representation questions be appealable to Federal courts to the same extent and in accordance with the same rules that comparable decisions of other Government entities are appealable under the APA." Ibid. (remarks of Sen. McClure). It was Sen. Javits' view that the provision left existing law on judicial review unaffected; neither adding to nor detracting from the courts' authority to review Corporation decisions. Ibid. (remarks of Sen. Javits). The Senate agreed to the Conference Report, Cong. Rec. S 19693 (December 15, 1977), without resolving what exactly were the "existing avenues of judicial review."

3. Summary: Legislative Intent

It is clear that both houses of Congress intended that the Act be enforced by a comprehensive scheme of Congressional oversight, regulation and monitoring of recipients by the Corporation, and the controls exercised by state advisory councils and local bar associations. A private right of action to enforce the Act was specifically rejected.

What is not as clear, is the nature and scope of judicial review of Corporation decisions envisioned by Congress. During consideration of the 1977 amendments, Congress expressed its intent that the Corporation be responsible for ensuring compliance with the Act. But Congress was careful to ensure that its amendments not be construed as precluding existing judicial review of Corporation action.

CASE LAW: PRIVATE RIGHT OF ACTION

If the Corporation chooses to oppose S. 2393, the question

remains whether a private right of action may be implied under the existing Act.

The Corporation has been involved in several cases in which the opposing party has argued that there is a private right of action in favor of the public to enforce the Act. The courts consistently have held that there is no express grant of a private right of action in the Act and have refused to imply such a right. See Moity v. Acadiana Legal Services Corporation, No. 81-3442 (5th Cir. March 31, 1982); Erwin v. Legal Aid Service, No. 78-1789 (9th Cir. June 9, 1980); Legal Services Corporation of Prince George's County v. Ehrlich, 457 F. Supp. 1058, 1064 (D. Md. 1978); Wilson v. Legal Assistance of North Dakota, No. A1-80-55 (D.N.D. Aug. 14, 1980); Acuff v. Legal Services Corporation, No. CA-3-79-0858-D (N.D. Tex. Nov. 2, 1979); Nabkey v. U.S. Dept. of Housing and Urban Development, 520 F. Supp. 5 (W.D. Mich. 1981); Grassley v. Legal Services Corporation, No. 81-277-B (S.D. Iowa Feb. 3, 1982).

In refusing to imply a private right of action, the courts have applied the four-part test set forth in Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L Ed. 2d 26 (1975): (1) is the plaintiff one of the class for whose "especial" benefit the statute was enacted, i.e., does the statute create a federal right in favor of the plaintiff?; (2) is there any indication of legislative intent to create or deny a private right of action?; (3) is a private action consistent with the underlying purposes of the legislative scheme?; and (4) (which is not applicable) is the cause of action one traditionally relegated

to state law? As for the first step of the Cort v. Ash analysis, to the extent that the Legal Services Corporation Act was enacted for the "especial" benefit of any particular group, it was for the benefit of those persons who would be financially eligible to receive legal assistance under its provisions. But even in a case brought by a person denied legal assistance by a local recipient, the court refused to find an implied private right of action. ". . . [T]he implication of a private remedy would undercut the purpose of the Act, which is to deliver maximum legal services to the poor on a priority basis with limited funds. The necessity of defending lawsuits and paying judgments would rechannel those funds and services away from this intended purpose." Nabkey, 520 F. Supp. at 8.

Secondly, as already demonstrated, the legislative history makes evident the fact that Congress intended to deny a private right of action.

The third step of the Cort v. Ash test is whether a private action is consistent with the underlying purposes of the legislative scheme. The view of the Corporation has been that the various accountability mechanisms contained in the Act are the exclusive means of enforcing compliance with the Act.4/

4/ These statutory and regulatory controls include the following:

Section 1006(b)(1)(A) of the Act grants the Corporation the authority to ensure recipients' compliance with the Act, including termination of financial assistance.

Section 1006(b)(5) provides for the promulgation of regulations to enforce the prohibitions of the Act by the Corporation's Board of Directors.

FOOTNOTE 4 CONTINUED ON NEXT PAGE

The Corporation has maintained that the necessity of defending private actions would result in the diversion of scarce resources from the provision of legal services to clients. Moreover, allowing private enforcement actions would create the risk of inconsistent application of the Act and regulations and would interfere with the statute's oversight scheme. The Corporation has argued that resolution of the issues which would be raised in such suits require the special expertise of the Corporation. For example, financial eligibilty decisions

---

4/ (Continued from previous page)

Section 1004(a) provides that the Corporation's Board of Directors is appointed by the President with the advice and consent of the Senate.

Section 1008(a) requires the Corporation to file an annual report with the President and Congress.

Section 1009(a) requires annual audits of the Corporation's accounts to be filed with the Comptroller General; audit reports are made to the President and Congress.

Section 1010(a) provides that Congress retains controls through authorization and appropriations.

Section 1007(g) requires monitoring and evaluation by the Corporation to ensure recipients' compliance.

Section 1008 permits the Corporation to require reports and recordkeeping by recipients

Part 1618 of the Corporation's regulations provides that complaints of violations of the Act may be made to the recipient, state advisory council, or the Corporation. Recipients must establish procedures for determining whether a violation has occurred and for determining appropriate sanctions. The Corporation must investigate and attempt to resolve complaints when there is reason to believe a violation occurred. The Corporation may suspend or terminate financial assistance for repeated or intentional violations or for failure to take appropriate remedial or punitive action.

Section 1006(a)(3) explains that staff attorneys are subject to the authority of local bar associations with respect to professional responsibility.

Section 1007(c) requires that at least 60% of recipients' governing bodies be attorneys admitted to the bar of that state.

Section 1004(f) provides for the appointment of state advisory councils by each governor charged with notifying the Corporation of apparent violations.

involve difficult questions concerning an individual's income, assets, debts, medical expenses, cost of living in the locality, and other factors pertaining to ones ability to afford legal assistance. See Section 1007(a)(2)(B), 42 U.S.C. Section 2996f(a)(2)(B), 45 C.F.R. Section 1611.5. Finally, private actions would be likely to interfere with confidential attorney-client relationships and with the ethical obligations imposed by the Code of Professional Responsibility.

On the other hand, persons seeking to assert a private right of action to enforce the Legal Services Corporation Act have argued that the existing enforcement scheme is inadequate. In their view, the statutory prohibitions were enacted without adequate methods for enforcing them and administrative self-restraint has not prevented abuses. They argue that congressional oversight is not an adequate safeguard in that Congress' ultimate recourse to terminate funds, is too harsh a remedy. See Plaintiffs' Memorandum in Opposition to Dismiss at 43-46, Grassley v. Legal Services Corporation, No. 810277-B (S.D. Iowa, Feb. 3, 1982).

These arguments have not yet persuaded a court to imply a cause of action. Thus, if the Corporation decides that the existing enforcement scheme is inadequate, it could choose to support, in concept, legislation expressly creating a private right of action. There are, however, other choices available to the Corporation to improve the existing enforcement scheme which, in our view, would be preferable. The Corporation might elect to support some of the provisions of H.R. 3480; for

example, strengthening the role of the state advisory councils. The Corporation also may take measures not requiring the enactment of new legislation. For instance, the Corporation is now taking steps toward increased self-policing in its development of a centralized system for resolving complaints alleging violations of the Act or regulations. Additionally, although never before exercised, the Corporation arguably may possess, under the existing Act, the authority to bring actions in court to specifically enforce compliance with the statute and regulations.

JUDICIAL REVIEW OF CORPORATION DECISIONS

While the courts have refused to imply private rights of action under the Legal Services Corporation Act, they have entertained appeals from Corporation hearing decisions. In San Juan Legal Services, Inc. v. Legal Services Corporation, 655 F.2d 434 (1st Cir. 1981), recipients appealed from the district court's judgment upholding the hearing examiner's decision that the Corporation should terminate the recipients' funding. The Court of Appeals for the First Circuit noted that there was no provision in the Legal Services Corporation Act for judicial review, 655 F.2d at 437, but nevertheless found that a right to judicial review existed. The Court reflected that "statutory silence . . . does not indicate a legislative intent to preclude judicial review" and found nothing in the statute or legislative history to suggest preclusion of judicial review of defunding hearing decisions. 655 F.2d at 438. In the view of the First Circuit, the presumption in favor of judicial review of the

actions of agencies subject to the APA also is applicable to LSC defunding decisions.[5/] 655 F.2d at 438 n.6.

Similarly, the Ninth Circuit considered an appeal of the Corporation's adoption of a hearing officer's recommendation to transfer funding from a recipient to a statewide program. The court held that the appropriate scope of review, given the inapplicability of the APA, was:

> If there is a rational basis for the agency decision and it is supported by some evidence, the decision should be accepted by the reviewing court.

Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662 (9th Cir. 1980).

It is uncertain whether the decisions in San Juan and Spokane will be followed or whether they have applicability to situations other than defunding proceedings. Choosing to oppose legislation creating a private right of action does not necessarily mean Corporation actions are unreviewable. With one possible exception, it appears that there have been no actions brought to review final Corporation decisions on issues other than defunding. Therefore, it is possible that courts would choose to review final Corporation enforcement actions taken pursuant to Part 1618 of the Corporation's regulations, 45 C.F.R. Section 1618.1 et seq.

5/ The court expressly distinguished between review of defunding hearings and private actions to enforce the prohibitions found in Section 1006 of the Act, finding that defeat of the Dennis amendment to create a private right of action did not signify legislative intent to preclude review of defunding decisions. 655 F.2d at 439 n. 7.

The Corporation might choose to recommend legislation expressly providing for judicial review of certain Corporation decisions or final actions and specifying the criteria for reviewability. Such a proposal would have the advantages of the exhaustion of administrative remedies. Permitting judicial review only of final Corporation determinations or actions would allow the Corporation to correct its own errors, afford the parties and the court the benefit of agency expertise and allow the compilation of a factual record for judicial review. See Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

Related to the exhaustion requirement is the doctrine of primary jurisdiction under which judicial process is suspended pending referral to the agency. In Martens v. Hall, 444 F. Supp. 34 (S.D. Fla. 1977), defendants collaterally contested the plaintiff's representation by a legal services program. The court held that the determination of the plaintiff's eligibility for legal services was "an administrative decision within the scope of decision of the Corporation and its recipients." The court found that this decision was within the primary jurisdiction of the agency. The bases for such finding were the need for coordination of the work of agencies and courts and the fact that courts generally should not act on subject matter within an agency's specialty without considering the agency's views. 444 F. Supp. at 36.

