OSB CIVIL LEGAL SERVICES TASK FORCE
FINAL REPORT

May, 1996

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Stephen S. Walters, Chair
May 24, 1996

Introduction; Task Force Charge

In the summer of 1995 Oregon, like every state in the United States, faced a crisis in its
delivery of civil legal services to low-income residents. The new Congress was considering
legislation which would ultimately eliminate the Legal Services Corporation, the federal
tility which provides funding to local legal services programs (including four programs in
Oregon). At the very least, it appeared inevitable that 1996 federal funding for legal services
would be reduced by as much as 35% from 1995 levels. Congress was also prepared to
impose severe restrictions on the activities of all programs receiving LSC funding, which
would have a serious impact upon the ability of LSC program attorneys to provide a full
range of high quality legal services to their clients.

In response to this crisis, OSB President Judy Henry, in consultation with Chief Justice
Wallace P. Carson, appointed the OSB Civil Legal Services Task Force. Stating that "the
organized bar has an important role to play in assisting our programs in planning for the
future and in assuring the continuing availability of legal assistance to all of the people of our
state," the OSB gave the Task Force the general charge to "develop a plan for civil legal
services in Oregon for 1996 and future years, which will, when implemented, effectively
provide a full range of legal services to low income Oregonians with all available resources."
Steve Walters of Portland was appointed Chair of the Task Force; its members were Judge
David Brewer, Neil Bryant, Ned Clark, Mike Haglund, Judge Jack Landau, Jim Massey,
Katherine McDowell, Katherine O'Neil, Larry Rew, and Martha Walters. Barrie Herbold
served as liaison to the BOG. Ann Bartsch was the OSB staff liaison and reporter. Ira
Zarov of Oregon Legal Services served as the liaison to the legal services programs.

Following its initial meeting in September, the Task Force organized itself into four
subcommittees, each with a separate charge. Each subcommittee was asked to invite
participation and otherwise to secure information from other interested persons, including
program board and staff, representatives of the Multnomah Bar Association, and the OSB
Low Income Legal Services Committee. (A complete list of all participants is attached to
this report as Appendix 5.) The full Task Force met periodically to review the
recommendations as they were developed by the subcommittees.

Task Force participants contributed hundreds of volunteer hours to the consideration and final
drafting of the reports and recommendations which follow. Complete reports from all of the
Task Force subcommittees are included as appendices to this report. The following is a
digested description of each subcommittee's activities, along with a listing of its key findings
and recommendations.
Subcommittee 1: Client Need/Priorities; Delivery System

This subcommittee was chaired by Judge David Brewer of Eugene. The subcommittee was asked to gather information on Oregon’s existing civil legal services delivery system, for use by the other subcommittees, addressing the following questions:

What legal needs of client community are programs currently addressing? Are there any areas of need which are not being addressed, and which should be incorporated into Oregon’s legal services delivery system?

What delivery systems are in place in Oregon to meet these needs? What systems could be developed or expanded?

The subcommittee was also asked to develop an overall mission statement for Oregon’s civil legal services delivery system, for adoption by the full Task Force and ultimately by the Board of Governors, as well as by other entities concerned with civil legal services (e.g. the Oregon Law Foundation).

The subcommittee’s initial report and Mission Statement were presented to the full Task Force in December and to the Board of Governors in January, 1996. That document is attached as Appendix 1 to this report. The Mission Statement was also adopted by the Board of Directors of the Oregon Law Foundation in February.

Key Findings:

1. Not more than one third of the legal needs of Oregon’s low income population were being addressed by legal services programs before the funding cuts.

2. However, as of December, 1995, Oregon did have in place a legal services delivery system capable of providing a full range of civil legal services to low income Oregonians. Key components of that system were federally funded LSC programs and a network of locally based volunteer attorney programs providing supplemental services to the staffed offices. That system will be undercut by the adoption of pending federal legislation providing for severe funding cuts to LSC programs, and for severe restrictions on the activities of those programs which were inconsistent with the Task Force’s mission statement for civil legal services.

