

NASW Legal Defense Fund ANNUAL REPORT 2015-2016

*Over 40 Years Defending Social Workers
and the Social Work Profession*

ADVOCACY

EDUCATION

SUPPORT

LAW NOTES

AMICUS BRIEFS

GRANTS

TO: Darrell P. Wheeler, Ph.D., M.P.H, ACSW
President – National Association of Social Workers

FROM: Raymie Wayne, PhD, JD, MSW
Chair – NASW Legal Defense Fund

DATE: October 28, 2016

RE: Annual Report for the NASW Legal Defense Fund
Fiscal Year July 1, 2015 – June 30, 2016

Introduction

The NASW Legal Defense Fund (LDF) was established 44 years ago in 1972 by the NASW Board of Directors to assist NASW members and the social work profession in defending against lawsuits and to protect legal and ethical principles and policies important to the social work profession.

The LDF Trust Agreement articulates the main purposes of the Legal Defense Fund. These include:

- Providing funds to help defray the cost of counsel and other legal expenses for the effective assistance of NASW members;
- Promoting the interests of the social work profession or of a significantly large group of NASW members in such matters as pay equity and declassification or to challenge restrictions that tend to bar social workers from qualifying as providers of services under managed care arrangements or other health and mental health settings;
- Providing educational activities and materials related to advocacy or legal defense and professional social work issues.

During its existence, the NASW Legal Defense Fund has provided financial support to numerous members' cases (individuals, groups or class actions), as well as support for friend of the court briefs (*amicus* briefs). The funds for LDF case support and other projects have come principally from the dues renewal check-off (\$10) by members on their annual renewal applications. NASW member contributions on the dues renewal form allow the LDF to make social work related legal resources and information available to all members; however, due to a sustained decline in overall NASW membership during the past five years the LDF Board has been seeking alternative revenue sources to avoid cuts in LDF programs and projects.

The Legal Defense Fund has underwritten numerous educational projects for NASW members. The funding for these projects is provided in certain instances by the Aileen Neely Fund and by the Social Work Ethics and Law Institute (SWELI). Both of these are designated funds for LDF education projects housed within the NASW Foundation. The Aileen Neely Fund was begun with a bequest from the estate of Aileen Neely, a former NASW member..

LDF was staffed during the fiscal year by four professional staff members. Anne B. Camper, MBA, JD, oversees and directs the operations of the Legal Defense Fund; Carolyn I. Polowy, JD, NASW serves as Of Counsel; Elizabeth M. Felton, JD, LICSW, Associate Counsel, LDF, manages the daily functions of the Legal Defense Fund and its numerous legal and educational projects. Carla B. McClinton, Senior Legal Assistant, assists LDF in administrative matters, responds to members' requests for information, and prepares legal research.

Financial Report

For FY 2016-2017, LDF'S actual revenues exceeded the budget by \$55,810. Year-end expenses were \$16,812 lower than budgeted, therefore, there was an overall surplus of \$20,567 (compared to the budgeted shortfall of \$53,054). LDF net assets were \$267,941 at the beginning of the year and \$288,508 by June 30, 2016. An increase in the recommended check-off from \$5 to \$10 reversed the trend of the past several year of declining revenues. Investment income decreased slightly during FY 2016-2017 as the total amount of LDF investments has decreased in recent years. Investment income was about 0.9% of LDF's total revenue.

For FY 2016-2017, LDF'S actual revenues exceeded projections by \$55,810. Year-end expenses were \$16,812 lower than projected, therefore, there was an overall surplus of \$20,567 against projected shortfall of \$53,054. LDF net assets were \$267,941 at the beginning of the year and \$288,508 by June 30, 2016. An increase in the recommended check-off from \$5 to \$10 reversed the trend of the past several year of declining revenues. Investment income decreased slightly during FY 2016-2017 as the total amount of LDF investments has decreased in recent years. Investment income was about 0.9% of LDF's total revenue.

The combined assets of the Aileen Neely Fund and the Social Work Ethics and Law Institute were approximately \$43,200 at the fiscal year's end. Over the past five years, LDF's assets have declined by over \$185,000. Investment funds, which have experienced a decrease in earnings, have been tapped to cover LDF budgeted expenses and related staffing costs.

