

CHAPTER 1 PREPARING FOR LITIGATION

Litigation can be a powerful tool for solving problems for your clients. However, other tools, such as legislative and administrative advocacy, community education, and direct action, should be considered along with litigation. The lawyer must first determine that a lawsuit is the best strategy, or one of several strategies, for solving the particular problem or attaining a specific goal. The purpose of this MANUAL is to assist legal aid lawyers in exercising the power of litigation most effectively.

I. Introduction

Planning for obtaining the client's goals is no different from planning for any project. Many models for strategic planning have been developed. Which model appeals to you will depend on your style. Whether you choose to use an explicit strategic planning process or not, you will need to answer the following questions before you start:

- What does your client want?
- Who or what has the power and resources to provide what is desired?
- What will cause the person or entity to do what needs to be done?
- How will it get done?
- What resources will be required?
- When do you need to get results? How long will it take?
- How will you know when you have succeeded?

Only when these questions have been considered and provisionally answered can you be confident that you are providing the best advocacy for your client. When litigation is one of your strategies, additional, more technical, questions must be asked. Many of these questions will be addressed later in this chapter:

- What are the capacities and limitations of your firm or organization?
- Who will the client be?
- Who will the plaintiff be?
- What will your claims be?
- On what law will you rely?
- What specific claims for relief will you make?
- How will the lawsuit be staffed or financed?

The amount of time that you devote to the prelitigation stage will depend on the circumstances. If the client is facing immediate eviction, for example, you may very quickly determine that the client needs a temporary restraining order and leave aside, for the moment, any systemic issues presented. Other cases might involve filing your complaint several weeks or months after the client retains you and after a long planning stage. For instance, a community group recently wanted to address the inadequate education that the city school district was providing to its overwhelmingly African American and Latino students. The legal services office spent over a year planning its strategy for this case. The attorneys created a coalition that was dedicated to the school problem and that ultimately became a plaintiff, created a funding mechanism and raised substantial funds for the litigation, conducted legal research, devised a media campaign, investigated the facts, and debated the various possible legal claims and strategies.

In another case, attorneys worked very closely with local disability rights groups to get adequate, timely transportation. The grassroots activists and community members planned the overall course of action, which included direct action and civil disobedience, negotiations and meetings with the transit authority, media coverage, public hearings, and eventually litigation. Although litigation was always a critical part of the plan, the community groups working on the issue chose other approaches first for tactical reasons. This chapter addresses these planning issues as you prepare for litigation.

II. Factors for Consideration

Your consideration and answers to the following questions will determine your strategy.

A. WHAT DOES YOUR CLIENT WANT?

The answer to this question will shape the course of your litigation. When you draft the complaint, you will need to identify the *legal relief* requested. However, at the earliest stages you must not think in legal terms but instead consider in a broader way the solutions that will address the problem that your client has presented. Only by doing this can you be sure that you have not prematurely selected litigation as your strategy and that you have not allowed any formulaic ways of requesting relief to limit unnecessarily the goals of your advocacy. As you begin, you will want to focus first on what is *desirable* as an outcome and not merely what is attainable. Litigation may not achieve all that is desirable. Other approaches may achieve much of what is sought more quickly and less expensively. If such alternatives are not feasible or successful, or will be employed in tandem with litigation, then you can more narrowly focus on what is legally attainable *after* you have completed your legal research and fact investigation.

In some cases a client will have a clear view of what role litigation may play, and in those situations the lawyer's job is to do the technical, professional work necessary to do what the client wants done. For example, in Massachusetts, an Aid to Families with Dependent Children (AFDC) recipient and officer of the Massachusetts Welfare Rights Organization read Massachusetts General Laws ch. 118, § 2, which directs that the aid furnished under the former AFDC program shall be sufficient to enable recipient parents to bring up their child or children properly in their own home. This person asked that Massachusetts legal aid lawyers sue to enforce that statutory mandate. The recipient's initiative led to one of the more important and productive lawsuits of the era.¹

In other situations, the client has limited expectations of the civil justice system, and the lawyer's job is to expand the client's notion of what is possible. Thus, for example, a tenant who hopes for extra time in which to move may in fact be able to secure repairs, reduced rent, a damage award, and the right to remain in a repaired unit. Part of the advocate's job is to make sure that the client has a full picture of the kinds and extent of relief available as well as the potential obstacles in achieving them. Once you have focused on the problem and its solution, you, your clients, and others can determine how to frame the legal relief that you are seeking to accomplish the agreed-upon solutions.

B. WHAT ARE THE CAPACITIES AND LIMITATIONS OF YOUR FIRM OR ORGANIZATION?

Obviously the extent of any potential advocacy effort is always circumscribed by the capacities and limitations of your firm or agency. The principal limitation, of course, is that of resources, which in broad terms consist of (1) staff time and (2) funds available to spend on advocacy-related expenses. Legal aid firms typically are engaged in a constant and never-ending institutional struggle to evaluate and satisfy the advocacy needs of their clients against extremely scarce organizational resources.

Many legal aid organizations across the country are funded, at least in part, by the federal Legal Services Corporation (LSC). In 1996 Congress enacted, in a budget bill,

- a series of sweeping restrictions,²
- subsequently codified in LSC-promulgated regulations, which limit the range of activities in which attorneys employed by LSC-funded programs may engage.³

These substantial restrictions include, for example, class action litigation; legislative and administrative advocacy; representation of aliens and prisoners; "welfare reform" advocacy; abortion-related advocacy; redistricting advocacy; and collection of attorney fees.⁴ Not all of these restrictions were new. Congress and LSC had long limited some of the advocacy

¹*Massachusetts Coalition for the Homeless v. Secretary of Human Services*, 400 Mass. 806, 511 N.E.2d 603 (1987).

²Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 501-509, 110 Stat. 1321-51 to 1321-59. *See also* 42 U.S.C. §§ 2296 *et seq.* (the Legal Services Corporation Act).

³*See* 45 C.F.R. pts. 1600 *et seq.* (2001).

⁴*Id.* Other areas of practice upon which restrictions are placed include political activities, client solicitation, grassroots organizing, "fee-generating" case representation, criminal and habeas corpus proceedings, defense of evictions in certain situations involving drug activities in public housing, and cases involving assisted suicide, euthanasia, and mercy killing.

which LSC grantees could undertake *using LSC funds*. However, the 1996 changes not only added numerous subjects to that list but also extended many of those limitations or prohibitions to *any* funds used by the grantee.⁵

The LSC regulations, which are subject to changing political currents as well as ongoing litigation, must be read very carefully. Many of the restrictions are in fact limited in their terms and permit attorneys' specific actions (sometimes using non-LSC funds) that fall within the scope of the general restriction.⁶ An in-depth analysis of all the restrictions is beyond the scope of this MANUAL. However, we must understand that the restrictions do *not* prevent "impact advocacy" either through litigation or other means of legal representation. Many significant legal changes have come about through the vigorous litigation of an individual client's claim (or a group of clients' claims), the setting of a legal precedent, a change in the law, or the obtaining of specific injunctive or declaratory relief, including broad prospective relief.⁷ Throughout this MANUAL, we will endeavor to point out any obvious issues regarding the LSC restrictions, but we assume that attorneys in LSC-funded programs are cognizant of the entire regulatory scheme and its implications for their advocacy.

These restrictions may counsel against the LSC-funded organization from taking a certain case as a strategic matter. Take, for example, the prohibition on an LSC-funded advocate's ability to request and obtain attorney fees, in most cases.⁸ Even after prevailing in litigation, the prohibition can remove a significant tool for forcing the defendant to understand the consequences of its wrongdoing and remove a bargaining chip from the table. Attorneys in restricted programs should consider any effect this might cause on the litigation as a whole and the resulting ability to obtain adequate relief for the client. The attorney should evaluate whether other economic sanctions, such as punitive damages or damages sounding in tort, can be requested and are supported by law. Cocounseling with a nonrestricted attorney or organization certainly may be worth doing in order to preserve at least some attorney fee leverage for your clients. Ultimately, in some instances, for example, where the appropriate advocacy strategy is class action litigation, ethical obligations to the client may require recruiting a nonrestricted attorney to handle the case. The point here is that advocates in LSC-funded programs must be creative and must be prepared to adjust their strategy in light of the restrictions.