Subcommittee 2: Structure and Organization

This subcommittee was chaired by Jim Massey of Sisters. It was asked to address the following questions:

Will existing legal entities and organizations be able to perform or facilitate the performance of the work identified by the previous working group? Are there
opportunities for resource savings through reconfiguration of existing programs? If the existing structure will not be able to perform the work, what other entities can be developed to perform it?

This subcommittee met five times in the fall and winter of 1995-96. It invited board and staff representatives of Oregon’s existing, and developing, legal aid and volunteer attorney programs to meet with the full Task Force to share their plans for necessary restructuring in light of the anticipated LSC funding cuts and restrictions on program activities. The subcommittee made no recommendations on questions it considered to be internal to the programs and their boards of directors, e.g. whether particular programs should or should not merge. However, subcommittee members did participate in ongoing discussions which were taking place among the programs, and the subcommittee’s meetings provided an opportunity for strategizing and planning among the programs, bringing in the expertise of the broader legal community.

The subcommittee’s full report is attached as Appendix 2. Its key findings and recommendations are as follows.

**Key Findings:**

1. In late April, 1996, Congress enacted HR 3019, the fiscal year 1996 appropriations bill which includes funds for the Legal Services Corporation. The legislation incorporated a long-anticipated series of restrictions on activities of LSC funded programs, including prohibition of most legislative and administrative advocacy, participation in class actions or welfare reform litigation, and representation of undocumented aliens (including undocumented migrant workers). The legislation further provides that LSC recipient programs may not use non-LSC funds, including state generated funds, to undertake any of these activities.

   The 1996 restrictions on LSC funding and substantive work threaten the historic commitment to key Oregon legal services delivery system values.

2. Oregon’s four LSC funded programs (Oregon Legal Services, Multnomah County Legal Aid Service, Marion-Polk Legal Aid, and Lane County Legal Aid) will continue to receive LSC funding, and will comply with the new restrictions in conducting their work on behalf of low-income Oregonians.

   Consistent with the Task Force’s mission statement for Oregon’s civil legal services delivery system, Oregon’s legal community must take responsibility for developing and nurturing other non-LSC entities capable of providing services which fill in the gaps which the new Congressional restrictions will otherwise impose.

3. As of the date of this report, the following structural changes have been made (or are in the process of being made) in Oregon’s civil legal services delivery system.
Organization of Full Service Law Centers  In response to the imposition of restrictions on programs which receive Legal Services Corporation funding, new entities have been and are being organized to provide critically important services to clients, which LSC recipients will no longer be able to provide. Oregon Law Center has been incorporated in Portland and will receive funding from OLF and other sources. The Lane County Law and Advocacy Center has been established in Eugene. A similar "Full Service Law Center" may be established to serve Marion and Polk counties.

MCLAS/OLS Reconfiguration  Effective May 13, 1996, Oregon Legal Services' Central Support Office and Multnomah County Legal Aid Service are sharing office space (at the former MCLAS office), resulting in an estimated savings of about $100,000 per year. The two programs are discussing possible merger later this year.

Marion-Polk  There have been no structural changes so far at Marion-Polk Legal Aid, although the question of merger with other entities is on the table. One attorney position has been lost because of resource limitations.

Jackson County  There have been no structural changes so far in Jackson County (Center for Non-Profit Legal Services). A ballot measure which would have provided county funding for the Center and other social service agencies, was defeated by the voters on May 21. It appears that it will be necessary for the program to continue to receive LSC funding as a subgrantee of Oregon Legal Services for its private attorney involvement program.

Campaign for Equal Justice  The Campaign for Equal Justice is now separately incorporated, free-standing 501(c)(3) corporation.