The suggested contribution to LDF was increased from \$5 per member to \$10, effective October 1, 2015.

Applications for Financial Support Approved in 2014-2015 Fiscal Year

During the program year, the Legal Defense Fund Board approved funding totaling \$11,500 in financial support for grant applications for the Texas Chapter (\$2,500), Wisconsin Chapter (\$3,000) a Wisconsin Chapter member (\$2,000), and a California Chapter member (\$4,000). Several educational programs and projects of benefit to NASW members and the social work profession (discussed below) were also supported by LDF funding.

NASW Chapter Applicant Grants

Wisconsin – The LDF Board of Trustees approved an application for financial assistance in the amount of \$3,000 for the Wisconsin Chapter to conduct legal research regarding state and federal laws pertaining to Medicaid reimbursement for clinical social work services. Specifically, the Chapter wanted to address two issues: 1) the Wisconsin Department of Health Service’s (DHS) certification requirement under DHS 35 for reimbursement of services rendered in schools; and, 2) the inability of independent licensed clinical social workers to provide in-home family services that would be reimbursed. The Wisconsin Chapter opposed these Wisconsin laws because, in both situations, DHS interpreted them to limit the reimbursement for independent practitioners to psychotherapy services rendered in an “office” by practitioners who work in a certified outpatient mental health clinic. The LDF funds were to be used to pay for a legal analysis of state law that would provide a foundation for a challenge to the State’s interpretation.

TEXAS

The Texas Chapter requested financial assistance from LDF in the amount of \$2,500 to conduct a legal review of how the Medicaid rates of reimbursement are set by the Health and Human Services Commission (HHSC) for Texas licensed clinical social workers (LCSWs). The Chapter questioned the low Medicaid reimbursement rates for LCSWs and wanted to submit an open records request to obtain information about programs, methodologies, and unpublished documents that would substantiate the calculations of the current reimbursement rates set by HHSC to be reasonable.

NASW Member Applicant Grants

The NASW LDF Board of Trustees granted conditional approval of a LDF application for \$3,000 for a Wisconsin Chapter member to retain counsel to defend against whistleblower activities, potential retaliation, and possible wrongful termination related to her advocacy for patients at the hospital where she is employed. The grant was conditional because no adverse employment action had occurred at the time the application was submitted.

The NASW LDF Board of Trustees also approved the application for \$4,000 for a California Chapter member to offset legal fees associated with the filing of a Motion to Quash a subpoena for a deposition, to testify in court, and related court appearances. The member intended to protect the records of her client as confidential.

Update on Previously Funded Applications

During the last fiscal year, the Massachusetts and California Chapters and a Pennsylvania Chapter member were awarded grants from the Legal Defense Fund.

The California Chapter received an award in the amount of \$2,500 for the filing of an *amicus* brief in *People v. Garcia* and \$1,200 to help cover the legal fees and costs related to the appellate argument in that case in the California Supreme Court. The *amicus* brief was filed in January 2015, but the date for oral argument had not been set as of the writing of this report.

The Massachusetts Chapter was awarded a LDF grant of \$3,500 to seek a legal analysis of antitrust laws that would affect Licensed Independent Clinical Social Workers in private practice if a draft bill supported by a Union was passed and how it would limit or expand their ability to bargain with insurance companies and managed care organizations. The Chapter obtained a legal opinion outlining significant issues in the draft bill that would result in antitrust and other legal issues.

A Pennsylvania Chapter member was awarded a grant of \$3,000 from the Legal Defense Fund for financial assistance with legal costs associated with challenging the overreaching scope of an investigatory subpoena issued by the licensing board and enforced by the Commonwealth of Pennsylvania. As of the writing of this report, however, no decision had been issued.

