard 2.4 - Work product**

A reviewing agency may not examine the work product of an attorney, paralegal or other professional employed by the service provider or furnished by a subcontractor or subgrantee.

**Standard 2.5 - Confidential communications with provider counsel**

Monitors and evaluators may not have access to records prepared by or for an employee or board member of a service provider, or by the provider's attorney, in anticipation of administrative proceedings or litigation between the service provider and the funding source. A reviewing agency may not have access to records containing communications between the provider and its attorney which are protected by the attorney-client privilege or by ethical provisions governing confidential communications.

**Standard 2.6 - Access to personnel records**

Personnel records maintained by a service provider may not be examined by a reviewing agency except when the reviewing agency has a specific legitimate purpose and the record can provide information which directly relates to the purpose. Only that portion of personnel records reasonably necessary to accomplish the purpose may be reviewed. In no case can a reviewing agency examine medical or health information, or other personal data which does not directly pertain to the operation of the provider. Review of personnel files is subject to applicable federal and state law and to collective bargaining agreements and other employment contracts.

### **Standard 2.7 - Requests for records**

Requests for records must be reasonable. The records requested should reasonably relate to the scope of the monitoring or evaluation and to the time period which it covers. To the maximum extent possible, a reviewing agency should focus its requests to avoid the necessity of photocopying and transmitting large amounts of materials. A reviewing agency should not request copies of the provider's records which the reviewing agency already has in its possession, unless such records have become unavailable to it.

Requests for large numbers of records as part of a monitoring or evaluation visit should be made well in advance of the visit whenever possible. Such requests and requests for records for purposes of off-site review should be made in writing and should describe the records sought with sufficient specificity to allow the service provider to identify the records desired. The request should state whether the reviewing agency wishes the records to be made available for review and copying on-site, or to be copied and transmitted elsewhere. The service provider must be granted a reasonable time to assemble the requested records.

Requests for records made during the course of an on-site visit may be made orally, unless the service provider asks that the request be reduced to writing. The service provider must be given a reasonable time to assemble the requested records.

### **Standard 2.8 - Responsibilities of the service provider regarding requests for records**

The service provider must furnish reasonably requested records in a timely manner unless there is a good faith assertion of confidentiality or other legal basis for not providing them. In the event that a provider believes that it has the right or duty to refuse to provide a record, it must state in writing the basis for its refusal, citing the pertinent authority which it believes prevents it from disclosing the record.

### **Standard 2.9 - Refusal to provide access to records**

In the event that a service provider refuses to make a requested record available to the reviewing agency based on an assertion of privilege, professional obligation or any other legal protection, the reviewing agency and the service provider should strive to identify alternative means to address the issue which the reviewing agency seeks to explore. In the event that alternative means cannot be found and the reviewing agency disputes the assertion of confidentiality or other legal prohibition against disclosure of the record, the parties should seek a ruling regarding the disputed claim with the organization or entity which has responsibility for enforcing or interpreting the protection, unless existing ethics opinions dispositively address the issue, in which case they should be followed.

In the event that a service provider withholds a requested record, the reviewing agency should take necessary steps to complete the monitoring or evaluation, pending resolution of the dispute, unless the record is so material to the review that it cannot reasonably be completed without resolution of the dispute.

## **Conduct of On-Site Monitoring and Evaluation**

### **Standard 3.1 - Notice of on-site monitoring or evaluation**

If a reviewing agency plans to visit a service provider for purposes of monitoring or evaluation, it should give the provider reasonable written notice of the date of the proposed site-visit and should seek to schedule the visit so as to avoid unnecessary disruption of service to clients.

The notice regarding a monitoring or evaluation visit should identify the intended purpose and scope of the visit, and to the extent possible, should state the standards and criteria against which the service provider will be measured.

### **Standard 3.2 - Magnitude and duration of on-site visits**

The size of a review team and the duration of its visit should be reasonably related to the size of the service provider, the percentage and amount of its funds provided by the funding source and the manner in which its resources are deployed.

### **Standard 3.3 - Frequency of monitoring or evaluation**

If on-site monitoring or evaluation is undertaken, it should occur at reasonable intervals which allow the reviewing agency to remain familiar with the service provider without unnecessarily disrupting the provider's operation.

### **Standard 3.4 - Qualifications of monitors**

The team of persons who conduct on-site review of a service provider should possess skills and experience related to the operations of the service provider and the type of representation which it offers, and appropriate to the specific purpose which the monitoring or evaluation seeks to accomplish.

### **Standard 3.5 - Exercise of independent judgment and conflicts of interest**

All persons engaged in the on-site review of a service provider should exercise independent judgment regarding the provider and its operation. No person may serve on a monitoring or evaluation team if that person has a conflict of interest with the service provider or one of its clients.

### **Standard 3.6 - Training and orientation of monitors**

Prior to engaging in on-site monitoring or evaluation, members of a team of monitors and evaluators should be familiar with or should receive training and orientation in:

1. Pertinent statutes, rules, regulations and grant or contractual agreements governing

- operation of the provider;
2. Pertinent issues related to the delivery of legal services by the provider, including legal issues which are of particular importance in its service area;
  3. Professional guidelines governing access to information in the possession of the provider;
  4. Standards which pertain to the operation of the service provider and the performance of its practitioners;
  5. Skills and knowledge necessary to conduct an effective review of the service provider.

**Standard 3.7 - Acceptable means to measure program compliance, quality and effectiveness**

A reviewing agency may use a variety of means to measure compliance and to examine the quality and effectiveness of a service provider and of the representation it provides its clients. The means utilized must not interfere with the provider's, or its practitioners', professional responsibility to clients, nor impair the integrity of the adversarial process.

**Standard 3.8 - Interviews of clients**

Monitors and evaluators who wish to interview current or former clients of a provider must notify the service provider in advance. The service provider must inform clients who may be interviewed of their rights, including their right not to be interviewed and advise them of the risk of inadvertent disclosure of confidences. A reviewing agency should not discuss the facts of a case with a provider client, except in extraordinary circumstances in which the client has initiated contact and the client is accompanied by counsel. A monitor or evaluator should not interview a client who has a current case with the service provider, except in extraordinary circumstances in which the client has information which is indispensable to the monitoring or evaluation and which cannot be obtained from any other source. A reviewing agency which believes that such extraordinary circumstances exist must provide notice to the service provider of that fact and discuss with it the basis for its conclusion that extraordinary circumstances exist. Clients who so request may have an attorney present during any interview to which they consent.

**Standard 3.9 - Contact with opposing parties and counsel**

A reviewing agency should not contact an adverse party or counsel to an adverse party in any matter in which the service provider is currently representing a client, except in the following circumstances:

1. When adverse counsel is an institutional or governmental law office which regularly practices against the provider, so long as current cases are not discussed;
2. When the contact is necessary in order to investigate a material violation of the law or of a condition of the grant or contract.

Monitors and evaluators must provide prior written notification to the provider of their intention to contact an adverse party or counsel to an adverse party. A reviewing agency shall not take any action which directly or indirectly would interfere with or otherwise influence the conduct of representation of a provider client.

### **Standard 3.10 - Conduct of interviews**

Interviews of provider personnel should be conducted according to the following guidelines:

1. Both parties should strive to communicate with openness, candor, and objectivity. Interviews should be sufficiently open-ended to allow the interviewee to offer unsolicited observations. They should also be sufficiently focused to assure that the reviewing agency receives thorough information regarding its areas of inquiry.
2. Subject to applicable federal and state law, interviews may only be recorded upon mutual agreement of the monitors or evaluators, provider personnel being interviewed and the service provider.
3. Upon specific request of provider personnel being interviewed, counsel may be present during an interview.

### **Standard 3.11 - Responsibility of monitors and evaluators regarding confidential or sensitive information**

In order to encourage candid interchange in the course of a monitoring or evaluation, and to protect the service provider and its clients from inadvertent harm due to indiscreet disclosures, the following standards should be followed by the reviewing agency, subject to the limitations imposed by the Freedom of Information Act and other applicable law:

1. The reviewing agency and the service provider should agree prior to an on-site review that its monitors and evaluators will keep confidential all documents and information obtained during a monitoring or evaluation, except as necessary to support the conclusions, findings and recommendations in a monitoring or evaluation report, or when the service provider consents.
2. The reviewing agency should not disclose the specific contents of individual interviews in a manner which discloses the identity of the source, unless such disclosure is essential to support the conclusions, findings and recommendations in a monitoring or evaluation report, and the reviewing agency has stated its intention to do so at the outset of the interview, or the person being interviewed consents.
3. A funding source may release aggregated data regarding a service provider as part of an informational report generally available to the public.

4. Notwithstanding other limitations, a reviewing agency may make such disclosures as are necessary to prevent the diversion of funds, to report material violations of the law or professional standards and to cooperate with a prosecutor, when there is evidence of criminal activity.

### **Standard 3.12 - Responsibility of the reviewing agency with regard to on-site costs**

The service provider is responsible for incidental costs of monitoring or evaluation.

The reviewing agency is responsible for payment of costs for any extraordinary expenditures incurred during the course of monitoring or evaluation, including:

1. Travel costs and fees of monitors and evaluators;
2. Costs incurred in direct expense and for time spent to photocopy extraordinarily large amounts of materials, and for copying materials which the service provider has already provided to the reviewing agency;
3. Long distance telephone charges made by monitors and evaluators and charged to the service provider;
4. Extraordinary charges for shipping large amounts of materials to the reviewing agency;
5. Rental of additional equipment or space required by the monitors and evaluators;
6. Fees charged by a provider's auditor or accountant for time beyond the usual and customary which is spent reviewing the provider's fiscal accounts.

Costs may include both direct expenditures and the value of the time required to carry out an activity.

### **Standard 3.13 - Exit interviews**

The reviewing agency should endeavor to provide an exit interview at the close of any on-site monitoring or evaluation visit, the purpose of which should be to offer tentative findings and conclusions regarding operation of the service provider.

## **Reports Regarding Monitoring and Evaluation**

### **Standard 4.1 - Conclusions, findings and recommendations: Limitations on the authority of the reviewing agency**

A reviewing agency may make recommendations regarding any aspect of the operation of a service provider which is within the scope of its inquiry. Generally, a funding source may

mandate that an action be taken by a service provider, if:

1. it is authorized to do so by statute or regulation;
2. it is authorized to do so under the terms of the grant or contract with the service provider;  
or
3. the action is directly essential to address the service provider's failure to perform a material obligation under its grant or contract with the funding source.

A reviewing agency or funding source may not, under any circumstances, direct that any action be taken which would limit the independent judgment of an attorney or otherwise interfere with a lawyer's professional obligations.

#### **Standard 4.2 - Submission of a preliminary and final monitoring or evaluation report**

Following completion of a monitoring or evaluation, the reviewing agency should prepare a written report setting forth its findings, conclusions, recommendations and requirements regarding the areas of provider operation which were the subject of the monitoring or evaluation. The report should be prepared in draft form and submitted to the service provider reasonably promptly or within a time limit which has been agreed upon between the reviewing agency and the service provider.

The service provider should have an opportunity to submit written comments, corrections or objections to the findings, conclusions, recommendations and requirements contained in the preliminary report.

Upon submission of the service provider's written response, or after expiration of the period provided for comments, the reviewing agency should submit a final written report setting forth its final findings, conclusions, recommendations and requirements. The final report should fairly state or summarize the provider's response to any issues retained in the final report.



**STANDARDS WITH COMMENTARY**



## **General Principles Governing Monitoring and Evaluation**

### **Standard 1.1 - Definitions**

**The following definitions apply to the terms used in these standards:**

#### **Assigned Counsel**

A lawyer in private practice appointed by a court or other appropriate authority to represent for a fee indigent defendants charged with a crime.

#### **Audit**

An examination of a service provider's financial accounts in order to verify 1) that the financial statements fairly present the provider's financial position in accordance with generally accepted accounting principles, 2) that an adequate system of internal controls is in place, and 3) that costs are allowable, reasonable and properly allocated.

#### **Complaint investigation**

An investigative inquiry into a specific allegation of a violation of the terms and conditions of a grant or contract, of the law, or of accepted professional standards by a provider or by its personnel, including a staff member, a board member or a private attorney operating on behalf of the provider.

#### **Confidential communication**

Any information provided to a provider or its personnel by a client or applicant for services, which relates to representation of the client or to the client's or applicant's eligibility for service.<sup>20</sup>

#### **Competitive bidding**

A process for awarding grants or contracts to provide civil or criminal representation in which the funding source chooses among competing proposals from more than one potential service provider.

#### **Contract attorney**

A lawyer or group of lawyers in a firm in private practice who contract with a legal services program to provide representation for a fee to indigent clients in civil matters or who contract with an indigent defense program or a state, county or municipality to represent for a fee indigent defendants in criminal matters.

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20. See Standards 2.3 to 2.6.

### **Defender**

The chief attorney appointed by the appropriate governing authority to oversee and carry out the representation of indigent persons accused of crimes. (See also, public defender).

### **Evaluation**

For purposes of these standards, the term, "evaluation" means to appraise the efficiency, effectiveness and/or the quality of a service provider through the collection and analysis of data and information related to the provider's operation.

### **Funding source**

Any one of the following entities which funds a service provider to furnish civil or criminal legal services to eligible clients:

1) a federal, state or local government or agency or instrument thereof, 2) a foundation or similar organization which distributes funds derived from Interest on Lawyers' Trust Accounts (IOLTA), 3) charitable organizations and private foundations, and 4) bar associations.

### **Indigent**

A person who is unable to afford legal services and is eligible for free representation under the guidelines of the legal services program or indigent defense program from which the individual seeks assistance.

### **Indigent defense program**

An organization which receives public funding to provide free representation to indigent defendants in criminal matters, either through the use of permanent staff attorneys, or through the use of contract attorneys or assigned counsel.

### **Legal services program**

An organization which receives public or private funds to provide free representation to eligible persons in civil legal matters, through the use of permanent staff attorneys and pro bono or contract attorneys.

### **Monitoring**

For purposes of these standards, the term "Monitoring" means to verify compliance by the service provider with pertinent laws, regulations and all other terms and conditions of a grant or contract through the collection and analysis of data and information related to the service provider's operation.

### **Provider**

For purposes of these standards, the terms "provider" and "service provider" refer either to a civil legal services program or to an indigent defense office.

### **Public Defender**

The chief attorney appointed by the appropriate governing authority to head an indigent defense program.

### **Records**

As used in these standards, the term "records" refers to accounting files, books and documents; administrative files and documents; legal work files and documents not protected by the attorney-client privilege, by rules of professional conduct or by other applicable law; provider publications; and other related materials which pertain directly to a provider's operations.

### **Review**

As used in these standards, the term encompasses both "monitoring" and "evaluation."

### **Reviewing agency**

An entity which engages either in the monitoring or the evaluation of a service provider. In most cases, the reviewing agency will be the funding source for the legal services provider. Where a funding source contracts with a third party to carry out either monitoring or evaluation, the funding source is responsible for compliance with the standards and, therefore, along with the third party is a reviewing agency.

### **Service provider**

For purposes of these standards, the terms "provider" and "service provider" refer either to a civil legal services program or to an indigent defense program.

### **Technical assistance**

Advice, guidance, consultation, expertise or similar support offered to assist a service provider to improve or change its operation.

### **Volunteer or *pro bono* attorney**

A lawyer who volunteers to represent indigent clients of a legal services provider without charging a fee to the client or to the provider.

## Work product

Tangible and intangible material which reflects a practitioner's efforts to investigate and prepare a case, to assemble information, to determine relevant facts, to formulate legal theories, to plan strategy, to research the law and to record mental impressions related to the case.

### *Commentary:*

#### Use of the terms monitoring and evaluation

The terms "monitoring and evaluation" have different meanings in different contexts and, moreover, their usage often differs from common meaning when used in the context of the appraisal of the delivery of legal services.<sup>21</sup> It is essential, however, that a common meaning be established for each for purposes of the standards. The meanings used here are chosen because they comport with the usage which has evolved, particularly in the civil legal services community. They are consistent, therefore, with the use of the terms in the literature regarding the issues addressed in these standards.

The delineation between the concepts contained in the definition of monitoring and the definition of evaluation is not sharply drawn. Issues related to *monitoring* for compliance can overlap issues more directly related to *evaluation* of the economy, effectiveness and quality of a program. The line is even less sharply drawn in the context of monitoring and evaluations by the Legal Services Corporation, because the Legal Services Corporation Act mandates that the Corporation "insure" high quality legal services<sup>22</sup> and make grants to insure economical and effective service delivery.<sup>23</sup>

#### Audit

The term "audit" as used in these standards always refers to a financial audit, and is defined as such. These standards are not intended to apply to a financial audit.<sup>24</sup>

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21. A common usage of the terms "monitoring" and "evaluation," for example, distinguishes between two distinct functions. Monitoring sometimes means ongoing oversight which is conducted through the routine review of reports and other data regularly submitted to the funding source. Evaluation in this set of definitions, on the other hand, means a full scale appraisal, often including a site visit. The distinction between the two functions is a valuable one, and the standards address both concepts. They do so, however, by distinguishing between "ongoing review,"(Standard 1.3) and "site visits" (Standards 3.1 to 3.13.)

22. Legal Services Corporation Act, § 1007(a)(1).

23. Legal Services Corporation Act, § 1007(a)(3).

24. See page 6.

## **Standard 1.2 - Principle of reasonableness**

**The actions of both the reviewing agency and the service provider should be reasonable. The service provider and the reviewing agency or funding source should interact with each other in good faith and should demonstrate courtesy and cooperation during the course of monitoring or evaluation. An action of a reviewing agency or a service provider is reasonable if it conforms to these standards.**

- 1. To determine whether an action or request by a reviewing agency is reasonable involves a balancing of its costs against its materiality and necessity to the monitoring and evaluation.**
- 2. An action or a request is not reasonable if it would require a breach of a duty owed to a client, a breach of a collective bargaining agreement or other similar employment contract or a violation of the law.**
- 3. A service provider should respond accurately to reasonable requests for information.**

### ***Commentary:***

The monitoring standards encompass a number of specific issues which arise in the context of monitoring or evaluation. For matters which are directly addressed, the standards define what is reasonable conduct. It is likely, however, that issues may arise which the standards do not directly address. Even where issues are addressed directly in the standards, there may be disagreement regarding whether the actions of a reviewing agency or service provider comply with the pertinent standard. Reasonableness is the underlying principle of virtually all of the standards governing monitoring and evaluation, and should be applied to any matter not directly addressed by a standard. The principle of reasonableness is, therefore, set forth as a separate standard and is defined more specifically in order to give guidance in such circumstances.

### **General application of the standard**

The standard of reasonableness applies equally to monitoring agencies and to service providers. Both should act reasonably during the course of monitoring or evaluation. In part, that means that both should treat the other with courtesy, and should act in good faith to comply with these standards. Each should act in a cooperative fashion with the other.

