

BAY AREA LEGAL AID
ADVOCACY MANUAL

February 2011



BAY AREA LEGAL AID

WORKING TOGETHER FOR JUSTICE

Advocacy Manual

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The Mission of Bay Area Legal Aid

Our mission is to provide high quality legal assistance to eligible Bay Area residents, regardless of where they live in the region, the language in which they communicate, or their disability. We help eligible clients get themselves out of poverty and/or foster safety and stability in their lives. All of our efforts must be consistent with this vision.

I. Organizing Substantive Advocacy

BayLegal helps clients with legal problems arising within or related to one or more of the substantive legal priorities identified as most pressing for the communities we serve. Because of high demand, we operate by triage, providing everyone seeking help with at least an appropriate referral, but reserving actual client representation to those cases where a successful resolution will help the client get herself out of poverty or foster safety and stability. We provide assistance only if we have sufficient resources and expertise to ensure competent advocacy.

A. Important Client Needs Drive BayLegal's Substantive Priorities¹

BayLegal's current priorities are:

- **Cases and Matters Preventing and/or Stopping Domestic and Sexual Violence**
- **Cases and Matters Seeking or Preserving Access to Adequate and Affordable Housing and Shelter**
- **Cases and Matters Seeking or Preserving Access to Sufficient Food and Income**
- **Cases and Matters Involving Access to Adequate Health Care**
- **Where resources are available, Cases and Matters Involving Public and Special Education, and Consumer Law**

¹ The Legal Services Corporation ("LSC"), BayLegal's largest funding source, requires our advocates to work only on cases and matters identified as priorities by the board of directors pursuant to the priority setting procedures set forth in LSC regulations. 45 CFR § 1620.6. The LSC regulations are available at www.lsc.gov under the "Laws & Regulations" tab. See also, David Udel, et al., *Guidelines for Vigorous Advocacy by Programs Subject to the legal Services Corporation Restrictions*, published by the Brennan Center for Justice and posted on the BayLegal intranet under: [AdvocacyPolicies&Manuals&Forms](#) → [LitigationAndAdvocacyFormsAndManuals](#) → AdvocacyManuals

B. Client Representation in Individual Cases should aim for positive and lasting results for the Client, thereby furthering BayLegal's Mission

All BayLegal advocacy, whether in addressing systemic issues or working on a case for an individual client, must at bottom contribute to helping clients get themselves out of poverty or foster client safety and stability. Our case acceptance guidelines have been adopted with this in mind, reserving full representation of clients to those cases where great need for representation is coupled with a reasonable potential for obtaining lasting benefits for the client.

In each category of service case where we consider representing the client, BayLegal has identified one or more discrete benefits ("measurable outcomes") which, if achieved, would indicate a high degree of success in meeting individual client goals.² The probability of actually securing these objectives – e.g., the merits of the case – is a key factor in deciding whether to offer representation.

Achieving the targeted objective or outcome also furthers the program's mission. Winning an eviction defense case, for example, establishes the client's right to continue living in an affordable unit, and is related to BayLegal's mission because it affords the client stability. Similarly, securing the supportive services needed by the client to benefit from a public benefits welfare-to-work program helps the client escape poverty.

Because BayLegal also aims to empower clients, an objective in every case is that the client gain sufficient knowledge (and confidence) to address a similar or related legal problem in the future.

C. Annual Work Plans should be devised to Effectively and Efficiently Conduct Advocacy around BayLegal's Substantive Priorities

To carry out our mission, each regional office, substantive unit, or project should meet at least annually to identify the most important issues on which its advocates will work in the coming year. The resulting work plan prioritizes the issues and advocacy efforts, and identifies the goals the office hopes to achieve.

Such advocacy should follow the **SMART** principle:

² Many of the "measurable outcomes" in the most common of BayLegal's service cases are listed (in a drop down menu) on the "main benefits" tab of each client's case management system file. A table showing the relationship between the case acceptance guidelines and main benefits entitled "Objectives in Selected BayLegal Service Cases" is found on the intranet at: [AdvocacyPolicies&Manuals&Forms](#) → [LitigationAndAdvocacyFormsAndManuals](#) → [MiscPoliciesAndGuidance](#) → [ExtendedCaseObjectivesJant2011.doc](#)

- The goals must be **Specific**
- **Measurable outcomes** for gauging progress must be identified
- The goals must be **Achievable**
- Identified advocate(s) must be **Responsible** for the advocacy effort
- A finite **Timetable** should be outlined for meeting the goals

All advocacy undertaken by the office or unit – including impact litigation, policy advocacy, community education or outreach, or the operation of clinics – should be in accord with the general outlines of the work plan. Individual advocate professional development plans (developed as part of the staff member’s annual self-evaluation) should also be coordinated with unit, project or office priorities for the relevant period.

In the following year, a balance sheet should be drawn comparing the issues, projects and goals set forth in the previous year’s work plan with the actual accomplishments during that year. This is taken into account in developing the work plan for the following year.

D. Advocacy should be Planned and Organized in “Projects”

Although lying within the substantive priorities adopted by the program, much of the work done by BayLegal advocates is not necessarily on behalf of specific clients but nevertheless addresses specific client needs. This non-case advocacy often leads to lasting results for the client community. To efficiently reach target objectives requires planning and organization, including creation of discrete “projects.”³

Any prolonged activity around related objectives should be organized as a formal “project.” Using the “SMART” principle, each project must have articulated and achievable objectives, quantifiable outcome measures to indicate progress, a projected time line for achieving the goals, and an identified advocate acting as the project’s leader. Larger and longstanding projects with significant funding may warrant appointment of a project coordinator who has more formal supervisory duties and receives a stipend.

A project need not have more than one assigned advocate, or designated funding, or be projected to last for an extended period. The most important point is to be able to

³ Instructions on how to create a project file in the case management system are found on the intranet at: [AdvocacyPolicies&Manuals&Forms](#) → [LitigationAndAdvocacyFormsAndManuals](#) → [CaseAndProjectPlanningTemplates](#) → CreatingProjectsInPrime.doc

systematically identify, and quantify the effectiveness, of the good work done throughout Bay Area Legal Aid.

The project must be approved by the Managing Attorney or other appropriate supervisor, and ideally will be the product of an office, unit, or regional discussion, and identified in the unit or office annual plan. A project file will be created in BayLegal's case management system, describing the goals, measurable outcomes, and staff assigned to the project. All cases associated with the project, and all time expended (whether or not on actual cases) should be linked to the project file. This will help the office or unit assess the effectiveness of the project when it has its annual meeting or retreat to assess past advocacy and plan for the following year, as well as assist BayLegal's Development Department in framing realistic project goals for the future.

THE CASE MANAGEMENT SYSTEM

The case management program we use is John Kemp's "Prime", an upgraded version of his "Clients for Windows." A manual covering the mechanics of this application, including how to open and close cases and projects, timekeeping, recording referrals and other non-case services, and explaining the codes we use, will be posted on the BayLegal Intranet.

E. Standards of Advocacy

All advocacy must be carried out in accord with the American Bar Association's *Standards for the Provision of Civil Legal Aid* (2006) and the Legal Services Corporation's *Performance Criteria* (2007). BayLegal has developed standards of practice which generally parallel the ABA and LSC guidelines. This manual also borrows heavily from these documents.

II. Assisting and Representing Clients

Bay Area Legal Aid's primary job is to provide legal services to low-income Bay Area clients and their communities in an effective and efficient manner. To receive assistance, a Bay Area resident must have a case within one of the program's substantive priorities, not raise a potential conflict of interest, and be financially or otherwise "eligible" for our services. Under our case acceptance guidelines, we can consider representation in cases with the potential for a lasting, positive impact for the client. In all cases, advocates provide legal services with a high degree of competence, professionalism and respect for the client.

A. Beginning the Intake Process

Most people seeking assistance will first speak with an advocate at the Legal Advice Line (LAL), or an advocate or receptionist at a regional office. If the client contacts us during non-intake hours, and the case is not an emergency (**see page 15, below**), s/he is told to call or come back during the regularly scheduled time for such intakes. This first contact does not create an attorney-client relationship.

INTAKE WITH FRIENDS OR RELATIVES OF THE PERSON NEEDING HELP

On intake, the advocate should only discuss a case with a caller seeking assistance for him or herself or for the caller's minor child, or with the legal representative of a person needing assistance. In an emergency, the advocate can speak to a relative or representative of an incapacitated person, but only to determine potential eligibility and to decide whether the case is within case acceptance guidelines. Advise the caller that actual legal assistance can be provided only after communicating the person needing assistance or her or his legal representative.

The staff member will first do a broad screening for the type of legal problem presented, referring callers with cases outside our priorities to appropriate agencies such as the Public Defender or a bar association lawyer referral service. The staff member will then ask for the caller's county of residence, again referring callers from out of our service area to their local legal services program, bar association referral service, or Public Defender, as appropriate. If the caller lives in one of the counties we serve, we then check for a conflict of interest. **(See pages 7-12, below.)**

This protocol should screen out most ineligible callers before BayLegal has obtained confidential information which could raise a potential conflict should a future caller include someone with a claim adverse to the first caller.

If the caller has a legal problem falling within the program's priorities, lives within our service area, and does not have a potential conflict, the advocate determines whether the caller is financially eligible and is a US Citizen or eligible non-citizen. **(See pages 23-26, below.)** If so, and at the direction of the supervising attorney, the caller is given legal information or counsel if the problem can be resolved at that level. If not, the caller will either be referred elsewhere for possible assistance, or considered for an appointment with an advocate in the appropriate BayLegal regional office.

B. Cultural and Linguistic Competence

Practicing in one of the most diverse regions in the country, Bay Area Legal Aid recognizes that disability, language, or cultural barriers should not hinder access to our services. The program hires a diverse and multi-lingual staff to better serve clients. We also encourage advocates to learn about the cultural nuances of the major ethnic groups served by their regional office, in particular, how these nuances can affect communication with an advocate. Advocates should also be aware of the subtle ways

that mass culture can shape one's perception of minority groups, and must guard against preconceptions and stereotypes which can color their view of the legal and factual merits of a case.

Communication with a client, including clients who are deaf, should be in the language in which the client is most comfortable.

- Identify the client's primary language at the outset. Use "I speak ..." charts or similar tools which the client can use to indicate their language preference. If the client is not fluent in spoken English, her/his case management file should be marked so that the need for an interpreter is obvious.
- Where it appears necessary, or if the client requests it and the request does not appear unfounded, use an interpreter. The client will not be charged for these services. Avoid using the client's relative or friend absent an alternative, e.g., the client refuses our offer of staff or professional interpretation. Document this in the case file.
- If an interpreter is needed, seek assistance from, in this order: (a) bi-lingual staff members, (b) contracted professional in-person or telephone-based interpreters (e.g., Language Line, Ethnic Bridges or Language 411), (c) community based organizations or referring agency staff who agree to maintain confidentiality and do not have a conflict of interest with the client. Coordinate client appointments beforehand to coincide with the availability of an interpreter.
- Determine whether the client is fluent in written English. Translations must be made of any documents or pleadings requiring the client's signature. If a written translation is made of a client-signed document which is to be filed with a court or agency, include an interpreter's certification signed by the interpreter.
- If possible, clients should be assigned to an advocate who speaks the client's primary language.

C. Guarding Confidential Client Information

Each advocate is required "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." Bus. & Prof. Code § 6068(e). To guard against inappropriate disclosures:

- Each client should be interviewed alone, away from friends, relatives or witnesses. This also preserves the attorney-client privilege

- Office doors should be closed during client interviews
- Client files or documents should not be left in public or open areas, nor cases discussed casually in the office hallway or public areas
- Confidential information should only be disclosed with the informed consent of the client, and then only if necessary to effectively represent the client
- Drafts of documents containing confidential information should be shredded before disposal

D. Avoiding Conflicts of Interest

A case management file is opened for every eligible client who receives at least counsel and advice. To make the checking of conflicts as thorough as possible, the following people or entities must be added to the conflicts database:

- All Adverse Parties (including individuals, business entities, and government agencies)⁴
- A Non-Adverse Spouse of the Client (in the future, the spouse could seek assistance in an unrelated case against our current client)
- A non-party intimately entwined with the case

In our practice, the potential for a conflict of interest most often arises when we are approached by an individual who is or was the adversary of a current or former client, or the spouse of a current or former client.⁵ Even if the issues presented are apparently unrelated, the potential exists that at some point, the interests of each client – including the interest in maintaining confidentiality – could be compromised.

This can occur, for example, where confidential information elicited from one client becomes relevant in another client's case. Use of the information to assist the second client is, on the one hand, prohibited by the duty of confidentiality owed to the first client; and on the other hand, is compelled by the advocate's duty of zealous representation owed to the second client.

⁴ Although we will probably never represent business entities or government agencies, these opponents should be added to the conflicts database so that we can track trends, including the frequent appearance of bad actors.

⁵ A potential conflict also exists if an advocate has a personal interest in the case or a relationship with one of the parties or key witnesses. This should be disclosed to the Managing Attorney when discovered.

To avoid such conflicts:

1. Identify the Potential for a Conflict at the Outset of Intake

The potential for conflict must be identified early on while screening the client. In creating a client file in the case management system, the name of the potential client, and his or her adverse party, is checked against the list of past and current clients, as well as the list of adverse parties in past or current cases.

MAKING IT EASIER TO CHECK FUTURE CONFLICTS

Because so many clients have the same or similar name, when entering a name into the conflicts database, try to include (in the conflicts database) identifying information such as the Social Security Number and/or date of birth of the party, the non-adverse spouse, or other person added to the database.

A conflict may exist where a match is found between the full name of the person now calling and (a) an adverse party in an open case, or (b) an adverse party in a closed case, or (c) a person previously entered into the conflicts database as a then non-adverse spouse. If the names match, the advocate must determine that these are NOT the same person before providing any assistance beyond a referral to the local bar association or pro bono program.

However, the fact that the caller is the same person listed in the conflicts database does not mean that a conflict actually exists. The following guidelines help avoid potential conflicts:

2. No Assistance will be Provided to Both Sides in the Same or Related Case

A BayLegal advocate can assist only one side⁶ in a case involving the same set of facts or related series of facts. The adverse party, or a caller whose interests in the case are potentially adverse to a current client must be referred elsewhere.

