



# The Power Play: Access to Justice for a Vulnerable Population and an Opportunity for Diversification of Civil Legal Aid Funding

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## Introduction

When a civil legal aid program has an opportunity for a power play, the program should seize the opportunity. In January 2017, Indiana Legal Services, Inc. (ILS)



initiated the Legal Assistance for Vulnerable Adults (LAVA) project. The mission of the LAVA project is to provide civil legal representation to Indiana seniors and endangered adults who have suffered abuse, neglect or exploitation, including criminal financial exploitation.

The purpose of the program is to ease or eliminate the negative effects of these crimes by providing free civil legal services. The legal services provided are expansive and range from advice and consultation to civil litigation.

The ambitious project was initiated in a time when funding of civil legal aid programs was uncertain. Why, at such an uncertain time, would ILS seek to hire new staff for a new program? The answer is diversification of funding. In 2016, ILS applied for and received a Victims of Crime Act (VOCA) grant to fund the program. A power play is an offensive move to reach a particularly rewarding end. If a power play is effectively

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executed, the rewards are generally magnified. I use the term power play to describe the creation and execution of the LAVA project because the ability to increase legal services provided by civil legal aid attorneys and to diversify funding in an uncertain economic time allows ILS to empower an extremely vulnerable population throughout the state of Indiana.

## The Clients — Seniors and Endangered Adults Who Are Victims of Crime

LAVA clients are seniors and endangered adults. In Indiana, a senior is defined as someone who is at least 60 years of age. State law regarding the definition of an elder varies from state to state. Some states have a threshold age of 65. In addition to age, LAVA represents endangered adults. Again, state law defines endangered or vulnerable adults; Indiana’s definition includes persons unable to provide self-care because of “mental illness, intellectual disability, dementia” or other incapacity. LAVA represents many younger clients who are considered endangered.

To comply with the requirements of the VOCA grant, a LAVA client must be a victim of crime. Importantly, the crime does not have to be reported, charged or prosecuted. According to the National Council on Aging, it is estimated that only one in fourteen cases of elder abuse are reported to authorities. Victims do not report due to fear or shame, fear of loss of independence, or a lack of understanding of how to report. Often victims have a multitude of vulnerability factors which make reporting difficult. Finally, victims may not see themselves as victims of a crime, especially when the crime is perpetrated by a loved one or family member.

The crime committed against the client does not

need to be a violent crime. The types of crimes committed against elderly and endangered adults include physical abuse, sexual abuse, psychological and emotional abuse, neglect, and financial exploitation. Financial exploitation is the use of a person's money or property without permission, in a fraudulent manner, or in a manner which is not in the best interest of the individual. Financial exploitation can take away or limit an older person's resources, choices and options.

And finally, LAVA clients must have the capacity to retain legal counsel. Clients with diminished capacity also may be represented as provided by each state's professional conduct rules, with the relevant rule in most states based on ABA Model Rule of Professional Conduct 1.14.

### The Blurred Line between Criminal and Civil Offenses

Civil and criminal law may overlap and coincide. Pursuing one action does not preclude the other. On the civil side, there is a lower burden of proof: beyond a reasonable doubt versus preponderance of the evidence. When a prospective client has filed a police report, if a prosecutor does not find cause to file charges, it does not mean there is no abuse and the lack of prosecution does not preclude the filing of a civil action. Unfortunately, it is not unusual for a prosecutor to determine there is not sufficient evidence to prosecute alleged abuse. Oftentimes, it is the vulnerability of the victim which contributes to a prosecutor's decision not to pursue a case. Recently, LAVA successfully represented a young adult with diminished capacity in a contested protective order case by proving a sexual assault occurred despite the fact that the prosecutor found no merit to prosecute the case.

When a financial exploitation case is reported, if the weapon used in the crime is a power of attorney, a victim is often told by law enforcement there is no crime. A guardian is often viewed by law enforcement as having immunity unless the abuse is horrific. And if the perpetrator is a family member, law enforcement will often simply tell the victim, the exploitation is a civil matter. In these types of common scenarios, civil legal services provide much needed relief to victims of crime.

### Why Civil Legal Remedies for Victims of Crime

In order to successfully obtain a VOCA grant, one must illustrate how civil legal services can assist victims of crime. Civil legal representation can empower victims, stop crime, reverse or ease the negative effects of crime, and prevent crime.