C. WHO IS YOUR CLIENT?

Part of the litigator's job is deciding who the client will be. A person who walks into your office with a grievance will not necessarily become your client in a lawsuit. Lawyers generally, and legal aid lawyers in particular, need to think carefully about not only which issues are suitable for litigation but also which clients will best present those issues as parties to litigation. The lawyer has considerable influence in deciding who the client will be.

The lawyer may seek clients and not simply sit and wait for individuals to ask for help. For example, when the lawyer knows that a damaging thing is about to occur or has been occurring, the lawyer may seek out people willing to challenge such action.⁹ This may take the form of public education about the issue or may involve more actively contacting potential clients through networking with organizations and client groups.¹⁰

Before accepting someone as a client, you must consider issues of standing and mootness discussed in Chapter 3 of this MANUAL. Minimizing standing and mootness problems may justify multiple plaintiffs. Yet representing more than

⁵The 1996 restrictions were, and continue to be, the subject of significant constitutional challenges raised by various legal aid organizations, clients, and individual advocates. See, e.g., *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), cert. denied, 525 U.S. 1014 (1998); *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). In *Velazquez* the U.S. Supreme Court invalidated, principally on First Amendment grounds, one aspect of the restriction upon advocacy related to "welfare reform" measures and remanded the plaintiffs' remaining claims. As of December 2003, *Velazquez* and a companion case, *Dobbins v. Legal Services Corporation*, No. 01 CIV 8371 (FB) (E.D.N.Y.), each raising numerous constitutional challenges to the restrictions, were pending before the federal district court.

⁶For a thorough discussion of all the restrictions, see ALAN W. HOUSEMAN & LINDA PERLE, WHAT CAN AND CANNOT BE DONE: REPRESENTATION OF CLIENTS BY LCS-FUNDED PROGRAMS (2001), available at www.clasp.org.

⁷See, e.g., Raun J. Rassmussen, *Affirmative Litigation Under the Legal Services Corporation Restrictions*, 34 CLEARINGHOUSE REVIEW 428 (Nov.-Dec. 2000); Gary F. Smith & Nu Usaha, *Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violations of Federal Law*, 32 CLEARINGHOUSE REVIEW 112 (July-Aug. 1998).

⁸45 C.F.R. § 1642.

⁹Although Legal Services Corporation (LSC) rules place restrictions on solicitation of clients, provision of legal information and outreach are permitted. 45 C.F.R. § 1638.4.

¹⁰An American Civil Liberties Union (ACLU) attorney's letter soliciting a potential litigant came within the zone of First Amendment protection for associational freedoms where the purpose of the solicitation was to advance the civil liberties objective of the ACLU and not to derive financial gain. *In re Primus*, 436 U.S. 412 (1978); see also *NAACP v. Button*, 371 U.S. 415 (1963).

one person may create the possibility of a conflict. As with any other litigation choice you make, the potential consequences must be considered.

In many situations the client may be a community organization. Working with a community organization, especially in the context of tackling systemic issues, has many advantages. The community group may have its own resources to contribute to the litigation. The group may lend financial and volunteer support, credibility, networking, and potential plaintiffs. Most important, the group may understand the importance of the issue at hand and the social forces that both have created the problem and can lead to its solution. The involvement of a community group can also ensure that attorneys advance the litigation in accordance with community needs.

Working with group clients involves special considerations.¹¹ Most important, you (and the group) must know and agree on who speaks for the group. You should also understand whether the group speaks for the community or constituency at large or only for its particular members or leadership. You must have open communications with the group and its leadership so that you understand and agree on the respective roles of attorney and client. While this same clarity is important in working with an individual client, it can be more complex when working with a group. The institutional interests of the organization may diverge from the desires of individual members of the group. The retainer agreement must incorporate all elements of the attorney-client relationship, and should spell out the mechanism by which the decisions of the group will be made and conveyed. While the retainer may specify the name of an individual member of the group, the retainer should state who speaks for the group in case the named individual leaves the group. Working with a group may also entail making presentations about the case to the leadership, the board, or the membership at large and attending meetings.

The retainer agreement is the blueprint for your relationship with your client. In addition to including any language mandated by your state bar or legal services program, the retainer should anticipate the potential attorney-client relationship problems that can arise during litigation. The respective responsibilities of the attorney and client should be discussed. Other important litigation items that should be addressed are grounds for termination of the attorney-client relationship and how such termination will be handled, costs and fees, and settlement offers. Some attorneys include language explaining the typical time frame for litigation.

In bringing a class action, be sure that the retainer agreements and conversations with the class leaders make clear that the lawyers' responsibilities are to all of the class members, not just the named plaintiffs. For example, in challenging mass evictions and proposed demolition of housing, be clear about the extent to which counsel is representing people who want to stay, people who left but will not return or do not want to return, and people who are in need of the housing and do not want it demolished. If you foresee potential conflicts, or if those conflicts already exist, you can choose to represent one of the subgroups and can recruit private or other nonprofit counsel to represent the other groups. A conflict of interest with the local legal services office is often one of the criteria that the local office uses for placing a case with pro bono counsel.

If you are in an LSC-funded program, you are prevented from filing or participating in a class action.¹² As emphasized above, this does not mean that you are prevented from doing impact litigation. The legal services restriction does not prevent you from determining the preferred strategy to obtain your client's goals and exercising your legal creativity and experience. Classlike relief may be available in declaratory and injunctive actions on behalf of an individual, group, or institutional plaintiff.¹³ The possibility of mootness may be limited by adding an institutional plaintiff.¹⁴ However, if these alternatives to class actions are inadequate to meet the needs of your clients, your obligations require you to state this and assist in locating alternate counsel, such as a nonrestricted office, a local nonprofit, pro bono, or private counsel.

Even in a case clearly appropriate to bring on behalf of an individual, there may be questions as to who the right plaintiff is. Is it the parent or the child? The leaseholder or the family member barred from the property? Is it one or both? Is it the first one who came to your office? What are the conflicts and potential conflicts? These issues must be addressed at the outset through careful legal and factual research.

¹¹LSC-funded programs seeking to represent a group or organizational client using LSC funds must ensure that the group meets certain financial eligibility criteria. 45 C.F.R. § 1611.5(c).

¹²45 C.F.R. § 1617

¹³See Chapter 9, Section III, of this MANUAL.

¹⁴See Chapter 3, Section I, of this MANUAL.

D. WHO CAN PROVIDE THAT RELIEF?

Once you and your clients are reasonably clear about what they want, you must decide who is able to provide that relief or able to direct that it be provided. Consideration of this question deserves some creativity. The relief may come directly from a private individual or local agency, but there may be one or more public agencies—federal, state, or local—with the authority to order that the relief be provided or with the power to provide it directly. Thus a local housing authority may be subject to direction from the U.S. Department of Housing and Urban Development (HUD); a nursing home from the U.S. Department of Health and Human Services; a private landlord from local code enforcement officials and from the mortgagee. You should identify all potential sources of relief.

Similarly every individual who is essential for relief should be considered. An attempt to get relief that costs money from a local housing authority could include HUD because HUD's resources might be needed. A lawsuit seeking relief that involves financial consequences for a private landlord could include the mortgagee. The advantage of bringing in the additional party must then be weighed against the disadvantages. For instance, suing HUD may delay the litigation and make informal advocacy within HUD impossible. As in all other decisions, you must work with the client to determine what is the best choice for the particular litigation.

E. WHAT ARE OTHER FACTORS TO CONSIDER BEFORE LITIGATION?

In preparing for litigation, consider the required financial resources and how long the litigation will take.

1. Financing

As part of the initial planning stages of the litigation, you should prepare a budget that covers both the *time* and *staff* resources and the *financial* resources necessary to conclude the litigation. Just as your litigation plan will include the legal claims, the facts necessary to prove your claims, and the method you will use to establish those facts, it should include an estimate of the time and staff necessary to draft and research motions, interview witnesses, review documents, and anything else you need to get done. The financial estimate should include fees and costs, such as for depositions, transcripts, experts, and witnesses. If you are fund-raising you can also translate the time and staff resource requirements into a dollar figure for salary and overhead.

