



THE REVISED ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID

By Jason Vail, Jayme Cassidy, Merf Ehman, and Leslie Powell-Boudreaux¹

For the past sixty years, legal aid organizations across the country have relied upon a set of standards promulgated by the American Bar Association Stand-



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ing Committee on Legal Aid and Indigent Defense (SCLAID) to guide management and operations in the delivery of high-quality legal services to clients. These standards are also used by funders of legal aid as a metric against which their grantees are measured and evaluated for ongoing funding. The ABA Standards for the Provision of Civil Legal Aid recently underwent a significant revision process, and a new set of standards was adopted by the American Bar Association in August 2021. The new standards are available online and for download at <http://ambar.org/legalaidstandards>.

This article will address the history of the standards and the recent process undertaken to revise them, and it will then explore the most substantial changes made to the standards in 2021. For those not familiar with

the standards, the following information will be helpful in providing orientation to the standards and how they work; and for those who have relied upon the previous version of the standards over the years, it will be helpful to learn about the ways that the standards are now much different from what existed previously.

The History of the ABA Civil Legal Aid Standards

In 1961, the American Bar Association (ABA) first established standards for the delivery of civil legal services to the poor. Following President Johnson's subsequent declaration of the "War on Poverty," a part of which included the provision of federal funds to support legal aid services through the Office of Economic Opportunity, the ABA revised its standards in 1966 to address issues relating to federal involvement and increased funding for legal aid. In 1970, the ABA adopted a third set of standards addressing new issues that developed as a national legal aid delivery system evolved.

Sixteen years passed before the standards were revised by the ABA again in 1986. During this interval, the Legal Services Corporation was established in 1974, and the amount of federal, state, and private funding for legal services increased dramatically, as did the number of staff-based and pro bono organizations providing civil legal aid. Also during this period of time, the ABA Canons of Ethics gave way to the Code of Professional Responsibility, which, in turn, has been superseded by the Model Rules of Professional Conduct, all of which are relevant to the obligation of lawyers to provide equal justice to all citizens. These rules intersect in numerous ways with the legal aid standards, and as they evolved, so too did the standards. The most recent revision to the standards before the latest set of changes was adopted in 2006.

The Standards Revision Process

In the years since the 2006 edition of the standards was issued by SCLAID, a multitude of changes in the delivery system and legal aid practice has occurred.

There have been fundamental changes in society, in low-income communities, in the use of technology by both advocates and clients, and in conceptions of the structure of legal aid delivery systems and in the practice of law, all of which profoundly affect how legal aid providers function and how client communities are served. The Model Rules of Professional Conduct have undergone significant changes, some directly related to legal aid practice. The ongoing, significant evolution in the use of information technology that has had a revolutionary effect on society and has reshaped the practice of law. New and innovative methods for delivering legal services via nonattorney legal practitioners have emerged. Courts have significantly increased their efforts to accommodate the needs of unrepresented litigants, including through the use of virtual and online proceedings. To provide appropriate guidance in the current environment, SCLAID began in 2017 to reexamine the standards and consider the ways they may be revised to address the current state of legal aid practice.

The first step in the process involved a series of listening sessions conducted by SCLAID with representatives from the legal aid community to explore recommended areas of focus for the next round of revisions. As was made clear during these sessions, the standards have been, and continue to be, widely referred to and relied upon to guide organizations providing civil legal assistance to their clients, and were viewed as providing a thoughtful treatment of issues arising in the context of the competing demands for high-quality legal work, efficiently produced within available resources. Accordingly, it was important for SCLAID to listen carefully to the concerns of the legal aid community when considering revisions in order for the standards to maintain relevance to the critically important work of legal aid organizations.