A provision for judicial review of final Corporation decisions, as opposed to a private right of enforcement, would serve the purposes of primary jurisdiction as expressed by the court in Martens.

STANDING

If a private right of action is to be created by Congress, the question of standing is raised. S. 2393 provides that "any person" may bring an action. Such a person, however, must meet the "case or controversy" requirement of Art. III of the Constitution.

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 [82 S.Ct. 691, 703, 7 L.Ed.2d 663] (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, Warth v. Seldin, 422 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978).

Thus, the constitutional elements of standing are a "distinct and palpable injury' to the plaintiff and a "fairly traceable" causal connection between the alleged injury and the challenged conduct. This causation requirement alternatively has been stated as a requirement that the claimed injury be "likely to be redressed if the requested relief is granted." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S. Ct. 1917, 1924, 48 L. Ed. 2d 450 (1976).

The Supreme Court has imposed additional prudential standing rules to avoid deciding cases in which no individual rights would be vindicated and to limit access to federal courts to those persons best suited to assert a claim. Among these prudential limitations are the requirement that the injury claimed be particular to the plaintiff, rather than one shared equally by all or a large proportion of citizens and the requirement that the plaintiff must assert his or her own interests, rather than those of third parties. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979). But Congress may enact legislation allowing litigation by persons "who otherwise would be barred by the prudential standing rules." Warth v. Seldin, 422 U.S. 490, 501; 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975). Thus, Congress may "expand standing to the full extent permitted by Art. III, . . ." but may not "abrogate the Art. III minima . . .." Gladstone, Realtors, 99 S. Ct. at 1608. Therefore, even if the statute, on its face, confers standing on any person, a litigant must satisfy the constitutional requirements of injury and causation. In Gladstone, the Court found that the private right of action created by Section 812 of the Fair Housing Act of 1968, 42 U.S.C. Section 3601 et seq., contained no restrictions on potential plaintiffs.[6/] 99 S. Ct. at 1610. But the court's inquiry did not end there. The court

---

6/ Section 812 provides in part: "(a) The rights guaranteed by Sections 803, 804, 805 and 806 may be enforced by civil actions in appropriate United States district courts . . .."

then considered the plaintiffs' standing in light of the requirements of Art. III and, accepting all material allegations as true, found injury in fact and causation sufficient to satisfy Art. III.

In addition to the Fair Housing Act of 1968, Congress has enacted consumer and environmental protection legislation conferring private rights of action to enforce the statutes on "any person," "any interested person," or "any citizen."[7/] The Supreme Court has recently ruled that the citizen suit provisions of the Water Pollution Control Act apply only to persons who can claim some sort of injury. The Court held that the definition of citizen[8/] was intended by Congress to allow suits by all persons meeting the constitutional requirements for standing. Middlesex County Sewerage Authority v. National Sea Clammer Ass'n, ____ U.S. ____, 101 S. Ct. 2615, 2624, _____ L.Ed.2d _____ (1981).

In light of the Supreme Court decisions in Gladstone, Realtors and Middlesex County, it appears safe to presume that,

---

7/ Consumer Product Safety Act, 15 U.S.C. Section 2073 (grants standing to "any interested person") Federal Water Pollution Control Act, 33 U.S.C. Section 1365 (grants standing to "any citizen"; "citizen" is defined as "person or persons having an interest which is or may be adversely affected."); Noise Control Act, 42 U.S.C. Section 4911 (grants standing to "any person"); Toxic Substances Control Act, 15 U.S.C. Section 2619 (grants standing to "any person"); Clean Air Amendments of 1970, 42 U.S.C. Section 7604 (grants standing to "any person"). The majority of these statutes require that the plaintiff give notice to the agency prior to commencement of the action (e.g., Consumer Product Safety Act requires 30 days notice; Toxic Substances Control Act requires 60 days notice).

8/ ". . . person or persons having an interest which is or may be adversely affected."

even under a statute conferring standing on any person, a litigant must allege actual or threatened injury to him or herself and a causal link with the challenged action. It seems likely that a local recipient would possess the requisite standing to enforce the Act against the Corporation. An aggrieved client or potentially eligible client also is likely to be able to assert injury caused by the Corporation or by a recipient. But a member of the public suing as a citizen interested in the proper enforcement of the law, may not be able to demonstrate the "personal stake" or "distinct and palpable injury" required to invoke the court's jurisdiction.

Additionally, members of Congress appear to have no special claim to standing based on their office. They still must meet the constitutional requirements of injury and causation. The claim that executive action is contrary to legislative intent is not sufficient to confer standing on a Member of Congress. See Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977).

If the Corporation decides to support the creation of a private right of action, it may wish to recommend alternatives to the "any person" language of S. 2393, e.g., requiring the litigant to be aggrieved or interested. This might reduce the number of suits brought by persons who lack the requisite standing to maintain such actions.

CONCLUSION

We recommend that the Corporation oppose the adoption of S. 2393 as presently drafted. Enactment of S. 2393 would

impose a substantial litigation burden on the Corporation and its recipients. Other approaches enhancing the Corporation's capability to enforce compliance are preferable to the creation of a private right of action. Legislative measures, such as expanding the role of the state advisory committees as proposed in H.R. 3480,[9/] would curtail abuses without substantially draining Corporation resources.

There are possible amendments to S. 2393 which would lessen the litigation burden on the Corporation and its recipients. One such amendment could require that litigants suffer some injury as a result of action by the Corporation or a recipient. This would ensure that the persons authorized to bring actions have the constitutionally-mandated standing to sue.

Secondly, S. 2393 could be amended to allow private actions to be brought to enforce only the prohibitions, as opposed to the provisions of the Act. Such an amendment would make the bill more manageable by focusing on the curtailment of violations of statutory restrictions[10/] while freeing the Corporation from having to defend suits brought by persons

---

9/ Section 2 of H.R. 3480 would make the establishment of state advisory councils mandatory. In addition, it would require the Corporation and recipients to notify the relevant councils of any alleged violations. Councils would be given a reasonable opportunity to review and comment on such allegations.

10/ For example, actions could be brought alleging violations of the statutory restrictions against political activity, representation of ineligible clients, or acceptance of fee-generating cases.

denied legal assistance or by clients dissatisfied with the way their cases are being handled.11/

Finally, an amendment providing for judicial review of final Corporation determinations would be preferable to the creation of a private right of enforcement because it would require exhaustion of the administrative procedures being developed as a part of the new Office of Compliance and Review.

11/ See the discussion of House debate with respect to the distinction "prohibitions" and "provisions" at pages 4-7 of this memorandum.

Moorhead Amendment Regulation

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: July 30, 1982

TO: Committee on Operations and Regulations

FROM: Gerald M. Caplan

SUBJECT: Proposed Regulation to Implement the Moorhead Amendment

Attached is a proposed amendment to Part 1612 of the Corporation's regulations implementing the Moorhead Amendment and a background memorandum on lobbying activities prepared by the General Counsel's Office. That memorandum and a proposed instruction on Moorhead were sent to you under separate cover in June. The instruction has been redrafted as a regulation, with changes in language.

Attach.

LEGAL SERVICES CORPORATION

45 C.F.R. Part 1612

Restrictions on Certain Activities

AGENCY: LEGAL SERVICES CORPORATION

ACTION: Proposed Amendment

SUMMARY: The Legal Services Corporation is publishing a proposed Amendment to Part 1612 of its regulations to implement certain restrictions on recipient lobbying activities contained in the Corporation's appropriation legislation. These restrictions, known as the Moorhead Amendment, were first applicable to the Corporation's FY 1979 appropriation (P.L. 95-431) and have been contained in each subsequent appropriation act through the current fiscal year, including appropriations authorized by continuing resolutions in FY 1981 and FY 1982. (P.L. 96-68, P.L. 96-369, P.L. 96-436, P.L. 97-51, P.L. 97-85, P.L. 97-92, P.L. 97-161).

DATES: Comments must be received 30 days after publication in the Federal Register.

ADDRESS: 733 Fifteenth Street, N.W., Washington, D.C. 20005

FOR FURTHER INFORMATION CONTACT:

Mary Wieseman, Acting General Counsel, Legal Services Corporation

Telephone: (202) 272-4010

SUPPLEMENTARY INFORMATION

Beginning in fiscal year 1979, every appropriation bill providing funds for the Legal Services Corporation has contained

a provision restricting the lobbying activities that may be conducted with appropriated funds. This restriction, known as the Moorhead Amendment, provides:

> Provided, No part of this appropriation shall be used for publicity or propoganda purposes designed to support or defeat legislation pending before Congress or any State legislature.

The Legal Services Corporation Act and regulations prohibit any lobbying activities by recipients unless the activity falls within three exceptions. (Section 1007(a)(5) of the Act, 42 U.S.C. Section 2996f(a)(5); 45 C.F.R. Part 1612.4). Those exceptions are:

1) in response to a request from a governmental agency or a legislative body, committee, or member (45 C.F.R. Part 1612.4(a)(1);

2) on behalf of an eligible client or a recipient, if the client may be affected by a particular legislative or administrative measure (but no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation possible) (45 C.F.R. Part 1612.4(a)(2)); or

3) if a governmental agency, legislative body, committee, or member thereof is considering a measure directly affecting the activities under the Act of the recipient or the Corporation (45 C.F.R. Part 1612.4(a)(3)). This proposed regulation explains th effect that the restrictions on legislative activity contained in the Moorhead Amendment have on the legislative activities otherwise permitted by the Legal Services Corporation Act and regulations.