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Empowerment of an elderly or vulnerable adult crime victim is rewarding for the civil legal aid attorney to witness. In a civil legal proceeding, unlike a criminal proceeding, the attorney works for the client and the client directs the case. The civil legal aid attorney's job is to advocate for the client as the client desires. The attorney must advise the client of their rights and their civil legal options, then *listen* to what the client wants. The ability to determine the extent of legal remedies is an important decision the client should always make.

Civil legal recourse includes a full range of legal options. The LAVA attorneys offer legal advice, negotiation in resolution of matters without litigation, civil litigation, assistance navigating the criminal justice system and restitution, and assistance to victims of violent crime to file an application for victim compensation. Some case examples follow which help illustrate how civil legal remedies can help victims of crime. The examples are not meant to be exhaustive of available remedies.

**Property Theft/Conversion** — A complaint for replevin may be filed to ask a judge to order the defendant to return property. A complaint for declaratory relief can be filed to void a fraudulently obtained deed or other documents. A complaint for damages can request compensatory damages. A civil legal aid attorney can assist a client with restoration of public benefits when theft has caused the cessation of benefits. Sometimes a simple fix to a big problem is appropriate. For example, one client was robbed of her home after her mother's death when an Heirship Affidavit was filed indicating the client was deceased. The simple fix was to file a Corrective Heirship Affidavit indicating the client was indeed alive and well. A variety of civil legal remedies may be used in theft and conversion cases.

**Crimes by Fiduciaries** — Crimes involving a power of attorney as a weapon are very common. The range of remedies is vast. A client may want a simple revocation of a power of attorney and preparation of a new power of attorney. Education on the duties and responsibilities of an agent under a power of attorney and the rights of a principal is important. Look to state law for the requirements of accounting of an agent's action. A

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complaint to compel an accounting can assist in recovering assets. Guardians can be perpetrators as well. A petition to terminate or modify a guardianship can be helpful in a multitude of situations where the client becomes a victim. A petition to substitute or remove a guardian may be filed with a court. A request for an accounting can be helpful to recover assets wrongfully taken by a guardian.

**Fraud, Scams and Identity Theft** — Home improvement scams, car sale scams, and home security scams are all consumer fraud that can elevate to a criminal level. A complaint for damages should also include violations of state laws specific to contractor or consumer fraud. Identity theft can be addressed effectively by working with the business where the fraud took place to reverse damages. Collection defense work can assist in cases of student loan fraud or fraudulent co-signing. Credit repair work and bankruptcy can help alleviate the problems associated with identity theft. General scams are difficult to when they involve international schemes. Stopping the damage with education and information is important.

**Housing** — A protective order can preserve a safe home environment. An unwanted “guest” is a common situation. A client may have a relative or other individual living with them who will not leave. The unwanted “guest” is often abusive or financially exploiting the client. An eviction may be appropriate if the law implies a landlord/tenant relationship has been established. Eviction defense may become necessary if a client is being evicted due to abuse of an unwanted “guest.”

**Domestic Violence** — A protective order, divorce, or eviction can assist a victim of violence.

The civil legal remedies to assist victims of crime are numerous. The civil legal aid attorney should also look to state laws which specifically address their client base. For example, in Indiana, the Indiana Senior Consumer Protection Act and the Indiana’s Relief for Crime Victims Statute are helpful when negotiating and litigating a case.

### A Few Additional Notes

Within a couple of weeks, LAVA attorneys realized their impact could be maximized by educational programs aimed at preventing crime. The attorneys actively engage community members by reaching out to victim advocacy groups, groups providing services to seniors, and social and volunteer groups consisting

of seniors to provide a variety of educational speaking events. Topics include avoiding scams, authority and limitations of powers of attorney, rights of an adult under guardianship, and signs of financial abuse.

It is important to develop good community relationships for referrals, coordination of services and to amplify community outreach. Working with agencies, such as Adult Protective Services, Medical/Legal Partnerships, and Centers on Aging as well as other groups that serve the vulnerable population you serve, is helpful to your practice. Developing positive and productive relationships with community partners not only strengthens the civil legal aid attorney, the partners can also provide support when it is time to renew the VOCA grant.

