



Creating and Running A Legal Services Program: A Guide for Grassroots Organizations Serving Immigrant Communities

September 20, 2022

Hedwig O'Hara

Legal Director

(212) 219-1800 ext. 226

hohara@lawyersalliance.org

Elizabeth Wytock

Staff Attorney

(212) 219-1800 ext. 274

ewytock@lawyersalliance.org

Laura Abel

Senior Policy Counsel

(212) 219-1800 ext. 283

label@lawyersalliance.org



Hedwig O'Hara, Legal Director, Lawyers Alliance for New York, 2002 – present, Senior Staff Attorney, 2002 - 2020. Fordham University School of Law, J.D., 1991. City University of New York at Hunter College, B.A., *cum laude*, 1978. Hedy oversees Lawyers Alliance's legal representation, educational, and client outreach services for nonprofits, and manages the staff attorneys.

Laura Abel, Senior Policy Counsel, Lawyers Alliance for New York, Senior Policy Counsel, 2013 – present. Yale Law School, J.D., 1994. Harvard College, A.B., 1989. Laura leads Lawyers Alliance's advocacy-related work on behalf of the nonprofit sector and provides business law representation to nonprofits engaged in advocacy.

Elizabeth Wytock, Staff Attorney, Lawyers Alliance for New York, September 2021 – present. University of Virginia School of Law, J.D., 2018. Georgetown University, B.A., 2012. Liz represents nonprofits, conducts trainings, and engages in client outreach activities.



This presentation is provided for informational purposes only and does not constitute legal advice.



Overview

- Organizations that serve immigrant communities may find they would like to provide legal services.
- There are laws regulating when and how nonprofit organizations can provide legal services.
- We'll review those laws and provide practical tips and considerations for nonprofits interested in providing legal services.



What We'll Cover

1. How to avoid the “Unauthorized Practice of Law”
 - What advice and services can you provide to the community?
2. Hiring a Staff Attorney
 - Can you hire a lawyer to provide legal help to our clients?
3. Navigating Issues in Employing Attorneys
 - What legal and ethical requirements will you need to navigate?
4. Demystifying Accredited Representatives
 - Should you consider applying to become a “recognized organization” by the Department of Homeland Security?



Avoiding the Unauthorized Practice of Law



Background

- When an organization does not have a staff attorney, it may not engage in the “unauthorized practice of law.” (NY Judiciary Law § 495)
 - Non-lawyers who engage in activities equivalent to the practice of law, without special authorization, are committing the unauthorized practice of law.
 - Be careful when providing notarial services.
- These rules are in place to protect people from fraud and to ensure legal advice is provided by lawyers.
- Penalties for the unauthorized practice of law can include monetary fines on the organization (up to \$5,000) and misdemeanor charges for the individual(s) involved. (NY Judiciary Law § 495(2))
- Certain immigration groups that charge a fee or other compensation for services above a nominal amount are subject to additional requirements. (NY Gen Bus L § 460)



Note on Notaries

- In the U.S., notary publics are licensed under state law and have ministerial duties. They may not advise clients or say they are qualified in immigration and naturalization procedures (unless they are a lawyer). In NYS notaries may charge \$2 per notarial act.
 - A lawyer can be a notary. But not every notary is a lawyer!
- Notaries in other countries may perform different duties than U.S. notaries. In some countries, notaries have powers similar to judges or licensed attorneys and can advise clients.
- Depending upon which country a person is from, they might think a notary in an immigrant services organization can provide legal advice and handle legal issues.



The Unauthorized Practice of Law

- Example: Sandra volunteers at a grassroots nonprofit. She knows a lot about immigration forms and regularly discusses immigration issues with clients who walk-in for help. Sandra has the best intentions and is admired and trusted. She does the following:
 - Answers questions about immigration procedures and explains to clients how to resolve their immigration issues.
 - Tells them which immigration forms to use.
 - Provides advice about how to fill in immigration forms.
 - Describes to clients what to expect throughout the immigration process.