### **Application of the standard to a reviewing agency or to a funding source**

To determine whether an action or a request of a reviewing agency or funding source is reasonable involves balancing its costs against the materiality and reasonable necessity to the monitoring or evaluation process. The essential test involves balancing several factors:

- The extent to which the information requested is material to the inquiry of the reviewing agency, and does not involve confidential or other protected information;
- The extent to which access to the information is the only means by which the reviewing agency can examine an issue pertinent to the monitoring or evaluation;
- The investment of time, dollars and other resources required to respond to the request (the higher the cost to the service provider to respond, the higher a standard of materiality and necessity the reviewing agency should meet);
- The cost of complying with the request in relation to the size of the grant or contract being reviewed (the cost should not be disproportional to the amount of funds involved).<sup>25</sup>

#### Application of the standard to service providers

The value of the monitoring and evaluation process is enhanced for both the service provider and the reviewing agency by the extent to which the interactions between personnel of each are cordial and businesslike. The value is also enhanced by both parties interacting openly and honestly. For its part, therefore, the service provider should strive to present accurate and forthright information regarding its operation. It should make staff, board members and other personnel available to respond to questions and requests of monitors and evaluators. The service provider should cooperate with all reasonable requests of the reviewing agency.<sup>26</sup>

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25. See also Standard 1.6.

26. See Standards 2.7 - 2.9.

### **Standard 1.3 - Means of conducting monitoring and evaluation**

**Monitoring and evaluation may take many forms including:**

- 1. Ongoing informal interaction between the funding source and the service provider;**
- 2. Periodic review by the funding source or reviewing agency of reports and other information submitted by the service provider regarding its operation;**
- 3. Periodic on-site visits for purposes of an in-depth review of the service provider's operation.**

**It is in the discretion of a funding source to determine if it will monitor or evaluate the use of its funds, and the means by which such review will be undertaken.**

#### ***Commentary:***

There are a variety of ways in which a funding source may review how activities are carried out by its grantees. The decision regarding whether it will monitor or evaluate how its funds are used generally rests with the funding source.<sup>27</sup>

It is also generally in the discretion of the funding source to determine the means by which it will review the use of its funds. These standards do not propose that there is only one appropriate way to monitor or evaluate. Many funding sources rely solely on informal interaction with their grantees, and do not engage in the more formal processes of data collection and analysis or of thorough on-site evaluations. Others choose simply to rely on the monitoring or evaluation of other funding sources, and do not undertake any additional action to review their service providers. These standards should not be read to imply that a funding source *must* engage in more formal monitoring or evaluation processes. If a funding source does undertake more formal monitoring or evaluation, however, it should do so in conformance with the applicable standards.

#### **Informal interaction**

Many funding sources engage in ongoing informal interaction and interchange with recipients of their funds. For some it is the primary means by which the funding source determines how its funds are being used. For others, informal interaction merely supplements more formal means of review.

For many funding sources, ongoing contact serves many functions, the least evident and important of which is monitoring and evaluation. Some feel their primary responsibility is to provide backup and support to their grantees. An ongoing relationship is central to the funding

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27. Some funding sources have a specific legal duty to engage in monitoring or evaluation of recipients of their funds. See, for example, Legal Services Corporation Act, § 1007(d).

source serving such a supportive and advisory role with its grantees.

It is generally advantageous for the ongoing relationship between a service provider and its funding source to be cooperative and constructive. It provides a basis for candor between the two which can expedite a more formal monitoring and evaluation process. Ideally, a funding source which relies upon an on-site monitoring or evaluation visit will have a background of understanding of the operations of its grantees obtained through informal interaction. An on-site visit, therefore, would not be an isolated event, but rather one occurrence in the course of ongoing interchange between the two.

#### Review of reports and other data

If a funding source requires recipients of its funds to submit reports regarding its operation and its use of grant or contract funds, it should regularly review those reports.<sup>28</sup> This regular and ongoing review and analysis should provide a basis for the funding source to understand the operation of the service provider and can be an integral part of the monitoring and evaluation process. Sudden changes in the pattern of information submitted, for example, may indicate programmatic shifts or management needs which warrant further inquiry.

In addition, some funding sources may seek information by means of self-assessment questionnaires which are periodically sent to the service provider regarding its operation. Such a review saves the cost of a more thorough site visit, while providing the funding source with an overview of the service provider. It can also serve to inform the service provider of the matters which are of principal concern to the funding source in the utilization of its funds.

#### On-site review

Some funding sources determine that the most effective means to review the operations of recipients of their funds is by means of a thorough on-site examination of the provider. Many of these standards focus on the monitoring and evaluation process in the context of such on-site visits.<sup>29</sup> They do so because it is the area in which the greatest potential for conflict arises. That focus, however, is not intended to imply that such reviews are a necessary part of monitoring or evaluation. Many funding sources -- particularly if their funds constitute only a small percentage of the service provider's funds -- determine that an on-site evaluation is not a cost-effective means to review the use of their funds.

The fact that so many of the standards address on-site review may also tend to understate the importance of the ongoing relationship between the funding source and the service provider, which often provides the underpinning for effective monitoring and evaluation.

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28. See Standard 2.1.

29. See Standards 3.1 to 3.13.

### **Standard 1.4 - The purpose of monitoring and evaluation**

**The funding source and reviewing agency should inform the service provider of the purpose which the monitoring or evaluation seeks to accomplish. Monitoring and evaluation may serve a number of purposes, which may be pursued simultaneously, including:**

- 1. Evaluation of program performance in order to provide advice and feedback to the provider to improve its operation and the quality of its work product;**
- 2. Evaluation as a fact-finding step prior to the provision of technical assistance;**
- 3. Monitoring and evaluation to determine if the effectiveness and efficiency of the service provider's operation and the quality of its legal work are adequate, and to assure that its practitioners are complying with relevant professional standards, including the Model Rules of Professional Conduct;**
- 4. Monitoring to assure compliance with legal requirements which the reviewing agency has a duty to enforce, including funding source rules and regulations and the requirements of the grant or contract;**
- 5. Monitoring and evaluation to assure that a service provider's activities conform to established plans, including any regional or statewide plan, and that such plans are accomplishing the purpose for which they were adopted.**

#### ***Commentary:***

##### Clarity of purpose

There are a number of purposes which monitoring and evaluation can serve, and several purposes may be served simultaneously. It is essential, however, that the funding source be clear regarding the purpose or purposes which it aspires to accomplish in monitoring and evaluation and that it inform the service provider of its intent.

The purpose being pursued affects a number of essential aspects of monitoring and evaluation. It will guide the service provider regarding the types of data which it keeps and the record keeping system which it adopts. It will influence whether the service provider budgets its own funds for technical assistance, or relies on assistance from the funding source.

For on-site review, it will determine the skills which the reviewing agency should seek among those whom it engages as on-site monitors and evaluators. It will also affect the areas of inquiry during the course of the monitoring or evaluation. Finally, it will impact the perceptions of the service provider regarding the risks of candor with the reviewing agency.

The different purposes are largely based on two potentially disparate roles which a

funding source can play. On the one hand, the funding source may operate in a supportive mode in which it offers the service provider technical assistance and other backup. On the other hand, it may operate in the mode of enforcer of the terms and conditions of the grant or contract with the service provider. While relations between the funding source and its grantee may be very cordial, there is, nevertheless, a potentially adversarial relationship whenever a funding source is in a compliance mode.

#### Evaluations designed to provide support and assistance to the service provider

Some funding sources seek to operate primarily in a helping mode with recipients of their funds. They use the evaluation process primarily to provide feedback and advice to the service provider regarding its operation. Their primary motive is to assist the service provider to operate in a more effective manner by objectively analyzing the strengths and weaknesses of the provider, and helping it to determine the extent to which it is meeting its goals and objectives and responding to identified client priorities.

At times, a funding source will have funds available to it to provide technical assistance to the organizations which it funds. Review of provider operations, therefore, may be designed primarily for it to determine whether technical assistance would be appropriate and to target its assistance appropriately.

#### Monitoring for compliance

Review of a service provider can be limited to a determination that it is operating in conformance with its agreements with the funding source, and that it is complying with legal requirements which the funding source has a duty to enforce.

Whatever the range of purposes a reviewing agency pursues in its monitoring or evaluation, monitoring for compliance is likely to be at least a tacit objective. At times a reviewing agency may have such confidence in a service provider that it does not rigorously review for compliance. Should the funding source's confidence diminish for any reason, however, it may quickly revert to a more overt enforcement role.

When a funding source seeks to emphasize its supportive role and to underplay its enforcement role, there is an potential that it may have to shift to the enforcer role. At a minimum, a funding source should recognize this tension between a supportive technical assistance role in which it may wish to cast itself, and which the service provider may seek, and its unavoidable role as potential enforcer.

Sometimes monitoring for compliance may also require a reviewing agency to engage in an evaluation of the effectiveness, efficiency and quality of service. Criteria related to quality, efficiency and effectiveness are sometimes explicitly stated as a part of an enabling statute or rule

or as part of a grant or contract.<sup>30</sup> Thus, issues which are commonly associated with the evaluation of a program for purposes of improving its operation are sometimes considered as part of an assessment where the principal purpose is to monitor for compliance.

### Monitoring and evaluation of regional and statewide plans

Some service providers operate within a network of services which are linked by cooperative arrangements throughout a region or state. The Older Americans Act, for example, requires that each area agency on aging adopt an area plan for the provision of a variety of services to older persons.<sup>31</sup> Monitoring or evaluation may be undertaken, therefore, not only to examine the operations of a single service provider, but also to determine if the provider is functioning effectively within the plan, and if the plan itself is sound.

Monitoring and evaluation related to competitive bid awards and other funding decisions

In some circumstances an evaluation for quality and effectiveness may be necessary to assist a funding source to choose among competing applicants for funding. A funding source may, for example, evaluate a program in order to determine whether it should continue to receive funds or would be eligible for additional funds. A service provider may be competing for funds with another potential service provider. In such circumstances, an evaluation can have potentially serious consequences for a provider. Because the consequences of the evaluation in such circumstances can be severe, the reviewing agency must be clear from the outset regarding the purpose of such an evaluation. It is also a purpose which should not be mixed with any technical assistance purpose, since the adversarial potential is so high.

The criteria for the evaluation and upon which any funding decisions will be made must be clearly stated at the outset of any such process, and should reflect nationally accepted standards.<sup>32</sup> An evaluation to assist a funding source in choosing among competitive bidders should examine a number of factors, including: 1) the relative quality and effectiveness of competing providers, 2) the accessibility for clients of each, 3) the experience of the providers in delivering similar services to clients, 4) the capability of the providers to identify and address the needs of clients, 5) the degree to which each is capable of providing comprehensive service appropriate to clients' needs, and 6) the relative cost of providing services by each.

### Combining purposes for monitoring and evaluation

The various purposes which monitoring and evaluation can serve are generally not mutually exclusive. Often a reviewing agency will combine more than one purpose both in its ongoing relationship with its funding recipients and in its on-site visits. The extent to which this occurs varies considerably among types of funding sources. There are different sets of

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30. See, for example, the Legal Services Corporation Act, § 1007(a)(1) and § 1007(a)(3).

31. Older Americans Act, § 306(a)(2), § 307(a)(3)(A) and § 321(a)(6).

32. See Standard 1.8.

expectations, for example, in the civil community and in the defender community regarding the purpose of monitoring and evaluation.

Among indigent defense programs and their funding sources, there has been less of a tradition of inquiry into matters beyond straight compliance. Monitoring and evaluation of civil legal services programs for the elderly by area agencies on aging, on the other hand, will often consider the effectiveness of both the provider and the area plan.

Requirements of the Legal Services Corporation Act generally lead to monitoring visits which inquire into issues of quality and effectiveness.<sup>33</sup> In past decades, the inquiry into the more subjective issues of quality and effectiveness often led the Corporation to combine the purposes of assuring compliance and providing technical assistance.

No simple rule can be stated when it is appropriate to mix the roles of enforcement and support. Each funding source must determine the extent to which it wishes to pursue both. On the one hand, there are certain risks when evaluative functions and monitoring functions are combined. There is a potential conflict, for example, in the role of the monitors, who may be called upon to be enforcers, advisors and confidants at the same time. The provider being monitored may perceive some risk in fully exploring all of its problems with the reviewing agency, knowing that full disclosure of areas of weakness may lead to detrimental consequences for it. Failure to disclose fully all factors affecting its operation, however, may lead to ill-suited advice from the reviewing agency, and recommendations which while not apt, the service provider feels implicit pressure to adopt.

On the other hand, many funding sources find that there are advantages to exercising a dual role related to compliance and support. First, it provides a basis for a constructive and affirming relationship between the funding source and provider. To exercise a supportive role is often more satisfying to the reviewing agency's staff. Second, the service provider often welcomes the opportunity for objective outside advice and guidance regarding its operations. Finally, with some service providers, questions of compliance with legal requirements and grant conditions do not comprise a serious issue.

Some funding sources, on the other hand, conclude that enforcing and helping roles should never be mixed and that the funding source should address technical assistance needs through a completely separate process. The conclusion is based in part on a determination that the role is inherently adversarial, regardless of the benign intentions which may infuse it.

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33. See footnotes 12 and 13 and accompanying text.

### **Standard 1.5 - Limitation on inappropriate purposes**

**Monitoring and evaluation should never be punitive, nor be intended to disrupt or harass a provider, nor be motivated by ideological considerations.**

#### ***Commentary:***

Monitoring and evaluation should be undertaken with a bona fide intent to assess the provider in furtherance of a legitimate purpose as set forth in Standard 1.4. It is never permissible for a reviewing agency to use the process itself as a sanction against a service provider. Although the process may lead to punitive action by a funding source, monitoring and evaluation are fact-finding processes which may establish a basis for further action. The proper purpose of monitoring and evaluation is undermined, if the process itself is used to punish or to harass a service provider.

It is also improper for a funding source to use the monitoring and evaluation process to impose requirements on a service provider which it does not have legal authority to require. This may occur when there are legitimate differences of opinion regarding the management of the service provider.<sup>34</sup> The reviewing agency may also be motivated by concerns, including political or ideological considerations which are not directly related to the grant or contract with the service provider. It is improper for a funding source to seek to impose its political views on a service provider or to gather information through the monitoring and evaluation process in order to advance an ideological viewpoint.

A funding source and a service provider may disagree regarding whether a monitoring or evaluation inquiry constitutes harassment or punishment, or is motivated by a political purpose. The underlying principle of these standards is that the actions of both the reviewing agency and the service provider should be reasonable. The actions of both the provider and the reviewing agency, therefore, should be read in the context of that underlying tenet.<sup>35</sup>

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34. See Standard 4.1.

35. See Standard 1.2.

## **Standard 1.6 - The scope of monitoring and evaluation**

**The scope of inquiry of monitoring and evaluation should be reasonably related to a proper area of focus and to the purposes which the monitoring or evaluation is intended to accomplish.**

**The inquiry may encompass the activities of a contract attorney or of a subrecipient of the service provider undertaken in furtherance of the grant or contract which is subject to the monitoring or evaluation.**

**The scope of monitoring or evaluation of a service provider which receives only part of its funds from the funding source carrying out the review should be proportional to the size of the grant in relation to the overall funding of the service provider. Generally, grantors of a small portion of a service provider's funds should confine their review to that necessary to determine that the funds are being spent in accordance with pertinent grant conditions and for the reviewing agency to ascertain the relationship between the activities supported by its grant or contract and the overall operation of the service provider.<sup>36</sup> Smaller funding sources should avoid subjecting service providers to multiple monitorings or evaluations, where they would be duplicative of reviews undertaken by other funding sources whose reports are available and which address matters of concern to the smaller funding source.**

### ***Commentary:***

#### General considerations

The proper scope of inquiry of monitoring and evaluation is a function of the purpose which the monitoring or evaluation seeks to accomplish.<sup>37</sup> If the purpose of the monitoring is limited to compliance with the terms and conditions under which the funds were granted, and does not encompass issues related to the economy or effectiveness of the provider, or to the quality of representation, then the scope of inquiry necessarily would be narrower. Most monitoring and evaluation will at a minimum inquire into the provider's compliance with the terms and conditions under which the grants were funded.

The requirements governing the utilization of funds by a service provider may derive from a variety of sources. If an enabling statute or rule of court provides the authority for the operation of the provider, that statute or rule may contain specific requirements or limitations on the use of funds. The act appropriating funding for the provider may contain specific requirements governing the use of those funds. In addition, the grant or contract between the service provider and the funding source may contain general or special conditions.

The area of inquiry by the reviewing agency must be reasonably related to the terms and

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36. See Standard 3.2.

37. See Standard 1.4.

conditions which relate to the funds whose use is being monitored. Thus, an monitoring inquiry generally should not involve the use of funds other than those granted by the funding source, unless there is a specific basis for doing so. Such a basis might include a legally enforceable requirement that the provider not expend other funds in a manner inconsistent with the conditions of the reviewing agency.<sup>38</sup>

When monitoring or evaluation involves an on-site visit to the service provider, the reviewing agency and the service provider should, to the extent possible, agree before the visit regarding the scope of the inquiry.<sup>39</sup> The determination of the scope is generally within the prerogative of the funding source, however, and is usually not a matter of negotiation. The process of monitoring and evaluation is more likely to run efficiently and smoothly, however, if the scope of the inquiry has been clearly established at the outset.

#### Monitoring or evaluation of a subcontractor or subgrantee

A service provider may subcontract with another organization or individual to carry out some of the functions which it has contracted with the funding source to perform. The funding source has the right to monitor the subcontractor or subgrantee to assure that its funds are being spent in accordance with the terms under which they were granted. It may require reports regarding the activities of the subcontractor or subgrantee, and may visit it in the course of an on-site review. Any inquiry, however, should be limited to activities which are supported by the sub-grant or sub-contract.

#### Monitoring or evaluation of a service provider which receives only part of its funds from the funding source

The basic principles of the standards are the same regardless of the amount or percent of funds received by the service provider. There are some differences, however, in how the standards will apply, based on the size of the grant that the service provider receives from the funding source and the percentage of the provider's total funds which are received from the reviewing agency. The underlying principle of the standards is reasonableness.<sup>40</sup> The principle affects what constitutes an appropriate expenditure of time and resources and what is an appropriate level of inquiry and intrusiveness into an organization's operation.

When the amount of funding provided by a program constitutes an inconsiderable percentage of the program's total funding, the extent of the reviewing agency's inquiry necessarily should be more limited. It is always appropriate for the reviewing agency to examine the extent to which its funds are being expended in accordance with its grant or contract with the service provider. A broad-based inquiry, however, into the overall operation of the provider, including

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38. Legal Services Corporation Act, §1010(c)

39. See Standard 3.1.

40. See Standard 1.2.

its use of other funds, would generally not be warranted. The proper balance may at times be difficult to strike. A general inquiry regarding the overall efficiency and effectiveness of an organization which receives a small amount of its funds from a reviewing agency would be justified, for example, if it directly relates to the consideration by the funding source of whether the provider is an appropriate recipient of its funds.