The Corporation's interpretation of the Moorhead Amendment is guided by the opinions of the Comptroller General issued by the General Accounting Office. The Comptroller General has construed other legislative restrictions on lobbying activity which are similar to those contained in the Moorhead Amendment, such as Section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act. 56 Comp. Gen. 889 (1977), 59 Comp. Gen. 115 (1979). The opinions on Section 607(a) and subsequent opinions construing the Moorhead Amendment itself make it clear that the prohibition on using funds for "publicity or propaganda purposes" is directed toward "grass roots" lobbying, that is, appeals directed to the public at large or to selected individuals suggesting that they contact their elected representatives and indicate their support for or opposition to legislation. B-163762 November 27, 1980; 60 Comp. Gen. 423 (1981). This restriction is in addition to those contained in the Legal Services Corporation Act itself.

It is proposed to amend 45 C.F.R. Part 1612 by adding the following new Part 1612.4(e):

* * * * *

§1612.4(e) - Legislative activities authorized under the Act and these regulations shall not include appeals to the public at large or to selected individuals to contact elected representatives in support for or in opposition to pending legislation. For the purposes of this regulation, an "appeal" is any written or oral communication which contains a direct or implied suggestion to contact an elected representative.

Nothing in this regulation prohibits advising an eligible client, as part of legal assistance activities conducted under the Act, with respect to the client's communications to elected officials concerning pending legislation, nor does it prohibit direct contact with elected officials concerning pending legislation, as long as such activities are authorized under one of the exceptions to prohibited lobbying activities contained in the Act and regulations.

This regulation is applicable to all Corporation grant funds awarded effective January 1, 1979, and thereafter.

Gerald M. Caplan,
Acting President
Legal Services Corporation

LEGAL SERVICES CORPORATION

MEMORANDUM

June 21, 1982

TO: Robert Stubbs, Chairman, Committee on Operations and Regulations

FROM: Gerald M. Caplan, Acting President

SUBJ: Proposed Restrictions on Lobbying

The attached memorandum provides a thorough background on the lobbying restrictions imposed on the Corporation and suggests additional routes the Board may wish to take to further inhibit political activity by program attorneys.

In particular, I recommend early action on the proposed instruction implementing the Moorhead Amendment. Action on Moorhead is long overdue by the Corporation and is not likely to invite great controversy.

I do, however, disagree regarding the mode of implementation: I can see no disadvantage in allowing a period of comment and thus prefer publication by regulation rather than instruction (see page 13 of the attached memorandum).

cc: Members, Committee on Operations and Regulations
William F. Harvey
Mary Wieseman
Michael Glumb
Dennis Daugherty
Gerry Singsen
Clint Lyons

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE : June 15, 1982

TO : Gerald M. Caplan

FROM : Mary Wieseman MW

SUBJECT: Lobbying Regulations

Attached is a memorandum discussing the restriction on lobbying imposed by the LSC Act, regulations and Moorhead Amendment. A proposed Instruction implementing the Moorhead restriction is also attached.

An additional focus has arisen since this memorandum was drafted. The question, raised in Max Miller's statement of May 10, 1982, relates specifically to the lobbying activities of support centers as opposed to other program grantees. Mike is continuing on the project and will be contacting Max Miller for his views. This issue will be the subject of a subsequent memorandum.

Attachment

LEGAL SERVICES CORPORATION

MEMORANDUM

June 21, 1982

TO : Robert Stubbs, Chairman, Committee on Operations and Regulations

FROM: Gerald M. Caplan, Acting President

SUBJ: Proposed Restrictions on Lobbying

The attached memorandum provides a thorough background on the lobbying restrictions imposed on the Corporation and suggests additional routes the Board may wish to take to further inhibit political activity by program attorneys.

In particular, I recommend early action on the proposed instruction implementing the Moorhead Amendment. Action on Moorhead is long overdue by the Corporation and is not likely to invite great controversy.

I do, however, disagree regarding the mode of implementation: I can see no disadvantage in allowing a period of comment and thus prefer publication by regulation rather than instruction (see pages 12 and 13 of the attached memorandum).

cc: Members, Committee on Operations and Regulations
William F. Harvey
Mary Wieseman
Michael Glomb
Dennis Daugherty
Gerry Singsen
Clint Lyons

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: June 9, 1982

TO: Mary Wieseman

FROM: Michael Glomb MG

SUBJECT: Lobbying Regulations

We have been asked for an analysis of the Corporation's current regulations relating to lobbying activities in anticipation of the Board's consideration of possible additional restrictions. This memorandum discusses the current applicable law, including restrictions on use of appropriated funds contained in appropriations legislation and the approaches available for imposing additional restrictions under existing law. I have attached an instruction implementing the Moorhead Amendment.

I. Restrictions on Lobbying Activities Under Current Law

The existing restrictions are contained in the Legal Services Corporation Act ("The Act"), the Corporation's implementing regulations (45 CFR Part 1612), and a rider on the Corporation's federal appropriation, the so-called Moorhead Amendment. All of the restrictions on grantee activity are addressed to the use of Corporation (i.e. appropriated) grant funds for lobbying activities. This is in contrast to other restrictions in the Act which prohibit an activity per se.1/

1/ For example, under the Act, no staff attorney may be a candidate in a partisan political election (Section 1006(e)(2)).

The Corporation itself, however, is prohibited from lobbying at all except for the narrow exceptions provided in the Act (Section 1006(c)(2)).

A. Restrictions Under the Act and Regulations

Section 1007(a)(5) of the Act provides:

> the Corporation shall--
>
> * * *
>
> (5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition, except where-
>
> (A) representation by an employee of a recipient for any eligible client is necessary to the provision of legal advice and representation with respect to such client's legal rights and responsibilities (which shall not be construed to permit an attorney or a recipient employee to solicit a client, in violation of professional responsibilities, for the purpose of making such representation possible); or
>
> (B) a governmental agency, legislative body, a committee, or a member thereof-
>
> (i) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or
>
> (ii) is considering a measure directly affecting the activities under this title of the recipient or the Corporation.

The parallel provision relating to the Corporation , Section 1006(c)(2), provides:

(c) The Corporation shall not itself-

* * *

(2) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative bodies, except that personnel of the Corporation may testify or make other appropriate communication (A) when formally requested to do so by a legislative body, a committee, or a member thereof, or (B) in connection with legislation or appropriations directly affecting the activities of the Corporation.

The provisions in the Act are implemented by regulations 45 CFR Part 1612.4 which provide:

Section 1612.4 Legislative and administrative representation.

(a) No funds made available to a recipient by the Corporation shall be used, directly or indirectly, to support activities intended to influence the issuance, amendment, or revocation of any executive or administrative order or regulation of a Federal, State or local agency, or to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body or State proposals by initiative petition.

(1) An employee may engage in such activities in response to a request from a governmental agency or a legislative body, committee, or member made to the employee or to a recipient; and

(2) An employee may engage in such activities on behalf of an eligible client of a recipient, if the client may be affected by a particular legislative or administrative measure but no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation possible; and,

(3) An employee may engage in such activities if a governmental agency, legislative body, committee, or member thereof is considering a measure directly affecting the activities under the Act of the recipient or the Corporation.

(b) Recipients shall adopt appropriate procedures and forms to document that the legislative activities in which they engage fall within the activities permitted in section 1612.4(a).

(c) Recipients may not establish full time legislative offices unless the decision to establish such an office is formally made by the Board of Directors of the recipient consistent with the provisions of Section 1620, provided that the legislative activities of these offices are solely activities permitted under section 1612.4(a).

(d) Nothing in this section is intended to prohibit an employee from

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies; or

(2) Informing a client about a new or proposed statute, executive order, or administrative regulation; or

(3) Communicating with the Corporation for any purpose.

The regulation essentially follows the Act by prohibiting lobbying, except under the circumstances provided for in Section 1007(a)(5). It clarifies Section 1007(a)(5)(A) by permitting lobbying on behalf of an eligible client "if the client may be affected by a particular legislative or administrative measure." (45 CFR Part 1612.4(a)(2)). Subsection 1612.4(b) was added in response to comments on the

proposed regulations published in 1976. The section makes explicit what was previously implied, namely that the lobbying prohibition does not prevent inquiries to the Corporation or to government agencies. Nor does the prohibition prevent furnishing information to clients about legislative or administrative developments. (Preamble to final regulating, Part 1612, 41 F.R. May 5, 1976). The regulations were amended in 1978 to reflect the 1977 amendments to the Act (see infra, p. 23-28).

There is no regulation which specifically implements Section 1006(c)(2) of the Act relating to Corporation lobbying activities. However, 45 CFR Part 1612.5(a)(1) authorizes the Corporation to discipline any Corporation employees who violate the provisions of Part 1612.

B. Restrictions on Appropriations

The Moorhead Amendment has been attached as a rider to each Corporation appropriation beginning with fiscal 1979. The amendment reads as follows:

> ... Provided, No part of this appropriation shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress or any State legislature.

A similar limitation on the use of appropriated funds has been contained in Section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act since 1972. Section 607(a) provides:

> No part of any appropriation contained in this or any other Act, (emphasis added),

> or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress.

The Moorhead Amendment essentially extended the limitation on expenditures for "publicity and propaganda" contained in Section 607(a) to legislative activities at the state level. Congressman Moorhead made this explicit in his explanatory remarks in support of his amendment.