### VOCA — Funding the Program

The Victims of Crime Act (VOCA) of 1984 established the Crime Victims Fund in the U.S. Treasury. The Fund is financed by fines and penalties paid by convicted federal offenders. It includes deposits from federal criminal fines, forfeited bail bonds, penalties, and special assessments collected by U.S. Attorney’s Offices, federal U.S. courts, and the Federal Bureau of Prisons. Funds also include gifts, donations, and bequests from private parties. The Fund provides the sources of funding for carrying out all of the activities authorized by VOCA.

The purpose of VOCA is to support the provision of services to victims of crime throughout the nation. “Crime victim” is defined as a person who has suffered physical, sexual, financial, and/or emotional harm as the result of the commission of a crime. Services are defined as those efforts that (1) respond to the emotional, psychological, and/or physical needs of crime victims; (2) assist victims to stabilize their lives after victimization; (3) assist victims to understand and participate in the criminal justice system; and (4) restore a measure of safety and security for the victim.

VOCA is administered at the federal level through the U.S. Department of Justice, Office for Victims of Crime. Annual grants are awarded to each state, the District of Columbia, and the U.S. Territories. DOJ allocates VOCA funds to the states, and each state has its own method for seeking proposals and distributing VOCA grants. In Indiana, the Indiana Criminal Justice Institute has been ILS’s cooperative partner throughout the application and implementation process, including assisting with the billing process in early stages of implementation.

Each state may have different priorities for the

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use of funds. One goal of the Indiana Criminal Justice Institute was to increase funding to programs that serve underserved populations, such as the Hispanic/Latino community, immigrant community, hearing impaired, LGBT, and elderly victims. “Underserved populations” is defined in 42 U.S.C. Section 13925(a)(39).

It is important to determine who administers the VOCA funds provided to your state and review the VOCA grant program solicitation if you are interested in applying for funds. Requirements and deadlines to apply for funding vary from state to state.

### Conclusion

Access to justice for an underserved and vulnerable population coupled with a source of funding for the program apart from Legal Services Corporation support is a dream for civil legal aid firms.

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# HOW MUCH CASH RESERVE DOES MY PROGRAM NEED (AND WHERE DO I GET IT?)

By Steve Eppler-Epstein<sup>1</sup>

There are always pressures on a legal aid program to spend money. We spend a lot of time worrying about how to balance the budget, or how to bring in a new grant if the budget suddenly went out of balance.



This article is about the money you don't want to spend. Cash reserve is your "just in case" money, and you hope it's not needed. But if you have adequate cash reserves, you will never have to worry about making payroll, and if you lose a grant or have an

unexpected expense, you will have some time to figure out whether there is a way to hold onto your staff. (There are some other advantages to a well-executed cash reserve policy — we will get there too.)

A best practice is to have a cash reserve policy that you follow, which has clarified for your organization:

1. What are the purposes for which we need to reserve cash?
2. How much money does our organization need for those purposes?
3. How do we decide when to use the money, and how much to use?
4. Where do we get money that we can keep in reserve?
5. But first — what about the voices telling you that you don't need so much cash in reserve?

## Talking with Those Who Want to Spend All Your Money instead of Saving Some

Legal aid programs use the vast majority of their money to pay for employees (and their benefits). As a result, the two most common pressures to spend are (1) "we deserve a salary increase" (or better benefits); and (2) "we need to hire more staff to serve the clients."

Both claims are, most likely, accurate and fair.

The problem is that it is quite risky for a legal aid program to base salary, benefit or staffing increases on the amount of money it has in reserve. Cash is a one-time commodity: you can only spend it once. A legal aid program that pays for staffing or salary increases with cash will reach a point down the road when the cash is depleted and the staff still need to be paid. Spending cash reserves on ongoing expenses will dig a financial hole for the program, and climbing out can be traumatic.

This is not to say that cash reserve should *never*

be used. As discussed below, there are good reasons you are building a cash reserve, and all of these reasons revolve around the fact that you may need to spend it. But because a cash reserve may take years to build, and its use is one-time, you should spend the reserve only on problems that are solved by one-time spending.

It can be useful to remind people that in our personal lives, we try to put money in the bank in case

of personal need. We all want to have reserve funds. In fact, personal financial planners recommend that we build an emergency fund equal to 3-6 months of living expenses. And while individuals are likely to have some forms of insurance against loss of revenue (workers compensation, unemployment insurance, disability insurance), legal aid programs cannot buy an insurance policy against the possibility of losing a major grant.

