EXEMPLARY LEGAL PRACTICES & POLICIES

GUIDEBOOK

PART II: Working with Attorneys


CAPLAW
Community Action Program Legal Services, Inc.

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An attorney plays a key role in helping a CAA maintain accountability and avoid liability. By proactively working with an attorney to ensure that its organizational infrastructure – its vendor contracts, grant agreements, personnel policies, etc. – are legally compliant and enforceable, a CAA may avoid costly litigation and the negative press and low employee morale that goes along with it.

Attorneys are trained to not only explain the legal implications of a matter but also to think objectively and analytically. An attorney typically has the expertise needed to present a client with options for addressing a matter and to thoroughly discuss the level of risk associated with each option. Situations when a CAA should consider consulting an attorney include, but are not limited to:

- Revising personnel policies,
- Purchasing a building,
- Negotiating leases and contracts,
- Reviewing loan documents,
- Revising governance documents such as articles of incorporation and bylaws,
- Terminating an employee,
- Responding to a subpoena for documents or testimony,
- Responding to a lawsuit filed against the CAA,
- Contesting a state CSBG office's decision to terminate or reduce funding and/or
- Addressing a complaint filed by an employee against the CAA.

Attorneys are also, often, well-connected within a community so when a CAA's needs expand beyond legal advice into more business or programmatic related matters, a seasoned attorney may be well-positioned to refer the CAA to other professionals and businesses that may further assist the CAA.

A. The Privileges of Privilege

Among the benefits of working with an attorney on a matter is the degree of confidentiality afforded by the attorney-client relationship. Communications between an organization and its attorneys may be protected by attorney-client privilege which means that the attorneys cannot disclose information contained in these privileged communications without the organization's consent. For a particular communication to be covered by this privilege:

1. The advice sought must be legal advice,
2. The person being told must be a lawyer acting, and
3. The information must be confidential (not relayed in the presence of a third party).

Thus, the privilege exists between a client and a lawyer who is acting in his or her legal capacity on the client's behalf. The presence of a third party can destroy the privilege, so the organization should make sure that its attorney informs it of who may be in the room or on the phone and who must leave before discussing anything that the organization would like to keep privileged. In addition, certain documents an attorney creates for an organization may be protected from disclosure to others under the work product doctrine. This doctrine forbids an attorney from turning over to any outside party any document that the attorney creates in anticipation of litigation.

B. Attorney Relationships with CAAs

A CAA's relationship with an attorney will typically be in the form of either in-house or outside counsel. A CAA's in-house counsel is often referred to as general counsel. A general counsel usually handles a broad scope of routine legal matters – such as contracts, real estate transactions, and employment issues – for an organization. For a public CAA, because it is a department or division of the local government, it often has access to local government attorneys which fill the role of the CAA's in-house counsel.

If a CAA does not employ in-house counsel, it may regularly work with outside counsel. The role of outside counsel depends on the needs of a particular CAA. Outside counsel may serve the role that a general counsel would serve via an arrangement that the CAA and outside counsel have established in writing, often in the form of an engagement letter. The arrangement may also involve what is referred to as a retainer, which is payment for services that will be rendered in the future. Engagement letters/retainer agreements, retainers and other fees are discussed in greater detail in Section III.B and Section IV. Also, it is important to note that under the federal cost principles (OMB Circular A-122 codified at 2 C.F.R. Part 230 for nonprofit CAAs and OMB Circular A-87 codified at 2 C.F.R. Part 225 for public CAAs) and the federal uniform administrative requirements for grants (OMB Circular A-110 generally codified at 2 C.F.R. Part 215 and by each federal agency at different C.F.R. locations as noted by OMB in a chart on its website), outside counsel is treated as a consultant and, as a result, CAAs must comply with specific requirements before entering into an outside counsel arrangement. For more information on the application of the cost principles and the uniform administrative requirements when hiring and compensating an attorney, see Section III and Section IV.

Even when a CAA has either in-house or outside counsel serving as general counsel, situations may arise where the general counsel may not have the experience, staffing or resources to handle a particular legal problem. Additionally, if a CAA does not have an attorney serving in the general counsel role, a CAA may depend on attorneys to handle matters as they arise. In these instances, outside counsel would be hired as a lawyer with particular expertise to either address situations that are too specialized for the general counsel to handle – such as grant disputes or appeals – or to meet the needs of the CAA on a case-by-case basis. The CAA should still establish in writing, often in the form of an engagement letter, the relationship it has with outside counsel in this limited role and also continue to comply with the cost principle requirements and procurement rules.

This chart gives a quick overview of the differences and similarities between in-house and outside counsel:

In-house Counsel	Outside Counsel
• An employee of a nonprofit CAA • An employee of the local government in which a public CAA is located • Handles a broad range of legal matters	• Typically paid consultant to the organization • If paid, organization must comply with federal cost principles and procurement rules • Like in-house counsel, may handle a broad range of legal matters for the organization or may be hired on a limited basis to handle legal issues requiring specific expertise • Arrangement should be established in writing and may involve a retainer or other fee arrangement

C. CAPLAW's Relationship with Community Action Agencies

CAPLAW is a 501(c)(3) nonprofit membership organization, established in 1989, dedicated to providing the legal resources necessary to sustain and strengthen the national CAA network. Through its in-house legal staff based in Boston, Massachusetts and a network of private attorneys located throughout the country, CAPLAW provides legal consultation, training, and publications on a wide variety of legal and management topics.

CAPLAW's legal consultations typically involve legal staff assisting CAAs and their local attorneys with inquiries about a wide range of federal laws, such as the Community Service Block Grant Act, Head Start Act, Family and Medical Leave Act, Internal Revenue Code and Affordable Care Act. When an issue involves matters of state law in a state where CAPLAW attorneys are not licensed, CAPLAW will help the CAA locate an attorney in that state with the necessary expertise. Additionally, CAPLAW attorneys do not represent CAAs in litigation or administrative proceedings, but are available to consult with the attorney representing the CAA in these matters.

