

New York State Office for the Aging
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To: <input checked="" type="checkbox"/> Area Agency on Aging Directors <input checked="" type="checkbox"/> Legal Assistance Providers <input checked="" type="checkbox"/> Substate LTCOP Directors	PROGRAM INSTRUCTION
FYI:	Number: 94-PI-52
Subject: Statewide Standards for the Delivery of Legal Assistance to Older New Yorkers	Date: December 29, 1994
Programs Affected: <input type="checkbox"/> Title III-B <input type="checkbox"/> Title III-C-1 <input type="checkbox"/> Title III-C-2 <input type="checkbox"/> Title III-D <input type="checkbox"/> Title III-G <input type="checkbox"/> CSE <input type="checkbox"/> SNAP <input type="checkbox"/> Energy <input type="checkbox"/> EISEP <input checked="" type="checkbox"/> Legal Assistance	Supersedes: 90-PI-37, 90-PI-62, & 91-PI-22 Response Due Date:
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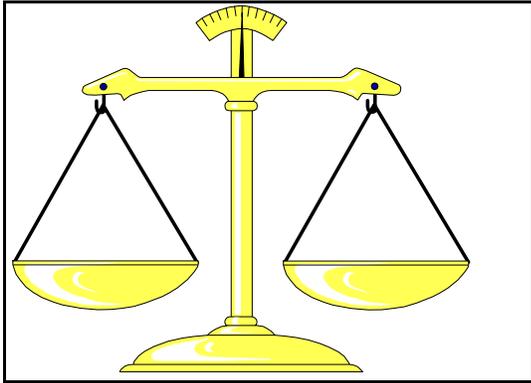
The purpose of this Program Instruction is to issue Statewide Standards for the Delivery of Legal Assistance to Older New Yorkers. These Standards are effective immediately and supersede Program Instructions 90-PI-37, 90-PI-62, and 91-PI-22.

When the Older Americans Act of 1965 was reauthorized in 1992, it required State Units on Aging, in conjunction with Area Agencies on Aging and Legal Assistance Providers, to develop statewide standards for the delivery of legal assistance to older individuals. This Office took the opportunity afforded by the Older Americans Act to convene a work group to review and revise our existing standards.

Representatives from the State Office for the Aging, Area Agencies on Aging, Legal Assistance Providers, the State Ombudsman, and the Governor's Advisory Committee participated in the work group. It was assisted in its task by representatives of The Center for Social Gerontology, Inc., of Ann Arbor, Michigan.

The group met for two days in August, 1993 and for a third day in September, 1993. Draft standards were developed following these meetings and circulated first to members of the work group and then throughout New York's aging network for comment. A discussion of the comments received accompanies these Standards.

After a review of the comments, the Standards were revised in what is now their final form. Therefore, these Standards reflect the contributions of many individuals.



Statewide Standards
for the
Delivery of Legal
Assistance
to Older New Yorkers

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Acknowledgement

The State Office for the Aging wishes to thank the following individuals for their contributions to the development of the Statewide Standards for the Delivery of Legal Assistance to Older New Yorkers.

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INTRODUCTION

When the Older Americans Act of 1965 was reauthorized in 1992, it required State Units on Aging, in conjunction with Area Agencies on Aging and Legal Assistance Providers, to develop statewide standards for the delivery of legal assistance to older individuals.¹ New York has had such standards in place for many years. Most recently, these standards were embodied in State Office for the Aging Program Instructions 90-PI-37, 90-PI-62 and 91-PI-22, which are now superseded.

Nonetheless, this Office took the opportunity afforded by the Older Americans Act to convene a work group to review and revise our existing standards. Representatives from the State Office for the Aging, Area Agencies on Aging, Legal Assistance Providers, the State Ombudsman, and the Governor's Advisory Committee participated in the work group. It was assisted in its task by representatives of The Center for Social Gerontology, Inc., of Ann Arbor, Michigan.

The group met for two days in August, 1993 and for a third day in September, 1993. Draft standards were developed following these meetings and circulated first to members of the work group and then throughout New York's aging network for comment. A discussion of the comments received accompanies these Standards.

After a review of the comments, the Standards were revised in what is now their final form. Therefore, these Standards reflect the contributions of many individuals.

Issuance of these Standards was delayed while a separate work group was convened to discuss the development of monitoring and reporting standards. Developing monitoring and reporting standards through a separate work group had been a recommendation of the original work group.

The monitoring and reporting work group meet in September, 1994 for two days. It was soon realized that effective and meaningful monitoring and reporting standards would have to be developed over a longer period of time than was available to the group. Thus, it was decided that these Standards should be finalized and monitoring and reporting standards incorporated at a later date.

¹ 42 U.S.C. § 3058j(b)(3)(A); OAA § 741(b)(3)(A).

I. The Legal Assistance Program

A. Legal Authority and Funding

The Federal Older Americans Act (OAA) designates legal assistance as a priority service funded under Title III-B.² The New York State Office for the Aging (SOFA) is responsible for the overall administration of the program, while direct legal services to older individuals are funded at the local level through Area Agencies on Aging (AAAs) and provided by their Legal Assistance Providers (Providers).

The OAA requires SOFA to set specific minimum percentages that AAAs must spend on each of the priority services.³ Currently, AAAs are required to spend 7% of their Title III-B funds to provide legal assistance to older individuals in their planning and service area. SOFA reserves the right to change the minimum percentage in the future in consultation with AAAs and Providers.