To begin this process, SCLAID conducted a series of open hearings to solicit input and feedback from interested individuals and organizations at the Annual Conferences of the National Legal Aid and Defender Organization (NLADA) in 2017 (Washington, D.C.) and 2019 (Detroit, MI), and at the ABA/NLADA Equal Justice Conferences in 2019 (Louisville, KY) and 2020 (virtually). As all of these hearings were at venues where legal aid leaders and practitioners gather, the SCLAID received a wealth of commentary, both during the hearings and after, which informed its approach to the revision process that SCLAID formally undertook in 2020 as one of the key projects of its observation and celebration of the 100th anniversary of the committee's founding.²

Based upon the commentary received, SCLAID determined that revisions should be undertaken by focusing on four key areas in which the most significant changes had occurred since 2006: 1) Changes in the conception of the legal aid delivery system/ecosystem and the role of legal aid broadly; 2) Changes in technology (meaning technology available to attorneys and its use in their practices); 3) Changes in regulatory standards and ethics rules; and 4) Changes in how promotion of staff diversity, application of race equity principles, and institutionalization of cultural humility training and practices impact the quality of services and the ability of providers to effectively serve the entire client community. After identifying these four focus areas, SCLAID recruited leaders from legal aid organizations to head four drafting teams that included twenty-four volunteer drafters from legal aid programs across the country. The teams each reviewed and proposed edits to the standards based upon each team's specific focus area between September 2020 and April 2021, and the edits from all four teams were merged into a final draft that was posted online for open comment from the legal aid community. After collecting feedback and reviewing all comments for inclusion, a final draft was produced by the drafting team and filed for approval by the ABA House of Delegates at the 2021 ABA Annual Meeting. The revised standards were adopted by the House of Delegates as ABA policy, and SCLAID is profoundly grateful for the countless hours committed by the volunteer drafters and their commitment to an open and transparent process that produced a new set of standards that reflects the best thinking of all involved in delivery of civil legal aid by legal aid organizations.

Purpose and Application of the Standards

The Standards for the Provision of Civil Legal Aid were developed as aspirational guidelines for the operation of legal aid organizations and the provision of service by their practitioners based on the combined and distilled judgment of those with substantial experience in the area. Note, however, that the standards do not create mandatory requirements, and failure to comply with any standard should not give rise to a cause of action or finding of a legal ethics violation by a lawyer in and of itself. As the standards are aspirational, not meeting them does not create any presumption that a legal aid organization or a practitioner has breached any legal duty owed to a client or funding source.

The standards do not expand, add, or change any ethical responsibilities with which a practitioner must

comply, and all lawyers are bound first and foremost by the rules of professional conduct that apply in the jurisdiction in which they practice. The standards do touch upon many issues that are addressed in the Model Rules of Professional Conduct. Because the ABA has historically taken the lead in developing and articulating the ethical standards governing the practice of law, the commentary to the standards generally refers to the ABA Model Rules of Professional Conduct when analyzing pertinent ethical responsibilities, though the standards do not provide references to every ethical rule that may apply in the representation of a legal aid client.

With regard to their application, the standards were written to provide guidance to all “legal aid organizations,” defined as entities that 1) provide civil legal representation or other civil legal assistance to clients; and 2) offer that representation for free or at a reduced cost. Reaching a common terminology to describe such entities presented a surprisingly difficult challenge for the drafters, but after much debate it was determined that such entities should be referred to in the standards as “legal aid organizations.” As defined, legal aid organizations are generally not-for-profit organizations or a distinct part of a not-for-profit organization that regularly makes civil legal assistance available to low-income individuals or groups or other underrepresented groups without charge or at greatly reduced cost. The term is intended to be applied broadly with respect to the standards and is meant to include organizations even if they may not, for practical or legal reasons, be able to meet every standard.

The standards also apply to legal aid organizations providing representation to individuals pursuant to a constitutional or legislative right to counsel, whether those organizations are directly appointed by the court or contracted by a government agency. Every state in the country has a right to counsel in one or more civil legal areas, and some cities do as well. The drafters of the revisions recognized that the movement for a civil right to counsel, particularly in the context of evictions, is surging, and represents one of the many fundamental changes to the delivery of legal services since the 2006 standards were published. As more jurisdictions enact a right to counsel in various civil legal areas, legal aid organizations must be supported, fully funded, and ready to carry out their obligations in compliance with the standards. While a right to counsel is a step toward

justice in civil proceedings where basic human needs are at stake, the organizations carrying out that right have to be consistent in their provision of services and, therefore, comply with the standards.