Volunteer Lawyers Project  The Volunteer Lawyers Project in Multnomah County considered a merger with Multnomah County Legal Aid, but declined to do so in light of the restrictions which would be placed on its activities. It now appears that parts of VLP's program will be taken up by MCLAS (along with financial support from the Multnomah Bar Association), and others will pass to the newly organized Oregon Law Center.

Staffing losses  Programs report various levels of staff attrition in the wake of the Congressional action. So far, one local office -- Oregon Legal Services' branch office in Klamath Falls -- has been closed. Most full-time staff at Multnomah County Legal Aid Service have been reduced to 80% time.

Key Recommendations:

1. Three fundamental premises should drive organizational and structural issues:
A. Quality and Independence

Legal services delivery in Oregon should not be driven by or be dependent on LSC funding or mandates. Legal services programs will continue to be an important and vital resource -- of many -- for providing access to the justice system for low income Oregonians.

B. Preservation of Funding Allocation

Funding levels for service to low-income client groups no longer eligible for LSC funded services, and for all other restricted forms of legal services representation, including welfare reform, class litigation, legislative and administrative advocacy, group representation and client education and training, must be maintained at levels sufficient to provide adequate representation to low-income clients.

C. Independence and Access

Planning and selection of substantive work, and prioritization of delivery to particular client groups or populations, should be based upon sound commitment to principles of equal access to justice consistent with DR 7-101 and EC 2-26, 27 and 28 of the Code of Professional Responsibility, and without regard to the disfavored social, political or economic status of any eligible client.

2. Consortium for Delivery of Services

There should be an ongoing independent consortium of Oregon legal aid providers. Membership would be open to any organization providing legal services to low income Oregonians, as well as any organization which sponsors the delivery of such services (e.g. the MBA). The consortium would provide a forum for ongoing identification of unmet client needs to which resources should be targeted, while avoiding duplication of efforts by member programs. The consortium would allow for coordination and integration of key functions across program lines, and facilitate communication among program funding sources.

The consortium should include:

Current LSC recipient programs
Non-profit legal centers
Public Interest Law Firms
Law school clinics
Campaign for Equal Justice
Bars, particularly OSB and MBA

3. Reorganization/Restructuring for Efficiency of Delivery

The existing legal services programs should continue the ongoing process of internal evaluation to identify means of streamlining, reducing costs and gaining new efficiencies. The programs should continue to evaluate, within the consortium context, whether program mergers, consolidation or sharing of particular functions or services or development of new means or methods of access and delivery are appropriate. Areas of continued discussion and evaluation should be:

-- Merger;

-- Consolidation of programs/services/shared systems; and

-- Appropriate use of technology.

-- Intake and referral improvements;

-- Coordination among programs with the Bar;

-- Coordination with ADR programs.

The various programs should continue to inform and advise one another as this process continues.

4. Development of Non-Restricted Entities

In response to the imposition of restrictions (on and after April 26, 1996) on programs which receive Legal Services corporation funding, new entities have been and are being organized to provide critically important services to clients, which LSC recipients will no longer be able to provide. Oregon Law Center has been incorporated and will receive funding from OLF and other sources; the Lane County Law and Advocacy Center has been established in Eugene. The Task Force makes the following recommendations regarding these "Full Service Law Centers:"

Should be an entity or entities capable of performing legislative and administrative advocacy.

Should be an entity or entities capable of providing representation to underserved populations with cultural barriers, language barriers, or local access programs, e.g. migrant workers. Should be capable of providing services all over the state.
Should develop pro bono capacities of the bar statewide -- not just as supplement (to take individual cases overflowing from legal services programs), but in such areas as class actions, legislative advocacy, policy development, low income housing development, etc.

Should include all LSC restricted work, particularly class actions on issues affecting low income populations, such as welfare reform and administration of public benefit programs.

As indicated above, the question whether there should ultimately be one such program, with branch offices in key locations (e.g. Salem) was left for study by the OSB legal aid oversight group.