Since legal assistance is a priority service mandated by the OAA, each of the 59 AAAs in New York must operate a Legal Assistance Program. Legal services offered through the program shall be accessible and available to those individuals 60 and over in greatest economic and social need throughout an AAA's planning and service area.

B. Waiver

If an AAA believes the legal assistance needs of the elderly are otherwise being met through resources already available in the community, it may ask the State Office for the Aging to grant it a waiver from funding the minimum percentage required for legal assistance, or from providing any Legal Assistance Program at all.⁴ An AAA requesting a waiver must:

- conduct a public hearing;
- provide notice of the public hearing to all interested parties in the area;
- furnish interested parties with an opportunity to testify at the public hearing;

² 42 U.S.C. § 3026(a)(2); OAA § 306(a)(2).

³ See, 42 U.S.C. § 3027(a)(22); OAA § 307(a)(22). In addition to legal services, the OAA designates access services and in-home services as priority services [*id.*, § 3026(a)(2); OAA § 306(a)(2)].

⁴ 42 U.S.C. § 3026(b)(1); OAA § 306(b)(1).

○prepare a record of the public hearing; and

○furnish the State Office for the Aging with the record along with its request for a waiver.

The public hearing record must clearly show that the legal assistance needs of those elderly in greatest economic or social need, as well as those elderly in the target populations, are being met through resources already available in the community. An AAA requesting a waiver must also demonstrate an ability to assist the elderly in accessing legal resources in the community.

C. Program Purpose

Legal assistance, as defined in the OAA:

- (A) means legal advice and representation provided by an attorney to older individuals with economic or social need; and
- (B) includes--
 - (i) to the extent feasible, counseling or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney; and
 - (ii) counseling or representation by a nonlawyer where permitted by law.⁵

Thus, the Legal Assistance Program is an advocacy program providing older individuals with legal advice and representation, including representation in court. An older individual is an individual who is 60 years of age or older.⁶

The regulations promulgated pursuant to the OAA by the U.S. Department of Health and Human Services require all Title III services to be provided without the use of any means testing.⁷ The term "means test" is defined as "the use of an older person's income or resource to deny that person's receipt of services..."⁸

With regard to legal assistance providers, the regulations state:

- (d) A legal assistance provider may not require an older person to disclose information about income or resources

⁵ *Id.*, § 3002(33); OAA § 102(33).

⁶ *Id.*, § 3002(38); OAA § 102(38).

⁷ 45 CFR § 1321.17(f)(3).

⁸ *Id.*, § 1321.3.

as a condition for providing legal assistance under this part.

- (e) A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.⁹

Balancing the statutory preference for serving those in economic and social need against the regulatory prohibition on means testing is accomplished by serving certain target populations within the AAA's service area and establishing case priorities to meet the needs of those populations.¹⁰

D. Target Populations

To meet the statutory and regulatory requirements, while recognizing that resources under the OAA are limited, legal assistance must be targeted to particularly needy populations of Older New Yorkers. Particularly needy persons, as specified in the Older Americans Act, include those in greatest economic or social need, low-income minorities, and rural elders.

The OAA defines "greatest economic need" as "the need resulting from an income at or below the poverty line."¹¹ Greatest social need is defined by the OAA as

...the need caused by noneconomic factors, which include-

- (A) physical and mental disabilities;
- (B) language barriers;
- (C) and cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, that-
 - (i) restricts the ability of an individual to perform normal daily tasks;
 - (ii) or which threatens the capacity of the individual to live independently.¹²

⁹ *Id.*, § 1321.71(d),(e).

¹⁰ For a more detailed discussion, *see, generally, Comprehensive Guide to Delivery of Legal Assistance to Older Persons, Chapter V, Targeting, Priority Setting, and Means Testing, The Center for Social Gerontology (1998).*

¹¹ 42 U.S.C. § 3002(29); OAA § 102(29).

¹² *Id.*, § 3002(30); OAA § 102(30).

Targeted populations should include, but not be limited to, Older New Yorkers who:

- are residents of nursing homes;
- are residents of adult homes;
- have assisted living needs or are in an assisted living arrangement;
- have chronic health problems;
- have particular problems of access to health care;
- are homeless, or threatened with homelessness;
- live on a subsistence income, or are threatened with the loss of subsistence income;
- have language barriers;
- are proposed for or under guardianship;
- are victims of abuse, neglect or exploitation (including fraudulent and deceptive financial and consumer practices); and,
- are physically isolated.

Consideration should be given on the local level to the existence and availability of other resources to meet the legal needs of targeted populations. This target listing is not intended to be exhaustive, mandatory, or in priority order but represents a range of possibilities that should be taken into consideration by AAAs and Legal Assistance Providers when targeting services and establishing case priorities.

E. Case Priorities

After identifying target population groups and subgroups, AAAs and Providers shall establish case priorities that will best meet the needs of the targeted groups. AAAs must specify their case priorities in their area plan beginning with the annual implementation plan (AIP) for the program year commencing April 1, 1996. The established priorities must be reviewed and, if necessary, updated not less than once every four years thereafter.

AAAs and Providers must consider the following broad categories of legal assistance, as specified by the Older

Americans Act Reauthorization of 1992:¹³

- Income
- Health care
- Long-term care
- Nutrition
- Housing and utilities
- Defense of guardianship
- Abuse, neglect and exploitation
- Age discrimination¹⁴

Within these broad categories, certain issue areas, as indicated in the table below, are of particular concern to older New Yorkers.

