

**COMMENTS ON THE
PROPOSED LSC REGULATORY REVIEW**

**Submitted by the Committee on Restrictions and Regulations
Of the Civil Policy Group
National Legal Aid and Defender Association
January 10, 2001**

These comments are submitted to the Legal Services Corporation (LSC) by the Committee on Restrictions and Regulations, on behalf of the National Legal Aid and Defender Association's Civil Policy Group¹ in response to LSC's request for public comment that were published in the *Federal Register* on November 24, 2000, (65 *FR* 70540), requesting input into a proposed review by the LSC Board of the LSC regulatory scheme.

We understand that LSC plans to recommend to the Board those current regulations that should be revised as well as new rules that should be proposed for adoption. Recommendations will be included in an interim report to the Board at its January meeting that will suggest one or more rules that can be addressed by the Board immediately, followed by a more comprehensive report at the March Board meeting that will recommend a long-term regulatory reform agenda. The Regulations and Restrictions Committee of the Civil Policy Group met by conference call on three occasions to discuss our suggestions regarding both the interim recommendations and the long term regulatory reform agenda. These comments represent those areas where there was consensus among the members of the committee.

Clearly, there may be other rules not addressed in these comments that LSC determines should be revised as part of its regulatory review. Of course, we are interested in participating fully in any regulatory reform efforts that LSC decides to undertake, regardless of the specific regulations that are ultimately selected for revision or adoption.

¹ The Committee is chaired by Richard Halliburton (Legal Aid of Western Missouri) and the members are Mary Asbury (Legal Aid Society of Cincinnati), Jon Asher (Colorado Legal Services), Howard Belodoff (Idaho Legal Aid Services), Terry Brooks (ABA, Division for Legal Services), Robert Gillett (Legal Services of Southern Michigan), Bruce Iwasaki (Legal Aid Foundation of Los Angeles), Lillian Johnson (Community Legal Services), Lisa Krooth (Community and Indian Legal Services), Pat McIntyre (Northwest Justice Project), Richard McMahon (New Center for Legal Advocacy), De Miller (Legal Services of New Jersey), Ben Obregon (Client member - Madison, WI), Jose Padilla (California Rural Legal Assistance), Linda Rexer (Michigan State Bar Foundation), Regina Rogoff (Legal Aid of Central Texas), Ernesto Sanchez (Idaho Legal Aid Services), John Trujillo (Southern New Mexico Legal Services), Mary Wilson (Client member - West Texas Legal Services). Linda Perle and Alan Houseman of the Center for Law and Social Policy staff the committee, and Gerry Singen of Singen and Tyrrell provides consultant services.

Background

On March 8, 2000, Linda Perle and Alan Houseman from CLASP responded to a request from LSC President John McKay with a memorandum exploring the background of LSC's regulatory revision efforts in the first half of the 1990s and describing a number of issues that should be addressed in any new regulatory reform effort that LSC undertakes. A copy of that memorandum is attached. In the March memorandum, CLASP suggested that LSC should develop revisions to Parts 1611 (Financial Eligibility) and 1626 (Aliens) to address documentation issues that have arisen in the last several years in response to the controversies surrounding the Case Service Review system. In addition, the memorandum suggested that LSC should review the regulatory proposals that were published in 1994 and 1995 and consider republishing them for additional comments. We urge LSC to adopt the suggestions made in that memorandum as part of its regulatory review effort, with the revisions and additions discussed below.

Goals of LSC Regulatory Reform

In general, we believe that the goals of the LSC regulatory reform effort should be (1) to clarify and simplify regulatory requirements, (2) to relieve unnecessary documentation and administrative burdens on recipients and (3) to alleviate substantive compliance burdens as much as possible consistent with governing legislative restrictions and requirements. The recommendations in these comments are intended to further these goals. The recommendations generally address only those LSC regulations that have been in effect for substantial periods of time without significant review and revision and that are in need of revision.²

Interim Recommendations (January 2001)

We recommend that LSC begin its regulatory reform effort with proposals to revise **Parts 1611** (Financial Eligibility) and **1626** (Aliens) of the regulations.

² Except for those rules that are described in these comments or addressed by the Erlenborn II Commission (i.e., 1609, 1642, 1626, 1627), we do not believe that the regulations that were adopted to implement the 1996 restrictions should be revised at this time (e.g., 1612, 1632, 1633, 1637, 1638, 1639). In our view, the other regulations that were adopted in the early days of LSC, are not in need of revision, since we are not aware that they have raised substantial problems. An example is Part 1616 (Attorney Hiring). While there may be specific issues or concerns that have arisen under these other regulations from time to time, we believe that these have generally been adequately handled through the interpretive process and do not warrant the time and resources that would be necessary to revise the rules themselves as part of the current LSC regulatory review process. Of course, if LSC determines that additional regulations should be examined, we will be happy to work with the LSC staff and Board on proposed revisions to address any concerns that have been raised.

With respect to **Part 1611**, we recommend that LSC address both the documentation issues that were raised in the March 8, 2000, CLASP memorandum, and the substantive and organizational revisions that were part of the proposed revisions to the rule published on January 19, 1995, for notice and comment in the *Federal Register* (60 FR 3798). In addition, there are numerous other policy concerns that are raised by the rule that LSC should reconsider, such as the policies with respect to representation of groups.