Section II. How Do You Find An Attorney?

Depending on the complexity and breadth of the legal issue, the board may be involved in hiring an attorney and may form an ad hoc committee to review and research the matter

Before the search for an attorney begins, the CAA's executive director should work with the management staff and, when necessary, the board of directors to determine the scope and type of legal assistance needed. Depending on the complexity and breadth of the legal issue, the board may be involved in hiring an attorney and may form an ad hoc committee to review and research the matter. For example, if a funding source has disallowed a large portion of the CAA's costs based on what the CAA believes to be an incorrect application of the law, the board of directors should not only be informed of the disallowance but may also play a role in hiring an attorney to represent the CAA in administrative proceedings with the funding source. Conversely, if the human resources (HR) director for the CAA has a question about how to calculate leave for one employee, the HR director may work with the executive director to hire an attorney for this limited, mostly likely, one-time consultation.

Additionally, determining the type of legal assistance needed involves not only recognizing the different areas of law potentially at issue but also considering the number and type of lawyers that may be needed. If the matter requires different types of legal expertise, the CAA may decide to work with a law firm rather than a solo practitioner. The size of the law firm that the CAA chooses to work with will depend on the type of legal assistance the CAA is seeking. For instance, if a CAA decides to update vendor contracts and develop a template that may be easily adapted to each vendor, the CAA will need to determine the number of contracts involved and will probably search for a business law attorney. The attorney would also, preferably, be one with experience in government grant funded projects since the vendors will most likely be paid with government grant funds. If, as part of the contract review, the CAA decides to update its personnel policies, it may ultimately decide to work with a small law firm with expertise in both business and employment law. If the CAA decides that it actually wants to have an ongoing relationship with attorneys that can offer expertise in most, if not all, of the areas of law that affect the CAA, the CAA may explore arrangements with mid-size to large law firms. Throughout this process, A CAA may contact CAPLAW for help in assessing the scope and type of legal assistance the CAA needs.

There are multiple ways for a CAA to locate an attorney who will best fit its needs. A referral is one of the more reliable ways. Look internally first for a referral. The unique tripartite structure of a CAA board offers a CAA a readily available diverse group of individuals who often have connections with or knowledge of attorneys in the community. Additionally, CAAs with Head Start programs must have at least one attorney serving on the board or, if one is not available to serve, acting as a consultant to the board. An attorney board member or consultant may be able to provide

your CAA with recommendations for attorneys in your community who may assist you in particular matters. The role of an attorney on the board is discussed in greater detail in Section V.

A CAA may also look externally for a referral. Other CAAs in your state and the state CAA association are good places to start your inquiry for an attorney who might have some familiarity with the work and needs of CAAs in your state. Also, CAPLAW maintains a list of attorneys located throughout the country that either have experience working with CAAs or have expertise in legal matters often faced by CAAs.

If a referral is not an option, other external resources exist. Many state bars offer resources to those seeking attorneys. To practice law in a particular state, an attorney must receive a license, which involves passing several examinations and undergoing a character and fitness assessment. A department in state government referred to as the state bar is authorized to oversee this process and will often aid the general public in its search for an attorney. For instance, the State Bar of California offers a guide on hiring an attorney titled "How Can I Find and Hire the Right Lawyer?". In addition to the state bar, there are nonprofit member organizations referred to as state bar associations which many attorneys join. These associations include sections for specific areas of law that attorneys may also join and serve as a good resource for locating an attorney with particular expertise. A general website for all state bar associations is available and lists contact information for each association. Moreover, the American Bar Association (ABA) offers a Consumer's Guide to Legal Help which connects users to legal resources available in a state.

Once a CAA locates an attorney, it is important for the CAA to vet the attorney to ensure that s/he is a good fit. Even an attorney who is highly recommended may have a working style or personality that conflicts with a CAA's approach. When vetting an attorney, it is important to ensure that s/he has the necessary expertise, sufficient time and adequate resources to devote to the matter, and is also affordable. A CAA should not hesitate to ask the attorney for references. The CAA should also check with its state bar to find out if any ethical complaints or malpractice claims have ever been filed against the attorney. Some other general questions that a CAA should consider asking an attorney prior to hiring him or her are:

- What is your experience in this area of law?
- Have you handled similar matters in the past? How many? Can you generally describe these past matters?
- How long do you anticipate it will take to complete the task or resolve the matter?
- How will you communicate status updates?
- How will the matter be staffed? How many partners and associates will be involved? If associates are involved, will they be senior or junior attorneys? Will you also be using paralegals? What is the expertise of the attorneys working on the matter?
- What type of fee do you charge, flat, hourly or contingency? If it is a contingency fee, what percentage will be your fee? If it's an hourly fee, what is the hourly rate of each attorney/paralegal that will work on the matter? See Section IV for more information on different types of attorney fees.

- Will there be other expenses in addition to the fee? How will additional expenses be determined?
- What's a reasonable approximate figure for a total bill? Can you provide me with the budget for the matter?
- Is there a way to decrease expenses? For instance, can some of the work be handled by members of your staff who are paid at a lower rate or can some of the work be performed by CAA staff?
- Do you carry malpractice insurance?

Obtaining answers to these questions prior to hiring an attorney will help to ensure that the relationship is a productive and cost-effective one. See Section III.A for guidance on the information you should obtain in writing when entering into a working relationship with an attorney.

Section III. How Do You Hire an Attorney?