It is not required that each issue from the table below be listed as a priority issue in an AAA's AIP. AAAs and Legal Assistance Providers, however, must give consideration to these issues when selecting the case priorities for their Title III-B Legal Assistance Program. When issuing a request for proposals for the position of Legal Assistance Provider, AAAs must require applicants to address these issue areas.

PRIORITY ISSUES	
INCOME/NUTRITION/BENEFITS	HOUSING/UTILITIES
Social Security (Title II) SSI (Title XVI) Food Stamps Railroad Retirement Workers Compensation Veterans Benefits Unemployment Compensation Pensions HEAP SCRIE Section 8 Housing	Tenant Issues Foreclosure Home Repair Fraud Utility Shut Offs Energy Issues Home Ownership/Real Property Home Equity Conversion

¹³ *Id.*, § 3027(a)(15); OAA § 307(a)(15).

¹⁴ *But see* discussion under "E. Other Issues" below.

PRIORITY ISSUES	
HEALTH/LONG-TERM CARE	GUARDIANSHIP/ABUSE/NEGLECT
Medicaid Medicare Nursing Home Issues Adult Home Issues COBRA Other Insurance Issues Home Health Care QMB Issues	Defense of Guardianship Representative Payee Abuse Cases Financial Exploitation
OTHER CATEGORIES	CONSUMER
Americans w/ Disabilities Act Grandparents' Rights Divorce/Annulment/Separation (in order to obtain benefits)	Collection Contracts/Warranties Non Health Insurance Issues Tax Loans/Installment Purchases

F. Other Issues

In addition to the Priority Issues specified in the table above, there are other issues that are of importance and concern to Older New Yorkers and, therefore, should be of importance and concern to AAAs and Providers. These issues fall into the categories of age discrimination and preserving personal autonomy.

Older New Yorkers sometimes face discrimination in gaining housing, employment, services and credit. The AAA or the Legal Assistance Provider may be contacted to assist the older individual in such cases. Age discrimination cases are often fee generating, however, and may not, ordinarily, be undertaken by the Provider.¹⁵ Nonetheless, the AAA or Provider should direct such individuals to the New York State Division of Human Rights and offer assistance in contacting that agency.

Matters involving the preservation of personal autonomy include the preparation of powers of attorney, health care proxies, do not resuscitate orders and even wills. These are matters that are of as much importance to those of limited means as they are to those of comfortable means. AAAs and Providers may want to explore the possibility of utilizing *pro bono* and reduced fee panels as a means of meeting the demand for assistance in this area while preserving limited financial resources to address the priority issues specified above.

G. Communications and Consultation

¹⁵ See, 45 CFR § 1321.71(g).

Good communication between AAAs and Legal Assistance Providers is essential to the success of the Legal Assistance Program. Therefore, in order to comply with the purposes of the program and meet the needs of the target populations, AAAs and Legal Assistance Providers are expected to engage in a dialogue on how they may best:

- formally establish case priorities that reflect local needs of the target population, taking into consideration those issues specified in these standards;
- foster cost effective, high quality services having maximum impact on these priority issues;
- assure the accessibility of the Legal Assistance Program throughout the planning and service area served by the AAA;
- cooperate with SOFA, other AAAs and Legal Assistance Providers in serving the legal needs of Older New Yorkers; and
- develop and maximize the use of other resources to expand the provision of legal assistance to the elderly.

The State Office for the Aging, upon request, will provide technical assistance to the AAAs and the Legal Assistance Providers in meeting the requirements of this section.

II. Responsibilities of the State Office for the Aging

A. The Legal Assistance Developer

In accordance with the OAA, the State Office for the Aging shall designate an individual as the State Legal Assistance Developer.¹⁶ This individual shall work with appropriate SOFA staff to comply with the requirements of Title VII, Chapter 4 of the Older Americans Act and also to ensure:

- State leadership in securing and maintaining the legal rights of Older New Yorkers;
- State capacity to coordinate the provision of legal assistance; and
- State capacity to provide technical assistance, training and other supportive functions to AAAs, Legal

¹⁶ 42 U.S.C. § 3058j(b)(2); OAA § 731(b)(2).

Assistance Providers, State and Local Long Term Care Ombudsmen, and others as appropriate.

B. Networking

In order to enhance the quality of legal assistance to Older New Yorkers, SOFA, through its Legal Assistance Developer, shall encourage and facilitate the coordination of advocacy activities among the AAAs and Title III-B Legal Assistance Providers. Toward this end, the Developer shall periodically disseminate a current list of Legal Assistant Providers to both AAAs and Providers.

The Legal Assistance Developer shall plan regional meetings for AAA staff and Legal Assistance Providers and others as appropriate. The planning for the regional meetings and other networking activities shall be coordinated with the appropriate AAA and Legal Assistance Provider.

C. Update Standards

SOFA, through its Legal Assistance Developer, in conjunction with AAAs and Legal Assistance Providers, shall periodically review the standards and, as appropriate, update them in whole or in part. AAAs and Legal Assistance Providers also are encouraged to make recommendations for updating the standards.