It can be easy to accept a case and commence litigation under the assumption that you will get a preliminary injunction and the case will settle or reach a quick conclusion. In fact, this is not uncommon in the type of case a legal services lawyer often brings, such as to challenge an agency's actions where the facts are not in dispute and only a legal issue is presented. But this often is not the case. The budget may be based on your assessment that you probably or likely will resolve a case at a certain stage, but you should know how much it would cost to pursue the case to completion. In addition, the possibility of appeal should be considered. You need to know how far you can carry your legal strategy.¹⁵

If you and your agency cannot afford to bring a case that will have broad social impact, the case may be a candidate for obtaining litigation funding. Litigation can be funded by foundations and private supporters. If the litigation is understood to be part of an overall strategy for obtaining an important community objective or in protecting a vulnerable population, and you can explain why litigation is the best tool to achieve a well-articulated goal, your likelihood of obtaining funding increases.

Another way to obtain financial resources is to partner with, or cocounsel with, a private law firm. Often the legal services program can provide the substantive expertise, and the law firm can contribute litigation and trial experience and cover the ongoing litigation expenses. In-kind assistance such as copying, secretarial, and paralegal work can free up program resources from this particular litigation to be used on other matters. There is an increasing national emphasis on working with civil rights groups and national nonprofit legal organizations such as the National Women's Law Center, the American Civil Liberties Union, or the American Association of Retired Persons. These groups can also provide expertise and in-kind assistance, media campaigns, research, and staffing resources. Organizations are careful stewards of their resources and work on cases that further their mission. Your relationship with a national organization may be one of full partnership or of cocounsel, or it may consist of getting help in discrete portions of the litigation. As with any other relationship that you form to advance your litigation, clear communication of expectations and responsibilities is critical and should be confirmed in a cocounsel agreement, memorandum of understanding, or letter.

¹⁵For instance, if you know that your program cannot bring an appeal under any conditions, either for financial, staffing, or programmatic reasons, and pro bono appellate counsel is unlikely, a settlement offer might be evaluated very differently from if you knew that you would appeal an adverse decision.

If your agency cannot afford the litigation, and you cannot obtain funding, then you should not and cannot bring the litigation. You must explain to the client the costs of the litigation and the risks of bringing underfunded litigation—making bad law and getting a bad decision for the client. Clients often have no idea of the costs of litigation and have notions distorted by the cultural mythology surrounding lawyers about how lawyers are paid. They may think that they will obtain millions of dollars in damages and that you will receive a portion, or they may care so passionately about an issue that they may push you to commit resources that you do not have. Either way, your job requires understanding the reality of the economics of litigation and giving your assessment to your client. You owe it to your client to make this determination promptly so that the client can explore other possible sources of representation or advocacy before any legal or practical deadlines occur.

2. Time

There is no litigation on record that took less time than the attorney originally thought it would. Legal research has a way of expanding exponentially. Clients talk with you for longer than you expected. The judge calls you in for a conference, keeps you waiting, and asks you to come back again. In your planning stage, you should estimate the time that it will take you and other office staff to handle the litigation responsibly. Then add time to that estimate.

A reality of legal services practice is that the need for our services is greater than what we can provide. You owe it to your client, yourself, and all your other current and potential clients to estimate at least the time that you will spend on this case. How many hours per week? Over how long a period of time? You must also have a clear sense as to the timetable by which your client needs or wishes relief. What are the deadlines in your case, and will you have a time crunch as you approach them? Then you can determine the consequences of accepting the case and beginning the litigation.

Do not accept a case or commence litigation if you do not have a plan for staffing the case and a realistic estimate of the time to bring it. Even with a realistic plan, there will be time deadlines and late nights—that is the nature of litigation. On the other hand, flexibility, creativity, and efficiency can often add significantly to your available time resources.

Keeping adequate time records is an important aspect of managing the litigation. You may need to keep contemporaneous time records to comply with legal services program rules or to obtain attorney fees from the court. Good time records can be useful should you ever have to move for or defend against sanctions. They are factual records of the actual time that it takes to litigate; they can also be considered in determining the staffing needs of your office, drafting funding proposals, and setting office priorities. Many offices are now using software that make capturing accurate contemporaneous time records easier and analyze and present the records.

F. WHAT ARE THE ALTERNATIVES AND COMPLEMENTS TO LITIGATION?

All options for obtaining relief, instead of or in conjunction with litigation, should be considered and used where appropriate. For some programs, the barriers to litigation are significant and the likelihood of the client retaining other counsel all but nil. To the extent that the problem can be resolved without litigation, it should be. Litigation can often be more expensive in time and cost than alternatives. Thus the use of alternatives to litigation can mean that more clients are served and more problems are solved. While these strategies are generally considered alternatives to litigation—alternative ways to obtaining the desired results—they can also be used as adjuncts to litigation.

1. Administrative Advocacy

Administrative advocacy can be formal or informal.¹⁶ Even where administrative proceedings are not required prior to litigation, they may be available. For instance, a fair housing claim may be filed either in court or with HUD. Your choice will be determined by the speed at which you seek relief, the HUD administration and its record, and the type of discovery and fact investigation that you wish to conduct. Many attorneys have had success in using the HUD administrative procedure for informal discovery and obtaining conciliation agreements. On the other hand, many HUD complaints have languished for years.

In addition to having quasi-judicial procedures for enforcement of a statute, such as through HUD or the Equal Employment Opportunity Commission, many agencies have procedures for filing administrative complaints. Under some statutory frameworks, the administrative process is a necessary prerequisite to filing in court. If you do not timely file administratively, you will lose your opportunity to pursue the case through litigation. In addition to formal administra-

¹⁶Doing so, however, may have preclusive effect. See Chapter 3, Section III, of this MANUAL.

tive processes that may involve investigation, conciliation, hearings and administrative appeals, there are other kinds of administrative routes to follow. For instance, in addition to availing of due process hearings, some attorneys have had success in special education cases with their state's complaint process or in making a complaint to the Office for Civil Rights within the U.S. Department of Education. You can also engage in administrative and federal rule making, including requesting a rule making or commenting on proposed regulations.¹⁷

Administrative advocacy can be informal. You can work up the chain of command, or you can contact the county attorney or general counsel. You can call your agency contacts who have agreed with your position or are at least open-minded to see if they may take any official or nonofficial action. A local administrator is often surprisingly amenable to changing a local practice if the agency knows that its federal or state oversight agency is supportive of the change. Of course, your local agency may be stubborn, but then you can count your informal administrative advocacy as informal discovery of the oversight agency's position.

Many local court rules require the attorney to attempt to settle the matter before commencing litigation.¹⁸ When time is of the essence, or when you do not want excessive lead time before you actually file, you can attach a draft complaint to your demand letter and set for the defendant a fixed period of time for response. As with any other correspondence with the defendant, or the attorney for the defendant, this correspondence may wind up before the court either during the substantive portion of the case or during a fee motion. Any time you write about your case to the opposing party, bear in mind that the letter may later be filed with the court.

2. Legislative Advocacy

One informal strategy is to contact, or have your client contact, your local congressional representative.¹⁹ Even if the congressional office does nothing more than forward the request to the federal agency, the request may receive attention that it otherwise would not. Congressional requests may be color-coded and given the highest priority.

The emphasis on federal litigation may cause us to forget that the remedy may lie within the state legislative process. If you are challenging a state law as illegal under a federal law or regulation, you may appeal directly to the state legislature to change the law possibly through a friendly legislator familiar with your organization or cause. Where the state's interest is in the practical administration of a shared state-federal program, or in the efficient working of state and local government, you may be able to advocate a change in the state law to bring it into compliance. There is not, however, much you can do if state lawmakers are dug in on ideological or political grounds.