When hiring an attorney, a CAA may be required to comply with certain federal laws and regulations if federal and/or state funds are used to pay for the attorney's services. Moreover, even if the attorney is paid for with unrestricted or private funds, the CAA may still consider following the federal and state requirements for retaining the attorney to reinforce the CAA's accountability for donors and private funders.

A. Procurement Rules and Procedures

The general rules regarding procurement of goods and supplies by federal grantees, contained in the Uniform Administration Requirements for Grants (known as OMB Circular A-110 and codified at 2 C.F.R. Part 215)[1] , apply to the procurement of legal services paid for with federal funds under grants and subgrants from federal agencies.[2] These rules serve as guidance to the federal agencies, which then adopt them as regulations applicable to grantees. See, for example, 45 C.F.R. § 74.40, which is the U.S. Department of Health and Human Services' adoption of the OMB Administrative Requirements.

One of the overarching principles of those rules is that "[a]ll procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition." Although a careful review should be made of all provisions of these rules, here are a few that are particularly relevant:

- A cost or price analysis must be made for the procurement. This could involve, for example, contacting several attorneys to obtain written or oral quotes on a fixed transaction basis, a monthly set fee, or for hourly fees.
- Positive efforts shall be made to use small businesses, minority-owned firms, and women's business enterprises, whenever possible.
- Procurement records and files for purchases in excess of the small purchase threshold (currently $100,000) shall include the following at a minimum:
    - *Basis for contractor selection;*
    - *Justification for lack of competition when competitive bids or offers are not obtained; and*
    - *Basis for award cost or price.*
- Certain specified provisions must be included in contracts with vendors. Some of these provisions are required depending on the dollar amount of the contract and address such topics as legal remedies, termination, access to records and bonding. These provisions are discussed in greater detail in OMB Circular A-110, Subpart C, 48. Other provisions must be included regardless of the dollar amount of the contract. These provisions address such topics as employment discrimination, kick-backs, prevailing wage rates, lobbying, rights in inventions, debarment and suspension and environmental protections. Examples of these provisions are set forth in Appendix A at the end of OMB Circular A-110.

Some CAAs issue a request for proposals (RFP) to hire attorneys, either as general outside counsel or for specific matters, such as real estate or employment.

• A grantee must maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award.

Some CAAs issue a request for proposals (RFP) to hire attorneys, either as general outside counsel or for specific matters, such as real estate or employment. An RFP typically includes general terms of the arrangement the organization is seeking to enter into with an attorney or firm including information about how to submit a proposal, description of the organization, scope of legal services, the information offeror's should submit, and how proposals will be evaluated. Many of the same questions described in Section II should be included in the RFP. The RFP could be advertised in a local newspaper or a legal periodical or the CAA may use contacts also described above in Section II to identify attorneys or firms with the appropriate expertise and send the RFP to that more limited group. A sample RFP is available in the Model Policies section of the CAPLAW website.

Also, CAAs may consider using a request for information (RFI) process, rather than an RFP. An RFI typically solicits names, expertise, and general rate information from attorneys and firms, but does not solicit information for a particular matter or necessarily result in a specific contract at that time. It could be used as the need for legal services arises.

An engagement letter is a form of contract and will be enforceable under state law.

To have better control over the hiring and use of outside counsel, and to ensure compliance with procurement rules and the cost principles, it is advisable to designate one person on the CAA staff, such as the executive director or human resources director, to approve the hiring and use of all attorneys. Any request for use of or consultations with the attorney would then go through that designee. That person should also review the legal bill each month. Of course, if an attorney is working with a specific department on a project, such as an affordable housing project working with a real estate attorney, additional staff may be authorized to consult with the attorney.

B. Engagement Letters/Retainer Agreements

Typically, an attorney will furnish an organization with an engagement letter. An engagement letter is a form of contract and will be enforceable under state law. Some key provisions in such letters include:

- The name of the client (in the case of a nonprofit CAA, the client is usually the CAA – acting through its board of directors – and not the executive director personally).
- Terms and scope of representation.
- Attorney's rates – describe whether those rates are calculated on an hourly or a flat fee basis and indicate whether a retainer will be required.
- Other charges or expenses for which your organization will be responsible (e.g., travel costs, court costs, etc.).
- Estimate for a particular project, if applicable – should include an agreement by the attorney to notify the organization when the number of hours billed on the project is nearing the estimate and to obtain approval before spending additional time on the project.
- Billing terms – it is generally good to be billed on a monthly basis with a breakdown of costs.
- Termination clause – the organization should be able to end the relationship at any time and the attorney should only be able to end the relationship after giving enough time for the organization to find other representation.
- Other provisions required by the procurement rules in OMB Circular A-110, such as the debarment and suspension certification.

It is important for a CAA to understanding that the terms of an engagement letter are negotiable. See a sample engagement letter that has been annotated in the Model Policies section of CAPLAW's website. Often engagement letters are referred to as retainer agreements and vice versa. A retainer agreement is basically an engagement letter that refers to the type of compensation involved. As discussed in Section IV.A, a retainer is payment made in advance for work that is specified at a later date. However, some states differentiate between the two types of agreements. For instance, under New York law, retainer agreements are engagement letters that have been signed by both parties.

Section IV. How Do You Pay For An Attorney?

Before deciding to hire a lawyer, an organization should discuss legal fees and the sources of funds that may be used to pay for such fees. As discussed in greater detail below, an organization should keep in mind that the use of grant or other government funds to pay legal fees is often restricted. These limits are found in OMB circulars, specific program regulations, and in grant appeals board decisions interpreting the circulars and program regulations.

It is also important for organizations to assess whether the lawyer's fees exceed the risks of forgoing representation (and vice versa). Organizations should constantly evaluate whether it is worth having a lawyer – not only do it before hiring one but also while the lawyer is working for the CAA. Lastly, all fees, are negotiable, so don't automatically accept what is first presented to you.