3. No Assistance will be Provided in an Unrelated Matter to the Adverse Party in an Active Case

Similarly, an advocate cannot assist an individual who is opposing a current BayLegal client in another unrelated case.⁷ This is true even where a different BayLegal

⁶ This does not preclude us from representing co-parties on the same side, keeping in mind any potential for a conflict between the particular interests of each co-party.

advocate has been consulted in the unrelated case. The attorney-client relationship has been created between *BayLegal* and the individual client, and not between the client and individual advocate who counsels the client.

4. No Assistance will be Provided in an Unrelated Matter to the Former Adverse Party in a Closed Case if Confidential Information Obtained From the Former Client is Potentially Material in the New Case

The duty of loyalty owed to a client exists only during the pendency of the case, and lapses when the attorney-client relationship ends. However, the duty to maintain confidentiality continues. Thus, while BayLegal is not barred outright from representing, in a later unrelated matter, someone who previously was the adverse party in a former client's case⁸, we are barred from using, in the later case, confidential information obtained from our former client absent consent from the former client.

A potential conflict is rebuttably presumed not to exist if the presenting case and the prior case are not related (for example, the two cases have a different LSC problem code, or both are divorces [same LSC problem code] but involve different spouses) and *four years have elapsed* since BayLegal assisted the former client. Since the cases are unrelated, the passage of time makes it unlikely that confidential information from the earlier case will be material in the later case. A key purpose of this "four year" rule is to be especially solicitous to former clients who are domestic violence survivors.

Because of the practical difficulties in locating, much less obtaining consent from, our former client, and the infeasibility (given limited resources) of erecting a technical barrier against access by the advocate in the new case to information contained in the file in the earlier case, the person now contacting us will ordinarily be referred to the Bar Association or other agency. BayLegal will only consider representing the former opposing party if the new case is both unrelated and "compelling," as described below.

5. Assistance can be Provided in a Compelling Case If the Managing Attorney has Determined that No Potential Conflict Exists

A "compelling case" involves (a) the necessities of life to a significant degree, or (b) a significant risk to the health and safety of the client or her/his immediate family members, or which (c) arises because of new or unforeseen circumstances such as a

⁷ Although representation is allowed if the first client consents (see Cal. Rule of Prof. Conduct 3-310(c)(3) and *State Farm Ins. v. Federal Ins.*, 72 Cal.App.4th 1422 (1999)), our policy is to refer the caller.

⁸ Assistance to a party in a claim adverse to a former client's interest is barred only if there exists a "substantial relationship" between the subjects of the current and closed cases. *State Farm Ins.*, *supra*, 72 Cal.App.4th at 1430.

natural disaster, AND (d) immediate legal action is required to preserve a client's legal rights or position OR (e) legal representation by an alternative provider is not practically available. In an unrelated new case which would ordinarily be referred elsewhere because *the old case was closed less than four years before*, BayLegal can assist a person who was the adverse party in a now closed case if the Managing Attorney has determined that information obtained in the earlier case would be immaterial in the second case.

6. Assess Conflict Potential in Joint Representation Cases

The potential for conflict also exists when we represent several clients in the same proceeding, for example, roommates in an eviction defense action. The conflict arises, for example, when we discover that the defense of one party (such as a co-tenant in a nuisance eviction case) consists of blaming the other. Also, there could be ongoing domestic violence between the two tenants, and representing both in the eviction action can preclude assisting the victim in a later family law case. Moreover, even if the program ultimately decides not to represent someone, the fact that that person sought legal assistance and received some consultation created a duty on BayLegal's part to avoid disclosing confidential information received from a person who sought legal assistance from the program.

BayLegal's retainer agreement tries to address the possibility of conflict in joint representation cases:

"I [client] know that you [BayLegal] will be helping both [name of other client] and me in this case. You have told me that if it turns out that my interests in this case do not agree with the other person's interests, you will not be able to help either of us and will withdraw from the case."

Nevertheless, since withdrawing representation from both clients can be disastrous for both parties, the potential for a conflict should be explored before deciding to represent anyone, and the following measures taken:

- Consider at the outset representing only one party, for example the mother in a CalWORKs case involving a two parent family, or the most responsible tenant in an eviction case, or, if domestic violence is suspected, the presumed victim. Interview that person first, without committing to representation. Advise the second party that for now, s/he will be interviewed solely as a potential witness, and not for potential representation. If a review of the facts does not indicate a potential conflict, the program can consider representing both parties.

- If joint representation (or assistance to both parties) is considered, explain the potential for conflict to the clients before committing to represent anyone.
- If you lack the information to decide which party to represent, obtain each individual's agreement that the initial interview is only for the purpose of fact-finding, and that the office may choose to represent only one (or neither) of the clients. Then interview each individual separately and explore the potential for conflict
- If BayLegal decides to only represent one party, we still have a duty to keep confidential information received from the person we declined to represent. If that information is important, try to obtain informed consent to use that information in the case.

7. Before Representing Membership Organizations, Ensure that Mechanisms for Addressing Potential conflicts Exist Before committing to Representation

Client groups or membership organizations raise the issue of who we represent when disagreements arise between members of the organization. This should be addressed in the retainer agreement by providing, for example, that:

- BayLegal represents the organization, not individual members;
- The organization speaks through its chair, acting on behalf of a majority of a steering committee elected by the members
- BayLegal has the right to withdraw representation if the wishes of the organization can't be determined, or if the group splits up

8. The Advocate Should Avoid Becoming a Witness in a Case

An advocate should avoid being the sole or principal percipient witness on key issues in potential jury cases.⁹ This can happen, for example, if the advocate obtains key information during a pre-litigation conversation with the opposing party or its agents. To avoid becoming a witness at trial (where the credibility of the client's case can be intertwined with the credibility of the witness-attorney), steps should be taken through

⁹ See Cal. Rule of Prof. Conduct 5-210(c), which bars an attorney from testifying in a jury trial unless the testimony relates to an uncontested matter, the nature and value of the attorney's services, or the client has given informed consent. Even if the attorney has obtained informed consent, the court has discretion to order the attorney or law firm to withdraw from representation. *Smith, Smith & King v. Superior Ct.*, 60 Cal. App. 4th 573 (1997).

discovery, stipulations of fact, confirming letters, or other means to render the issue undisputed or to obtain alternative evidence of a key disputed fact.

9. Other Conflicts of Interest

Any other conflicts should be resolved consistent with the applicable ethical guidelines, beginning with Cal. Rules of Professional Conduct 3-300 and 3-310, The State Bar Ethics Hotline (800-238-4427) may be able to answer some questions. Other issues should be referred first to the regional office Managing Attorney, and, if necessary, to the Director of Advocacy.

E. Initiating the Attorney-Client Relationship and Memorializing its Terms in a Retainer Agreement

An attorney-client relationship is created when an individual seeks legal assistance from BayLegal, *and* the program agrees to provide that assistance. The relationship is a two-way street. Just as someone calling us has some say in who to engage as his or her attorney, we also can decide to decline representation, as well as determine the degree of assistance we will provide.

The key is to ensure that the client understands from the outset the nature of the relationship and degree of assistance to be provided. That understanding must be reduced to writing, in the intake notes (if assistance is limited to counsel and advice over the phone), a limited retainer agreement (if only limited-scope assistance is provided), or a full retainer agreement (where more than brief service, including representation in a proceeding, is contemplated). The terms of a limited or full retainer agreement must be explained to the client, who must also receive a copy.

As a practical matter, the deciding factor in creating an attorney-client relationship will be whether the caller is or is not eligible for our services. If the caller has a case within one of our substantive priorities, lives in our service area, does not present a conflict, is poor, and is either a US citizen or eligible non-citizen, he or she will usually receive at least counsel and advice appropriate to his or her individual facts and legal problem. An attorney-client relationship will therefore exist, although the scope of the services to be provided will be determined by reference to case acceptance guidelines, the merits of the case, the capacity of an office or advocate to handle the case, and other relevant factors described at **pages 28-29**, below.

1. “Legal Assistance” vs. “Legal Information”

Sometimes, however, the caller actually receives only “legal information” and not “legal assistance.” “Legal assistance” consists of counseling the client by applying specialized legal knowledge to the facts relayed by the client and obtained from other sources. “Legal information,” on the other hand, consists of general information about

legal concepts, procedures or issues without applying this information to the client's specific situation.¹⁰

A "Know Your Rights" leaflet or brochure, or orally-given general information that a three-day notice is not the same as a sheriff's notice, or that failure to appropriately respond to either notice could lead to eviction, is merely factual information which, without more, does not rise to "legal assistance."

Since the recipient of legal information does not receive legal assistance, no attorney-client relationship is created. The caller is not a "client," and a file need not be created in the case management system. Instead, since the caller will most likely be referred elsewhere, the incident should be recorded as an "other service" (formerly known as an "other matter" in LSC-speak.)

2. Some Information Received from a Caller Remains Confidential even if BayLegal Declines the Case

Nevertheless, because the caller approached us seeking legal counsel, case-related information received from the caller is, and must be kept, confidential, even if we decide not to actually provide "legal assistance."¹¹ Moreover, if the information gleaned later becomes relevant in a case against that caller, the potential conflict could bar BayLegal from assisting that caller's opposing party. This is especially a problem in family law cases¹², and puts a premium on screening out ineligible callers before the program obtains sufficient confidential information to bar BayLegal from assisting a subsequent caller.

3. Intake Questions must be Structured to Screen out Ineligible Callers before Confidential Information has been Gathered

¹⁰ Par. 2.2 of the Legal Services Corporation "Case Service Report Handbook" (2008) states: "Legal assistance is specific to the client's unique circumstances and involves a legal analysis that is tailored to the client's factual situation. Legal assistance involves applying legal judgment in interpreting the particular facts and in applying relevant law to the facts presented. The provision of legal assistance creates an attorney-client relationship."

Par. 2.3 of the LSC Case Service Report Handbook defines legal information as "the provision of substantive information not tailored to address a person's specific legal problem. As such, it is general and does not involve applying legal judgment and does not recommend a specific course of action... The provision of legal information does not create an attorney-client relationship."

¹¹ See Vapnek, Tuft, et al., 1 *California Practice Guide: Professional Responsibility* ¶ 7.29, p. 7-4 (Rutter Group, 2007); State Bar Standing Com. on Prof. Resp. Formal Opinion No. 2003-161; *People ex rel Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th 1135 (1999).

¹² Savvy batterers have been known to intentionally call the program in order to create a conflict which would prevent BayLegal from assisting the batterer's victim.

For this reason, the initial client screening must filter out ineligible callers (e.g., a batterer, whose family-law related legal problem is outside of BayLegal’s case acceptance guidelines) without eliciting confidential information.

At the Legal Advice Line, the phone set will usually indicate the substantive legal area in which the caller’s case falls, e.g., family law. Knowing this, the intake advocate should begin by asking about (1) county of residence; moving to (2) the caller’s name (immediately performing a six-way conflicts check)¹³; then asking for (3) US citizenship or immigration status; followed by (4) source and amount of income and assets; and finally (5) eliciting the facts of the case. By level 5, and often by level 4¹⁴, enough confidential information may have been elicited as to create a potential conflict should the opposing party later call BayLegal seeking assistance. Often, however, the earlier caller will have stated at levels 1, 2, or 3 that he has been served with a restraining order. The caller should then immediately be referred to the Family Law Facilitator.

In this scenario we will have provided only “legal information” and not elicited case-related facts. The intake should then be terminated and the call tallied as an “Other Services/Other Matter” referral.

4. Counseling and Advising Clients in Brief Service Cases, and Scheduling Appointments in Regional Offices

The client’s realistic objectives in her or his case will be the most important factor used to determine the level of assistance BayLegal will provide. The intake advocate, exercises professional judgment in making that determination. If the client needs only advice on how the applicable law applies, or has a case outside of our case acceptance guidelines, s/he will receive counsel and advice and a possible referral to other providers of legal services. A client who needs brief service such as preparation of an unlawful detainer answer or assistance in filing a restraining order petition will receive both counsel and advice and be referred to an agency providing that service, which can include a BayLegal regional office or clinic if appropriate.

¹³ Interpreting 42 USC § 2966 *et seq.*, courts have ruled that disclosure to LSC of client names and problem codes to monitor compliance with the LSC Act does not violate the attorney-client privilege. See, e.g., *United States v. LSNY*, 100 F. Supp. 2d 42 (DDC 2000), *aff’d* 249 F. 3d 1077 (DC Cir. 2001).

¹⁴ For example, income and asset information received in confidence from the first caller will be relevant in a case involving child/spousal support or the division of assets, barring BayLegal from representing the spouse should she call. On the other hand, the fact that we once represented a client in a divorce case does not necessarily preclude us from representing the spouse in an eviction or public benefits termination. Confidential information received in the earlier case may be irrelevant in the second case since no “substantial relationship” exists between the subjects of the two cases. See footnote 7, *supra*.

A case management file is opened for every client who receives “legal assistance.” The client’s name, address, demographic information, the nature of his or her legal problem, a summary of the issues and of any advice given the client, the level of service provided by BayLegal, and the amount of time spent counseling the client, will be logged in the case file by the advocate conducting the screening. Any pending hearing dates or filing deadlines, including statutes of limitations, will also be noted. If the case involves a private attorney, the case management file will be marked as “PAI” (Private Attorney Involvement; **see pages 17-18**, below). The intake appointment date and time will be calendared in Outlook, BayLegal’s e-mail and calendaring program, for the appropriate regional office, and in the name of the advocate assigned to see the client on intake day.

A case which is still open more than one week after the client has been given counsel and advice or brief service should be scheduled for an appointment with an advocate in a regional office, referred to another agency, or closed, as appropriate.

Service cases within our case acceptance guidelines, or cases within our priorities which may raise systemic or policy issues are set for an appointment with a regional office advocate or referred (“stealthed”) to a regional office for further assessment. The office can decide to represent the client after weighing the factors described below at **pages 28-29**. **The client should be timely advised of our decision to offer or decline representation.**

5. Access for Disabled, Homeless and Non-English Speaking Clients, and Clients with Emergencies

Each regional office should have a protocol for screening and serving clients who, because of disability, inability to communicate in English, or in an emergency, are unable to telephone the Legal Advice Line (LAL). If interpreter service is not available in the client’s first language, an advocate may have to rely on telephone interpretation services such as “Language Line,” “Ethnic Bridges,” or “Language 411” (especially for Asian languages).