Legislative reform is a topic too large for this discussion. Yet, as many courts become more hostile to our clients' claims, the legislative process cannot be ignored. In general, success in the legislative arena depends on knowing the players and in being part of a larger coalition pressing for change. An excellent example of an area in which legal aid attorneys have had legislative success is in the passage of state legislation protecting low-income homeowners from predatory lending practices.

3. Press and Media

Newspapers and other media can be useful in several ways. First, publicity and articles can get your message out and shape public opinion. This is especially useful if you need public opinion to support your lobbying efforts or if you wish to encourage the public to take a particular action. Second, an article or story can reflect public opinion and can bolster your moral standing or give a margin of comfort for a judge who might otherwise be afraid to issue a novel order. Third, the news reporting can serve as another source of fact finding and can force your adversaries to pin down their position as they are quoted. Fourth, readers of an article may bring further evidence or potential plaintiffs to your attention.

When you approach the media, you must do so with an understanding of the way the media operate. In most cases the reporter is interested in the general public interest of the story. Very few local reporters have the resources for true investigative reporting. The press release may form the core of the story and may represent all that the reporter knows about the issue. Commonly the reporter will call you and your adversary for a quote. You should have a quote prepared, and you should understand that the reporter will listen to your articulate explanation and will pull out the one sentence you wish you had never said. You can start the conversation by saying that you would like to give some information on background and then indicate when you want to be quoted, but such control is not always granted or honored.

¹⁷ See 45 C.F.R. § 1612 (restrictions on legislative and administrative rule-making activities).

¹⁸ LSC regulations also require certain procedures to be followed with respect to prelitigation negotiation and the filing of litigation. 45 C.F.R. §§ 1636, 1644.

¹⁹ Restricted programs are expressly *permitted* to "advise the client of the client's right to communicate directly with an elected official." 45 C.F.R. § 1612.5(c)(6).

If you are going to use the media, or are forced by your adversary into doing so, you must create a message that will be understandable and persuasive to your audience. A radio or television interview is not the time to talk about motions to dismiss and burdens of proof. It is the time to think in sound bites, just as when you were first formulating the solution to your client's problem.

If you work at it, you will be able to develop a relationship with a reporter who is interested in your story. You will be able to give background information to the reporter, and the reporter may be willing to share information obtained during an interview or investigation. Do not be lulled, however, into thinking that the reporter is on your side or your friend. You may find your confessions and doubts incorporated into a future article.

In general you can contact the media in three ways. You can simply call the city desk, relevant beat reporter, or a reporter with whom you have a relationship. You can issue a press release that conforms to the format used in your community. You can call a press conference by issuing a press release or making direct calls and inviting the media to appear at a particular time and place. You can often attract a lot of attention by doing this, despite the short attention span of the media. The press conference should be planned with as much care as an oral argument; you should include the sound bites you want aired and be prepared for challenging questions.

A client or group representative as a spokesperson makes the story more immediate. An attorney as the spokesperson can project a level of seriousness, knowledge, and intent. Often a combination of both works best. You should prepare the client and practice, just as you would for testimony.

You can also approach the editorial board of the newspaper to attempt to solicit a favorable editorial. Usually you can ask to arrange a meeting with the editorial board or representative where you will have an opportunity to present your story and argue your position. Even if you do not obtain a favorable editorial, the off-the-record remarks and feedback you obtain from the editorial board can serve as a useful barometer of community response.

To insure internal control of your media strategy, you should have a clear understanding within your office, your litigation team, and your client as to how media inquiries will be handled. In general one attorney in your office should be the point of contact with the media for the case, and that attorney should know and understand the media strategy for the litigation. Your agreement with your client as to how media inquiries will be handled should be in the retainer.

4. Community Education

Community education is one of the most important undertakings of a legal services attorney.²⁰ In most circumstances it will also be an adjunct to litigation. Community education may be particularly necessary when you are trying to locate plaintiffs or witnesses or when you want to test the capacity of a public system. For instance, before commencing litigation to challenge the failure of a paratransit system to comply with the Americans with Disabilities Act, the attorneys and the organizational client educated potential riders of their rights, surveyed people with disabilities about their experiences with the system, and obtained data about noncompliance as a result. Community education can be especially useful after you have settled or won the case to let people know about the new resources available to them or the new rules that will apply to them. In fact, you can include community education as part of your settlement or request for relief.

When you engage in community education, you must be sensitive to the forms of communication best understood and appreciated by your target audience and their spoken languages. You should always consider alternate formats, such as large print, tape, and Braille for people with visual impairments, and the availability of interpreters when conducting outreach and community presentations.

5. Direct Action and Community Development Work

Direct action can refer to two different approaches to obtaining your desired solution. First, you can simply fix or coordinate the fixing of the problem. For instance, as the defendant in a lawsuit initiated by her town to declare her house an imminent health hazard and to raze it, a client contacted a legal services lawyer. Legally the attorney could have raised procedural defenses or counterclaims relating to the client's disability. Instead the lawyer contacted a local community group that, working with a local church, sent a team of people and a dumpster to the house. The volunteer team cleared out years of debris, cleared out the rats, and performed some emergency repairs. The only legal work the attorney had to do was to negotiate for additional time and be present in court when the town withdrew its case.

Direct action can also mean mobilizing a group of people to apply pressure to the government or other entity to obtain a specific result.²¹ Disability groups have engaged in direct action, often in conjunction with litigation, to obtain accessi-

²⁰LSC-funded attorneys may not conduct or support training that advocates a specific public policy, 45 C.F.R. § 1612.8.

²¹LSC regulations prohibit attorneys in LSC-funded programs from grassroots lobbying, 45 C.F.R. § 1612.4, engaging in inter alia public demonstrations or civil disturbances during working hours, 45 C.F.R. § 1612.7, or organizing, 45 C.F.R. § 1612.9.

ble transportation or access to public buildings. Direct action in your case might occur on a smaller scale. It may be as simple as turning out a crowd at a public hearing or in the courtroom. It may be a sit-in at the welfare office to protest a new rule or at a local restaurant to obtain an accessible restroom. In most cases combining direct action with a media strategy is useful.

Community development work involves the use of public, community resources to obtain the desired results. It can refer specifically to becoming involved in your town, city, or state's process for allocation of federal and state community development dollars. It can also mean working with a local not-for-profit or for-profit development company to create housing, job opportunities, or other community enhancements.

6. Amicus Participation

One alternative to the substantial investment of time and resources required for the preparation, initiation, and prosecution of direct litigation on behalf of your clients is to participate, selectively and strategically, in pending lawsuits involving *other* parties which have raised the same or similar issues.

The Amicus Curiae. Through the vehicle of the amicus curiae—the “friend of the court”—legal aid attorneys can vigorously represent their clients’ interests, often in the context of precedent-setting decisions, without formally initiating, or intervening in, the underlying litigation. Amicus participation thus affords attorneys, while avoiding most of the resource constraints imposed by conventional litigation, the opportunity to influence directly and immediately the outcome of cases which may dramatically affect their clients’ lives.

Unlike their counterparts in many other public interest law organizations, legal aid advocates do not routinely participate as amici in cases involving other parties, but given

- the modern expanded role of the amicus curiae in federal litigation²² and
- the increasing success of amicus arguments presented by a wide variety of interest groups, including conservative public interest organizations,²³

legal aid advocates should more fully utilize this effective (and efficient) alternative to direct litigation.²⁴

Role of the Amicus. Historically the amicus was a disinterested judicial advisor called upon only in rare or unique circumstances, sometimes offering a mechanism for the articulation of third-party interests not otherwise before the court.²⁵ Its original role “was to provide impartial information on matters of law about which there was doubt, especially in matters of public interest.”²⁶ Over time the role of the amicus curiae evolved to encompass overt advocacy on behalf of the amicus organization’s legal position, and modern amici invariably provide active support for one or more parties to the litigation.²⁷ Indeed, under current federal rules, an amicus seeking leave to participate in a case must articulate its specific interest in the litigation, identify the party that it intends to support, and (in the U.S. Supreme Court) disclose certain relationships which may exist between the amicus and the parties to the case.²⁸

The Amicus Brief. Typically an amicus simply submits a brief in support of its legal position. Under the federal appellate rules, such briefs may be filed “only if accompanied by written consent of all parties, or by leave of court granted on motion, or at the request of the court.”²⁹ Generally an amicus who is unable to obtain the requisite consent will file a motion for leave to file its brief and at the same time “conditionally file” the brief itself—a procedure permitted under

²² See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court*, 148 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 743 (2000).