Laws Against Unauthorized Practice

- Sandra is not a licensed attorney.
- She is not authorized to practice immigration law.
- Sandra may therefore be engaging in the unauthorized practice of law.
- *Unfortunately, these laws can prevent good-faith attempts by non-lawyers to help individuals with immigration services.*



Permissible Activities without a Staff Attorney

- Many nonprofit organizations that do not employ lawyers, such as the one where Sandra volunteers, can still provide valuable services in immigration matters. For example, Sandra can:
 - Provide interpretation, language, and literacy assistance to customers and/or other legal services organizations.
 - Provide a good legal services referral to customers.
 - Host a “know your rights” presentation.
 - Advocate for immigration reform or certain immigration-related legislation (keeping in mind lobbying restrictions for 501(c)(3) organizations).
 - Assist in providing social services to customers, such as financial assistance, food and lodging, language resources (i.e., English courses), medical benefit assistance, education services, etc.



Hiring a Staff Attorney



Background

- Nonprofit organizations that serve noncitizens and immigrant communities may want to start a legal services program and hire one or more staff attorneys to provide legal advice and assistance.
- New York State regulates the provision of legal services, so organizations must make sure to be aware of and comply with the relevant law before hiring any lawyers and offering legal services.



Which Nonprofits Can Provide Legal Services?

- In New York, a nonprofit corporation is authorized to employ lawyers and practice law if **“it is organized and operates primarily for a purpose other than providing legal services, and it furnishes legal services merely as an incidental activity in furtherance of its primary purpose.”** (NY Judiciary Law § 495(7))
 - “Organized and operates primarily for a purpose other than providing legal services”
 - For example, a nonprofit’s primary mission is to provide help to refugees with finding a job and housing in NYC
 - “Furnishes legal services merely as an incidental activity in furtherance of its primary purpose”
 - This nonprofit may hire an lawyer to provide legal services that advance and support its primary mission of helping refugees



Filing Requirement

- If a nonprofit organization decides to provide legal services, it must register with the New York Supreme Court, Appellate Division. (NY Judiciary Law § 496)
 - The registration must include a statement describing:
 - The organization's purposes
 - The composition of its board of directors
 - The type of legal services being made available, and
 - The names and addresses of attorneys employed by the organization or with whom commitments have been made.
 - The organization must update this information annually (on or before July 1 each year) and include the names and addresses of attorneys who rendered legal services during the year.



Navigating Issues in Employing Attorneys



Background: Legal, Ethical, and Practical Considerations

- Organizations that provide legal services, as well as the attorneys they hire, are subject to legal and ethical requirements. Therefore, a number of issues are at play:
 - Attorney-client communication must be kept confidential.
 - An attorney needs to avoid conflicts of interest.
 - Case management supervision must be handled properly.
 - An attorney must always provide competent representation to a client.
 - Advertisements for legal services must adhere to a number of guidelines.
 - Organizations must continue to adhere to rules surrounding their tax-exempt status
- Hiring an attorney may present practical issues:
 - Is our digital infrastructure and physical office space adequate for client privacy?
 - Is our insurance coverage adequate?
 - How do we structure the attorney's salary?



Attorney-Client Confidentiality

- Communications between a client and their attorney are confidential. (NY Rules of Professional Conduct, Rule 1.6)
- By extension, anyone who handles client information while performing duties under an attorney must also adhere to the same attorney-client privilege policies as the attorney.
- To ensure client confidentiality:
 - Train and supervise employees working with attorneys on client confidentiality practices.
 - Conduct in-person client meetings in a private room.
 - Maintain secure document storage space and protections for digital files.
 - Institute a document shredding policy.