Where a client would otherwise be asked to call the LAL, an exception should be made for homeless clients who do not have easy access to a phone. Each office will provide the drop-in client with a phone in a confidential setting to permit the client to call the LAL.

In setting appointments outside of the usual “first come, first served” order, an “emergency” is narrowly defined to avoid bottlenecks at the regional office level. If the client is otherwise eligible and her case within the program’s substantive priorities, the following situations will be considered emergencies:

- **Housing Emergency:** an actual or threatened lockout or utility shut-off; sheriff's notices to vacate to be executed within three days; or where an unlawful detainer answer is due within two days
- **Public Benefits Emergency:** imminent loss of public assistance; or where the deadline for requesting a hearing or other appeal will expire within two days
- **Health Emergency:** imminent loss of access to medically necessary treatment; or where the deadline for requesting a hearing or other appeal will expire within two days
- **Family Law Emergency:** imminent danger of harm from domestic violence or child abduction

In addressing the emergency, the office should deal with the immediate problem (e.g., filing the UD answer or hearing request, etc.) and, if case acceptance guidelines are met, the client should be given a follow-up appointment.

6. Referring Applicants for Assistance

If possible, ineligible callers, or clients who receive only brief service, must be referred to an agency which offers that person the best chance of actually receiving further help. When a caller is referred to another agency, the identity of that agency must be recorded in the client's case management file, or, if no case file was opened because of ineligibility, in the "other matters/other services" section of the case management system.

i. Referring Fee-Generating Cases

To avoid the appearance of favoritism, fee-generating cases – defined by LSC as any case in which an attorney can receive a fee¹⁵ – should ordinarily be referred to two private attorneys, or to an organized lawyer referral service, unless past experience has shown that such referrals are not viable. We can also directly refer Social Security or SSI cases referred to members of our Social Security claimants' representatives panel.

ii. Referring Clients in Cases Involving Systemic Issues

The Legal Advice Line will periodically advise advocates in a particular office or practice area of particular cases, trends, or issues warranting closer scrutiny. Cases involving systemic or recurring issues within program priorities should be considered for an appointment with an advocate from the appropriate office. Clients with such cases should not be referred unless the appropriate BayLegal unit and Managing Attorney,

¹⁵ 45 CFR § 1614.1(d).

using the criteria set forth at **pages 31-32** and consulting with the Director of Advocacy, have decided against representing the client. Questions as to whether any other case has impact potential should be referred to the Managing Attorney, Regional Counsel, or Director of Advocacy.

7. Intake at Community Outreach Events

Clients may also obtain counsel and advice from a program advocate at outreach clinics. If a confidential consultation was provided to a client, the advocate will obtain the usual client demographic and case-related information ordinarily obtained at a screening or intake interview. A case management file will be opened soon thereafter.

Individual client information need not be obtained if the advocate gave a community education presentation without providing individual consultation. However, a description of the presentation (sponsor, location, topic, number of attendees) will be posted in the “other matters” section of the case management database and later used for program fundraising or advocacy reports.

F. Private Attorney Involvement (PAI)

Each LSC funded program is required to devote the equivalent of at least 12 ½ percent of its LSC grant to involving private attorneys in assisting LSC-eligible clients. Private Attorney Involvement can consist of co-counseling cases with private attorneys, providing them with technical assistance for eligible clients on eligible cases, providing training or manuals, or other activities. We determine if the PAI requirement is met by calculating the value of the total hours devoted by casehandlers during a calendar year to PAI activities and adding any PAI related expenses. BayLegal also annually counts the number of cases designated “PAI.” For this reason, PAI cases must be identified as early as possible in the intake process, and time spent on such activities marked as such in time slips.¹⁶

1. PAI Cases

A PAI case involves **a private attorney** – defined as a member of the bar who, within the past two years, has not been employed by an LSC funded program and within that time has not received at least 50% of his or her compensation from an LSC funded program – **providing legal assistance to an LSC eligible client in an LSC eligible case**. An eligible client is one which meets the LSC income and citizen/non-citizen requirements, and whose civil case is within the categories for which LSC funding is authorized. For example, since LSC funds cannot be used for criminal defense or many fee-generating cases, these cases cannot be considered PAI cases even if they involve an LSC-eligible client.

¹⁶ The PAI regulation is found at 45 CFR Part 1614. BayLegal’s PAI policy is posted on our intranet.

PAI cases involve ongoing collaboration or oversight between BayLegal and the private attorneys which continues until the case is concluded. Merely referring a case to a private attorney will not transform it into a PAI case. The private attorney's assistance to the client must also be either *pro bono* or for a reduced fee.

A PAI case involves an LSC eligible client such as:

- A BayLegal case which is co-counseled by a private attorney
- A BayLegal case in which a private attorney was or is involved at some point, such as where a volunteer attorney performed the intake or was engaged in one aspect of the case (e.g., drafted a motion or did research)
- A BayLegal case which is referred to a private attorney on a *pro bono* or reduced fee basis AND the program continues to monitor the progress of the case (the BayLegal case should remain open until concluded)
- A BayLegal case taken by a private attorney and which continues to be supervised by the program until concluded

2. Other PAI Activities

Private Attorney Involvement can also include advocacy and activity which does not involve a particular client. This can include:

- Technical assistance to private attorneys who are assisting eligible clients in eligible cases whether or not the case is a BayLegal case
- Technical assistance such as the production of brochures or manuals which can be used by private attorneys to assist eligible clients in eligible cases
- Acting as a trainer, or organizer of a training, aimed in part at private attorneys who are or will be providing assistance to eligible clients in eligible cases
- Attending a training, as a trainee, given by a private attorney on a *pro bono* or reduced fee basis, if the training will be helpful in your representation of eligible clients in eligible cases

G. Client Eligibility

BayLegal generally assists only **poor residents of Alameda, Contra Costa, Napa, Marin, Santa Clara, San Francisco, and San Mateo counties** who have **civil legal problems falling within program priorities**. A resident is a person who is present in one of the counties we serve with the intent to remain there indefinitely. While clients accepted for representation or other extended service will usually be assisted by the regional office serving the county in which the client resides, this is more for the convenience of the client than an ironclad rule.

1. Bay Area Residency

Applicants for assistance living outside of our service area are referred to other agencies, such as their county legal services program or bar association. We can assist an otherwise eligible client who lives outside of our service area if his or her case has been filed in one of the counties we serve, and falls within our priorities and case acceptance guidelines. Typically, the client has been referred by a local legal services program which has already assessed financial and citizen/immigrant eligibility.

We can continue to represent clients who move away from the Bay Area if the move is only temporary, or if our withdrawal from the case would unduly prejudice the client. Prejudice would exist, for example, if the case was on the eve of trial and there existed little chance that another lawyer would substitute in as counsel; or where the potential that a domestic violence client would be battered remained high and no restraining order had been secured.

2. Financial Eligibility

DOCUMENTING FINANCIAL ELIGIBILITY

The financial eligibility of each client must be documented in the case management system using an “eligibility slip” linked to the client’s file and indicating that both income and assets have been reviewed.

i. Income Restrictions

a. LSC Funded Assistance

Under the regulations of the Legal Services Corporation, the monthly **gross income of a client (or his/her household) receiving LSC-funded assistance cannot be more than 125% of the annually adjusted poverty line, nor her assets exceed**

certain limits set by the program.¹⁷

CATEGORIES OF INCOME ELIGIBILITY

LSC Eligible	Eligible Using Non-LSC Funds
Gross income must be under 125% of poverty	Net income must be under 125% of poverty
Gross income may be between 125 and 200% of poverty IF the client is seeking to obtain or retain needs-based or disability-related public benefits OR the client's disposable income is affected by the factors** set forth below.	Net income may be between 125 and 200% of poverty IF the client is seeking to obtain or retain needs-based public benefits OR the client's disposable income is affected by the factors** set forth on the left side of this table.
Gross income may be over 200% of poverty IF disposable income is limited because of medical expenses AND executive director has approved	Net income may be over 200% of poverty IF disposable income is limited because of medical expenses AND executive director has approved
** 125% -200% Factors: the client (a) has high recurring monthly expenses, or (b) has employment-related expenses, or (c) has medical or nursing home expenses, or (d) has age or disability related expenses, or (e) receives seasonal income which (f) reduces his/her disposable income to 125% of poverty or below	Gross income may be above LSC guidelines but below 250% of poverty if client is seeking Healthy Families benefits (CHAP Project only)
	No income guidelines if explicitly allowed by funding source

A “household” is a group of people which lives together, shares income and expenses, and whose adult household members (such as the parent of a minor child) are legally responsible for the support of the other household members. Examples of separate “households” include: an unrelated roommate who is neither the spouse or domestic partner of the client. An adult child living with his/her parent(s), a parent or grandparent living with his/her adult children, and each adult sibling or cousin living together with another sibling or cousin will be considered separate households *unless* another family member *actually* provides that person's principal support.

In some circumstances affecting the actual availability of income, the client's **gross household income** can be as high as 200% of the poverty line. These situations must be documented in the client's case management file. They include:

- The client seeks assistance in obtaining or maintaining a needs-based public benefit such as subsidized housing or public assistance, or a public benefit for people with disabilities (such as Social Security Disability)
- The client's income varies seasonally and his/her current income prospects, averaged over 12 months, approximates a monthly income not exceeding 125% of poverty

¹⁷ See 45 CFR Part 1611.

- The client has significant documented medical or nursing home expenses which effectively reduce household income below 125% of poverty
- The client makes regular monthly payments on fixed debts and obligations which effectively reduce household income below 125% of poverty (monthly residential rent can be a “fixed debt or obligation” triggering this exception if the rent exceeds 30% of the household income, e.g., is above what the U.S. Department of Housing and Urban Development would consider as “affordable”)
- The client regularly pays child care, clothing, transportation, and other work-related or job-training related expenses which effectively reduce household income below 125% of poverty
- The client has substantial non-medical expenses related to age or disability which effectively reduce household income below 125% of poverty
- Other “significant factors” including current tax obligations which affect the client’s ability to afford legal assistance.¹⁸

With the approval of the executive director, the program can also assist a client whose gross income exceeds 200% of the poverty line if a significant proportion of the client’s income is devoted to documented medical or nursing home expenses.¹⁹

b. Non-LSC Funded Assistance

The “gross income” restrictions apply only in the case of client services funded by the Legal Services Corporation. In order to assist working clients who have incomes slightly above LSC guidelines, non-LSC funds may be used to assist an **employed client** whose **net income** (gross income less taxes and other income-related deductions) is within 125% of the annually adjusted poverty line. An employed client whose net income is under 200% of the poverty line may also be assisted if one of the listed extenuating circumstances affecting the client’s disposable income is present. This exception is used only if the employed client cannot meet the LSC financial guidelines. **While an LSC eligible case which is funded by non-LSC funds does count as an LSC case, an LSC-ineligible client’s case cannot be counted as an LSC case.**

¹⁸ See 45 CFR §§ 1611.4(a), 1611.5(a).

¹⁹ See 45 CFR § 1611.5(a)(2). A request to invoke this exception requires a memorandum to the executive director explaining why the case should be taken and how the exception applies, accompanied by proof of the debt and the client’s attempts to pay the debt.

If required by the funder, non-LSC funds may also be used to assist other groups of clients in particular substantive areas and under varying financial eligibility guidelines. Advocates funded under these sources will receive more specific instructions on any reporting and timekeeping reporting requirements from their project coordinator or other person managing the particular grant.

ii. Asset Restrictions

RELYING ON ASSET EVALUATIONS BY PUBLIC ASSISTANCE AGENCIES

If the welfare department or other government agency has determined that the client's assets do not exceed the allowable property limits of a needs-based benefits program (e.g., SSI, CalWORKs, Food Stamps, etc.), we can rely on that finding in assessing the client's financial eligibility at BayLegal. If this is the case, check the appropriate box in the eligibility slip of the client's case management file.

In general, **an individual client household may own up to \$10,000 in liquid assets (plus \$5,000 for each additional family member) and \$15,000 in non-liquid assets (\$5,000 for each additional family member)**. A liquid asset is cash or something such as a bank account which can be readily reduced to cash. Assets which are not counted include the client's principal residence, one car, personal and household goods, tools or equipment essential to employment, trusts restricted to educational or medical purposes, interest in IRA or retirement plans, assets not counted by public assistance programs, and burial plots or trusts.²⁰

In domestic violence cases, BayLegal only counts community assets which are actually available to the client. For example, if the client has a community interest in a home but actually does not live there because of domestic violence, that asset would not be counted in assessing the client's eligibility for our services.²¹

The client countable assets must be identified (e.g., "checking account" or "real property") and the asset's equitable value (owned by the client) entered into the client's financial eligibility slip in the case management system. Exempt assets need not be listed. If the client has no countable assets, LSC requires that that fact be affirmatively noted in the financial eligibility slip.

3. Non-US Citizen Eligibility

²⁰ BayLegal's "Policy and Procedure on Client Eligibility", available on the BayLegal Intranet, includes a full list of assets which are not counted in determining whether a client is financially eligible.

²¹ Because of LSC restrictions on handling fee-generating case (see **pages 53-54** and 45 CFR Part 1609), we do not take domestic violence cases where the opposing party's income exceeds \$75,000 per year, or the combined community and separate assets (exclusive of the family home) combined exceed \$100,000.