Note, however, that the term “legal aid organizations,” as used in the standards, does not include outside practitioners (i.e., an attorney in private practice, a government attorney, corporate counsel, or other attorney who is not employed by a legal aid organization, but who represents a client referred by a legal aid organization on a pro bono or significantly reduced-fee basis); law firms that accept referrals from legal aid organizations for the representation of low-income clients; issue-focused organizations; or organizations that provide legal assistance on a contingent fee basis. That said, while not written for these outside practitioners and other entities, they may find the standards useful.

Key Revisions Made by the 2021 Standards

As noted above, the four volunteer drafting teams approached the revision process from differing areas of focus, each working independently within their respective focus areas. One fundamental change to the standards was made by all of the drafters working collaboratively, however: The adoption of a Preamble that did not exist in prior versions of the standards. The Preamble reflects considerable thought and insight from all of the drafters who represented a wide array of legal aid organization types, priorities, and locations throughout the country, and who came together in the development of a clear statement of the philosophical foundation underlying the new edition of the standards.

While all of the existing standards were revised to some degree by the drafting teams, what follows below is a summary of the most significant changes made by the four drafting teams under their areas of primary focus.

Revisions based on changes in the conception of the legal aid delivery system/ecosystem and the role of legal aid broadly.

The drafting team undertaking revisions in this focus area, which was the largest team of the four, did the most work in reorganizing the standards in order to address how legal aid practice has evolved in the past fifteen years, which included, in many cases, consolidating some standards while expanding others. Those who are familiar with and have used the 2006 standards will find the structure of the new standards much

changed but, hopefully, more responsive to their needs in the current environment.

The drafting team carved out a brand-new Section 2 on Leadership and Management, recognizing that, while the prior standards addressed many issues directly relevant to leadership and management, these issues were spread throughout the standards. By consolidating these standards into a new section, those in leadership and managerial roles within legal aid organizations can now easily find those standards in one section. The new section draws upon a number of sources, including content pulled from the Legal Services Corporation's Performance Criteria; Harvard nonprofit management certificate materials; characteristics of high performing nonprofit organizations on learning.candid.org, created by the Foundation Center and Guidestar; as well as updated portions of various 2006-edition Standards, primarily from Sections 4 and 5.

Further reorganization by the drafting team included the creation of a new Section 3 on Standards Regarding Provider Effectiveness—General Requirements, which was created to fully update versions of the same standards previously found in Section 3. Also, the remaining standards from the 2006-edition Sections 4 and 5 that were not moved to the new Section 2 on Leadership and Management were updated and consolidated into a new Section 5 on Standards for Internal Systems, Procedures, and Client Relations.

The final way the standards were significantly reorganized and updated by this team involved the removal of the 2006-edition Section 7 Standards for Practitioners. After much debate and discussion, the drafting team decided to take these standards and have them moved, reorganized, updated, and placed in a new Appendix as Guidelines for Practitioners. The objective of this change is to allow for future updating and expansion of this Appendix independent of the process required for revision and adoption of the standards, which provides SCLAID with the flexibility to keep these Guidelines as current as possible on an ongoing basis without having to go through the lengthy process of obtaining ABA House of Delegates approval.

Revisions based on changes in technology (meaning technology available to attorneys and its use in their practices).

As the standards had not been revised since 2006, the focus area on technology was one that required some of the most extensive work by the drafters. The drafting team included members from a range of organizations who were very knowledgeable about the

current uses of technology in legal aid practice and were very mindful of the many ways that technology, while a critical tool to facilitate access to justice, can present difficulties and even dangers to clients.

The drafters combed through the standards and either updated or added to standards where technology issues could arise. This work resulted in changes to a significant majority of the standards, and it represented a huge task for the drafting team. It became very apparent that technology is interwoven into every aspect of a legal aid organization's structure and function, and technology issues arise at every level within the organization, from the board, executive leadership, management, and staff.

The revisions made by the drafters are found throughout the standards, but the most important standard regarding technology is found at Standard 4.10 on Effective Use of Technology. The substantially revised standard continues to advocate for the utilization of technology to support the efficient operation and provision of high-quality services by a legal aid organization (as did the prior version), and it discusses the many ways that clients now interact with technology and how that has changed the ways in which the organization communicates with, and receives information from, clients. Beyond these issues, however, the revisions go further than the earlier standard: Legal aid organizations are now called upon to be mindful of how technology tools impact clients, and not just those tools used by the legal aid organization, but also those used by courts and administrative agencies with which clients interact. Legal aid advocates are encouraged, wherever possible, to “strive to participate in the creation of technology tools used by courts and agencies and work toward integration of technology systems with justice system partners to create efficiencies and seamless experiences for clients while also preserving confidentiality of information.”