Conflicts of Interest Considerations

- Attorneys may not represent a client if “the representation will involve the lawyer in representing differing interests.” (NY Rules of Professional Conduct, Rule 1.7)
- A lawyer who has represented a client may not represent another person in the same or a substantially related matter if that person’s interests are adverse to the interests of the former client. (NY Rules of Professional Conduct, Rule 1.9)



Conducting Conflicts Checks

- Nonprofits with staff attorneys need to have a procedure for reviewing potential conflicts prior to accepting a new client.
 - Details can be collected in an intake form.
- An effective conflict checking system records as much information as possible. At a minimum, a conflicts database should include the following, to the extent applicable:
 - Client name, address and contact information
 - Any other parties or persons
 - Brief description of the legal help provided
 - Opposing counsel
- A conflicts system can be logged on a simple spreadsheet or dedicated software, depending on the needs and resources of the organization.



Supervisory Responsibilities and Professional Independence

- Attorneys are responsible for ensuring that nonlawyers working under direction of the attorneys follow the previously discussed ethical rules. (NY Rules of Professional Conduct, Rule 5.3)
- An attorney must maintain “professional independence” when practicing, meaning that a nonlawyer may not direct or control the professional judgment of that attorney. (NY Rules of Professional Conduct, Rule 5.4)
 - Nonlawyer supervisors must respect this rule—they may not “direct or regulate the lawyer’s professional judgment in rendering legal services or cause the lawyer to compromise the lawyer’s duty to maintain the confidential information of the client.” (NY Rules of Professional Conduct, Rule 5.4(c))



Professional Independence and Supervisory Responsibilities (cont'd)

- Nonlawyer supervisors may manage attorney employees as follows:
 - Define job responsibilities
 - Evaluate and track performance
 - Set job goals
 - Establish workday hours and workplace rules
 - Determine salary and benefits
 - Set and monitor attorney caseload
 - Monitor CLE compliance and professional licensure



Competency Rules

- Attorneys must have the “legal knowledge, skill, thoroughness, and preparation” reasonably necessary client representation. A lawyer who knows he or she is not competent to handle a particular legal matter should not engage in that representation without assistance by another lawyer who is competent. (NY Rules of Professional Conduct, Rule 1.1)
- An organization should therefore keep in mind attorney experience levels during the hiring process, especially if there will only be one attorney on staff.



Advertisements for Legal Services

- An advertisement for legal services cannot be false, deceptive or misleading. (NY Rules of Professional Conduct, Rule 7.1)
- An advertisement may include:
 - Attorney credentials
 - Fee rates
 - Testimonials or endorsements of previous clients, so long as the clients consent and the advertisement states that “Prior results do not guarantee a similar outcome”
- An advertisement may not include:
 - Use actors to portray a judge, the lawyer, or clients, or utilize depictions of fictionalized event or scenes without disclosure
 - Statements or images that are made to resemble legal documents



Issues Concerning Tax Exemption: Commerciality

- An organization may jeopardize its tax-exempt status if it primarily engages in “commercial activity.” (Treas. Reg. § 1.501(c)(3) - 1(c)(1))
- An activity is deemed “commercial” if it:
 - Has a direct counterpart in the for-profit sector, or
 - Is conducted by the organization in the same manner as it is by for-profit corporations.
- An organization that charges legal fees must ensure that its charitable enterprise, rather than its legal services enterprise, remains its primary purpose.



Issues Concerning Tax Exemption: Private Benefit

- Tax-exempt organizations must be operated exclusively for charitable purposes, meaning that an individual cannot substantially benefit from the organization's activities. (Treas. Reg. § 1.501(c)(3) - 1(c)(1))
- When hiring an attorney, private benefit issues could arise in a number of contexts:
 - To avoid conferring an impermissible private benefit to a newly-hired attorneys, the organization should ensure the attorney receives “reasonable” compensation.
 - If staff, retained, or volunteer attorneys are representing clients in fee-eligible cases (such as civil rights litigation), the fee award may need to go to the nonprofit rather than the individual attorney.
 - An organization must be careful not to act as a conduit for attorney staff, volunteers, or board members to obtain clients for their for-profit practices.



