# Preparing and Managing a Medicaid Case

## An Introductory Guide

**Prepared by:**
**Jane Perkins, Sarah Somers and Steve Hitov**

**National Health Law Program**

**July 2006**

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The Nathan Cummings Foundation

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## Preparing and Managing a Medicaid Case

***Abstract***. *This introductory guide discusses various aspects of preparing and managing a Medicaid case. Both individual and class action cases receive attention. After providing some background to Medicaid litigation, the following topics are covered: (1) verifying clients and claims; (2) coordinating counseling responsibilities; (3) negotiations; (4) choice of forum; (5) preparing complaints in manageable analytic bites; (6) individual v. class actions; (7) forms of relief; (8) managing discovery; (9) expert witnesses; (10) anticipating and addressing defenses; and (11) monitoring and enforcing orders and agreements.*

*This guide can only touch on the many complex issues involved in case preparation and management. For in-depth assistance with case development, please contact the National Health Law Program. If you are a legal aid advocate, you should also obtain a copy of the National Center on Poverty Law, Federal Practice Manual for Legal Aid Attorneys.*

### A. Background to Medicaid Litigation

Since Medicaid was enacted in 1965, there have been a number of court challenges seeking to enforce the program's requirements. While these cases have often obtained the requested relief, advocates who have filed them will, with near uniformity, caution that these efforts are not easy. Moreover, changes in the composition of the judiciary are bringing added challenges.

A review of previous litigation shows the following:

- There have been thousands of published court decisions. There are numerous unpublished decisions.
- There has been litigation in almost every state.
- Since the mid 1990s, cases have focused on eligibility and services, provider participation; access to behavioral and mental health services and providers, particularly in community-based settings; and denials of services by managed care organizations.
- The majority of cases have been resolved through settlements and consent decrees.
- Since the 1990s, cases are much more likely to be tested by motions to dismiss on jurisdictional/standing bases. These requests have been granted by some courts and, in all cases, have led to frustrating delays in obtaining relief from ongoing problems.

While some Medicaid disputes can be resolved fairly quickly, problems are often difficult to

address. There are many reasons for this, including:

- Beneficiaries come to the office and complain but are intimidated to go to court; they lack the resources to do so.
- Beneficiaries move and lose contact with their advocates. Beneficiaries also may experience on-again-off-again eligibility as family income varies, and this also complicates litigation.
- Beneficiaries' problems can be mooted out once they are brought to the attention of the government agency or managed care company, so systemic problems may be hard to address.
- Impact litigation is costly and time consuming in situations where, already, there is little money and time.
- Beneficiaries' access to legal representation is limited. Individuals are dependent on legal services, protection & advocacy offices, public interest law firms (which typically are small offices), and private law firms (which can devote only limited resources to pro bono efforts). Legal services corporation-funded organizations are barred by Congress from filing class action lawsuits. Private law firms may have conflicts of interest, particularly where health care providers and insurers are involved, and they may be concerned about the ability to obtain attorneys fees if the state changes its policies after the case is filed. *See Buckhannon Board and Care Homes v. W. Va. Dept. of Health and Human Res.,* 121 S.Ct. 1835 (2001) (rejecting catalyst theory for attorneys' fees); *Green v. Mansour*, 474 U.S. 64 (1985) (refusing injunction where state has voluntarily halted violation).
- Motions to dismiss can add to the cost of the litigation and the delay in obtaining relief through the courts.
- Often, following even successful litigation, implementation of relief can be slow. It can be difficult locating legal staff to monitor implementation.

In sum, each Medicaid case needs to be considered and planned carefully. The "strategy of the case" should be developed before the complaint is filed. What other forms of advocacy will be employed in support of the case or the issue–e.g. education, legislation, media? Should the case be filed as an administrative complaint, in state court, in federal court? Is a preliminary injunction needed? Will the case require the use of experts? What are the requirements of the Federal Rules of

Civil Procedure and your Local Rules?

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## B. Verifying Clients and Claims

Each Medicaid case will be different. While the legal claims may recur from case to case, no two fact patterns will precisely match. Thus, as a first step, it is essential that care be taken to verify both the client's situation and their potential legal claims.

**Getting the client's story.** Most offices use intake forms that allow advocates to obtain basic case information. However, the client's story must be fully developed through carefully documented interviews with the family and providers.

You may be dealing with repeated instances of a violation. In this case, consider using form questionnaires so that you and your co-workers will be obtaining uniform information from potential plaintiffs, but leave room to capture any individual differences among plaintiffs. Forms can also be developed to elicit information from other major players. If a case develops, these forms will be helpful when preparing for depositions and affidavits. As the case proceeds, you will be maintaining contact with your clients to obtain updates. In addition, you should write to them periodically to summarize case activities, not just major developments, and to learn whether they have experienced any relevant events.

**Verifying claims.** As you review the Medicaid Act, it is likely that you will identify a number of Medicaid Act provisions that seem to be violated by the facts of your case. It is tempting to draft a complaint that includes all of these claims, because this illustrates just how bad the problems are. However, proceeding with numerous claims and/or claims based on facts that do not clearly track the elements of the statutory provision invite the defendant to file a motion to dismiss,

and courts have been increasingly hesitant to enforce some provisions of the Medicaid Act.[1] For example, some courts have refused to enforce:

- 42 U.S.C. § 1396a(a)(4) – the "adequate methods of and criteria for administering the state Medicaid plan" requirement (implicated, for example, when the computer system cannot uniformly track provider Medicaid claims).
- 42 U.S.C. § 1396a(a)(5) – the "single state agency" requirement (implicated, for example, when the mental health division is allowed to administer the Medicaid mental health managed care program).
- 42 U.S.C. § 1396a(a)(19) – the "best interests of recipients" requirement (implicated, for example, when the state's goal is to maximize contracting with private managed care companies rather than assure needed services for recipients).
- 42 U.S.C. § 1396a(a)(30)(A) – the "equal access" provision, which requires state Medicaid programs to make adequate payments to participating providers. Some recent circuit court decisions have found that this provision cannot be privately enforced.

Preparation of a legal theories memorandum will allow you to focus your thinking on the case. The legal theories memo should identify each possible claim, discuss the claim in relation to your facts, assess the importance of the claim to your case, and research whether the provision is likely to be enforced by the court. The legal theories memorandum will provide valuable background information as you develop your complaint and substantive pleadings.

You may find it useful to complete a chart that lists the claims, matches those claims with the various plaintiffs, and summarizes the relevant facts needed to establish the claim:

| CLAIMS | PLAINTIFF | FACTS |
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[1] For additional discussion, *see* Anticipating and Addressing Defenses, *infra.*

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### C. Coordinating Responsibilities Among Counsel

If your claims involve multiple plaintiffs or are being filed as a class action lawsuit, you may wish to co-counsel the case with other attorneys. This section discusses the considerations involved with these arrangements, focusing on sources of co-counseling assistance and how to sort through various responsibilities.

**Involving support centers**. Litigation support centers exist at the state and national levels and may be available to co-counsel the case with you. You should select support centers that will contribute to the case either through in-depth expertise on the issues or knowledge of the courts.

**Examples of litigation support centers:**

National Health Law Program, Los Angeles, CA, Chapel Hill, NC, Washington, DC

National Senior Citizens Law Center, Los Angeles, CA, Washington, DC

Bazelon Center for Mental Health Law, Washington, DC

Center for Medicare Advocacy, Willimantic, CT

**Involving private law firms.** You may also consider pro bono assistance from a private law firm. There are a number of considerations. A private law firm may have the finances and personnel to more effectively prosecute a case involving complex discovery, particularly if you are working in a small office. A private law firm may have knowledge of local court practices or relationships with the state attorney general that are missing from the current staff in your office. And, a private law firm may add prestige to your case.

If you are considering working with a private firm, research the possible candidates. It is important to identify and meet with a partner – preferably a senior partner – who is committed to the issues. The associates in the firm who will be working on the case should also be involved in these early meetings. There should be a full understanding of the level of involvement that is expected and how responsibilities will be shared. This is particularly important when working with a private firm – the firm may not have worked with Medicaid beneficiaries, the Medicaid Act, or common defenses in Medicaid cases, and as a result, may not fully anticipate the time and financial commitments (e.g. depositions, court reporters and paid experts) that a Medicaid case can demand. Also, you should be comfortable sharing your theory of the case, and any weaknesses in it, with the firm. This may mean ascertaining if the firm sometimes represents, for example, other state agencies. While that may not constitute a formal conflict, advocates should be wary of sharing their best thinking only to see it used against clients in another state. Private firm involvement should be considered early on, because the firm will need to complete a conflicts check, and this can take time.

**Co-counseling agreement.** If multiple counsel are involved, then all counsel should sign a co-counseling agreement. While the excitement of early case preparation may obscure the need for a written agreement, later case processing will be well-served by a clear articulation of co-counseling rights and responsibilities.

The following issues should be addressed in the agreement:

- ✓ Listing of attorneys and offices
- ✓ Designation of lead counsel
- ✓ Description of co-counsel responsibilities (e.g. making sure all counsel are up-to-date on case developments and receive copies of all pleadings and decisions, managing discovery, making decisions when consensus is not present, managing a litigation fund)
- ✓ Discussion of costs and attorney fees – how costs will be allocated and fees, if any, shared.