The Legal Services Corporation has limited BayLegal's ability to assist undocumented immigrants or certain other non-US citizens who are not permanent residents, refugees or political asylees.

i. We Can Provide Legal Assistance To:

- **U.S. Citizens or Nationals (born in Puerto Rico, U.S. Virgin Islands, or American Samoa)**
- **Citizens of former U.S. Trust Territories in the Pacific,**
- **Lawful Permanent Residents,**
- **Close Relatives (spouse, parent, unmarried child under 21) of a U.S. Citizen who have petitioned for adjustment of status to permanent residents and whose application has not been denied,**
- **Refugees admitted into the country and those granted Political Asylum or withholding of deportation because they fear persecution in their home countries,**
- **Certain Agricultural Workers as described in LSC regulations,**
- **Canadian-born Native Americans (50 % by blood), or members of the Texas Band of Kickapoo,**
- **Victims of Trafficking for Sexual or Labor Exploitation Purposes²²**
- **Otherwise ineligible non-U.S. citizens who are victims of partner, spousal or parental abuse**

DOCUMENTING THE ELIGIBILITY OF NON-CITIZEN CLIENTS SEEN IN-PERSON

A non-U.S. citizen client who is seen in person, or who receives more than brief service, must provide documentation issued by the U.S. Citizenship and Immigration Service that s/he is within one of the categories of immigrants who are eligible for legal services provided by an LSC-funded program. This verification requirement does not apply to clients who receive only counsel and advice over the telephone.

²² LSC Program Letters 02-5 (May 15, 2002) and 05-2 (October 6, 2005). The client must have a "victim certification" issued by the US Department of Health and Human Services' Office of Refugee Resettlement.

Eligible non-US citizens who are interviewed in person, or who, if interviewed over the phone, have a case requiring more than counsel and advice, must document their immigration status by showing the originals, certified copies, or “photocopies that appear to be complete, correct and authentic” of the appropriate CIS/INS documents. The advocate must in each case certify in writing that she has verified that the client is an eligible non-US citizen, must note the serial number of the produced document on the client’s case management file, and must also place a photocopy in the client’s manual file.²³ The client’s status as a citizen or non-citizen must also be noted in the case management system.

Note that possession of a work permit does not necessarily mean that the client is eligible. For example, work permits are often given to those with pending political asylum applications. Yet, LSC allows us to assist only asylees whose application has actually been approved.

ii. Emergency Assistance to Clients Unable to Verify Eligible Immigration Status

In an emergency, assistance can be provided to an eligible non-US citizen who lacks documentary verification so long as the client signs a form identifying the basis for their eligible immigrant status and agrees to obtain and produce the supporting documentation within one week, absent exigent circumstances. Emergency assistance must be approved by the Managing Attorney.

An emergency exists where immediate legal action is required to preserve a client’s legal rights or position in circumstances involving the necessities of life, a significant risk to the health and safety of the client or the client’s immediate family members, or which arise because of new or unforeseen circumstances such as natural disasters or unanticipated changes in the law affecting large numbers of clients.²⁴

Two exceptions exist to the ban on assisting ineligible non-citizen immigrants.

iii. Victims of Sexual or Labor Trafficking

The first exception covers victims of trafficking for sexual or labor exploitation. Victims are “persons who have been subject to sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of

²³ See 45 CFR Part 1626, which contains an appendix listing acceptable INS/CIS documentation. The immigrant eligibility verification form is found in the client’s case management system file.

²⁴ 45 CFR § 1636.2.

force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”²⁵ **LSC funds can be used to provide assistance.**

The client must meet the above definition AND either be under age 18, or over 18 and subject to certification by the Office of Refugee Resettlement (ORR), US Dept of Health and Human Services. To establish eligibility, the client must present an ORR certification letter. If the client does not have a certification letter, the advocate can verify status by calling the trafficking verification line at (202) 401-5510 and noting in the case management system file that verification was obtained from ORR.

iv. Victims of Partner or Parental Abuse, or Sexual Assault, or Who Qualify for a “U” Visa under the Violence Against Women Act

The second exception covers a client (or a client’s child who, without the client’s “active participation”) who “has been battered or subjected to extreme cruelty or is a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under 8 USC § 1101(a)(15)(U).”²⁶ **Program advocates may use LSC funds to represent victims of partner or parental violence if the case is aimed at preventing, or obtaining relief from, such violence.**

4. Eligibility of Community Groups or Organizations

The program can represent a community or client organization:

- Using LSC funds if the organization (i) provides information showing that it lacks, and has no means of obtaining, funds to hire private counsel; AND (ii) is primarily composed of LSC eligible persons; OR (iii) has as a principal activity, delivering services to financially eligible individuals and the legal assistance sought relates to such activities.²⁷
- Using *unrestricted non-LSC funds* if the organization provides benefits primarily to indigent persons, even if most members, or the organization, would be financially ineligible.

Each organization requesting assistance must fill out a Group Representation Eligibility Form. After the supervising attorney has approved extending assistance to the

²⁵ See 22 USC § 7105(B)(1)(a) and LSC Program Letter 05-2 (October 6, 2005)

²⁶ See P.L. 109-162, § 104(a)(1)(B) and (C) (January 5, 2006) and LSC Program Letter 06-2 (February 21, 2006)

²⁷ See 45 CFR § 1611.6(a).

organization, the appropriate officer or representative of the organization must also sign a retainer agreement setting forth the scope of our legal services. The retainer must anticipate conflicts arising between members of the group (see pages 11-12).

H. Cases Opened Solely for Brief Service (Limited Scope Assistance)

Many BayLegal clients receive only “counsel and advice” or “brief service” from the program. “Counsel and advice” consists of advising a client of how the applicable law applies to the client’s particular situation and outlining possible options, without committing the program to do anything further. “Brief service” or “limited scope assistance” consists of counsel and advice plus additional limited assistance such as preparing a demand letter, calling the landlord or agency for information, obtaining documents for the client, or preparing pleadings for the client. If a client is seen in person, a “limited retainer agreement” must be executed explicitly indicating the limited range of assistance we will provide.

An attorney-client relationship *is* created if we provide limited scope assistance such as preparing a *pro per* pleading for filing with a court²⁸, or contact a third party on behalf of the client. In performing these “unbundled” services, BayLegal is providing legal assistance and, in contacting the third party, acting as the client’s representative. The most important point is to ensure that the client understands that any assistance we provide is, indeed, limited in time and scope. *This understanding must be confirmed in writing in BayLegal’s limited retainer agreement or a confirming letter to the client.*

Even though our service to the client is limited, BayLegal advocates have a duty to advise the client of potential affirmative claims which are related to the matter about which we are providing assistance, especially where failure to address them could result in adverse consequences such as losing the right to sue.²⁹ For example, in helping a client file an answer raising a discrimination defense to eviction, the advocate should inform the client that s/he may also have an affirmative housing discrimination claim. In advising a client about appearing *in pro per* in a welfare or housing authority overpayment case, the client should be warned that testimony elicited at the hearing could be used against the client should the client later be charged with criminal fraud.

²⁸ However, to preserve the appearance of court impartiality, *pro per* assistance given at restraining order clinics co-sponsored by the San Mateo or Contra Costa County superior courts cannot create an attorney-client relationship. See LSC office of Legal Affairs Opinion Letter dated April 9, 1998, available under the Laws & Regulations tab of the LSC website.

²⁹ *Nichols v. Keller*, 15 Cal. App. 4th 1672 (1993).

Avoid “Virtual Representation”!

Unless the advocate is a case manager, she must limit herself to providing legal assistance. Except where related to ongoing legal assistance (and even then think twice), the advocate should avoid playing social worker.

As a rule, counsel and advice or brief service cases should be closed within one week of having been opened. If the case is open for a longer period, one should ask why we have not agreed to represent a client. If no good reason to represent exists, it may be that the client’s legal problem is one that we cannot solve given the merits and our case acceptance guidelines, or that the client has a non-legal problem which we have no business attempting to solve. These clients should be immediately referred the bar association, other advocacy program, or a social services agency. **Avoid creating client expectations that we will not or cannot fulfill.**

Advocates should take care not be drawn into “virtually representing” a client, e.g., in all but name. This particularly happens in *pro per* cases where, having filed the answer, the advocate then prepares discovery or motions, or tries to settle the case. Not only does this create expectations in the client’s mind, but similar expectations on the part of opposing counsel or the court. Avoid creating – by accretion – an ethical obligation to represent the client. Seek guidance from your Managing Attorney or Regional Counsel before going beyond filing the first paper.

I. Cases Opened for Representation or Extended Assistance

1. Case Acceptance Guidelines

Program-wide protocols for accepting particular service cases for representation or extended service exist for each substantive priority. These case acceptance guidelines are goal-oriented, favoring representation in cases which have the potential for providing lasting benefits to the client by helping him or her escape poverty or by fostering safety and stability. The case acceptance guidelines are subject to local modifications based on the availability or unavailability of program or other advocate resources in the area served by regional office.

Clients are given an intake appointment with a program advocate if the intake worker determines from the facts presented and the client’s stated objective, that the case appears to fit within the case acceptance guidelines, or should for other reasons, be considered for possible representation. The date and time of the appointment must be calendared in Outlook under the name of the assigned advocate.

Before deciding to represent the client, the following factors must be considered:

- the client’s objective and its relation to BayLegal’s mission,

- the legal and factual merits of the case – e.g., the realistic possibility of achieving the client’s objective, including whether there is a good faith basis to seek the extension, modification, or reversal of existing law which is unfavorable to the client’s position,
- the availability of alternative assistance or representation for the client,
- the existing caseload of the advocate and, where transfer of the case to another BayLegal advocate is an option, the caseloads of other advocates taking cases in the substantive area,
- the difficulty of taking the case given the program's resources,
- the willingness of the client to cooperate with the advocate,
- the difficulty for the client of representing him/herself,
- the effect on the client if the program does not assist or represent the client,
- any other program policy reasons for accepting or declining a case.

No case should be accepted for extended service representation without the approval of the appropriate supervisor, except in an emergency and the supervisor is unavailable. (An emergency is when, in a meritorious case, a delay in representing the client is likely to cause harm to a significant safety, property or liberty interest of the client.³⁰) With the approval of the Managing Attorney and/or Director of Advocacy, an advocate may take a case which is within the BayLegal’s priorities but outside of its extended service case acceptance guidelines.

Generally, the advocate urging representation will present the case at a meeting of the staff advocates in the appropriate office or unit for a discussion as to whether to take the case in light of the unit or office priorities and the above-listed factors.

No affirmative case in which BayLegal intends to represent the plaintiff will be filed without the permission of the appropriate supervisor.³¹ No affirmative case naming BayLegal as a plaintiff (including as amicus curiae) will be filed without the additional approval of the executive director or the Director of Advocacy.

2. The Initial or “Intake” Interview With the Client

³⁰ 45 CFR § 1636.2(c)

³¹ LSC requires that each plaintiff in an affirmative court case sign a “statement of facts” before the case is filed. See page 30 of this manual.

At the intake interview, the advocate must explore the client's legal problem in a manner which develops trust and confidence between the client and the advocate. The advocate will elicit the relevant facts and circumstances, tentatively identify the legal issues presented, determine the client's objectives and the merits of his claim, inform the client about the nature of the legal problem, and propose the steps to be taken by both the client and the advocate to begin resolving the problem.

The advocate must also reconfirm that the client is eligible for our assistance. If the case is accepted for representation or other extended assistance, the BayLegal "Case Checklist" must be completed by the advocate assigned to the case to independently ensure that assisting the client is permissible under LSC regulations, and that a retainer agreement and all verification forms have been completed.

The advocate should not consider taking the client's case unless she is satisfied that on balance, the case acceptance factors set forth on **pages 28-29** weigh in favor of representation. This may require advising the client that a decision to represent will require further investigation of the facts, and/or further analysis and research of the pertinent legal issues. Such an agreement to "investigate but not (yet) represent" must be confirmed in a limited retainer agreement signed by the client. The ultimate decision to represent the client will be made as soon as possible in consultation with the advocate's Managing Attorney and fellow advocates, and the client will be advised very soon thereafter.

3. Confirming the Scope of Program Services and the Responsibilities of the Client and Advocate

Once eligibility has been established and BayLegal offers representation or other extended assistance, the advocate and the client must mutually agree on the objectives of the advocacy, the scope of representation, and the services which the advocate will provide the client.

<p style="text-align: center;">A Signed Client Retainer Agreement is Required in All Cases Involving More Than Counsel and Advice</p>
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The client must understand that it is her responsibility to maintain regular contact with the advocate, to assist in the preparation of her case, and to refrain from contact with the opposing party or her attorney without permission from the advocate.

Where appropriate, the client will also be advised that LSC restrictions may preclude the program from providing the client with certain types of services, asserting certain legitimate claims and from using particular advocacy tools such as lobbying or a class action. The client must agree that the program may represent her in spite of these limitations, and must be advised that the program may have to withdraw from the case if

it appears that these restrictions adversely affect the advocate's ability to fully prosecute or defend the case.

Each of these understandings will be specifically set forth in a **Client Retainer Agreement** signed by both the advocate and the client. This confirms the scope of our advocacy to the client, and protects the advocate and the program from potential disputes over the extent of the agreed upon services. If only brief services, such as preparation of pleadings *in propria persona*, are contemplated, a limited assistance retainer agreement will be completed. However, a full retainer agreement must be executed if we later decide to represent the client.

With the approval of the Managing Attorney, an engagement letter may be used in place of the retainer agreement if the client refuses to sign the retainer agreement because of the client's disability or inability to understand its terms. Any such engagement letter must clearly spell out what the program will or will not do for the client, that assistance is limited to the present case and does not include any appeal of an adverse decision, the obligation of the client to cooperate with the program, spelling out particular concerns including reimbursement of costs advanced on the client's behalf, and that failure to cooperate will justify our withdrawal from the case. A copy of the Retainer Agreement, or the engagement letter, will be given to the client.³²

4. Impact Cases

An "impact case" is one whose resolution will favorably affect many more clients than those who initially sought our assistance. Advocates are encouraged to take on meritorious cases which can improve the lives of a substantial number of clients, and which involve issues which are not peripheral to the client community. Each office should identify potential impact issues in their office or unit plans, and be proactive in responding to such issues. Impact cases are subject to the factors set forth on **page 28-29**, and should not be referred to non-BayLegal attorneys without a discussion (involving the unit, project and Managing Attorney, Regional Counsel, or Director of Advocacy) of the merits, the issues, and the pros and cons of BayLegal retaining the case with or without co-counsel.