The other thing to say to those who want to spend your cash on recurring expenses is: "Take a look at our reserve policy. This money is performing a service for our organization, and it would endanger us all to ignore that purpose."

## Designing Your Cash Reserve Policy

The simplest way to think of cash reserve is to

Cash reserve is your "just in case" money, and you hope it's not needed. But if you have adequate cash reserves, you will never have to worry about making payroll...

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address two needs — cash flow, and organizational stability.

### *Reserves for Cash Flow*

Most programs find that if they look at their cash balance at the end of every month, it is not a steady number. The fluctuations are primarily caused by revenues that are not spread evenly through the year (for example, foundations that send a check every six months, or fundraising events you run once a year). Fluctuations in cash reserve may also be caused by significant expenses that are not spread evenly through the year (for example, insurance payments or printing/ mailing the annual report). Similarly, reimbursement grants require programs to spend their money, and only catch up on cash when the expenses have been verified and reimbursed by the funder.

When you think about how your cash predictably drops at certain times of year, you may want to dig a little deeper and see how much *unrestricted* cash you have left at the end of each month. Funders and auditors likely will frown if it appears your program is spending grant money on a different purpose than the purpose for which it was granted. A negative balance of unrestricted cash is an indicator that this may be happening.

### *Reserves for Stability*

The reserves you hold for organizational stability are your “just in case” funds. Every legal aid program — every company in the world — worries about specific events that could result in the loss of revenue or a sudden unbudgeted expenditure. Stability reserves are held to address such a crisis, or at least cushion the impact of the crisis on the program. It is often useful to think of stability funds in terms of how much time they buy for the program. For example: consider a program that has a major grant of \$200,000 per year for three years, and the grant might (or might not) be renewed at the end of its term. The program faces the possible loss of \$200,000 per year in revenue. If that program has \$100,000 in stability reserves, it would have as much as six months to try to replace the lost funding before being forced to implement staffing cuts.

Another way to think of stability funds is as “bridge funding.” The purpose of these funds is to give you a way to get from one point in time to another — and as discussed below regarding when to use the funds, your

“destination” must be a strategically appropriate and achievable goal.

There is also a view — debated by some — that it is also appropriate to use stability funds to avoid missing a one-time opportunity. Your program may be litigating a case and have the need to pay for experts, so that all your other investments in the case are not wasted, and knowing that you will win the costs back if you win the case. You may have the opportunity to get a new project off the ground, knowing that if you move quickly there is a significant chance of revenue down the road. It could be strategically appropriate to spend stability funds towards these opportunities, because of the long-term benefits to your program.

### **How Much Should Be in Reserve?**

The two kinds of reserve each require their own calculation as to “how much is enough.”

#### *How Much Do We Need in Reserve for Cash Flow?*

Reserves for cash flow should be calculated based on the regular and predictable fluctuations in your cash balance during the year. Look at your cash in the bank at the end of every month for the past year or two. The month with the lowest cash figure is your anchor point. The amount of reserve you need for cash flow each month is the amount you have in the bank at the beginning of each month, less the anchor amount.

For example, take a program whose low-point for cash is always the end of October, when their cash is down to \$40,000. At the beginning of January and June, they have as much as \$300,000 in cash. The program needs to recognize that \$260,000 of the funds they have at the beginning of January and June are temporary funds, which will be spent down in the normal course of business. Of course, despite knowing that they have \$260,000 in cash fluctuation, the program will have only \$40,000 left at the end of October. The program must have good projections for the coming year and manage its budget so that the cash is back up to \$300,000 in January, to ensure that they are on track to have the \$260,000 available for the predictable annual drop.

What is hard about wrapping your mind around reserves for cash flow is that some months — when the big check just came in — you do not have to worry about cash flow. But you need always to maintain the amount in cash reserve that will guarantee that you still have cash to pay the bills in the months when you are likely to see low balances. Your actual amount of reserve for cash flow will vary month by month. In the

months you have strong revenues, you will have a lot in cash, and you will use that cash in the months when you have lower revenues.

It is really not dissimilar to making sure you always have enough cereal to feed the kids breakfast. When you go to the store you will get a couple boxes. It is OK to use it up every day — as long as you have enough to make it through to the next time you go to the store.

The program will constantly be spending and replenishing cash flow reserves, month to month. Because you have a sense of your annual cash cycles, you can explain at any time how much of your total reserve is currently held against your future regular cash fluctuations.