**Meetings of counsel.** Co-counsel will be taking various roles – obtaining plaintiff information, developing legal theories, and overall case management. It is important to keep all counsel up-to-date on case developments and to maximize the opportunity for exchange of information. An e-mail list serve should be established for immediate exchange of information. If

in-office meetings cannot occur because attorneys are in different locations, then a pre-set teleconference meeting time can be established. For example, co-counsel may decide to meet for ½ hour every other Friday. Once established, these meetings can be chaired by the lead counsel and occur at the pre-arranged time, even if all counsel cannot attend.

**Coordinating Counsel Check List**

**Make sure you:**

- ✓ Identify co-counseling needs early on
- ✓ Decide on a litigation team and specify roles
- ✓ Enter into a written co-counseling agreement
- ✓ Use e-mail for immediate exchange of information
- ✓ Establish routine telephone conference calls for updates
- ✓ Meet in person when appropriate

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### D. Negotiations

**Caution:** Some years ago, advocates would file complaints with the idea that the case will settle shortly after filing. Avoid this mentality. Regardless of your negotiation strategy and hopes for a settlement, you should not file a case thinking that it will settle without significant effort. When filing a case today, you must be prepared for it to be aggressively litigated by the defendant.

It may seem that this section is out of place. However, negotiations may begin well before a complaint is filed in court, so it is helpful to think about how they fit in before filing, through trial, and at all points in between.

**When to negotiate.** There are many points in a case when advocates should consider negotiating. Typical points are: 1) after initial investigation, 2) just before filing the complaint or seeking preliminary relief, 3) at the conclusion of formal discovery, 4) at the point of class certification, 5) after entry of a preliminary injunction or partial summary judgment, 6) on the eve of trial. It is important to be open to negotiation at any point – even when past efforts have failed. A negotiated settlement may obtain more precise relief than the court will order (at least initially), will obtain that relief more quickly, and can often benefit more clients by gaining the defendant's buy-in to the resolution.

**What to negotiate.** While resolution of the problem is the ultimate aim of any negotiation, there are many issues in a case that advocates may want (or be required) to negotiate: scheduling orders, discovery limitations, class certification.

**Pre-filing negotiation.** For many of the cases that may arise under Medicaid, advocates may already have filed administrative complaints with the state Medicaid agency or already had an opportunity to discuss with the state Medicaid agency the problems that exist and the barriers to resolving them. Early negotiations with state officials may come about naturally for advocates handling such cases. Once a complaint if filed, ethical rules will limit communications with state personnel.

Pre-filing negotiations can also be an opportunity to develop a relationship with opposing counsel and to outline the problems for them outside of the litigation context. It is also an opportunity to let them know that you have identified serious problems you intend to aggressively pursue legally. Before engaging in early negotiation, however, advocates should have a clear strategy regarding acceptable resolutions and time frames for negotiating. Otherwise, the other party can negotiate to no end, delaying relief all the while. Therefore, considering all the circumstances, set a time frame for any early negotiations and try to stick to it.

You may want (or be required by law) to state your demands in a detailed demand letter. By setting forth the legal support for your claims, along with the evidence that your prospective plaintiffs are being harmed by the defendants' actions, you may be able to convince the defendants of the need for changes and the likelihood of success in a lawsuit, as well as your determination to

pursue legal action.

The negotiation methods at your disposal before a case is filed are limited in some respects. You will not have access to court-ordered mediation or to a judicial settlement conference. If these methods would be helpful, if the parties are hostile to each other, for example, it may be advisable to wait until the litigation is underway before negotiating. Also, you may consider using the services of private mediators.

**Negotiation after filing.** Once a complaint is actually filed, advocates have some additional tools. First, a court-ordered settlement conference or mediation will usually be an option, if not required. Early on, check your Local Rules to learn the practice in your courts. With a knowledgeable and sympathetic judge or magistrate, this conference/mediation can be helpful. However, a hostile judge can damage plaintiffs' case and embolden the defendants to fight on. Regardless of a judge's attitude, do not assume that a judge will want to fashion a complicated injunctive remedy. Courts are increasingly reluctant to take on complicated supervisory roles in cases.

**Practice Tip:**
Federal Rule of Civil Procedure, Rule 16, requires a scheduling order. A scheduling conference may be held with the judge or magistrate. Use this time wisely. If your case involves clients who are not getting needed services, negotiate hard for an aggressive scheduling order. Seek tight deadlines for class certification and summary judgment. This lets the court know that you are prepared and educates the court about your claims and theory of the case.

**Preparing for Negotiation.** When deciding whether negotiation of solutions can begin in earnest, you need to determine whether you have enough information to formulate a solution. This includes information about the specific causes of the harm that your clients are suffering so that you can fashion an effective remedy. It may also require knowledge of the defendants' capabilities, as their counsel may not be aware of them. If you have not yet gathered enough information, early negotiations may

include convincing the defendants to give you the information you need. When negotiations begin, you should be certain of what you, and your client, will settle for.

Determine what additional information you need to formulate an effective settlement agreement. Make a list of all possible relief, and determine which items you will not settle without. If possible, prepare settlement language in advance of meetings with defendants, particularly if you plan to propose changes in policy. Make sure that the site where in-person negotiation will take place has ample space for all parties to adjourn for private discussions.

**Negotiation Styles.** Practitioners must decide for themselves what style of negotiation works best for them – confrontational, conciliatory, or something in between. You may want to bear in mind, however, that the nature of the relief you are seeking may well require the cooperation of the defendants if it is going to be implemented. The defendants know how their system works and, frequently, what is wrong with that system. Without the defendants' active and willing participation in problem-solving, success will be difficult to achieve.

**Publicity.** Publicity can be an effective part of your negotiation strategy. You may be able to present the problem in a way that rewards the defendants for negotiating, for example by showing them as concerned about the issue and working on an effective strategy. Depending on your case, you may want to contact:

- Friendly reporters, columnists or editorial boards and give them information about the story before filing a complaint.
- Provider or population-based groups. Many of these groups are experienced in publicizing the problems of your clients and will have connections in the press as well as strategies.

**HELPFUL RESOURCE:**

Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1983).

In this classic text, the authors describe their four principles for effective negotiation. They also describe three common obstacles to negotiation and discuss ways to overcome those obstacles. Many litigators swear by it.

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## E. Choice of Forum

This section discusses the different fora in which advocates might bring claims and some of the advantages and drawbacks of each. Generally speaking, fact-intensive individual problems are better handled in administrative hearings and in state court. Issues that will require systemic injunctive relief are better suited to a federal or state court forum.

### Administrative Proceedings

**Fair Hearings.** Medicaid applicants and recipients have the right to notice and administrative fair hearings when claims for assistance are denied or not acted upon with reasonable promptness or when an adverse action is taken against an individual.[2] Adverse actions are

[2] 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.200 *et. seq.* In states with managed care programs (most states), there will be an added layer of grievance and appeal. These processes must also comply with "due process," and federal requirements are set forth at 42 C.F.R. § 438.400 *et seq.*

terminations, suspensions or reductions of Medicaid eligibility or covered services.[3] When an adverse action is taken, a notice of the intended action generally must be sent at least ten days before the date of the action and services continued pending resolution of the issue.[4]

The state must provide a hearing that complies with due process. The claimant must have an opportunity to examine his or her case file.[5] The claimant must also be allowed to review any documents and records that will be used at the hearing by the state or local agency.[6] The hearing must be conducted at a reasonable time, date and place by an impartial hearing officer.[7] At the hearing, the claimant must be allowed to present witnesses, establish facts, present arguments, and cross examine adverse witnesses.[8] If a hearing involves medical issues and the hearing officer decides she needs an independent medical assessment, this assessment must occur at state expense and be made part of the hearing record.[9] A decision notice must inform the individual of the reasons for the decision and any additional administrative or judicial review that is available.[10]

> **Practice Tip:**
> If you are contacted by a client about a denial at an early stage, consider asking the client to send a letter, two-hole punched on top, to the provider stating the service requested, the date, and a request that the letter be made part of the medical record. This provides helpful evidence to the hearing officer regarding the specific nature and the length of time of the problem.

The fair hearing process works best when the problem is not based upon a systemic

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[3] 42 C.F.R. § 431.201.

[4] *Id.* at §§ 431.206, 431.211, 431.214.

[5] *Id.* at § 431.242(a).

[6] 42 C.F.R. § 431.242(a). The state must make past hearing decisions publicly available. *Id.,* § 431.244(f). This provides an important source of review to assure that an arbitrary action has not been taken against your client.

[7] 42 C.F.R. § 431.240(a).

[8] 42 C.F.R. § 431.242(b)-(e).

[9] 42 C.F.R. § 431.240(b).

[10] 42 C.F.R. §§ 431.244(a),(d),(e),(f).

policy, but upon individual facts. In some cases, it is not clear whether the problem is based upon an illegal policy or erroneous application of a policy that is legal. Under such circumstances, an administrative hearing for an individual can be a means to narrow and focus the issues. It can force the state to set forth its reasons for interrupting, terminating or denying a service, and thus reveal whether a system-wide policy problem lies at the root of your client's difficulty.