Additional Practical Considerations

- Beyond the legal and ethical rules applicable to attorneys, there are many practical considerations to take into account before employing a lawyer:
 - Given the importance of confidentiality, organizations should implement or strengthen cyber security policies and procedures.
 - Organizations should have professional liability insurance to cover the organization in the event of a malpractice claim.
 - Before an offer is made, organizations should confirm the attorney is admitted to practice in New York State and has no disciplinary history.
 - Organizations should consult with an attorney on whether any changes need to be made to the purposes statement in their Certificates of Incorporation.



Additional Practical Considerations

- Beyond the legal and ethical rules applicable to attorneys, there are many practical considerations to take into account before employing a lawyer:
 - Organizations should confirm the attorney's salary comports with salary norms and whether it will cover the attorney's registration and continuing legal education fees.
 - Attorneys have recordkeeping and document retention responsibilities (NY Rule of Professional Conduct 1.15(d)), so organizations may have space/storage considerations in light of these document retention rules.
 - It is best practice to enter into retainer agreements with clients (translated into the clients' best language), to clearly state the scope of each engagement.
 - When seeking funding for attorney services, organizations need to demonstrate they have considered all points discussed above.



Accredited Representatives in Immigration Court Proceedings



Background: Accredited Representatives

- Federal regulations allow nonlawyer ***accredited representatives*** to represent immigration clients before the Department of Homeland Security and the Executive Office for Immigration Review (which includes Immigration Courts and the Board of Immigration Appeals). (8 C.F.R. § 1292.1(a)(4))
 - Representatives are accredited through the Recognition and Accreditation (R&A) Program.
- The goal of the accredited representatives program is to increase the availability of immigration legal representation for low-income and indigent noncitizens.



Recognized Organizations

- Accredited representatives may only provide immigration legal services through ***recognized organizations***, for whom they must serve as employees or volunteers. (8 C.F.R. § 1292.11)
- An organization is eligible to apply for recognized status if it:
 1. Is a nonprofit, religious, charitable, social service, or similar entity;
 2. Offers immigration legal services to indigent and low-income clients in the U.S. and has policies to allow for a waiver of fees if needed;
 3. Maintains federal tax-exempt status;
 4. Has a minimum of one accredited representative on staff;
 5. Identifies a designated authorized officer (someone who has authority to speak and act on behalf of the organization in matters related to the R&A Program); and
 6. Has access to adequate knowledge, information, and experience in all aspects of immigration law and procedure.



Application Process

- Once an organization has attained recognized status, it may apply to accredit certain individuals to act as its representatives and provide immigration legal services.
- Accredited representatives may be eligible to practice before either DHS, EOIR, or both. The application for accreditation must detail the nature and extent of the applicant's experience and knowledge of immigration law and procedure.
- An accredited representative must make a showing of good character and fitness to represent clients.



More Information on R&A Program

- Grassroots social services organizations, like many of those that work with immigrants, often need guidance on applying for and utilizing these statuses.
- For official information on the Recognition & Accreditation Program, see: <https://www.justice.gov/eoir/recognition-and-accreditation-program>.
- For additional, helpful resources, see:
 - <https://cliniclegal.org/issues/recognition-and-accreditation>
 - <https://www.nyic.org/resources-training/immigrant-concerns-training-institute/>



Conclusion

- Organizations interested in beginning a legal services program, whether through the hiring of their first staff attorney or through the R&A Program, must evaluate a number of administrative, legal, and practical considerations.
- Organizations should therefore consider seeking the advice and guidance of legal counsel before offering legal services.



Further General Information from Lawyers Alliance

- For additional resources, see:
 - <https://lawyersalliance.org/publications/list>
 - <https://lawyersalliance.org/legal-alerts>
- Contact Lawyers Alliance's Resource Call Hotline:
 - 212-219-1800 ext. 224
 - ResourceCall@lawyersalliance.org
 - An attorney will respond within two business days

