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January 30, 2003

The Honorable John N. Erlenborn
President

The Legal Services Corporation
750 First Street N.E., 10th Floor
Washington, D.C. 20002-4250

Re: **Issuance of Final Regulations at the January 2003 Legal Services Corporation Board Meeting**

Dear Mr. Erlenborn:

This letter urges the current Legal Services Corporation ("LSC" or "Corporation") Board of Directors to refrain from issuing new rules under 45 C.F.R. § 1604, relating to the outside practice of law by full-time legal services attorneys, and 45 C.F.R. § 1611, relating to the financial eligibility for clients receiving LSC-funded legal services. The Board should delay action on these rules, which I understand is scheduled to occur as early as this week, in order to allow new Board members to consider the proposals. Moreover, the proposals, if adopted, appear to be contrary to the express provisions of the Legal Service Corporation Act of 1974 (Pub. L. No. 93-55), and the subsequent restrictions originally adopted in the 1996 appropriations Act (Pub. L. No. 104-134).

The LSC Board should wait until the new Board members are confirmed to consider the proposals. On January 9, 2003, President Bush resubmitted the names of six candidates for the LSC Board to the U.S. Senate for consideration and confirmation. The Senate is expected to act quickly on President Bush's pending nominees and confirm them in the next few weeks. Five of the nominations were originally submitted to the Senate in April 2002, with the sixth originally submitted in November 2002. Acting on the proposed regulations will unnecessarily prejudice the functioning of the Corporation under a new Board of Directors.

Such prejudice should especially be avoided when, as in this case, the proposals, if adopted, would be unlawful. The proposed regulations would plainly violate the prohibitions on the receipt of legal fees for matters handled by an LSC-funded lawyer. Section 1007(a)(4) of the

The Honorable John N. Erlenborn
January 30, 2003
Page 2 of 3

LSC Act clearly states that the Corporation shall "insure that attorneys employed full time in legal assistance activities . . . refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law . . ." In addition, Section 1007(b)(1) of the LSC Act states, "No funds . . . may be used to (1) provide legal assistance . . . with respect to any fee-generating case . . ." The prohibitions are intended to eliminate any economic incentive for taxpayer-funded attorneys to choose to represent one client over another.

The proposed rule is inconsistent with this prohibition. For instance, the proposed change to Section 1604.5, entitled "Compensation," will allow LSC-funded attorneys to take fee-generating cases as long as the fees are returned to the LSC grantee. As the LSC's own Office of Inspector General (OIG) states in its public comments on the proposed rule:

No matter what the attorney receiving the compensation later does with the fee award, outside practice for which an attorneys' fee is awarded is compensated outside practice, *Jordan v. City of Greenwood, Miss.*, 808 F.2d 1114 (5th Cir. 1987), cert. denied, 484 U.S. 824 (1987).

The OIG further observed that "allowing and claiming and collection of an attorneys' fee award and/or requiring that the fee award be remitted to the recipient violates section 504(a)(13) of the 1996 appropriations Act."

I am also concerned about the proposed regulations under 45 C.F.R. § 1611 involving client eligibility. Sections 1007(a)(1) and (2) of the LSC Act originally described the purpose of establishing eligibility criteria as "ensur[ing] that a[n] [LSC] recipient will determine eligibility according to criteria that give[s] preference to the legal needs of those least able to obtain legal assistance . . ." However, the proposed rule appears to be insufficient to ensure that only eligible individuals receive representation; it would permit representation of individuals who do not satisfy the financial eligibility criteria and would establish vague standards for the documentation of eligibility of group clients.

Of the suggested changes to 45 C.F.R. § 1611, most alarming is the elimination of the requirement that LSC-funded grantee attorneys obtain retainer agreements. The OIG objected to this provision, stating "Congress . . . indicated its intention that retainer agreements be obtained when it specifically listed them as documents to which LSC has access under section 509(h) of the [1996] appropriations [A]ct."

The Corporation has a statutory duty to "ensure that activities . . . are carried out in a manner consistent with attorneys' professional responsibilities," 42 U.S.C. § 2996e(b)(3), and to "[e]nsure the maintenance of the highest quality of service and professional standards [and] the

The Honorable John N. Erlenborn
January 30, 2003
Page 3 of 3

preservation of attorney-client relationships" 42 U.S.C. § 2996f(A)(1). In my judgment, a retainer agreement between a lawyer and his or her client helps to fulfill this responsibility by clearly defining that relationship and preventing both lawyer and client from any misunderstanding as to the nature and scope of representation.

Again, I urge the current LSC Board of Directors to give deference to President Bush's statutory prerogative to appoint a new Board of Directors, which is anticipated to occur in the near future. The proposed changes to the current regulations are inconsistent with the express language of the relevant statutory provisions.

If you have any questions, please contact Committee Oversight Counsel, Patricia DeMarco, at 202-225-3926. Thank you for your attention to this request.

Sincerely,



F. JAMES SENSENBRENNER, JR.
Chairman

FJS/pfd

cc: Clay Johnson, Office of Presidential Personnel
Senator Judd Gregg
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