The fair hearing is designed to be informative, so be creative in your presentation of evidence. Make a record. Make sure your client can attend in person if at all possible. Submit pictures that illustrate their everyday life. Submit copies of current assessment forms and any diary logs of what happens during the day. If the treating provider cannot attend, submit an affidavit or see if the provider can participate by phone. If there is helpful medical research or academic literature, submit that as well. Submit *State Medicaid Manual* and federal transmittals that support your client. Consider filing a pre- and/or post-hearing brief that summarizes the evidence and cites helpful cases and previous administrative decisions to the court.

If you have more than one client who is experiencing the same problem, consider asking for a group hearing. Cumulative testimony can be powerful.

Finally, the hearing should occur at a "meaningful time and place."[11] If necessary, ask to have the hearing in the clients' home or by telephone.

**Practice Tip:**

Federal Medicaid regulations require the state Medicaid agency to make its fair hearing decisions available to the public. *See* 42 C.F.R. § 431.244(g). Cite this regulation to ask the agency for copies of these decisions. Compare their facts to your case. If the agency reaches a different result without justification, this could be the basis for claiming on appeal that an adverse decision was arbitrary and capricious.

**Rulemaking petitions.** Advocates should also consider whether their dispute is grounded in a lack of rules or the application of unwritten rules. If so, a rulemaking petition pursuant to the state Administrative Procedures Act (APA) may be the best avenue for relief. Consult your state's APA

[11] Goldberg v. Kelly, 397 U.S. 245 (1970).

on how to proceed.

In some states, the APA allows declaratory relief, thus providing another method of resolving situations that are not producing appropriate clients for administrative fair hearing or court actions.

**State Court Actions**

Advocates may consider bringing an action in state court. States will have their own laws implementing the Medicaid Act that contain parallel requirements to the federal law. Nearly all states have a statutory right to appeal an administrative decision to state court.

Advocates might also choose to file an action in state court under the state APA to avoid provoking disputes over filing suit against state officials in federal court. *See* discussion of common defenses, *infra.* Unlike in federal court, retroactive benefits are likely to be available in state court, which will sometimes diminish the importance of getting immediate preliminary relief. Advocates may be more familiar with state courts and state procedures and therefore might be more comfortable practicing there. State court procedures might be less formal and less burdensome than federal court and may move more quickly. Finally, both federal and state law claims can be brought against the state in state court, while only the former can be pursued in federal court (although a federal claim may lead to removal to federal court).

Advocates should consider whether their potential claims fit well within the parameters of the state code. The nature of judges in state court will be a consideration, whether they will be receptive to claims and how they might deal with the probably unfamiliar technicalities of health codes.

**Federal Court Actions**

Advocates may go directly to federal court and sue to enforce provisions of the Medicaid Act pursuant to 42 U.S.C. § 1983 and/or to assert a claim that the state law or regulation is inconsistent with and thus precluded by the Supremacy Clause of the U.S. Constitution

**Caution:** The case law concerning § 1983 and preclusion is complicated. There are numerous land mines. For helpful discussion, you may want to review:

- Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 38 CLEARINGHOUSE REV. J. OF POV. L. & POL. 720 (Mar.-Apr. 2005)
- Lauren K. Saunders, *Preemption as an Alternative to Section 1983*, 38

CLEARINGHOUSE REV. J. OF POV. L. & POL. 705 (Mar.-Apr. 2005).

Exhaustion of administrative remedies is generally not required before filing a case in federal court.[12] However, advocates should consult their jurisdictional law as courts may require the administrative process, once begun, to be finalized before going to court. Also, be aware that–regardless of whether it is justified– the exhaustion argument is being raised increasingly as a bar to Medicaid litigation. Be familiar with the precedent in your jurisdiction.

The federal courts have traditionally been considered a superior forum for Medicaid litigation in many jurisdictions.

- Federal courts interpret complex federal laws on a daily basis and oversee complex compliance issues. All federal judges have law clerks and administrative assistance.
- Federal judges are not subject to the same political pressures as state court judges who may be elected and have limited terms. Making a decision that has a negative impact on the state treasury might therefore be easier for a federal judge.
- Enforcement procedures in federal court are generally more effective than in state court. Most complex Medicaid cases deal with systemic state-compliance issues and will necessitate ongoing monitoring to ensure that settlements are implemented. State courts deal more frequently with damages than with ongoing, injunctive relief and may be less equipped to effectively enforce an injunction.

That said, this tradition of federal court enforcement is being revisited by advocates in every state. Advocates should consider the composition of the federal court and state court benches and recent decisions from each of these courts before reflexively filing in federal court. As always, the location of plaintiffs and witnesses and local rules of court should also be considered.

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[12] *See* Patsy v. Board of Regents, 457 U.S. 496 (1982) (exhaustion not prerequisite to § 1983 action). For additional discussion, *see* Anticipating and Addressing Defenses, *infra.*

## F. Individual v. Class Action

When developing litigation to obtain relief for Medicaid recipients, advocates will be considering whether it will be necessary to file a class action. This section discusses the considerations that may enter into this decision and issues that advocates may face when litigating these actions.

**Individual equitable relief**

Solving the problems that individuals encounter in Medicaid programs does not always require class relief. If a state has a policy that can be challenged, one plaintiff may be able to obtain the injunctive relief that will solve the problem for those affected. Generally, plaintiffs cannot seek money damages or other compensatory relief through Medicaid litigation in federal court (because of sovereign immunity obstacles), and the equitable relief that benefits a few individuals may benefit all those eligible to receive services.

Moreover, you may be able to cite Fed. R. Civ. P. Rule 71, which states in part: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party...."[13]

**Class actions**

> **CAUTION:** Federal Rule of Civil Procedure, Rule 23, which governs class actions, was amended effective December 1, 2003. Advocates must become thoroughly familiar with the revised rule prior to filing a class action case.

**Benefits of a class action.** Class actions have traditionally been used to correct systemic problems in state Medicaid systems. For the most part, advocates consider class litigation because a large number of people are being harmed by the manner in which the state is administering – or failing to administer – the benefits guaranteed by Medicaid. As Federal Rule of Civil Procedure, Rule 23, makes clear, one of the express purposes of a class action is to obtain appropriate final injunctive or other declaratory relief against a party who has violated the rights of a large number of people. Thus, it is logical for attorneys to consider the class option.

A class action promotes uniformity of decision and avoids the possibility of having differing rules for different plaintiffs on the same issues. In addition, most potential Medicaid plaintiffs are more vulnerable to retaliation than the typical plaintiff. They are in the position of having to

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[13] *See, e.g.,* Crum v. Alabama, 213 F.R.D. 592 (M.D. Ala. 2005) (citing Rule 71 and collecting cases).

demand services from, and place pressure on, a case worker, local program or managed care plan to whom they look for assistance and support. An individual action may alienate the provider or at least create tension between the case worker and recipient. A class action may enable a family to get relief with some degree of insulation from hostility from employees of the defendant.

**Requirements for bringing a class action.** Federal Rule of Civil Procedure, Rule 23, sets forth the requirements for bringing a class action. A plaintiff or group of plaintiffs may sue on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representatives of the class will fairly and adequately protect the interests of the class.[14] In addition, the class representatives must show one of three things, either that: (1) separate actions by the plaintiffs would create a risk of inconsistent, incompatible standards of conduct for the defendants or that adjudications with respect to the plaintiffs would dispose of or impede the interests of other non-parties; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or declaratory relief for the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members.[15] Typically, classes in Medicaid cases are certified on the grounds that injunctive and declaratory relief are appropriate. These actions are sometimes referred to as "(b)(2)" actions, after the subsection of Rule 23 that authorizes them.[16]

NOTE: Advocates litigating in state courts where the class action rules mirror Rule 23 should consider proceeding under subsection (b)(3) as well as subsection (b)(2), as the need for individualized monetary awards does not generally defeat class certification under (b)(3).

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[14] Fed. R. Civ. P. 23(a).

[15] Fed. R. Civ. P. 23(b).

[16] Classes certified on the grounds that common questions of fact or law predominate are generally filed to seek monetary damages, and are commonly known as "(b)(3)" classes. As Medicaid cases are generally seeking systemic, injunctive relief, the most appropriate route is through Rule 23(b)(2); therefore, we do not discuss (b)(3) actions here.

**Practical Barriers.** Advocates need to be aware that, despite their apparent advantages, class actions can present difficulties. First, advocates may lack money and time to bring these actions. An organization may not have enough lawyers who can dedicate the time needed to make an action successful and will not have the financial resources to hire more people. A class action necessarily involves more discovery than individual actions. Discovery, particularly depositions, is very expensive, as are costs and fees for experts. Written discovery may generate massive amounts of documents. Advocates will need to make sure they have support staff who can organize and catalog these extensive documents.

Advocates working for organizations funded by the Legal Services Corporation are prohibited from participating in class actions, which raises a practical problem for their clients. Such advocates, and others, should carefully consider the alternative approach of representing a group with standing to challenge the defendant's conduct. It will be difficult for the defendant to moot out such a plaintiff, and the group, like a certified class, will retain standing following judgment to engage in any necessary enforcement activities.

**Legal Barriers.** In addition to practical difficulties, litigants have encountered opposition to class certification. Defendants have claimed that the named plaintiffs are not typical of the class, that class definitions are overly broad and vague, that the named plaintiffs are inadequate class representatives, that the alleged class fails the prerequisites of commonality and typicality.