²³ Kenneth Jost, *The Amicus Industry: Conservatives Catch Up with Liberals in Getting the Attention of the Supreme Court*, CALIFORNIA LAWYER, Oct. 2001, at 40.

²⁴ For an extensive discussion of the role of the amicus curiae, and for examples of its application to legal services advocacy, see Gary F. Smith & Beth E. Terrell, *The Amicus Curiae: A Powerful Friend for Poverty Law Advocates*, 29 CLEARINGHOUSE REVIEW 772 (Nov.–Dec. 1995).

²⁵ Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE LAW JOURNAL 694, 696–97 (1963).

²⁶ *United States v. State of Michigan*, 940 F.2d 143, 164 (6th Cir. 1991). A few courts are still reluctant to depart from this “orthodox” formulation and allow amici only a “very limited adversary” role through briefing or oral argument or both. *Id.* at 165.

²⁷ See Krislov, *supra* note 25, at 695–96; *Funbus Systems Inc. v. California Public Utilities Commission*, 801 F.2d 1120, 1125 (9th Cir. 1986) (partisan advocacy by amici is “perfectly permissible”).

²⁸ See S. Ct. R. 37; Fed. R. App. P. 29. In 1997 the Supreme Court added a provision requiring all amicus briefs to disclose (1) whether counsel for a party authored any part of the brief and (2) every person or entity, other than the amicus and its counsel, that made a monetary contribution toward the preparation of the brief. S. Ct. R. 37.6.

²⁹ Fed. R. App. P. 29.

Rule 29.³⁰ The motion must identify the “interest of the applicant,” and the brief should be filed (or conditionally filed) within the same time allowed for the party whose position the amicus supports.³¹

A similar procedure governs amicus participation in the Supreme Court and is set forth in Supreme Court Rule 37. Although Rule 37.2 states that motions for leave to file an amicus brief after the parties refuse to consent are “disfavored,” in practice the Court currently grants “nearly all” motions for leave to file an amicus brief, even when consent is denied by a party.³²

No express provision in the Federal Rules of Civil Procedure applies to amicus advocacy in the district courts. However, those courts might well look for guidance to Federal Rule of Appellate Procedure 29, and an amicus seeking to be heard in the district court should follow the process set forth in Rule 29.³³

Content of the Brief. An amicus brief can serve a variety of functions. It can target a specific weakness in a party’s argument, develop variations on the arguments made by the parties, and present emotive or otherwise “risky” arguments that a party cannot or should not address.³⁴ Often an amicus brief can serve as an important factual supplement to the record or furnish relevant technical data or background information not otherwise available to the court.³⁵

The overall influence of amicus advocacy upon court decisions is quite difficult to measure in objective terms.³⁶ However, many organizations that regularly appear as amici point to “the frequent citation of amicus briefs in Justice’s opinions” as support for the commonsense inference that “the [U.S. Supreme] Court often finds such briefs helpful.”³⁷

New Issues or Arguments. Often an amicus may seek to argue a legal theory or raise a legal issue that the parties themselves have not argued or raised. As a rule, courts are reluctant to permit an amicus “to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore.”³⁸ This principle is merely a corollary to the more basic jurisprudential prohibition against the consideration of issues that are not

- argued in the lower court³⁹ or
- raised in the appellant’s opening brief.⁴⁰

However, courts often exercise their discretion to rule upon new issues raised by amici

- when “the issue is purely one of law and either does not affect or rely upon the factual record developed by the parties”⁴¹ or
- where “exceptional circumstances” warrant consideration of the argument.⁴²

³⁰*Id.*

³¹*Id.*

³²Kearney & Merrill, *supra* note 22, at 760. As a result, parties represented by experienced lawyers in the Supreme Court rarely refuse consent for leave to file an amicus brief. *Id.*

³³See *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D. N.Y. 1991) (denying leave to file an amicus brief after consideration of the Rule 29 factors).

³⁴See Krislov, *supra* n. 25, at 711.

³⁵These are sometimes called “Brandeis briefs,” after a famous turn-of-the-century filing by future Supreme Court Justice Louis Brandeis, who urged support of a law limiting women workers to ten hours per day by packing his brief with sociological data about the negative effect of excessive hours on workers’ health. *Muller v. Oregon*, 208 U.S. 412 (1908).

³⁶For an extensive empirical analysis of the influence of amicus briefs upon Supreme Court decisions, see Kearney & Merrill, *supra* note 22, at 828–30.

³⁷*Id.* at 745 (Court made reference to an amicus brief in nearly 30 percent of decisions, in cases where at least one amicus brief was filed, over a fifty-year period).

³⁸*Lane v. First National Bank*, 871 F.2d 175 (1st Cir. 1989). See *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994).

³⁹See, e.g., *Service Employees Union Local 102 v. San Diego*, 35 F.3d 483, 486 (9th Cir. 1994); *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22 (1st Cir. 1991).

⁴⁰E.g., *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co.*, 842 F.2d 977, 985 (8th Cir. 1988) (en banc); *Preservation Coalition Inc. v. Pierce*, 667 F.2d 851, 861–62 (9th Cir. 1982); *Consumers Union v. Federal Power Commission*, 510 F.2d 656, 662 n.9 (D.C. Cir. 1974).

⁴¹*Hamilton v. Madigan*, 961 F.2d 838, 841 n.6 (9th Cir. 1992).

⁴²*Resident Council of Allen Partway Village v. U.S. Department of Housing and Urban Development*, 980 F.2d 1043, 1049 (5th Cir. 1993); *Preservation Coalition*, 667 F.2d at 862. Courts also will consider whether all parties have had a fair opportunity to brief the issue. *Continental Insurance*, 842 F.2d at 985.

Courts will find such “exceptional circumstances”

- when the issue presents “a significant question of general impact,”⁴³
- where the issue implicates “substantial public interest,”⁴⁴ or
- where failure to consider the issue would cause an “unduly harsh” result.⁴⁵

Furthermore, since the federal courts have an independent and continuing obligation to resolve jurisdictional questions, even when not raised by the parties, an amicus who presents such issues may in fact be “welcomed.”⁴⁶

The Supreme Court, consistent with these principles, has sometimes expressly refused to consider issues raised solely by an amicus.⁴⁷ However, the Court periodically deviates from this general rule and bases its decision on an argument presented only in an amicus brief.⁴⁸ Hence amici organizations and their counsel certainly are not deterred from offering new issues or theories for the Court’s consideration.

An amicus (or any other party on appeal) who offers new legal theories or alternative legal grounds in *support* of the lower court’s judgment will benefit from the “settled rule” that holds “if the decision below is correct, it *must* be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”⁴⁹ Thus a reviewing court “may affirm on any ground supported by the record even if it differs from the reasoning of the district court.”⁵⁰ An amicus who argues in support of the lower court’s disposition therefore should be accorded greater latitude in presenting new or alternative claims on appeal.

Reply Briefs and Oral Argument. The Supreme Court prohibits the filing of amicus reply briefs.⁵¹ Other federal courts have adopted the same rule.⁵² However, an amicus that has been permitted to file a brief in connection with a petition for certiorari or other discretionary review (e.g., a rehearing or rehearing en banc in the court of appeals) certainly may seek to participate in the briefing on the merits if review is granted.⁵³

Both the Supreme Court and federal appellate rules indicate that a motion by an amicus to participate in oral argument will be granted only for “extraordinary” reasons, particularly where the party whose position the amicus supports does not consent to share its allotted argument time.⁵⁴ However, in significant cases the courts of appeals are probably more likely than the Supreme Court to permit argument by an amicus, and the allied parties to the litigation are more likely to share their argument time.⁵⁵

Advantages and Disadvantages of Amicus Participation. Many traditional public interest law organizations have long favored amicus participation as a resource-efficient way to concentrate their advocacy upon cases which appear poised for a precedent-setting decision in order to obtain the most direct and immediate impact for their constituents. Direct litigation may consume years of time and expenses, with no guarantees that the outcome, even if favorable, will establish any lasting precedent.