5. Development/Expansion of New Resources

The Subcommittee recommends development and expansion of new and non-legal services resources to complement consortium activities:

There are currently some regional hotlines operated by all legal services programs. Development of additional hotlines could be beneficial; a prime topic would be a (statewide) Child Support hotline.

Local and statewide bar groups should expand their pro bono efforts, working in cooperation with offices statewide. As a corollary, all programs should consider using emeritus attorneys in their area, on the model of the "ELVIS" program in Marion-Polk Legal Aid Service.

There should be strategic, thoughtful reassignment of OLF funding, filing fee surcharge resources, and other available funds to provider programs.

Courts, Bar and OLF should continue to support efforts to increase ADR resources (e.g. farmworker mediation program) and self help mechanisms (Oregon Family Law Task Force is investigating the Maricopa County model).

The OSB should expand its existing Tel-Law program to cover new topics.

The OSB Order Desk/Pamphlet distribution efforts could include legal aid brochures, which are already available from the programs.

OSB should expand its Modest Means program as far as possible.
6. **OSB Oversight and Support**

The Oregon State Bar should take on an expanded role in oversight and provision of technical assistance to legal aid programs. This oversight/technical assistance role should be assigned to a small group (not more than five persons) who would be directly accountable to the Board of Governors. Members of the group should be OSB members who are knowledgeable in the areas of law office management and legal services/pro bono delivery, and who are independent of the programs. The group should develop defined standards for ongoing assessment of the programs’ operations based on existing national standards (e.g. ABA’s SCLAID standards, LSC Performance Criteria, Code of Professional Responsibility). Their assessments should concentrate on outcomes, with the emphasis on achieving quality results for clients.

If the Oregon legislature is willing to delegate allocation of filing fee surcharge revenues to the Oregon State Bar Board of Governors, this group would be an appropriate entity to take on this task, or at least, to evaluate and make recommendations to the BOG. (A significant minority of Task Force members believe that, while it is critically important that the OSB assume an oversight/technical assistance role with respect to civil legal services programs, this role should be separated from that of allocation of actual amounts of filing fee surcharge funding.)

**Subcommittee 3: Funding**

This subcommittee was chaired by Katherine O’Neil of Portland. The subcommittee was asked to address the following questions:

- What current funding sources are in place to support legal services delivery in Oregon? How can they be expanded to meet future needs? What new financial resources can be developed to support a reconfigured delivery system?

The subcommittee gathered information from each of the programs on their present financial base -- components and amounts, short term and long term financial prospects. The subcommittee gathered similar information from the major non-LSC funding sources for legal services and volunteer attorney programs in Oregon, specifically the Campaign for Equal Justice, the Oregon Law Foundation, the Multnomah Bar Association, and the legislature (the source of the filing fee surcharge legislation). Members of the group also researched funding mechanisms which have had success in other states, using information supplied by the American Bar Association’s PERLS (Project to Expand Resources for Legal Services) Project. The goal was to develop insights for the BOG on how the organized bar could best step in and help alleviate the anticipated shortfalls.

The subcommittee’s full report is attached as Appendix 3. Its key findings and recommendations are as follows.
Key Findings:

1. In FY 1996, funding to the Legal Services Corporation (the federal agency which funds local legal services programs across the country) was cut by approximately 30 percent, to a total of $278 million. This translates into a loss of approximately $1 million (of total 1995 funding of approximately $6 million from all sources) for Oregon’s civil legal services programs. There are proposals in the current Congress to reduce LSC funding to $141 million in FY 1997 ($1.5 million shortfall for Oregon) and to eliminate it entirely by FY ‘98. If these proposals are successful, states like Oregon will be charged with all responsibility for providing civil legal services for their low income residents.