A. Fee Arrangements

Different fee arrangements are available depending on the type of legal service the organization is seeking. Usually, lawyers charge by the hour. However, if a lawyer is hired for a particular project, the organization may be able to negotiate a flat fee for the entire project. If the organization is paying on an hourly basis for a project, the organization should request that the lawyer: (1) give a fee estimate, based on how many hours s/he

If a lawyer is hired for a particular project, the organization may be able to negotiate a flat fee for the entire project.

Generally, for purposes of the federal cost principles for both nonprofit and public CAAs, an attorney is treated as a professional and/or consultant because s/he is a member of a particular profession and possesses a special skill.

thinks the project will take, (2) notify the organization when the hours billed on the project are nearing the estimated fee and (3) seek approval before spending more time on the project.

Some lawyers may require a retainer. A retainer is an amount of money (always negotiable) that the client pays up front, before the lawyer begins work on a matter. The lawyer puts these funds in a trust and can only use them for legal fees and expenses incurred during the course of the representation. At the end of the legal matter, the lawyer must return any unused funds in the trust account to the client. For more information about retainer fees see Section IV.C below.

Other lawyers may seek a contingency fee which is paid by the client to the lawyer only if the lawyer successfully handles a case. This arrangement is typically entered into when an attorney is hired to pursue litigation on behalf of his/her client and is seeking a monetary award such as in a personal injury or workers' compensation case. The lawyer agrees to accept a fixed percentage (often one third) of the recovery, which is the amount finally paid to the client. If a client wins a case, the lawyer's fee will be the agreed-upon percentage of the money awarded to the client. If the client loses a case, no money will be awarded to either the client or the attorney but the client will still be required to pay the lawyer for the work performed in relation to the case.

B. Creating a Budget for Legal Services

CAPLAW recommends including legal fees in the agency-wide annual budget. Although the nature of legal issues often means that legal fees may not always be foreseeable, some minimum amount of fees should be included in the budget for regular legal advice, such as for consultations on employment matters, review of contracts and policies, and corporate governance issues. The exact amount will of course depend on the size of your CAA, the programs you run, the legal services you require, and the fees charged by your attorney(s). Some of these fees, such as for review of policies, contracts, leases, and bylaws, corporate governance issues, general review of employment practices, may be included in your administrative budget or indirect cost pool. Others, such as legal advice needed to set up a new affordable housing entity, a lease for a building used exclusively by one program, or a claim brought by a specific employee, may be more appropriately charged directly to a specific program, assuming it is allowable by the program rules, as discussed below in Section IV.C. For some costs, such as the cost of legal representations in proceedings with the government, the CAA may need to use unrestricted funds or obtain pro bono representation.

To determine the appropriate amount to include in the budget, start with looking at past year's costs. Also, speak to attorneys that you intend to use to get a sense of how much their services will cost. You may want to consider using an RFP process, or, if federal grant funds are used, some other process that will ensure the CAA is getting good value and

the right expertise for its money. See Section III.A for more information about RFPs. If an attorney or firm is willing to be paid on a retainer basis rather than an ad hoc one, that may enhance your CAA's ability to plan ahead. In either case, it is a good idea to obtain a budget from the attorneys or firms for specific projects and review that budget either periodically or on an annual basis.

C. Using Federal Grant Funds To Pay Legal Fees

The ability to use federal funds to pay legal fees depends upon how the fees arise. The Office of Management and Budget's (OMB) basic cost guidelines – found in OMB Circular A-122 for private nonprofit grantees (A-122) and OMB Circular A-87 for public programs (A-87)[3] – set rules for costs that may and may not be charged to federal grants. The rules require that all costs paid with federal funds must be reasonable, allocable to a particular federal program, and documented, among other things.[4]

> Regarding the establishment or reorganization of an organization, OMB Circular A-122 is clear that legal fees may not be paid with federal grant funds except with prior approval from the awarding agency.

Additionally, all legal fees paid for with federal funds must comply with the requirements for professional service and consultant costs set forth in the federal cost principles in Section 37 of Appendix B of 2 C.F.R. Part 230 (OMB Circular A-122) for non-profit CAAs and in Section 32 of Appendix B of 2 C.F.R. Part 225 (OMB Circular A-87) for public CAAs. Generally, for purposes of the federal cost principles for both nonprofit and public CAAs, an attorney is treated as a professional and/or consultant because s/he is a member of a particular profession and possesses a special skill. Thus, as long as the attorney is not an officer or employee of the CAA, fees associated with his/her services may be paid with federal grant funds if they are reasonable in relation to the services provided and if they are not contingent upon recovery of the costs from the federal government.[5] To determine if fees are allowable in a specific case, grantees must consider the:

- legal service provided compared to what was required,
- need to contract with an external lawyer[6]
- past pattern of similar costs,
- qualifications and usual fees of the attorney,
- whether the legal services may be performed more economically by direct employment rather than by contracting, and
- adequacy of the contract (including service description, time required, compensation, and termination provisions).

Also, any "retainer" fees must be supported by evidence of services available or rendered.[7] The application of these general principles may be complicated by the application of program-specific rules. In many circumstances, grantees may use federal grant funds to pay for insurance that covers attorneys' fees in defending lawsuits from third parties.[8] Purchasing insurance that cover legal fees is discussed in Section IV.E.

Additional cost principles may also apply to different types of legal fees. Therefore, when determining if federal funds may be used for payment of legal fees, a grantee must consider whether fees arose from:

- the general administration of federal programs;
- a private lawsuit;
- legal proceedings against the government; or
- establishment or reorganization of an organization or termination of a program.