A couple of cases illustrate. *K.L. v. Valdez*[17] shows the problems that can arise when plaintiffs seek to enforce a number of different laws in one class action case. In *K.L.*, the plaintiffs sought to represent children who need therapeutic supports for mental and/or developmental disability and who are now or in the future will be in or at risk of state custody. In their complaint, the plaintiffs alleged that the state defendants violated the Medicaid Act; Individuals with Disabilities Education Act; Alcohol, Drug Abuse and Mental Health Reorganization Act; and the Fourteenth Amendment. The court refused to certify a class because the complaint did not identify any one claim common to all named plaintiffs and class members. According to the court, each claim was common to an imprecisely defined subset of plaintiffs, with no legal theory or factual issue common to all plaintiffs. The court also concluded there were potential conflicts of interest between the named plaintiffs and the putative class – with, for example, the plaintiffs needing screening motivated to pursue the EPSDT claims at the expense of the IDEA claims. Cases

[17] Civ. No. 93-1350 BB/LCS (D.N.M. June 26, 1996).

narrowly tailored to Medicaid Act violations can avoid these pitfalls.

In *Prado-Steinman v. Bush*,[18] the plaintiffs alleged that Florida state officials routinely denied or delayed home and community-based waiver (HCBW) services based on funding concerns rather than medical necessity concerns and systematically denied procedural due process protections required by the Medicaid Act. Defendants filed a Fed. R. Civ. P., Rule 23(f), petition for an interlocutory appeal of the district court's grant of class certification, arguing that the class failed to meet the commonality and typicality requirements. The court of appeals agreed and held that the class was "composed of too many subgroups with disparate legal claims to warrant certification."[19] The court remanded for determination of the appropriate subclasses into which this class would be broken. For example, the court suggested that "[a] separate EPSDT [Early and Periodic Screening, Diagnosis and Treatment] subclass [of children under age 21] may be appropriate if after further factual development it becomes clear that Defendants' alleged EPSDT policy is sufficiently different from its HCBW policy."[20]

Advocates should be aware that defendants are increasingly arguing that (b)(2) classes need not be certified because they will comply with whatever injunctive or declaratory relief that the court may order. These claims are meeting with some success.[21] If confronted with this issue, advocates might consider voluntarily foregoing class certification *if* the defendant agrees that the named plaintiffs can challenge any failure of the defendant to comply fully with any subsequent judgment, even if the plaintiffs themselves have been afforded relief.

Finally, Federal Rule of Civil Procedure, Rule 23, requires that notice of any proposed dismissal or compromise must be given to all members of the class as directed by the court. Methods of delivering notice to the class should be tailored to inform the class members of the terms of the proposed settlement, such as distribution through Medicaid offices, other public benefits offices, schools and hospitals or clinics serving low-income children; inserts in eligibility updates; or separate mailings.

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[18] 221 F.3d 1266 (11th Cir. 2000).

[19] *Id.* at 1280.

[20] *Id.* at 1282.

[21] For additional discussion, *see* Jane Perkins, *The "Necessity" of Class Certification* (December 2005), *available at* http://www.healthlaw.org.

**Fairness hearing**. In addition, the court must approve any settlement of a class action. Typically, the court will first require that notice be sent out, then will hold a hearing on whether the settlement is fair, adequate, and reasonable. Interested persons will be asked to comment on the fairness of the settlement. You may be listed as a contact person for individuals who have questions about the settlement. If you are contacted, provide information about the notice and how to comment. You should not try to convince the individual that the settlement is fair. Keep a record of the names of the individuals who call, along with the date, their city of residence, and the subject matter of the conversation. You can share your log with opposing counsel and the court.

While the fairness hearing need not be a full-blown trial, courts do look at a number of factors to make a determination of fairness, including: (1) the likelihood of plaintiffs' success on the merits; (2) the amount and nature of discovery and evidence; (3) the actual settlement terms and conditions; (4) the experience of counsel; (5) the potential future expense and likely duration of litigation; (6) the recommendations of neutral parties; (7) the number and nature of objections to settlement; and (8) the good faith and lack of collusion on behalf of the parties.[22]

[22] *See, e.g.,* Boyle v. Arnold-Williams**,** No C01-5687JKA, 2006 U.S. Dist. LEXIS 91920 (W.D. Wash. Dec. 20, 2006); Rolland v. Celluci, 191 F.R.D. 3 (D. Mass. 2001).

## Class or Individual Plaintiffs? Considerations

- Does your organization have the ability to bring a class action?
  - Financial Resources
  - Time Resources
  - Expertise
- Are there LSC funding restrictions?
- Can equitable relief to an individual solve the problem?
- Is there a group with standing that you can represent instead of a certified class?
- Are your plaintiffs' claims in danger of becoming moot?
- Is it necessary to show widespread harm to prove your claims, i.e. to show systemic abuses?
- Is your client the third party beneficiary of an existing order that can be enforced pursuant to Fed. R. Civ. P. 71?
- Are you considering bringing your suit in a jurisdiction with law making it difficult for you to certify the class?
- Does the class you propose to certify meet the requirements of Fed. R. Civ. P. 23(a) and Rule 23(b)?
  - Numerosity
  - Common Questions of Law or Fact
  - Typicality of Claims and Defenses
  - Representatives will Fairly and Adequately Protect Interests.

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## G. Preparing Complaints in "Manageable Analytic Bites"

Federal Rule of Civil Procedure, Rule 8, requires notice pleading, that is filing a complaint with a "short and plain" statement of claims and facts. However, a recent Supreme Court decision demands more in cases that seek to enforce federal statutes through 42 U.S.C. § 1983.[23]

In *Blessing v. Freestone*, the Court held that "[o]nly when the complaint is broken down into manageable analytic bites can a court ascertain whether a federal statute creates rights."[24] This case requires you to break the complaint into discrete and specific allegations that closely correspond to statutory requirements that can be enforced.

In *Blessing*, five plaintiffs sued the director of the Arizona Department of Economic Security pursuant to § 1983, alleging that the director had failed to "substantially comply" with the requirements of Title IV-D of the Social Security Act. The Act required that a state, as part of its Aid to Families with Dependent Children program, operate a comprehensive child support enforcement system that collected payments, established paternity, located absent parents, and obtained further support orders. Plaintiffs alleged that the defendant had failed to comply with this requirement and requested that the court order "substantial compliance" with the statute. The Supreme Court held that it could not ascertain whether the plaintiffs had raised claims that were enforceable because they had failed to break down their complaint into "manageable analytic bites." The court reasoned that "only by manageably breaking down the complaint into specific allegations" can a court determine whether "each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights."[25]

While the full import of *Blessing* is still being debated, at the very least the case calls upon advocates to match clients carefully with claims and to set forth the precise facts that tie each plaintiff's harm to the requirements that form the legal basis for the case.

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[23] For additional discussion, *see* Anticipating and Addressing Defenses, *infra.*

[24] *Blessing,* 520 U.S. 329, 342 (1997). *See also*, *e.g.,* Diggs v. Housing Authority of the City of Frederick, 67 F. Supp. 2d. 522, 531-32 (D. Md. 1999) ("The [statute] may not be analyzed as a generic whole.").

[25] *Blessing,* 520 U.S. at 342.

**Complaint Checklist**

Make sure the complaint:

✓ Clearly establishes that at least one plaintiff has standing to assert each of the legal claims

✓ Sets forth each provision of the Medicaid Act at issue with clarity

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## H. Form of Relief

This section addresses the different types of relief that advocates may consider: temporary restraining orders, preliminary and permanent injunctions, declarations and summary judgment. It focuses on the federal rules in this area, so advocates filing in state fora will need to check parallel state law on the issue.

**Temporary Restraining Orders.** Under the federal rules, a temporary restraining order may be granted without notice if: (1) it clearly appears from specific facts, shown by affidavit or verified complaint, that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing any efforts which have been made to give notice, along with reasons that notice should not be required.[26] A TRO can last no more than ten days, unless it is extended for good cause or with the opposing party's consent.[27]

[26] Fed. R. Civ. P. 65(b).

[27] *Id*.

The TRO can be transformed into a preliminary injunction. When a TRO is granted, a motion for preliminary injunction must be set for hearing at the earliest possible time. At that hearing, the moving party must come forward with the application for a preliminary injunction or the TRO will be dissolved.[28] Similarly, judges denying a TRO will typically set the preliminary injunction hearing for the earliest possible time. Thus, advocates seeking temporary relief must be prepared to move forward with their case.

As the rule specifies, filing for a TRO is appropriate when you are representing an individual who will suffer great harm in a very brief period without the order. Facts are usually very much the focus of these actions. Examples include cases where:

- an individual living at home will be institutionalized because services are being taken away
- an individual needs a life-saving procedure
- an individual needs a specific service to avoid significant deterioration in their condition.

Given the exigency of such circumstances, advocates should make filing the case with the court their primary concern – even if this means that their pleadings are not as polished as might otherwise be the case. For example, supporting case law can be presented with citations and annotated statements of the holding, rather than through developed discussion of facts, holdings, and application of the holdings to the case at hand.

**Preliminary Injunctions.** A preliminary injunction is issued for the same reasons as a TRO, when a party will suffer serious and irreparable harm without expedited relief requiring the other party to do or not to do something. Preliminary injunctions are used in circumstances less time-constrained than TROs and generally cannot be issued without notice. The federal rules do not set forth specific requirements for application other than requiring notice. Advocates should check their local rules and case law, or, if filing in state court, state rules.