2. Oregon programs report the following projected shortfalls in their geographic service areas for 1996:

   Jackson County (Center for Nonprofit Legal Services): $70,000

   Lane County (Lane County Legal Aid Service, Lane County Law and Advocacy Center): $125,000

   Marion and Polk Counties (Marion-Polk Legal Aid): $125,000

   Multnomah County (Multnomah County Legal Aid Service): $440,000

   Remaining Oregon counties (Oregon Legal Services): $210,000

3. Oregon is relatively fortunate in having developed significant sources of non-federal funding for civil legal services at the state and local level. Non-federal funding constituted approximately 51% of the resources available to the legal aid/volunteer attorney programs in 1995. The most significant sources of in-state funding are:

   Campaign for Equal Justice Now incorporated as an independent 501(c)(3) entity, the Campaign solicits contributions from Oregon attorneys and law firms, and solicits grants and other assistance from a wide variety of private sector sources, on behalf of legal services programs. In 1995, a total of $322,000 was raised.

   Filing Fee Surcharge Pursuant to ORS 21.480-.490 (appendix 3A to this report), circuit and district courts collect a surcharge on filing fees paid by moving parties in civil suits, which is paid to the legal aid program in that county by the State Court Administrator. This mechanism produces approximately $1.5 million annually.

   Oregon Law Foundation/IOLTA Programs providing civil legal services to low income Oregonians have been (and should continue to be) the major recipients of funding from OLF’s IOLTA (Interest on Lawyers Trust Accounts) program. In 1996,
OLF will make a total of $599,000 in grants, with approximately $496,000 going to programs in the legal services category.

Without assistance from the Oregon State Bar, the courts, and the legal community generally, these funding sources will not be able to make up the shortfall in federal funding in the foreseeable future.

**Key Recommendations:**

1. **Filing Fees surcharge**  Oregon’s circuit and district courts will be consolidated effective January 15, 1998. Currently, legal services programs receive a surcharge on each filing fee paid into circuit court in the amount of $22.00. In cases currently being filed in district court, the surcharge is $8.50.

   The BOG should urge Chief Justice Carson to exercise his discretion to maintain the $22 filing fee for all courts after merger of Circuit and District courts in January, 1998.

   Alternately, the BOG should make its #1 Legislative agenda for the ‘97 Legislature a revision in the laws related to filing fees with the fees going to the OSB for distribution.

2. **OSB dues assessment**  The FY ’96 shortfall could be met by a $100 per attorney contribution made with the annual OSB dues. Subsequent Congressional cuts would require a greater per attorney contribution.

   The BOG should exercise its leadership and chose a method of per capita contribution among the following:

   a. **Voluntary** contribution collected with OSB dues: “$100 or other.”

   b. **Voluntary first year or so and then make it compulsory:** “$100”.

   c. **Compulsory** contribution collected with OSB dues: “$100” FY ’97, “$250” in subsequent years to make up for continued cuts in Congressional funding. With an option to do 40 hours (or another figure) of pro bono work in an OSB certified pro bono program.

   Any compulsory contribution should first be approved by the new OSB House of Delegates with a referral to the general membership following the meeting at which it is approved.

3. **Greater OSB/local bar support for Campaign for Equal Justice**  The CEJ would greatly benefit from open, public, frequent support for CEJ from the BOG and other
bar leaders. The BOG members can mention the campaign in stump speeches, write about it in all publications. Make CEJ the “lawyers’ charity,” a part of the legal culture. If BOG members and the county bar presidents did an hour of intake at a legal aid office, they would gain a perspective that would fire their support of the CEJ.

4. **Increase income to OLF/IOLTA** The Oregon Law Foundation should be asked to pursue various mechanisms, for which national models exist, to increase IOLTA income. These include "sweep" accounts for IOLTA funds (cash management or sweep account which sweeps all or part of the IOLTA balance that is over a specified threshold amount from low-yield checking accounts into an investment in Treasury backed securities on a daily basis, producing higher yields for the IOLTA account); ongoing negotiations with banks for higher interest rates, and lower service charges, paid on IOLTA accounts.