One additional caveat: the money the program has left in those low-cash months should be unrestricted funding. If the cash is low, and the program has *negative* unrestricted funding, this suggests the program has been spending funds specified for one purpose, on a different purpose — and that could have negative consequences down the road.

### *How Much Do We Need in Reserve for Stability?*

To establish a policy around stability reserves, the program has to estimate several factors:

- Is a risk (or a possible opportunity) likely enough that it is worth maintaining cash against the possibility?
- How big is the risk (are you worried about losing all of a grant, or half of it)?
- How much time would allow you to bridge to a better outcome?
- What is that better outcome, and how likely is it that you can achieve the outcome?

For example, imagine a program that gets 65% of its funding from the Legal Services Corporation (LSC), 20% of its funding from foundation grants, 10% of its funding from IOLTA, and 5% of its funding from donations. The program could reasonably think:

- Based on budget proposals floating in Washington, D.C., there is a serious push to cut LSC funding by 50%.
- Half of the foundation grants end this year, and it might not be possible to replace them quickly.
- The IOLTA funds might drop by 25% next year.
- The donations should stay stable or grow slightly.

This program is looking at a significant chance that it could lose 45% of its funding. Of course, while all of the potential losses have to be recognized, the chances

are that they will not all happen simultaneously. Despite that, each of them is a serious risk, and a program that is trying to be prepared should assume that it wants some stability in a worst case scenario.

The program could decide that it wants to give itself a year's time to maintain its work, in the event all of these losses happen. They have picked a one year target because next year's LSC budget might be better; and with a year's time they can prospect for additional grants.

Additionally, the program might want to keep enough money in reserve that it could also launch a new project during that difficult year, because this would demonstrate its capacity to deliver this new project, and the impact of this new project. It could use this innovation cycle as another strategy to attract new funding. Let's assume that project requires another 5% of budget.

This program's goal, then, is to have 50% of annual expenditures in its stability reserve. If it can achieve that goal, the program will start to draw down that money when the funding losses happen to avoid precipitous cutbacks (and possibly to start a new project to attract funding). Even though the program has established a one-year timeline for use of its bridge funding, it will be actively monitoring the situation. The program might slow its use of reserve funds if it succeeds in attracting new revenues. It also might slow use of reserve funds — and move to some calculated shrinkage of staff or other expenses — if it concludes that (for example) LSC funds are highly unlikely to improve in the following year. In that case it will want to adjust to the new reality more quickly. There is no purpose using reserve funds if there isn't a landing place on the other side. The program must keep in mind that reserve funds are for one-time costs (i.e., bridging events). If the funding gap is likely to be ongoing, the program must cut expenses and save the reserve funds for future situations more likely to be one-time bridging moments.

### *What about Stability Reserves against Cataclysmic Losses — Is Such a Reserve Really Possible?*

The history of legal aid funding teaches that periodically, mainstay sources of funding are at risk of suddenly going to zero (or near-zero). These losses may seem so cataclysmic that it is of no use to try to maintain a stability reserve against the possibility. But that conclusion would be wrong.

Even against cataclysmic loss, stability reserve funds will buy time for the program. If a cataclysmic

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event occurs, programs will likely stretch the time span for response by making *some* immediate cuts in staffing, so that the available reserve funds can maintain a smaller staff long enough to build a new business model and attract new funding. The history of some of the “back-up centers” demonstrates this scenario. Most of them were largely dependent on federal funds, which were suddenly completely taken away in 1996 as a result of federal cuts. A number of these centers survived to continue important work, due to a combination of strategies which included immediate staff cutbacks *and* strategic use of available cash reserves.

Another cataclysm occurred in 2008 and subsequent years, as plummeting interest rates caused IOLTA revenues to drop by as much as 90%. Many legal aid programs around the country, while frantically developing strategies for new funding, survived because the program had accumulated stability reserves, the IOLTA funder had retained stability reserves (and spent them down during the crisis), or both. The reserves made the crisis less harmful, as reductions in program resources were phased in more gradually, and over a longer time, so programs had time to seek alternate funding and be more planful where shrinkage was necessary.