D. Technical Assistance

The Legal Assistance Developer shall be responsible for providing technical assistance regarding the following matters:

- Targeting
- Reporting and Monitoring
- Confidentiality
- Promoting the Legal Assistance Program
- Selecting Case Priorities
- Client Grievance Procedures
- Requests for Proposals

E. Training Responsibilities

The Legal Assistance Developer shall facilitate the education and training of professionals, volunteers, and older individuals concerning elder rights. The training will focus on the requirements of those laws intended to benefit the elderly. Whenever possible, such training will be incorporated into the

regional meetings specified in Section II(B) of these standards.

III. Responsibilities of Area Agencies on Aging

A. General Responsibilities

The Area Agency on Aging has the primary responsibility for selecting a Legal Assistance Provider to serve its planning and service area. An AAA may contract with more than one Provider, but each Provider must demonstrate the experience or capacity to deliver quality legal assistance in the priority issue areas. The Provider may represent individual elderly clients or groups of elderly clients. An example of group representation would be representation of a group of elderly tenants seeking relief from lease violations by their landlord.

The AAA shall work with its Legal Assistance Provider to provide leadership relative to all aging issues within the planning and service area. This leadership shall include, but not be limited to, planning, advocacy, coordination of services, interagency linkages, and information sharing in order to assure that the Legal Assistance Program is an integral part of the services offered by the AAA.

B. Coordination with the State Legal Assistance Developer

The AAA may seek technical assistance from the State Legal Assistance Developer to ensure the delivery of quality legal assistance at the local level. The AAA also may designate a contact person for the State Legal Assistance Developer whenever the Developer has occasion to communicate with the AAA regarding the Legal Assistance Program.

C. Selection of a Legal Assistance Provider

A Title III-B Legal Assistance Provider must be:

- a Legal Services Corporation grantee; or
- a not-for-profit corporation organized for the delivery of legal assistance; or
- a private law firm licensed to practice law in New York State; or
- a private attorney licensed to practice law in New York State; or
- a social agency that has an identifiable legal component independent from the agency. (A unit within the agency directly supervised by an attorney would

most likely meet this requirement.)

The Legal Assistance Provider may engage the services of a paralegal to provide Title III-B legal assistance. A paralegal providing legal assistance must be under the direct supervision of an attorney.

A Legal Assistance Provider may not be either a full-time or part-time County Attorney. Elderly clients seeking representation against a county and its agencies must be assured that the Legal Assistance Provider will be able to represent their interests without conflict.

D. Primary Criteria for
Selecting a Provider

An AAA must select a Provider that best meets the following standards as required by Federal regulation:¹⁷

- Has staff with expertise in specific areas of law affecting older persons in economic or social need.
- Demonstrates the capacity to provide effective administrative and judicial representation in those areas of law affecting older persons with economic or social need.
- Demonstrates the capacity to provide support to other advocacy efforts, such as the long-term care ombudsman program.
- Demonstrates the capacity to provide effective legal assistance to institutionalized, isolated, and homebound older persons.
- Demonstrates the capacity to provide legal assistance in the principal language spoken in areas where most do not speak English as their principal language.

E. Other Criteria

The criteria that follow are not required by law or regulation, but are considered by the State Office for the Aging to be highly desirable to achieve the goal of providing quality legal assistance to all elderly, and especially to those elderly in greatest economic or social need. Potential Providers that best meet these criteria, along with the standards discussed in section D, above, should be given due consideration.

- Has offices and/or outreach sites that are convenient and readily

¹⁷ These standards are currently found at 45 CFR § 1321.71(c). AAAs must also comply with any changes or amendments to the current regulations.

accessible to all older people in the community, including socially and economically vulnerable older persons, or is willing to travel to outreach sites designated by the AAA.

- Demonstrates the capacity to provide legal services in the priority issue areas in a cost effective manner.
- Demonstrates the capacity to obtain other resources to provide legal assistance to the elderly.
- Has a good relationship with the private bar and the ability to involve the private bar in providing legal assistance to the elderly, such as on a *pro bono* basis.

IV. Responsibilities of the Legal Assistance Provider

The primary responsibility of the Legal Assistance Provider is to provide elderly residents in greatest economic and social need served by the AAA with legal advice and representation, including representation in court. The Provider may represent individual elderly clients or groups of elderly clients. An example of group representation would be representation of a group of elderly tenants seeking relief from lease violations by their landlord. While other legal assistance activities, such as community legal education, are acceptable under these standards, the primary focus of the program is the direct legal representation of clients.

As noted in Section III, however, the AAA and the Legal Assistance Provider are to provide leadership relative to all aging issues within the planning and service area. This leadership shall include, but not be limited to, planning, advocacy, coordination of services, interagency linkages, and information sharing in order to assure that the Legal Assistance Program is an integral part of the services offered by the AAA.

Therefore, it is expected that the Legal Assistance Provider will utilize the full range of legal advocacy tools in representing the interests of program clients. Specifically, the Legal Assistance Provider should pursue judicial, administrative, and legislative remedies as appropriate, within the limits of applicable Federal and State Law.