LDF *Amicus Curiae* Briefs

NASW and/or LDF are frequently requested to initiate the filing of a brief with a unique social work outlook or to sign *amicus curiae* briefs prepared by other organizations with shared interests in a particular policy area. Staff support is used to coordinate the inclusion of NASW, the relevant state chapter, and a social work perspective into the *amicus* briefs. NASW's participation in such cases is based on the principles in the NASW Code of Ethics and NASW's policy statements published in *Social Work Speaks*. The support of well qualified *pro bono* legal counsel is utilized in most cases to facilitate NASW's participation as a friend of the court. In FY 2015 – 2016, eleven *amicus* briefs were filed on behalf of NASW and relevant NASW chapters. Court decisions were rendered in the same fiscal year for eight of the cases while the outcomes in three other cases are still pending. Cases in which *amicus* briefs were filed during the fiscal year included:

Evenwel v. Texas (U.S. Supreme Court, 14-940)

Case Description: Total population is appropriate basis for redistricting

NASW Supported: Texas????

Date Brief Filed: 10/2/2015

Outcome: Favorable

Fisher v. University of Texas at Austin (U.S. Supreme Court, 14-981)

Case Description: Equal Protection challenge to the University of Texas undergraduate admissions process

NASW Supported: University of Texas

Date Brief Filed: 11/2/2015

Outcome: Favorable 4/4/2016

Friedrich v. California Teacher's Association (U.S. Supreme Court, 14-915)

Case Description: Support of collective bargaining agreements that include "fair share" dues provisions

NASW Supported: California Teachers Association

Date Brief Filed: 11/13/2015

Outcome: Split decision – but fair share permitted 6/23/2016

Secretary of Labor v. Integra Health Management (OSHA, 13-1124)

Case Description: The case addresses OSHA's use of guidance documents as a legal basis for issuing penalties in situation such as workplace violence where no specific standard applies, which could potentially affect the use of the OSHA's general duty clause.

NASW Supported: Secretary of Labor

Date Brief Filed: 12/18/2015

Outcome: Pending

Whole Woman's Health v. Cole (U.S. Supreme Court, 15-274)

Case Description: Brief explains how poor health outcomes in part reflect policy choices of the Texas legislature

NASW Supported: Whole Woman's Health

Date Brief Filed: 12/30/2015

Outcome: Favorable 6/27/2016

Zubik v. Burwell (U. S. Supreme Court, 14-1453)

Case Description: This case involves a challenge to the contraception mandate of the Affordable Care Act (ACA) based on religious beliefs.

NASW Supported: Burwell

Date Brief Filed: 2/17/2016

Outcome: Vacated and remanded 5/16/16

Flores v. Lynch (Ninth Circuit Court of Appeals, 15-56434)

Case Description: Enforcement of the 1997 settlement agreement with respect to unaccompanied minors

NASW Supported: Flores

Date Brief Filed: 2/23/2016

Outcome: Pending

Conover v. Conover (Court of Special Appeals in Maryland, 79)

Case Description: Protecting familial attachments between LGBT couples and their children.

NASW Supported: Petitioner - Conover

Date Brief Filed: 2/25/2016

Outcome: Favorable 7/7/2016

U.S. v. Texas (Texas, 15-674)

Case Description: This case addresses the executive actions by President Obama that expanded the existing Deferred Action for Childhood Arrivals (DACA) program and introduced the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.

NASW Supported: U.S.

Date Brief Filed: 3/8/2016

Outcome: Split decision 6/23/2016

Estrellita v. Brooke (Court of Appeals State of New York, APL-2015-00235)

Case Description: The New York Court of Appeals expanded the definition of "parenthood" and ruled that non-biological, non-adoptive partners can seek visitation and custody of the children the parties agreed to conceive and raise together.

NASW Supported: Estrellita

Date Brief Filed: 3/18/2016

Outcome: Favorable 8/30/2016

Piro v. McKeever (North Carolina, 93A16)

Case Description: Social workers lack of duty to third parties

NASW Supported: McKeever

Date Brief Filed: 5/26/2016

Outcome: Pending

Court Decisions – Prior Years’ Filings

During this fiscal year, the courts handed down decisions in eleven cases in which NASW had filed a brief reported in a prior fiscal year. Ten out of the eleven decisions were favorable. These included the following matters:

***Wright, et al. v. Smith, et al.* (Arkansas Supreme Court, CV-14-427)**

Case Description: Marriage equality for same sex couples in Arkansas

NASW Supported: Wright

Date Brief Filed: 10/6/2014

Outcome: Favorable - dismissed 6/26/2015

***Robicheaux, et al v. Caldwell* (U.S. Court of Appeals for the Fifth Circuit, 14-31037)**

Case Description: Marriage equality for same sex couples

NASW Supported: Robicheaux

Date Brief Filed: 10/24/2014

Outcome: Favorable - reversed and remanded 7/1/2015

***Brenner et al v. Armstrong et al* (U.S. Court of Appeals 11th Circuit, 14-14061-AA, 14-14066-AA)**

Case Description: Marriage equality for same sex couples

NASW Supported: Brenner

Date Brief Filed: 12/19/2015

Outcome: Favorable 3/30/2016

***Harrison v. Granite Bay Care, Inc.* (U.S. Court of Appeals 1st Circuit, 14-1988)**

Case Description: Case addresses whether filing a mandatory report with DHHS constitutes protected activity under the Maine Whistleblower Protection Act.

NASW Supported: Harrison

Date Brief Filed: 1/9/2015

Outcome: Favorable 1/13/2016

***Conde-Vidal v. Ruis-Armendariz* (U.S. Court of Appeals 1st Circuit, 14-2184)**

Case Description: Marriage equality for same sex couples

NASW Supported: Conde-Vidal

Date Brief Filed: 2/2/2015

Outcome: Favorable – vacated and remanded 7/18/2015

***Obergefell, et al, v. Hodges, et al* (576 U.S. 14-556)**

Case Description: Supreme Court case regarding state laws prohibiting same sex marriage. The Court held that the Fourteenth Amendment requires the states to license a marriage between two people of the same sex and to recognize lawfully licensed out-of-state marriages.

NASW Supported: Obergefell

Date Brief Filed: 3/6/2015

Outcome: Favorable 6/26/2015

***Jernigan et al v. Crane* (U.S. Court of Appeals 8th Circuit, 15-1022)**

Case Description: Marriage equality for same sex couples

NASW Supported: Jernigan

Date Brief Filed: 3/26/2015

Outcome: Favorable 8/11/2015

Lawson v. Kelly (U.S. Court of Appeals 8th Circuit, 14-3779, 14-3780)

Case Description: Marriage equality for same sex couples

NASW Supported: Lawson

Date Brief Filed: 3/26/2015

Outcome: Favorable 7/7/2015

Rosenbrahn et al v. Daugaard (U.S. Court of Appeals 8th Circuit, 15-1186)

Case Description: Marriage equality for same sex couples

NASW Supported: Rosenbrahn

Date Brief Filed: 3/26/2015

Outcome: Favorable 8/11/2015

Waters v. Ricketts (U.S. Court of Appeals 8th Circuit, 15-1452)

Case Description: Marriage equality for same sex couples

NASW Supported: Waters

Date Brief Filed: 4/24/2015

Outcome: Favorable 8/11/2015

Zubik v. Burwell (Supreme Court, 14-1453)

Case Description: The Supreme Court will review challenges brought by non-profit organizations to the “accommodation” of the Affordable Care Act’s birth control benefit.

NASW Supported: Burwell

Date Brief Filed: 2/17/2016

Outcome: Vacated and remanded 5/16/16

LDF Educational Projects

The Legal Defense Fund celebrated the 20 year anniversary of the 1996 landmark decision in *Jaffee v. Redmond* which extended the federal psychotherapist-patient privilege to confidential communications made to social workers.

LDF participated in a symposium at the 2016 NASW national conference entitled: “Client Confidentiality and Privilege: *Jaffee v. Redmond* -- 20 Years Later” that included presenters, Karen Beyer, current LDF Board member and social worker who refused to turn over her psychotherapy notes in the *Jaffe* case, Carolyn I. Polowy, and Elizabeth M. Felton. LDF also set up a booth at the national conference to commemorate the *Jaffee* decision, distribute commemorative items regarding the case, as well as provide information about the valuable LDF resources available to members.

In June 2016, Elizabeth Felton participated in An Hour With Private Practice: Questions & Answers on the topic of “Tips for Using HIPAA in Private Practice,” presented by Mirean Coleman, MSW, LICSW, CT, Senior Practice Associate for Clinical Social Work.