However, the limited role of the amicus curiae places significant constraints upon the use of the amicus vehicle as a strategic option, and legal aid advocates must always consider whether direct initiation of litigation (or formal intervention in pending litigation) better serves their clients’ interests. For example, because amici lack formal party status, now well settled is that an amicus may not, on its own, appeal a lower court judgment; seek rehearing or other discretionary

⁴³*Service Employees Union*, 35 F.3d at 487.

⁴⁴*Continental Insurance*, 842 F.2d at 985; *Consumers Union*, 510 F.2d at 662; *Platis v. United States*, 409 F.2d 1009, 1012 (10th Cir. 1969).

⁴⁵*Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303, 1306 n.1 (9th Cir. 1970).

⁴⁶*Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994); *General Engineering Corp. v. Virgin Islands Water and Power Authority*, 805 F.2d 88, 92 n.5 (3d Cir. 1986); *American Meat Institute v. Environmental Protection Authority*, 526 F.2d 442, 449 (7th Cir. 1975) (court “required” to consider jurisdictional issues raised by amici).

⁴⁷*See, e.g., United Parcel Service Inc. v. Mitchell*, 451 U.S. 56, 60, n.2 (1981).

⁴⁸*See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion); *see also* *Kearney & Merrill, supra* n. 22, at 745, n.5 (collecting cases).

⁴⁹*Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (emphasis added).

⁵⁰*Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994); *see also* *DELTA v. Humane Society*, 50 F.3d 710, 712 (9th Cir. 1995).

⁵¹S. Ct. R. 27.3.

⁵²*See, e.g., Ninth Cir. R. 29-1.*

⁵³*See, e.g., Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991) (en banc) (legal services advocate permitted to file amicus brief on the merits and to participate in oral argument after filing brief in support of successful petition for rehearing en banc).

⁵⁴S. Ct. R. 28.7; Fed. R. App. P. 29.

⁵⁵The Supreme Court does not favor “divided argument,” S. Ct. R. 28.4, and counsel for the parties in cases before the Court rarely agree to share their argument time with amici. *See* *Smith & Terrell, supra* note 24, at 780.

review; broaden the scope of the remedy or seek relief not requested by the parties; or (generally) obtain attorney fees and costs.⁵⁶ Advocates who become aware of significant cases at the trial level should consider whether intervention in the litigation is the most appropriate means to protect their clients' interests, particularly if no current party to the litigation apparently is motivated to protect those interests, or to appeal an adverse judgment.⁵⁷

Practical Considerations. Watchful legal aid advocates will discover significant opportunities to advance their clients' interests in the context of litigation between other parties. Legal aid attorneys successfully have provided a voice for their clients through amicus appearances in important cases involving bankruptcy, consumer protection, civil rights, housing, and social security issues.⁵⁸ Counsel who seek to participate as amici in appropriate litigation should collaborate as closely as possible with the party to be supported in order to coordinate briefing and argument strategy. Obviously all amicus advocacy should be done, with appropriate retainer agreements, on behalf of a current client or clients who have a stake in the outcome of the case at issue. Often the actual "amicus" is an organization or association with goals or missions relevant to the issues being litigated, and the legal services advocate serves as counsel to the amicus organization.⁵⁹ Where the legal services organization itself carries credibility with the court, it may appear as amicus in its own right.⁶⁰

Advocates who are attuned to the possibilities of amicus participation may realize some significant corollary benefits for their general practice. Regular monitoring of other cases raising issues of significance to clients will certainly increase awareness of the opportunity (or perhaps the necessity) for advocacy on those issues in a variety of forums. Amicus participation also can be a catalyst for greater networking and collaborative efforts with advocates in both the private and public interest sector. Counsel who regularly consider the opportunities and possibilities of amicus advocacy will be more likely to obtain an advantage in their *own* litigation by inviting the participation of influential organizations and allies to serve as their clients' amici in appropriate cases.

III. Crafting and Preparing the Lawsuit

Sound legal practice, as well as Rule 11, requires you to engage in a reasonable factual investigation prior to filing a lawsuit.

A. FACTUAL INVESTIGATION

Your first source of information about the case usually will be the client. There are many texts devoted to the art and practice of client interviewing.⁶¹ Space does not permit a review of interviewing technique. Suffice it to say that effective client interviewing is essential to the success of litigation. A sloppy interview can lead to missed facts, omitted legal claims, litigation delays and worse. Young attorneys should conduct their first few client interviews in the presence of a senior colleague prepared to give detailed feedback.

1. The Attorney-Client Relationship

Even before filing the complaint, you may well interview or review the facts with the client for several purposes and on several occasions. At intake your focus will be on obtaining an overview of the legal issue to see whether it meets your program's priorities, ascertaining the immediacy of the client's need, and determining if the client meets income and other program requirements. Once eligibility for service has been established, you will likely conduct a detailed interview in order to establish an attorney-client relationship, complete a retainer and learn necessary facts so that you can conduct relevant legal research, investigate further facts, evaluate the merits of the case and determine your case strategy. As you are doing so, you will likely have occasion to consult with your client to clarify and confirm facts, report on your ongoing efforts, survey options, and obtain direction and instructions from your client. Another meeting should be scheduled with the client to review the draft complaint.

⁵⁶Smith & Terrell, *supra* note 24, at 783–87.

⁵⁷*Id.* at 787–88.

⁵⁸*Id.* at 787 & n.152 (listing examples).

⁵⁹*Id.* at 792 & nn.192–94.

⁶⁰*Id.* Counsel should of course obtain approval of the board of directors before formally involving the legal services organization itself in any litigation. LSC-funded attorneys may not participate as amici in class action litigation. 45 C.F.R. § 1617.

⁶¹See ROBERT M. BASTRESS & JOSEPH D. HARBOUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH* (1977).

Clients often do not understand why they have to tell their story repeatedly; they may feel that counsel are not listening to them or understanding them. Thus being clear about the purpose of the interview and letting clients know early on that they will have to tell the same story many times can ease the attorney-client relationship. You will also need to ask questions that may upset or offend the client. If you establish that you are on the client's team and that you are asking the kind of questions the other side is sure to ask or that the judge will want to know, the client will understand that you are trying to help.⁶²

Good practice, as well as many states, bar rules, and legal services programs, requires that counsel and client enter into a formal written retainer. Not only will the retainer authorize you to file suit, but also it will address such critical issues as class action authorization, attorney fees, costs, and settlement. Retainers generally lay out the attorney's and the client's responsibilities and the scope of the representation, such as the need to reconsider representation if the case is appealed. You may need to have the client sign releases to obtain information from health care providers, housing providers, schools, police departments, and the like.

2. Informal Investigation

The goal of prefilng factual investigation is twofold. First, you must understand the facts so that you can advocate most effectively. Second, you can obtain evidence for trial or leads on the sort of information to ask for in discovery. Do not allow evidentiary constraints to restrict your informal investigation. Obtaining witness statements containing hearsay or unauthenticated documents is perfectly acceptable, if not inevitable. You will be able to deal with the evidentiary issues should they arise later in the litigation. To do so, however, you should keep careful track of when, how, and under what circumstances you received particular information.

The extent of your prefilng investigation will depend on the needs of the case, time restrictions, and your available resources. You need to be flexible and creative in identifying sources of information other than the client. When appropriate, and with the consent of the client, interview the family, associates, friends, and the client's coworkers. Such individuals may be indispensable sources of information and should be interviewed with an eye to obtaining detailed statements. After completing the interview, prepare a handwritten statement in the first person, and present it to the individual to read and sign. Return later with a typed statement to be signed and, if necessary, notarized.⁶³ Whenever possible, the statements should be in declaration or affidavit form so that they may be used to support pleadings or to oppose motions for summary judgment.