> In the past, Congress has acted to prevent taxpayers money being used for propaganda or publicity purposes. A provision added to the Treasury, Postal Service, and General Government Appropriations Acts prohibits using funds appropriated by Congress for lobbying or propaganda purposes. And the General Accounting Office has enforced this antilobbying provision even against the White House.
>
> I want to make it clear that this amendment would in no way prohibit a Legal Services Corporation lawyer from sitting down with a client, advising the client that it is in his or her best interest to write a Congressman or an assemblyman about a particular problem affecting that client.
>
> Additionally, my amendment would in no way prohibit a lawyer advising the client what the client should say in a letter or any other communication.
>
> My amendment seeks only to do what this Congress has done in the past with the Treasury, Postal Service, and general government appropriation bill.
>
> In that bill, which we just passed, the Legal Services Corporation and all other corporations or agencies are prohibited from using appropriated funds for--"publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

> However, there is at least one loophole open to abuse of Federal funds and my amendment takes care of that.
>
> The only effect of my amendment is to prohibit the use of Federal funds to be used for publicity or propaganda purposes designed to support or defeat legislation pending before State legislatures as well as the Congress. (emphasis added)
>
> This amendment does speak to the problem of mass letter writing campaigns and other publicity or propaganda gimmicks conducted with the use of Federal funds.
>
> * * *
>
> My amendment would in no way hinder the Legal Services Corporation or their grantees from testifying or advising, when asked, before any governmental body. (Cong. Rec. H 5544, June 14, 1978)

Therefore, the interpretation of "publicity and propaganda" under 607(a), that is, the kinds of activity that are proscribed, is highly relevant to the interpretation of Moorhead.[2/] Indeed, the General Accounting Office (GAO) has

---

2/ Moorhead does not repeal the exceptions to the general ban on legislative advocacy contained in the Act. Rep. Moorhead's remarks quoted above clearly indicate that the amendment was addressed to a particular type of activity, i.e., "publicity and propaganda." His remark in a floor colloquy with Rep. Goldwater nearly two years later that the amendment "virtually wipes out legal services lobbying altogether" (Cong. Rec. H 6253-54, July 22, 1980) does not change the legislative intent of Congress expressed before passage. Regional Rail Reorganization Cases, 419 U.S. 102, 132 (1974). See generally, Sutherland on Statutory Construction and Committee for Humane Legislation v. Richardson, 450 F.2d 1141 (D.C. Cir. 1976). In addition, other statements in the legislative record following Moorhead's remarks indicate that Congress did not intend to repeal the pertinent provisions of the Act in enacting Moorhead. (See Cong. Rec. E 3654, July 29, 1980). Moreover,

Footnote 2 Continued on Next Page

relied on its interpretations of 607(a) for purposes of construing the Moorhead Amendment. The Corporation is not bound by the opinions of the Comptroller General since it is not a federal agency. Section 1005(e)(1); 60 Comp. Gen. 423 (1981).[3/] However, since Comptroller General opinions are dispositive as to the use of appropriated funds within the federal establishment and naturally persuasive with Congress, the construction they give to 607(a) and Moorhead should be considered authoritative. Moreover, the opinions correctly construe Section 607(a) and Moorhead in a way that reconciles them with the specific provisions on lobbying contained in the Legal Services Corporation Act.

The Comptroller General's opinions on Moorhead indicate that the activity prohibited by 607(a), and, by extension, the Moorhead Amendment at the state level, is "grass roots" lobbying, that is, "appeals addressed to the public at large or to selected individuals suggesting that they contact their elected representatives and indicate their support for opposition to legislation...." 60 Comp. Gen. 423, 427 (1981);

Footnote 2 Continued from Previous Page

GAO, which has no interest in narrowing the effect of the Moorhead Amendment, has concluded that it does not repeal the authorized exceptions in the Act. (B-163762 November 14, 1980, quoted infra p.10-11). See Hanten memorandum of September 2, 1980, for full discussion of the effect of statements made after passage.

3/ Section 17 of H.R. 3480 would give GAO the same authority to settle and adjust the accounts of the Corporation as it has with respect to all departments and agencies of the United States.

B-163762 November 24, 1980. The permissible scope of activity is elaborated in 59 Comp. Gen. 115 (1979), cited in 60 Comp. Gen. 423.

> In interpreting "publicity and propaganda" provisions such as section 607(a), this Office has recognized that every Federal agency has a legitimate interest in communicating with the public and with Congress regarding its policies and activities. If the policy of the Administration or of any agency is affected by pending legislation, including appropriations measures, discussion by officials of that policy will necessarily, either explicitly or by implication, refer to such legislation and will presumably be either in support of or in opposition to it. An interpretation of section 607(a) which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.
>
> In our view, Congress did not intend by enactment of section 607(a) and like measures, to prohibit agency officials from expressing their views on pending legislative and appropriation matters. Rather, the prohibition of section 607(a) applies primarily to expenditures involving appeals addressed to members of the public suggesting that they contact their elected representatives and indicate support of or opposition to pending legislation, or urge their elected representatives to vote in a particular manner. The foregoing general considerations constitute our construction of section 607(a) and form the basis for our determination in any given instance of whether there has been a violation of that section. 56 Comp. Gen. 889 (1977); B-128938, July 12, 1976.

In summary, under Moorhead direct communication of views to legislators or the public is permissible; drumming up support for the same purpose is not. 60 Comp. Gen. 423 (1981).

C. Applicable Legislative Advocacy Rules Under Current Law

The scope of permissible lobbying activities is broader for Corporation grantees than it is for the Corporation itself. Employees of Corporation grantees may not, under the Act and regulations, use Corporation funds for legislative advocacy activities except

1. on behalf of an eligible client;
2. when requested to do so by a governmental agency, legislative body, committee, or member thereof, which is considering matters directly affecting the activities of the grantee or of the Corporation under the Act;
3. when such agency, body, committee, or member thereof is considering matters directly affecting the activities of the grantee or of the Corporation under the Act.

Moreover, a grantee may not solicit a client in violation of professional responsibilities in order to make representation possible under the first exception. Further, the preamble to Part 1612 makes it clear that the third exception extends only to appropriations or other measures directed to the Corporation itself or to grantees or their employees, and does not permit lobbying on poor people's issues generally. Finally, the Moorhead Amendment and section 607(a) provide that "grass roots" lobbying may not be conducted as part of any of the legislative activities authorized by the exceptions in the Act. The Comptroller General has adopted this view.

> The Moorhead amendment has been made applicable to the Corporation's appropriations each year since it was first introduced and enacted. Under this restriction, appropriated funds may not be used by recipients for legislative representation that involves "publicity or propaganda;" i.e., appeals to members of the public to urge their elected representatives to support or defeat legislation pending in the Congress or in any State legislature. Other legislative representation in the interests of clients or of recipients, as permitted by 42 U.S.C. Section 2996f(a)(5), is not affected by this restriction, or, for that matter, by the section 607(a) restriction.
>
> * * *
>
> As indicated above, the Moorhead amendment extends the existing section 607(a) restriction on Corporation's expenditure of appropriated funds for publicity and propaganda activities, whether on behalf of clients or for other purposes, to include such activities at the State as well as the Federal level. Thus, when recipients undertake legislative representation of clients, the representation may not take the form of "publicity or propaganda designed to support or defeat legislation pending before Congress or any State legislature." (B-163762 November 14, 1980.)

The Corporation itself may not engage in legislative advocacy activities, except when formally requested to do so by a legislative body, committee, or member thereof, or in connection with legislation or appropriations directly affecting the activities of the Corporation. Thus, the Corporation may not lobby on behalf of a client. Under Moorhead, as with grantees, "grass roots" lobbying is excluded from the otherwise permissible legislative activities. 60 Comp. Gen. 423 (1981). However, as the opinion indicates, Moorhead does not prohibit

Corporation officials from making their views known on pending legislative and appropriations measures affecting the Corporation.

II. Approaches to Implement Applicable Law

A. Implementing Moorhead

There is currently no Corporation policy statement which reconciles the Moorhead Amendment with the restrictions on legislative advocacy in the Act and regulations in the manner advanced above. GAO has criticized the Corporation's failure to clarify for recipients the distinction between legitimate client representation and the publicity and propaganda activities proscribed by Moorhead. (B-163762 November, 1980) Any such policy statement, whether by rule, regulation, guideline, or instruction, must be published in the Federal Register at least 30 days prior to its effective date in order to bind grantees (Section 1008(e) of the Act).

An instruction appears to be the best vehicle to implement Moorhead. First, it can be promulgated more quickly than a rule, regulation, or guideline because, unlike those methods, there is no statutory requirement to provide an opportunity for prior comment. Moreover, the Moorhead restrictions are simply a rider on an appropriations act which will expire September 30, 1982. It makes little sense to go through all of the formalities of adopting an amended regulation to implement Moorhead now.4/

4/ H.R. 3480, if enacted, would require significant amendments

Footnote 4 Continued on Next Page

A draft instruction to recipients is attached.[5/] There is no need to publish any statement applicable to Corporation employees since that can be accomplished simply by a directive to employees.

B. Imposing Additional Restrictions on Lobbying Under Current Law.

The question of whether or not the Corporation can impose additional restrictions on grantee legislative advocacy activities and, if so, the form that they could take can only be resolved in the light of the expectations that Congress had when it enacted section 1007(a)(5) of the Act. To that end, the legislative history of section 1007(a)(5) in both the 1974 Act and the 1077 amendments is reviewed below. At the outset, however, it should be remembered that the Corporation has ample statutory authority to enforce the provisions of section 1007(a)(5) by regulation as distinguished from adopting additional restrictions. Section 1006(b)(5) in fact requires the Corporation to issue rules and regulations for the

---

Footnote 4 Continued From Previous Page
to Part 1612. The bill permits administrative advocacy only on matters affecting a particular client, and prohibits legislative advocacy except at the invitation of a legislator and then only on matters on which the recipient has expertise because of its legal services activities. Given recent history, it is likely that any FY 83 appropriation will contain some form of restriction on legislative activity. However, we should defer promulgating regulations until the form of the appropriation is clear (reauthorization and appropriation, appropriation only, continuing resolution), and whether the appropriation Act or continuing resolution contains only the Moorhead language or incorporates the provision of H.R. 3480 by reference.

5/ Since Moorhead is more restrictive than Section 607(a),
Footnote 5 Continued on Next Page

enforcement of section 1007(a)(5).[6] Congress always anticipated that the Corporation would issue guidelines to restrict lobbying activities not authorized by the Act. Speaking on the floor in support of the committee version of the original House bill, H.R. 7824, Rep. Steiger said:

> The committee bill strengthens the individual client orientation of the program by banning legislative and administrative advocacy which is not client oriented. Such activity is to be further restricted through guidelines issued by the Corporation, whose Board of Directors is fully appointed by the President. (Cong. Rec. H 5077, June 21, 1973.)[7]

The Committee version of H.R. 7824 authorized legislative advocacy only pursuant to representation of an eligible client or upon request of a legislative body or member. Section 7(a)(5) of H.R. 7824 provided:

> . . . the corporation shall in accordance with the Canons of Ethics and Code of Professional Responsibilty of the American Bar Association --
>
> * * *
>
> (5) Insure that no funds made available to recipients by the corporation shall be used at any time, directly or indirectly, to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local

---

Footnote 5 Continued From Previous Page
covering state legislation as well, an instruction applicable to Moorhead would cover activities prohibited under 607(a).