Generally speaking, applicants for a preliminary injunction must show: (1) they will suffer irreparable harm without the injunction; (2) the likelihood of success on the merits of their case; (3) that the benefits of the injunction will outweigh the burden to the party against whom the injunction will issue; and (4) that an injunction is consistent with the public interest. Advocates should be

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[28] *Id.*

aware, however, that the test for issuance of a preliminary injunction varies somewhat among the circuits.[29] In some jurisdictions, as the potential for harm increases, so does the justification for the court to issue the injunction. Many courts have found that the denial of needed Medicaid benefits or even the threat of such a denial constitutes significant irreparable harm, stating, for example:

- The danger to plaintiffs' health, and even their lives, that may result from termination of Medicaid benefits gives plaintiffs a strong argument of irreparable harm.

  - *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003)

- The nature of the claim – a claim against the state for medical services – makes it impossible to say that any remedy at law could compensate them.

  - *McMillan v. McCrimon*, 807 F. Supp. 475, 479 (C.D. Ill. 1992)

- Wrongful denial of government benefits may constitute irreparable injury ... particularly where, as here, the denial results in a disruption of the family unit and a consequent threat to the health of the claimant.... The possibility that a plaintiff might be forced to enter an institution constitutes irreparable harm that cannot be prevented or fully rectified by a later judgment.

  - *Maine Ass'n of Interdependent Neighborhoods v. Petit*, 647 F. Supp. 1312, 1315 (D. Me. 1986)

- Termination of benefits that causes individuals to forgo such medical care is clearly irreparable harm.

  - *Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983)

- Irreparable injury is shown when enforcement of a Medicaid rule "may deny [plaintiffs] needed medical care."

  - *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982)

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[29] For circuit court of appeals cases setting forth the standard, *see, e.g.,* Jolly v. Coughlin, 76 F.3d 468 (1st Cir. 1996); Sweeney v. Bane, 996 F.2d 1384 (2nd Cir. 1993); Brian B. v. Pennsylvania Dep't of Educ., 230 F.3d 582 (3rd Cir. 2000); Microstrategy, Inc. v. Motorola, Inc., 245 F.3d 335 (4th Cir. 2001); Evergreen Presbyterian Ministries, Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000); Southwest Williamson County Community Ass'n v. Slater, 243 F.3d 270 (6th Cir. 2001); Legacy Healthcare, Inc. v. Feldman, 11 Fed. Appx. 589 (7th Cir. 2001); Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006); Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832 (9th Cir. 2001); Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001); McDonald's Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998); Al-Fayed v. C.I.A., 254 F.3d 300 (D.C. Cir. 2001).

Your preliminary injunction motion will be accompanied by declarations, at least from the plaintiffs who are describing how they are being harmed. Note that unsworn declarations can be used if they meet the requirements of 28 U.S.C. § 1746 (however, verify this against local rules). While preliminary injunctions are often heard on the pleadings and oral argument, you should consider asking to present testimony from witnesses at this point. Frequently the circumstances of the plaintiffs are compelling, and it may be best for the individuals to tell the story in person. In addition, the defendant may present witnesses as well, thus providing an excellent, early opportunity to explore their evidence and defenses.

**Declaratory relief.** Declaratory judgements are authorized by 28 U.S.C. § 2201. They describe the rights and responsibilities of the parties and may form the basis for follow up activities in a state forum.

**Permanent Injunctions.** A permanent injunction can issue after a resolution of the case – following a consent decree, summary judgment, or as the result of a trial on the merits. The plaintiff needs to prevail on the underlying merits of his or her claim, as well as show that injunctive relief is appropriate.

**Summary Judgment.** A plaintiff may be awarded summary judgment on a showing that there is no genuine issue of material fact and plaintiffs are entitled to judgment as a matter of law.[30] Motions for summary judgment are often used in Medicaid cases because the issues involved concern whether the state's admitted rules, policies and practices comply with federal requirements. Motions for summary judgment are often filed after discovery has been conducted. Under these circumstances, affidavits and other evidentiary items will be attached to the motion. Advocates may also file for partial summary judgment on individual issues.

**Trial.** If the case cannot be settled or disposed of through dispositive motions, then a trial will be necessary. The next sections discuss discovery and witness management that will lead to effective trial advocacy.

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[30] Fed. R. Civ. P. 56(c).

## I. Developing and Managing Discovery

The Federal Rules of Civil Procedure require parties to make initial discovery disclosures without awaiting a discovery request.[31] Thus, while an organized discovery plan has always been an essential ingredient to successful case management, the Federal Rules make it that much more important for the Medicaid advocate to think through discovery as early in the case as feasible.

**Developing a Discovery Plan**

It is helpful to write a detailed discovery plan that includes all of the elements that you must prove to make your case and matches them with the type of discovery you plan to do to prove that point (e.g. depositions, affidavits, expert testimony). Indeed, it is a good idea to think about these elements when you first begin to draft the complaint, as doing so may help you decide which of your viable claims you choose to pursue.

Advocates should consider preparing a detailed internal schedule for discovery, incorporating any court-ordered deadlines and assigning responsibility for tasks. The schedule should allow for the possibility that defendants will not comply or will raise objections, making it necessary to file motions to compel. The plan should take into account limitations on the number of written requests or depositions that are imposed by federal or local rule. Making such a plan provides an opportunity for advocates to consider the potential expense of the discovery they are planning and to budget accordingly.

Using Medicaid Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services as an example, the following broad categories of information will likely be important:

- Descriptions of policies and practices related to:
    - identifying needs of current and potential Medicaid recipients
    - applications for benefits
    - EPSDT screens and treatment services
    - managed care obligations, including contracts, policy issuances
- Materials and policies for informing beneficiaries and applicants about:

[31] *See* Fed. R. Civ. P. 26(a).

    - benefits
    - screens and treatment services
    - transportation and appointment scheduling assistance
    - enrollment in a managed care plan that is to provide EPSDT
    - applying for home and community based services
- Quality management reports, external reviews, site visits, audits and similar documents
- Copies of beneficiary and provider complaints and beneficiary fair hearing decisions
- Correspondence between the federal government and state regarding EPSDT
- EPSDT Reporting Form-416 (current and past forms submitted)
- To discover problems associated with provider shortages:
    - number of licensed, active providers in the state
    - number of Medicaid-participating providers
    - rates of Medicaid v. other private/public reimbursement for providers
    - sources of providers
    - utilization of the needed services by Medicaid beneficiaries and those insured through other programs
- To discover notice and complaint problems:
    - copies of notices
    - policies regarding when notice of termination of benefits is given
    - provider and managed care contract provisions concerning notice and complaint processing
- To determine problems with outreach and informing:
    - copies of current brochures and materials describing the EPSDT program
    - list of recipients of materials, when provided and where available
    - readability/reading level of materials
    - copies of materials describing the managed care program
    - copies of materials describing home and community based care programs
- To determination problems with long waits for home and community care:
    - number of children on wait lists and services needed
    - information related to how wait list is compiled and monitored
    - information related to how much time is spent on wait lists
    - information on status of home care provider availability

- information on the relationship among wages, reimbursement rates, and provider turnover; survey/exit interviews to confirm cause of turnover

**Pre-litigation discovery.** Effective information gathering can take place informally before the case is filed. Local providers and community groups should be interviewed. Many states and managed care organizations have extensive web-based information, which can help you shape discovery requests and eliminate unnecessary interrogatories and requests for production. If advocates have friendly relationships with employees of the state Medicaid agency, including hearing officers, they should make sure they have gathered all of the information from these people that they can before filing a suit. Knowledgeable persons from other agencies (e.g. mental health division, developmental disabilities division) should also be contacted.

A public records request may be filed early on to obtain relevant documents.

**Formal Discovery.** Generally, discovery in Medicaid cases involves much information. Conducting it in stages can be helpful. As mentioned above, informal gathering of information should be the first step.

The first set of formal discovery requests can be used to further clarify and narrow the issues and to learn more about the defendants' potential responses to your case. Strategy comes into play. You may decide that your initial formal discovery will be a select number of depositions of the administrators who work with the program on a daily basis. This is useful if you are fairly certain of what these individuals will respond and that it will be helpful to lock in the defendants to their problems.

On the other hand, you may decide to open discovery with a fairly open-ended request for production of documents that refer or relate to your particular Medicaid issue. The information obtained from these documents can be used to plan further discovery, including depositions. You can either depose named individuals based upon what you learn from the documents, or use Fed. R. Civ. P. Rule 30(b)(6) depositions, which require the defendant to produce the most knowledgeable individual with regard to the information that you seek and treat the testimony of those produced as admissions of the defendant. Another option provided by Rule 30 is a subpoena duces tecum, which requires a prospective deponent to bring specified documents to the deposition. A subpoena duces tecum submitted along with the deposition notice may yield more information than a regular request for production of documents, because the advocate has the opportunity to ask the deponent

in person about each document that has been produced and whether any similar documents exist. When a response is given to a request for production, by contrast, the advocate only has the defendants' attorney's assurance that all possible documents have been produced.