Lastly, it is important to have documentation to support any payment made to an attorney. A CAA should, thus, ensure that the attorney's bills reflect detailed entries as to the service they provide, including the subject of the advice, the identity of the lawyer or other professional providing services, the amount of time spent (assuming it is paid on an hourly basis) and the amount for reach matter.

Type 1. Legal Fees Resulting from the Administration of Federal Grants

Grantees routinely incur legal fees that arise from the administration of federal programs, which include, for example, fees associated with conducting real estate closings, arranging development deals, offering tax credits, preparing personnel manuals, and presenting training on legal compliance. Federal grant funds may be used to pay these fees if they comply with the requirements for professional service and consultant costs set forth in the federal cost principles discussed above in Section IV.C.

Type 2. Legal Fees From Reorganization and Grant Termination

Some restrictions exist relating to the allowability of legal fees associated with CAAs or program life-cycle events, which include creation of new corporations or other organizations or reorganizations of existing organizations, as well as voluntary or involuntary grant terminations. Regarding the establishment or reorganization of an organization, OMB Circular A-122 is clear that legal fees may not be paid with federal grant funds except with prior approval from the awarding agency.[9] In the case of grant relinquishments, legal costs may be disallowed if the relinquishment is viewed as a termination for default.[10] However, grantees should review the grant agreement, specific laws and regulations for exceptions to these general provisions. The grantee may also consider negotiating with the funding source to include attorneys' fees as part of the costs associated with closing out a grant that was either voluntarily or involuntarily terminated.

The rules regarding payment of litigation-related legal fees differ depending on whether the litigation involves a private party or a unit of government.

Type 3. Legal Fees From Proceedings Against the Government

For nonprofit CAAs legal fees incurred in connection with litigation against the federal, state or local government and for public CAA legal fees incurred in litigation with the federal government are subject to a different, more restrictive set of rules. In proceedings (which include administrative proceedings, judicial proceedings and investigations) with the federal, state or local government for nonprofit CAAs and with the federal government for public CAAs, fee allowability largely depends on which side prevails. If the government prevails, the general rule is that legal fees from defenses or claims in administrative or judicial courts are unallowable from the point when an agency issues a final decision letter, such as a disallowance.[11] Should the grantee prevail, the grantee may recover legal fees under the OMB cost guidelines or under the Equal Access to Justice Act.

Under OMB Circular A-122, a nonprofit grantee that prevails against the government can bill up to 80 percent of legal fees to a federal grant if:

- the fees are reasonable,
- they are not prohibited by the sponsored award,
- they are not otherwise recovered from the federal government or a third party, and
- a federal official determines the percentage to be appropriate.[12]

Prevailing public grantees are not as fortunate; OMB Circular A-87 disallows legal fees whenever a public grantee initiates claims against the federal government.[13]

Nevertheless, a public grantee is not entirely without recourse as either a prevailing nonprofit or public grantee can overcome these fee limitations by seeking reimbursement under the Equal Access to Justice Act (EAJA).[14] The EAJA applies to proceedings against the United States before an administrative agency[15] or judicial court[16] regardless of which party initiated the litigation. To be eligible for an EAJA award, a grantee must prevail in a judgment that cannot be appealed. For example, a voluntary change in the government's conduct is not enough to make a grantee a prevailing party[17], but an order of settlement may be sufficient in a judicial proceeding.[18] To recover fees in an administrative proceeding, the prevailing grantee files an application with the agency showing that its entitled to receive an award of attorneys' fees pursuant to 5 U.S.C. Section 504 and the amount sought; in a judicial proceeding, the prevailing grantee files an application with the court showing that it is entitled to an award pursuant to 28 U.S.C. Section 2412 and the amount sought. Fees will be awarded unless the agency or court finds that the position of the United States was substantially justified or that special circumstances make the award of attorneys' fees unjust.[19]

A CAA that does not have the money to pay for an attorney's services should ask the attorney if he or she would be willing to work for the CAA for free, i.e., on a pro bono basis.

Type 4. Litigation Fees from a Private Lawsuit

Grantees may also incur legal fees in connection with litigation, and the rules regarding payment of litigation-related legal fees differ depending on whether the litigation involves a private party or a unit of government. In a private lawsuit, the grantee normally may pay the fees with federal grant funds consistent with the general cost allowability and professional fees rules discussed above in Section IV.C, with a few exceptions. When Circular A-122 was revised in 1998, OMB comments acknowledged that legal fees from a lawsuit filed by a former employee for termination or by subrecipients are allowable.[20] However, federal funds cannot cover legal fees incurred in private litigation if the proceeding is an antitrust suit, patent infringement litigation, or if an organization is found liable or settles when defending a suit brought by an employee under the Major Fraud Act of 1988.[21] These specific costs are subject to disallowance, and grantees should note that administrative agencies may also disallow legal fees for similar types of litigation.[22]

Type 5. Litigation Fees Covered by Program-Specific Provisions

In some instances, though, whether the government or the grantee ultimately prevails is not relevant because payment of litigation-related legal fees is covered by program-specific provisions rather than under the general OMB cost principles. For example, the Head Start Act prohibits using Head Start funds to pay legal fees in connection with administrative appeals of terminations, suspensions, and denials of refunding. However, if the grantee prevails, there is a possibility that reimbursement for fees deemed reasonable and may be determined and provided by the Department of Health and Human Services.[23] Since certain programs have specific regulations regarding litigation-related and other legal fees, which may be more or less generous than the ordinary OMB cost principles, grantees must look at program-specific regulations before concluding that a particular litigation related legal fee is or is not allowable.

