

governing bodies of recipients of LSC funds. Many of the revisions are simply intended to clarify current Corporation policy or to interrelate this part to other LSC regulations. However, a number of the revisions represent changes in Corporation policy or interpretations with respect to issues that arise under the regulation. The final rule also includes a number of technical revisions to make the rule easier to understand and apply:

**EFFECTIVE DATE:** January 18, 1995.

**FOR FURTHER INFORMATION CONTACT:** Victor M. Fortuno, General Counsel, (202) 336-8810.

**SUPPLEMENTARY INFORMATION:** The Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") held public hearings on April 15, 1994, in Washington, DC, and on May 13, 1994, in Atlanta, Georgia, to consider drafts of proposed revisions to 45 CFR part 1607, LSC's regulation on recipient governing bodies. At the meeting in Atlanta, the Committee approved a draft, which was published as a proposed rule for public comment at 59 FR 30885 (June 16, 1994).

Twenty-two written comments were received and reviewed by the Corporation. The comments generally applauded the proposed revisions, but there were some areas of disagreement and several suggestions for changes. On September 16 and 30, 1994, the Committee held public meetings to consider the written and oral comments on the proposed rule. Based on those comments, the Committee made several revisions. The Committee met again on October 27, 1994, and voted to recommend a final rule for adoption by the full Board. On November 5, 1994, the Board voted to adopt the rule as recommended by the Committee for publication as a final rule in the Federal Register.

The Corporation recognizes that legislation to amend the Legal Services Corporation Act and reauthorize appropriations for the Corporation may be considered by Congress. If such legislation does become law, the Corporation's regulations will be revisited and revised accordingly.

In addition to amending 45 CFR part 1607, this rule is also intended to supersede part 1607's interpretive guideline published at 48 FR 36820 (August 15, 1983).

The entire rule, as revised, is published for clarity and ease of use.

## Section Analysis

### Section 1607.2 Definitions

Most of the changes in this section are technical and clarifying in nature. The section has been reordered to put the definitions in alphabetical order. Also, definitions found in other parts of the regulations but applicable to this part are included here for easier reference. In addition, language found in other sections of this part that, in fact, constitute definitions of terms are included here both for easier reference and to treat similar terms similarly. A new definition was added and some of the language has been clarified to make it consistent with past and current LSC interpretations.

#### Section 1607.2(a)

Although the definition of "attorney member" applies to attorneys who serve on any recipient board subject to this part, it was added primarily to make it clear that board members of a national support center do not have to be admitted to practice in a state where the center actually provides legal assistance. Because the "service area" of national support centers is the entire nation, an attorney board member need be admitted to practice in only one of the 50 states.

One comment suggested that law professors who teach within a recipient's service area, but who are not members of the bar in the recipient's service area, should be allowed to serve as an "attorney member" on the recipient's board. Statutory requirements for recipient boards do not allow this option. However, such law professors may serve pursuant to § 1607.3(d).

#### Section 1607.2(c)

The definition of "eligible client member" has been revised from the current definition. First, the language has been changed to make it clear that client board members must be eligible at the time of their appointment to each term of office. Thus, a client member who is financially eligible for services when first appointed to a recipient's board may not be reappointed to a second or subsequent term if, at the time of reappointment, the client board member is no longer financially eligible for LSC-funded services. However, nothing in the rule would require a client board member to resign during the course of a term if the client became ineligible subsequent to appointment.

Some comments suggested a further change to the definition to clarify that eligibility is based on financial eligibility, so that individuals who

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## LEGAL SERVICES CORPORATION

### 45 CFR Part 1607

#### Governing Bodies

**AGENCY:** Legal Services Corporation.  
**ACTION:** Final rule.

**SUMMARY:** This rule amends part 1607 of the Legal Services Corporation's ("LSC" or "Corporation") regulations relating to

would be financially eligible to receive legal assistance, but who could not be served by the recipient because of some other restriction on types of legal assistance or program priorities, could serve on recipient boards. The Board agreed and revised the language to clarify that a member need only be financially eligible pursuant to the requirements of LSC's financial eligibility guidelines, set out in 45 CFR part 1611, to qualify for board membership.

Language has also been adopted for this definition to clarify, in response to concerns raised in comments, that it is the national rather than the local financial eligibility standard that is applicable. As long as a person would qualify for services under Part 1611, the person would qualify for board membership, regardless of whether the recipient has a lower financial eligibility threshold or regardless of whether the person would also qualify for other services provided by the recipient.