Only a few of the requirements and procedures of Part 1611 were mandated by the LSC Act, and none are tied to legislative mandates imposed by the appropriations act. Instead, most of the provisions are the result of policy decisions made by the LSC Board and staff, and LSC is free to change those underlying policies and the provisions of the rule. The regulation was last revised in 1983 and a large number of issues of interpretation have arisen since that revision. The complex structure of the rule invites confusion and inconsistent practice among recipients. Both the substantive interpretative issues and the structural concerns were addressed in the proposed regulation that was published in 1995. LSC should carefully review the host of documentation and other administrative requirements that have been engrafted onto the regulatory requirements in the wake of the CSR controversy.

Although **Part 1626** was revised substantially in 1996, in response to the action by Congress to apply the alien restriction to all of a recipient's funds, we recommend that LSC look again at the provisions of the rule. LSC already plans to revise Part 1626 to incorporate the first Erlenborn Commission's interpretation of the "present in the US" phrase. We recommend that LSC should also review the documentation requirements that are in the current rule as well as those that have been added in light of the CSR controversy. These documentation requirements are not mandated by statute and they may be revised or eliminated by LSC if it determines that they are reasonable or unnecessary or that the statutory mandate could be accomplished in a less burdensome way. In addition, LSC should consider whether there are substantive changes that could be made in the restrictions imposed by the regulation that would give recipients additional flexibility to serve legal aliens consistent with the legislative intent of the provisions restricting alien representation.

Long-Term Regulatory Reform (March 2001)

During 1994-95, LSC published three additional proposals for regulatory revisions that should be reviewed and republished. These three rules were originally adopted during the early years of LSC and have not been revised since their adoption. The proposals for revising **Part 1604** (Outside Practice), **1608** (Political Activities) and **1621** (Client Grievance Procedures)³ were the result of

³ Revisions to Part 1621 (Client Grievance Procedures) should be considered along with revisions to Part 1624 (Handicap Discrimination), since there may be areas where the legal requirements for handling complaints about alleged discrimination against the disabled in the

careful consideration by the LSC Operations and Regulation Committee, the LSC staff and the Regulations Committee, a representative group that included members appointed by NLADA, PAG and SCLAID. The proposals were developed in response to numerous substantive concerns about interpretations of these rules that had been raised over the years, but were addressed through a patchwork of often inconsistent interpretations adopted at different times by various divisions of the Corporation. We believe that the approaches that were incorporated into the 1994-95 proposals are still valid, although we recognize that there may be some specific provisions that need additional revision because the issues may have changed slightly as a result of the passage of time and more recent developments. We recommend that LSC carefully review these proposals and republish them for additional comments, and we would be available to discuss any specific changes that should be made in the proposals prior to republication.

In addition, there are a number of other current regulations that LSC should review with an eye toward making revisions to address general or specific issues that have arisen over time. These regulations include:

Part 1600 (Definitions). Although we recommend generally that the definitions in Part 1600 be revised consistent with revisions made in the specific regulations where the terms are used, LSC may wish to separately reconsider the definition of the general term “staff attorney” which is used in several different places throughout the regulations. One particular problem with the definition is the requirement that if more than one-half of an attorney’s professional income comes from a recipient, that attorney is considered to be a staff attorney for purposes of Part 1614, even if the attorney is a contract attorney who is in private practice.

Part 1609 (Fee-Generating Cases). Although we understand that LSC has indicated that Part 1609 will be reviewed in light of the Erlenborn II Commission’s study of the restriction on attorneys’ fees, we recommend that LSC specifically address the basic question of what constitutes a fee-generating case. Some have suggested that the current definition is broader than required by the original legislative intent and might inappropriately preclude recipients from handling a wide range of cases where attorneys’ fees may be awarded, but where the fees will be either too small, too difficult to seek or too unlikely to be awarded to attract any private attorneys.

Part 1614 (PAI). The current Private Attorney Involvement regulation was adopted in 1985 and has not been revised since that time. The language of the current rule is complex, confusing and, in places, internally inconsistent. It contains a number of administrative requirements and procedures that have been inconsistently enforced and/or that do not make sense in the context of the

provision of services may overlap with the policies underlying the LSC client grievance procedure requirements.

current relationships between recipients and pro bono programs/bar associations/private attorneys. We believe that LSC should review the current Part 1614 to simplify and clarify the language and the requirements of the rule. In addition, it should be revised, consistent with changes made in Parts 1611 and 1626, to eliminate the unnecessary and burdensome documentation requirements that have resulted in recipients either not being able to count many of their PAI cases for CSR purposes or having difficulty recruiting and retaining private attorneys and pro bono programs to participate in their PAI programs.

Part 1624 (Handicap Discrimination). Part 1624 was adopted in 1979 in response to new requirements of the Rehabilitation Act of 1973. Civil rights law around issues of discrimination on the basis of disability has changed significantly in the last three decades, and the regulation is in need of a thorough update and revision. Nevertheless, we believe that in designing a new approach LSC should seek significant input from both the disabilities rights community and recipients to ensure that the new rules are consistent with the law that applies to the broader community and does not impose undue burdens on recipients.

Part 1627 (Fees and Dues). The restriction on the use of LSC funds to pay dues to private or nonprofit organizations has often interfered with the ability of recipients to develop close relationships with local bar associations that participate in PAI programs. LSC should consider whether it has any discretion under the statute to modify the rule with respect to payment of local bar dues.

Part 1631 (Expenditure of Grant funds). This regulation should be eliminated in its entirety. It was developed in response to an appropriations rider that is no longer in effect and is no longer relevant.

If you have questions about these comments or any of the issues that are raised, please feel free to raise them with Linda Perle (202-328-5146 or lperle@clasp.org) or Alan Houseman (202-328-5141 or ahouse@clasp.org) at CLASP.