Type 6. Legal Fees in Settlement Agreements

Under Circular A-122, a grantee may also be able to charge a federal grant for legal fees from litigation against the government as part of a settlement or other agreement.[24] Legal fees arising from a proceeding brought by a state or local government may be charged to a federal grant when an authorized federal official specifically allows the grantee to use federal funds to pay the fees. A grantee may charge a federal grant for legal fees arising from a proceeding brought by the federal government when it settles with the government and the settlement agreement states that the fees are allowable costs. However, if a settlement can be interpreted as favorable to the federal government, and the agreement lacks a legal fee provision, fees may be disallowed. Thus, the terms of the settlement agreement are very important to a grantee hoping to use grant funds to pay for litigation against the federal government.

D. Pro Bono Attorneys:

A CAA that does not have the money to pay for an attorney's services should ask the attorney if he or she would be willing to work for the CAA for free, i.e., on a pro bono basis. Depending on an attorney's case load and resources and the nature of the CAA's request, the attorney may be willing to perform services for the CAA at no cost. Alternatively, an attorney or firm may be willing to discount its regular fees. A CAA should still enter into an engagement letter with an attorney who works on a pro bono basis. See Section III.B for information about engagement letters. And, the CAA should still ensure that the attorney has the appropriate expertise.

CAPLAW has compiled a list of nonprofits located throughout the country that aid organizations in obtaining legal services from attorneys in their communities on a pro bono basis. These nonprofits typically require that organizations meet certain criteria before receiving services and a CAA should be prepared to participate in the nonprofit's intake process.

E. Insurance:

Since the use of government grant funds to pay for legal fees and settlements is somewhat restricted as discussed in Section IV.C, it is important for CAAs to understand what if any insurance may cover attorney fees and settlement costs. The various types of insurance a CAA may obtain include general liability, property, auto and directors 'and officers' (D&O) coverage.

Generally, insurance is an allowable cost if it is required or approved by the grant award or if certain requirements are met.[25] Insurance maintained by an organization in connection with the general conduct of its operations is allowable subject to the following limitations:

- Types and extent of coverage are in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.
- Costs allowed for business interruption or other similar insurance are limited to exclude coverage of management fees.
- Costs of insurance or of any provisions for a reserve covering the risk of loss or damage to federal property are allowable only to the extent that the organization is liable for such loss or damage.
- Provisions for a reserve under a self-insurance program are allowable to the extent that types of coverage, extent of coverage, rates, and premiums would have been allowed had insurance been purchased to cover the risks. However, provision for known or reasonably estimated self-insured liabilities, which do not become payable for more than one year after the provision is made, may not exceed the present value of the liability.
- Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibilities are allowable only to the extent that the insurance represents additional compensation. The cost of such insurance when the organization is identified as the beneficiary is unallowable.
- Costs of insurance with respect to any costs incurred to correct defects in the organization's materials or workmanship are unallowable.[26]

CAAs must typically follow procedures set forth in their insurance plans to notify the insurer promptly about claims or potential claims to receive coverage.

Moreover, according to the federal costs principles for grants, actual losses (including those resulting from judgments and legal settlements) which could have been covered by permissible insurance, but are not, are unallowable unless: (1) expressly provided for in the award; (2) the costs fall under a nominal deductible that is in keeping with sound business practice; or (3) the losses are minor ones not covered by insurance, such as spoilage, breakage, and disappearance of supplies, which occurred in the ordinary course of operations.[27] Therefore, it is important for CAAs to

be sure they have adequate insurance coverage. Also, CAAs must typically follow procedures set forth in their insurance plans to notify the insurer promptly about claims or potential claims to receive coverage.

To determine if attorneys' fees, settlement costs and judgment awards are covered by insurance, a CAA must first understand when obtaining insurance what claims will be covered. Due to the frequently inscrutable language of policies, CAAs should work with an attorney to determine if a claim is covered, or if the CAA can successfully challenge a carrier's denial of coverage or reservation of its right to deny coverage after investigating the claim. It is essential for CAAs to be familiar with both the specifics of the entire scope and time period of insurance coverage and to carefully read each potentially relevant policy. CAA's should review the package as a whole to ensure that all riders, endorsements, etc., are included in the materials. It may also be necessary for CAAs to understand the interpretations of the various provisions, including legal research on how particular clauses have been interpreted by the courts.

Again, a careful reading of the policy is needed to determine the level of attorney choice permitted to the insured.

Once coverage is determined, another issue that comes up is who decides on the attorney. Does the policy permit the insured to select counsel freely? Is the insured required to select from an identified panel of carrier-approved attorneys? Or does the carrier retain total control over the appointment of an attorney? Again, a careful reading of the policy is needed to determine the level of attorney choice permitted to the insured. If CAA has a long-standing relationship with an attorney or firm, and the attorney is not on the pre-approved panel, the CAA may wish to consider negotiating to add a rider to the policy permitting use of that attorney or firm. The attorney may also want to investigate how to be included in the carrier's general panel of approved attorneys.

The carrier may set a cap on hourly fees that is lower than the attorney's or firm's standard rates. The CAA should be aware of this fact and the attorney and CAA should discuss ahead of time whether it will be responsible for paying the difference. The CAA should also negotiate with the insurer on the cap, if any, and, if possible, specify that the cap will not apply if the insurer only agrees to cover a claim under a reservation of rights, rather than full coverage.

Settlements of lawsuits are another hot issue. Again, CAAs should read the policy carefully as to who has the final say on settlements. Some policies will give the insured the authority to veto a settlement, others will not. If the insured does have the right to veto a settlement, and the case goes to trial, often the carrier will only be obligated up to the settlement amount.

Finally, it is important for CAAs to obtain professional advice in selecting the appropriate types and amount of insurance coverage and to review their coverage every few years. CAAs should also review their coverage during the policy period to determine if they have taken on additional risks (for example occupied new properties or started new programs that need to be insured).

Section V. What Is the Role of an Attorney on the Board of Directors?