Some comments suggested that the definition should be expanded to include individuals who are eligible for non-LSC-funded but not LSC-funded services provided by the recipient. One such comment suggested the adoption of a proportionality requirement, so that clients who are eligible for non-LSC-funded services, could serve in proportion to the amount of overall funding from the non-LSC source. Several comments argued that it is more important that client representatives be effective advocates for clients than that they be financially eligible for LSC-funded services. Two comments suggested substantially different and more expansive definitions of eligibility for client board membership. After consideration of these proposals, the Board decided not to expand the definition because it wished to insure that the focus of the legal services program remains on the indigent population. The Board believes that eligible client members are supposed to bring to the recipient a perspective of the community's needs, and that can best be done by someone who is financially eligible for the recipient's LSC-funded services.

The last major change to the definition is intended to clarify that it is the recipient that should decide how client board member eligibility is determined, i.e., the recipient should decide whether it or a particular group should make the determination. Thus, the recipient could decide that, for some groups, the recipient will make the determination and for others it will leave the determination up to the

appointing group. Two comments opposed the language that permits client eligibility determinations to be made by the appointing groups, rather than the recipient, arguing that the determination should not be delegated. No changes were made to the proposal, however, because it does not require that the recipient delegate the decision; it merely gives the recipient the choice.

#### Section 1607.2(d)

The proposed rule defined "governing body" so that it would have applied both to the governing bodies of recipients who have as a primary purpose the provision of legal assistance to eligible clients and to the policy boards or bodies established pursuant to the waiver provision in § 1607.6(d). However, in response to comments on the proposed definition, the Board narrowed the definition so that it does not apply to the policy boards or bodies referred to in § 1607.6(d).

There was a concern expressed in a comment as to whether a body that does not have full authority to make all "governing" policy and administrative decisions for the LSC-funded project would fall within the rule's definition of "governing body." For example, one LSC recipient that receives very little of its funding from LSC has set up a "policy board" to oversee the LSC grant separate from its Board of Directors, which oversees all of its other activities. However, the policy board does not have all the authority envisioned by this rule in the definition of "governing body" and in § 1607.4, which deals with the functions of governing bodies.

In response, the Board decided to define "governing body" so that it does not apply to the policy boards or bodies referred to in § 1607.6(d) and to make it clear that a governing body should have full authority over LSC grants as envisioned in this rule. However, in certain special circumstances that are discussed at length in this commentary on § 1607.6 on waivers, the President has the authority to grant waivers on board composition requirements. As a condition of granting such a waiver, a recipient would be required to establish a special policy board or body, rather than a governing board or body, to oversee the grant.

#### Section 1607.2(e)

A definition of "policy body" is added to this section to distinguish such a body from a governing body. As discussed above under the definition of "governing body," a policy body would be established pursuant to the waiver provision in § 1607.6(d) for grantees seeking a waiver of any of the

requirements imposed upon governing bodies by § 1607.3. However, a policy body would be required to conform to the membership and appointment requirements of § 1607.3, as well as the meeting requirements and compensation restriction in §§ 1607.4 and 1607.5, respectively, and would be required to have full authority to set policy for the services and activities funded under the LSC grant.

#### Section 1607.2(f)

This definition of "recipient" appears in 45 CFR part 1600, but is repeated here as an aid in interpreting this part.

#### Section 1607.3 Composition

##### Section 1607.3(a)

This section is revised to require in paragraph (a) that all board members must be supportive of the purposes of the LSC Act, and must be interested in and knowledgeable about the delivery of quality legal services to the poor. The current regulation does not include any similar requirement for client board members; but does include similar, although not identical, requirements for attorney and other board members. The rule removes the reference to the board's reflecting "the characteristics of the client community, in part because it is not clear what that language means and in part because it could be construed to be inconsistent with diversity requirements that are included in this section for each category of board membership.

Three diversity provisions are added to the regulation in §§ 1607.3(b)(3), (c) and (d) to require that board members reflect the diversity of the legal and client communities, including such factors as race, ethnicity, gender, and other similar factors. In so doing, the regulation relocates the current section of the rule that relates to diversity among attorney board members, revises the language to incorporate a more up-to-date statement of the concerns addressed by the current subsection, and applies the requirement to all categories of board members. While the language of this final rule specifically mentions race, ethnicity, and gender, it also includes a reference to "other similar factors" that may be relevant in a particular legal community and population of the area served by the recipient, which may include, for example, age, physical abilities, and religious belief.

The proposed rule did not have the word "similar" as a modifier in the phrase "other factors." Some comments stated that the diversity requirement was too broad and compliance would be

difficult if, at the same time, a recipient did not have the authority to select client board members. However, other comments suggested broader areas of diversity, such as experience or expertise in poverty areas, such as housing, education, benefits, homelessness, etc. The Board decided to revise the language to "other similar factors" instead of "other factors." This revision is intended to provide sufficient leeway for local programs to determine the appropriate types of diversity in their service areas and to insure that their local boards "reasonably" reflect those types of diversity that are relevant to the mission of legal services programs.