Among the factors to consider in determining the appropriate level of inquiry are: 1) the relative cost to the service provider and the reviewing agency of a monitoring or evaluation; 2) the percentage of the service provider's funds which are provided by the funding source; 3) the extent to which the funds being monitored are spent for a discrete activity by the service provider; and 4) the extent to which the service provider allocates funds from other funding sources to the same activity. The cost of monitoring and evaluation should not be disproportionately high in relation to the size of the grant or contract being monitored.

Many service providers receive funding from multiple sources. While each funding source has a legitimate interest in assuring that its funds are being properly spent, full scale review by each could result in a significant expenditure of time by the service provider, often for duplicative inquiries. To the extent that monitoring or evaluation reports are available, therefore, and that they adequately address matters that would be in the scope of review of smaller funding sources, those grantors should rely on those reports. Funding sources should also coordinate the timing and scope of any on-site visits to avoid unnecessarily burdening the service provider with frequent or repetitive visits.

### **Standard 1.7 - Improper areas of inquiry**

**Except as pertains to the legitimate investigation of possible violations of the law relating to unlawful discrimination, a reviewing agency may not inquire into the following areas:**

- 1. The political or religious beliefs of any staff, board member or client;**
- 2. The sexual orientation or activity of any staff, board member or client;**
- 3. Personal matters of staff, board members, or clients unrelated to the operation of the program;**
- 4. The non-work related activities of any staff or board member, except to the extent that they directly impair the individual's competence to perform assigned duties, constitute a conflict of interest under the Model Rules of Professional Conduct, or are subject to lawful restrictions on off-duty activities.**

#### ***Commentary:***

The scope of inquiry of a reviewing agency should be limited to areas which directly relate to a specific, acceptable purpose for the monitoring and evaluation.<sup>41</sup> Certain areas should not be inquired into as a matter of course. Those relate to matters which are personal to staff members, to board members or to clients, or which relate to a person's activities while off duty, unless there is a direct connection with the person's employment or service on the board. On rare occasions, off-duty activities may have a direct and adverse effect on the capacity of the service provider or one of its employees to function effectively. An inquiry would be appropriate, for example, if a reviewing agency entertains a reasonable belief that alcohol abuse impairs the capacity of a staff member to function competently. Similarly, participation in off-duty activities which would give rise to a conflict of interest under the Model Rules of Professional Conduct may properly be examined by a reviewing agency. The inquiry should be limited, however, to that necessary to gauge any adverse impact on the representation of clients.

There are circumstances in which a funding source may have legitimately placed limitations on the off-duty activities of staff members. The Legal Services Corporation Act and regulations and other state and federal law, for example, limit the circumstances in which a staff attorney may engage in the outside practice of law,<sup>42</sup> or in partisan political activities.<sup>43</sup> In order to examine whether a provider is in compliance with such restrictions a reviewing agency may need to inquire regarding a staff member's off-duty activities. Such inquiries should be narrowly circumscribed, however, to encompass only that information necessary to gauge compliance.

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41. See Standard 1.4.

42. Legal Services Corporation Act, § 1007(a)(4), and 45 CFR 1604.

43. Legal Services Corporation Act, § 1007(a)(6), and 45 CFR 1608.

Areas involving a person's political or religious beliefs or sexual preferences or activities are particularly sensitive, and should generally not be the subject of inquiry in a monitoring and evaluation. Such an inquiry is proper only if it relates directly to an investigation of an allegation of discrimination, sexual harassment or other improper action related to such factors. Investigation of such allegations, however, should be made only in a complaint investigation conducted in accordance with the standards governing such procedures.<sup>44</sup> Questions regarding these matters, therefore, should only be made if there has been a specific allegation of a violation. General inquiries regarding the political, religious or other beliefs of provider personnel are never proper.

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44. See Standards 1.9 and 1.10.

## **Standard 1.8 - Utilization of accepted performance standards in monitoring and evaluation**

**To the extent possible, an evaluation which includes in its scope the efficiency and effectiveness of a service provider's operation and the quality of its representation should measure such factors against accepted performance standards.**

### ***Commentary:***

An objective of these standards is to reduce, as much as possible, the subjectivity of the monitoring and evaluation process. This is most difficult when the reviewing agency is assessing such inherently subjective areas as the efficiency, the effectiveness and the quality of a service provider. To reduce the potential for subjective disagreement, therefore, it is incumbent on the reviewing agency to seek to make its judgments from the touchstone of accepted national standards, when available.

To the extent possible, the reviewing agency and the provider should agree regarding which standards are most appropriate to the operation of the provider. At a minimum, the funding source should state the criteria against which it intends to measure the provider. Many funding sources develop checklists governing aspects of the provider's operation which they intend to review, and which reflect adopted performance standards. It is generally useful for the reviewing agency to make such checklists available in advance to the service providers which it is reviewing.

### **Indigent defense standards**

A number of national standards have been developed which relate to indigent defense representation.

◆ National Legal Aid and Defender Association

*Guidelines for Legal Defense Systems in the United States Defender Standards*

*Report of the National Study Commission on Defense Services*

◆ National Advisory Commission on Criminal Justice Standards and Goals

*Chapter 13, Courts*

◆ American Bar Association

*Criminal Justice Standards: Providing Defense Services*

◆ Speciality standards, including:

National Legal Aid and Defender Association  
*Appellate Defender Standards*

American Bar Association  
*Juvenile Justice Standards*  
*Standards Relating to the Negotiation and Awarding of Indigent Defense Contracts*  
*Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*

### Civil standards

There is currently only one set of national standards governing the provision of civil legal services: the American Bar Association *Standards for Providers of Civil Legal Services to the Poor*, adopted by the House of Delegates in August 1986. The *ABA Civil Standards* address issues related to the quality of the services provided, and state the basic ingredients that should be in place in order for a legal services provider to produce high quality legal work.

### Ethical standards

The *Model Rules of Professional Conduct* (and the predecessor *Model Code of Professional Responsibility*) are national standards recommended by the American Bar Association. Each state, however, adopts the professional standards which apply in that jurisdiction. Authority to enforce ethical standards as adopted in the jurisdiction generally rests with the agency designated by the state supreme court. The standards adopted declare ethical minimums that a provider and its advocates must meet.

### Accounting standards

There are also a number of well established standards governing accounting:

- ◆ Pronouncements of the Financial Accounting Standards Board or the Accounting Principles Board
- ◆ Auditing standards and other statements of the American Institute of Certified Public Accountants (AICPA)
- ◆ Governmental Accounting and Auditing Standards

### Standards regarding effectiveness and efficiency

It is less clear what standards, if any, apply to the question whether resources are being used effectively and efficiently by a service provider. Some of the more vexing questions associated with monitoring and evaluation involve issues of effectiveness and efficiency and their relation to quality of services provided. In spite of the lack of clear national standards, however, each funding source should strive to be clear with its service providers regarding its standards governing efficient and effective use of its resources.

Efficiency or economy of service should never be the sole criterion against which provider operations are measured. Adequate representation of clients requires a number of activities which are cost producing. To measure solely against apparent cost-effectiveness without regard for the quality of the work produced or its effectiveness in accomplishing the goals and objectives of the clients represented is shortsighted and over the long run can lead to a dangerous diminution in the quality of representation offered clients.

A related problem arises in the context of measuring the adequacy of a service provider's productivity. Measures of productivity in legal services are inexact at best. Comparative productivity is even more difficult given the differences in law and procedure which affect costs among different jurisdictions. In addition, the goals and objectives which a program sets for itself will radically affect issues such as cost per case. A reviewing agency, therefore, should be chary of measuring a service provider against national productivity standards. At the same time, whether a program is working hard enough is a legitimate inquiry. At most, therefore, comparison of data across jurisdictional lines should be limited to using national figures as guidelines which may trigger a need for further inquiry as to whether a program is working effectively.<sup>45</sup>

Monitoring of caseloads represents a potentially significant issue among indigent defense offices, because in many jurisdictions the level of funding received is a direct function of caseload level. Moreover, there are differences in the way that prosecutors and indigent defense offices count cases which have important ramifications. Standards regarding caseloads, therefore, should be monitored according to accepted definitions of what constitutes a case with appropriate consideration of its complexity and difficulty.

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45. See Standard 1.3.

## Standard 1.9 - Investigation of complaints

**The investigation of specific complaints or allegations of improper conduct by a legal services program or indigent defense program or its staff, should be conducted as an independent investigation and not as part of the process of monitoring and evaluation.**

### *Commentary:*

There are important differences between "monitoring and evaluation,"<sup>46</sup> on the one hand and "complaint investigation,"<sup>47</sup> on the other. Investigation of complaints of violations of the terms and conditions of a grant carry an explicit threat of sanction in the event that the allegation of a violation is confirmed. Complaint investigation, therefore, requires a more formal process in which specific notice of the nature of the claim must be provided to the service provider, in order for it to respond to the accusation. The level of formality required by such an inquiry and the inherently adversarial nature of the process would in most cases color the entire scope of the monitoring and evaluation process, if conducted at the same time. Complaint investigation, therefore, should not take place in the context of a monitoring visit.

Some matters which may constitute a material violation of the law or of the terms of a grant or contract may come to the attention of a reviewing agency during the course of a monitoring or evaluation on-site visit. It is appropriate to pursue the investigation of such matters during the course of the visit. The reviewing agency should advise the service provider of the specific nature of the complaint at the earliest opportunity, and should proceed in a manner consistent with the standard governing complaint investigation.<sup>48</sup>

Whether a complaint should be investigated at all by the funding source is a question in some instances. Certain complaints are in the jurisdiction of the courts or the bar association and should be conducted under procedures adopted by them for such matters. The Legal Services Corporation, on the other hand, has jurisdiction to enforce certain provisions of the Legal Services Corporation Act, so that allegations of violations of these sections must be investigated by it.<sup>49</sup>

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46. See Standard 1.1.

47. See Standard 1.1 and 1.10.

48. Standard 1.10.

49. Legal Services Corporation Act, §1006(b)(1)(A).

### **Standard 1.10 - Standards regarding complaint investigation**

**Each reviewing agency and funding source should have rules and procedures for the review and investigation of complaints or allegations that a service provider has violated a law which the funding source has a duty to enforce, or has breached the terms and conditions of its grant or contract. At a minimum those rules and procedures should provide the following:**

- 1. Procedures governing the filing of a complaint with the funding source or reviewing agency;**
- 2. A requirement that notice of the complaint be given to the service provider before any action is taken by the funding source or the reviewing agency, including**
  - ◆ the identify of the complainant,**
  - ◆ a concise, but complete statement of the actions which constitute the allegedly unlawful action, and**
  - ◆ a statement of the legal provision which allegedly has been violated;**
- 3. A reasonable opportunity for the service provider to respond to the complaint;**
- 4. Procedures for initiating an on-site investigation of a complaint;**
- 5. Rules governing the treatment of complaints by adversary parties which protect the integrity of the provider's representation of its client;**
- 6. Rules establishing a standard of proof and who bears the burden of meeting it;**
- 7. Procedures governing written findings and recommendations, and providing an opportunity for the service provider to respond to the findings and recommendations; and**
- 8. Procedures for terminating an investigation.**

#### ***Commentary:***

Because the potential sanction from an investigation of a complaint that a service provider has violated the law or its contract or grant with the funding source can be significant, the process for investigation of such complaints is necessarily more formal. Consistent with the increased risk to the service provider, the standard states a number of appropriate due process protections which should be incorporated into any complaint investigation process. The rules and procedures adopted for complaint investigation should be made available to the service provider.

The precise nature of the legal relationship between a funding source and its grantees may vary considerably. Generally, except where a complaint states a potential breach of its contract

with a service provider, a private funding source would not investigate complaints of violations of the law. The standard, therefore, states that each funding source and reviewing agency should develop rules and procedures governing complaint investigation which are appropriate to its circumstance, but which substantially comply with procedural requirements set forth in the standard.

Some matters which would constitute a potential violation of the law by a service provider or one of its personnel may become the subject of an investigation by other entities, including a public prosecutor. These standards relate to investigations by a funding source or a reviewing agency, and do not purport to state appropriate standards for investigation and prosecution of complaints by other entities. The funding source or reviewing agency, however, should have written standards and procedures governing when to refer an investigation to a prosecutorial authority, or other entity. At times, another entity, such as a public prosecutor, may on its own initiate an investigation of a matter regarding which a complaint has been filed. The funding source and reviewing agency should also have guidelines in place regarding cooperation with such investigations.

## Access to Records

### Standard 2.1 - Submission of reports and other data

**A funding source may require service providers periodically to submit reports and other data regarding the provider's operations which are supported by the funding source. Requests for reports and other data should be reasonable and should be limited to information which the funding source will actually review and for which it has a reasonable use.<sup>50</sup>**

#### *Commentary:*

Reports may be sought from a service provider to describe its operation and the services it furnishes with funds provided by the funding source. Some funding sources will limit the extent of their review of provider operations to analysis of such data and reports.

Although such reports may be integral to the monitoring and evaluation in which a funding source engages, it should limit reporting requirements so as not to burden the service provider with unnecessary data collection and reporting. The funding source should only seek information which it is likely to use. To collect reports and other data for which the reviewing agency does not have a use or which it does not review is a waste of the resources of both organizations and spawns disrespect for the monitoring and evaluation process on the part of both.

To the extent possible, the funding source should coordinate its reporting requirements and data collection with those required by other funding sources, so that service providers with multiple funding sources are not required to maintain duplicate sets of records and data in different formats. Smaller funding sources in particular should adjust their reporting requirements to those of larger funding sources.

In order to ease the process of gathering data for use by a funding source, the service provider should establish record keeping procedures which will make needed records available without risk of compromising client confidentiality.<sup>51</sup>

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50. See Standard 2.7.

51. Some service providers, for example, use intake forms which for a compliance check, automatically generate a copy of eligibility information from which confidential and client identifying information is eliminated.

## **Standard 2.2 - Requirements related to the production of documents and records**

**Subject to the limitations set forth in Standards 2.3 through 2.7, and subject to applicable law, a reviewing agency may have access to records which are in the possession, custody and control of a service provider or a subgrantee or subcontractor, which are properly within the scope of its review<sup>52</sup> and which pertain to:**

- 1. The use of the funds provided by the funding source;**
- 2. A determination of the effectiveness and efficiency of the provider's operation and the quality of its legal work produced with the funds provided by the funding source; or**
- 3. A determination of compliance by the program with the terms and conditions of the provider's grant or contract and with other applicable law which the funding source has the responsibility to enforce.**

### ***Commentary:***

Generally, a funding source and reviewing agency are entitled to access to a service provider's records which pertain to the work undertaken with the funding source's money, unless those records are otherwise protected by law.<sup>53</sup> Access by the reviewing agency serves the provider's accountability both to the funding source and, in the case of governmental grants or contracts, to the public. To assure effective operation and accountability, a service provider should maintain complete records regarding its operation. Records should be released unless there is a specific prohibition on their release,<sup>54</sup> or the request is unreasonable because of its size and scope.<sup>55</sup>

A refusal to provide records on the ground that their release is prohibited should be handled in accordance with Standard 2.9. If a service provider objects to release of material on the grounds that the request for records is unreasonable under the terms of Standard 2.7, the funding source and the service provider should attempt to negotiate an agreement regarding what will be furnished. Entry into negotiations should not itself be considered a refusal to provide records. If the service provider and the funding source cannot reach an agreement regarding the release of records, each may pursue other remedies which may be available under the law.

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52. See Standard 1.6.

53. Standard 1.1 states: "As used in these standards, the term 'records' refers to accounting files, books and documents; administrative files and documents; legal work files and documents not protected by the attorney-client privilege, by rules of professional conduct or by other applicable law; provider publications; and other related materials which pertain directly to a provider's operations."

54. See Standards 2.3 - 2.7.

55. See Standard 2.7; see also Standard 1.6..

### Restrictions on disclosure

A primary area in which there are limitations on the information which a reviewing agency is entitled to see relates to information gathered by the service provider and its practitioners in the course of client representation. These limitations are addressed in Standards 2.3 and 2.4. They involve both direct application of ethical provisions regarding the protection of client confidences,<sup>56</sup> and indirect application in the context of attorney work product.<sup>57</sup>

Personnel records are also protected by law in some jurisdictions and because they potentially contain very personal information, not directly germane to the monitoring or evaluation of a provider, are subject to special consideration.<sup>58</sup>

The records to which a funding source is entitled in its monitoring or evaluative capacity are those which pertain to its grant or contract with the service provider. At times this gives rise to difficult questions regarding the reviewing agency's right to records which relate to activities supported by funds from other sources.<sup>59</sup> On the one hand, there are circumstances in which to evaluate the use of its own funds, a funding source needs access to financial records which pertain to other funds. This might be necessary, for example, to determine if grant funds are being used to subsidize the activities of other grants or contracts.

In other circumstances, there may be limitations placed by the funding source on the activities undertaken by the service provider using other funds. The limitations set forth in the Legal Services Corporation Act on activities undertaken by Corporation funded recipients using non-LSC funds are the prime example.<sup>60</sup> On the other hand, a funding source is not entitled to conduct a fishing expedition through a service provider's records which relate to other grants and contracts. The standard of reasonableness applies.<sup>61</sup> Several guidelines govern when a reviewing agency should be able to review records other than those which pertain directly to its own funds:

- ◆ the existence of a rational connection between the records sought and a legitimate monitoring or evaluation concern related to the reviewing agency's grant or contract;
- ◆ the relative size of the grant funds being monitored or evaluated in relation to the other funds; and
- ◆ the burden and cost of producing the records sought.

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56. Standard 2.3.

57. Standard 2.4.

58. Standard 2.5.

59. See Standard 1.6.

60. Legal Services Corporation Act, §1010(c).

61. Standard 1.2.

Original vs. copies of records

Generally, the reviewing agency has the right to access to the original records if it so requests, and so long as the original records do not contain protected information.<sup>62</sup> The reviewing agency, however, generally may not remove original records from the premises of the service provider.

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62. See Standards 2.3 - 2.5.

### Standard 2.3 - Client confidences

**A reviewing agency may not have access to records which contain information protected by the attorney-client privilege or by ethical provisions prohibiting the disclosure of confidential information obtained from a client, or by other statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the reviewing agency. Neither a funding source nor a service provider may require that a client waive the protections against the disclosure of confidential information as a condition of representation.**

**A reviewing agency may reasonably expect a service provider to delete protected information from a record, if feasible, in order for monitors and evaluators to examine it. Records from which privileged or confidential information cannot be reasonably removed may not be disclosed to the reviewing agency.**

#### *Commentary:*

One of the fundamental underpinnings of the attorney-client relationship is the guarantee that clients enjoy that confidential information they provide in the course of representation will be protected from unauthorized disclosure.<sup>63</sup> The potential for erosion of this protection in requests from funding sources of legal services providers was specifically noted and warned against in the commentary to the *ABA Standards for Providers of Civil Legal Services to the Poor*.