A. General Provider Requirements

Each Legal Assistance Provider shall:

- maintain client confidentiality and otherwise abide by the Lawyer's Code of Professional Responsibility as adopted by the New York State Bar Association;

- work closely with the Area Agency on Aging;
- adhere to the standards set forth in this document and any amendments thereto;
- work with the Area Agency on Aging to develop a method for surveying client satisfaction and assure that the views of older persons are solicited and considered as to the operation of the program. Such method shall respect the client's right to confidentiality;
- assist the State Office for the Aging and the Area Agency on Aging in developing and amending reporting instrument as necessary;
- work with the Area Agency on Aging and obtain input from the State Legal Assistance Developer to assess and develop local program plans for reaching the target populations and addressing the case priorities;
- provide effective, high quality administrative and judicial representation in the priority issue areas for eligible individuals, unless it can be demonstrated that another Provider within the PSA is delivering the service in accordance with these Standards;
- use Title III-B funds or other funds as contracted for from the Area Agency on Aging to maintain or increase, to the extent practicable, the level of legal assistance furnished to eligible individuals, and shall not use Title III-B funds to supplant funds from other federal or non-federal sources;
- not condition the provision of Title III-B funded legal assistance to any person 60 years of age or older on their level of income or resources. The Provider may only question the client about financial circumstances as a part of the process of providing legal advice, counsel and representation, and for the purpose of identifying additional resources to which the client may be entitled, and to assist in targeting clients with greatest social and economic need;
- give clients a voluntary opportunity to contribute to the cost of the services they receive and ensure privacy with respect to the client. The method of informing the client of the opportunity to contribute shall not discourage the utilization of the service by the contributor or other potentially eligible individuals;
- not subcontract any interest or obligation arising under a Title

III-B contract without written agreement of the Area Agency on Aging;

- have the capacity to provide legal assistance in the principal language spoken by clients in areas where a significant number of clients do not speak English as their principal language;
- provide complete, accurate programmatic and fiscal reports to the Area Agency on Aging and the State Office for the Aging in a timely manner and provide additional information as may be requested by the Area Agency on Aging and the State Legal Services Developer, while maintaining client confidentiality; and,
- establish goals for the future of the Legal Assistance Program in consultation with the AAA and the Legal Assistance Developer.

B. Assisted Referrals

There will be times when an elderly individual asks a Legal Assistance Provider for help with a matter for which adequate and accessible legal resources exist in the community. In such cases, the Provider, or AAA program staff, may make referral to an attorney in private practice.

The Legal Assistance Provider should work with the AAA to establish a referral mechanism. If possible, referral should be on a *pro bono* or reduced fee basis.

If a client has a problem normally handled by the Legal Services Corporation (LSC), the Legal Assistance Provider, with the elderly client's permission, may make a referral to the LSC grantee. The client should be told, so long as it is true, that the LSC office handles more of that type of case and has a better expertise. The Provider should know whether this is in fact true because a cooperative relationship with the local LSC office should already have been established.

In those instances where a Legal Assistance Provider is a LSC grantee, that Provider must attempt, to the extent possible, to serve the elderly client with funds and personnel provided by LSC. The LSC/Legal Assistance Provider will be required to demonstrate a fair proportion of assistance to eligible elderly clients as a condition of receiving OAA funds from the AAA. This in keeping with the objective of the OAA Legal Assistance Program supplementing legal assistance already available in the AAA's service area.

The Legal Assistance Provider or AAA program staff must, if appropriate, make the first contact with the attorney or LSC office receiving the referral. The Provider or the AAA must have

procedures to follow up after the referral to assure that the client is served in a timely and adequate manner. This does not mean that the client always must be totally satisfied; the Provider is responsible only for assuring that what can be done for the client is being done. If not, the Provider must determine whether it is appropriate to take back the client and try to resolve the problem either through another, more effective referral, or through the OAA Legal Assistance Program.

V. Coordination with the Long-Term Care Ombudsman Program

The State Long-Term Care Ombudsman Program is an advocacy program representing residents of long-term care facilities. Coordinating services between the Legal Assistance Program and the Ombudsman Program is deemed essential for the effective representation of a particularly vulnerable target population.

While other means may be utilized, the best means of assuring the coordination of services is through the adoption of a memorandum of understanding. Such memorandum should be reviewed and renewed not less than once every four years.

A memorandum of understanding adopted pursuant to this section should address, but not be limited to, issues of conflicts of interest, case acceptance procedures, and referral procedures. The memorandum should specify that clients of the Long-Term Care Ombudsman Program are entitled to advice and representation where otherwise eligible and appropriate under Legal Assistance Program priorities. In addition to the Lawyer's Code of Professional Responsibility, Legal Assistance Providers must maintain confidentiality in accordance with the Older Americans Act and regulations, including, but not limited to, the sections on the Legal Assistance and Long-Term Care Ombudsman Programs.

VI. Joint Responsibilities of the AAA and the Legal Assistance Provider

The AAA and the Legal Assistance Provider have a joint obligation for assuring that the elderly within the Area Agency's planning and service area are receiving adequate representation, while also maximizing limited financial resources. There are several ways in which this obligation may be met. The establishment of case priorities and making assisted referrals, as previously discussed, are two such ways.

The following requirements are intended to make the Legal Assistance Program more effective both in terms of maximizing the limited funding available and service provided to its clients. These dual goals may be achieved by other methods currently in use by individual Area Agencies. AAAs are encouraged to share methods they have determined to be effective with both the State Office

for the Aging and other Area Agencies.

A. Coordination with the Legal Services Corporation

The Legal Services Corporation (LSC) is a federally funded, non-profit corporation that receives funding on the basis of the number of poverty level individuals in each county. The Older Americans Act requires Title III Legal Assistance Programs to coordinate its services with existing LSC projects.¹⁸

LSC grantees are mandated to serve the legal needs of all poverty level individuals in the county for which it receives a grant. These offices do not receive sufficient funds to represent every client who qualifies under the "poverty level" criteria. Nonetheless, each LSC grantee should represent a fair proportion of elderly since they receive funds based on the presence of these elderly individuals.