The provision does not require mathematical precision, but sets out goals that recipients should strive to achieve. In this regard, § 1607.3(h) will allow programs to consult with the appointing organizations to insure that the appointments are made consistent with LSC guidelines. This seems to be a reasonable compromise between allowing no recipient input and giving the recipient the authority to make all appointments. Finally, if necessary and appropriate, the waiver provision in § 1607.6 could be utilized.

#### Section 1607.3(b)

With respect to attorney board members, the rule revises the language of the current rule that is based on the requirements of the McCollum Amendment in the act appropriating funds for the Corporation. The McCollum Amendment requires a majority of the board members to be appointed by appropriate state, county and municipal bar associations. The revision clarifies that the appointments can be made by one or more such bar associations, as long as those bar associations collectively represent a majority of attorneys practicing law in the recipient's service area. If there are minority or gender-based bar associations that represent attorneys practicing in a particular locality, those bar associations may be included in the mix of bar associations that make appointments of attorneys to a recipient's board, especially if their inclusion would help to insure that there is appropriate diversity among the attorney members of the board. In addition, although the rule, consistent with the language of the McCollum Amendment, states that the appointments are to be made by the "governing bodies" of the bar associations, the Board recognizes that different bar associations should be free to exercise their appointment responsibility in a manner consistent

with their own policies, procedures and practices. The McCollum Amendment does not direct LSC to impose any particular method of appointment on a bar association.

One comment objected to term limitations on attorney appointments imposed by a state bar and suggested that the rule state specifically that any decisions on term limitations should be made by the recipient as part of its bylaws, rather than by the appointing bar or other organization. The Board did not incorporate the suggested change, because it feels that recipients should be allowed to work out those differences on a local level with the appointing organizations.

The rule also adds language which is based on part of the McCollum Amendment to make it clear that national support centers are not required to use the American Bar Association ("ABA") or a collection of all state bars to appoint their attorney members, simply because they provide service nationally. The rule also recognizes that some recipients, especially Native American or migrant programs, may have offices in one state, but also provide services in one or more adjacent or nearby states. The language is intended to permit those programs, if they so decide, to have the bar associations of the other states in which they provide service make appointments as well as the bar of the state in which their principal office is located.

For the additional ten percent of the board members who must be attorneys, but who are not covered by the McCollum Amendment, the final rule now explicitly states what is implicit in the language of the current regulation, i.e., that they may be selected by the recipient's governing body, if it so chooses. The rule does change the current regulation with respect to the additional ten percent of attorney board members in one respect, however. Under the current regulation, the additional attorneys must be representatives of bar associations or other legal organizations, e.g., law schools. This requirement is not contained in the LSC Act. Under this revised regulation, the recipient may select attorneys who are not representatives of any particular bar or legal organization, or may select attorneys who are affiliated with non-legal organizations, as long as they are admitted to practice in a state within the recipient's service area, and as long as the organization has an interest in the delivery of legal services to the poor. Thus, the recipient may select lawyers who represent the business community or the United Way and who could be

helpful in fundraising, or lawyers who provide substantial pro bono services to the client community and could be helpful in designing a recipient's private attorney involvement program.

#### Section 1607.3(c)

The rule includes a number of changes in the language that relates to client board members. The principal revision addresses the ambiguity of the language of the current regulation that has caused problems for some LSC recipients. This revision codifies the current LSC interpretation of the language to require that client board members be selected by client groups that have been designated by the recipient. The revision also adds language that more accurately reflects the kind of groups or organizations that would be appropriate client groups for purposes of selecting eligible client members.

Most comments applauded the language broadening the types of client organizations that may make appointments. Comments were not uniform, however, on whether recipients or client groups should have authority to appoint client board members. Numerous comments supported the clarification and the policy choice that it represented, while other comments stated that it is very difficult, and sometimes impossible, to comply with the requirement that client members be appointed by client organizations. According to these comments, often there are no organized client groups within the service area and, even when there are, it is not necessarily true that client groups speak for the client community. Other comments noted that recipients often come into contact with program clients or other financially eligible individuals who would make good client board members but who, for one reason or another, are not involved with any client group.

No change was made by the Board in response to comments on the proposed language. With the addition of § 1607.3(h), permitting consultation with the appointing organizations, and the waiver provisions in § 1607.6, the rule attempts to strike a reasonable balance among these concerns by (1) giving local programs as much input as possible into the selection of board members and (2) providing for waivers for special conditions.