"A second risk to client confidences arises when funding sources, or others such as judges and opposing counsel, seek information about the legal services which are provided to a particular client, or about the basis on which a client was found to be eligible.

There may be a tension between the legitimate interest of funding sources to account for the proper expenditure of funds, and the need for providers to protect the confidences and secrets of their clients. The American Bar Association has specifically ruled in Informal Opinion 1394 (1977) that a legal services provider cannot ethically give a funding source access to confidential information in the absence of willing and informed consent by the client. The scope of the prohibition against disclosure is unclear, however, and ABA opinions provide only partial guidance. Informal Opinions have found, for example, that protected information includes the identity, address, and telephone number of legal services clients (Informal Opinion 1287, 1974), and information contained in client trust fund records (Informal Opinion 1443, 1979). Ultimately, the scope of the attorney-client privilege is a matter of state law which should be examined to

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63. See *Model Rules of Professional Conduct*, Rule 1.6; See also, *Standards for Providers of Civil Legal Services to the Poor* (American Bar Association, 1986), Standard 1.3.

determine what, if any, information may be disclosed to a funding source without client consent. Both practitioners and managers of a legal services provider should be familiar with the ethical considerations involved, and should only disclose information to a third party, including a funding source, consistent with ethical prescriptions and applicable law. " Pages 1.7-1.8.

Both parties to a monitoring or evaluation have a responsibility to approach the matter responsibly. To the extent possible, the service provider should be specific regarding the basis on which it asserts that information sought cannot be provided because it is confidential.<sup>64</sup> A reviewing agency should be aware of the limitations on disclosure and should abide by them in its requests. A reviewing agency should not ask for information which it knows to be confidential.

In determining whether requested information can be properly disclosed, the service provider and the reviewing agency should rely on state law governing the attorney-client privilege, the rules of professional conduct which pertain to client confidences and fifth amendment privileges if applicable. They should also consider any statutory protections which apply, such as the special protections afforded parties to juvenile proceedings in many jurisdictions.

It is improper for a funding source to require that a service provider condition its representation of clients on their prior agreement that the funding source or reviewing agency may have access to otherwise confidential information the client has given to the service provider. Such a requirement deprives the client of the right to a voluntary waiver. It may also significantly jeopardize the client's interests, since the requirement itself can abrogate the client's protections against disclosure to parties other than the funding source.

#### Deletion of confidential information from records

At times a reviewing agency will request records which contain confidential material. Client trust records, for example, will generally include client names and other confidential information pertinent to the representation. The confidential information in those records may not be disclosed to the funding source.<sup>65</sup> When such records are requested, therefore, the confidential information must be deleted prior to their review.

To delete confidential information from records can be a costly and time consuming effort. The principle of reasonableness, therefore, limits the extent to which a reviewing agency should request such records.<sup>66</sup> To determine whether a request for redacted records is reasonable, therefore, requires the service provider and the reviewing agency to balance the cost, time and

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64. See Standard 2.9.

65. See ABA Informal Opinion 1443 (1979).

66. See Standard 1.2.

other resources which are required to purge the files against the materiality and reasonable necessity of the record for the successful accomplishment of the monitoring and evaluation.

## Standard 2.4 - Work product

**A reviewing agency may not examine the work product of an attorney, paralegal or other professional employed by the service provider or furnished by a subcontractor or subgrantee.**

### *Commentary:*

At times, in order to evaluate the quality of the legal work produced by a service provider, a reviewing agency may seek reports and other records which relate to the provider's legal work. Such inquiries, however, must be limited to general inquiries and may not seek either client confidences,<sup>67</sup> or a practitioner's work product.<sup>68</sup>

Two separate considerations protect work product from disclosure to a reviewing agency. First, work product is protected by evidentiary privilege, which has evolved to safeguard the adversary process. The work product privilege is grounded in public policy against intrusion into an attorney's preparation of a client's case.

Second, a request to examine a practitioner's work product raises a difficult issue regarding the boundaries of client confidentiality. A file containing research and investigative notes may be interlaced with factual evaluations that are based on client confidences. Even though no overt reference is made to a client's communication, the focus of the research and the strategy disclosed in the work product may indirectly reveal matters which are confidential to the client.

The risk to the client is more clear in light of the fact that premature revelation of a legal strategy may have deleterious consequences for the provider's client. Similarly, the research undertaken in the course of representation of a client may reveal ongoing strategy or perceived weaknesses in a client's case, disclosure of which could prejudice a client.

The same considerations do not apply to a pleading, brief, memorandum or other document which has been publicly filed in the course of representing a client. A reviewing agency may request such documents from a service provider.

### Case specific time records

Time records which are kept by a provider related to specific cases are considered part of the work product of that case and are not reviewable by a reviewing agency. Case specific time

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67. See Standard 2.3.

68. For purposes of these standards, "work product" is defined as tangible and intangible material which reflects a practitioner's efforts to investigate and prepare a case, to assemble information, to determine relevant facts, to formulate legal theories, to plan strategy and to record mental impressions. See Standard 1.1.

records may contain information regarding its conduct of a case and could disclose areas in the case about which the provider is particularly concerned. On the other hand, general time records of individuals whose salaries are supported by funds under review may legitimately be provided, so long as they do not otherwise contain confidential information.

### **Standard 2.5 - Confidential communications with provider counsel**

**Monitors and evaluators may not have access to records prepared by or for an employee or board member of a service provider, or by the provider's attorney, in anticipation of administrative proceedings or litigation between the service provider and the funding source. A reviewing agency may not have access to records containing communications between the provider and its attorney which are protected by the attorney-client privilege or by ethical provisions governing confidential communications.**

*Commentary:*

From time to time a service provider may consult counsel regarding its obligations under the terms of its grant or contract with the funding source. Such consultations may be undertaken in anticipation of litigation or an administrative proceeding with the funding source. Similarly, the staff of a provider or one of its board members may conduct research or otherwise prepare a record which pertains to the possibility of such action. In order to protect the integrity of the legal process involved, such records and communications must be protected from disclosure to the funding source.

Communications to the provider's counsel about any matter in which the information is confidential and which would not otherwise be available to the reviewing agency are also protected from disclosure. A provider should be able candidly to discuss its operations with its attorney, knowing that it is afforded the same protection from disclosure as any corporate client.

## Standard 2.6 - Access to personnel records

**Personnel records maintained by a service provider may not be examined by a reviewing agency except when the reviewing agency has a specific legitimate purpose and the record can provide information which directly relates to the purpose. Only that portion of personnel records reasonably necessary to accomplish the purpose may be reviewed. In no case can a reviewing agency examine medical or health information, or other personal data which does not directly pertain to the operation of the provider. Review of personnel files is subject to applicable federal and state law and to collective bargaining agreements and other employment contracts.**

### *Commentary:*

A reviewing agency is generally entitled to review records which relate to the operation of a service provider. Personnel records, however, often contain information which is private to the employee to whom the record pertains. The reviewing agency, therefore, should refrain from seeking personnel records except when necessary to accomplish a specific, legitimate purpose. A reviewing agency, for example, may seek access to personnel records when it has a reasonable belief based on independent information that the provider or one of its personnel:

- ◆ has violated a term or condition of the grant or contract between the provider and the funding source, or
- ◆ has violated a law which the funding source has the authority and responsibility to enforce, and
- ◆ has a reasonable belief that relevant information about the possible violation is contained in the personnel records sought.

To establish that a service provider is pursuing sound personnel policies and has proper accounting systems in place a reviewing agency may review personnel files from which identifying or personal information has been excised.

There are several factors which may further limit the extent to which a service provider has access to personnel files. A service provider may have entered into an collective bargaining agreement or other employment contract in which it agrees not to reveal the contents of personnel files without the affected employee's approval. Some states have laws restricting the disclosure of information contained in personnel files.<sup>69</sup>

Personnel files also may contain personal information about an employee, which does not directly relate to the administration of the provider and which an employee would reasonably expect to remain confidential. Foremost among such matters are personal health records which

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69. See, for example, California Constitution, Article 1, §1, *El Dorado Savings and Loan Assoc v. Superior Court*, 190 Cal. App. 3d 342, 235 Cal Rptr. 303 (1987).

may be contained in a staff member's personnel file. A reviewing agency should have access to such materials only if the staff member to whom they pertain consents.

## **Standard 2.7 - Requests for records**

**Requests for records must be reasonable. The records requested should reasonably relate to the scope of the monitoring or evaluation and to the time period which it covers. To the maximum extent possible, a reviewing agency should focus its requests to avoid the necessity of photocopying and transmitting large amounts of materials. A reviewing agency should not request copies of the provider's records which the reviewing agency already has in its possession, unless such records have become unavailable to it.**

**Requests for large numbers of records as part of a monitoring or evaluation visit should be made well in advance of the visit whenever possible. Such requests and requests for records for purposes of off-site review should be made in writing and should describe the records sought with sufficient specificity to allow the service provider to identify the records desired. The request should state whether the reviewing agency wishes the records to be made available for review and copying on-site, or to be copied and transmitted elsewhere. The service provider must be granted a reasonable time to assemble the requested records.**

**Requests for records made during the course of an on-site visit may be made orally, unless the service provider asks that the request be reduced to writing. The service provider must be given a reasonable time to assemble the requested records.**

### ***Commentary:***

The general principle of reasonableness which underlies these standards has particular application in the context of requests for the production of records as part of the monitoring and evaluation process. There is significant cost involved in producing extensive records, particularly if they have to be reviewed in order to check for potentially confidential client information. In addition, photocopying costs can be substantial for a large quantity of materials.<sup>70</sup> Finally, requests for voluminous records can be counterproductive to the monitors and evaluators who for practical reasons often are unable to review large amounts of material.

A reviewing agency, therefore, should request only those records which are necessary to its inquiry, and should be specific in its request in order to limit the number of documents requested to those essential for effective monitoring or evaluation. Blanket requests for extensive records should not be made absent a compelling reason.

### **Limitations on the time period for the records requested**

Documents requested should relate only to the time period under review. This means that absent a compelling reason, a reviewing agency should not request records for any time period which it has already monitored or evaluated. Monitoring may be extended to time periods which

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70. See Standard 3.12 regarding responsibility for costs.

have already been investigated when a matter has been discovered which was not known or could not have reasonably been known to the reviewing agency at the time of the earlier review.

#### Records already in the possession of the reviewing agency

The reviewing agency should not request information which it already has in its possession, simply to avoid having to locate the record in its own files. From time to time, however, a record may be misplaced so that it is no longer available to the reviewing agency. In that event, it should notify the service provider and seek a duplicate copy.

#### Time to assemble requested records

In requesting records, a reviewing agency must give the service provider a reasonable amount of time to assemble the requested records. What constitutes a reasonable time is a function of several factors: 1) the amount of materials requested, 2) the date of the record and whether it is currently available, and 3) whether the records must be reviewed by the service provider to determine if they contain confidential or protected information which needs to be redacted.

#### Written request for records

In order for both the reviewing agency and the service provider to be clear regarding the records requested, it is generally preferable for the reviewing agency to state its request in writing. Requests for records made in anticipation of a monitoring or evaluation on-site visit should be written and clearly identify the specific records desired and the expectations of the reviewing agency with regard to their availability. For purposes of clarity, the reviewing agency should state requests for records made during the course of an on-site visit in writing, as well, if the request is for a significant amount of material. Isolated requests for records during a visit, however, can be accommodated by the service provider without the formality of a written request.

## **Standard 2.8 - Responsibilities of the service provider regarding requests for records**

**The service provider must furnish reasonably requested records in a timely manner unless there is a good faith assertion of confidentiality or other legal basis for not providing them. In the event that a provider believes that it has the right or duty to refuse to provide a record, it must state in writing the basis for its refusal, citing the pertinent authority which it believes prevents it from disclosing the record.**

### *Commentary:*

For monitoring or evaluation to be effective, the reviewing agency must have access to pertinent information which will allow it to form accurate conclusions regarding the service provider. Both the service provider and the reviewing agency have an interest in the reviewing agency having accurate information on which to base its conclusions. Most requests for records, therefore, will readily be complied with by the service provider without question.

At times, however, requests for records can lead to disagreements regarding what can properly be released. The interests of a reviewing agency in the fullest disclosure of information may lead it to interpret the right of disclosure broadly. The service provider, on the other hand, may interpret its obligations narrowly both for reasons of convenience and to assure that it meets its fiduciary and professional obligations to its clients and staff.

Just as a reviewing agency is bound by a standard of reasonableness in its request for records,<sup>71</sup> a service provider must also avoid overly narrow interpretations of its obligations. Any assertion of a right or duty to withhold a requested record, therefore, must be made in good faith.<sup>72</sup> A service provider should never use an unjustifiable assertion of an ethical duty, or other legal prohibition on the disclosure of a record as a means to protect information which it finds detrimental to its interests or otherwise unfavorable.

When a service provider asserts a legal or ethical basis for withholding information, it should do so only after it has researched the law governing the protection asserted, and reasonably believes that the law supports its position. On the other hand, it must be recognized that should any doubt exist regarding the propriety of disclosing confidential information, particularly when obtained from a client, the service provider should err on the side of caution and decline to provide the information.

The service provider should clearly state in writing the specific grounds on which it is withholding information, citing the authority on which its assertion is based. Requiring the service provider to state the basis for withholding records and information serves two purposes. First, if correct and convincing, it may forestall the reviewing agency further asserting its right to the material, and may avoid a prolonged dispute. Second, it assures that the service provider

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71. See Standard 2.7.

72. See Standard 1.2.

does in fact have a good faith basis for its position. Refusal by a service provider to disclose a requested record should be addressed in accordance with Standard 2.9.

### **Standard 2.9 - Refusal to provide access to records**

**In the event that a service provider refuses to make a requested record available to the reviewing agency based on an assertion of privilege, professional obligation or any other legal protection, the reviewing agency and the service provider should strive to identify alternative means to address the issue which the reviewing agency seeks to explore. In the event that alternative means cannot be found and the reviewing agency disputes the assertion of confidentiality or other legal prohibition against disclosure of the record, the parties should seek a ruling regarding the disputed claim with the organization or entity which has responsibility for enforcing or interpreting the protection, unless existing ethics opinions dispositively address the issue, in which case they should be followed.**

**In the event that a service provider withholds a requested record, the reviewing agency should take necessary steps to complete the monitoring or evaluation, pending resolution of the dispute, unless the record is so material to the review that it cannot reasonably be completed without resolution of the dispute.**

#### ***Commentary:***

For monitoring and evaluation to be effective, a reviewing agency must have access to pertinent facts to assess the operations of the service provider in the areas which are in the scope of the monitoring or evaluation. Most information which a reviewing agency seeks will be made available without question by a service provider. Indeed, where the purpose of an evaluation is to support technical assistance or for a similar reason, the service provider's interest is in broad disclosure.

Nevertheless, there will be times when a service provider believes that it is prohibited from releasing a record by ethical requirements or some other provision of the law. There are often a number of ways, however, for a reviewing agency to obtain relevant facts. When one source of information is foreclosed because of the need to protect client confidences or because of other legal impediments, alternate means should be used. It is not an appropriate use of the resources of either the funding source or the service provider to engage in protracted disputes over access to contested materials, if there are other means to obtain useful data.

To minimize disputes regarding the propriety of releasing records, whenever possible the service provider should attempt to keep its records in a manner which does not mix confidential or other protected information with other data which it is reasonably likely the reviewing agency may wish to review. Record keeping procedures which automatically create records which eliminate confidential or client identifying information can facilitate the review process and avoid unnecessary conflict.

#### Alternative means of providing the requested information

When a reviewing agency requests information which a service provider believes it cannot ethically or legally provide, the service provider and the reviewing agency should explore

less intrusive means to obtain information which meets the needs of the reviewing agency. The reviewing agency should state the purpose for which it desires the information, in order for both to identify alternative ways to serve the desired objective.

Alternative means may include the service provider's furnishing redacted copies of the desired records, or participating in an oral review of the records without the reviewing agency having physical access to any document containing protected information. Such approaches may diminish the verifiability of the record to some degree. Any diminution in verifiability, however, is secondary in importance to the need to protect client confidences from improper disclosure.

A request by a service provider to discuss alternative means for providing requested information should not be treated as a denial of access to a record, until reasonable alternatives have been jointly discussed by the service provider and the reviewing agency, and have been rejected.

### Requests for a ruling

In the event that the reviewing agency concludes in good faith that it cannot satisfactorily monitor or evaluate the service provider without access to a requested record and the service provider concludes that it is prohibited from surrendering the record, the reviewing agency and the service provider should seek a ruling from the entity with jurisdiction and authority to determine the matter. Generally, in the case of an assertion of a professional obligation, the proper advisory authority would be the committee of the state bar with responsibility for interpreting its ethical provisions, or a court. The need for speed or for finality will determine which is the appropriate forum from which to seek a ruling. Generally only a court can make a binding determination. The funding source and the service provider should abide by any rulings or opinions which the entity with authority to rule on the matter has already issued, if they dispositively address the issue.

If a service provider refuses to provide requested materials, and if the matter cannot be resolved during the course of a monitoring or evaluation visit which has already been undertaken, the reviewing agency should complete as much of the monitoring or evaluation as possible, absent access to the requested materials. A monitoring or evaluation visit should be completed pending resolution of the issue regarding access to the record unless 1) the requested record is so essential to the purpose and scope of the monitoring or evaluation that it cannot reasonably be conducted without the record and 2) no alternative means are available to obtain the information.

## Conduct of On-Site Monitoring and Evaluation

### Standard 3.1 - Notice of on-site monitoring or evaluation

**If a reviewing agency plans to visit a service provider for purposes of monitoring or evaluation, it should give the provider reasonable written notice of the date of the proposed site-visit and should seek to schedule the visit so as to avoid unnecessary disruption of service to clients.**

**The notice regarding a monitoring or evaluation visit should identify the intended purpose and scope of the visit, and to the extent possible, should state the standards and criteria against which the service provider will be measured.**

#### *Commentary:*

Effective monitoring and evaluation does not always require that a reviewing agency conduct an on-site visit to the service provider.<sup>73</sup> Many funding sources find that informal interaction and review of reports which are submitted by the service provider are adequate to satisfy their need for review. Others, on the other hand, may determine that they require the greater fact-finding potential of on-site review, and therefore, schedule periodic visits.

When a reviewing agency does conduct on-site visits of a service provider for purposes of monitoring or evaluation, it should strive to schedule those visits at a time which will be most conducive to effective evaluation and at the same time will not unnecessarily disrupt the capacity of the service provider to serve clients. Whenever possible, therefore, monitoring or evaluation visits should be scheduled to the mutual convenience of both the service provider and the reviewing agency.