It is the responsibility of the Area Agency and the Legal Assistance Provider to find out the extent to which the local LSC grantee is representing elderly clients and, if necessary, advocate for increased representation of the elderly at or below the poverty level. Area Agencies should become familiar with the local LSC grantee, if the grantee is not the same entity as the III-B Legal Assistance Provider, and work to assure that the elderly are adequately represented on its governing board. A close relationship should be maintained among the AAA, the III-B Legal Assistance Provider, and the LSC grantee.

Where the local LSC grantee is also the Title III-B Legal Assistance Provider, documentation of good faith efforts to represent the elderly with LSC funds should be required as a condition of contract continuance. LSC grantees receiving Title III-B funds must keep statistics on the age of the clients represented so that these statistics will be available for review by the Area Agency.

B. Training for AAA Staff

The AAA Director and the Legal Assistance Provider are responsible for maintaining the competence of the AAA staff in the legal assistance area. The Provider must provide support to the AAA staff and to the Long Term Care Ombudsman Program staff, upon request, on legal questions for the institutionalized. At the request of the Director, the Provider must provide training to designated staff and volunteer advocates or Ombudsmen on a variety of topics, such as methods for identifying legal issues and proper procedures for referral to the Legal Assistance Program.

The AAA Director should attempt to provide capable staff to assist the Legal Assistance Provider in:

¹⁸ 42 U.S.C. § 3027(a)(15)(B); OAA § 307(a)(15)(B).

o handling cases appropriate for non-attorneys;
o screening requests for assistance; and,
o providing other appropriate assistance.

C. Community Legal Education

The resources available under the OAA are extremely limited. Therefore, the primary focus of the Legal Assistance Program is the direct legal representation of clients. Nonetheless, the Legal Assistance Provider, in consultation with the AAA, should decide as a matter of policy if it can also serve the needs of the elderly by engaging in community legal education.

The Provider should recognize that community legal education can generate increased demand for services. Ideally, community legal education should be integrated into the Provider's service delivery scheme so as to complement the direct representation of the elderly in priority areas. Examples of such integration are:

- Teaching the elderly to take steps themselves to resolve their problems.
- Advising the elderly of a result achieved through direct representation, so that such result reaches those to whom it applies.
- Advising the elderly that a specific problem, which traditionally may not be recognized as having a legal remedy, is amenable to a legal solution.
- Familiarizing the elderly with the Legal Assistance Program and informing them of the availability of its services.

**COMMENTS ON STATEWIDE STANDARDS
FOR THE DELIVERY
OF LEGAL ASSISTANCE TO
OLDER NEW YORKERS**

Discussion of Comments and Changes

In January, 1994, the State Office for the Aging distributed for comment Proposed Statewide Standards for the Delivery of Legal Assistance to Older New Yorkers. The Proposed Standards were sent to Area Agency on Aging Directors, Legal Assistance Providers and Substate Long-Term Care Ombudsman Program Directors. The following is a brief discussion of the comments received and changes made to the Standards as a result of those comments.

General Comments

Table of Contents

Comment: One commenter suggested that a table of contents is necessary. The Standards are rather lengthy and a table of contents would make it easier for users to find the appropriate section.

Response: A table of contents has been added to the final version of the Standards.

Monitoring and Reporting

Comment: The Standards do not address monitoring and reporting of the Legal Assistance Program at either the State or AAA level.

Response: The work group charged with developing these Standards had recommended that a separate work group address the development of monitoring and reporting standards. Issuance of these Standards was delayed while a separate work group was convened for that purpose.

The monitoring and reporting work group met in September, 1994 for two days. It was soon realized that effective and meaningful monitoring and reporting standards would have to be developed over a longer period of time than was available to the group. Therefore, it was decided that these Standards should be finalized and standards for monitoring and reporting would be issued at a later date.

I. The Legal Assistance Program

B. Waiver

Comment: The material regarding the waiver of funding the Legal Assistance Program was originally part of the section

entitled "A. Legal Authority and Funding". One commenter suggested that it be put in a separate section to reflect its importance.

Response: The waiver of funding the Legal Assistance Program has been given separate treatment in this new section entitled "B. Waiver". The remaining sections have been relettered accordingly.

C. Program Purpose

Comment: One commenter noted that the definition of legal assistance did not appear in the standards. Given the importance of this term, it was suggested that the definition from the Older Americans Act (OAA) be incorporated here.

Response: The OAA definition of the term "legal assistance" is reflected throughout the Standards. It is agreed, however, that the term should be defined in the Standards and has been incorporated in this section. The discussion also has been expanded to address the regulatory prohibition on means testing.

D. Target Populations

Three comments were received concerning target populations. One comment concerned the income criteria for targeting services, while the two other concerned the list of target populations.

Comment: It was suggested that 125% of poverty be used as an income threshold. The commenter noted that Legal Services Corporation programs, many of which are also OAA Legal Assistance Providers (Providers), utilize 125% of poverty as their income threshold. Thus, importing this standard would avoid confusion.

Response: This suggestion has not been adopted. Income can not be used to determine eligibility, even for targeted populations. Eligibility base on income would, under any circumstance, violate the prohibition on means testing. The reference in this section to those in greatest economic or social need, low income minorities and rural elders is intended to indicate those older individuals to whom services should be targeted. Delivery of legal assistance to those individuals is accomplished through identifying target populations and establishing case priorities, as specified in the Standards.