In almost all cases involving systemic issues, a pre-litigation demand letter should be sent to the opposing side, identifying the client and his or her legal claims. In fact, should the defendant change its policy after a lawsuit is filed, a pre-litigation attempt to settle the matter is a pre-requisite for an award of fees under the "catalyst" theory.³³ Exceptions can be made because of time constraints in emergency situations or where the case is an appeal of an adverse administrative agency decision.

³² Bus. & Prof. Code § 6148.

³³ *Graham v. DaimlerChrysler*, 34 Cal. 4th 553 (2004), interpreting Code Civ. Proc. § 1021.5.

Before filing an impact case or assuming responsibility for a case which has already been filed by a non-BayLegal attorney, the lead attorney will submit a completed “Request to File Affirmative Case” to the Managing Attorney and the Director of Advocacy. The request will describe:

- The names of the proposed plaintiffs and defendants
- Potential co-counsel, both within and outside of the program (outside co-counsel should be gotten, if possible)
- The court where the case is to be filed
- The relevant facts
- The issues raised, their importance to the client community, and the approximate number of people affected
- The legal theories, and legal claims, explaining the strengths and weaknesses of particular claims, and recommending which claims to pursue and which not to raise
- An estimate of the duration of the litigation and the program resources, including advocate hours, that the case will require (if the case will consume substantial resources, co-counsel with adequate resources must be actively pursued)
- A general plan for conducting the litigation, e.g., discovery to be obtained, motions to be filed
- The attainable objectives of the case, e.g., what is hoped to be accomplished and the indicators of success

The Managing Attorney will consult with appropriate staff and the Director of Advocacy to determine whether to go forward with the case. The primary consideration should be whether the case will be an effective and efficient use of program resources given the importance of this particular issue in the context of other ongoing demands on the office’s or program’s resources.

5. The Litigation or Advocacy Plan

In agreeing to represent or assist the client, the advocate has a duty to determine a course of action for achieving the client’s objectives. This begins with an analysis of the key elements of the relevant claims and defenses. The advocate’s strategy must

relate the material facts to the legal issues presented, identify the applicable law and available remedies, identify the evidence needed by each party to prove the case or defense, project how the evidence will be obtained, and outline a course of action for attaining the ultimate goals. This analysis should enable the client and the advocate to make knowledgeable decisions about the options to pursue, taking into account the resources available and the risks and benefits of each option.

To minimize wasted effort, the overall strategy and the key steps to be taken to accomplish the client's objectives must be outlined at the beginning of the case. Firm time lines must be set for the completion of each step. These should be described in notes to the client's case management file or, where necessary, a longer memorandum. Setting forth the case strategy in an easily accessible format is important to bring other casehandlers up to speed should important case developments need to be addressed in the absence of the principal assigned advocate. The case must be regularly reviewed by the advocate (at least monthly), and calendared for that purpose.

The Advocacy Plan Should Answer the Following Questions:

Who are the parties to the case?

What are the relevant facts?

What are the client's realistic objectives in the case?

What claims and defenses should be raised or anticipated?

How will each objective be met?

What steps will be taken – e.g., evidence gathering, motions, etc. – to achieve these objectives?

What additional resources (co-counsel, experts, etc.) will be needed?

When will each step be taken?

A tool for analyzing case tasks is a simple chart setting forth the elements of the prima facie case which a plaintiff must prove, and the elements of affirmative defenses. Columns alongside each element identify evidence which supports each element, where that evidence can be found, the discovery tools which could yield the evidence, and finally, a column for acknowledging that the evidence is in hand.

A similar chart can be used in any case, and as the case develops, adapted for other purposes, for example: (1) to outline the factual allegations which the plaintiff must plead and ultimately prove; (2) to identify weaknesses in the complaint which are susceptible to an attack on the pleadings; (3) as the basis of a discovery plan; (4) as the basis of a statement of undisputed facts for a motion for summary judgment or summary adjudication; and finally (5) as the backbone of a trial notebook.

Below is an example based on a non-payment of rent case:

Elements of a Prima Facie Case	Supporting Evidence	Source/Location of Evidence	How Evidence will be Obtained	Accomplished?
Creation of tenancy @ \$X/mo.	The Lease	Landlord	Depo/Req for Prod	Yes – [date]
Breach (rent not paid)	LL's records	Landlord		
Service of Proper Notice	LL's agent; the notice	Landlord & Agent	Depo/Interrogs	
Tenant still in possession				
Damages				
Elements of an Aff've Defense	Supporting Evidence	Source/Location of Evidence	How Evidence will be Obtained	Accomplished?
LL's Duty to repair	Green v. Sup Ct			
Defects exist	Photos; DBI Report; testimony	Tenant		
Notice to LL but no repairs	DBI Report; T's testimony	Dept of Bldg Inspection	Subpena duces tecum	
Reduction in rental value	T's testimony			

Here is the same chart, adapted for trial:

Elements of a Prima Facie Case	Supporting Evidence	Presented?	Objections?	Admitted?
Creation of tenancy @ \$X/mo.	The Lease	Yes. LL's Ex A	No	Yes
Breach (rent not paid)	LL's records	Yes. LL's Ex B; Agent's testimony		Yes
Service of Proper Notice	LL's agent; the notice	Yes. LL's Ex C; Agent's testimony	No	Yes
Tenant still in possession		Yes. Agent's testimony	No	
Damages	The Lease	Agent's testimony		
Elements of an Aff've Defense	Supporting Evidence	Presented?	Objections?	Admitted?
LL's Duty to repair	Green v. Sup Ct			
Defects exist	Photos; DBI Report; testimony	Yes	Authentication;	Yes
Notice to LL but no repairs	DBI Report; T's testimony	Dept of Bldg Inspection	No	Yes

Reduction in rental value	T's testimony			
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6. Client Participation in the Conduct of Advocacy on Her Behalf

Case objectives are set by the client, subject to the ethical obligation of the advocate to only counsel or maintain legal or just actions or defenses.³⁴ From the beginning, the advocate and the client must have a common understanding of the legal problem and the client's goals. The advocate must evaluate and explain the means available for achieving the objectives, and ensure that the client understands the advantages, disadvantages and potential risks of each option.

The client should be actively involved in the preparation of the case, identifying witnesses, gathering evidence, etc. Not only does this strengthen the advocate-client relationship, it fosters self-reliance and educates the client about the legal system.

The advocate must therefore keep the client reasonably informed of the status and of important developments in the case. **Under no circumstances can a case be settled without the client's express and informed consent.**

7. Affirmative Litigation

Except in family law cases or actions seeking only review of an administrative agency decision, an advocate who wishes to file an affirmative court action must seek BayLegal approval by submitting a completed "Request to File Affirmative Case" to the Managing Attorney, and to the Director of Advocacy in cases addressing systemic problems or issues. Before the case is filed, a demand letter should be sent to the opposing party outlining the steps needed to settle the case.³⁵

Before engaging in pre-litigation negotiations with a prospective defendant on behalf of a represented client, whether orally or via demand letter, LSC regulations require that the advocate identify that client to the prospective defendant, unless a court order has been obtained keeping the client's identity confidential. To ensure that the client has a colorable claim – even in routine cases – **LSC regulations also require that before any affirmative suit is filed, the client must sign a "pre-litigation statement of fact" which is written in English and in a language that the client understands.** Finally, the regulations require that the client be identified in the

³⁴ Bus. & Prof. Code § 6068(c).

³⁵ Such a demand is a pre-requisite for an award of fees under the catalyst theory. *Graham v. DaimlerChrysler*, 34 Cal. 4th 553 (2004) (Code Civ. Proc. § 1021.5; *Tipton-Whittingham v. City of Los Angeles*, 34 Cal. 4th 604 (2004) (FEHA, Govt. Code § 12965). Note that fees cannot be awarded in federal court on a catalyst theory. *Buckhannon Bd & Care Home v. West VA DHS*, 532 US 598 (2001).

complaint or petition, unless a court order has been secured permitting the client's identity to remain confidential.³⁶

In state court cases, the "pre-litigation statement of fact" requirement can be met by having the client sign and date a copy of the petition or complaint to be filed with the court. This is because state pleading rules require the complaint or petition to "state facts constituting the cause of action." The preferred practice, however, is to separately draft the statement of fact. Where the client does not read English, the statement of fact must be in the client's written language.

8. Responsibility as an Advocate

i. In the Present Proceeding

The advocate has a duty to competently represent the client. Consulting with her Managing Attorney and with input from program staff who have the requisite experience, the advocate develops, and periodically reviews, case strategy and tactics. Pleadings are drafted which preserve and advance the client's claim in accord with applicable law, motions are considered, and formal and informal discovery is pursued, as appropriate, to obtain necessary information in a timely manner. The ultimate aim is to narrow issues to those actually in dispute and to promote resolution of the case in the client's favor, either through settlement negotiations or at a trial or dispositive hearing.

Settlement should always be considered, not only to avoid a possibly unfavorable outcome at trial or hearing, or to avoid the unnecessary expenditure of resources, but also to take advantage of the opposing party's uncertainty as to the outcome at trial. Getting the best settlement, however, is a skill which rests on the advocate's understanding of the facts and evidence supporting each side's case. The advocate should educate him or herself on conducting negotiations, at minimum reading handbooks such as Fisher, Ury and Patton's *Getting to Yes* (Penguin Press 1991). Only the client can consent to settlement, and the advocate is responsible for ensuring that the client has the information needed to make an informed decision.

At the trial or administrative hearing, the advocate presents the case in a manner that is appropriate to the rules, procedures and practices of the tribunal and which reflects thorough and current preparation in the facts and the law. Even in administrative hearings, where the evidentiary rules are relaxed, the advocate must ensure that *evidence* is presented to support the client's claim or defense, and that appropriate

³⁶ 45 C.F.R. § 1636.2. In an emergency, where delay is likely to cause harm to a significant safety, property or liberty interest of the client, the litigation may be filed without a signed statement provided that the statement of fact is signed as soon as possible thereafter. 45 CFR § 1636.2(c).

³⁸ This not only makes good sense, but is required by LSC regulations. See 45 CFR Part 1605.

objections are made when the opponent seeks to introduce inappropriate evidence. This is necessary to ensure the best record should either side appeal.

When a BayLegal case is handled by a volunteer attorney, or co-counseled with a private attorney, the advocate must closely monitor or supervise the private attorney's performance to ensure that the client is competently represented. The private attorney should be offered appropriate support and training. The advocate must also closely supervise a law clerk who is working on the advocate's cases.

ii. Enforcing Favorable Rulings

When a favorable judgment, settlement or order is obtained, the advocate must take steps to ensure that the client receives the benefits conferred, including advising the client of what s/he can expect, and how s/he can enforce the order or judgment including appropriate referrals. A client's case should not be closed until such steps have been taken. In most family law cases, a notice of withdrawal should be filed so that BayLegal will not be attorney of record in post-judgment proceedings. Similarly, where eviction defense cases are settled with the client remaining in possession subject to certain conduct, the advocate should consider substituting out of the case once the settlement has been filed with the court.

iii. Preserving the Basis For, and Prosecuting, an Appeal

BayLegal's agreement to represent a client extends only to the present proceeding and does not encompass an appeal of an adverse judgment, court order or administrative agency decision. Nevertheless, the advocate should be aware of possible factual and legal bases for appeal of an adverse ruling and should make a deliberate decision with appropriate client participation as to the need to preserve such issues for appeal in light of the overall advocacy strategy.

No appeal from a trial court decision, or a petition for an extraordinary writ to set aside a trial court order, may be filed without the approval of the director of advocacy.

If there is an adverse appealable judgment, decision or order, or a nonappealable court order which is subject to discretionary writ review, or an appealable administrative agency decision, the advocate, consulting with the Managing Attorney and other advocates, must decide whether an appeal or writ is warranted. The decision should be based on the merits of the client's appeal; the importance of an appeal in light of our mission, priorities and resources; the potential benefits and risks of an appeal; the willingness and ability of private counsel to undertake the appeal; and other factors set forth on **pages 28-29** of this manual. The client must be timely advised of her right to appeal and of the advocate's evaluation of the merits of an appeal.

Advocates contemplating a court appeal of an administrative hearing decision must obtain the relevant exhibits and a tape recording of the hearing to aid in determining whether the program should represent the client in an appeal. Once we have decided to represent the client on appeal, the administrative agency should be requested to prepare the administrative record. In most cases, the record can be obtained free of charge once suit has been filed by presenting the agency with a copy of the court order granting the client leave to proceed without payment of filing fees.

If the advocate believes that the program should represent the client in an appeal (or writ) of a *trial court* judgment or order, she must obtain the approval of the Director of Advocacy before the appeal or writ petition is filed.³⁸ The Director of Advocacy's approval is not required in cases in which our client was successful but the opposing party filed the appeal or petition for an extraordinary writ.

Because the case was originally taken only for assistance at the trial court or administrative proceedings level, a new client retainer agreement must be signed by the client covering an appeal from (or writ of) a final judgment or court order, or an action to review an administrative agency decision.

The decision for or against filing an appeal (or writ) must be made promptly, with enough time to permit the client to file an appeal (or writ) if s/he so decides. The client must be advised of the decision in writing of the appeal deadline and of what she must do to perfect the appeal. If the deadline for appealing is fast approaching and the client wishes to pursue this option, a notice of appeal should be prepared for the client's signature and filed with the client acting *in propria persona*.

iv. Withdrawing From a Pending Case

The advocate must withdraw from a pending case:

- **When the agreed services have been provided to the client** (for example, where the client agreed that representation was solely for purposes of negotiating a settlement and negotiations were unsuccessful). A formal notice of withdrawal should be filed in family law cases so that BayLegal will not continue to be attorney of record in post-judgment proceedings.
- **When the client is no longer eligible for the program's services and withdrawal will not unduly prejudice the client** (for example, in a domestic violence case in which a now-ineligible client is still in danger and an injunction against the batterer has not been obtained, withdrawal of assistance would prejudice the client)

- **When we cannot competently represent the client** (for example, because we lack necessary expertise or the resources required to prosecute or defend the case), or
- **When the client has made representation difficult or impossible** (for example, by disappearing or failing to respond to contact letters without good cause, by ignoring or acting contrary to the advice of the advocate, by misrepresenting facts related to an essential aspect of the case, by requesting that the advocate take positions which are not legally tenable or which would require the advocate to violate ethical obligations, or other good reason).