In some cases, well-targeted interrogatories will reduce document production and clarify issues for both parties. As the case develops, you may decide to serve contention interrogatories to further narrow the case, for example:

> What do you contend is a reasonable standard or norm for travel distances and/or travel time for Medicaid recipients to experience in obtaining dental care?
>
> With respect to your answer to the immediately preceding interrogatory, please:
>
> (a) state any and all facts that support your contention;
>
> (b) identify each and every person having personal knowledge of each such fact; and,
>
> (c) identify each and every document which relates to or evidences any fact on which you base your contention.

**Requests for admission** can be used in place of or in addition to the contention interrogatories. One advantage of this approach is that, under the Federal Rules of Civil Procedure, there are no numerical limits on requests for admissions, as there are on other forms of discovery. (You should check your Local Rules for limits.) In addition, if the defendant fails to admit facts or the application of fact to law and you subsequently establish those facts (by prevailing on summary judgment for example), Rule 37(c)(2) may provide for the granting of attorneys fees for the work that was necessary to prove the facts that were not admitted. Therefore, if your case otherwise lacks an attorney's fee claim, and you serve a comprehensive set of requests for admission early on in the litigation, you may eventually be granted fees for some of your work in the case.

**Common Objections**

**Privilege.** Defendants may claim that state or federal law prohibits the disclosure of some protected information related to the provision of psychiatry, psychology or other behavioral health services. This type of information is generally protected from disclosure by state statute, and possibly by the Health Information Portability and Accountability Act (HIPAA), and defendants

may argue that they cannot disclose it.

Plaintiffs can deal with this in several ways. First, in some cases, the information sought does not actually fall under the prohibition against disclosure, and advocates can make the case to a judge that it should be disclosed.[32] When information arguably is privileged, plaintiffs can propose that the parties enter into a stipulated protective order or can seek such an order from the court. [33] As noted in the Federal Rules of Civil Procedure, Rule 26(a), the content of these protective orders can vary to suit the circumstances. For example, the order can provide that documents with sensitive information will be filed under seal, to be available only to the court and the parties, or that sensitive information will be redacted.

**Confidentiality.** Responses requested through discovery may contain information that has names, social security numbers, and other personal information. Defendants may claim that federal regulations prohibiting disclosure of confidential information about Medicaid recipients,[34] or that a similar state law, prevent disclosing recipients' names and information. Again, disclosing information under seal is a possible solution.

**Burdensomeness**. Defendants may object to discovery on the ground that it is unduly burdensome. Advocates should make sure that their requests are no broader than needed, not only to avoid this objection, but to prevent a flood of documents that are not necessary. If the objection is made, advocates should consider whether the requests could be narrowed. For example, you may be able to reduce the number of years for which you request information.

**Managing Discovery Documents**

In addition to following a discovery plan, advocates can take a number of steps to help them manage documents. Before beginning discovery, advocates should ensure there is filing space to contain the produced documents. Advocates should determine a filing system for the documents. Computerized document management systems can be used, as can part-time paralegals or law

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[32] *See, e.g.,* Boudreau v. Ryan, 2001 U.S. Dist. LEXIS 12996 (N.D. Ill Aug. 24, 2001) (holding that disclosure of wide variety of documents related to home and community based behavioral health services did not fall under psychotherapist privilege).

[33] *See, e.g.,* Rosie D. v. Romney, 256 F. Supp. 2d 115 (D. Mass. 2003) (requiring disclosure of information from Medicaid agency's non-defendant agents, subject to protective order).

[34] 42 C.F.R. § 431.300 *et seq.*

students to index and organize materials. Another possibility is to seek volunteer assistance from a local law school or AARP chapter. You can also ask a private law firm to donate their administrative manager of discovery to spend a morning with your office giving suggestions and pointers on organizing discovery.

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## J. Expert Witnesses

An expert witness can be crucial to making a successful case. This section discusses the selection of expert witnesses, possible sources for them, as well as how to use them.

**Types of Experts.** Medicaid cases implicate medical issues, such as public health, preventive care, and treatment of physical and mental conditions; administrative issues, including functioning of state Medicaid systems, computer systems and managed care organizations; economic issues, like cost effectiveness, budget neutrality for waivers, and adequacy of reimbursement rates and wages. Experts are helpful not only to prove a case but also to formulate remedies and discovery. Lawyers will need to call on expert assistance both to understand what is wrong with the system they are trying to change, as well as to present evidence to the finder of fact on what to change and how to change it.

**Retaining experts.** Discussions with potential experts should begin early on. Experts should be retained in writing. When introducing your case to a potential expert, present the facts, claims and expected defenses objectively; state the subject matter of the testimony you seek; then, ask the individual if they are comfortable testifying for your clients. Make sure your experts are sufficiently credentialed or experienced and that their area of expertise fully overlaps with the scope of their testimony.

You should not ask your experts to place initial opinions in writing, circulate draft reports, or prepare evidence summaries because these written products may be discovered by the opposing party. Always be professional in your discussions with your experts.

The Federal Rules of Civil Procedure, Rule 26, generally requires parties to disclose the identity of any "testifying experts" – persons who are retained or specially employed to provide expert testimony who may be used as an expert at trial. Unless otherwise directed by the court, this disclosure will include a report from the expert stating, among other things, the opinions to be expressed, data and information considered, qualifications, and compensation. Generally, a party cannot depose the expert until after the report has been submitted. During the deposition or at trial, opposing counsel can ask your expert to testify about your conversations (as these conversation arguably could form a basis for the expert's conclusions and are not considered work product by most courts).

In addition to testifying experts, you may also retain "consulting experts" – persons who you do not intend to call at trial but who will be used to provide advice. These individuals are working for you, and their work should be privileged as work product. A party can discover facts or opinions held by experts who are *not* expected to testify at trial only in exceptional circumstances.

The issue of pay should be thought out. Some offices do not use donated time – on the theory that "you get what you pay for." Other advocates make the decision based on the nature and extent of the work needed and the interest of the potential expert. For many offices, the reality is limited funds, and sources of reduced or no-cost assistance will need to be explored.

**Sources for experts.** Advocates can draw upon professionals who have relationships with individual plaintiffs or the plaintiff class – treating physicians, dentists, psychologists, case managers. For broad, systemic issues, you should look to the academic literature. You may be able to identify an academic who will be interested in studying and publishing on a topic that is at issue in the case. You may find experts by targeting conferences where sessions in the relevant subject matter will occur. The national support centers mentioned in the co-counseling discussion frequently receive invitations to such conferences and may be a source of referral.

**Where to Find Experts or Referrals**

Universities (Medical schools, Social sciences programs, Behavioral health programs)

Professionals caring for plaintiffs

National and state legal support centers

Former employees of the Center for Medicare & Medicaid Services or state Medicaid agency

National conferences

Web-based searches

Academic literature

As you develop experts, you may actually find it helpful to "over-identify," that is to retain more experts than you actually end up using at trial. This helps you to be sure in the early phases of the case that you will have all bases covered as the case progresses. In all cases, theses five tips for successful experts may be helpful:

1. Does the expert support your theory of the case?
2. Does the expert have expertise in the subject matter of your case?
3. Does the expert have proper credentials?
4. Does the expert have the available time to devote to the case?
5. Will the expert make a good witness?[35]

**A word on expert scientific testimony**

In *Daubert v. Merrell Dow Pharmaceuticals*,[36] the Supreme Court set forth the test for admitting expert scientific testimony under the Federal Rules of Evidence. The classification of

[35] Source: Robert Newman, Staff Attorney, Western Center on Law and Poverty, Los Angeles, CA (2001).

[36] *Daubert,* 509 U.S. 579 (1993).

"scientific" can apply to some of the testimony being offered in a Medicaid case, including, for example, epidemiologic information.

When determining whether to admit scientific testimony, a trial judge must determine whether the expert is proposing to testify to: (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. The court must make a preliminary assessment of whether reasoning or methodology underlying the testimony is scientifically valid (grounded in "methods and procedures of science") and whether it can properly be applied to the facts in issue. *Daubert* sets forth general guidelines to assist trial courts in making this determination, making clear that the guidelines are not intended to be a closed-ended test:

- Whether the theory or technique in question has been tested
- Whether the theory or technique has been subjected to peer review and publication
- What is the known or potential rate of error of the technique and have adequate standards been maintained to govern review
- Whether the theory or technique enjoys widespread acceptance in the scientific community.

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## K. Anticipating and Addressing Defenses

It is now increasingly common for states to raise defenses in Medicaid cases in motions to dismiss, filed after the complaint and in lieu of an answer. It is important to anticipate these arguments. While the listing is by no means exhaustive, the following defenses are being raised:

- The state has sovereign immunity from the suit.
- The Medicaid provisions cannot be enforced pursuant to § 1983.
- The plaintiff failed to exhaust administrative remedies.
- The case is moot.

Each of these defenses is discussed below.

### Sovereign immunity

The Eleventh Amendment provides that federal courts cannot hear suits against states by citizens of another state or a foreign state.[37] Despite the plain language of this amendment, a nineteenth-century case, *Hans v. Louisiana,*[38] holds that the Eleventh Amendment also prohibits federal courts from hearing citizens' suits against their own state. An exception to state sovereign immunity exists for suits in federal court against *state officials* seeking *prospective injunctive* relief for *ongoing violations* of *federal law*. This is known as the "*Ex parte Young*" exception. [39]

Nevertheless, recent Supreme Court cases in other areas of the law have caused states to raise Eleventh Amendment sovereign immunity claims in Medicaid cases. These arguments typically include one or all of the following (and all can be responded to effectively):

- Because the relief that plaintiffs seek will require financial expenditures by the state, it is, in essence, a case for damages and as such is barred by the Eleventh Amendment.
- The state implicates "special sovereignty interests" in deciding how to administer the

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[37] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amd. XI.