Social Work Ethics and Law Institute (SWELI)

SWELI was created by LDF in 2005 as a charitable fund within the NASW Foundation for the purpose of developing educational projects related to social work legal and ethics issues. Last year, a Webpage for SWELI was created and posted on the NASW national website (www.socialworkers.org/sweli) consisting of a general information page and links to the SWELI mission, resources and projects and to LDF and the NASW Foundation. Throughout the year LDF and ethics staff provided twice-weekly updates of ethical and legal information for social workers on the online Facebook.com page for SWELI (www.facebook.com/socialworkethicslaw). Over the course of the fiscal year, the “likes” on the Facebook

page increased from 3,050 to 3,419. Fifty nine percent of the viewers are in the 25-44 age range. This is consistent with the focus of the Facebook outreach efforts to expose a wider audience to the information and resource available from LDF and the NASW Office of Ethics and Professional Review. Donations to SWELI are tax deductible.

LDF Web Page and eNews Bulletin

During this fiscal year, nine new *Legal Issue of the Month* articles were published on the Web site and were forwarded to the chapters for reprinting in Chapter publications. Introductions to these articles are also sent by email to the NASW members who support LDF through their NASW membership renewal check-off as the *LDF eNews Bulletin*, which provides a link to the current LDF *Legal Issue of the Month* article as well as hypertext links to LDF online content, such as the *Amicus* Briefs Database, related *Legal Issue of the Month* articles, LDF news releases and the SWELI Facebook page. For FY 2015-2016, the articles included the following titles:

- *Jaffee v. Redmond: 20 Years Later*
- Legal Issues in Clinical Supervision
- FERPA and the Disclosure of Student Education Records
- Who is Responsible for Making the Child Abuse Report?
- Waiver of Co-Payments and Deductibles
- Couples' Therapy – Access to Records
- Social Work Licensing Board Complaints
- End-of-Life Decision Making
- Social Workers and Elder Abuse

Law Note Series

The NASW Press General Counsel Law Note publication Note entitled, *Social Workers and Licensing Laws* will be developed into a series of related Legal Issue of the Month articles instead of a Law Note.

Conclusion

Five favorable court decisions were reached this fiscal year out of the eleven cases in which *amicus* briefs were filed on behalf of NASW through the efforts of the Legal Defense Fund. Six of those cases were before the U.S. Supreme Court. The topics in NASW's *amicus* briefs addressed voting, abortion, affirmative action, familial attachment, unions, immigration, and contraception. Each brief was grounded in NASW policy as articulated in *Social Work Speaks*.