Generally, forty-five days advance notice should be provided for on-site visits which will involve a thorough examination of the provider. If the proposed date is not satisfactory to the service provider because of previously scheduled absences of key personnel, conflicting events or other factors which would deleteriously affect service to clients, it should notify the reviewing agency within sufficient time for both to establish a mutually satisfactory date, if possible. To the extent possible, the date should be chosen to assure the availability of the largest number of staff and board members. The time selected should also be as non-disruptive to the operation of the provider as possible, considering such factors as:

- ◆ major trials,
- ◆ previously scheduled training events
- ◆ previously scheduled vacations of important participants,
- ◆ previously scheduled monitoring, evaluations from other funding sources,<sup>74</sup> and previously scheduled financial audits, and

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73. See Standard 1.3 regarding means of conducting monitoring and evaluation.

74. See Standard 1.6 regarding scope of review and multiple funding sources; see also Standard 3.2.

- ◆ known or scheduled absences of key personnel for medical reasons.

### Follow-up and informal visits

Informal visits and on-site calls to follow-up on previous monitoring or evaluation do not require the same advance notice as a full scale monitoring or evaluation. Nevertheless, reasonable notice should be given to avoid unnecessary disruptions in the service provider's operation.

### Grounds for shortening the notice period and unilaterally setting a date

In the event that the reviewing agency has a reasonable belief that an emergency exists, it may shorten the time for notice, and unilaterally establish a date for the visit. In any event, however, it should provide adequate prior notice of its proposed visit in order for the service provider to prepare.

When a service provider requests the postponement of a visit for a legitimate reason, the reviewing agency generally may not unreasonably insist that the visit go forth at the proposed time. There may be times, however, when the legitimate needs of the reviewing agency require it to insist on a specific date for a visit:

- ◆ If it entertains a reasonable belief that to delay may prejudice its capacity to monitor the provider effectively;
- ◆ If the service provider unreasonably refuses to agree to an appropriate alternative date;
- ◆ If the reviewing agency has an obligation under the law or a contract to complete the monitoring or evaluation visit by a date certain, and would be unable to comply with its requirement unless the visit is completed; or
- ◆ If the reviewing agency entertains a reasonable belief that the service provider is materially out of compliance with the terms and conditions of its grant or contract, and there is a risk of destruction or alteration of records if there is a delay in monitoring.

### Informal visits

There are occasions when a staff member of a reviewing agency or a funding source may wish to drop-by and visit one of its recipients. The visit may have a specific, though limited, purpose such as to follow-up on a previous monitoring or evaluation. At times, it may simply be a courtesy call because the staff member of the funding source is in the area. The more formal notice requirements which attend a full scale monitoring or evaluation visit are obviously not appropriate or necessary in such circumstances. The reviewing agency or funding source should, nevertheless, provide prior notice of the intended visit as a matter of courtesy.

Notice regarding the intended scope of monitoring or evaluation

In order to enhance the efficiency and effectiveness of monitoring and evaluation, both parties should have the same understanding and expectations regarding the scope of a monitoring or evaluation visit.<sup>75</sup> If they cannot agree, it is sufficient that the reviewing agency be clear regarding its expectations. A service provider should not unilaterally attempt to block inquiry into an area simply by refusing to agree regarding the scope of a visit.

Notice to subcontractors and subgrantees

For subcontractors and subgrantees who will be included in the monitoring or evaluation, it is particularly important to have a statement of the scope of the inquiry and an indication of the information which the reviewing agency wishes to explore. Often subcontractors and subgrantees do not know what information is appropriate and necessary to provide a reviewing agency. With prior knowledge of the scope and purpose of the monitoring or evaluation, however, the subgrantee or subcontractor can prepare adequately.

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75. See Standards 1.4 and 1.6.

### **Standard 3.2 - Magnitude and duration of on-site visits**

**The size of a review team and the duration of its visit should be reasonably related to the size of the service provider, the percentage and amount of its funds provided by the funding source and the manner in which its resources are deployed.**

#### ***Commentary:***

The principle of reasonableness which underlies the standards suggests among other things that the reviewing agency should proceed in a manner which is the least disruptive to the service provider, consistent with the reviewing agency meeting its obligation for thorough monitoring or evaluation. The size of the team and the timing and duration of their visit, therefore, should be proportional to the size of the service provider and the amount of funding it receives from the funding source responsible for the monitoring or evaluation.<sup>76</sup>

Generally, the duration of a review and the size of the team are a function of the number of the provider's attorneys and paralegals, including permanent staff members and contract attorneys. Duration and size are also a function of geographic distribution of offices and the time and logistics involved in contacting and interviewing both staff members and contract attorneys. For fiscal and accounting monitors and evaluators, the number and duration of their visit is a function of the amount of funding which the provider has which is subject to review by the reviewing agency.

#### Review of service providers with multiple funding sources

The scope of monitoring or evaluation of a service provider which receives only part of its funds from the funding source carrying out the review should also be proportional to the size of the grant in relation to the overall funding of the service provider. Generally, for one grantor among many, particularly when its grant is small, a review should be confined to that necessary to determine that the funds are being spent in accordance with pertinent grant conditions and for the reviewing agency to ascertain the relationship between the activities supported by its grant or contract and the overall operation of the service provider.

Funding sources providing a minor portion of a provider's funds should avoid subjecting service providers to multiple monitoring or evaluations, where they would be duplicative of reviews undertaken by other funding sources whose reports are available and which address matters of concern to the funding source which provides a small amount of funds. To the extent that monitoring or evaluation reports are available, therefore, and that they adequately address matters which would be in the scope of review of such funding sources, those grantors should rely on those reports. This allows funding sources providing a small amount of funds to avoid having to conduct full scale inquiries with costs disproportionate to their own investment in the service provider. At the same time, it will reduce the expenditure of resources by the service

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76. See Standard 1.6 regarding the scope of monitoring and evaluation.

provider to respond to duplicative inquiries.

A reviewing agency should not rely on the monitoring or evaluation by another funding source, however, if it believes that the review was not thorough, or that it did not examine all pertinent aspects of the provider's operation. There also may be times, when a report by another funding source will not be available for review. For example, a confidential report resulting from a technical assistance evaluation may be inappropriate for review and use by other funding sources. Access to other reports may also be restricted by contract or by law.

### **Standard 3.3 - Frequency of monitoring or evaluation**

**If on-site monitoring or evaluation is undertaken, it should occur at reasonable intervals which allow the reviewing agency to remain familiar with the service provider without unnecessarily disrupting the provider's operation.**

#### *Commentary:*

##### Frequency of on-site visits

When a reviewing agency undertakes on-site visits for purposes of monitoring and evaluation of recipients of its funds, it should be reasonable with regard to the frequency of such visits. A balance should be struck. On the one hand, overly frequent on-site visits can cause disruption of the service provider's operations without giving the reviewing agency additional insight into the program. Visits that are too infrequent, on the other hand, run their own risks. Major changes which have occurred in the provider may be missed. Moreover, the baseline of information which the reviewing agency has may be so out of date as to require a more basic and, therefore, more costly inquiry.

The actual interval at which it is appropriate to conduct on-site reviews will vary according to circumstance. Generally, on-site monitoring or evaluation which takes place at eighteen to twenty-four months intervals allows time for the service provider to undertake changes in response to the findings, conclusions and recommendations of the reviewing agency, and for those changes to take effect. Other facets of the provider may also have changed sufficiently to justify a complete review of its operations. Other factors, however, will affect the timing of reviews, including their comprehensiveness and the extent to which other funding sources may have completed similar monitoring or evaluation.

##### More frequent monitoring or evaluation

There are circumstances when an on-site visit may need to be undertaken more frequently. Follow-up visits based on previous monitoring, for example, may be conducted relatively soon after the previous visit. Occasionally, a grant may be for a limited time period and may require frequent monitoring by the funding source.

There are also circumstances in which problems of such magnitude have been identified that closer scrutiny of the service provider, and, therefore, more frequent monitoring visits, are warranted. A reviewing agency may, for example, have reason to believe that a service provider is experiencing significant fiscal problems or is materially violating the law or the terms and conditions of the grant or contract.

### Informal visits

During the normal course of ongoing interaction with a service provider,<sup>77</sup> staff of a funding source may visit the service provider for an informal visit. Nothing in this standard is intended to discourage such interaction nor to impose artificial limitations on the frequency of such visits.

### Need for a written report

The purpose of monitoring or evaluation is generally unable to be accomplished unless the service provider receives written findings, conclusions and recommendations.<sup>78</sup> A service provider, therefore, should receive a report regarding the previous monitoring or evaluation before additional visits are scheduled.<sup>79</sup> Receipt of a written report allows the service provider to address any perceived weaknesses, and to act on recommendations in anticipation of newly scheduled visits. Moreover, the written report provides an appropriate basis for the inquiry during the subsequent visit.

There may be circumstances when it has not been possible to issue a report. In such circumstances, the lack of a report does not become a shield to protect the service provider from any further monitoring or evaluation.

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77. See Standard 1.3.

78. See Standard 4.2.

79. The appropriateness of requiring the completion of a written report before new monitoring or evaluation takes place is particularly heightened in light of the potentially disruptive effect of monitoring or evaluation.

### **Standard 3.4 - Qualifications of monitors**

**The team of persons who conduct on-site review of a service provider should possess skills and experience related to the operations of the service provider and the type of representation which it offers, and appropriate to the specific purpose which the monitoring or evaluation seeks to accomplish.**

#### ***Commentary:***

The value of the monitoring and evaluation process is the opportunity it provides the reviewing agency to determine if the service providers which it funds are in compliance with applicable laws and are operating efficiently and effectively, while producing high quality legal work. A funding source cannot make reasonable judgments about such issues, however, if the persons whom it engages to conduct monitoring or evaluation do not possess expertise and ability directly pertinent to the work of the service provider.

Each team, therefore, should include persons who possess appropriate skills and expertise. The team should include attorneys who have significant experience related to the service provider's principal legal work. Similarly, management specialists should have significant experience with law office management or fiscal administration, and fiscal monitors and evaluators should be experienced with auditing and accounting principles that apply to not-for-profit organizations.

All reviewers should be aware of applicable laws and grant conditions. Each attorney member and the team leader should be aware of pertinent ethical rules governing the service provider. At least one team member should be familiar with the overall service network which serves the client population represented by the service provider.

An indigent defense program should be reviewed by persons with specific expertise in the legal representation of indigents. The monitors or evaluators should have specific knowledge of criminal defense practice. The monitoring or evaluation should not include persons who have adversary interests to the service provider or one of its clients, such as persons currently serving as a prosecutor, or county, state or district attorney.<sup>80</sup>

Monitors and evaluators of civil legal services programs should be familiar with poverty law. They should have specific expertise in both the substantive law which affects clients and issues related to the effective delivery of service to indigents.

Because monitoring involves examination of whether a service provider is complying with the law and the terms and conditions under which it has received its funds, the monitoring and evaluation team should be familiar with such issues. Lack of familiarity results in the monitors and evaluators failing to identify areas of possible concern or, conversely, asserting

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80. See Standard 3.5 regarding the exercise of independent judgment and conflicts of interest.

violations where they do not exist.

The team members should also be familiar with ethical provisions governing client confidences and any other limitations on access to records. This is particularly important in order to avoid any improper inquiries or actions by the monitors and evaluators.

Many providers operate in a system in which there are other services on which their clients rely and which may be integral to the service provider's being able effectively to assist its clients. This is particularly true of legal services programs which serve the elderly. To assess whether the service provider is operating effectively within the network of services which are available to clients, therefore, an evaluation team should have at least one member who understands the operation of the network which is appropriate to the provider's clients.

A funding source may sometimes include inexperienced or newly hired persons on a team as a way to familiarize them with the service provider or with its work. A private charitable foundation or an IOLTA foundation, for example, may include a new board member in order to educate the individual regarding the work of its grantees. This standard is not intended to discourage such worthwhile goals.

### **Standard 3.5 - Exercise of independent judgment and conflicts of interest**

**All persons engaged in the on-site review of a service provider should exercise independent judgment regarding the provider and its operation. No person may serve on a monitoring or evaluation team if that person has a conflict of interest with the service provider or one of its clients.**

#### ***Commentary:***

##### Independence of judgment

The effectiveness of monitoring and evaluation depends in part on the objectivity and independence of the monitors and evaluators. Members of an on-site review team need to render their judgments regarding the provider free from any influence which might undermine their independence. The funding source, therefore, should not substitute its judgment for the conclusions reached by the review team. Generally, a funding source should not alter the report of a review team without making it clear that it has done so.

##### Conflict of interest

To protect the objectivity of the monitoring and evaluation process, persons engaged in the process as monitors and evaluators must be free of any conflict of interest which might interfere with their role as impartial observers. Three kinds of conflicts are most problematic: 1) a legal conflict of interest between a monitor or evaluator and a client of the provider, 2) an institutional conflict with the service provider's clients; and 3) a conflict arising from a monitor or evaluator having a direct or indirect financial interest in the operation of the service provider.

##### Legal conflict with a provider's client

A person who has been either an adverse party or adverse counsel in any matter in which the service provider or one of its subcontractors or subgrantees has represented a client should not monitor or evaluate the provider. Questions regarding whether a conflict exists should be resolved consistent with the principles enunciated in the *Model Rules of Professional Conduct*, Rules 1.7 to 1.12.

There are several serious ethical risks when monitors or evaluators have a legal conflict with a client of a service provider. First is that they may be unfairly motivated to render unfavorable judgments about the service provider, either to gain favor for their client or to retaliate against the provider. Second, they may try to gain unfair advantage in the matter in which they have an adverse interest by indirectly affecting the conduct of the service provider. Third, monitors and evaluators with a conflict may try to obtain information about the provider which relates to the conduct of the matter. The risk of such a conflict extends vicariously to an individual who has an interest in an organization or entity which is or has been in conflict with a client of the provider.

### Institutional conflict with the service provider's clients

No person should serve as a monitor or evaluator who has an institutional conflict with the provider or its clients. An institutional conflict exists when an individual is directly associated with or represents interests which are contrary to the interests of a provider's clients, even though no direct conflict exists with any one client. In no case, for example, should persons currently serving as a public prosecutor, state, county or district attorney or the like be included on a team reviewing an indigent defense program.

### A conflict arising from a direct or indirect financial interest in the operation of the service provider

A person may also be disqualified from being a monitor or evaluator because of a financial conflict. Such a conflict would arise in the case of an individual who has a financial interest in the service provider or in a subcontractor or subgrantee of the service provider. Similarly, if a person has an interest in an organization which provides services or products to the service provider or any subcontractor or subgrantee for fee, an impermissible conflict would occur. A person who has an interest in an organization which directly competes with the service provider for funding should not be included on a review team.

The risk inherent in the conflict is that it invites an attempt to influence the operation of the provider to benefit the person with the financial interest further. In some circumstances, it could provide the opportunity to cover-up or divert attention away from possible abuses.

### Notice of members of the review team

As early as possible, the reviewing agency should provide the names and business addresses of the members of the monitoring or evaluation team, as well as a brief description of each member's occupational background. The furnishing of names and backgrounds of the monitors and evaluators allows the service provider to determine if a conflict exists with any of them.

### **Standard 3.6 - Training and orientation of monitors**

**Prior to engaging in on-site monitoring or evaluation, members of a team of monitors and evaluators should be familiar with or should receive training and orientation in:**

- 1. Pertinent statutes, rules, regulations and grant or contractual agreements governing operation of the provider;**
- 2. Pertinent issues related to the delivery of legal services by the provider, including legal issues which are of particular importance in its service area;**
- 3. Professional guidelines governing access to information in the possession of the provider;<sup>81</sup>**
- 4. Standards which pertain to the operation of the service provider and the performance of its practitioners;<sup>82</sup>**
- 5. Skills and knowledge necessary to conduct an effective review of the service provider.**

#### ***Commentary:***

Teams of monitors and evaluators should possess the skills and experience necessary to make appropriate judgments regarding the service provider's operations.<sup>83</sup> Even so, there will inevitably be aspects of the provider's operation or the legal requirements which govern it with which not every member will be familiar. The reviewing agency, therefore, should provide training and orientation so that team members are familiar with matters which are unique to the review of the service provider. If the evaluation encompasses the quality of a provider's legal work, it can be beneficial for the evaluators to receive training and orientation regarding unique substantive or procedural issues pertinent to the provider's practice.

Areas which are most likely to be unfamiliar to persons who have not engaged in monitoring or evaluation of a service provider before are the statutes, rules, regulations and grant or contractual agreements which govern operation of the provider, and professional guidelines which govern access to information in the possession of the provider. In addition, there are issues which are unique to the delivery of legal services to the poor with which the monitors and

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81. See Standard 2.3.

82. See Standard 1.8.

83. See Standard 3.4.

evaluators should be familiar.<sup>84</sup> Those include matters such as case intake and acceptance, hiring and recruitment, priority setting, and the use of contract and pro bono private attorneys. Finally, the monitors and evaluators should be familiar with any standards of practice which pertain to the service provider or its practitioners.<sup>85</sup>

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84. See generally, *Standards for Providers of Civil Legal Services to the Poor* (American Bar Association, 1986)

85. See Standard 1.8.

### **Standard 3.7 - Acceptable means to measure program compliance, quality and effectiveness**

**A reviewing agency may use a variety of means to measure compliance and to examine the quality and effectiveness of a service provider and of the representation it provides its clients. The means utilized must not interfere with the provider's, or its practitioners', professional responsibility to clients, nor impair the integrity of the adversarial process.**

#### ***Commentary:***

One of the most valuable benefits of on-site monitoring and evaluation is the opportunity it offers for an outside observer to provide feedback regarding the quality and effectiveness of the service provider's legal work. Judgments about quality and effectiveness, however, are naturally subjective in nature. A reviewing agency, therefore, may consider a variety of means to assess quality and effectiveness of legal work and of the provider. Among the means which a reviewing agency may undertake are the following:

- ◆ Interviews of advocates regarding their legal work, including an informal review of case matters, conducted in a manner which does not violate professional guidelines protecting client confidences.<sup>86</sup> A review of files in which the practitioner maintains physical possession of the file and discusses the case with the evaluator is a direct way to assess quality and effectiveness. It allows the reviewer to explore what the client's objectives were and whether they were met. The reviewer can also discuss the theory of the case with the practitioner and examine whether the strategy pursued was appropriate. The reviewer is able to form a judgment regarding both the provider's personnel and the legal work which they produce.
- ◆ Personal observation of practitioners in a trial, public hearing, or comparable setting can also provide insight into advocacy skills. It can be cumbersome to schedule, however, and has a higher risk than other methods of detrimentally affecting the representation. It should not be utilized if there is reason to believe that the presence of monitors or evaluators could adversely affect the practitioner's performance at the hearing.
- ◆ Interviews of judges and other attorneys practicing in the area in which the service provider operates may provide information regarding the reputation of the provider among judges and the bar. An evaluator may also find it helpful to interview key actors in the legal system, such as prosecutors, bailiffs and court clerks. Any interviews with adversary counsel should be conducted subject to the limitations set forth in Standard 3.9.
- ◆ Interviews of representatives of the client community served by the provider. In order to determine the program's reputation for accessibility and responsiveness to clients, evaluators may contact social service agencies and others in the general community who refer clients and which also provide service to them. One aspect of the effectiveness of

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86. See Standard 2.3.

the service provider will relate directly to the extent to which it has succeeded in establishing effective working relationships with other organizations which also serve the client community.