The advocate must take steps to minimize any prejudice to the client caused by a withdrawal, including advising the client of his or her legal options and options for alternative representation, referring the client to private counsel, or seeking a continuance of a trial or hearing. If the case involves an administrative agency proceeding, the agency must be promptly advised that the program will not be representing the client.

The withdrawal should be confirmed in writing with the client, either by stipulation or a confirming letter, and notice of the withdrawal promptly given to all parties and the court or agency. If a formal motion to withdraw is necessary, the advocate should state the reasons for the breakdown of the attorney-client relationship in general terms to avoid disclosing confidential information.

In no event may an advocate require that a client sign a substitution of attorneys before the actual existence of circumstances warranting withdrawal or substitution.

v. Transferring Cases

a. Responsibilities When a Case is Transferred

Cases are transferred to another advocate when, for example, the assigned advocate leaves BayLegal or changes her substantive practice within the program.

A departing advocate will close all inactive cases in which future activity is not anticipated. Twenty days prior to the transfer, or as far in advance as is reasonably possible, the departing or transferring advocate will provide a complete list of the open cases to his or her Managing Attorney. Where possible, this list will designate an advocate who has agreed, subject to the approval of the Managing Attorney, to assume responsibility. If all cases are not assigned, the Managing Attorney will promptly assign each case to a staff advocate. The advocate transferring the case has the responsibility to ensure that:

- All cases are brought up to a current state of readiness. This means pleadings shall be filed, research conducted, and other work done on the case up until the moment of assignment to another advocate. In cooperation with the new advocate, the departing advocate shall continue working on the case until his or her departure.
- Letters are sent to each client informing her not only that the case is being transferred, but also identifying the new advocate (if known) who is assuming responsibility for the case.
- A transfer memo is placed in each case folder. This memo shall include, at minimum, the name of the case, the date the case was opened, the type of case, work done on the case to date, anticipated next steps, major legal theories, names and addresses of any opposing counsel, anticipated court dates, and any other significant features of the case.
- The name of the responsible advocate is changed in the case management file and the date of the change noted in the case notes.

b. **Accepting a Transferred Case**

Advocates who receive transferred cases shall:

- Immediately review the case folder and the client's case management file to determine the nature of the case and its current status.
- If the departing advocate has not sent a letter to the client announcing the transfer, the new advocate must send a letter to the client identifying the new counsel of record. The letter should state the advocate's understanding of the scope of representation of the client. If the case is in litigation or is being adjudicated within an administrative agency, the letter should request that the client contact the advocate regarding the case.
- If any pleadings have been filed in court, the advocate should file a Notice of Substitution of Attorney or Entry of Appearance directing the parties to take note of the new counsel of record.
- The advocate must review the case folder in detail for any pleading deadlines (responses to motions for summary judgment, discovery deadlines, etc.) or for any upcoming trial, motion or hearing dates.
- If there is an appeal deadline or a trial date, the advocate must immediately notify the Managing Attorney and take action to avoid prejudice to the client.

- The advocate must review all pleadings, concentrating specifically on determining what issues have yet to be resolved. If certain issues have been eliminated or new issues have emerged, either through motion practice or discovery, these should be analyzed, and a memo reviewing these issues placed in the file.
- If the review indicates that motions should be filed or discovery initiated, steps should be immediately taken to get this started.
- The advocate will ensure that the name of the responsible advocate has been changed in the client's case management file.

9. Co-Counseling Agreements

Co-counseling a case with other attorneys – particularly private attorneys – should be explored where appropriate. The terms of the co-counsel relationship must be determined before the relationship begins, and a written co-counseling agreement reflecting those terms – including the nature and objectives of the case, the identity and duties of lead and co-counsel, the relative responsibilities of the parties, the sharing and advancing fees and costs, etc. – must be executed between the program and co-counsel. This agreement must be approved by the Managing Attorney, Pro bono Coordinator, Regional Counsel, or Director of Advocacy, as appropriate.

Absent extenuating circumstances and the approval of the Director of Advocacy, BayLegal cannot co-counsel a case with an attorney who has a contingent fee arrangement with the client under which the private attorney will recover a percentage of any damages recovered. However, we can co-counsel a case with an attorney whose fee will consist of statutory attorneys' fees. The decision to participate in any fee-generating case must, of course, comply with the LSC guidelines governing fee-generating cases. The pleadings should also state that only co-counsel will seek a fee in the proceeding.

If there are both eligible and ineligible parties on our side of the case, the program can only represent those eligible for our services. If individual parties are represented by different legal services programs or attorneys, the pleadings and other relevant papers must expressly identify the individual clients represented by each program or attorney.

10. Advancement and Reimbursement of Fees and Costs

At the initiation of representation, or whenever it becomes evident that the prosecution of the case will require the payment of fees or costs, the client must agree to pay these costs in advance or to reimburse the program if they are incurred. A letter memorializing this agreement should be sent to the client before we advance payment for any fees or costs.

In appropriate cases, the program will advance a litigation cost or fee, for example, to cover court fees which cannot be waived, transcripts not covered by the Certified Shorthand Reporters fund, service fees, or expert witness fees. A litigation cost request, explaining the justification for an advance, must be submitted for approval to the Managing Attorney.³⁹ An advance of costs or fees exceeding \$250 must also be approved by the Director of Advocacy. The client is expected to advance the payment for any cost of \$5.00 or less.

11. Client Funds and the Client Trust Account

Cal. Rule of Professional Conduct 4-100 requires that all funds received or held for the benefit of clients are to be placed in a Client Trust Account. All such funds must be given to the designated regional office staff person – usually the office manager, for deposit in the office’s trust account. Money orders are preferred and should be made out to Bay Area Legal Aid. Personal checks are not accepted, and cash is taken only in very exceptional circumstances. A receipt must be given to the client for any money received, with a copy kept in the client file and another copy forwarded to the finance department. A notation must also be made in the case management system.

The client may request the return of monies held in the trust account at any time prior to disbursement. A signed receipt must be obtained from the client and kept in the case folder, and a notation made in the case management system. If applicable, a substitution of attorneys taking us out of the case will be executed in those cases in which depositing monies in the client trust account – e.g., in lieu of rent payments – is a condition for our representation.

BayLegal should not hold client funds unless there is a very good reason for us to do so. Any money remaining in the account and due to the client must be returned when the case is closed.

12. Miscellaneous Actions to be Taken in New Cases Opened for Extended Service or Representation

A case management file will be opened for each client receiving legal assistance. In addition, a case folder will be prepared for every client receiving extended service or representation. A printout of the client’s case management file containing demographic and financial information related to the client, must be placed in the case folder.

³⁹ The litigation cost request form is on the intranet at: [Forms](#) → [FinancialForms](#) → Litigation Costs.xls

The case management client file must contain a narrative which outlines for anyone working on the case the basic facts, potential issues, and the initial course of action to be taken.

Calendar Case Events!

In every case where BayLegal represents the client, key dates, deadlines, and other important events must be recorded in the calendaring system of Outlook, BayLegal's e-mail program. Certain events must be recorded **in the OFFICE-WIDE calendar** so that if an advocate is unexpectedly absent, support staff and the Managing Attorney will know that other arrangements need to be made:

- Client Intake Appointments
- Hearing, Trial, Mediation and Similar Dates
- Discovery Dates such as Depositions, Document Production, etc.

In addition, it is good practice to also calendar (in Outlook):

- The last day for Filing a Complaint, Requesting a Hearing, or Responding to a Pleading
- Discovery Deadlines
- Deadlines Imposed by an impending Trial (e.g., the last day for filing a summary judgment motion or to file a motion to compel discovery).

At minimum, each of these key dates should be set forth in the case summary section of the "case notes" tab in the client's case management file. Each client's file also has a "critical date" box (outlined in red) where the statute of limitations, filing deadline, or other crucial upcoming events must be recorded.

13. File Organization and Maintenance

The "client file" consists of the electronic file maintained in the case management system ("Prime file"), and the manual "case folder" containing pertinent documents.

Along with client eligibility and demographic information, the Prime file must contain (1) a summary of what BayLegal agreed to do for the client (unless this is clear from the retainer agreement) and the steps proposed to be taken to achieve this goal (see "Litigation or Advocacy Plan" at **pages 32-34**, above); (2) notes of all important actions taken, including the date of each action and its substance. If that substance is set forth in a document, the document must be identified and a copy placed in the case

folder (or an explanation given for its absence); and (3) on closure, a “closing case memo” explaining how the case was resolved. Brief notes of events may be written in time slips and exported into the case notes. Since time slips are available to LSC, care must be taken to ensure that time slip notes do not reveal confidential client information.

A client case folder must be created for all cases accepted for extended service or representation. The advocate must ensure that the client’s case folder contain all eligibility documentation (financial, citizenship, etc.), memoranda, letters and pleadings relevant to the case.

All documents must be affixed to the folder. The folder should be organized as follows:

- Left hand side:**
- Intake sheet (printed out from the Prime file)
 - Client eligibility documentation (e.g., citizenship attestation or non-citizen verification; financial eligibility printout from the Prime file, and a completed “Grant Compliance Checklist” tracking LSC requirements)
 - Retainer agreement, engagement letter, or agreement to investigate
 - Client Trust Account receipts and cost bills
 - Case activity notes (which may largely consist of printouts from the Prime file)
 - Correspondence with client and internal memoranda (filed chronologically, under the case activity notes)
 - Research memoranda, drafts, extra copies (if voluminous, in separate files, each with a label having client’s name, case number and subject matter, e.g., “research”)
- Right hand side**
- Papers filed with a court or administrative agency and correspondence with opposing party (filed chronologically with a tabbed separator between pleadings and correspondence) (if voluminous, use separate folders, each with a label having client’s name, case number and subject matter, e.g., “pleadings”)

Evidentiary documents, photos, kept in a manila envelope affixed to the file (if voluminous, in separate folders, each with a label having client's name, case number and subject matter, e.g. "evidence")

All original documents will be copied and immediately returned to the client, except when absolutely necessary, for example, when the original is to be introduced as evidence. Originals will be placed in a manila envelope and conspicuously labeled. Original documents should not be taken from a client on behalf of an absent advocate without explicit instructions from that advocate. Instead, copies should be made and the originals returned to the client.

All important case developments must be noted in the client's case management file as they occur. These notes should periodically be printed out and fastened to the client's case folder.

Complex Litigation Files

Documents in "complex litigation" cases – involving multiple court filings – should be organized chronologically in separate folders arranged by the function of the material each contains. Each folder should contain a face sheet listing the documents contained in the folder in the order that they are dated or received, as appropriate. The documents within each file may be divided into volumes when the folder becomes voluminous. Separate folders should be considered for:

Pleadings and Court Documents: all documents filed in court or served on the advocate, such as responses to discovery (if voluminous, a separate discovery folder should be maintained containing interrogatories, requests for admissions and, and responses. Documents produced in response to requests for production should be kept in a separate folder)

Correspondence: all letters sent and received

Memoranda: internal and research memos, clippings, related articles. This folder should contain a separate volume containing the retainer and co-counseling agreements, time records, costs and disbursement lists, etc.

Legal Research: filed chronologically or by subject matter

Client papers: medical or employment records, etc.

Documents Obtained in Discovery: in volumes by date produced. A roster identifying each document must be maintained and each document

given a unique identifying number and marked accordingly. Numerous documents should be numbered sequentially for ease in identification.

Documents Produced in Discovery: in volumes by date produced. A roster identifying each document must be maintained and each document given a unique identifying number which differs from the numbering system used to identify documents obtained in discovery and marked accordingly.

Miscellaneous Folders: materials not fitting any other category

Deposition/Witness Folders: in volumes for each deponent or witness labeled by name and date, each containing the transcript, all exhibits and notes if necessary, and a roster identifying any documents produced at the deposition

Reporter's Transcripts: filed by hearing and date

Related Cases: documents or pleadings from related cases

14. If Available, Seek a Waiver of Court Fees and Costs

In general, an advocate filing court papers should always seek fee waivers or applications to proceed *in forma pauperis*. Even if BayLegal has advanced fee payment because of the urgency of the matter, the advocate should attempt to obtain reimbursement by subsequently filing a fee waiver. In the event that the litigation results in an award of damages, the party is required to reimburse the court for any fees waived.⁴¹

15. Apply for Reimbursement of the Costs of Depositions, Court Hearings, Trials, and Similar Proceedings

The cost of obtaining depositions or court transcripts may be waived for litigants represented by the program. (The waiver generally does not extend to administrative hearings or other hearings of governmental bodies.) The appropriate application form and the deposition or transcript bill will be sent to the Certified Shorthand Reporters' Board. The bill must be promptly given to the responsible regional office support staff person so that the application can be timely prepared and submitted.⁴²

16. Attorneys' Fees

⁴¹ See California Rule of Court 985 and Government Code § 68511.3.

⁴² See Business and Professions Code § 8030.2.

BayLegal can claim and collect attorneys' fees in certain matters. In any case having the potential for a recovery of fees, the prayer of court pleadings or the requisite administrative agency forms will explicitly request that BayLegal be awarded fees.

Under the Retainer Agreement, the client has assigned the right to fees to the program. In any case with fee potential, the advocate will explain the fees provision of the retainer to the client at the time the agreement is signed, emphasizing the importance that the recovery of fees will play in expanding our ability to help a greater number of eligible clients.