Additionally, legal aid organizations must be concerned about information security and data protection, including client data. The revised standard addresses the importance of maintaining client data in a way that prevents its misuse as well as keeping clients informed about how data they provide will be used and protected by the legal aid organization. Relatedly, the standard also discusses special considerations regarding the use of artificial intelligence and how such uses may impact clients.

While it is recognized that the fast-moving world of technology will soon render the new standards as out-of-date as the 2006 standards were, the drafting

team endeavored to look ahead as much as possible to anticipate where technology use by legal aid organizations may evolve while also trying to avoid making specific recommendations based upon current software and apps that will undoubtedly be supplanted in near-term future.

Revisions based on changes in regulatory standards and ethics rules.

The small, mighty group of drafters working on this focus area represented a relatively broad spectrum geographically and in their roles within legal aid practice. They recognized from the start that a review of all of the changes in regulation and professional ethics rules over the prior fifteen years would require an unpacking of how those changes had become interwoven into the practice of law and, in particular, within a legal aid organization. They began their work by reviewing the standards that already referenced a regulation or ethics component, which ultimately was most of the standards.

As the drafting team dug deeper within each standard, they had in-depth conversations on regulatory and ethics issues, avoiding assumptions that the rule as written met current professional standards of ethics. Team members took responsibility for different sections, reviewing them and bringing back not just suggested changes, but difficult questions as to whether a standard addressed the changing dynamics of the legal profession. Rules related to the professional limits of board engagement in the day-to-day legal work led to significant debates involving governance and conflicts of interest. The drafters also identified a tension in respecting cultural values where families are deeply involved in decision-making balanced with the professional standards of avoiding conflict and ensuring that the client's decision is their own, especially in situations of victimization or exploitation.

At the same time, as the drafters worked through the existing standards, they also had to address new language proposed by the other drafting teams, some of which included fully redrafted and entirely new standards. The drafters had to be responsive to those changes as they raised new regulatory and ethics issues or caused a renewal of discussions thought long-settled. The drafters worked diligently to make sure that issues identified by one team were highlighted and reviewed by other teams as needed. This collaborative,

yet independent, approach opened the process to each voice on each team to weigh in on some of the less clear issues. As all drafters worked toward a final document, it was apparent how critical it was to have regulatory and ethics rules top of mind. Upon final completion of the draft revisions to the standards, all areas where regulatory and ethics rules intersected with the standards were reviewed by the ABA standing committees on Ethics and Professional Responsibility and Professional Regulation. The extensive review undertaken by these entities ensured that the work done in this drafting area of focus was consistent with all current ethical and regulatory standards.

Revisions based on changes in how promotion of staff diversity, application of race equity principles, and institutionalization of cultural humility training and practices impact the quality of services and the ability of providers to effectively serve the entire client community.

Legal aid organizations today more fully understand the complexity and diversity of clients and staff, as well as the intersection of societal, economic, and racial barriers communities face. Recognizing this, the drafting team working in this focus area began its work by replacing the previous Standard 2.4 on Cultural Competence with a new, further developed Standard 4.4 on Race Equity, Disability Diversity, Cross-Cultural Sensitivity, and Cultural Humility to provide additional guidance on these issues.

Under the old Standard 2.4 on Cultural Competence, training of staff and attorneys on cultural competence was considered good practice based on the belief that cultural competence could be achieved through training and experience. Many legal aid organizations have traditionally offered cultural competence training with the goal of educating staff on the various cultures in their service area, and once learned, it was accepted that staff training to expand the understanding of the beliefs, values, and behavior of persons with a different culture would create competence about that culture. The concept of cultural competence suggests there is a distinct identifiable knowledge and skill set that will allow persons to understand and effectively communicate and serve clients who are perceived as different, and such training is typically based on stereotypical thoughts and beliefs about a cultural group to educate the trainee to interact appropriately and competently.