Talk to other people affected by the challenged policy. Consult with other lawyers who, you believe, may be investigating or litigating similar issues. Read newspaper and magazine accounts. Examine relevant governmental or academic reports. While you as the attorney will ultimately want to review all the information and talk to witnesses and informants, students and volunteers can be very helpful in the early stages of investigation. They can take photographs, call similarly situated individuals, and camp out in front of the local welfare office to interview people.

A potentially important source of investigation, however, may be those arrayed on the other side. These may be staff of a housing authority, a state or county welfare agency, a school or juvenile detention facility, a private or public employer. The temptation is to ignore such people until after suit, when discovery devices may be employed. Usually, however, investigation should extend to the opposition prior to suit.⁶⁴ Consider three reasons for doing so. First, the suit itself may dry up sources of information or create such hostility that cooperation is denied. Second, information gathered prior to suit will help you draft pleadings and frame theories. Third, full investigation prior to suit will deflect motions for sanctions under Rule 11.

Inquiries and investigation directed toward the opposition will sometimes meet with surprising success. For instance, employees in a state or county agency may question or oppose the policies that they enforce. Prior to suit, they may be free to meet and discuss those policies and make information or materials available. Also, before litigation is filed, agencies may have ongoing relations or meetings with clients; during such meetings disclosure of information may occur. Be

⁶²Throughout the case, the attorney-client relationship must be supported by clear and regular communication. Regular, direct, explicit communication and information will keep you and the client working together as a productive team. Even if you have no "news" to share, an update call or letter just to let the client know the case status is sound legal practice. Confirming letters to the client, in addition to your case log or notes, can help the client keep track of information. Needless to say, they also help you if the client later denies facts told to you or claims that you mishandled the case; nonetheless the main purpose of the letters is to give information and to reinforce a working relationship.

⁶³In federal practice, notarization is not needed; instead of affidavits, one uses declarations made under penalty of perjury. *See* 28 U.S.C. § 1746.

⁶⁴*See* Chapter 6, Section I, of this MANUAL for a discussion of the ethical issues governing such interviews.

aware of the pros and cons of playing your litigation card close to your vest. Some adversaries may prefer to offer information that will support their position or lead to settlement. Others will shut down completely if they know litigation is in the offing. If you need to retain a working relationship with the other side, you may destroy that relationship if you obtain information using your friendships or goodwill and then the information turns up in litigation. Openness versus subtlety is a consideration during all stages of litigation.

Some states have sunshine laws or public record laws that provide full or limited access to agency records. On the federal level, there is the Freedom of Information Act.⁶⁵ Apart from these statutory or regulatory provisions, formal requests or letters of inquiry may produce useful information that can help you draft the complaint. Of greater formality, but still prior to a suit, a Freedom of Information lawsuit itself may be of use; such a legal action may yield valuable information for framing a subsequent suit on the merits.

Moreover, many local and state government agencies must periodically report to the sources of their appropriations. Federal and state oversight agencies may similarly audit or analyze the agency. Such reports and audits can be enormously valuable in surfacing information regarding agency policies and critique of them. Careful advocacy with the monitoring agency or committee may lead it to inquire further, requiring the monitored agency to prepare additional reports. Other persons or institutions concerned with the issues that you raise may be sources of valuable information.

When data are obtainable, the next step is analyzing them. If you do not have facility with spreadsheets, mapping software, or other programs that can turn numbers into information, you may be able to use a graduate student as a volunteer or short-term consultant. Local universities can be great sources of help for statistical, economic, and sociological analysis. Some professors have been willing to assign legal services case data analysis as a class or homework project.

Likewise, investigation may be useful when directed toward related disciplines. A housing case may be helped by literature or expertise from the fields of social work, architecture, or planning. A welfare case may be assisted by those who teach, write, or study in the fields of social work or public health. A corrections case may turn upon testimony or research from experts in corrections or criminal justice. As attorneys, we tend to be narrow in training and perspective. Other disciplines may yield theories for litigation, authority, and scholarship as well as expert witnesses.

Pre- or postfiling consultation with experts does raise discovery issues.⁶⁶ Whether information relating to your expert is discoverable will turn largely on whether the expert will testify at trial. If you have merely consulted with an expert in connection with preparing for litigation, information relating to the expert is discoverable only if permitted by Federal Rule of Civil Procedure 35(b) or if extraordinary circumstances are shown.

The Internet can be a valuable source of information. If your office uses Lexis, Westlaw, or any other online legal or information service, consulting with your service representative about needed information is well worth your time. You may find that some resources have no added cost. You may be unaware of some that are targeted to nonattorneys, those resources may have information about businesses, corporations, investors, and owners. In this age of information technology, you can also search dockets to see other cases in which the parties, attorneys, and judges have been involved. You can access a variety of legal aid list-serves usually by signing up with a national backup center and list-serves sponsored by national attorney associations, such as the National Association of Consumer Advocates and the Association of Trial Lawyers of America. A quick post about a potential defendant may result in networking with an attorney who has handled a case against the same party and is willing to share discovery and strategy with you.

3. Organizing Factual Information

Organization of the facts and the file should begin as soon as you know that you will commence litigation. Your system should be flexible enough to accommodate growth of the file. The particular way that you organize your file will depend on the potential size of the file, the type of case, and your personal style.

Whatever organization system you choose, you must be able to locate quickly the information that you need when you need it, and someone else should be able to find the information pretty easily. The latter is a critical piece of responsible lawyering—if someone has to take over the case from you or cover for you in your absence, your client's interests must not be compromised. Almost all federal litigation is substantial enough to require an index to the file as a whole and an index or master list of evidence. Software is available to help you track documents and evidence.

⁶⁵ 5 U.S.C. §§ 552 *et seq.*

⁶⁶ See Chapter 6, Section I, of this MANUAL.

As you organize and create your file, you should keep in mind that you are organizing each of the following types of documents:

- Pleadings
- Correspondence
- Other court filings, such as motions
- Records of telephone calls
- Interview notes and other informal investigation
- Discovery, including demands, responses, and the documents produced
- Documents that your client supplies or you locate during investigation
- Legal research
- Other research
- Time records

If you are unsure what system will work for you, using an accordion folder for most of these divisions is a good place to start. You can then create subdivisions by using file folders for each motion, factual topic, or witness. Correspondence and phone logs should be secured into a file to ensure that the chronology of the case development is preserved.

Whether your program is restricted or not, you must keep accurate time records. The biggest mistake attorneys make in obtaining attorney fees is to underrecord time and to underestimate the time that they spent if they do not record it contemporaneously.⁶⁷ Accurate and detailed time records ensure that if your adversary accuses you of noncooperation, ethical violations, or rule violations you will be able to document how your case time was spent. Again, many vendors offer timekeeping software.

B. IMPACT, LAW-REFORM, AND TEST-CASE LITIGATION

Your primary purpose in bringing the litigation may be to get your individual client what she is entitled to under the law. Or you may have a much broader purpose. You may want to ensure that the legal violation does not occur again, to compensate past victims of the illegal action, or to change the law entirely. Where the outcome of your case will affect large numbers of people, your suit can be considered impact litigation. Where the goal of your litigation is to change the law or the way the law is interpreted and applied, your suit can be considered law-reform litigation.

In some cases you may be seeking this broader relief under well-recognized legal principles or by fine-tuning an established body of law. In some circumstances, however, you will be seeking to push the existing boundaries of the law to create new legal rules that will henceforth determine the issue.⁶⁸ Such test-case litigation uses the specific litigation as a vehicle for furthering a social or legal cause.

Bringing test-case litigation, while similar to any litigation in its day-to-day progress, requires extra care in several areas. The primary difference is the extent to which the litigation team shapes the case. In some cases you will bring test-case or law-reform litigation based on the issue that a client brings into your office; your client comes seeking a solution to his individual problem, but the resolution of the case will have broad impact. In other cases a community organization may come to you with a novel legal theory or critical social issue, and the plaintiff will be chosen to frame the facts and claims. Or the plaintiff will engage in an act to challenge a law only after the litigation strategy will have been determined. For instance, if a community group wants to challenge the way that the local council holds public hearings, you may recommend that on a particular day a representative community member attempt to present her views at the council meeting and be refused the opportunity to speak. A draft complaint may have already been prepared and you can be ready to file the next day, while at the same time taking advantage of and creating media attention.