#### Section 1607.3(d)

With respect to the other board members, i.e., those that are neither attorney members nor eligible client members, the rule makes it clear that

recipient boards are permitted to fill these slots. This gives recipients flexibility to include board members who can help them with fundraising, community relations, coordination with other social service providers, or any other locally identified need. Law school professors who cannot count as "attorney members" because they are not admitted to practice in a state within the recipient's service area, could be selected for this category of membership. Although there is no comparable language in the current regulation, this provision is consistent with longstanding LSC interpretations.

#### Section 1607.3(e)

This provision is revised by adding language to the "domination" provision in the current regulation to make it clear that the provision is not intended to prevent recipients from designating a single regional or statewide client council as the appointing organization for client board members, as long as that client council represents numerous smaller client groups. One comment suggested that coalitions may not always be broad-based and that there might be competing coalitions of client groups within a service area. The regulation, however, does not require that recipients use coalitions as the appointing organizations; it merely gives recipients the choice.

#### Section 1607.3(f)

This paragraph and paragraph (h) have been amended from the proposed rule. This section now deals only with the method of selection and is intended to revise the current rule by deleting language which could be incorrectly interpreted to give LSC authority to veto particular methods of selecting local board members. The rest of the proposed paragraph (f) has been amended and merged with paragraph (h).

#### Section 1607.3(g)

This section establishes a standard for dealing with recipient board vacancies by requiring recipients to make reasonable and good faith efforts to insure that governing body vacancies are filled promptly. Implicit in this standard is a recognition that recipients often have no control over the appointment process other than to change the groups that they have designated to make the appointments if a particular group fails to make an appointment in a timely manner.

Comments generally favored this provision. One comment noted that the existence of a few vacancies on a large board would have no influence on the

ability of a recipient to conduct its business. Several cautioned, however, that recipients "should be expected to exercise due diligence in the filling of board vacancies" and others proposed specific timeframes for compliance.

The Corporation retained the proposed language as a reasonable and realistic approach to problems with vacancies; but the Corporation also recognizes that there are alternative approaches to deal with vacancies. For example, through their own bylaws or board policies, recipients could take a number of actions when appointing organizations are slow in making appointments, refuse to make them, or are unable to make them for whatever reason. Thus, a recipient board could adopt bylaws that would permit its members to hold over until replacements are appointed, or could allow for short-term interim appointments, if necessary, until regular appointments could be made.

#### Section 1607.3(h)

This section has been revised from the proposed rule. It incorporates and amends the consultation provisions in the proposed § 1607.3(f) and the provisions in the proposed § 1607.3(h) that would have explicitly permitted a recipient to veto an appointee to its board. As adopted by the Board, this paragraph now states affirmatively that recipients may recommend names to bar associations and other appointing groups and should consult with those groups to insure that appropriate appointments are made. The Board adopted this consultation provision because it recognizes that bar associations or other groups may wish to request information from recipients on who would make a good legal services program board member and that appointing groups would benefit from recipient input in making their appointments. Most comments, including those from several bar associations, approved of this proposal, as long as it is clear that appointing bodies are to make independent judgments about whom to appoint to recipient boards. It is the intent of the Board that appointing organizations are to make independent judgments and retain their status as the decision makers for recipient board members. The consultation provision is meant to be an aid, not an impediment, to the appointing organization's decision making process.

In light of comments from the Standing Committee on Legal Aid and Indigent Defendants ("SCLAID") of the American Bar Association, the Board chose not to adopt the provision

authorizing a recipient to veto an appointee. SCLAID opposed the provision because it could cause unnecessary controversy and has the potential to be misread or misunderstood. SCLAID suggested that the consultation provision would obviate most problems at the outset and that local recipient bylaw provisions or state laws would adequately resolve any problems that might arise. Although other bar associations approved the concept of the veto provision, they advised building more specific checks and balances into the provision, for safeguards. The Board agreed that there were problems with the veto provision and decided to incorporate the consideration of individual or institutional conflict into the consultation provision. In addition, the Board noted that applicable state law that deals with conflict issues of nonprofit boards and recipient bylaws should be consulted to determine what mechanisms are available to deal with situations that cannot be resolved through the consultation process. Accordingly, recipients could amend their bylaws to add provisions that deal with board membership conflicts as long as the bylaws do not conflict with any requirements of the LSC Act or regulations. Then, when making recommendations to appointing organizations, recipients may refer to their bylaws as part of the standards by which board members should be appointed. It is recommended that such bylaws deal with situations where conflict issues are not resolved by the consultation process and also make it clear that it should be the governing body rather than the recipient's staff that determines whether there is a conflict.