- ◆ Interviews of individual clients, conducted in accordance with Standard 3.8. In addition, leaders of client groups may provide valuable insight into the effectiveness of the service provider. If the service provider keeps a record of client satisfaction surveys as well as a file of complaints, they should be reviewed.
- ◆ Contact with elected and appointed public officials who are familiar with the work of the provider and the services which it provides. At times, such public officials may be familiar with a service provider and its representation of clients because of its advocacy before the officials. At the same time, however, the reviewing agency should not allow its contact with public officials to interfere with the representation of program clients. Such interference might occur if the reviewing agency, for example, discusses the issues regarding which the service provider is currently representing clients.

A reviewing agency may choose to utilize one or more methods in the course of a single evaluation. The decision regarding which is most appropriate should be made in the context of each evaluation. Some of the methods suggested are more comprehensive than others. All must be conducted in a fashion which does not intrude on client confidences, and does not impair the integrity of the adversarial process.

### **Standard 3.8 - Interviews of clients**

**Monitors and evaluators who wish to interview current or former clients of a provider must notify the service provider in advance. The service provider must inform clients who may be interviewed of their rights, including their right not to be interviewed and advise them of the risk of inadvertent disclosure of confidences. A reviewing agency should not discuss the facts of a case with a provider client, except in extraordinary circumstances in which the client has initiated contact and the client is accompanied by counsel. A monitor or evaluator should not interview a client who has a current case with the service provider, except in extraordinary circumstances in which the client has information which is indispensable to the monitoring or evaluation and which cannot be obtained from any other source. A reviewing agency which believes that such extraordinary circumstances exist must provide notice to the service provider of that fact and discuss with it the basis for its conclusion that extraordinary circumstances exist. Clients who so request may have an attorney present during any interview to which they consent.**

#### ***Commentary:***

Monitors and evaluators should never initiate contact with individual program clients, without first informing the service provider. Particularly with clients of indigent defense programs, the client needs to be advised that information given to the monitors and evaluators will not be protected nor privileged. Additional constraints and even prohibitions against interviewing a client may exist when the client is a child or is mentally handicapped.

Since the reviewing agency should not be given names of clients without the clients' consent, generally the service provider will have to make the initial contact. Unless the monitor or evaluator obtains client names from a source other than the service provider (such as court files), therefore, the service provider will have to participate directly in the process of identifying and selecting the clients. If a reviewing agency obtains client names from another source, it nevertheless must advise the service provider of the clients it wishes to interview in order for the provider to advise the client properly regarding the consequences of inadvertent disclosure of confidential information.

To accomplish this a letter should be sent to clients asking if they would be willing to be interviewed by the monitors or evaluators. In order to assure that the service provider is not able to hand pick the persons to be interviewed, the letters can be sent to a random sample or to all clients from a discrete time period.

#### **Confidentiality issues**

There are significant confidentiality problems which can arise in the context of a reviewing agency interviewing provider clients. The client may inadvertently disclose damaging information or admissions, not realizing that they would not be protected from disclosure should the monitor or evaluator be asked to testify against them. Moreover, the disclosure of confidential information to a third party may abrogate the right of the service provider to assert

the privilege in the event that client confidences are sought.

The reviewing agency should, therefore, never interview clients about their case nor about any facts which relate to their case. Their inquiry should be limited to their satisfaction with the services they received and their treatment by the service provider. To avoid inadvertent disclosures by the client, it is advisable that the client be interviewed with the monitor or evaluator using a checklist. Moreover, no client with an active case should be interviewed, unless there are extraordinary circumstances. Such circumstances might include when a client voluntarily steps forward seeking the monitors or evaluators with information about the service provider. Similarly, if a reviewing agency has independent grounds for believing that there are significant violations or deficiencies which can only be examined by speaking to current clients, it may do so, subject to the restrictions in the standard.

No client should be interviewed without first being advised about the importance of not disclosing any confidences. If a client wishes to speak with a monitor or evaluator in order to complain about the conduct of representation, the reviewing agency should refer the client to the provider's grievance procedure.

### **Standard 3.9 - Contact with opposing parties and counsel**

**A reviewing agency should not contact an adverse party or counsel to an adverse party in any matter in which the service provider is currently representing a client, except in the following circumstances:**

- 1. When adverse counsel is an institutional or governmental law office which regularly practices against the provider, so long as current cases are not discussed;**
- 2. When the contact is necessary in order to investigate a material violation of the law or of a condition of the grant or contract.**

**Monitors and evaluators must provide prior written notification to the provider of their intention to contact an adverse party or counsel to an adverse party. A reviewing agency shall not take any action which directly or indirectly would interfere with or otherwise influence the conduct of representation of a provider client.**

#### ***Commentary:***

It is improper for a reviewing agency to take any action which interferes in any way with the conduct of representation of a client of a service provider. Thus contact with adversary counsel during the pendency of a matter is discouraged because of the risk of direct or indirect impact on the representation.

In the case of an indigent defense program, the public prosecutor will be adverse counsel in virtually all of its cases. The prosecutor, therefore, often may be the most well informed office to comment on the quality and effectiveness of the indigent defense program. At the same time, monitors and evaluators should be sensitive to the possibility of antipathy or bias toward the defender office on the part of the prosecutor.

Any such inquiry made of the prosecutor must refrain from discussing the specific substance of any case, and should be limited to questions regarding the quality and effectiveness of the provider's practice. The risk of inadvertent disclosure of damaging information which might jeopardize the rights of a client is significant, particularly if monitors and evaluators are discussing representation both with the prosecutor and the defender.

There may also be cases in small towns where it would not be possible for a reviewing agency to find counsel who does not have ongoing cases with the provider. In such circumstances, the evaluators may interview them so long as the discussion does not include any pending case.

When a funding source is called upon to investigate a complaint which involves current

representation, it may be required to inquire about the matter while it is pending.<sup>87</sup> In such a case, however, the reviewing agency must provide prior notice to the service provider of its intent to contact adversary counsel. The service provider should be aware of the contact in order to gauge any affect the contact may have on the matter involved. Mere contact with adversary counsel may inadvertently encourage the adversary attorney to adopt a more uncompromising posture toward the service provider's client, based on a belief that the funding source may pressure the service provider to drop the case.

Notwithstanding its responsibility to assure compliance with the terms and conditions of its grant or contract, the funding source may not take any direct action which would jeopardize the rights of the client of the provider.

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87. See Standards 1.9 and 1.10.

### **Standard 3.10 - Conduct of interviews**

**Interviews of provider personnel should be conducted according to the following guidelines:**

- 1. Both parties should strive to communicate with openness, candor, and objectivity. Interviews should be sufficiently open-ended to allow the interviewee to offer unsolicited observations. They should also be sufficiently focused to assure that the reviewing agency receives thorough information regarding its areas of inquiry.**
- 2. Subject to applicable federal and state law, interviews may only be recorded upon mutual agreement of the monitors or evaluators, provider personnel being interviewed and the service provider.**
- 3. Upon specific request of provider personnel being interviewed, counsel may be present during an interview.**

#### ***Commentary:***

The effectiveness of monitoring or evaluation is enhanced by the degree to which all the parties to it deal with each other with openness, candor and objectivity. Open-ended interviews allow for information to be developed without being affected by any predisposition of the interviewer. At the same time, interviews should have prescribed set of issues which they are intended to address. Monitors and evaluators should have the skill to strike the appropriate balance to assure the objectivity of each interview, while efficiently covering all issues which are germane to the evaluation. They should be able to elicit needed information expeditiously and to avoid repeated inquiries into the same subject matter.

Generally, it is desirable that interviews of staff members and other personnel be conducted in an informal and cordial manner. In most instances, this will happen naturally as a matter of course. There may be times, however, when the reviewing agency or service provider personnel want a complete and permanent record of interviews. In such circumstances, with the consent of all pertinent parties, an interview may be recorded, either by the reviewing agency or by the service provider.

In some circumstances, a staff member may want to have counsel present during an interview. While such an arrangement is discouraged because of the potentially adversarial nature it imposes on the interview, if a staff member insists, it should be permitted.

The service provider does not have a right to insist that it have managerial or supervisory personnel present during the interview of staff members. To permit that would have a chilling effect on the candor of the staff member which often is necessary for the monitoring process to be effective.

**Standard 3.11 - Responsibility of monitors and evaluators regarding confidential or sensitive information**

**In order to encourage candid interchange in the course of a monitoring or evaluation, and to protect the service provider and its clients from inadvertent harm due to indiscreet disclosures, the following standards should be followed by the reviewing agency, subject to the limitations imposed by the Freedom of Information Act and other applicable law:**

- 1. The reviewing agency and the service provider should agree prior to an on-site review that its monitors and evaluators will keep confidential all documents and information obtained during a monitoring or evaluation, except as necessary to support the conclusions, findings and recommendations in a monitoring or evaluation report, or when the service provider consents.**
- 2. The reviewing agency should not disclose the specific contents of individual interviews in a manner which discloses the identity of the source, unless such disclosure is essential to support the conclusions, findings and recommendations in a monitoring or evaluation report, and the reviewing agency has stated its intention to do so at the outset of the interview, or the person being interviewed consents.**
- 3. A funding source may release aggregated data regarding a service provider as part of an informational report generally available to the public.**
- 4. Notwithstanding other limitations, a reviewing agency may make such disclosures as are necessary to prevent the diversion of funds, to report material violations of the law or professional standards and to cooperate with a prosecutor, when there is evidence of criminal activity.**

***Commentary:***

The value of a monitoring or evaluation is enhanced by the extent to which the service provider feels that it can be candid with the reviewing agency and with its funding source. This is particularly important when one of the stated purposes of an evaluation is to give the service provider an objective assessment of its operation and to offer recommendations for improvement.<sup>88</sup> In order for a service provider to be candid regarding its operation, however, it generally needs to know that the information it provides will be kept confidential.

There is not well established law which protects information from disclosure which was provided to a reviewing agency in the course of monitoring or evaluation. Indeed, some such information may be subject to disclosure under the Freedom of Information Act and other pertinent law. The mutual expectations of both parties will be clear and candid interchange encouraged, therefore, to the extent that the reviewing agency and the service provider agree

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88. See Standard 1.4.

prior to any review being undertaken that information will be kept confidential.

A reviewing agency should not volunteer information to the public or any member of it except as necessary to refer a matter to a prosecutor or other enforcement agency. The reviewing agency should be particularly careful about its treatment of sensitive information regarding:

- ◆ program legal work;
- ◆ personnel matters;
- ◆ activities of the provider in relation to its adversaries;
- ◆ labor-management relations;
- ◆ questions of competence of specific staff members.

Unless the reviewing agency specifically states otherwise at the outset of the interview, the anonymity of each person being interviewed should be protected. Monitors and evaluators should be particularly careful not to disclose the content of a staff member's interview to a supervisor and to other staff members, in a way which discloses the source of the information. The candor with which a staff member approaches a monitoring or evaluation interview will be affected considerably by the extent to which staff members and others feel confident that their anonymity will be protected.

#### Contacts with the press

A reviewing agency should not initiate contact with the press regarding the results of its on-site monitoring or evaluation. It should generally disclose only information which is available in response to a request under the Freedom of Information Act. It should not release copies of the preliminary report, before the service provider and others with a right to do so have had an opportunity to read and correct it.<sup>89</sup>

#### Release of non-sensitive data

At times, a funding source may publish materials regarding the activities of recipients of its funds. Some of the contents of such publications may be statistical data and non-sensitive information regarding the program's legal work and its use of its resources. The publication of non-sensitive data released for such informational purposes would not violate this standard.

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89. See Standard 4.2.

**Standard 3.12 - Responsibility of the reviewing agency with regard to on-site costs**

**The service provider is responsible for incidental costs of monitoring or evaluation.**

**The reviewing agency is responsible for payment of costs for any extraordinary expenditures incurred during the course of monitoring or evaluation, including:**

- 1. Travel costs and fees of monitors and evaluators;**
- 2. Costs incurred in direct expense and for time spent to photocopy extraordinarily large amounts of materials, and for copying materials which the service provider has already provided to the reviewing agency;**
- 3. Long distance telephone charges made by monitors and evaluators and charged to the service provider;**
- 4. Extraordinary charges for shipping large amounts of materials to the reviewing agency;**
- 5. Rental of additional equipment or space required by the monitors and evaluators;**
- 6. Fees charged by a provider's auditor or accountant for time beyond the usual and customary which is spent reviewing the provider's fiscal accounts.**

**Costs may include both direct expenditures and the value of the time required to carry out an activity.**

***Commentary:***

Monitoring and evaluation are an inherent aspect of grant making with public and private funds, some expenses of which are a cost of doing business by the service provider and some of which generally fall naturally to the reviewing agency. A service provider and a funding source may by contract assign the costs of monitoring and evaluation. Generally, however, costs should be allocated in accord with the principles which are enunciated in this standard.

The standard assigns incidental costs of monitoring or evaluation to the service provider, but assigns extraordinary costs to the reviewing agency and defines some of such costs. Costs such as moderate photocopying, for example, should be absorbed by the service provider.<sup>90</sup> There is a risk of overreaching, however, if the funding source can insist on cost-producing actions for which it does not directly pay. The standard establishes a monetary incentive for the reviewing agency to be reasonable in its requests for information and actions which are cost-producing, by assessing the costs of extraordinary photocopying to the reviewing agency.

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90. Some funding sources believe that all of the costs of monitoring or evaluation should be considered a cost of doing business to be borne by the service provider regardless of the amount.

The determination of whether costs for photocopying and shipping are extraordinary and, therefore, should be borne by the reviewing agency is a function of the size of the request and the amount of funds provided to the service provider by the reviewing agency.<sup>91</sup> The costs incurred for photocopying may include both the direct expense for reproduction of the materials and the time of staff members or persons hired to comply with the request.

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91. See Standard 2.7.

### **Standard 3.13 - Exit interviews**

**The reviewing agency should endeavor to provide an exit interview at the close of any on-site monitoring or evaluation visit, the purpose of which should be to offer tentative findings and conclusions regarding operation of the service provider.**

#### *Commentary:*

Exit interviews provide an opportunity for the reviewing agency to present its tentative views in a setting in which there can be interaction regarding the factual conclusions and the recommendations. At times, the more informal atmosphere of an exit conference can permit the reviewing agency and service provider to discuss matters candidly which the reviewing agency might state more indirectly in the written report. It can also allow the service provider to begin immediately to address the issues raised by the reviewing agency.

Generally, therefore, closing a monitoring or evaluation with an exit interview can be salutary. Exit conferences should be identified, however, as the presentation of tentative conclusions which are subject to change. A provider should avoid reliance on statements made during an exit interview until receipt of the final report.

Care should be taken by the reviewing agency to plan the exit interview and to cover the important items which it encountered during the course of the monitoring or evaluation. It should also plan its schedule so as to allow adequate time for team members to prepare before the exit interview, in order to ensure that the interview is based on as complete an analysis as possible. The team should also meet regularly during the course of the monitoring or evaluation to review and update the tentative conclusions which are being formed. If a review team is not adequately prepared for an exit conference, there is a risk that it will mislead the service provider. An exit interview should not be conducted, therefore, unless the review team has prepared adequately.



## Monitoring and Evaluation Reports

### **Standard 4.1 - Conclusions, findings and recommendations: Limitations on the authority of the reviewing agency**

**A reviewing agency may make recommendations regarding any aspect of the operation of a service provider which is within the scope of its inquiry. Generally, a funding source may mandate that an action be taken by a service provider, if:**

- 1. it is authorized to do so by statute or regulation;**
- 2. it is authorized to do so under the terms of the grant or contract with the service provider; or**
- 3. the action is directly essential to address the service provider's failure to perform a material obligation under its grant or contract with the funding source.**

**A reviewing agency or funding source may not, under any circumstances, direct that any action be taken which would limit the independent judgment of an attorney or otherwise interfere with a lawyer's professional obligations.**

#### ***Commentary:***

##### General considerations

The extent to which a funding source or other reviewing agency can mandate that certain actions be taken by the service provider is a function of the authority granted to the reviewing agency and the contractual relationship between the two. Generally, where a service provider is an independent organization, a reviewing agency is limited in its authority to order that specific actions be taken. Such authority may be granted either by statute or regulation, or by the contract between the funding source and the service provider.

There are competing principles involved in this issue. On the one hand, the funding source has a right to require that its funds are spent in a manner consistent with the purpose for which they were granted. On the other hand, there are often a number of ways to accomplish the purpose of a grant consistent with its legal requirements. How a grant is administered, therefore, is often a matter of judgment. There is strength in locally run and controlled organizations which make decisions regarding their operation based on their understanding of local needs and conditions.

Ideally, questions regarding the authority of a reviewing agency should not be a source of conflict. Rather, the service provider and funding source should strive toward a relationship of trust and communication that allows dialogue regarding the provider's operation. Disputes over whether a reviewing agency has authority to mandate a course of action by the service provider will stand in the way of recommendations *or* requirements being adopted willingly or effectively.

Nevertheless, there will be circumstances in which the funding source will encounter what it deems to be a violation of the law which it has the authority and responsibility to enforce or when it concludes that a service provider's performance under the grant or contract is so deficient that it constitutes non-performance of its contractual obligations. In such circumstances the funding source may mandate that action be taken to remedy the defect. The service provider may, of course, dispute the finding of the funding source or challenge its authority, leaving each to pursue other remedies which are available.

#### Relation to the purpose of monitoring or evaluation

Because a reviewing agency may engage in monitoring and evaluation to serve a number of purposes, its conclusions may range widely from requirements regarding compliance with the terms and conditions of its grant, to advice that is in the nature of technical assistance. The purpose for which monitoring and evaluation is undertaken will affect the scope of the inquiry and of the conclusions which are reached. A monitoring investigation conducted exclusively for purposes of determining whether there is compliance with the requirements of a grant or contract, for example, will be narrower in scope than an evaluation which is designed to determine the quality and effectiveness of service. It is also more apt to involve issues in which the funding source has a right to mandate more specific action by the service provider.

The more that monitoring and evaluation examine legal work quality and program effectiveness, however, the more that the conclusions reached are apt to encompass management judgments regarding the provider's operation. How those conclusions are characterized both by the reviewing agency and by the provider is potentially quite important. Conclusions by the reviewing agency about matters which are in the discretion of the provider should be stated in the form of a recommendation or a suggestion.