Because attorneys are trained to spot issues, identify risks and propose options, they play an essential role on a CAA board of directors. The importance of an attorney's role on the board has increased since the 2007reauthorization of the Head Start Act which now requires the governing body of a Head Start grantee to have at least one member who is a licensed attorney familiar with issues that come before the board. However, if a licensed attorney is not available to serve on the board, a consultant or another individual with relevant expertise must work directly with the board.[28] The only guidance from the Administration of Children and Families (ACF, the division of the U.S. Department of Health and Human Services (HHS) overseeing the Head Start program) regarding this requirement is in the form of a Policy Clarification which, in response to the following questions, simply states:

1. *Does "licensed attorney" include an attorney who is licensed in a state other than the one in which the Head Start program is located?*

2. *Does "licensed attorney" include an attorney who is retired, and registered with the state bar but no longer required to maintain continuing legal education courses? As long as the individual is licensed to practice law and is 'familiar with issues that come before the governing body,' including issues under the laws of the state in which the grantee operates, he or she will be considered to have met the requirements of the Head Start Act.*[29]

Due to the lack of additional guidance from ACF along with the new emphasis placed by Head Start on the inclusion of an attorney serving on or as a consultant to the board, many attorneys asked to join, consult with or remain on CAA boards are unsure of their roles.

Like all other board members, attorneys on a nonprofit CAA board are subject to state nonprofit corporate laws which impose two main fiduciary duties: the duty of care and duty of loyalty.

The role of an attorney on a CAA board is different than the role of other board members. Like all other board members, attorneys on a nonprofit CAA board are subject to state nonprofit corporate laws which impose two main fiduciary duties: the duty of care and duty of loyalty. In discharging these duties, non attorney board members may be held to a "'reasonable person' standard, which means the [board member] must exercise the care of an ordinarily prudent person would exercise under similar circumstances."[30] However, an attorney board member would more than likely be held to a higher standard – the "reasonable person" standard for someone with the same background.[31]

Additionally, the specific laws that authorize the different types of funding a CAA receives often either include requirements or offer guidance on the roles, responsibilities and expectations of all board members, including attorney board members. The unique source of funding received by all CAAs is the Community Service Block Grant (CSBG) and the Office of Community Services (OCS, the division of HHS overseeing CSBG programs) offers guidance on the roles and responsibilities of CSBG board members in Information Memorandum 82.[32] Additionally, the Head Start Act sets forth specific requirements for board members.[33]

In meeting the general board member requirements, attorney board members often encounter issues distinctive to their service on the board because of their known expertise in certain areas of the law. The issues faced include: (1) role confusion, i.e., determining when they are acting as a board member, attorney or both; (2) potential conflicts of interest involving the attorney-director's law firm/law practice, attorney's current and prospective clients and decisions to hire outside counsel; (3) the application of the attorney-client privilege; and (4) the heightened liability exposure

An attorney who regularly provides legal services to a CAA and is asked to serve on the board should consider several issues relating to this dual role.

resulting from the attorney board member's competency to provide an opinion in an area of law in which the attorney board member does not regularly practice.[34]

The attorney board member must be prepared to manage the expectations of the other board members regarding the attorney board member's ability to provide legal representation and advice. An attorney who regularly provides legal services to a CAA and is asked to serve on the board should consider several issues relating to this dual role. If the attorney board member r is providing free legal advice to a CAA or providing paid legal advice to a CAA that does not receive Head Start funds, the attorney should (1) consider whether performing the work for the CAA poses a conflict of interest and (2) clearly delineate for the board when s/he is acting as either an attorney or simply as a board member to ensure that attorney/client privilege is preserved when s/he is acting as an attorney. Moreover, attorneys considering taking a position as an officer of the CAA should be aware that federal grant funds may not be used to pay for professional services, including legal services, provided by a grantee officer or employee.[35]

However, if the attorney is providing paid legal services to a CAA that receives Head Start funds, the attorney is prohibited from serving on the board pursuant to the Head Start Act's conflict of interest provision which states that "[m]embers of the governing body shall . . . not have a financial conflict of interest with the Head Start agency (including any delegate agency)" and shall "not receive compensation for serving on the governing body or for providing services to the Head Start agency."[36]

Generally, an attorney board member is not a substitute for a CAA's inside or outside legal counsel. Most attorneys specialize in specific areas of law that may not be directly relevant to the organization and, even if an attorney board member possesses expertise in an area of law relevant to a CAA, the attorney board member's specialized knowledge does not absolve other directors from their fiduciary duties as board members. Ultimately, it is very important for all board members to be cognizant of the potential issues involved when an attorney board member is also asked to serve as legal counsel for the CAA or board. The board should also not lose sight of the benefits, other than legal advice, that an attorney board member will bring to the board. An attorney board member provides a different perspective and adds an extra layer of vigilance to board deliberations and actions. Attorney board members are invaluable for pointing out the red flags and for proposing procedures and methods for addressing matters.[37]

Attorney board members should disclose to the board any potential conflicts of interest (while being mindful not disclose client confidences) and how those conflicts may prevent the attorney board members from performing his/her duties as a board member. The attorney board member may request that the board take precautionary measures to avoid conflicts such as not seeking paid legal services from the attorney board member's law firm/law practice.[38] Attorney board members should recuse themselves from any discussions or actions relating to the relationship of the

attorney board member or his or her firm to the CAA, compensation of the firm, and any other matters in which the attorney board member has a personal interest. If an attorney board member agrees to take on a specific limited representation of the CAA, such as preparing restated articles of incorporation or an employment agreement for the executive director, the attorney should clearly explain in writing the extent of the representation. Moreover, an attorney board member engaged in such representation should work with the board to carefully consider his/her ability to exercise independent judgment when deciding whether or not to participate in the board approval of any actions relating to the representation, such as voting on the restated articles of incorporation or the employment agreement.[39]

If an attorney board member agrees to take on a specific limited representation of the CAA ... the attorney should clearly explain in writing the extent of the representation.