#### Section 1607.4 Functions of a Governing Body

##### Section 1607.4(a)

This rule deletes the requirement for "effective" prior public notice, which has proven to be a difficult concept to enforce and may be very fact-specific. The Board felt that truly effective public notice is virtually impossible to achieve even if a recipient spent huge amounts of money on advertising. The Corporation does not wish to promote such wasteful expenditures or assume that the efforts were not "effective" simply because few members of the public showed up at a board meeting. Instead, the standard should be that of "reasonable" prior public notice, so that recipients would be required to do only what is reasonable under the specific local circumstances.

The Board also considered whether it should include within the regulation specific guidance as to what kinds of matters were properly discussed in executive session. In response to comments that some boards do not give appropriate notice of meetings, the Board revised the proposed language of § 1607.4(a) to require recipients to have written policies that are adopted by their governing bodies, so that arbitrary or ad hoc decisions would not be made regarding these matters. It also decided to recommend that recipients look to the kinds of matters described in the LSC bylaws and Sunshine Act regulation (45 CFR part 1622), state Sunshine Act provisions, or other provisions in state nonprofit corporation law for guidance as to the kinds of matters that might appropriately be discussed out of the public eye.

#### Section 1607.4(b)

New language is added to the rule to clarify that recipient governing bodies have, in addition to the specific functions described in the regulation, the authority and responsibility inherent in their status as boards of nonprofit corporations. The Board felt that the current regulatory language does not recognize that general authority, and the Board determined that it should do so.

In addition, the Board added language to make the section consistent with ABA opinions on the role of governing bodies of legal assistance programs under the American Bar Association's Model Rules of Professional Conduct, especially with respect to the governing bodies' interference with an attorney's representation of a client or with the conduct of any ongoing representation. The Board wished to make clear that while recipient board members were prohibited from such interference, the board as a whole should be encouraged to adopt policies to guide the executive director's actions when he or she undertakes representation in a case that is inappropriate under the restrictions of the LSC Act or regulations.

#### Section 1607.4(c)

This new provision is intended to make it clear that it is up to recipients to design their own bylaws and that LSC approval is no longer required. The Corporation would, of course, have authority to review a program's bylaws, as well as any revisions that are made to them, to insure that they comply with the LSC Act and regulations. Several comments suggested that the proposed language did not make it clear whether a recipient must submit its bylaws to the

Corporation for approval. Thus, paragraph (c) of the proposed rule was revised to clarify that LSC approval of original or amended bylaws is no longer required. Recipients need only send the Corporation a copy of any changes to their bylaws within a reasonable time after the bylaws are revised. Although the Board did not adopt a specific deadline, it noted that a reasonable time would be approximately 30 days.

#### Section 1607.5 Compensation

##### Section 1607.5(a)

The revisions to this section clarify an interpretation of the current rule and make two significant changes dealing with recipient board member compensation. First, this section has been revised so that the compensation restriction applies only to attorney board members. Since the provision of the LSC Act that prohibits compensation applies only to attorney board members, it is consistent with the Act to permit a recipient to pay compensation to a client or other non-attorney board member for board service or other service to the recipient. Comments were mixed on this provision. Some wanted to preserve the current rule because it relieves individual programs of the necessity to engage in debate on the subject. Several comments, on the other hand, suggested that client board members should always be compensated, and another stated that small stipends for client board members should be made in recognition of the effort that they make in fulfilling their board responsibilities. The Board adopted the proposed revision, since the statutory language is limited to the compensation of attorneys. The decision of whether to apply it to client members is purely a local policy decision to be made by recipients.

The second change made in this provision reverses the decision made by the LSC Board in 1988, which interpreted the language of the LSC Act to prohibit a recipient board member from receiving compensation from any recipient, not just the one on whose board the member sat. The effect of the 1988 revision was to prohibit field program staff from sitting on state and national support center boards, and vice versa, and thus prevented support centers from being accountable through their boards to the programs that they were intended to serve. This revision restores and clarifies the prior LSC policy that was in existence from 1975 to 1988 and which reflects the intent of Congress. Both the Legal Services Corporation reauthorization bill that

passed the House in 1992 (H.R. 2039) and the bill that was approved by the Senate Committee on Labor and Human Resources the same year (S. 2870) would have amended the LSC Act in a manner consistent with this revision. All but one comment favored this revision.