6/ This is the only section of the Act which requires the Corporation to issue regulations. Section 1006(b)(5) also requires regulations to enforce the anti-boycott provisions of the Act. The regulations are codified in 45 C.F.R. Part 1612.

Footnote 7 on Next Page

> legislative bodies, except that personnel of any recipient may (A) testify or make other necessary representations (pursuant to guidelines promulgated by the corporation) in the course of providing legal assistance to an eligible client, or (B) testify when requested to do so by a legislative body, or a committee, or a member thereof. (Cong. Rec. H 5113, June 21, 1973).

Representative Quie offered an amendment which was adopted during the floor debate. The Quie amendment prohibited lobbying activities concerning executive orders or other similar promulgations in addition to legislative measures. A statement or testimony was permitted in response to a request from an agency or a legislative body. However, lobbying pursuant to representation on behalf of an eligible client was limited in the Quie amendment to executive orders or other similar promulgations. Representation was relatively unrestricted relative to matters at the local level. Thus, the House-passed version of H.R. 7824 precluded legislative and administrative lobbying except in fairly limited circumstances. As amended, the section provided that the Corporation should:

> (5) Insure that no funds made available to recipients by the corporation shall be used at any time, directly or indirectly, to undertake to influence any executive order or similar promulgation of any Federal, State, or local agency, or to undertake to influence the passage or defeat of legislation by the Congress of the United States, or by any State or local

---

7/ The authority to promulgate regulations on lobbying was originally contained in section 7(a)(5) of H.R. 7824, which is now Section 1007(a)(5) of the Act. The Senate version, S. 2686, had the language now contained in section 1006(b)(5). The Conference Committee adopted the Senate approach.

> legislative bodies, except that the personnel of a recipient may (A) testify or make a statement when formally requested to do so by a governmental agency, or by a legislative body or a committee or member thereof, or
>
> (B) in the course of providing legal assistance to an eligible client (pursuant to guidelines promulgated by the corporation) make representations necessary to such assistance with respect to any executive order or similar promulgation and testify or make other necessary representations to a local governmental entity. (Cong. Rec. H 5115, June 21, 1973).

In the Senate, the bill reported out by the Committee on Labor and Public Welfare, S. 2686 also prohibited lobbying, but authorized exceptions involving representation of an eligible client or at the request of a legislative body. Section 1007(a)(5) of S. 2686 provided:

> . . . the Corporation, consistent with attorney's professional responsibilities shall--
>
> * * *
>
> (5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, except where --
>
> (A) representation by an attorney as an attorney for any eligible client is necessary to the provision of legal advice and representation with respect to such client's legal rights and responsibilities; or
>
> (B) a legislative body, a committee, or a member thereof requests personnel of any recipient to make representations thereto; (S.R. No. 93-495, 93rd Cong., 1st Sess.)

Senator Nelson, one of the sponsors of the Senate bill, explained this provision as being consistent with an attorney's ethical responsibilities in representing a client.

> Legal Services attorneys may not attempt to influence legislation before Congress or before any State or local legislative body, except as necessary to the provision of legal advice and representation for eligible clients. This provision would prohibit indiscriminate, non-client-oriented lobbying, and would more benefically channel the legal efforts of the attorney--whose primary duty is to provide the best possible legal assistance to the eligible poor. It does not prohibit necessary legal advice and representation because to do so would set up an artificals double standard prohibiting a legal services attorney for a poor person from doing what any other private attorney could do. No attorney shall be forced to violate the Canons of Ethics by providing less than the full range of legal services to eligible clients. (Cong. Rec. S. 535, January 28, 1974).

The Committee Report likewise reflected the Senate's view that "such legal assistance [referring to legislative advocacy] shall be provided in compliance with the highest professional standards as embodied in the Canons of Ethics and Code of Professional Responsibility of the American Bar Association." (S. R. No. 93-495, 43rd Cong., 1st Sess. p. 16). The full Senate adopted the committee language. An amendment introduced by Senator Bellmon which would have restricted lobbying except at the request of a legislative body was defeated on the floor (Cong. Rec. S 917-921, January 31, 1974). The Senate eventually passed H.R. 7824 after substituting the provisions of the Senate bill, S. 2686. (Cong. Rec. S 1012, January 31, 1974).

In Conference, the Senate conferees agreed to the general prohibition on lobbying with respect to executive orders contained in the House bill. However, the exception permitting such lobbying when requested contained in the House bill was also included in the Conference bill. Significantly, the conferees essentially adopted the Senate position, expanding the scope of permissible lobbying on behalf of a client (which the House had limited to administrative rather than legislative representation), and qualified it by adding the statement that the exception was not intended to permit solicitation of a client. (S. R. No. 93-845, 93rd Cong. 2nd Sess. p. 24-25). Thus, the lobbying provision that was ultimately enacted into law in the 1974 Legal Services Corporation Act provided:

> (5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, except where--
>
> (A) representation by an attorney as an attorney for any eligible client is necessary to the provision of legal advice and representation with respect to such client's legal rights and responsibilities (which shall not be construed to permit a recipient or an attorney to solicit a client for the purpose of making such representation possible, or to solicit a group with respect to matters of general concern to a broad class of persons as distinguished from acting on behalf of any particular client); or

> (B) a governmental agency, legislative body, a committee, or a member thereof requests personnel of any recipient to make representations thereto; (S. R. No. 93-845, 93rd Cong., 2nd Sess. p. 8).

The legislative history of the 1974 Act thus presents a rather clear statement that Congress intended to permit legislative advocacy on behalf of clients as long as they were, in fact, eligible for service. This is further apparent from the floor statements of the conferees in support of the Conference bill. Representative Quie, for example, who authored the House amendment restricting lobbying on behalf of clients, spoke in favor of the compromise bill. He responded to a "fact sheet" circulated by opponents of the bill. The "fact sheet" stated:

> The very important anti-lobbying ban imposed by the House on a 200-181 roll call vote (which had prohibited lobbying on state or federal issues, except to permit statements or testimony) has been replaced with language authorizing legal services efforts "to influence the passage or defeat of any legislation by the Congress of the United States, or by a State or local legislative bodies" [sic] whenever one "member thereof . . . requests personnel of any recipient to make representations thereto;" Furthermore, continuation of the practice of having registered legal services lobbyists in state legislatures is fostered by permission of lobbying "representation by an attorney as an attorney for any eligible client." "Eligible clients" would include lobbying organizations concerned with issues as diverse as passage of the Equal Rights Amendment and gun control. (Cong. Rec. H 3894-3895, May 15, 1974).

Congressman Quie responded as follows:

> Again, this is a misreading of the effect of one of my amendments and of the

> conference action concerning it. The House bill always permitted a Legal Services attorney to testify before a legislative body when requested to do so, even by one member of such body. So did the Senate bill and that issue was not within the scope of the conference. What my amendment did was to include lobbying on Executive orders and similar promulgations at any level and to preclude representation of a client before a legislative body at the State or Federal levels. The conference bill includes executive orders and similar promulgations, a recession to the House position, and permits the representation of an eligible client before a State legislature or the Congress, but only with the added restrictions I have described against the solicitation of a client or of a group to make such representation possible. The whole purpose was to prohibit either an organized lobbying effort or the representation of groups described in the fact sheet. I think the House position is effectively sustained. (Cong. Rec. H 3895, May 15, 1974).

Congressman Perkins said:

> In short, our prohibition against legislative and administrative representation is designed to make sure that program lawyers espouse the legal needs of their clients, not their own ideological beliefs. (Cong. Rec. H 3951, May 16, 1974).

The result of the extended negotiations on the Legal Services Corporation Act and the Congress's expectation for the future, were summarized by Congressman Meeds, one of the original authors of the House bill and a member of the Conference Committee.

> In describing the legislation that we now have before us, it seems most appropriate to use the term "balance." What we have done is to achieve a balance between the need for quality representation and the

need to prevent any potential program abuses. In so doing, we tried to make sure that poor people will remain confident that they are properly and adequately represented in the legal arena, and we tried to make sure that the people throughout our land will retain confidence in this program so that it remains popular in the vital political arena.

The provisions that we now have in this bill achieves the balance that we sought. Since this bill, therefore, is the subject of numerous compromises and delicate balances, it is our hope that the Corporation will painstakingly adhere to the bill's provisions. For us who have labored on this bill for so long, this requires two things, first, that the Corporation enforce the program restrictions that we have established in the legislation and, second, that the Corporation makes sure that no further program restrictions are established unless they are approved through the normal legislative process and signed by the President. (Emphasis added)

The balances that were drawn by this bill can best be exemplified by our provision on legislative and administrative advocacy. Under the conference bill, we have prohibited legislative and administrative advocacy except when such action is performed in behalf of an individual or group client, or when such representation is made pursuant to a request by a legislative official, agency staff person, executive officer or employee, and the like. (Cong. Rec. H 3956, May 16, 1974).

Senator Cranston summarized the meaning of the lobbying provisions as follows:

Under the conference bill, legislative and administrative representation has been prohibited except when done in behalf of an eligible individual or group, and except when representations are made following a request by a legislator, a legislative committee, or an authoritative official of an agency or executive department, or some

other governmental entity. These two exceptions to the rule are very important and I would like to explain them at this time.

Under the first exception, we tried to make sure that recipients and their employees will be unable to subvert this program so that it reflects merely their personal ideologies and goals. Therefore, legislative, administrative and executive representation is completely permissible as long as it is done in behalf of an individual or group client. Under this exception those recipients and attorneys which generally represent an eligible group--such as an economic cooperative or an impoverished senior citizens group or a poor people's civic organization--may represent them before legislative and administrative bodies on issues that are of important consequence to such group.