The reviewing agency can, on the other hand, mandate actions regarding compliance with legal requirements which govern the grant or contract with the service provider. It can also interpret how its requirements apply to the service provider, and if the provider is fulfilling the fundamental purpose of the grant or contract. Failure to implement resulting requirements potentially may result in a sanction against the provider. Mandatory requirements, therefore, should be identified as such with a clear statement of the funding source's expectations regarding compliance.

In presenting both recommendations and requirements to a service provider, a reviewing agency should review previous reports to make certain that current conclusions are consistent with prior suggestions.

Recommendations may also be made regarding actions by the funding source or other outside agency. A recommendation may, for example, be made for a follow-up evaluation, or the provision of technical assistance. A recommendation may also be made that action be taken by another agency which has jurisdiction and authority over a particular issue, such as a bar association, or state or federal licensing board.

Recommendations regarding actions of an advocate

A reviewing agency may never mandate or suggest a course of action which would limit the independent judgment of a lawyer on behalf of a client, or otherwise interfere with a lawyer's professional obligations to a client. A reviewing agency is not a part of the attorney-client relationship which is formed between a legal services provider and a client. Ethical considerations prohibit a lawyer from allowing a third party which pays for the representation provided from interfering in the attorney's exercise of professional judgment on behalf of the client.<sup>92</sup> Thus, a reviewing agency and funding source must assiduously avoid taking actions which might invade a lawyer's professional responsibilities to a client, to a tribunal or to third parties.

A reviewing agency also may not require or recommend action to be taken which would itself impair the capacity of the organization's attorneys to represent their clients zealously. It would be improper, for example, for a reviewing agency to seek to limit the types of discovery which a provider's attorneys might undertake, or to restrict the taking of appeals in certain matters.

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92. See *Model Rules of Professional Conduct*, Rule 5.4(c).

#### **Standard 4.2 - Submission of reports**

**Following completion of a monitoring or evaluation, the reviewing agency should prepare a written report setting forth its findings, conclusions, recommendations and requirements regarding the areas of provider operation which were the subject of the monitoring or evaluation. The report should be prepared in draft form and submitted to the service provider reasonably promptly or within a time limit which has been agreed upon between the reviewing agency and the service provider.**

**The service provider should have an opportunity to submit written comments, corrections or objections to the findings, conclusions, recommendations and requirements contained in the preliminary report.**

**Upon submission of the service provider's written response, or after expiration of the period provided for comments, the reviewing agency should submit a final written report setting forth its final findings, conclusions, recommendations and requirements. The final report should fairly state or summarize the provider's response to any issues retained in the final report.**

#### ***Commentary:***

The report which follows a monitoring or evaluation visit is essential to the process serving its desired purpose. The report should be completed in a sufficiently timely fashion that the findings and conclusions are still germane to the circumstances at the service provider. Generally, the final report should be completed within 90 days of the monitoring or evaluation visit.

The report should address all issues pertinent to the purpose for which the monitoring or evaluation was undertaken. Submission of a preliminary draft allows the report to be revised to reflect comments and corrections after review by the service provider. The service provider should be afforded adequate time to review the draft report thoroughly and to comment on it.

The final report should reflect the comments made by the service provider in response to the preliminary report. If a reviewing agency rejects the comments or suggested corrections of the service provider, it should, nonetheless, note those comments and the reason for their rejection.



Board of Directors  
c/o Rebecca Weir, Assistant General Counsel  
Legal Services Corporation  
3333 K Street, NW  
Washington, DC 20007

October 4, 2011

Dear LSC Board of Directors:

Thank you for the opportunity to comment on the July 28, 2011 Fiscal Oversight Task Force Report to the LSC Board of Directors ("Task Force Report"). The commentary below is provided by the Board of Directors of the International Federation of Professional and Technical Engineers ("IFPTE") on behalf of the union. Local 135 is comprised of two bargaining units that represent 70 of the 100 positions at LSC (this staff number does not include the OIG staff). IFPTE Local 135 is the exclusive representative of all positions (except management) in the Office of Information Management, Office of Compliance and Enforcement, and Office of Program Performance that could be significantly impacted by certain conclusions and recommendations of the Task Force Report. With this in mind, we hereby submit the following comments.

As agreed to with management, these comments dated October 4, 2011 replace in full the comments originally submitted by letter dated September 30, 2011.

***General Statement***

Overall, the Task Force Report reflects significant work and consideration of financial oversight as it applies to LSC. Further, the Task Force Report provides extensive recommendations for improvement of LSC's financial oversight function. We offer our appreciation to the membership of the Task Force, and to the LSC Board for conducting a study of this critical oversight area.

Regarding some recommendations of the Task Force Report, we determined it essential to provide additional information and comments from a staff perspective. Local 135 strongly supports increased efficiency and effectiveness at LSC. As part of this, we strongly support increased efficiency and effectiveness for the core LSC functions involved with the grant-making cycle. This includes the critical assessment of: the quality of the legal services provided; compliance with the law and congressional restrictions; and financial accountability systems and expenditures. These efforts also include the critical information and statistical support functions of the Office of Information Management ("OIM"). It should also be noted that significant collaboration

between the three offices of OPP, OIM, and OCE has continued to grow productively in the last several years.

We hope that our comments below will be helpful towards the goal of ensuring needed improvements to LSC and its important work. Also, should the LSC Board adopt any of the Task Force Report recommendations that affect employee terms and conditions of employment, we welcome the opportunity to work collaboratively and have discussions with management in the best interests of the employees and of LSC and its critical mission.

### ***Diverse Policy Manuals of Units***

The Task Force Report notes that the units of OCE and OPP have various separate manuals. We note that LSC also has several other manuals. Over time, these manuals contradict, confuse and reduce LSC's ability to have consistent overall instructions to, and practices by, LSC staff. The ability of each division or unit to have a separate manual or manuals has often increased a lack of consistency and effectiveness at LSC and should be ended in favor of a central document with specialized sections, as warranted.

Whether or not the LSC Board adopts the structural changes of the Task Force Report, we strongly recommend ending the practice of having multiple policy and other manuals throughout the LSC offices and activity areas.

### **Task Force Report Recommendations**

Below, we provide several specific or general comments to certain Task Force Report recommendations. These comments are organized according to the designation and numbering of the recommendations in the Task Force Report.

#### ***I. Organizational Identity and Mission***

In general, the recommendations and statements found in Section I of the Task Force Report recommendations section are strong and would serve to improve LSC's critical functions. A few of this section's recommendations warrant additional comment or emphasis.

##### ***Recommendation I(5)***

Recommendation I(5) states that LSC should continue to promulgate a strong "tone at the top" that promotes the importance of LSC's fiscal oversight activities. As the Task Force Report was limited to the review of fiscal oversight, the limitations of this recommendation are understandable. Nevertheless, we recommend that all efforts and statements regarding the essential development and communication of an appropriate "tone at the top" be expanded to include all core LSC functions, and not be solely

focused on fiscal oversight. At a minimum, the value guidance envisioned by this recommendation should clearly include both quality and compliance functions, and should make clear the relative weight placed on each, if differing.

*Recommendation I(6)*

Recommendation I(6) states:

*Draft, agree-upon, and promote a detailed description of LSC's intended culture, balancing an emphasis on grantee program quality, compliance, and fiscal responsibility with an organizational dynamic that results in high morale and commitment of LSC's people.*

This recommendation is critical and we recommend that it be commenced immediately, as it is of the highest importance. This recommendation is solidly part of a report focused on fiscal oversight. However, providing clarity as to LSC's intended culture, and development of an *affirmative, intended* organizational dynamic is something that does and should stand alone, and should engage and include all LSC units and staff. The values and elements behind this recommendation are essential to LSC's ability to function effectively.

Also, as elected representatives of a majority of LSC staff, we appreciate the inclusion of staff morale in Recommendation I(6). Further, the connection of "high morale" and commitment are noteworthy and critical. As one could probably expect, in an environment with continual change, much of it without clear objectives or outcomes, staff morale is an ongoing challenge for LSC. In recent years, staff chose to unionize by overwhelming margins so as to have some ability to voice concerns over managerial and directional issues at LSC. However, the slow pace of change and the continuation of many past issues through to the present have meant ongoing morale issues. Further, the issuance of this report with its limited scope of review, but nevertheless with the broad, unsupported recommendation for yet another structural change, resulted in additional erosion of staff morale.

For all of the above reasons, we recommend that recommendation I(6) be expanded to include all LSC units and staff and be given top priority.

***II. Communications and Coordination among the Board, Management, and OIG***

**A. Roles and Responsibilities**

As the development of a new organizational structure is a fundamental underpinning of this group of recommendations, our comments to this section will focus on identified issues with that conclusion.

## ***Scope of Review***

The Task Force Report clearly stated that the focus of the Fiscal Oversight Task Force was solely on financial oversight. On page iii the Task Force Report stated:

*In 2010, the LSC Board of Directors (the Board) approved the creation of an independent task force to review and make recommendations to the Board regarding how LSC carries out its fiscal oversight responsibilities.*

On page ii, the letter from the co-chairs stated:

*The charter of the Task Force focused on fiscal oversight, and that has therefore been the focus of our work.*

Further, on page 30, the Task Force Report defined “Fiscal Oversight” as:

*The process and systems in place to appropriately monitor and review the use of funds to mitigate the risk of misuse of grant monies, as described in OMB Circular A-110, Subpart C. Fiscal oversight may include many activities, including audits, information gathering and data analysis, or required reporting.*

This fiscal scope of review limitation did not include an assessment of the other two core LSC oversight functions of quality and compliance. Nor did the review include assessment of the functions of the Office of Information Management (“OIM”). In particular, regarding LSC’s quality assessment function, the Task Force Report on page iii stated:

*LSC’s processes related to assessing program quality were outside of the scope of the Task Force’s purview...*

Despite not having conducted an in-depth review of the compliance and quality functions, nor of OIM, the Task Force Report nevertheless determined that these functions should be combined into a new unit under one vice-president. The same is true for the functions of OIM. It is unclear what evidence and analysis supports this conclusion, as discussed further, below.

## ***Recommendation for a new LSC Structure – Quality, Compliance and OIM Functions***

Neither the compliance nor the quality review functions conducted by LSC receive much detail in the report. It is clear that the report, as well as the hired consultants were focused upon the financial oversight systems of LSC. It was therefore surprising that the Task Force Report then reached a conclusion that may fundamentally change two significant oversight functions that were not specifically reviewed. All three of the oversight functions (compliance, quality and fiscal) have been congressionally mandated, and each should be considered fully before LSC determines the most effective organizational configuration. As the report lacks detail regarding the perceived positive

effects on the quality and compliance review functions from the new structure, we find it impossible to agree or disagree with the recommendation for a combined unit. Neither the evidence nor the analysis supports the conclusion for a new combined unit.

We see a strong possibility of significant expenditures of LSC staff time and resources being taken to effect a unit structure change, which by itself would not address any of the significant underlying issues that hamper LSC's effectiveness in discharging its core statutory and regulatory functions. In the experience of many staff, it has seldom been the structure of the LSC divisions and units that affected their ability to conduct their work. It has been the lack of planning, coordination and consistent direction that has led to restricted or inefficient working conditions.

Several current, long-term staff members have been present at one of the numerous prior LSC configuration changes. What was consistent about each such change is that it required extensive work and cost. What has also been the experience of many is that when a new structure was implemented, the outcome was that little had ultimately changed. The changes did not effectively address LSC's underlying and long-term issues.

Related to this discussion, it is the presence, or not, of a clear LSC work vision, and consistent application of that vision, that ultimately matters in an organization as small as LSC. In the past, the names and number of offices and divisions have been many, but they served no effective function if management was not consistently applying uniform, effective and clearly disclosed (written) standards.

If reorganization is the desired goal, we recommend that further study be conducted (by appropriate professionals in compliance and quality assessment) to include a more detailed consideration of the two areas outside the scope of the Task Force Report (compliance and quality). A similar assessment of OIM is also warranted. Only in this manner can a decision as to the proper LSC structure be well informed and fully deliberative. In the end, whatever changes are made should ultimately result in the anticipated desired outcomes; and be justified by an analysis of the benefit derived from the cost and work involved in any reconfiguration.

Should the LSC Board determine to adopt the proposed reorganization, Local 135 expects to work collaboratively with management regarding any anticipated changes to terms and conditions of employment.

### ***Methodology – Non-Management Interviews***

Of the LSC staff interviewed by the consultant firm, 20 of the 25 were management or employees of the OIG. The Task Force Report states that a total of only five non-management staff in OCE and OPP were interviewed. No non-management staff members were interviewed in OIM. The non-management staff interviewed included one attorney and one non-attorney in OPP and one attorney and two fiscal analysts ("Program

Analyst”) in OCE.<sup>1</sup> The number and lack of diversity of the non-management staff interviewed in OCE and OPP means that the information obtained could not be adequate or representative of the compliance or quality functions conducted by LSC. In addition, as the only fiscal analyst staff interviewed were two of the most recently hired staff (having each been at LSC slightly more than one year), the task force could not have obtained a comprehensive understanding of the past limitations and restrictions on fiscal staff work *from the staff perspective* that have persisted into the current time. Finally, we note that some of the information sought by the interviewers was unclear as to its probative value.<sup>2</sup>

### ***Office of Information Management Independence***

The report does not discuss the important reasons why the OIM was made into a separate unit by LSC, which is a critical consideration before potentially undoing its independence. In the past the data functions now conducted by OIM could be overly influenced by a subset of management to serve their viewpoint or perspective. As a result, a unit and unit head were created so as to allow an independent voice with access to the LSC president. OIM can routinely serve the information needs and requests of OCE, OPP, Government Relations and Public Affairs (“GRPA”), the Office of Inspector General (“OIG”) and the Executive Office. The existence of a separate unit has been critical to this work. Again, it is unclear what evidence supports the inclusion of OIM, without review and analysis of its work, role and history, into a new proposed division as set forth by the Task Force Report.

### **B. Board’s Responsibility for Fiscal Oversight**

We have no specific comments on the specifics regarding Items 1, 2, and 3, and their subsections. However, we wish to strongly recommend that the current LSC Board be the first to establish another essential line of formal communication not mentioned in the report. Specifically, the LSC Board should establish some type of formal liaison, committee, or other mechanism by which all LSC staff are encouraged to directly communicate, in complete safety and confidence, and present evidence directly to, the LSC Board regarding potentially serious issues occurring at LSC. Such issues should include situations such as:

- When LSC upper management has withheld or misrepresented crucial information necessary for the board to properly exercise its responsibilities; or
- When the OIG has failed, or is refusing to investigate an internal LSC issue for which there is sufficient evidence of fraud, waste and/or abuse.

It should be noted that both of the above situations have occurred at LSC in the past, and that at that time no staff felt safe in approaching the LSC Board. Further, there have been

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<sup>1</sup> Also, it should be noted that the Task Force Report contains an error in the characterization of one of the non-management staff interviewed. Willie Abrams, Esq. is an attorney and therefore is a Program Counsel, not a Program Analyst.

<sup>2</sup> For example, one staff member was asked to opine whether a certain class of their fellow workers were good—or not—at exercising their job functions. An individual staff member is not in a position of either sufficient awareness or authority to properly answer such a broad question.

prior executive-office policies restricting direct staff access to the board. In some situations, actions or statements by members of a prior LSC Board indicated support for the stated “no contact” rule.

LSC has no comprehensive whistle-blowing policy. A formal board mechanism is also necessary, as traditionally LSC Boards have come to rely on a small number of upper management staff both in the OIG and LSC. As this occurs, the appearance to staff becomes that the board and management are very close, and that staff (including sometimes mid-level management) are neither welcome nor safe to communicate with or bring information to the attention of the LSC Board. This has had the result, on occasion, of the LSC Board learning of issues months or years after they had begun and after they had continued for long periods.

As an aside, the ability to be able to speak up safely against perceived wrong was another significant desired change that led many staff to organize a union. With a union structure there are several mechanisms for staff to have LSC Board or other contacts, so as to ensure that future wrongdoing is stopped in a timely manner. However, the unionization only partially solved this issue and only for the unionized staff. To this date there is still no *confidential individual* staff communication mechanism with the LSC Board. Such a mechanism would establish a highly positive and accountable “tone at the top” from the LSC Board. It would be available to both unionized and non-unionized staff, and all members of management. Ultimately it would best serve the LSC Board’s exercise of its fiduciary responsibilities, by allowing multiple avenues for the provision of information, when warranted.

### **C. Management and OIG Relationship**

**Item 1:** The following observation is not specific to the subsections (a) through (c) of Item 1.

As a general observation, we strongly support having board awareness of, and guidance for, the sharing of information regarding grantees, by the OIG with the LSC oversight management and staff. The OIG and LSC do not have in place clear document and information sharing systems to ensure timely disclosure of pertinent information. However, should it be concluded that the current level of information sharing by the OIG is due to the nature and necessary independence of the OIG’s work, it would still be useful for the LSC Board to ensure the creation of written policies and practices so as to provide future clarity for LSC staff.

There have been several instances in which both OCE/OPP and the OIG have had to conduct, by design, separate but overlapping investigations of the same recipient in the same general time period. This alone is not a problem, and is sometimes necessary. However, when this has occurred, information collected by the OIG is, in general, not shared with LSC staff. By contrast, as is appropriate, all information collected by LSC may be requested by the OIG. In the past, the secrecy of pending OIG reviews, audits or

investigations has sometimes resulted in duplicative, delayed or disrupted reviews by LSC along with increased review costs.

**Item 2:** Putting aside the recommendation regarding the creation of a new division, the union strongly supports increased sharing of best practices and common challenges between the OIG and the LSC oversight staff (OIM, OPP, and OCE). Under the current Inspector General this has occurred on occasion, and when this has been done it has served both LSC and its staff well. Further, unlike for LSC oversight staff, the OIG has had a strong emphasis on ongoing and intensive support and training of its staff.

### **III. Grantee Fiscal Oversight Process**

Our comments to this section will not address specific items found in parts A, B, and C. However, there are specific comments regarding section D addressing conflicts of interest.

Overall, the complex and varied items found in this section and its parts include many strong ideas and recommendations that are likely to improve LSC oversight functions. It is noted that several of these will require substantial work and expense, such as the recommendation found at III(B)(3) that LSC increase the scope and frequency of grantee capability assessments.

To the extent that the recommendations of section III reference a newly created Office of Grantee Assessment (“OGA”) division, we note that the recommendations should remain valid even if this new structure is not adopted. The current OCE, OIM and OPP divisions should simply assume the coordination and information sharing functions attributed to OGA.

#### ***Conflicts of Interest***

We strongly support enhancement, clarification and enforcement of a strong conflicts of interest policy as part of an appropriate “tone at the top” (as also discussed in the Task Force Report). However, we note that the current recommendation appears inadequate. The conflicts of interest policy should be expanded to include all LSC staff, all management and all LSC Board members. In the past, some LSC staff members have witnessed or been subjected to direct interference by a member of management or by an LSC board member regarding a person, program or economic interest with which the manager or board member had a clear and direct conflict. Some of these activities also have been documented in formal oversight reports regarding LSC.