The Oregon State Bar should assist OLF in investigating mechanisms for increasing income to the Foundation through legislation providing for, among other possibilities: direction of interest on funds in the hands of title insurance companies to OLF; direction of a portion of state abandoned property funds to OLF; direction of unclaimed client trust funds to OLF.

5. **Potential funding sources for consideration by legal services programs** include implementation of sliding scale fees for service to clients in the moderate income range (125% - 200% of poverty guidelines); local and county bond issue funding (Jackson County example); retainer contracts with Indian tribes and social service agencies; and gaming revenues.

**Subcommittee 4: Ethical Responsibility/Quality Assurance/Transition**

This subcommittee was chaired by Judge Jack Landau of the Court of Appeals. It was asked to consider how the bar could best assist the LSC programs’ attorneys in meeting their ethical responsibilities to clients in light of the restrictions imposed by Congress.

The subcommittee also reviewed a memorandum from James N. Gardner of Portland, outlining a potential 10th Amendment challenge to the conditions and restrictions imposed on the Legal Services Corporation and its grantees by Congress.

The subcommittee’s full report is attached as Appendix 4. Its key findings and recommendations are as follows.

**Key Findings:**

1. **ABA Formal Opinion 96-399** In February, 1996, the American Bar Association Standing Committee on Ethics and Professional Responsibility released Formal
Opinion 96-399, "Ethical Obligations of Lawyers Whose Employers Receive Funds for the Legal Services Corporation to their Existing and Future Clients When such Funding Is Reduced and When Remaining Funding Is Subject to Restrictive Conditions." At approximately the same time, Oregon Legal Services prepared its own proposed response to the anticipated funding and practice restrictions. Rather than duplicate the foregoing efforts, the subcommittee focused on a review of the analysis and recommendations of the ABA Standing Committee and OLS.

In general, the OLS policy appears to follow from, and is entirely consistent with, the formal opinion of the ABA Standing Committee.

Copies of ABA Formal Opinion 96-399, and of OLS' internal memorandum "Implementing New Restrictions," are attached to the full subcommittee report at Appendices 4A and 4B.

Key Recommendations

1. The ABA Standing Committee's formal opinion is, of necessity, based on the Model Rules and not on the rules of professional responsibility governing any particular jurisdiction. So far as the Task Force is aware, however, the Oregon Code of Professional Responsibility is consistent with the Model Rules in all respects material to the questions before the ABA Standing Committee. The Task Force has little reason to believe that the ethical obligations of Oregon legal services lawyers will be substantially different under the Oregon Code and, therefore, regards the ABA Standing Committee's formal opinion as a useful source of advice to legal services lawyers in this state. Nevertheless, the Task Force believes that it may be of value to Oregon lawyers to have the Oregon State Bar Legal Ethics Committee review the ABA Standing Committee's formal opinion in the light of the particular requirements of the Oregon Code, to determine the extent to which the obligations of Oregon legal services attorneys are anticipated to be different than those of lawyers generally in the context of the Model Rules. Accordingly, the Task Force has prepared an opinion request to that effect.

2. The Task Force has considered, at least preliminarily, the possibility of other responses to the anticipated funding and practice restrictions than accommodation through modification of legal services policies and practices. Of particular note is the suggestion that the constitutionality of the restrictions be challenged in federal court. Although the Task Force expresses no opinion on the likelihood of success of such a challenge, it does recommend that the option be explored by the appropriate authorities.

In essence, the theory of the proposed lawsuit is that the imposition of federal restrictions on the provision of legal services violates the Tenth Amendment to the federal Constitution. The major premise of the argument is that the operation of state
court systems is at the core of powers reserved to the states by the Tenth Amendment
and that the operation of state court systems includes the promulgation and
enforcement of rules of professional responsibility. The minor premise of the
argument is that the anticipated restrictions on legal services practice will necessitate a
modification of such rules of professional responsibility. The key, of course, is the
minor premise, namely, whether the expected practice restrictions actually require a
modification of state professional responsibility rules or other matters properly
regarded as core areas of state sovereignty.