In so doing, it should be clear that the attorney is permitted to provide the full complement of legal representation for his client, including testifying, drafting proposed legislation, commenting on proposed legislation and regulations, working with legislative committees and the like. In short, representation for the client, and not for the attorney's pet causes, is what is permitted and encouraged by the bill. They may and should, of course, fully inform potential clients, and the groups they represent, about their legal rights, and the legal services available to them; if such persons or groups then request legal aid, then the attorneys may represent them before judicial, legislative, executive and administrative bodies.

Under the second exception, representation and advocacy of positions are permitted if such representation and advocacy are made pursuant to a request by a legislative or administrative official.

Therefore, if an official or member of a legislative body requests that representations be made by a recipient,

> personnel of the recipient are fully authorized to advocate positions and make representations to the legislature. If an authoritative official of an administrative or executive agency requests that representations be made to the agency, then personnel of the relevant recipient can make such representations. If proposed regulations are published in the Federal Register and requests therein are made for comment on such proposed regulations, then recipients and their personnel will be permitted to comment. By setting forth the second exception to the general rule, therefore, it should be understood that we sought to keep the Legal Services program responsive to the informational needs of Government representatives and officials. (Cong. Rec. S. 12934, July 18, 1974).

Both the House and the Senate bills prohibited the Corporation from undertaking to influence the passage or defeat of any legislation by the Congress or by a State or local legislative body. However, the Senate version allowed the Corporation to testify and make appropriate comment in connection with legislation or appropriations directly affecting the activities of the Corporation. The House agreed to the Senate provision in Congress (S.R. No. 93-495, 93rd Cong., 1st Sess.)

Congress again considered the question of permissible lobbying activities in connection with the 1977 reauthorization legislation. Reauthorization measures were introduced in both the Senate and the House with various proposals for amendments to section 1007(a)(5) of the Act, but none amounted to more than an attempt to fine tune the statutory scheme established in 1974. Both houses specifically recognized lobbying as a legitimate form of client representation. Thus, the Senate

Committee on Human Resources report on S. 1303, the Senate reauthorization bill states:

> When it enacted the Legal Services Corporation Act, Congress recognized that circumstances might arise in which legislative or administrative advocacy might sometimes be the most efficient method of resolving an issue affecting legal services clients, and it authorized legal services programs to engage in such activities on behalf of specific clients or organizations and in response to requests for information from legislators. (S. R. No. 95-172, 95th Cong., 1st Sess. p. 14).

The House Judiciary Committee report includes essentially the same language. (H.R. No. 95-310, 95th Cong., 1st Sess. p. 11).

Both the House bill (H.R. 6666) and the Senate bill (S. 1303) addressed the questions of the appropriate program personnel to conduct legislative and administrative advocacy, the ethical restrictions on soliciting clients for the purpose of conducting legislative advocacy, and the type of representation that could be provided. In addition, the House bill added "State proposals by initiative petition" to the list of legislative measures on which lobbying was prohibited absent an applicable exception. (H.R. No. 95-310, 95th Cong., 1st Sess.)

H.R. 6666 made explicit the legality of employing nonlawyers to conduct legislative or administrative advocacy. S. 1303 had a similar provision, except that the Senate bill specifically required that the nonlawyer be supervised by an attorney. That requirement was dropped in the Conference

the language in the 1974 Act which provided for representation "by an attorney as an attorney" was amended to read simply "by an employee of a recipient."

H.R. 6666 would have dropped entirely the prohibition contained in the 1974 Act against soliciting a client, either individual or group, for the purpose of making legislative representation possible. This action was not intended to authorize solicitation, but simply to recognize the special consideration that the ABA Code of Professional Responsibility gives to the educational and outreach efforts of legal services attorneys. The House Judiciary Committee explained:

> The omission of the language prohibiting the solicitation of clients for the purposes of legislative advocacy is not intended to authorize solication. Legal Services attorneys, like all other lawyers, are subject to the ethical constraints of the Code of Professional Responsibility which prohibits solicitation. However, the ABA Code of Professional Responsibility authorizes legal services lawyers to engage in educational and outreach activities that the Committee believes should be encouraged. Opinions issued by the ABA Committee on Ethics and Professional Responsibility state that because the poor tend to be ignorant of the legal rights, and suffer particular problems because of that ignorance, legal services programs have a responsibility to go out into the community to educate the poor concerning their legal rights. The Committee further considered that under Section 1006(b)(3) of the act, all lawyering that is done under the act is already subject to the Code of Professional Responsibility, so that activities exceeding this community education function are elsewhere regulated. Therefore, a specific prohibition addressed to legal services lawyers was deemd both unnecessary and misleading. (H.R. No. 95-310, 95th Cong.,

The Senate Committee agreed that the prohibition against solicitation in the 1974 Act did not ban activities permitted under the Code of Professional Responsibility. (S.R. No. 95-172, 95th Cong., 1st Sess.) However, language in the Senate bill prohibiting solicitation "in violation of professional responsibilities" was intended to make it clear that the Code was applicable with respect to the solicitation of clients. The conference committee adopted this approach. (H.R. No. 95-825, 95th Cong., 1st Sess.)

The House bill contained language intended to clarify the types of representation that a legal services program could provide in response to a request and on measures directly affecting the program or its clients. The committee bill provided that representation was authorized when:

> (B) a governmental agency, legislative body, a committee, or a member thereof -- (i) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or (ii) is considering a measure directly affecting eligible clients or the activities of the recipient or the Corporation (H.R. No. 95-310, 95th Cong., 1st Sess. p. 22).

The Committee made it clear that "directly affecting eligible clients" was not a carte blanche for legal services employees to lobby on <u>any</u> issue which may affect the poor, but only those that directly affect eligible clients to the degree that the program board voted, in consultation with the client community, to support and comment on the issue. (H.R. No. 95-310, 95th

amended on the floor to specifically reflect the committee's intention, to provide as follows:

> (ii) is considering a measure directly affecting eligible clients (when the measure involves a subject on which the board of the local program, in consultation with the client community, has voted to take a position) or the activities of the recipient or the Corporation. (Cong. Rec. H 6532, June 27, 1977).

The Senate bill had no language specifically dealing with the lobbying activities that could be conducted upon request. The Senate Human Resources Committee report indicates that the Committee believed that Congress intended Section 1007(a)(5) to permit testimony, drafting, and reviewing of legislation and "other appropriate timely forms of representation once assistance had been requested by the administrative or legislative entity." (S.R. No. 95-172, 95th Cong., 1st Sess. p. 15). Thus, in the Senate's view, no further legislation was required.

In conference, the Senate receded on both House amendments. As a result, the conference bill specified examples of the types of representation (testifying, drafting, etc.) that might be undertaken in response to a request. The Conference Report states, however, that they were not exclusive.

> The conferees agree that the representations enumerated by the House bill are those which are already implicit in current law. This provision in no way precludes a recipient from responding to a request directed to a recipient by a governmental agency, legislative body, a committee, or a member thereof to make representations of a general nature. (H.R. No. 95-825, 95th Cong., 1st Sess. p. 13).

services personnel may lobby per se. The issue is whether lobbying can be conducted with (public) funds provided under the Act. Section 1006(b)(3) of the Act prohibits the Corporation from interfering with an "attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association." Thus, the Corporation could be in violation of this provision of the Act if it attempts to implement regulations on lobbying activities which substantively narrow the scope of activities that Congress has permitted. In this respect, it is significant that Congress has not reduced in any way (until H.R. 3480) the permissible lobbying activities on behalf of eligible clients since the Conference Committee restored authority to lobby on behalf of eligible clients on the full range of legislative measures in the 1974 Act. Except for the addition of state initiative petition as a prohibited measure, the 1977 Amendments essentially clarified the existing law. What emerges, then, is a clear indication that Congress has rather fully considered the question of permissible lobbying activity and that the existing legislation completely embodies its intention with respect to lobbying. Moreover, Representative Meeds made this explicit in noting that Congress did not intend for the Corporation to add any additional restrictions to the Act beyond those imposed by Congress. (Supra, p. 21).

On the other hand, the Corporation clearly has authority

Finally, you asked whether the Corporation could prohibit programs from maintaining full time legislative offices. Surprisingly, there is some legislative history on this point. Speaking in support of the original House version of H.R. 7824, Representative William Ford said,

> This bill assures the independence of legal services staff attorneys as they serve their clients' legal needs. It contemplates that these attorneys will act as advocates in all legal forums. Thus, in addition to litigation, we on the committee anticipate that lawyers will represent their clients before administrative agencies and legislative bodies. The corporation is expected to promulgate regulations that will guarantee that no one will interfere with attorneys' obligations to vigorously pursue the rights of clients in legislative, administrative, and judicial forumss. In order to conserve meager resources, it is our hope that recipients will make arrangements to pool resources to maintain an office and staff personnel at the places the legislatures and agencies work. (Cong. Rec. H 5085, June 21, 1973.)

His remarks echoed those of Representative Clay, who said:

> There is also no prohibition on advocacy before legislative and administrative bodies on behalf of a client or on the request of such bodies. In fact, it is expected that various legal services groups will engage in such advocacy and should be enabled to do so in a reasonable and economical fashion. Thus, the Corporation should permit legal services recipients to jointly have offices or employees in the locations where the legislatures and administrative agencies are located. (Emphasis added) (Cong. Rec. H 5083, June 21, 1973.)

Section 1007(a)(3) requires the Corporation "to insure that grants and contracts are made so as to provide the most

economical and effective delivery of legal assistance to persons in both urban and rural areas." Therefore, it appears that a decision to bar full time legislative offices would have to be based on considerations of economy and efficiency, and not purely on ideological grounds. Since even H.R. 3480 permits some advocacy, it may be hard to justify restricting arrangements, such as pooled offices, which would presumably save funds in a period of shrinking resources. Further, any such restriction should be accomplished pursuant to the funding process (for example, by grant condition), because of the close relationship the issue has to funding policy, as opposed to simply by regulation.