Finally, this section clarifies that all board members may receive a per diem payment for expenses in lieu of actual expense reimbursements, so long as such a payment is reasonable in light of actual average costs. Recipients are required to have written procedures for such payments. Per diem payments may be easier for programs to administer and may encourage board members to save money on items such as meals and lodging by setting the per diem at a relatively low rate. Language in the current rule was deleted to make it clear that reimbursement could be made for expenses incurred by recipient board members on the same terms and conditions that are applicable to non-board members, when such board members are involved in other program activities not directly related to their board membership or service; e.g., an attorney board member who volunteered to drive a program client to a meeting or a hearing could receive reimbursement for automobile expenses, or attorney board members who did pro bono work on behalf of the program could receive reimbursement for travel expenses for attending an out-of-town settlement conference.

#### Sections 1607.5 (b) and (c)

This section includes two new provisions that clarify how the compensation prohibition relates to a recipient's private attorney involvement program. Paragraph (b) makes it clear that, for those rural programs that operate in areas where there are so few attorneys that it is difficult or impossible to find attorneys willing to serve on program boards, the Corporation could partially waive the compensation prohibition to allow partners and associates of board members to participate in judicare or other compensated PAI activities. Comments generally favored this provision. However, one comment cautioned that the waiver should be limited to those rural situations in which, essentially, it would be otherwise impossible to recruit attorney board members. According to the comment, "[t]here is a danger that the delivery system could be skewed to direct resources towards associates or partners of board members and away from the employees of the program." Most comments spoke of the problems

of finding sufficient attorneys in rural areas to participate in PAI programs. No changes were made to the proposed language in response to comments. However, it is the intent of the Corporation that the waivers be used sparingly.

Paragraph (c) was added to clarify that attorney board members can receive referrals of fee-generating cases and participate freely in the recipient's pro bono PAI programs on the same terms as any other attorney. This is particularly important for rural areas where there are few private attorneys.

#### Section 1607.6 Waiver

##### Section 1607.6(a)

There is no change in this waiver provision which was designed to cover those programs, primarily reservation-based Native American programs, that existed prior to the creation of the Corporation and had nonattorney majorities on their boards. In lieu of attorneys, most of those programs include tribal advocates who practice in tribal courts.

##### Section 1607.6(b)

This provision is added to permit the Corporation president to waive any of the provisions of this rule that are not mandated by law, if the recipient demonstrates that it cannot comply with them because of the nature of the population, legal community or area served or because of special circumstances, such as conflicting requirements of the recipient's other major funding sources.

The proposed rule had a separate waiver provision for client board membership, but the LSC Board rejected the language. The proposed waiver for client board membership was intended for recipients that are not statutorily required to have clients on their boards to seek a waiver from the requirements of this rule. The rule applies to any recipient that receives financial assistance from the Corporation pursuant to § 1006(a)(1)(A) of the LSC Act. The statutory requirement for client membership, however, applies only to recipients organized solely for the provision of legal assistance. Comments from client representatives persuaded the Board to continue the client board membership requirement for any recipients that are subject to this rule. The Board agreed with the comments that any recipient funded by LSC funds would benefit from the client input and that clients would be better served as a result of their ability to have input into board policy decisions.

The language of (b)(1) has been amended to include a reference to "legal community" to make it clear that the nature of the legal community, as well as requirements of state law, could be considered as a basis for a waiver. The Board recognized that there may be programs, especially in rural areas, where there are peculiar problems or situations within the legal community that may make it necessary or desirable to permit the recipient to have a governing board that varies from the normal. An example would be for those programs that serve Native American populations and practice in tribal courts. The president, through the waiver authority, could permit the recipient to substitute one or more tribal advocates for attorney board members. In addition, this provision could be used as authority for partial waiver of the compensation prohibition, to permit a recipient to adopt policies that would allow partners or associates of a board member to participate in compensated PAI activities supported by the recipient.

##### Section 1607.6(c)

The only change made in this subsection was a reference to the previous subsection. It provides that a recipient seeking a waiver under § 1607.6(b)(1) must demonstrate that it has made diligent efforts to comply with the client board membership requirements.

##### Section 1607.6(d)

This new provision was added to require that as a condition of granting a waiver under paragraph (b)(2) of this section from the requirements of § 1607.3, the president shall require that the recipient receiving the waiver have a policy body to establish and enforce policy with respect to the LSC grant. This waiver provision might apply, for example, to an organization that is not principally a legal assistance organization but gets an LSC grant for legal assistance activities. The organization would be able to set up a policy board similar to those established for several of the Delivery Systems Study programs during the late 1970's, to govern the activities covered by the LSC grant. The Board intends that such a waiver would be given only in very unusual circumstances. Such a policy body would need to comply with the appointment and membership requirements of § 1607.3 and the meeting requirements of § 1607.4(a), and its members would be subject to the compensation prohibitions of § 1607.5. The Corporation wanted to make clear that a policy board is not merely an

advisory committee with limited authority to recommend policy to the recipient's governing body. By definition, such a policy board would be required to have full authority to formulate and enforce policy with respect to the services provided under the recipient's LSC grant or contract, although it may not necessarily have any policy-making authority with respect to the recipient's non-LSC funded activities. This provision requires the president to determine the powers and responsibilities of the policy body that are necessary to carry out its responsibilities with respect to setting policy for the LSC-funded activities. Because the scope of the powers and responsibilities of such policy bodies might be different than those of grantees not covered by the waiver, the reference in the proposed rule to § 1607.4 has not been retained in this final rule.