Attorneys' fees may be requested under the following statutes:

- **Private Attorney General: Code Civ. Proc. § 1021.5**
- **State Public Assistance Appeals: Welf. & Inst. Code § 10962**
- **SSI District Court Review under EAJA: 5 USC § 504(a)**
- **Dissolution, Legal Separation, Annulment and subsequent related proceedings: Family Code § 2030**
- **Domestic Violence Prevention Act: Family Code § 6344**
- **Paternity Actions: Family Code § 7640**
- **Uniform Child Custody Jurisdiction & Enforcement Act: Family Code § 3450(b)**
- **Uniform Interstate Family Support Act: Family Code § 4927(b)**
- **Modification of Support Orders: Family Code § 365**
- **Wrongful Eviction & Utility Termination: Civil Code § 789.3(d)**
- **Unlawful Detainer Actions where the lease allows fees only to the landlord: Civil Code § 1717**
- **Habitability (violation of Civ Code § 1941.1): Civil Code § 1942.4(b)(2)**
- **Retaliatory Eviction: Civil Code § 1942.5(g)**
- **Frivolous Appeal by Landlord of Rent Control Agency's Administrative Decision: Civil Code § 1947.15(h)(2)**
- **Housing Discrimination: 42 USC § 3613(c)(2) (Fair Housing Act); Govt Code § 12982.9 (FEHA); 42 USC § 12133 (ADA); Civil Code § 52(h) (Unruh Civil Rights Act)**
- **Civil Rights Cases: 42 USC § 1988**

In cases where the client could potentially win damages, the advocate must also explain the importance of separating negotiations over the amount of damages from negotiations over the amount of fees in order to avoid a potential conflict between the client and the attorney.⁴³ An agreement to separate these issues during settlement negotiations should be reduced to writing and signed by the client as an addendum to the retainer agreement. Should a defendant later offer a lump sum settlement which includes both damages and fees, the advocate can in good faith object that the client has instructed her or him that these issues must be separately discussed.

⁴³ See *Evans v. Jeff D*, 475 US 717 (1986), for an illustration of the conflict.

Fees are awarded based on a “lodestar” which consists of the hours reasonably expended by the advocate multiplied by a reasonable hourly rate.⁴⁴ The reasonable rate is based on prevailing hourly rates in the community for attorneys with comparable experience.⁴⁵ Fees are generally awarded only for hours expended on successful claims.⁴⁶ Advocates will keep clear, contemporaneous time records in the case management system which describe the activity without revealing client confidences. Activity descriptions will be tied to specific pleadings, motions, discovery events, etc., to anticipate objections by the other side as to the appropriateness of the time expenditure or the inadequacy of the description.

As noted, the simultaneous negotiation of a damage award to the client and the amount of fees poses a conflict between the interests of the client and that of BayLegal. When negotiating the settlement of a case, the attorney will take the position that the client’s substantive claims should be resolved before addressing the attorneys’ fee issues. No attorney will agree to waive fees without obtaining the Managing Attorney’s approval.

Advocates must take particular note of the deadlines for filing a motion for an award of attorneys’ fees. In California, the motion must be filed within the time during which the losing party can appeal.⁴⁷ In contrast, federal court fee motions must be filed within a shorter time.⁴⁸

If a case is successfully concluded and an application for fees becomes necessary, the Managing Attorney must be promptly notified of the deadlines for filing the motion so that a decision can be made as to whether the motion will be prepared by BayLegal staff or contracted out to private fee counsel, and if prepared in-house, who will actually draft the motion. Cases with multiple co-counsel ordinarily should be referred to private counsel. The lead attorney in an attorneys’ fee case will attempt to collect the fee if collection would be relatively simple. If collection of the award is not relatively

⁴⁴ See, e.g., *Graham v. DaimlerChrysler*, 34 Cal. 4th 553, 579 (2004). BayLegal has compiled a table of reasonable hourly rates for complex cases as of 2009, available on the BayLegal intranet.

⁴⁵ Non-profit attorneys fees are calculated on the basis of prevailing rates, not the actual cost to the agency. *Blum v. Stenson*, 465 US 886 (1984). The “prevailing rate” formula does not apply to fees awarded under the Equal Access to Justice Act (EAJA, 42 USC § 504), which caps the rate at \$125 per hour. 28 USC § 2412(d)(2)(A).

⁴⁶ See *Hensley v. Exkerhart*, 461 US 424 (1983), addressing how to calculate fees in partially successful cases.

⁴⁷ Cal. Rule of Ct. 3.1702.

⁴⁸ In most cases, within 14 days of entry of judgment (FRCP Rule 54(d)(2)(b)). and within 30 days in EAJA cases. 5 USC § 504(a)(2).

simple or will require resorting to enforcement proceedings, the matter should be referred to a collection agency after consultation with the Managing Attorney.

17. Timekeeping

The Legal Services Corporation requires all staff advocates to keep concurrent time and activity records for all program compensated work on cases, matters, supporting activities, and leaves.⁴⁹ “Case time” is time spent on a named client’s case. Time spent on each case must be allotted to the proper client and entered in the case management system. Notes in case management time slips can and should be exported to the case file notes. “Matter time” is directly related to serving the client community (such as community education or advocacy related training) while “supporting activities” such as fundraising are said by LSC to be less directly related to serving clients.

Law clerk and volunteer attorneys should be encouraged to keep computer records of the time and activity spent on cases. This information is useful in showing funders how the program leverages staff time to permit maximum usage of volunteers.

18. Investigating Client Grievances and Reporting Potential Malpractice

The most common reason for client complaints is the advocate’s failure to maintain regular contact with the client to inform her of case developments, including advising her that nothing more can be done and the case will be closed. While actual malpractice is rare, failure to maintain client contact can be a sign that the advocate has difficulty managing his or her cases. Such complaints should be taken seriously by the Managing Attorney.

A second important cause of client complaints is the failure to articulate clear limits on the assistance we will provide, or blurring those limits by going beyond what the advocate originally said would be done. The failure to explain or stick to the limits stated in the retainer agreement is particularly a problem in brief service cases where the advocate, although formally agreeing only to draft a *pro se* pleading, nevertheless goes on to prepare discovery or jury instructions, and perhaps negotiates with opposing counsel, all of which fosters in the client an expectation of full representation. Misunderstandings can also occur when the advocate goes beyond providing legal services, and takes on non-legal roles (e.g., helping a hoarder client by cleaning his apartment, resulting in a grievance when now cherished items have been disposed of). Advocates should be keenly aware of these pitfalls and avoid situations which can invite client complaints.

⁴⁹ See 45 CFR Part 1635. The use of particular timekeeping codes at BayLegal is explained in “Timekeeping Protocols for Advocates,” available on the intranet at: [AdvocacyPolicies&Manuals&Forms](#) → [LitigationAndAdvocacyFormsAndManuals](#) → MiscPoliciesAndGuidance

When a client does have a grievance, the advocate should first attempt to resolve the matter directly with the client. If that does not resolve the matter, the client should then meet with the Managing Attorney. Further steps include, in order, referring the client to the Executive Director for resolution, and then to the Client Complaint Committee of the Board of Directors for an informal hearing. The client's ultimate recourse is to complain directly to the Legal Services Corporation.

Potential malpractice by program staff or volunteers should be immediately reported to the Managing Attorney and the director of advocacy. No advocate or employee may make any admission regarding the program's responsibility for any acts or omissions which may constitute malpractice. Complaints from other attorneys, judges and administrative law judges, etc., should be referred first to the Managing Attorney of the affected office, and if not resolved, then to the director of advocacy.

19. Cases Should Be Promptly Closed

Each case will be promptly closed once the advocate has discharged her responsibilities to the client or withdrawn from the case.⁵⁰ Suitable pleadings should be preserved in a brief bank maintained on the intranet and accessible by all program advocates.

The following actions will be taken when a case is closed:

- **The case folder will be reviewed** to determine the presence of irreplaceable documents such as deeds, wills, ID cards, etc, and these items returned to the client or other appropriate person. In the event that the rightful owner cannot be located, the Managing Attorney will be notified so that arrangements can be made to preserve these documents pending contact with the owner.
- A **closing letter should go to the client** advising her that the case will be closed, the reasons for the closure, and any appropriate deadlines for appeals or other action by the client.
- The BayLegal "**Case Checklist**" should be reviewed to ensure compliance with LSC regulations.
- The advocate will fill out a **Closing Case Memo**, which acts as a checklist comparing the results achieved to the client's original objectives; ensures that original documents and monies have been returned to the client; and, if the

⁵⁰ LSC requires all cases in which the only service rendered is a referral, counsel and advice, or brief service to be closed during the same calendar year in which the case was opened, except for cases opened in the last quarter of a calendar year which must be closed in the first quarter of the following year. LSC Case Service Report Handbook, Par. 3.3 (2008)

case was unsuccessful, prompts the advocate to advise the client of the deadlines for filing an appeal.

- **The client's case management file will be closed**, with care taken to designate the outcome (outright win, generally favorable, generally unfavorable, outright lost, other), describe the main benefit to the client, and to estimate and enter the monetary value to the client and community of prosecuting or defending the case.⁵¹
- The case folder will be reviewed by the supervising attorney and filed in the office with other recently closed cases.

Generally, client case folders stored outside of the office after the case has been closed for at least two years. Under the client retainer agreement, case folders may be destroyed five years after the case has been closed.

III. Legal Services Corporation Prohibitions and Restrictions on Substantive Advocacy

For a compilation of LSC statutes and regulations, see David Udell, et al, *Guidelines for Vigorous Advocacy by Programs Subject to the Legal Services Corporation Restrictions* (NYU Brennan Center for Justice, 2010)⁵²

A. Advocacy Prohibited Regardless of Funding Source

Under federal statutes and interpreting regulations, BayLegal cannot provide assistance in cases involving the substantive matters set forth below, even if paid for by non-LSC funds. Program policies describing the applicability of the most important of these prohibitions and restrictions have been adopted by the Board of Directors and are found in BayLegal's intranet.

1. Welfare Reform Litigation

⁵¹ For example, one can estimate that the value to the client of establishing eligibility for SSI benefits is the benefit rate (approximately \$800 per month) for three years (36 months), e.g., nearly \$29,000, plus any retroactive benefits also awarded. The purpose of documenting the value of such successes is to show funders how effectively we use their money.

⁵² Found on the BayLegal intranet at: [AdvocacyPolicies&Manuals&Forms](#) → [LitigationAndAdvocacyFormsAndManuals](#) → AdvocacyManuals. BayLegal's policies implementing the LSC regulations are found at: [AdvocacyPolicies&Manuals&Forms](#) → BaylegalBoardPolicies

Although the Congress and LSC regulations (in 1996) prohibited LSC funded programs from challenging "welfare reform" measures (defined as a legislative or administrative effort to change a key component of public assistance)⁵³, the U.S. Supreme Court found this provision unconstitutional in *Legal Services Corporation v. Velasquez*, 531 U.S. 533 (2001).

Moreover, advocates can use non-LSC funds to respond to an unsolicited written request for information or testimony regarding a welfare reform proposal emanating from a legislative or governmental official. **See pages 55-56.**⁵⁴

2. Participation in Class Actions

Participation in class actions, including acting as *amici*, is prohibited.⁵⁵ This prohibition applies even where we represent an individual whose case has been consolidated with a pending class action, and extends through the entry of a final order. However, the rule does not prohibit post-judgment assistance in obtaining individual relief under a class action settlement or order.

3. Drug Related Public Housing Eviction Defense

This prohibition applies where the client has (a) been charged with or, within the past 12 months, been convicted of, the **sale or distribution of illegal drugs**, and (b) the eviction is based on the drug activity constituting a threat to the health and safety of other housing authority tenants or housing authority employees.⁵⁶ **This provision does not apply to evictions from subsidized housing programs such as Section 8.**

4. Representing Incarcerated Prisoners in Litigation

We cannot represent an incarcerated prisoner in a case which has been filed in court. The only exception to this prohibition is where the client was incarcerated after legal assistance began and the incarceration is expected to be brief.⁵⁷ In general, we can assist a person who will be incarcerated for 30 days or less. Representation of prisoners in administrative proceedings (such as an SSI hearing) is not prohibited.

⁵³ 45 CFR Part 1639. LSC regulations are found at www.lsc.gov, in the Laws & Regulations folder.

⁵⁴ See 45 CFR Part 1639.

⁵⁵ See 45 CFR Part 1617.

⁵⁶ See 45 CFR Part 1633.

⁵⁷ See 45 CFR Part 1637.

5. Redistricting Cases

The program cannot engage in activity advocating or opposing the reorganization of electoral districts.⁵⁸

6. Soliciting Cases

BayLegal advocates cannot solicit cases from an individual who did not seek assistance from the program. However, the prohibition does not prohibit us from providing community legal education, nor does it prohibit a program advocate from representing an otherwise eligible client who seeks assistance in response to our community education or outreach activities.⁵⁹

B. Substantive Advocacy Prohibited Using LSC Funds

Under statutes in effect since the 1980s, certain other substantive advocacy is prohibited using LSC funds, and in any event, are not within the program's current adopted priorities. This prohibited advocacy includes:

1. Criminal Proceedings or Collateral Attacks on Criminal Convictions

The program cannot use LSC funds to provide legal assistance in criminal proceedings, nor in challenging such proceedings by way of the writ of habeas corpus.⁶⁰

2. Procuring Non-Therapeutic Abortions

The program cannot provide legal assistance aimed at procuring a non-therapeutic abortion, or in compelling an individual or institution to perform an abortion.⁶¹

3. School Desegregation Proceedings

The program cannot provide legal assistance relating to any proceeding to desegregate a public school.⁶²

⁵⁸ See 45 CFR Part 1632.

⁵⁹ See 45 CFR part 1638.

⁶⁰ See 45 CFR Parts 1613 and 1615.

⁶¹ See 42 USC § 2996f(b)(8) and 45 CFR Part 1610.

⁶² See 42 USC § 2996f(b)(9) and 45 CFR Part 1610.

4. Draft Resistance Proceedings

The program cannot use LSC funds to provide legal assistance related to any proceeding involving resisting induction into, or desertion from, the U.S. Armed Forces.⁶³

5. Assisted Suicide Proceedings

The program cannot provide legal assistance related to a client obtaining an assisted suicide or euthanasia.⁶⁴

C. Permissible Activity Which is Restricted Under LSC Regulations

LSC has also restricted the program's ability to take fee generating cases, to collect attorneys fees and to engage in legislative and administrative advocacy.

1. Taking Fee Generating Cases⁶⁵

BayLegal can take the following fee-generating cases:

- Social Security and SSI cases
- Individual cases within our priorities which have been rejected for *pro bono* or low-fee placement by two private attorneys or which cannot be placed *pro bono* or on a low-fee basis by an organized referral panel
- Cases within our priorities where the recovery of damages is not the major aim of the lawsuit AND substantial attorneys fees are not likely to be awarded
- At the discretion of the executive director, cases involving an emergency compelling filing before a referral can be made
- Classes of cases which the program, in consultation with the private bar, has determined would be unlikely to be taken by a private attorney (see below)

⁶³ See 42 USC § 2996f(b)(1) and 45 CFR Part 1610.