LEGAL SERVICES CORPORATION

45 C.F.R. Part 1612

Instruction on Prohibited Lobbying Activities

AGENCY: LEGAL SERVICES CORPORATION

ACTION: Instruction on Prohibited Lobbying Activities

SUMMARY: The Legal Services Corporation is publishing an instruction to recipients regarding restrictions on lobbying activities contained in the Corporation's appropriation legislation. These restrictions, known as the Moorhead Amendment, were first applicable to the Corporation's FY 1979 appropriation (P.L. 95-431) and have been contained in each subsequent appropriation act through the current fiscal year, including appropriations authorized by continuing resolutions in FY 1981 and FY 1982. (P.L. 96-68, P.L. 96-369, P.L. 96-536, P.L. 97-51, P.L. 97-85, P.L. 97-92, P.L. 97-161). The purpose of this instruction is to inform recipients of the effect of the lobbying restrictions on the Corporation's current regulations on lobbying (45 CFR Section 1612.4).

EFFECTIVE DATE: 30 days after publication

FOR FURTHER INFORMATION CONTACT:

Mary Wieseman, Acting General Counsel, Legal Services Corporation, Suite 700, 733 Fifteenth Street, N.W., Washington, D.C. 20005. Telephone: (202) 272-4010

INSTRUCTION ON PROHIBITED LOBBYING ACTIVITIES.

Beginning in fiscal 1979, every appropriation bill providing funds for the Legal Services Corporation has contained a provision restricting the lobbying activities that may be conducted with appropriated funds. This restriction, known as the Moorhead Amendment, provides:

> Provided, No part of this appropriation shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress or any State legislature.

The Legal Services Corporation Act and regulations prohibit any lobbying activities by recipients unless the activity falls within three exceptions. (Section 1007(a)(5) of the Act, 42 U.S.C. 2996f(a)(5); 45 CFR Part 1612.4). Those exceptions are :

1) in response to a request from a governmental agency or a legislative body, committee, or member (45 CFR Part 1612.4(a)(1));

2) on behalf of an eligible client of a recipient, if the client may be affected by a particular legislative or administrative measure (but no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation possible) (45 CFR Part 1612.4(a)(2)); or

3) if a governmental agency, legislative body, committee, or member thereof is considering a measure directly affecting the activities under the Act of the recipient or the Corporation (45 CFR Part 1612.4(a)(3)). This instruction explains the effect

that the restrictions on legislative activity contained in the Moorhead Amendment have on the legislative activities otherwise permitted by the Legal Services Corporation Act and regulations.

The Corporation's interpretation of the Moorhead Amendment is guided by the opinions of the Comptroller General issued by the General Accounting Office. The Comptroller General has construed other legislative restrictions on lobbying activity which are similar to those contained in the Moorhead Amendment, such as section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act. 56 Comp. Gen. 889 (1977), 59 Comp. Gen. 115 (1979). The opinions on section 607(a) and subsequent opinions construing the Moorhead Amendment itself make it clear that the prohibition on using funds for "publicity or propaganda purposes" is directed toward "grass roots" lobbying, that is, appeals directed to the public at large or to selected individuals suggesting that they contact their elected representatives and indicate their support for or opposition to legislation. B-163762 November 27, 1980; 60 Comp. Gen. 423 (1981). Therefore, under the Moorhead Amendment, recipients may not use Corporation funds to make such appeals, that is, to conduct "grass roots" lobbying efforts. This restriction is in addition to those contained in the Legal Services Corporation Act itself. Legislative activities authorized under the Act and regulations may not include appeals to the public to contact elected representatives in support for or in opposition to pending legislation.

The Moorhead Amendment does not prohibit advising an eligible client, as part of legal assistance activities conducted under the Act, that it may be in his or her best interests to contact an elected official concerning pending legislation. Likewise, it does not prohibit direct contact with elected officials concerning pending legislation. (Such activities, of course, must come within one of the exceptions to prohibited lobbying activities provided for in the Act and regulations.)

This instruction applies to all Corporation grant funds awarded effective January 1, 1979, and thereafter. This instruction supersedes all previous instructions or other communications to recipients from the Corporation construing the Moorhead Amendment.

Gerald M. Caplan,
Acting President
Legal Services Corporation

Eligibility Regulations

LEGAL SERVICES CORPORATION

MEMORANDUM

Date : July 30, 1982

To : Committee on Operations and Regulations

Through: Gerald M. Caplan, Acting President

From : Mary F. Wieseman MFW

Subject: Issues Relating to Eligibility for Services and Part 1611

Attached is a package of materials relating to a variety of issues that come up under the general rubric of client eligibility. The materials consist primarily of internal LSC memoranda relating to eligibility issues, correspondence between the Corporation and HEW/HHS, General Counsel's opinions and ABA opinions relating to eligibility and access to confidential client information. Although you have already seen much of the material, we felt it would be useful to have it all together.

In general, the materials and the discussion that follows deal with (1) needed clarifications of Part 1611, (2) suggestions for changes in the regulation provisions dealing with group eligibility, and (3) the Corporation's need for and authority to require disclosure by legal services programs of information that identifies clients for the purpose of confirming eligibility.

1. Clarifications of Part 1611

The June 8, 1982 memorandum from L. Perle to M. Wieseman and the attachments thereto discusses a variety of clarifications that should be made in the current version of Part 1611. That memorandum speaks for itself and needs no further discussion.

2. Group Eligibility

In his June 21, 1982 memorandum responding to the proposed modifications of Part 1611, Mr. Caplan discussed the suggestion that Section 1611.5(c), dealing with group eligibility, be modified to prohibit group representation unless the group is composed primarily of poor persons. The June 28, 1982 memo from

Bucky Askew and the July 8, 1982 memo from Gerry Singsen both address that issue. They both suggest that before recommending the repeal of Section 1611.5(c)(2), which permits representation of a group which "has as its primary purpose furtherance of the interests of persons in the community unable to afford legal assistance," the Corporation should find out as much factual information as it can about what kinds of groups actually receive representation under this provision.

Assuming that the Board decided, on the basis of this information, to limit group representation only to those groups composed primarily of eligible clients[1/] it could do so by simply repealing Section 1611.5(c)(2) and making appropriate changes in the order of the remaining provisions of Section 1611.5(c). Although the legislative history of the Legal Services Corporation Act is clear that Congress intended to permit group representation and provides some support for the current language in Section 1611.5(c)(2), it cannot be read to require that the Corporation permit representation of any group not composed primarily of eligible clients. The Board could choose, therefore, as a matter of policy, to so limit group representation.

3. Disclosure of Identifiable Client Information

The remainder of the materials in the package deal with the question of how far the Corporation may and should go in requiring programs to corroborate and disclose information provided by clients and used in making eligibility determinations. The correspondence between the Corporation and HEW/HHS illustrates the position that the Corporation has consistently taken since its creation regarding the authority of funding agencies to demand that legal services providers disclose information that would identify their clients. The materials also contain the ethical opinions that support the Corporation's position in this matter. Most of those opinions were written before the Corporation was in existence.

1/ In the event that H.R. 3480 were to become law this discussion would probably become moot, since Section 15 of that bill restricts representation to those groups that are "limited to those persons financially eligible pursuant to Section 1007(a)(2) of the Legal Services Corporation Act."

Current regulations provide that information obtained by programs to determine eligibility "shall be preserved, in a manner that protects the identity of the client, for audit by the Corporation." 45 CFR Section 1611.6(a). Such eligibility information may not be disclosed to "any person who is not employed by the recipient [including the staff of the Corporation] in a manner that permits identification of the client without the express written consent of the client." 45 CFR Section 1611.6(c).

As Bucky Askew indicates in his June 28, 1982 memorandum, these provisions permit the Corporation to perform routine audits of program compliance with eligibility standards, and Regional Offices do perform such audits as part of their monitoring efforts. Absent complaints about the eligibility of specific individuals, the Corporation has, in the past, not found it necessary or useful to have access to any information which identifies clients by name. When, on the other hand, allegations are raised about the eligibility of specific individuals, the Corporation has taken the position that neither Section 1611.6 nor the applicable ABA opinions prevents it from requiring that programs provide the information necessary to confirm or refute the allegations (so long as it is not information subject to the attorney-client privilege) since in those instances the identity of the client has already been revealed. In a few instances, legal services programs have resisted providing the information sought by the Corporation, based primarily on the language of Section 1611.6(c). The suggestion made in L. Perle's June 8, 1982 memorandum to revise Section 1611.6(c) is intended to meet this specific problem. Since none of the applicable ABA opinions deal with the situation where the eligibility of a particular client is in issue, the memorandum suggests that prior to implementing such a change in the regulation, the Corporation seek clarification from the ABA that such a procedure would not pose an unacceptable ethical dilemma for program attorneys.

The suggestion has been made that the Corporation should do more to ensure that programs are serving only eligible clients. Two approaches have been suggested: first - to require programs to require and maintain additional documentation of eligibility; and second - to permit the Corporation to have access, either directly or indirectly, to information which identifies clients so that someone other than the program itself can, on a routine basis, verify that the clients served by a program are in fact eligible under the program's and Corporation's financial eligibility guidelines.

With respect to documentation, the Corporation's regulations do not now specify any particular form of documentation that is required to support eligibility determinations. Section 1611.6(b) requires a recipient to "make appropriate inquiry to verify" the accuracy of information used to determine eligibility "if there is substantial reason to doubt the accuracy of the information," and Section 1611.6(a) requires a recipient to "adopt a simple form and procedure to obtain information to determine eligibility" subject to approval by the Corporation. Eligibility is to be determined "in a manner that promotes the development of trust between attorney and client" and the verification shall be done in a manner consistent with an attorney-client relationship." These provisions have, in the past been interpreted to prohibit programs from, for example, requiring clients to swear, under penalty of perjury, that the information they have provided is true and accurate, since to do so was regarded as undermining the trust and confidence that is essential in the attorney-client relationship.

Nothing in the current regulations would prohibit the Corporation from requiring programs to maintain more specific documentation of client eligibility, for review by the Corporation, so long as that review is done in a manner that protects the identity of individual clients.[2/] Such requirements could be done administratively, as part of the Corporation's approval authority under Section 1611.6(a), or examples of the appropriate kinds of documentation could be included within Part 1611.