#### Deletion of Section 1607.7: Compliance

The compliance section of the current regulation is no longer applicable, because it refers to the changes that were made in the regulation in 1983. None of the revisions would require programs to change anything about their board structures in order to come into compliance, although they would permit programs to make numerous changes and still remain in compliance with the regulation. Therefore, the Corporation deletes the provisions on compliance. The Corporation will insure compliance with the new regulation in the same manner that it insures compliance with the other regulations.

#### List of Subjects in 45 CFR Part 1607

Legal services.

For the reasons set forth in the preamble, LSC revises 45 CFR part 1607 to read as follows:

#### PART 1607—GOVERNING BODIES

Sec.

- 1607.1 Purpose.
- 1607.2 Definitions.
- 1607.3 Composition.
- 1607.4 Functions of a governing body.
- 1607.5 Compensation.
- 1607.6 Waiver.

Authority: 42 U.S.C. 2996f(c); Pub. L. 103-317

##### § 1607.1 Purpose.

This part is designed to insure that the governing body of a recipient will be well qualified to guide a recipient in its efforts to provide high-quality legal assistance to those who otherwise would be unable to obtain adequate

legal counsel and to insure that the recipient is accountable to its clients.

#### § 1607.2 Definitions.

As used in this part,

(a) *Attorney member* means a board member who is an attorney admitted to practice in a State within the recipient's service area.

(b) *Board member* means a member of a recipient's governing body or policy body.

(c) *Eligible client member* means a board member who is financially eligible to receive legal assistance under the Act and part 1611 of this chapter at the time of appointment to each term of office to the recipient's governing body, without regard to whether the person actually has received or is receiving legal assistance at that time. Eligibility of client members shall be determined by the recipient or, if the recipient so chooses, by the appointing organization(s) or group(s) in accordance with written policies adopted by the recipient.

(d) *Governing body* means the board of directors or other body with authority to govern the activities of a recipient receiving funds under § 1006(a)(1)(A) of the Act.

(e) *Policy body* means a policy board or other body established by a recipient to formulate and enforce policy with respect to the services provided under a grant or contract made under the Act.

(f) *Recipient* means any grantee or contractor receiving financial assistance from the Corporation under § 1006(a)(1)(A) of the Act.

#### § 1607.3 Composition.

(a) A recipient shall be incorporated in a State in which it provides legal assistance and shall have a governing body which reasonably reflects the interests of the eligible clients in the area served and which consists of members, each of whom is supportive of the purposes of the Act and has an interest in, and knowledge of, the delivery of quality legal services to the poor.

(b) At least sixty percent (60%) of a governing body shall be attorney members.

(1) A majority of the members of the governing body shall be attorney members appointed by the governing body(ies) of one or more State, county or municipal bar associations, the membership of which represents a majority of attorneys practicing law in the localities in which the recipient provides legal assistance.

(i) Appointments may be made either by the bar association which represents a majority of attorneys in the recipient's

service area or by bar associations which collectively represent a majority of the attorneys practicing law in the recipient's service area.

(ii) Recipients that provide legal assistance in more than one State may provide that appointments of attorney members be made by the appropriate bar association(s) in the State(s) or locality(ies) in which the recipient's principal office is located or in which the recipient provides legal assistance.

(2) Any additional attorney members may be selected by the recipient's governing body or may be appointed by other organizations designated by the recipient which have an interest in the delivery of legal services to the poor.

(3) Appointments shall be made so as to insure that the attorney members reasonably reflect the diversity of the legal community and the population of the areas served by the recipient, including race, ethnicity, gender and other similar factors.

(c) At least one-third of the members of a recipient's governing body shall be eligible clients when appointed. The members who are eligible clients shall be appointed by a variety of appropriate groups designated by the recipient that may include, but are not limited to, client and neighborhood associations and community-based organizations which advocate for or deliver services or resources to the client community served by the recipient. Recipients shall designate groups in a manner that reflects, to the extent possible, the variety of interests within the client community, and eligible client members should be selected so that they reasonably reflect the diversity of the eligible client population served by the recipient, including race, gender, ethnicity and other similar factors.