[38] 134 U.S. 1 (1890).

[39] Ex parte Young, 209 U.S. 123 (1908). *See, e.g.,* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (*Ex parte Young* is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States'").

Medicaid program, thus an Eleventh Amendment bar.

- The case merely seeks to enjoin state officers to comply with the state Medicaid plan and would, thus, require the federal court to order the state to comply with state law, an order which the Eleventh Amendment precludes.
- The plaintiffs are getting some care, so there is no ongoing violation of federal law, thus an Eleventh Amendment bar.[40]

**Enforcing Medicaid provisions pursuant to § 1983**

The Medicaid Act does not itself provide a cause of action; however, section 1983 of the Civil Rights Act does provide an express cause of action when, under color of state law, an individual is denied rights, privileges or immunities that are guaranteed by the U.S. Constitution or laws. Medicaid advocates are increasingly likely to see a motion to dismiss based on the argument that the Medicaid Act provision at issue is not enforceable pursuant to § 1983.

The Supreme Court has established a test to determine whether a federal law is enforceable under § 1983**:** (1) the statute must create an enforceable right and (2) Congress must not have foreclosed enforcement of the statute in the enactment itself.[41] To determine whether there is an enforceable right, a three-prong test is applied:

(1) Was the provision in question unambiguously intended to benefit the plaintiff?

(2) Does the provision in question contain sufficient mandatory language to create a binding obligation on the state, or does it merely express a congressional preference?

(3) Is the provision's language specific enough to create an enforceable right, or is it too vague and amorphous?[42]

Once a plaintiff satisfies the three-prong test, there is a rebuttable presumption that the provision is enforceable under § 1983. The burden then shifts to the defendant to show that Congress has foreclosed enforcement of the statute. To answer this question, the Court asks:

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[40] For assistance and model briefing responding to these claims, please consult the Court Watch folder on our website or contact NHeLP's Chapel Hill office, (919) 968-6308..

[41] *E.g.* Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 508 (1990).

[42] *See*, *e.g.,* Gonzaga Univ. V. Doe, 536 U.S. 273 (2002); Blessing v. Freestone, 520 U.S. 329 (1997) (focusing on 2nd and 3rd criteria, denied enforcement of a Title IV-D provision, in part, because statute did not identify with particularity the rights claimed); *Wilder*, 496 U.S. at 509.

(1) Does the statute expressly foreclose enforcement through § 1983?

(2) Does the statue itself create a comprehensive remedial scheme that demonstrates Congress' intent to preclude the use of § 1983?[43]

The Supreme Court has previously held that the Medicaid Act does not preclude § 1983 enforcement.[44]

Since the Supreme Court's 2002 decision in *Gonzaga University v. Doe,* the test for enforcing federal statute through § 1983 has tightened.[45] *Gonzaga* concerned the Federal Educational Rights and Privacy Act (FERPA), which is a spending clause enactment but not part of the Social Security Act. The specific FERPA provision at issue provides:

> No federal funds shall be made available … to any education agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information …) of students without the written consent of their parents. 20 U.S.C. § 1232g(b)(1).

The Court refused to allow the plaintiff to enforce the provision through § 1983, stating "[W]e have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights." According to the Court, Congress' authority to place conditions on the granting of federal funds makes Spending Clause programs "much in the nature of a contract." Thus, unless Congress "speak[s] with a clear voice" and manifests an "unambiguous" intent to confer individual rights, federal funding provisions provide no basis for private enforcement under § 1983. The Court found the provision unenforceable because it contained:

> **No rights- or duty-creating language.** The majority found that "rights- or duty-creating language" is critical to showing the requisite congressional intent to create rights enforceable against the state. The majority contrasts the language of FERPA–"no funds shall be made available"–with the language of Civil Rights Act statutes, which the Court stated confer individual rights by providing that "No person in the United States shall . . . be subjected to

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[43] *E.g.* Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

[44] *Wilder*, 496 U.S. at 521-23.

[45] *Gonzaga*, 536 U.S. 273 (2002).

discrimination" on the basis of race, color or national origin (Title VI) or on the basis of sex (Title IX).

**Aggregate, not individual, focus.** The majority notes that FERPA's non-disclosure provisions speak only in terms of institutional policy and practice, not individual instances of disclosure. According to the Court, the provision does not show concern for the needs of a particular individual, but rather the policies of an educational institution. Moreover, the provision primarily directs the Secretary of Education's distribution of public funds.

**Provisions for Enforcement.** Congress authorized the Secretary of Education to deal with violations of FERPA by creating a centralized office and review board for investigating and adjudicating violations. This, according to the majority, further counseled against finding a congressional intent to create individually enforceable private rights.

Since *Gonzaga:*

1. **Judges are reviewing claims provision-by-provision.** Early on, a few judges had seemed to apply *Gonzaga* broadly to say the Medicaid Act cannot be enforced. Recent Court of Appeals decisions, however, are applying a provision-by-provision analysis as they look for a focus on "individual" Medicaid beneficiaries.

2. **The Social Security Act enforcement amendment is receiving uneven deference.** Interestingly, in 1994, Congress stated that provisions of the Social Security Act can be privately enforced. *See* 42 U.S.C. §§ 1320a-2, 1320a-10 ("In an action brought to enforce a provision of this [Social Security Act] chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan."). While the provision is forming the basis for some decisions, other courts have not found it persuasive.[46]

3**. Provider suits are faltering.** Many of the adverse decisions have involved suits filed by health care providers. Even before *Gonzaga* was decided, a number of courts had refused to allow health care providers to enforce Medicaid Act provisions, stating that the Act was intended to benefit Medicaid beneficiaries. Since *Gonzaga,* the courts are even less receptive to provider suits.

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[46] *Compare* Rabin v. Wilson-Coker, 362 F.3d 190 (2d Cir. 2004) (citing § 1320a-2 to allow beneficiaries to enforce a Medicaid Act provision) *with* Sanchez v. Johnson, 416 F.3d 1051, 1057 (9th Cir. 2005) (finding little significance in § 1320a-2 and refusing to enforce a Medicaid Act provision).

Unfortunately, as with many court decisions, the opinions in these cases include discussion beyond enforcement by providers, and these statements can be harmful to Medicaid beneficiaries who may later seek to enforce the Act.

4. **Courts are refusing to allow enforcement of federal regulations.** Even though § 1983, by its terms, applies to the federal "constitution and laws," courts are refusing to allow plaintiffs to enforce federal regulations pursuant to § 1983. The courts are focusing on congressional intent to create federal rights in federal statutes and will not allow individuals to enforce regulations that create obligations beyond those created by the statute.

5. **The Supreme Court remains interested.** Concurring opinions filed in *Pharm. Res. & Manufacturers of Am. v. Walsh*, confirm that the arguments against enforcement are not going away.[47] According to Justice Scalia, the Medicaid Act claim in the case should have been rejected because the remedy for a state's failure to adhere to the Medicaid Act is termination of funding by the Secretary of Health and Human Services. According to Justice Scalia, a plaintiff must seek enforcement of the Medicaid condition through that authority and "may seek and obtain relief in the courts only when the denial of enforcement is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[48] Justice Thomas observed that Spending Clause legislation is "much in the nature of a contract," and the "contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation...."[49]

The National Health Law Program maintains a docket of cases that assess the enforceability of Medicaid Act provisions under § 1983. Please consult the docket and its updates when deciding whether to include causes of action in a complaint or responding to a motion to dismiss.[50]

**Failure to exhaust administrative remedies**

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[47] 538 U.S. 644 (2003).

[48] *Id.* at 675 (quoting the Administrative Procedures Act, 5 U.S.C. § 706(2)(A)).

[49] *Id.* at 682-83.

[50] *See also* Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, CLEARINGHOUSE REV. J. OF POV. L. & POL. 720 (Mar.-Apr. 2005).

The Medicaid Act includes an administrative fair hearing process for individuals whose claims for assistance are denied or not acted upon promptly.[51] Regulations make the process available where an "adverse action" occurs, meaning termination, suspension or reduction of Medicaid eligibility or covered services, including decisions by nursing facilities to transfer or discharge patients.[52] Thus, some cases which advocates will consider filing can also be addressed, on an *individual basis*, through the administrative hearing process. In a number of cases, however, the advocate may determine that administrative relief will not provide the benefits that are needed, that such relief will be futile, or that going through the process will only create delay before a court action is ultimately filed. Fortunately, program applicants and recipients are not generally required to exhaust administrative remedies when seeking to enforce provisions of the Medicaid Act pursuant to 42 U.S.C. § 1983.[53]

Despite the fact that the law is generally well-settled on this point, defendants may raise this issue. For example, if the administrative hearing process has been initiated and a § 1983 action is then filed, the defendant may seek to require exhaustion by asking the court to abstain from ruling until the state process has been completed. Once the fair hearing has been conducted, the state may seek to have the federal court afford preclusive effect to any findings of fact and perhaps even conclusions of law reached by the hearing officer.