Comment: One commenter noted that the legal needs of those institutionalized with mental illness or mental retardation are met by the Mental Hygiene Legal Services, an entity funded by the State and operating under the auspices of the respective Appellate Divisions. In view of the services available through this resource, the commenter believed no purpose would be served by specially identifying this population.

Response: Those with mental illness or mental retardation have been deleted from the list of target populations due to the availability of legal assistance from the Mental Hygiene Legal Services. This is consistent with the regulatory requirement that services funded under Title III not duplicate existing services. If, however, an AAA or Provider has reason to believe that the legal needs of this or any other population of older individuals is not being met, such population may be targeted for legal services. As noted in the Standards, the listing is not intended to be exhaustive or mandatory. AAAs and Providers are encouraged to identify target populations within their planning and service area whose needs are not being met.

Comment: A suggestion was made that those who are proposed for or are under guardianship be deleted from the list of target populations. The commenter noted that Article 81 of the Mental Hygiene Law, which governs guardianship proceedings, allows for independent counsel for the allegedly impaired person, in addition to a court evaluator.

Response: The elderly still remain vulnerable to unwanted and inappropriate guardianship proceedings. The OAA clearly requires the State and AAA to give priority to the defense of guardianship. It is entirely appropriate for Title III-B Providers, if asked, to defend the elderly in involuntary guardianship proceedings. Therefore, those who are proposed for or under guardianship remain a target population.

E. Case Priorities

Comment: Noting the requirement that AAAs and Providers formally establish case priorities, it was suggested that a time frame be established for reviewing and reconsidering these priorities. As the legal needs of the elderly change, the priorities should be reviewed to make sure the need is met.

Response: In response to this suggestion, a requirement to review and reconsider case priorities has been added. Case priorities must be submitted with an AAA's AIP for the year beginning April 1, 1995. These priorities must be reviewed and, if necessary, updated prior to the submission of the four year plan beginning April 1, 1996. Thereafter, the Standards call for a review to occur not less than once every four years.

F. Other Issues

Two comments were received regarding this section. One comment came from an AAA and the other from a Provider, and both concerned age discrimination.

Comment: It was noted that Older New Yorkers continue to be victims of housing discrimination. A suggestion was made that housing be added to employment, services and credit as areas in which the elderly are victims of discrimination.

Response: This suggestion has been adopted.

Comment: The Provider suggested that viable age discrimination cases be accepted by Title III-B programs if the client has sought representation from two members of the private bar and has been refused. It was also noted that the State Division of Human Rights may take up to three years to complete review of a claim. A Legal Assistance Provider might be able to achieve a quicker resolution of the matter.

Response: This comment is being taken under advisement and may become part of technical assistance materials to be developed at a future time.

G. Communications and Consultation

Comment: It was suggested that this section, formerly entitled "Meeting the Need," be retitled. The substance of this section concerns communications between an AAA and its Provider and this should be reflected in its title.

Response: The section has been given a new title.

Comment: Several favorable comments were received about the case priorities. One AAA director, however, expressed dismay with the requirement that case priorities be included in the annual implementation plan (AIP). The AIP process, in the opinion of the director, is now very demanding and the additional requirement of listing case priorities is considered undesirable.

Response: The establishing of case priorities is essential to ensure that limited resources are focused on those individuals most in need of assistance. Establishing case priorities is not a new requirement. It has long been required by the Program Instructions governing the operation of the Legal Assistance Program. Since priorities, after the first year, need only be reviewed and updated once every four years, the requirement to include case priorities in the AAA's AIP should not be too onerous.

II. Responsibilities of the State Office for the Aging

B. Networking

Comment: One commenter expressed reservations about the possibility of holding regional meetings for the Legal Assistance Program. The time and expense involved in attending the meetings were given as the primary concerns.

Response: Regional meetings have been requested by many Providers and AAA directors. As noted by another commenter, the purpose of regional meetings is to provide AAAs and Providers with a forum to brainstorm on substantive legal issues, service delivery mechanisms and future directions of the program. Other legal programs have used similar forums to improve service to their clients and there is every reason to believe the Title III-B programs can achieve similar results.

III. Responsibilities of Area Agencies on Aging

B. Coordination with the Legal Assistance Developer

Comment: This section was originally entitled "Legal Assistance Coordinator." One commenter expressed concern that designating a legal assistance coordinator would result in unwarranted paperwork and labor for AAAs with minimal staffing. Other commenters suggested that a legal assistance coordinator may not be necessary.

Response: Most AAAs already have a staff person who is responsible for monitoring the Legal Assistance Program, as well as other programs, at the local level. The proposed standards attempted only to incorporate what was viewed as a general practice. Nonetheless, this section as originally written did not reflect the intent.

AAAs should be able to contact the State Legal Assistance Developer for technical assistance in the operation of their local program. That is one of the functions of the Developer. Likewise, the Developer must know who to contact at the AAA regarding its Legal Assistance Program. This section, as now written, continues to allow the AAA flexibility to designate the contact person.

D. Primary Criteria for Selecting a Provider

Comment: One criterion for selecting a Legal Assistance Provider is that the Provider must demonstrate the capacity to provide legal assistance in the principal language spoken in areas where most do not speak English as their principal language. One commenter noted that this is difficult when the AAA serves multiple ethnic communities.