(d) The remaining members of a governing body may be appointed by the recipient's governing body or selected in a manner described in the recipient's bylaws or policies, and the appointment or selection shall be made so that the governing body as a whole reasonably reflects the diversity of the areas served by the recipient, including race, ethnicity, gender and other similar factors.

(e) The nonattorney members of a governing body shall not be dominated by persons serving as the representatives of a single association, group or organization, except that eligible client members may be selected from client organizations that are composed of coalitions of numerous smaller or regionally based client groups.

(f) Members of a governing body may be selected by appointment, election, or

other means consistent with this part and with the recipient's bylaws and applicable State law.

(g) Recipients shall make reasonable and good faith efforts to insure that governing body vacancies are filled as promptly as possible.

(h) Recipients may recommend candidates for governing body membership to the appropriate bar associations and other appointing groups and should consult with the appointing organizations to insure that:

(1) Appointees meet the criteria for board membership set out in this part, including financial eligibility for persons appointed as eligible clients, bar admittance requirements for attorney board members, and the general requirements that all members be supportive of the purposes of the Act and have an interest in and knowledge of the delivery of legal services to the poor;

(2) The particular categories of board membership and the board as a whole meet the diversity requirements described in §§ 1607.3(b)(3), 1607.3(c) and 1607.3(d);

(3) Appointees do not have actual and significant individual or institutional conflicts of interest with the recipient or the recipient's client community that could reasonably be expected to influence their ability to exercise independent judgment as members of the recipient's governing body.

#### § 1607.4 Functions of a governing body.

(a) A governing body shall have at least four meetings a year. A recipient shall give timely and reasonable prior public notice of all meetings, and all meetings shall be public except for those concerned with matters properly discussed in executive session in accordance with written policies adopted by the recipient's governing body.

(b) In addition to other powers and responsibilities that may be provided for by State law, a governing body shall establish and enforce broad policies governing the operation of a recipient, but neither the governing body nor any member thereof shall interfere with any attorney's professional responsibilities to a client or obligations as a member of the profession or interfere with the conduct of any ongoing representation.

(c) A governing body shall adopt bylaws which are consistent with State law and the requirements of this part. Recipients shall submit a copy of such bylaws to the Corporation and shall give the Corporation notice of any changes in such bylaws within a reasonable time after the change is made.

§ 1607.5 Compensation.

(a) While serving on the governing body of a recipient, no attorney member shall receive compensation from that recipient, but any member may receive a reasonable per diem expense payment or reimbursement for actual expenses for normal travel and other reasonable out-of-pocket expenses in accordance with written policies adopted by the recipient.

(b) Pursuant to a waiver granted under § 1607.6(c)(1), a recipient may adopt policies that would permit partners or associates of attorney members to participate in any compensated private attorney involvement activities supported by the recipient.

(c) A recipient may adopt policies that permit attorney members, subject to terms and conditions applicable to other attorneys in the service area:

(1) To accept referrals of fee-generating cases under part 1609 of these regulations;

(2) To participate in any uncompensated private attorney involvement activities supported by the recipient;

(3) To seek and accept attorneys' fees awarded by a court or administrative body or included in a settlement in cases undertaken pursuant to §§ 1607.5(c)(1) and (2); and

(4) To receive reimbursement from the recipient for out-of-pocket expenses incurred by the attorney member as part of the activities undertaken pursuant to § 1607.5(c)(2).

§ 1607.6 Waiver.

(a) Upon application, the president shall waive the requirements of this part to permit a recipient that was funded under § 222(a)(3) of the Economic Opportunity Act of 1964 and, on July 25, 1974, had a majority of persons who were not attorneys on its governing body, to continue such nonattorney majority.

(b) Upon application, the president may waive any of the requirements of this part which are not mandated by applicable law if a recipient demonstrates that it cannot comply with them because of: (1) The nature of the population, legal community or area served; or (2) Special circumstances, including but not limited to, conflicting requirements of the recipient's other major funding source(s) or State law.

(c) A recipient seeking a waiver under § 1607.6(b)(1) shall demonstrate that it has made diligent efforts to comply with the requirements of this part.

(d) As a condition of granting a waiver under § 1607.6(b)(2) of any of the requirements imposed upon governing bodies by § 1607.3, the president shall

require that a recipient have a policy body with a membership composed and appointed in the manner prescribed by § 1607.3. Such policy body shall be subject to the meeting requirements of § 1607.4(a) and its attorney members shall be subject to the restrictions on compensation contained in § 1607.5. The policy body shall have such specific powers and responsibilities as the President determines are necessary to enable it to formulate and enforce policy with respect to the services provided under the recipient's LSC grant or contract.

Dated: December 13, 1994.

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General Counsel.

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