The attorney-client privilege would only apply to attorney board members if they communicate with the board as an attorney for the CAA. If attorney board members assume such a role, they should explain that role to the board and remind the board how to preserve the attorney-client privilege. Moreover, before an attorney can commit to serving on a CAA board, s/he will need to check his/her malpractice insurance to see if s/he is permitted to serve on a nonprofit board and, if as a nonprofit board member, s/he is also able to periodically serve as the organization's legal counsel. Lastly, an attorney board member's exposure to liability may be limited by D&O coverage carried by the CAA.[40]

FOOTNOTES

1. 2 C.F.R. §§ 215.40 - .48.
2. These requirements do not necessarily apply to federal block grants administered by the states. However, many states incorporate OMB Circular A-110 into their contracts and the federal Office of Community Services has taken the position that A-110 applies to all Community Services Block ("CSBG") eligible entities. The federal CSBG Act requires states to ensure that OMB cost and accounting principles are applied to eligible entities, but says nothing about OMB administrative requirements for grants.
3. The OMB cost principle circulars have been codified in the Code of Federal Regulations (C.F.R.). Circular A-87 (A-87) can be found at 2 C.F.R. Part 225 and Circular A-122 (A-122) can be found at 2 C.F.R. Part 230.
4. 2 C.F.R. Part 225, App. A; 2 C.F.R. Part 230 App. A. All references in this article will be to the Code of Federal Regulations Citations.
5. 2 C.F.R Part 230, App. B, ¶ 37; 2 C.F.R. Part 225, App. B, ¶¶ 10.b and 32.
6. *See Marie Detty Youth and Family Services Center, DAB No. 1643 (1998).*
7. 2 C.F.R. Part 230, App. B, ¶¶ 37.b-c; 2 C.F.R. Part 225, App. B, ¶¶ 32.b-c.
8. 2 C.F.R. Part 230, App. B ¶ 22; 2 C.F.R. Part 225, App. B ¶ 22.
9. 2 C.F.R. Part 230, App. B, ¶ 31.
10. 2 C.F.R. Part 230, App. B, ¶ 48.e.
11. 2 C.F.R. Part 230, App. B, ¶ 10.b; 2 C.F.R. Part 225, App. B, ¶ 10; *See* 1998 A-122 Comments
12. 2 C.F.R. Part 230, App. B, ¶ 10.e. OMB comments to the 1998 revision of Circular A-122 indicate that legal fees may be allowable, up to 80 percent, if a nonprofit's position is sustained by the administrative appeal process or a settlement agreement. *See* 1998 A-122 Comments.
13. 2 C.F.R. Part 225, App. B, ¶ 10.b.
14. *See* 5 U.S.C. § 504; 28 U.S.C. § 2412.
15. 5 U.S.C. § 504.
16. 28 U.S.C. § 2412.
17. *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources, 532 U.S. 598 (2001).*
18. 28 U.S.C. § 2412.
19. 5 U.S.C. §504 (a); 28 U.S.C. § 2412 (d).
20. See Cost Principles for Non-Profit Organizations; Notice, 63 Fed. Reg. 29794-5 (June 1, 1998) (1998 A-122 Comments).
21. 2 C.F.R. Part 230, App. B, ¶¶ 10.f h.
22. See, e.g., *Humanics Associates*, DAB No. 860 (1987) (disallowing legal fees in a suit alleging unfair competition and use of a trade name, on the ground that the suit concerned the livelihood of the organization and protection against competitors rather than the operation of federal programs).

23. The 2007 Head Start Reauthorization, "Improving Head Start for School Readiness Act of 2007," Pub. L. 110-134 (2007), required that procedures be established to allow for reimbursement of reasonable and customary fees to be reimbursed in cases where the grantee prevails in an action to terminate or reduce their funding or deny an application for refunding.
24. 2 C.F.R. Part 230, App. B, ¶¶ 10.c-d.
25. 2 C.F.R. Part 230, App. B, ¶ 22.a.(1), (2).
26. 2 C.F.R. Part 230, App. B, ¶ 22.a.(2).
27. 2 C.F.R. Part 230, App. B, ¶ 22.a.(3).
28. 42 U.S.C. § 9837(c)(1)(B)(iii), (iv).
29. Policy Clarification, OHS – PC – E – 026 .
30. *See* Jack B. Siegel, *A Desktop Guide for Nonprofit Directors, Officers, and Advisors: Avoiding Trouble While Doing Good*, John Wiley & Sons, Inc. (2006) at 81.
31. Lisa A. Runquist, *The ABCs of Nonprofits*, American Bar Association (2005) at 21.
32. See Information Memorandum 82.
33. See 42 U.S.C. § 9837(c)(1)(E).
34. *See Lawyers' Service on Nonprofit Boards, Managing the Risks of an Important Community Activity*, by Willard L. Boyd III, American Bar Association Business Law Today, Volume 18, Number 2, November/December 2008 available at http://www.abanet.org/buslaw/blt/2008-11-12/boyd.shtml.
35. 2 C.F.R. Part 230, App. B, paragraph 37.
36. 42 U.S.C. § 9837(c)(1)(C)(i) and (ii).
37. Id.
38. CAAs who are Head Start grantees should review their conflict of interest policies (which are required by the Head Start Act) to determine if an attorney from a firm with which the CAA does business may serve on its board. The answer may depend, for example, on how the policy defines a conflict of interest. Do non-owner firm employees (i.e. associates), or owners (i.e. partners) who have a very small ownership interest, (less than 5%, for example) come within the policy's definition of a "financial conflict of interest"?.
39. Id.
40. Id.