### Where Do We Get the Money for Reserve Funds?

Accumulating cash flow reserves and stability reserves requires attention and planning, because many fund sources have limits on how much can be carried over from year to year (and some grants do not allow any carry-over at all). There are, however, a number of ways to accumulate reserve funds:

#### *Receipt of Unrestricted Funds*

The best way to build reserve funds is through the program’s work to bring in unrestricted funds. Common examples of these funds are donations, attorney fees, and cy pres awards. (LSC programs should note, however, that attorney fees count towards the LSC carryover limits to the extent the work to produce the attorney fees was supported by LSC funds — in other words to the extent the revenues are derivative of LSC funding.) The program’s total revenues must be in excess of expenditures for it to build reserves using unrestricted revenues (and if necessary, program expenses must be scaled back so that the reserve can be built). The timing of acquisition of certain kinds of unrestricted funds can be unpredictable — you may

not know whether the program will receive an attorney fee award or a cy pres award in the coming years — but you can establish policies that ensure that the first use of such awards, when received, is to build your program’s reserves.

#### *Grant Carry-Over*

Programs should have a strong understanding of carry-over policies for each of their grants, and they should have systems in place to meet the requirements. Under federal law, for example, 10% of LSC funds can be carried over from year to year, and unless programs have reliable sources of unrestricted funds, that flexibility should be used to add this amount to their available stability reserve. Additionally, because LSC funding is paid in large checks, the amount beyond the immediate month’s costs will become part of cash flow reserves. LSC also allows additional carry-over based on unusual circumstances, so the program should have reminders in place to assess each year whether trouble is approaching and a request for additional carry-over should be made. It is important to remember that the funds can only be drawn down for spending that is appropriate under the LSC grant. This works well if, for example, both LSC funds and IOLTA funds are used for a broad range of activities, and the IOLTA check comes in late. The program can spend more of the LSC funds earlier and more of the IOLTA funds later. But the program cannot use LSC funds as cash reserve for a purpose not permitted under the grant.

#### *Use of Grant Funds to Create Unrestricted Funds*

Some grant funds must be expended within the grant period, but may be used for purposes that create unrestricted funds. For example, if

- your program obtains a contract to provide services that are within your mission, and
- you have a separate grant that can pay for the staff who deliver the contracted services,

then the revenues you receive from the contract are unrestricted and can be added to your reserves, as long as your budget is constructed such that revenues exceed expenditures. This may seem obvious, but your fiscal strategy must understand that you cannot save unrestricted money as reserves if you have to spend it on expenses.

Similarly, your program may have grant funds that can be spent on fundraising activities such as events. Absent restriction by the grant source, the revenues from those events can be added to your reserves (again assuming you don’t need to spend them).

### *Awards and Stability Grants*

Occasionally there are opportunities to obtain foundation funds that can permissibly be used to build cash reserves. One such example is foundation awards, such as the MacArthur Award for Creative and Effective Institutions. The MacArthur Award is the organizational equivalent of the individual “genius” awards, and there are no strings tied to the use of the funds (in fact MacArthur encourages organizations to use some of the awards for organizational stability). There are few such awards; they cannot be “applied for,” and they are targeted to organizations doing groundbreaking work. But an unrestricted award like the MacArthur is an opportunity to create significant reserve funds.

Foundations often look at nonprofit’s financial position as a factor in deciding whether an organization is a good bet to invest program funds. While foundations have generally been reluctant to use their funds to support the nonprofit sustainability they are looking for, there has been some effort to point out to foundations (and their boards, lawyers and auditors) that their other philanthropic investments might be well-supported by awards or grantmaking that helps build cash reserve.

### *What about a Line of Credit?*

An inexpensive line of credit can add to a program’s resiliency, but it is not a true addition to reserve funds, because in the long run it must be repaid. It can be a good practice to maintain a line of credit, if the terms are not too expensive, but using a line of credit for cash flow suggests you do not have enough cash flow reserve, and using a line of credit in the event of a funding loss makes the hole deeper that you need to climb out of.

### **How Often Should We Be Thinking about Reserves?**

Your financial situation is constantly evolving. New funding opportunities will arise; some funding may go away. Your expense picture will change. Your program may take on a new project. Staff may depart, possibly leaving a gap in time before you can replace them.