To reduce the risk of stereotyping and stigmatizing by accepting others' concepts of a particular culture which can foster implicit racist attitudes and

behaviors, the drafters advocated for a more inclusive mindset for legal aid organizations, including the staff, board, and collaborative partners, to learn and practice cultural humility in addition to diversity training. Cultural humility is broadly summarized as the “ability to engage knowledgeable with people across cultures.” The concept includes the multiple dimensions of intersectionality (defined as “the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage”) and the importance of social justice issues. Cultural humility embraces three principles: lifelong learning and critical self-reflection, recognizing and challenging power imbalances, and institutional accountability.³ The practice of cultural humility has been adopted by several professions that serve a client base.⁴

The drafters also made extensive revisions to the standard addressing staff diversity, which is a new Standard 4.5 that replaces the previous Standard 2.5, encouraging organizations to go beyond the basic attempt to hire staff that does not “look or think like us.” Legal aid organizations should instead demonstrate a commitment to equity, inclusion, and diversity that is planned and organized when recruiting staff and board. The new standard calls for deliberate and structured recruitment, hiring, training, mentoring, and retention plans for persons that mirror the communities and client base that the organization serves. Legal aid organizations have a duty and obligation to go beyond filling quotas or filling that one singular slot, as clients are best served by a diverse staff and board that bring an array of values, life experiences, and differences including ethnicity, gender, gender identity, color, age, race, religion, disability, national origin, sexual orientation, and additional individual characteristics. Recruitment of diverse staff and attorneys should be approached in multiple ways to ensure a robust applicant pool, and a number of illustrative examples are provided in the new standard. In addition to hiring diverse staff, legal aid organizations should prioritize developing practices, policies, and organizational structures that prioritize equity and inclusion and that are responsive to the diverse cultures and populations it serves and employs.

Finally, when undertaking revisions to the previous Standard 4.6 on Communication in the Primary Languages of Persons Served, the drafting team decided to update and expand on the existing concepts in the standard, and they also split the standard: A new Standard 2.3 on Promoting Language Justice now

appears in the new section on legal aid management issues, while a second Standard 5.7 on Implementing Language Justice is found in the section on Standards for Internal Systems, Procedures, and Client Relations. The new standards address the need for legal aid organizations to embrace the fact that “an absence of language justice is the elimination of racial and social justice.” Individuals who are afforded the right to speak in their native language maintain self-identity, culture, community, and a sense of belonging. Persons and communities should not be stigmatized, treated as second-class citizens, or have their access to the justice system disrupted because of their choice or need to speak in their native language.

The two new standards on language justice stress the importance of upholding linguistic equity by evaluating client needs, recruiting and hiring linguistically diverse staff, and incorporating and utilizing diverse tools and strategies to achieve the goal of communicating with clients in their native or chosen language. An organization has the responsibility to promote language justice by providing language access to all language communities they serve. Assuring that all clients who want to communicate in their native language including those who use American Sign Language have meaningful and equitable access to the legal aid organization’s legal services, programs, materials, as well as participation on the board must be prioritized. Legal aid organizations should develop practices, policies, procedures, and mechanisms (employing a multilingual staff, interpretation, translation, signage, and outreach) ensuring that language justice is promoted and achieved.

Conclusion

As set forth in the 2021 ABA Standards for the Provision of Civil Legal Aid, a nation that lays claim to being just has a responsibility to make justice available to all, regardless of their resources and their status in society. All of those who labor to bring civil legal aid to those in need of assistance and help them to address their legal needs are instrumental to the effort to make justice universally available. The new standards and accompanying commentary have been developed to provide thoughtful and practical guidance on how those efforts might best succeed. The drafters hope the guidance offered by the standards will play a small part in helping create a more just society.

1 Merf Ehman: As executive director of Columbia Legal

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Services, I am facilitating organization-wide efforts to prioritize advocacy that supports community-led social justice movements that transform racialized systems and eradicate racism. Merf may be reached at *merf.ehman@columbialegal.org*.

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- 2 To learn more about the history of SCLAID and the work it has done over the past 100 years, visit <http://ambar.org/SCLAID100>.
- 3 See Cultural Humility Toolkit at <https://inclusion.uoregon.edu/cultural-humility-toolkit>.
- 4 See Addressing Cultural Bias in the Legal Profession by Debra Chopp. <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2874&context=articles>.