Response: This section lists criteria for selecting a Legal Services Provider as set forth in Federal regulations. We note that those Providers who currently serve multi-ethnic communities use a variety of methods to serve non-English speaking clients. We anticipate that they will continue to do so.

E. Other Criteria

Comment: One commenter, referring to the requirement that the

Legal Assistance Provider should have a good relationship with the private bar and the ability to involve the private bar in providing legal assistance to the elderly, noted that this can be a problem for AAAs serving small, rural areas.

Response: We recognize that it is oftentimes difficult to involve the private bar in any legal assistance program, especially on a *pro bono* basis. Nonetheless, private bar involvement has worked for many programs in the State. We would note that while *pro bono* services are desirable, it is only one of several ways of involving the private bar in an AAA's Legal Assistance Program.

IV. Responsibilities of the Legal Assistance Provider

B. Assisted Referrals

Several comments were received regarding the section on Assisted Referrals. Generally, the comments suggested there was not enough flexibility for Legal Assistance Providers and AAAs to develop procedures for handling referrals. The section has been rewritten to allow more flexibility at the local level.

Some of the specific comments are discussed below.

Comment: Noting that the Standards would allow referrals whenever "adequate and accessible legal resources exist in the community," one commenter asked what standard should be used to make that determination.

Response: This provision is carried over from previous Program Instructions governing the Legal Assistance Program. AAAs and Providers generally have not needed assistance in determining the adequacy and accessibility of legal resources in their community. Nonetheless, if requested this Office would be glad to provide technical assistance in developing standards to make this determination.

Comment: The proposed standards stated that the Provider and AAA should establish a panel of attorneys in private practice to whom cases could be referred. Two commenters expressed concern that the standards thus would not allow referrals to a county bar association.

Response: The Standards have been revised to allow Providers and AAAs more flexibility in establishing referral mechanisms. While referrals to County Bar Associations are not specifically mentioned in the Standards, such referrals would be permissible.

Comment: One AAA expressed the opinion that requiring a Provider to make referrals and then follow-up on all referrals would be neither practical nor advisable. Some providers expressed concern that the proposed standards did not take into consideration

the various types of referrals. They wanted to see a differentiation between referrals of matters that are not within the priority issues and those that are priorities but which the provider needs to refer elsewhere.

Response: The American Bar Association has taken the position that it is permissible and advisable that a program that refers clients to another attorney, private or publicly funded, should follow up to determine that appropriate service has been rendered. We encourage that practice.

However, the Standards have been revised to allow the Provider and AAA flexibility to determine whether they need to make the first contact with the attorney or LSC receiving the referral. The Standards also allow Providers and AAAs to establish procedures to govern when a follow-up on the referral will be made. Once again, if requested this Office would be glad to provide technical assistance in developing standards to make this determination.

V. **Coordination with the Long-Term Care Ombudsman Program**

Comment: One Legal Assistance Provider recommended the Standards specify a time frame for review and reconsideration of any memorandum of understanding between a Legal Assistance Program and an Ombudsman Program.

Response: The Standards now specify that a memorandum of understanding be reviewed and renewed not less once every four years.

Comment: The same provider offered the comment that any activity undertaken pursuant to a memorandum of understanding with the Ombudsman Program must be consistent with Legal Assistance Program acceptance policies.

Response: The Standards require a memorandum of understanding to specify that clients of the Long-Term Care Ombudsman Program are entitled to advice and representation where otherwise eligible and appropriate under Legal Assistance Program priorities. Any local case acceptance policies consistent with the Standards could also be incorporated into the memorandum of understanding.

VI. **Joint Responsibilities of the AAA and the Legal Assistance Provider**

General Comment: The Proposed Standards contained a section entitled Intake and Screening of Clients. Many commenters found this section problematic.

Canon 3 of the Lawyer's Code of Professional Responsibility.

Response: This section has been deleted in its entirety and subsequent sections relettered accordingly.

A. Coordination with the Legal Services Corporation

Comment: One commenter recommended the change in title for this section, which had been entitled "Community Resources." Since this section primarily addressed coordination with the Legal Services Corporation, it was suggested the title should be changed to more accurately reflect the subject matter.

Response: As indicated, the suggestion has been adopted. The title has been changed and the section slightly rewritten.

B. Training for AAA Staff

Comment: The Proposed Standards would have required the Legal Assistance Provider to train AAA staff to provide research assistance. One Provider pointed out that it would be difficult for a provider to adequately supervise AAA staff engaged in legal research. Instead, it was suggested that the standards require training for AAA staff to provide other appropriate assistance.

Response: This suggestion has been adopted. This will give greater flexibility to AAAs and Legal Assistance Providers to determine the types of assistance that AAA staff can provide.

C. Community Legal Education

Comment: Several comments were received regarding the sections entitled "Group Presentations" and "Outreach." The commenters generally like the intent of providing community legal education to the elderly. They made it clear that community legal education is an important part of a Legal Assistance Program. Nonetheless, they made several suggestions about the organization of the two sections. One commenter raised an important point: as important as community legal education is, limited resources dictate that the primary function of the program should be on direct services to clients.

Response: The sections entitled "Group Presentations" and "Outreach" have been replaced by a single section entitled "Community Legal Education." This section clearly states that the primary focus of the Legal Assistance Program is the direct legal representation of clients. The importance of community legal education is acknowledged. Yet, it is left to the AAA and the Legal Assistance Provider to determine how and whether to engage in community legal education.