A best practice is to have a multi-year view of your budget and expected cash — the current year and one or two years beyond. And then you need to have regular meetings with appropriate staff and board members to review your assumptions and new developments on a regular basis (two to four times a year). Following this practice, you will have as good an idea as is possible about how your cash position and reserves are likely to

### **Other Resources:**

- “A Primer on Reserves For Legal Services Programs,” Sable, *MIE Journal* Fall 2009.
- “Nonprofit Operating Reserve Ratio,” Non-Profit Reserves Workgroup, December 2008, <https://www.nonprofitaccountingbasics.org/sites/default/files/01-OperatingReservesWhitePaper2009.pdf> .
- “Reserves Planning: A Step-by-step Approach for Nonprofit Organizations,” Klein, Mulligan, Oster & Unterman (Grant Thornton), <https://www.nonprofit-accountingbasics.org/sites/default/files/01-OperatingReservesWhitePaper2009.pdf> .

evolve, and be able to make plans as may be needed to bolster your cash flow and stability reserves.

### **What If We Haven’t Yet Achieved Our Stability Reserve Target (or What If We’ve Already Spent It)?**

Part of good financial management is a pragmatic understanding of where you really are, as opposed to what you may wish was your situation.

If your program encounters a significant loss of funding, and has only half the stability reserves to address that loss, then it will have half the time it hoped to cushion itself and get to its next stable place.

If your program has been through a terrible financial year, used up most of your stability reserves, and nothing got better (or things got even worse), then you will have to cut staffing and other costs to match expenditures to budget. You have exercised good financial management but you cannot ignore your resulting situation. And under no circumstances can you spend your cash flow reserves on further stability. The exception is if your cash flow variation has shrunk with your revenues, so you no longer need quite as much cash flow reserve — in that case you can use the excess previously reserved for cash flow for a little more stability/bridge money.

### **Some Other Notes...**

A few other thoughts are worth keeping in mind as you build your strategy towards adequate reserve funds.

First — it will be impossible to construct a good strategy or spot your opportunities to build the reserve funds if you do not have good accounting and time-keeping practices. You will want to make sure that your

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program's financial staff are comfortable with the policy and that they have the tools and skills to do the necessary analysis. And you will have to be sure that your auditors are comfortable with the practices you are adopting.

Second — even if your reserves are substantial, it is not a good practice to invest them in securities that are not guaranteed to maintain their value (in other words, keep the funds in money market accounts and CDs with established institutions). While the possibility of obtaining a return on your reserves may be tempting, your reserve funds cannot perform their function if their value is not stable and reliable at any moment when the cash may be required. (Endowments, as noted in the endnote below, are a completely different category, and often are constructed with the explicit understanding that the corpus will never be used, and the entire purpose is to generate returns. Endowments are not reserve funds.)

Finally, there is an important competing use for unrestricted cash: the activities that cannot be funded with your grant funds. Depending on your program, these may include lobbying, or certain kinds of litigation. You will want to have practices that ensure that you maximize the extent to which your restricted fund sources pay for your staff's work, but if unrestricted revenues (or cash) are needed to pay for aspects of your program's work, you will have to build that reality into your plan to build reserve funds.

## Conclusion

This article may make it seem that you should expect to be constantly using your reserve funds — and in fact that is true, but perhaps not in the way you are imagining.

You will of course always be drawing down and replenishing your cash flow reserves, as part of your regular business cycles.

Your stability funds, on the other hand, should be understood as “working for you” just by being in the bank. Their purpose is to create stability. Having money in the bank for one-time use, in case your program encounters a sudden loss of funding, allows everyone in the program to go about their daily work without constant worry. You all will know that if “something

happens,” the program will have time to figure out a plan. And that sense of security will add to everyone's productivity and sense of well-being in their work life.

Finally, putting your reserve policy in writing — describing how you calculate the funds you need for cash flow reserves, and what your policy is around accumulating and spending stability reserves, will provide a measure of much-needed rationality at a time when the stress and pressure of funding loss may make it hard to have good organizational conversations.

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- 2 I would not include endowment funds in a reserve policy. An endowments generally is established to create a dependable revenue stream for the organization, and is governed by its own independent policy.
- 3 The uses of *cy pres* awards may be impacted by the U.S. Supreme Court's consideration of *Frank v. Gaos* in its October 2018 session.
- 4 See, e.g., “Keeping It In Reserve: Grantmaking For A Rainy Day,” *Non-Profit Quarterly* (Polanco and Summers), May 2, 2016 (updated March 16, 2017), <https://nonprofitquarterly.org/2017/03/16/non-profit-rainy-day-grant-making-keeping-it-in-reserve/>.