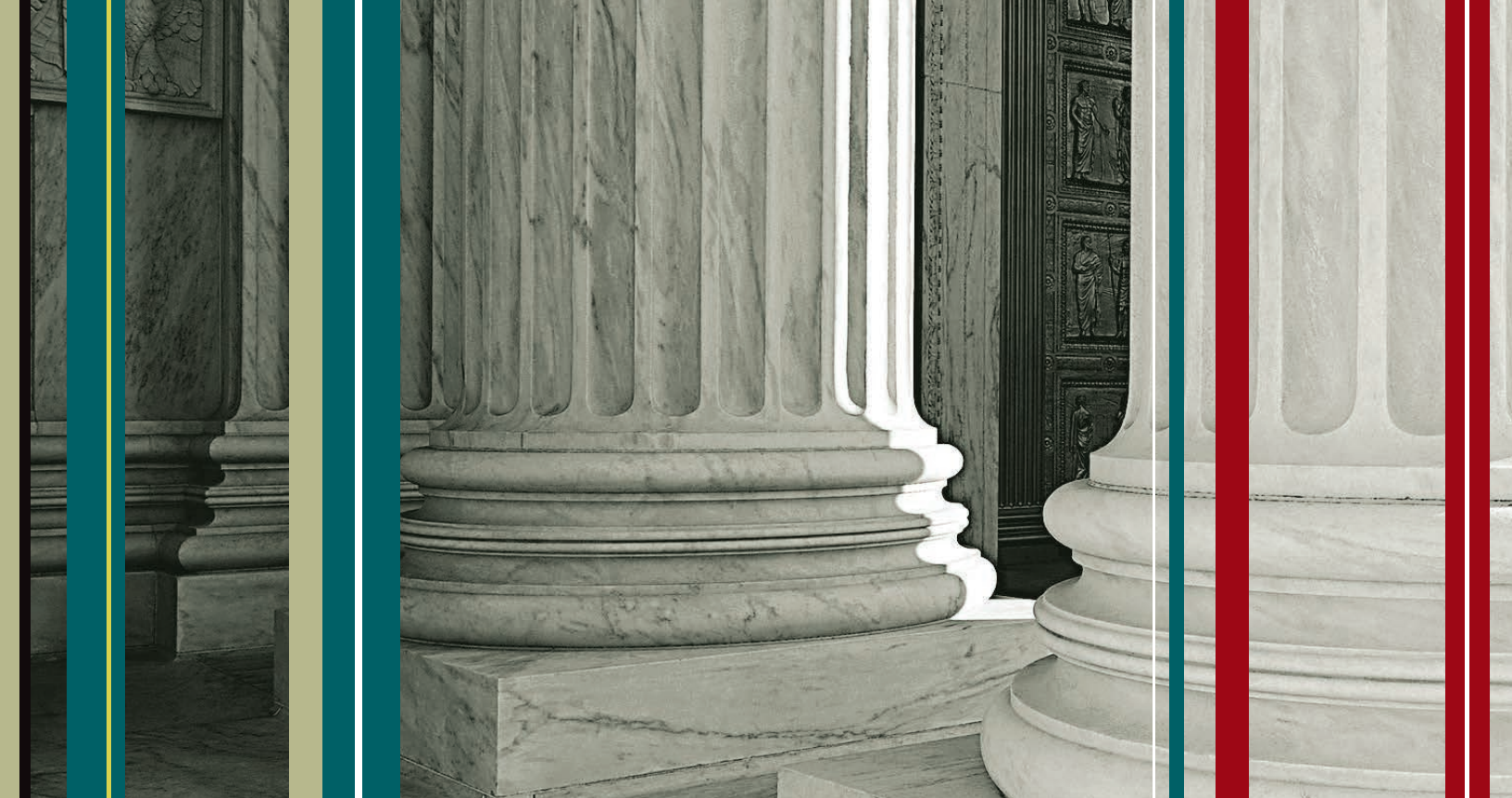
LDF consistently provided legal consultation to NASW members, responding to over 1,500 member calls, and fulfilled its commitment to publishing free online legal updates to members, as well as through email distribution of the *Legal Issue of the Month* to LDF contributors throughout the year. The publication of semiweekly Facebook updates provided a significant expansion of LDF's outreach efforts to a broader spectrum of social workers. The LDF continued its role in educating members about social workers' legal rights and ethical responsibilities through teleconferences, Internet resources, legal articles, and Law Note

publications, although the financial resources for providing this level of services and programmatic support were limited.

The need for legal information and resources among NASW members remains high and the Legal Defense Fund is well-positioned to serve members by maintaining and expanding communication with members, all social workers and the public. However, budgetary constraints continue to limit staff availability. The LDF Board was pleased with the increase in the amount of the NASW dues renewal check-off for LDF as additional financial support. In spite of these challenges, LDF continues to achieve notable results for the Association and the social work profession.

The following NASW members served on the LDF Board of Trustees during the 2015-2016 fiscal year:

Chair, Anne Chambers, MSW
Vice Chair, Drew Pledger, MSW, ACSW, LCSW
Karen Beyer, MSW, MPA, LCSW, CSWM
Judge Gail Chang Bohr
Stacie Hiramoto, MSW
Howard Rodgers, III, MSW, GSW
Raymie Wayne, PhD, JD, MSW



LEGAL DEFENSE FUND

www.socialworkers.org/ldf

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- Providing educational activities and resources related to advocacy or legal defense and professional social work issues.

SOCIAL WORK ETHICS & LAW INSTITUTE

www.facebook.com/socialworkethicslaw

The NASW Social Work Ethics and Law Institute (SWELI) was established by the NASW Legal Defense Fund (LDF) to enhance social workers’ understanding and knowledge of legal and ethical issues affecting the social work profession.


National Association of Social Workers
Legal Defense Fund


Social Work Ethics & Law Institute

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