We cannot state strongly enough that any conflicts of interest policy, in order to be fully effective, must include all persons serving in formal roles with LSC. This is also consistent with Sarbanes-Oxley principles.

With the above said, it is necessary to fully clarify that to our full knowledge, the current LSC Board generally, and each of its members individually, have operated only in a fully

professional manner and with high ethical standards. Further, neither the current board nor any of its members have been involved in the activities or incidents discussed above. Similarly, current management has not been involved in the type of incidents discussed.

#### **IV. Knowledge, Skills and Experience**

This section again assumes the adoption of a new OGA unit. Our response to that suggestion has been discussed fully, *supra*.

We wish to first address Parts A, C and D of this section, and then provide comments to Part B that addresses LSC employees.

Regarding IV(A)(1), we strongly support staggered terms for LSC Board members for the reasons stated. We also believe that this would allow for enhanced knowledge retention and better governance during transitions.

Regarding IV(C), we note that LSC has had, for several years, diverse training programs for new grantees, new executive directors, and/or for programs at risk. Further, although much of the subject matter of those trainings addressed compliance-related or other non-fiscal issues, some of these training modules also covered numerous financial and internal control issues. One training module for new executive directors specifically reviewed and instructed on proper fiscal internal controls in a targeted on-site review. The reception to, and success of, such recipient training indicates that strong training *provided directly by LSC* can be a highly effective and cost-effective oversight tool. With this awareness, we strongly support the Task Force Report recommendation IV(c)(3) regarding the addition of training regarding the effective stewardship of funding. We also recommend that this training be housed in LSC and utilize LSC staff.

We have no specific comments on the two recommendations regarding IV(D) regarding the Independent Public Accountants (IPA). However we have a general comment regarding past effectiveness of the IPA system. The report makes no mention of the insufficiency of the LSC IPA system, over many years, to identify many significant compliance patterns or violations with required regulatory requirements and restrictions. The independent IPA system has also failed to identify significant fiscal issues. In the past, comparisons were conducted of then-recent OCE reports to IPA reports of the same grantee in the same time period. Repeatedly, the OCE reports identified numerous compliance issues and corresponding required corrective actions that were not identified by the IPA. In several instances, the issues identified only by LSC were very significant.

The identified weakness in the IPA system was reported to a prior LSC Board; as a result, the OIG determined to increase its oversight of the IPA system and of the individual IPA contractors. It is recommended that the LSC Board actively continue the assessment of the IPA oversight process to ensure that the IPA work product is highly reliable.

***Part B – LSC Employees***

This section contains several items that will involve a need for formal union-management engagement if these recommendations are adopted. Some recommendations could affect certain staff's terms and conditions of employment, and the effects of some proposed changes are appropriate topics for union engagement. As this report is currently in the public comment period, we believe it prudent to withhold any specific comments on this section and its parts, until such time that the LSC Board and/or management make a final decision regarding these items.

With the above said, we do wish to provide the following general information regarding staff training.

We note that LSC's budget allots money for staff training that has been, in the experience of many staff, arbitrarily and inconsistently expended, and often not towards staff training. Most LSC staff members have been provided very little professional training designed specifically for LSC's oversight functions. Many have received no LSC-paid training for many years.<sup>3</sup> Often we have been told that LSC lacks sufficient funds. However, that is rarely true as LSC often carries a significant surplus, as it does today.

From a union perspective, the lack of training is a matter of management and board priorities. To date, it has never been an overall LSC Board or management priority to provide sufficient funding for appropriate, comprehensive and necessary staff training. This has specifically affected staff's ability to be widely trained on internal controls (as noted in the report) and on other critical areas surrounding oversight and other work.

We strongly support a policy and practice to have all staff receive ongoing and necessary training for their job functions. Today, as in the past, both the resources and ability to ensure proper training of staff are available; and the ability to remedy this issue rests fully with the LSC Board, through its funding priorities and instructions to, and follow-up with management. Simply making money available in the budget has proven ineffective from past experience. The relationship of staff training to LSC's ability to best discharge its duties is an area that warrants significant board oversight.

Sincerely,



David de la Tour, Esq.  
Board President  
IFPTE Local 135

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<sup>3</sup> It is worth noting that some staff members have paid for their own professional training or education. This includes administrative and oversight staff. Also, such training may not be in LSC records, as staff members have also used their personal leave for the training days.



National Legal Aid & Defender Association

October 5, 2011      EQUAL JUSTICE.  
OF THE PEOPLE.  
FOR THE PEOPLE.

Rebecca Weir  
Office of Legal Affairs  
Legal Services Corporation  
3333 K Street, NW  
Washington, DC 20007

Dear Rebecca:

On behalf of the National Legal Aid and Defender Association (NLADA), I want to thank LSC for the opportunity to comment on the report of the Fiscal Oversight Task Force, submitted to the LSC Board of Directors on July 28, 2011. These comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Resources Committee and Restrictions and Regulations Committee.

NLADA appreciates the significant efforts made by the Task Force to assess the current state of LSC's fiscal oversight efforts and to develop thoughtful recommendations to address what needs to be done to ensure that LSC meets its responsibilities as a grant-making entity responsible for distributing taxpayer dollars devoted to supporting those organizations that provide civil legal assistance to eligible low-income clients. NLADA subscribes to the basic recommendations of the Task Force report and supports the idea that LSC should take steps to enhance fiscal oversight of its grantees, while continuing its emphasis on assessing the quality of services that they provide to their low-income clients.

Nevertheless, we do have several concerns regarding the implementation of the Task Force recommendations, and we want to make sure that LSC takes these concerns into account as it considers whether to adopt the recommendations and how to implement those that it does adopt.

1. Staffing: The Report recommends that LSC staff increase its oversight of fiscal risk and of fiscal policies, procedures and capacity of grantees both prior to awarding grants and post grant awards. It will require considerable training and commitment by current LSC staff to learn new skills and changes in current LSC staff responsibilities to achieve this objective. Most LSC staff members were hired based on their background, skills and interests. Many came to LSC either because of a background in legal aid programs and a desire to improve program performance or with a clear expectation that they would be responsible for program compliance and enforcement. Very few current LSC staff members have expertise and interest in fiscal oversight. The training required and the changes in staff responsibilities should not be

underestimated. It may very well require different and perhaps new staff to really accomplish this objective.

2. Program Visits: The Office of Program Performance and the Office of Compliance and Enforcement have attempted a number of coordinated joint program visits without great success. Programs that were subjected to these joint visits stated that they were really like experiencing two concurrent but different visits at the same time, requiring double the preparation and resulting in twice the disruption. While it theoretically makes a great deal of sense to integrate program visits, adding a significant fiscal oversight aspect to existing program quality and compliance visits has the potential to become more like three separate visits happening at the same time. While each of the three pieces will focus on different aspects of the program's operations and will likely be addressed by different program staff, a triple focus visit will be terribly disruptive to program operations and may well be overwhelming to the program's executive director who will be expected to respond to inquiries relating to all three aspects of the visit. In order to make a combined visit efficient and limit disruption of program operations, LSC must take the time to plan to ensure that the visits are truly integrated into one simplified visit that focuses on the essential concerns regarding program operations. Furthermore the report suggests that LSC will do a risk assessment to determine the frequency of program visits, which may in some situations be "back-to-back," and could be as often as once a year. Unless there are serious fiscal issues identified, such frequent visits could be major disruptions for most programs and should be reserved for only the most egregious circumstances.

3. Applications for Funding (RFP): The Report recommends greater attention in the RFP process (Pre-Award) to fiscal management and an applicant's capacity to ensure fiscal accountability. We agree that this will be an improvement in the grant award process. However, we want to note that this will require significant revisions to the current grant application form which must be done carefully, with attention to additional burdens that any changes will make on grant applicants, both those who are applying for the first time as well as on current grantees. The revised application should be available very early in the funding process, and LSC should commit to explaining and working with current and prospective grantee programs in completing it, at least in the first several grant cycles. Adding fiscal management questions to the grant application is likely to be a major change and will take additional time and work for applicants to complete. It will also require additional space in the response to the application, which is already quite limited.

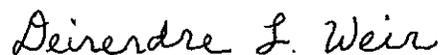
4. Training: The Report recommends that LSC engage in significant grantee training on issues of fiscal accountability and oversight. This will take considerable thought and effort by LSC staff most of whom are not currently expert in the field of fiscal oversight. LSC programs generally do not fail to comply with LSC rules, regulations and requirements intentionally, but have done so in the past because program staff did not fully understand LSC's expectations or requirements. Training, including periodic webinars by LSC, for program directors and senior management on program quality and regulatory compliance would have helped reduce these problems dramatically. Similarly, substantial training on fiscal accountability and oversight will

be essential if LSC expects its grantees to fully comply with fiscal controls and requirements. Without such training it is unrealistic for current program staff to learn, much less master, the intricacies of fiscal analysis and oversight requirements. If new program fiscal staff needs to be hired, we are concerned that the resources for these new staff members will come at the expense of basic field operations. In addition, it is essential that LSC have sufficient staff with the appropriate skills and experience to provide training on fiscal accountability and oversight. This may require LSC to hire new staff if those who are used to focusing on quality and compliance do not have the capacity to shift to a fiscal training mode.

5. Conflicts of Interest: The Report recommends that LSC identify, monitor and disclose conflicts of interest related to staff and grantees. Nowhere in the report does it really describe what it means by “conflicts of interest,” nor does it provide examples of such potential conflicts of interest. If the report is suggesting that someone from a current grantee who is hired by LSC should not have direct oversight or programmatic responsibilities related to that grantee for at least a reasonable period of years, as is required by some federal agencies, that rule may be quite appropriate. On the other hand, if the recommendation is intended to exclude applicants for employment with LSC who have had actual experience in the delivery of legal services, it will do a grave disservice to both LSC and its grantee programs. If anything, LSC needs to hire additional staff with senior program management experience. It is not clear how far, and exactly in what direction, this recommendation goes.

I hope that these thoughts are helpful to the LSC board and staff as it considers which of the Fiscal Oversight Task Force Report recommendations to adopt and begins its implementation of those recommendations that it does adopt. If you have any questions regarding these comments, please feel free to contact Linda Perle at 202-906-8002 or [lperle@clasp.org](mailto:lperle@clasp.org).

Yours truly,



Deirdre L. Weir  
Chair, Civil Policy Group

**TO:** LSC Board of Directors  
c/o Rebecca Weir

**FROM:** Janet LaBella  
Director, Office of Program Performance (OPP)

**DATE:** October 5, 2011

**SUBJECT:** Comments to Fiscal Oversight Task Force Report and Recommendations

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**Introduction.** These Comments to the Fiscal Oversight Task Force Report to the Board of Directors of the Legal Services Corporation are primarily focused on the findings and recommendations that most directly affect OPP. While they take into consideration the work of OPP and the impact of the Report’s recommendations on OPP, they are not intended to be submitted on behalf of OPP or necessarily reflect the views of the staff of OPP.

**Limited purpose of the Task Force.** As stated in the Report, the purpose of the Task Force was: “to undertake a review of and make recommendations to the Board regarding LSC’s fiscal oversight responsibilities and how the Corporation is conducting fiscal oversight of its grantees.” (Report, p. 1). The composition of the Task Force was consistent with its fiscal oversight focus.

OPP’s mission is centered on promoting high quality legal services by LSC grantees and effective and efficient delivery systems. While OPP conducts a limited review of the financial administration of LSC grantees as part of the competition process and program quality oversight activities, it does not conduct a full fiscal review nor does it examine fiscal internal controls. That function, as noted in the Report, is executed by the Office of Compliance and Enforcement (OCE) and the Office of the Inspector General (OIG). The Report further notes that “LSC’s processes related to program quality were *outside of the scope of the Task Force’s purview and, as such, are discussed in this report only to the extent needed to provide context for comments regarding LSC’s fiscal oversight functions.*” (Report, p. 1, emphasis added).

This background is essential to provide context to the Task Force’s findings and recommendations. As demonstrated in footnote 20 of the Report, the Report’s recommendations often far surpassed the Task Force’s limited purpose and encompassed how LSC should assess program quality, even though a review of OPP’s activities and program quality oversight were not a focus of the Task Force’s review.

**LSC Strategic Planning.** It is important to note that the LSC board and management are embarking on a strategic planning process to guide the Corporation for the next five year period. The recommendations in this Report should be viewed in the context of that strategic planning, particularly those that recommend a significant change in organizational structure or focus. Those recommendations should be considered as part of the strategic planning process and implementation should be deferred until that process is completed and a thorough review of the organizational structure of LSC is conducted.

## **Review of Findings and Recommendations.**

**I. Organizational Identity and Mission.** The Task Force’s recommendation that LSC “clarify and affirm the Corporation’s responsibilities related to fiscal oversight” makes sense. A high level of coordination between grantee program quality oversight activities and compliance and fiscal oversight is essential in order for LSC to effectively and efficiently fulfill its mission to provide funding for and oversight of the provision of civil legal services to low income persons.

**II. Communication and Coordination the Board, Management and OIG.** The Task Force recommends that LSC build on its progress in strengthening the focus on oversight and compliance and clarify roles of each of the parties (the Board, LSC Management, OIG and the IPA’s) with regard to fiscal oversight roles. While clarification of the roles of each of the interested parties is a worthwhile objective and will likely lead to more efficient fiscal and program quality oversight, some of the individual recommendations go beyond the scope of the Task Force’s charge and focus of review.

Clarification of roles and better collaboration can occur without OPP, OCE (and possibly OIM) being consolidated into one office, referred to by the Task Force as the Office of Grantee Assessment (OGA). (Recommendation II.A.1.) Prior to such a massive restructuring, a full analysis of the goals and objectives of such a re-organization should be undertaken in the context of the ongoing strategic planning process. As noted in the Report, LSC experiences frequent transitions of leadership and management as a new board is appointed with each United States presidential administration. In the past, the functions performed by OPP and OCE were combined and all reports are that the combined office was not effective in executing compliance and fiscal oversight responsibilities. Recently as two separate offices, OCE and OPP have been managed by a Vice President for Programs and Compliance. That position, currently vacant, provides the structure for coordination and collaboration between the distinct functions of those offices.

The restructuring that is proposed is not necessary to accomplish more efficient and effective program oversight and the laudable goals and objectives of the Task Force. A Vice President position should be filled to oversee OPP and OCE (and OIM). While fiscal oversight and experience in internal controls would be an asset for the incumbent of that position, legal aid field experience is equally important and should not be ignored. In addition, while increased fiscal oversight should be effectuated, it should be done in a balanced manner and not at the expense of program quality.

Recommendation II.A.3. speaks to creating multi-disciplinary oversight teams. Currently, OPP is organized into regional teams, with individual program assignments to program counsel, who are responsible for competition reviews, funding recommendations and program quality oversight. Having OCE compliance and fiscal staff either assigned to similar regional teams or assigned as point persons

for individual programs would likely enhance the communication and collaboration between OPP and OCE. The consolidation of OPP and OCE is not necessary for there to be greater cooperation and collaboration between the two offices. OCE and OPP participate in a number of committees such as Intake, PAI and Grant Assurances. Participation by both offices in other committees should be encouraged. Targeted “joint visits” would benefit both grantees and LSC, however, joint visits should not replace separate OCE CSR/CMS and OPP PQVs. They are most effectively employed when there is an issue of interest to both OCE and OPP or where the risk assessment analysis points to both compliance and program quality visits. It would be beneficial for fiscal oversight teams to go on some OPP PQVs when fiscal issues are apparent.

**III. Grantee Fiscal Oversight Process.** The Task Force recommends that an LSC risk assessment process that includes the OIG and identifies financial risks be implemented. (III.A.1.) In 2008-2009 LSC engaged in developing a risk management assessment that is ripe for review. This review could be part of the strategic planning process. Both OPP and OCE currently employ a risk assessment process to determine which grantees will be visited in the upcoming year. It would be productive to review the factors considered in the risk assessment processes and for the offices to collaborate more fully in the assessment of the factors. It is important to note that many of the factors considered by OPP do not pertain to financial risks, but rather to programmatic risks. A renewed focus on fiscal risks should not be undertaken at the expense of reviewing program quality and provision of effective legal services.

In Recommendation III.A.5. the Task Force calls for consolidation of the “process for tracking recommendations made to grantees and their plans for corrective action.” LSC recently implemented the “Post PQV RFP” through which grantees report on the status of implementing recommendations from Program Quality Visit reports. This process provides a mechanism for timely follow up of such recommendations and is incorporated into LSC Grants. LSC should be careful, however, not to turn follow up of OPP program quality recommendations into required corrective actions. Follow up of OCE Corrective Actions could be accomplished by integrating a supplement to the competition process, similar to the PQV follow up tool.

The Task Force recommends that the scope of fiscal reviews be expanded prior to the award of grants. (III.B.1.) The RFP would benefit from a greater focus on fiscal capacity. Fiscal review at the point of competition would be conducted most efficiently by the fiscal staff, who are trained and have expertise in this field. Fiscal staff should develop additional inquiries and document requests to be incorporated into the RFP that would enable a more robust review. While it may be beneficial to increase the number of capability assessments prior to awarding grants (III.B.3.), such assessments are currently performed in multi-applicant competitions, for new applicants and when a sole current grantee/applicant has significant performance issues. This capability assessment process would be enhanced by expanding the

scope of the assessments to include a focus on fiscal capacity and internal controls. Trained fiscal staff should take the lead in fiscal capacity assessments.

In Recommendation III.B.5., the Task Force calls for greater flexibility in visit planning and budgeting. Currently the duration and team composition and size for on-site visits conducted by OPP vary depending on the size and the complexity of the grantee visited and the risk assessment scope. Even more flexibility in visit preparation and planning, including flexibility in budgeting, would further enhance on-site assessments and oversight.

Increasing the use of data analytics would improve not only oversight, but also knowledge of the grantees' work and overall management. (Recommendation III.B.6.) LSC is currently engaged in a review of its grantee data analysis. A greater emphasis on systematic comparisons of data would improve both the risk assessment process and program oversight. In order for this recommendation to be effectively implemented, training in the use of statistics and analytics needs to be provided.

**IV. Knowledge, Skills and Experience.** Recommendation IV is heavily focused on training for fiscal oversight roles. Identification of and provision for trainings for staff development is currently an organizational goal. While some cross training would enhance collaboration and productivity, it would not be productive to attempt to train all professional staff to acquire the same or similar skills. Maintaining separate functions that recognize the multi-faceted aspects of effective grantee oversight—fiscal, compliance and program quality—would be most efficient. Each aspect of program oversight requires different and specialized skill sets. This should be recognized while promoting increased collaboration and cross training between the offices.

Communication of expectations and responsibilities to grantees should be enhanced. (IV.C.1.) However, this should not be limited to fiscal best practices but be inclusive of best practices that affect quality, effectiveness and efficiencies of legal work as well.