Even if the Corporation were to require more specific documentation of eligibility, under the current regulations and ABA opinions, the Corporation would still be precluded from requiring programs to routinely make available to the Corporation or any other person not employed by the program information that identifies individual clients. However, as is discussed in Pat Yogus' July 1, 1982 memorandum, the ABA has sanctioned the use of

---

2/ Section 12 of H.R. 3480 would specifically require such documentation of eligibility and review by the Corporation to assure compliance with eligibility guidelines, but would also protect "confidential client information" and does not specify what kinds of documentation would be required or appropriate.

independent auditors, under contract to the programs, to review identifiable client information,[3] and certify the results of the review so long as the auditors are carefully chosen by the program and are under the same confidentiality constraints as the program. The ABA opinion [4] specifically states that:

> In reaching our opinion, we assume that neither the independent accountant nor the local program reveals to the program's funding source or other third party any information that identifies a particular client or that otherwise is a confidence or secret of a client.

No changes in Part 1611 would be required to expand the scope of the annual audits that programs must provide for, but the coverage of the Corporation's Audit and Accounting Guide would have to be substantially modified to include eligibility audits and provision would have to be made for the additional costs that programs would have to bear for a greatly expanded audit process. In addition, if a decision were made to use the same auditing firm for both the Corporation and its grantees, an ABA opinion should be sought to determine whether such an arrangement would still be acceptable.

Any effort by the Corporation to enable it to have direct access to information that identifies individual clients who are not the subject of specific complaints would run head long into the existing ABA opinions and would be inconsistent with the position that the Corporation has long advocated vis a vis other funding agencies. If, however, the Corporation chose to reject its previous position because it now considered direct access to

---

[3] The question posed to the ABA was whether auditors hired by the program could audit client trust accounts that listed the names of the individual clients whose funds were in the accounts. Although the specific factual situation differs, the basic considerations would be similar in both cases. Legal services programs in Pennsylvania and elsewhere that receive Title XX funding to provide legal services have utilized the independent auditor system for several years to confirm the validity of statistical information submitted by the programs to the funding agency.

[4] I.O. No. 1443 (December 10, 1979).

individually identifiable information essential to its task of ensuring compliance with the Act, it could seek specific guidance from the ABA on the parameters of the Corporation's authority to require such information. As with judicial opinions, the ABA opinions do not address every circumstance, and if the Corporation could justify its need for identifiable client information, the ABA could reconsider its prior opinions in light of that justification.

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: : June 8, 1982

TO: : Mary Wieseman

FROM: : Linda Perle

SUBJECT: : Explanation of Suggested Modifications of Part 1611

Attached to this memorandum is a draft that includes suggested changes intended, for the most part, to clarify those sections of Part 1611 that have proven to be ambiguous or otherwise troublesome. The suggestions represent my first attempt to deal with the issues of interpretation that have arisen since the regulation was finalized in 1976. I am open to alternative suggestions for dealing with these issues; in a few instances I will discuss other alternatives that have been proposed.

With the exception of the revision to Section 1611.6 discussed below, these suggestions do not make any substantive changes in Part 1611 as it has been interpreted by the Office of General Counsel. In essence, the suggestions serve to codify what have been the official interpretations of this office with respect to these issues.

I will discuss the modifications in the order in which they appear. Where no change is proposed in a particular section, there is no discussion and "no change" appears in brackets in the draft.

Section 1611.3 Maximum income level

The current Section 1611.3 refers to "the official poverty threshold as defined by the Office of Management and Budget." This year OMB delegated its responsibility for preparing the revised Federal Poverty Income Guidelines to the Department of Health and Human Services which published those figures on April 9, 1982. The proposed modification is intended to permit the Corporation to use the current Federal guidelines without regard to whether they are prepared by OMB or some other federal agency to whom the responsibility is temporarily delegated.

Section 1611.4 Authorized exceptions

The only change is to make the current reference to Section 1611.5(b) consistent with the proposed revision to that section

used to reduce income..." (Section 1611.5(b)(1)) and those "which may be considered in denying assistance to an otherwise eligible individual..." (Section 1611.5(b)(2)).

Section 1611.5(b) Exceptions to maximum income level

The current version of Section 1611.5(b) contains a list of "other relevant factors [which shall be considered by a recipient] before determining whether a person is eligible to receive legal assistance. The regulation itself does not indicate in what manner any of these factors is to be considered. Although it is clear that some of the factors could only rationally be considered as deductions to income (e.g., fixed debts and obligations), with respect to other factors (e.g., the consequences for the individual if legal assistance is denied) it is not apparent whether they were intended to expand or contract the circumstances under which representation is to be provided. Section 1611.4(a) refers to the factors stated in Section 1611.5(b) in the context of "circumstances requir[ing] that eligibility should be allowed..." Nevertheless, since Part 1611 was adopted the General Counsel's Office has recognized that some of the factors are more appropriately considered in militating against providing services for certain individuals who might otherwise be financially eligible. The Office has written a series of opinion letters interpreting and clarifying 1611.5(b); copies of several of these letters are attached.

In the proposed revision, the Section 1611.5(b) factors have been divided between (1) those that may be considered as deductions from income; and (2) those that may be considered in denying assistance to otherwise eligible individuals. Proposed Section 1611.5(b)(1)(A) is identical to current Section 1611.5(b)(1).* Proposed Section 1611.5(b)(1)(B) is identical to current Section 1611.5(b)(3) except that a reference to state taxes has been added to clarify that these are encompassed within the provision. Proposed Section 1611.5(b)(1)(c) is identical to current Section 1611.5(b)(4). Proposed Section 1611.5(b)(1)(D) is a variation of current Section 1611.5(b)(5) and is intended to clarify that deductions may be made for those expenses associated with age or physical infirmity of resident family members, not simply for the fact that there may be elderly or handicapped

---

*The assumption is that a client whose annualized income would put them above the eligibility line, but whose income is seasonal could be considered eligible under this provision; on the other hand a client who has little or no income when services are sought, but whose income prospects are favorable would be covered under the provision of Section 1611.7 which deals with changes in circumstances.

members of the family. Proposed Section 1611.5(b)(1)(E) incorporates the "catchall" provision in the first part of current Section 1611.5(b)(7), and permits programs to consider other factors that may indicate that an individual's real disposable income is below the program's guideline.

Section 1611.5(b)(2) factors are intended to be applied in those situations where an individual would appear to be financially eligible for services, but where a program may find other circumstances that make representation inappropriate.** Proposed Sections 1611.5(b)(2)(A) and (B) are identical to current Sections 1611.5(b)(6) and (7) except that in each proposed section the word "minimal" is added. This is intended to justify a program's refusal to represent a financially eligible client in those matters where private representation is available for little or no cost, or where the client's interest at stake are insufficient to warrant the use of program resources. In the past some programs have attempted to justify representation of individuals whose income far exceeded income guidelines because the case was of major importance to that individual (and usually involved issues of relevance to poor people) or because private representation would be too costly for the individual's financial resources. Opinion letters have stated that the regulation was not intended to permit representation in these situations, but the actual language was by no means clear.

Proposed Section 1611.5(b)(2)(c) incorporates current Section 1611.5(b)(2) and expands it to encompass those situations where an individual with little income but with substantial liquid or non-liquid assets could be expected to utilize those assets in some way to pay for legal representation.***

**In most situations, Section 1611.5(b)(2) would simply complement a program's priorities and would serve as additional justification for a program's rejection of a client. In this sense, the section may be considered to be redundant.

***No clear line can be drawn when applying this factor, but some actual examples may be helpful. In one instance a complainant asserted that a program had represented an indigent woman who owned a home worth approximately $35,000, but had equity of only $10,000. The Corporation responded that our regulations would not require the woman to mortgage her home, especially when she had insufficient income to repay a loan in order to purchase legal services. On the other hand, another complainant asserted that a program had represented an individual who had little income, but who owned real property worth several hundred thousand dollars. In that instance the Corporation found that the program should have considered the property in determining whether or not to represent the client.

Proposed Section 1611.5(b)(2)(D) is identical to the current section 1611.5(b)(8) and is required by Section 1007(a)(1)(B)(iv) of the Act, 42 USC 2996f(a)(1)(B)(iv).

Section 1611.5(c) Group representation

The proposed change simply rearranges the provisions that apply to group representation to clarify that in order to qualify for legal assistance any group, regardless of its membership or purpose, must first show that it lacks the financial resources to pay for private representation.

Section 1611.6 Manner of determining eligibility

The proposed revision of Section 1611.6(b) represents the only substantive change that is proposed. The revision is made in recognition of the fact that under the Act the Corporation is charged with exclusive authority to review and dispose of questions of whether representation of particular clients is authorized. See Section 1006(b)(1)(B) of the Act, 42 USC 2996e(b)(1)(B). Although in most instances in the past the Corporation has had the full cooperation of legal services programs in investigating complaints about client eligibility, in a few instances programs have relied on the current Section 1611.6(c) for their refusal to provide the Corporation with adequate information to enable the Corporation to determine whether or not a particular client was eligible for services.

In drafting this revision care was taken to ensure that the provisions would not intrude unnecessarily on the attorney-client relationship and would not be inconsistent with Section 1009(c)(1) of the Act, 42 USC 2996h(c)91), which prohibits the Corporation from "access to any reports or records subject to the attorney-client privilege."

The provisions apply only to situations where allegations have been raised about the financial eligibility of a particular previously identified client. The information sought must relate solely to the financial eligibility of that particular client and is necessary to confirm or deny specific allegations relating to that particular client's eligibility. In addition, the Corporation is under an obligation not to disclose the information to anyone outside the Corporation, and the program is obligated to notify the client that the information has been sought and will be provided.

An alternative approach has been suggested that would permit the information to be provided, not to the Corporation, but to an independent third party who would certify that the

client was or was not eligible. This approach was not included because it would be less effective, in responding to complainants, for the Corporation to say it was relying on the judgment of a third party, rather than to say it had reviewed the information itself and had made its own judgment. Nevertheless, there may be ways to minimize this concern if this kind of alternative is deemed to be preferable.

Although I am confident that the approach described above is fully consistent with the Code of Professional Responsibility and the Act, I believe it would be prudent for the Corporation to request an informal opinion from the ABA on the ethical propriety of this or any alternative procedure prior to its institution. This would be useful in countering opposition from field programs as well as in ensuring that the Corporation is not undermining its credibility with the profession in general.