**Mootness**

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[51] 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.200, 431.206(c); 42 C.F.R. §§ 431.200-431.250.

[52] 42 C.F.R. §§ 431.206(b), 431.210, 435.912, 435.919.

[53] *See* Patsy v. Board of Regents, 457 U.S. 496 (1982) (exhaustion not a prerequisite to § 1983 enforcement action). *See also, e.g.*, *Wilder* , 496 U.S. at 523 (1990) ("availability of state administrative procedures ordinarily does not foreclose resort to § 1983"); Felder v. Casey, 487 U.S. 131 (1988); Skubel v. Fuoroli, 113 F.3d 330 (3rd Cir. 1997) (exhaustion of Medicaid administrative rule making process would be futile). *But see* Arden House, Inc. v. Heinz, 612 F. Supp. 81 (D. Conn. 1985) (holding provider should take rate claims through state processes).

Advocates may face claims that their case has become moot during the course of the litigation and that the case should therefore be dismissed.[54] This may occur when the defendant has provided some of the previously withheld Medicaid services to plaintiffs or when there has been a change in circumstances that affects plaintiffs' rights to the relief requested – for example, plaintiffs have become financially ineligible for Medicaid or moved out of state.

A change in circumstances does not automatically or necessarily make a case moot. First, voluntary cessation of the challenged conduct by the defendant (e.g. providing some services) does not moot a case unless "there is no reasonable expectation that the violation will recur .... [Defendant's action must] have completely and irrevocably eradicated the events of the alleged violation."[55] Moreover, if a problem is "capable of repetition but evading review," a case may not be rendered moot by a change in circumstances depriving a plaintiff of standing. Under this exception to the mootness doctrine, the case proceeds because the challenged action is of too short a duration to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation or demonstrated probability that the same complaining party could be subjected to the same action again.[56]

Advocates may face difficulty if the claims of individual named plaintiffs do become moot. To stay in court, the plaintiff will need to show that the challenged harm is capable of repetition but evading review. Filing the case as a class action can also avoid this problem: If the named class representatives lose standing, they should be given the opportunity to amend the complaint to add new named plaintiffs, and that amendment should relate back to the date of the original pleading.[57]

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[54] A "live controversy" must exist at all stages of the litigation. A plaintiff must demonstrate that she has standing: (1) she has suffered an "injury in fact" that is concrete and particularized as well as actual and imminent; (2) the injury is fairly traceable to the action of the defendant and (3) it is likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[55] County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (stating defendant's burden is a "heavy one"). *See also, e.g.*, Honig v. Doe, 484 U.S. 305 (1988).

[56] Spencer v. Kemna, 523 U.S. 1, 17 (1998). *See, e.g.*, Granito v. Bane, 74 F.3d 406 (2d Cir. 1996) (although Medicaid reinstated home health benefits, plaintiff's claim for injunctive and declaratory relief was not mooted because her serious, chronic health problems and need for home care created a reasonable expectation that she would face the same situation again).

[57] *See* Fed. R. Civ. P. 15. *See, e.g.*, Wade v. Kirkland, 118 F.3d 667, 670 (9th Cir. 1997); *Compare* Board of Sch. Commissioners of the City of Indianapolis v. Jacobs, 420 U.S. 128, 129

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## L. Monitoring and Enforcing Orders and Agreements

Resolution of a case in a plaintiff's favor, whether by settlement or court decision, can be only half the battle. Frequently, remedies to fix broken Medicaid programs are complex and will require close attention, over time, to ensure that they are being implemented. This section of the manual discusses major issues involved with monitoring and enforcement.

**Measuring compliance.**

The first issue that advocates should address is what standards will be used to determine compliance. Compliance can be outcome-based and simply require that certain results occur, such as specifying that individuals waiting for home-based services will receive those services by a date certain. This leaves the Medicaid agency free to determine what steps it will take to obtain the outcome.

Compliance measurement may also be process-based and set forth requirements for how the defendant will achieve specific results, such as requiring the Medicaid agency to change the format of its mental health screening forms and record keeping methods as part of a plan to improve Medicaid services.

In any case, compliance can be measured by:

- General terms (e.g. "reasonable efforts," "as soon as feasible," "substantial compliance")[58]
- Prescriptive terms (e.g. "...services will be provided to all eligible recipients")

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(1975) (dismissing case when the claims of all named plaintiffs had become moot before class certification and the issue in controversy was not capable of repetition but evading review).

[58] *See* Halderman v. Pennhurst State School and Hosp., 901 F.2d 311, 324 (3rd Cir. 1990) (holding "substantial compliance must be measured with respect to the services each individual retarded class member is receiving services and not with respect to the services received by the class as a whole").

- Numerical terms (e.g. "80 percent of recipients will receive required services")[59]

When considering different types of standards, advocates should keep in mind that, should implementation become an issue, courts will only enforce clearly-written orders. In addition, advocates should take into account the competence and cooperativeness of the defendant. If the defendant is resistant to change, it would probably not be effective to have an outcome-based standard expressed in general terms. Rather, process-based compliance, designed with the help of an expert, may be more likely to lead to success. Process-based compliance would also be quite appropriate where the defendant has failed to design a workable process in the past. However, if defendants are cooperative and plaintiffs' counsel want to rely on their knowledge of the system, a less restrictive standard may work. It will generally be easier to convince defendants to agree to a standard that is less restrictive.

**Using monitors/special masters**

Third parties, such as monitors and special masters, can be used to ensure compliance.[60] These court-appointed services are typically paid a reasonable compensation, on court order, by the defendant.[61]

**Monitors.** Monitors can serve a number of functions. They can:

- Establish the standards for compliance with the settlement agreement or decree
- Act as a fact finder to determine whether compliance is occurring
- Respond to individual complaints
- Provide a mechanism for dispute resolution
- Provide technical assistance to defendants to enable them to comply with the agreement or order.

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[59] *See* Rolland v. Cellucci, 138 F. Supp. 2d 110, 118 (D. Mass. 2001) (finding noncompliance and strictly enforcing numerical standards of settlement agreement).

[60] Implementation teams have also been used in complex cases. *See, e.g.,* New York State Ass'n for Retarded Children v. Carey*,* 596 F.2d 27, 32 (2d Cir. 1979) (using seven member review panel: three chosen by plaintiff, two chosen by defendants, two recognized experts - one in management of mental institutions and one in community care facilities for the mentally ill).

[61] Fed. R. Civ. P. 53.

The monitor can be an attorney, an expert in dispute resolution, or a substantive health expert. These types of monitors have obvious strengths: knowledge of the law, experience in resolving conflicts between opposing parties, knowledge of the state of the art in the underlying subject matter. In some cases, the list of appropriate monitors may overlap with the list of good experts. Choosing a person who knows how the Medicaid program should work, however, or who is familiar with how the defendants' system works is generally most helpful. The national litigation centers, discussed above in the section addressing co-counseling agreements, may have recommendations for monitors. Universities and colleges may have appropriate academics, doctors, or psychologists who have knowledge about health care delivery systems in your state.

**Sources for Monitors**

- ✓ National Support Centers
- ✓ Universities
  - Medical schools
  - Social sciences
  - Public health/social work/nursing
  - Behavioral health programs
- ✓ Former employees of Centers for Medicare & Medicaid Services or state Medicaid agency

**Special Masters.** The federal courts, as well as a number of state courts, allow the appointment of a special master to exercise authority over a consent decree or court order. Under the federal rules, this term includes a referee, auditor, examiner, or assessor who will be compensated through the court.[62] Special masters may be useful in cases involving technical issues. However, appointment is disfavored under the federal rules, and is only allowed in jury trials when the issues are complicated or in bench trials when some exceptional condition requires it.[63] Note that the special master's job is to interpret the decree or order as written, not to modify it. Modifications are typically matters for the court to decide. For sources of special masters, see the discussion, above, regarding monitors.

**Responding to a failure to comply**

[62] Fed. R. Civ. P. 53.

[63] Fed. R. Civ. P. 53(b).

As noted throughout this guide, realizing actual implementation of a settlement or court order may require constant monitoring. If the defendant repeatedly fails or refuses to comply with the required relief, a motion to compel compliance may be needed.

If the court retains jurisdiction, plaintiffs can file a motion for contempt if defendants repeatedly violate the terms of the decree. District courts have wide latitude in determining contempt and wide discretion to address it, including orders for specific performance and sanctions. The plaintiff has the burden to prove contempt and the standard of proof is high, generally requiring: (1) the order itself to set out clear duties and (2) clear evidence that the other party has violated the order. Generally, however, good faith efforts to comply with the order will not excuse non-compliance.

If the parties have simply signed a settlement agreement, plaintiffs may file an action for breach of the agreement in state court. Or, plaintiffs may decide to file a new case.

**Attorneys Fees**

Advocates may do significant work after an order is entered to ensure that the terms are being implemented by the defendants. Consider negotiating, or asking the judge, for a provision that plaintiffs' attorneys will be compensated for their work on the case after the order is entered and while the court retains jurisdiction.

## Conclusion

Litigating a Medicaid case can be both challenging and rewarding. Please do not hesitate to contact us if we can help you at any step along the way.