⁶⁴ See 45 CFR Part 1643.

⁶⁵ See 45 CFR Part 1609.

In consultation with the private bar, **BayLegal has determined that without prior payment of a consultation fee, it would be unlikely that a private attorney would take cases on behalf of low-income clients involving:**

- unlawful detainer defense
- consumer collection defense
- court appeals from adverse public assistance or Section 8 administrative agency decisions
- domestic violence matters involving additional issues such as dissolution or annulment of marriage, legal separation, parental rights, child custody or child visitation and not involving substantial property, AND the opposing party's income does not exceed \$75,000 per year, AND the community and separate assets (exclusive of the family home, which is not counted) combined are worth less than \$100,000.

If a fee-generating case is accepted, the file notes should describe the reasons, cite the applicable exception, and (if applicable) state the names of the private attorneys or referral service which declined to take the case.

2. Claiming, Collecting and Retaining Attorneys' Fees

Effective January 1, 2010, the regulations restricting LSC funded programs from claiming, collecting or retaining statutorily authorized attorneys fees were suspended.⁶⁶ BayLegal advocates can now seek attorneys fees, even in cases using LSC funds. **See pages 46-48** for BayLegal's attorneys' fees policies.

3. Legislative and Administrative Advocacy

LSC regulations also restrict program advocates from engaging in Legislative and Administrative Advocacy except in response to a written request from a governmental or legislative agency or official for testimony, information or analysis, and then only if non-LSC funds are used.⁶⁹ Such requests must be unsolicited, and any communication in response to the request may be distributed only to the party or parties making the request. "Grassroots lobbying" (a direct suggestion to the public to contact public officials in support of or in opposition to a pending or proposed law or policy, and

⁶⁶ See 75 FR 21506 (April 26, 2010), removing 45 CFR Part 1642.

⁶⁹ See 45 CFR Part 1612. Requests for public comment on proposed regulations constitute "invitations."

includes financial contributions to demonstrations, marches, rallies, etc. aimed at influencing the passage or defeat of a proposed law or policy) is strictly prohibited.⁷⁰

Permissible Legislative and Administrative activities include:

- Responding to requests for comments in a federal or state rulemaking proceeding,
- Communicating with a government agency for the purpose of obtaining information, clarification or interpretation of the agency's rules, regulations, practices or policies,
- Providing administrative representation in a proceeding adjudicating the particular rights or interest of the client,
- Pre-litigation negotiations,
- Litigation challenging agency rules, regulations, guidelines or policies unless otherwise prohibited,
- Informing a client or the public about, or analyzing the effect of, new or proposed statutes or administrative regulations, without taking a position for or against the measure
- Advising a client of her right to communicate directly with an elected official,
- Participating in meetings or committees of bar associations where program resources are not used to support prohibited legislative or rulemaking activity and the program is not identified with bar association activities that include such prohibited activity, or
- Participating in activity related to the judiciary, including the promulgation of court rules, rules of professional activity and disciplinary rules.

Before responding to a request from a governmental or legislative agency or official, program advocates must obtain prior permission from the executive director of the program. It is preferable that we have an actual client affected by the proposed rule or legislation, and that our proposals be generally approved by the client. Once such advocacy begins, the advocate's time sheet must reflect the nature of the activity and the

⁷⁰ The "grassroots lobbying" restriction does **not** prohibit reporting the content or status of a proposed law or policy, or the effect of the enactment of the law or policy on an eligible client. 45 CFR § 1612.2(a).

time expended and the non-LSC source of funding for the activity. A copy of any written response to the request for input must be given to the director of litigation.

D. Ramifications of LSC Prohibitions and Restrictions on the Advocate's Fiduciary Obligations to the Client

Because each client is entitled to competent representation,⁷¹ a program advocate must consider withdrawing from representation whenever LSC prohibitions or restrictions would materially interfere with the advocate's ability to competently represent the client. Such a case would arise, for example, where the resolution of the client's problem would require a class action.

Where appropriate, clients must be advised that these prohibitions or restrictions may inhibit BayLegal's ability to fully assist them in solving their problem, that any assistance provided will be subject to these restrictions, and that the program may have to withdraw from representing the client where these restrictions render competent representation impracticable.

IV. Miscellaneous Matters

A. Maintaining Substantive Expertise

Each advocate is expected to maintain a high level of proficiency in her substantive legal fields, and to regularly follow legal developments in these areas. (See the BayLegal Performance Standards and Professional Development Guidelines.) Where applicable, advocacy should be considered in consultation with other legal services or other advocates practicing in the field.

1. Participation in Task Forces

In consultation with members of his or her project, unit or office, each advocate should also participate in the housing or welfare task forces, or similar organizations of advocates in other substantive legal fields. Advocates attending a task force meeting should obtain copies of important handouts distributed at the meeting for dissemination to program advocates who were unable to attend.

2. Professional Development of Advocates

The advocate and his or her supervising attorney will meet annually to develop a professional development and work plan. In line with BayLegal's Professional Development Guidelines, the plan should set forth the advocate's goals for the next

⁷¹ See Cal. Rules of Professional Conduct 3-110.

twelve months in the areas of policy work, caseload, specific experiences (e.g., “two depositions” or “draft summary judgment motion”), as well as identify training needs and outline a training plan.⁷²

Advocates should take advantage of available legal education and training opportunities to keep abreast of new developments in the field, and should suggest potential in-house training topics to the director of advocacy and training. To better be able to serve clients, and because the attrition in the number of staff advocates in recent years has made it difficult to justify full specialization, advocates should take advantage of the periodic substantive training given new law clerks to familiarize themselves with other areas of law practiced by program advocates.

3. Approval of Training

The program will consider paying for work-related continuing legal education and other training outlined in the advocate’s professional development and work plan. A request that the program pay for training must be submitted in writing to the Managing Attorney a sufficient time before the training event to permit requesting any available discounts or fee waivers.⁷³

A request for program payment for additional expenses, including travel or lodging, must be separately submitted (**See pages 59-60**). Requests for expensive or out-of-town training will be closely scrutinized, and travel and accommodations to be paid by the program must be approved by the executive director.

B. Review of Open Cases and Projects

The advocate and her supervisor will meet periodically (at least every six months, if not more often) to review the status of the advocate’s open cases and projects. The purpose of these meetings are to ensure that clients are provided with quality advocacy in an efficient and effective manner. The review will also entail examining a sampling of the case folders in active cases. Under the collective bargaining agreement, a more formal performance review takes place annually, culminating in a professional development plan setting forth training and advocacy goals for the following year. The annual review permits a more rounded discussion of the advocate’s development and the advocacy projects s/he is engaged.

⁷² Sample training plans are found on the intranet at: [AdvocacyPolicies&Manuals&Forms](#) → [BaylegalStandardsAndProfessionalDevelopmentGuidelines](#) → TrainingPlanTemplates

⁷³ The training request form is found in the financial forms folder on the intranet: [Forms](#) → [FinancialForms](#) → TrainingRequestFormRevFeb2010.xls. Trainings which cost more than \$250 must also be approved by the director of advocacy.

C. Minimum Caseload Expectations

Each advocate is expected to maintain a caseload, devoting on average at least 60% of his time to case work, and to engage in impact advocacy, commensurate with her experience and other duties. Where the advocate is engaged in approved systemic advocacy or other important BayLegal approved work, the 60% guideline can be adjusted. The most important goal is to ensure that the expenditure of BayLegal resources – including advocate time – most effectively and efficiently responds to the needs of the client community.

Staff attorneys who have developed sufficient substantive expertise in a particular field will be expected to devote a proportion of their time on impact advocacy, including litigation, policy advocacy, community education and outreach, and training other advocates. The nature and goals of such advocacy will be determined in the course of developing the individual's annual professional development and work plan, and must be consistent with the goals and priorities of the applicable regional office, project, or unit.

While BayLegal has adopted minimum caseload guidelines which estimate the number of cases an advocate should be handling, the actual number of active cases maintained during a calendar year will vary depending on the substantive nature of the advocate's practice, the breadth and complexity of impact advocacy, and her other job-related responsibilities.

C. Supervising Law Clerks

Law clerks and volunteers are a valuable resource for supporting advocates in assisting clients, and a recruitment pool for future public interest advocates. BayLegal has a duty to ensure that law clerks and volunteers are well supervised and have a rewarding experience while learning about our practice.

Advocates assigned a law clerk or volunteer should establish at the outset what the advocate (and BayLegal) expects from the intern, and learn what s/he hopes to gain from the internship. The advocate should ensure that the intern has enough substantive work to keep busy, meet often to provide feedback on the intern's work product and discuss his or her concerns, and expose the intern to different experiences. This can include client intake, witness interviews, outreach events, drafting pleadings, discovery, or memos, attending or conducting court or administrative agency proceedings, participation coalition or substantive unit meetings, etc. The intern should leave the program with both positive memories and tangible products, such as a substantive writing sample.

D. News Releases and Policy Statements

Only the executive director or his or her designate can make policy statements on behalf of Bay Area Legal Aid. Except as provided in the next paragraph, all news releases must be approved by the executive director or his or her designee. Once the executive director or his/her designee has approved a policy or position taken with respect to a particular continuing matter, it is not necessary to obtain additional approvals for each expression of such policy or position in the course of the continuing matter. Program employees should not make policy statements or news releases on their own behalf as program employees. Policy statements and news releases may be made expressly on behalf of an eligible client only after obtaining express authorization from the client and consulting with their Managing Attorney, and such statement or news release should indicate that the client is represented by a particular advocate of the program.

Any California-licensed attorney may discuss with the media, within the limits of professional ethics, any case in which she is the attorney-of-record. Such discussion may only occur after obtaining express authorization to do so from the client, and should be approved in advance by the Managing Attorney or the director of advocacy unless obtaining such approval is impracticable.

E. Travel and Other Expense Advances or Reimbursement

The program will reimburse advocates for expenses associated with pre-approved work-related activity or purchases, including travel, lodging, meals, or publications. The appropriate forms should be submitted first to the Managing Attorney.

1. Travel (including Training-Related Travel)

Mileage and Parking Costs Reimbursement:

The program will reimburse advocates who have to use their own cars for travel within the Bay Area and Sacramento related to client advocacy or other BayLegal-related activity. Reimbursement is at a rate per mile set by the finance and administration department. The advocate must fill out a “field expense report” form⁷⁴, indicating the purpose of the travel, the date, and the beginning and ending odometer readings, attaching any receipt for parking, tolls, or other expenses; secure the approval of the Managing Attorney; and submit the form to the finance department.

Airline, Lodging, Meals and Miscellaneous Expenses:

Reimbursement or prepayment of these costs is a two-step process. As discussed below, prior approval for these expenditures must be secured, allowing for an advance payment of the anticipated cost of meals and taxi fare. Reimbursement of pre-

⁷⁴ Found on the intranet at: [Forms](#) → [FinancialForms](#) → [2010Forms](#) → 2010FieldExpenseRpt.xls

approved transportation and hotel expenses which the advocate has typically charged to her credit card is requested after the advocate has returned.

Program payment or reimbursement of all of the above expenses must be approved in advance. This approval is in addition to any authorization for payment of registration or training fees. If these expenses are related to training, an estimate of the expenses must be contained in the advocate's training request form. The advocate must fill out an "extended travel approval" form setting forth the purpose and inclusive dates of the travel and the estimated expenses, and submit it to the director of advocacy for approval.⁷⁵ This form allows the advocate to request advance payment to cover anticipated cash outlays for taxi or meal expenses of travel costs, subject to submission of the appropriate receipts after the completion of travel.

Where necessary, the program will pay the actual cost of travel and lodging expenses, along with meal expenses at the rate set by the finance department. After the travel has been completed, the advocate should fill out an "extended travel reimbursement" form available from the department, attaching the appropriate receipts and submitting it within 20 working days after the training. Payment will follow approval of the reimbursement by the director of advocacy.

2. Other Expense Reimbursement

BayLegal will consider reimbursing an advocate for other pre-approved work-related expenses, including the purchase of work-related books or subscriptions, and the cost of membership in task forces or similar organizations. A "purchase and/or service request" form available from the accounting department⁷⁶, with the receipt attached, must be submitted to the Managing Attorney and, if the cost exceeds \$250, must also be approved by the director of advocacy.

3. State Bar and County Bar Association Dues

BayLegal will pay the California bar dues of staff attorneys. The bill should be submitted to the accounting department as soon after it has been received to permit payment before the deadline for payment of dues.

The program will also pay county bar association dues if bar participation is directly related to program advocacy, such as to further pro bono activities or to participate in bar committees on the delivery of legal services to our clients.

F. Restrictions on Individual BayLegal Employees

⁷⁵ Found on the intranet at: [Forms](#) → [FinancialForms](#) → 2010ExtendedITravelExpenseForm.xls

⁷⁶ Found on the intranet at: [Forms](#) → [FinancialForms](#) → [2010Forms](#) → 2010ReimbursementRequestOrPurchaseOrder.xls

1. Outside Practice of Law

No attorney employed full time by the program may engage in an outside law practice without the permission of the executive director. The executive director may grant such permission where:

- a newly hired attorney has a professional responsibility to complete or transfer cases for pre-existing clients and expeditiously does so;
- the attorney is acting under an appointment made under a court rule or practice equally applying to all attorneys in the jurisdiction and remits to the program any compensation received for the appointment; or
- the attorney is providing uncompensated assistance to a close friend or family member, or a religious, community or charitable group and the nature of the legal work does not run counter to BayLegal's substantive priorities.⁷⁷

2. Prohibited Political Activity

Neither BayLegal, nor employees acting on its behalf or during working hours, may advocate, oppose, or contribute resources to any political party or association, any campaign for public or party office, or any ballot measure, initiative or referendum; nor use any political test in extending legal assistance. BayLegal employees may not identify the program with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office, or use program resources to engage in any electoral or voter registration activity. No program staff attorney may be a candidate for partisan or non-partisan elective office.⁷⁸

⁷⁷ See 45 CFR Part 1604.

⁷⁸ See 45 CFR Part 1608.