That “bad facts make bad law” cannot be emphasized enough. No matter how good your legal claim, if your clients are completely unsympathetic, are responsible in good measure for the bad outcome of which you are complaining, or are perceived to be undeserving, the outcome of the case will not be to your liking. The court may be forced to rule in your favor on the law but will do so parsimoniously, and you will not achieve your broader objectives. Or you will find yourself with a decision that you know to be wrong on the law and having now set a bad precedent that makes the legal landscape worse than before.

⁶⁷On attorney fees see Chapter 9, Section IV, of this MANUAL.

⁶⁸See Fed. R. Civ. P. 11(b)(2).

A classic illustration of this principle occurred in *Lassiter v. North Carolina Department of Social Services*.⁶⁹ *Lassiter* presented the question of whether due process required providing counsel to an indigent parent in a proceeding to terminate parental rights. Given the number of termination proceedings that take place in states that did not provide counsel, selecting a client who appeared to be a victim of an uncaring bureaucracy would have been possible. Instead the petitioner chosen to present the question was a convicted murderer who had no real hope of release from prison before her child became an adult and who had been provided counsel in an earlier proceeding. The Supreme Court rejected her claim in a 5-to-4 decision; one member of the majority concurred, conceding that the question was extremely close. The answer might well have been different if a more sympathetic client had been chosen.⁷⁰

Examples of careful client selection abound. When attorneys sought to challenge the provisions of the Food Stamp Act enacted to eliminate unrelated members of a household from food stamp eligibility, they recognized the importance of a sympathetic client. To bring their claim to life, the lawyers chose as the lead plaintiff Jacinta Moreno, a farmworker forced by economic circumstances to share housing with nonrelatives. The choice of plaintiff shifted the focus of the litigation from the propriety of seeking to eliminate hippies' eligibility for food stamps to the unanticipated effect of the provision on the neediest. The plaintiff prevailed in the Supreme Court by a 5-to-4 margin.⁷¹

Below are some of the particular issues that arise in test-case or law-reform litigation.

- Likelihood of appeal: Since you are challenging the status quo, the case is likely to be appealed. Therefore you must budget for an appeal at the beginning, prepare your clients for the possibility, and create a clear and persuasive record.
- Mootness: The defendant may prefer to offer your client what she wants rather than change the system, or over the course of the litigation the representative client may no longer have a claim as her circumstances change. Thus you must consider how to avoid mootness through a class action, claim for monetary damages, and claims for injunctive or declaratory relief.
- Soliciting clients: Often a legal services attorney knows that an issue is out there through the attorney's own experience with clients and the community. Although there are some restrictions on soliciting clients, lawyers may inform potential clients of their rights.⁷² Nonprofit organizations may solicit potential litigants to further their public policy goals.⁷³ By working with community groups you can generally avoid ethical or legal services restriction barriers to locating affected individuals and potential plaintiffs.⁷⁴
- Facts: Even if the law-reform issue seems to be a purely legal issue, do not lose sight of the importance of choosing a plaintiff with sympathetic facts that make a compelling argument for why your interpretation of the law is correct.
- Strategic coordination: The need for coordination with other legal aid programs, state and national backup centers, and other organizations concerned with the issue is concomitant with the responsibility that you take on when you engage in test-case or law-reform litigation. By definition your case will affect a large number of people or will change the law. Although you may be sure that your outcome is desired and your strategy a good one, you must ensure that you have fully understood the implications of your litigation.
- Practical coordination: You may be working with multiple cocounsel, amicus, and clients. Just as you must plan your file organization early on, you must coordinate and plan among cocounsel and others. Who will be lead counsel? Will you have monthly conference calls or meetings for updates? Who has authority to make decisions? What are your expectations for time records?
- Enforcement: It is never too early to think about how you will enforce a settlement or decision should you win. Often you can get a judge to rule in your favor on the law, but the hard work comes when you have to figure out how to make it work and stick.⁷⁵

⁶⁹*Lassiter v. North Carolina Department of Social Services*, 452 U.S. 18 (1981).

⁷⁰*Lassiter* is not unique. *Wyman v. James*, 452 U.S. 18 (1981), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), were made more difficult by unappealing clients.

⁷¹*U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

⁷²“[A] State may not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.” *Shapiro v. Kentucky Bar Association*, 486 U.S. 466, 468 (1988).

⁷³*In re Primus*, 436 U.S. 412 (1978) (ACLU was such a nonprofit).

⁷⁴45 C.F.R. § 1638.

⁷⁵On consent decrees see Chapter 9, Section II, of this MANUAL.

As noted above, legal services restriction regulations do not prevent the legal services attorney from engaging in law-reform or test-case litigation. The regulations restrict certain activities and may alter strategic choices. However, the creative attorney can still change and improve the system, the laws, the rules, and the practices that affect clients' lives. The eviction case on which you go into court next week may be the vehicle for changing the way that the housing authority gives notices to all its residents who are sight-impaired if you not only win your case but also insist on a broader solution. You may file a case to obtain unemployment benefits for your client but change the definition of misconduct in your state. The form of the litigation may be different, but the commitment, intelligence, creativity, and zeal of legal aid attorneys can still be counted on to provide our clients with meaningful and effective representation.

C. PREFILING NEGOTIATION AND OFFERS OF SETTLEMENT

Most cases resolve through settlement rather than through trial or judicial determination. Not considering and preparing for settlement possibilities early in your planning would be foolish. You must prepare your client for the settlement process during one of your initial meetings. The client must understand what the ultimate goal of the litigation would be if you could win everything and that there may be very good reasons to be pleased with less. You should explain to the client that what is an acceptable settlement will change over time, as new evidence is evaluated, the investment in the case increases, and the assessment of risks changes.

Sometimes an attempt to settle the case before filing the litigation can be very effective.⁷⁶ A demand letter accompanied by a draft complaint will get attention. A settlement before filing is very attractive to defendants who do not want negative publicity or a record of their involvement in litigation. It can be useful when the defendant wants to comply with the law but you have been unsuccessful in getting the issue to the attention of the person with the authority to make the change. It can be a chance to obtain informal discovery as you ascertain the defendant's position and rationales. The disadvantages of a prefiling attempt to settle are the loss of surprise, the possibility of the defendant rendering your claims moot, and the delay necessary to engage in prefiling negotiations.

Even where the adverse action seems to be final and from the highest adverse authority, a formal request for settlement before litigation may be effective if the request sets out the facts, details what has been done, states with precision what exactly you want the other side to do, and sets a precise deadline by which you want it done. If you state that you will sue if a settlement is not reached by a date certain, you must be prepared to do so. If you make such a threat and do not carry it out, you will lose your credibility and adversely affect your future negotiating strength.

Such a letter should be polite but firm. It should make clear the strength of your case and be suitable to attach as an exhibit to the complaint or future motion. The objective is to produce a letter that, when read by a judge, will evoke incredulity at the recipient's noncompliance. Where time does not permit writing such a letter, a telephone call can accomplish the same result. The call may later be confirmed by letter.

Even where the adverse action is taken deliberately, the demand letter—especially if coupled with a draft complaint—will send the message that your client has a capable, determined, and knowledgeable attorney who is about to sue and will initiate the involvement of your opposition's counsel, who may be able to talk sense into your opponent or urge it to attempt settlement. At the least, the letter will formalize the action, confirm the authority of the people taking the action, and set the predicate for judicial review. Apart from all of this, the request for review may set the tone for the injustice suffered by the claimant or detail the damages that the claimant sustained.

⁷⁶Legal services restriction regulations require, absent narrow exceptions, that certain disclosures be made regarding your client's identity to defendants in settlement discussions, and to LSC after litigation is filed, and that certain records be kept before filing the litigation. Your client needs to be aware of, and consent to, such disclosures. *See* 45 C.F.R. §§ 1636, 1644.