Assuming the potential viability of a Tenth Amendment claim, the question arises:
Who would be the proper plaintiff(s)? In all likelihood, the proper party plaintiff
would be the State of Oregon, or the Chief Justice, or both; in all events, the matter
would be subject to the advice and representation of the Attorney General. The Task
Force recommends that the Attorney General be requested to evaluate the possibility
of initiating a lawsuit to challenge the constitutionality of the anticipated funding and
practice restrictions.

Conclusion

Hundreds of hours of volunteer effort, energy, and emotion have gone into the creation of
this final report. The issues with which the Task Force has wrestled with are critically
important to the future of access to justice for low-income Oregonians, both in the short and
the long term. The Task Force members urge the Board of Governors to put these issues at
the head of the bar’s agenda for this year and the years to come. As the BOG’s original
charge to the Task Force stated, the organized bar has a critically important role to play in
assuring the continuing availability of legal assistance to all of the people of our state. We
urge the Board to take up this work.
APPENDIX 1

Report of Subcommittee on Client Need/Priorities; Delivery System

Hon. David V. Brewer
Subcommittee Chair
OREGON'S CIVIL LEGAL SERVICES DELIVERY SYSTEM: 
MISSION, VALUES, AND CAPACITIES

January, 1996

Recent changes in the funding and political context within which legal services are provided to low income people have resulted in the need for Oregon's legal community to undertake a comprehensive review of the current statewide service delivery system and to develop plans to implement changes dictated by the current and projected environment, building on and strengthening the system which is currently in place. In conjunction with the state's Supreme Court, the Oregon State Bar has appointed a Civil Legal Services Planning Task Force, whose charge is to "develop a plan for civil legal services in Oregon for 1996 and future years, which will, when implemented, effectively provide a full range of legal services to low income Oregonians with all available resources."

As an initial step in fulfilling its charge, the Task Force believes that it is important to have in place a clearly articulated, and commonly accepted, statement of the mission of Oregon's civil legal services delivery system. The following statement also incorporates core values of equal justice, and core capacities which we believe must be present in our delivery system.

I. MISSION

Legal services programs exist to ensure that institutions and organizations created to serve public interests and needs, particularly governmental and civic institutions, treat individuals equally no matter what their economic situation. This is not a radical notion; it is the cornerstone of American concepts of justice and fair play.

The mission of Oregon's statewide legal services delivery system should continue to be centered on the needs of its client community. It should be expansive, recognizing that equal justice contemplates more than simply providing a lawyer in every family law or unlawful detainer case (though it certainly includes this goal as well). The mission must contemplate lawyering in its broadest sense, acknowledging that the interests of low income clients can only be served if the delivery system is dedicated to providing full and complete access to the civil justice system in a way that empowers this segment of the population to define, promote, and protect its legitimate interests. As such, the mission must be to:

* Protect the individual rights of low income clients;
* Promote the interests of low income individuals and groups in the development and implementation of laws, regulations, policies and practices that directly affect their quality of life;
* Employ a broad range of legal advocacy approaches to expand the legal rights of low income individuals and groups where to do so is consistent with considerations of
fundamental fairness and dignity; and

* Empower low income individuals and groups to understand and effectively assert their legal rights and interests within the civil justice system, with or without the assistance of legal counsel.

II. EQUAL JUSTICE VALUES

The mission suggests core values which will have important implications for operational decisions about a restructured civil legal services delivery system. Many of these core values already exist in current partnerships, and much of the work associated with reconfiguring the delivery system should therefore focus on retaining and, wherever possible, expanding the ability of any changed structure to reflect these values:

* **Responsive to Most Pressing Client Needs.** The civil legal services delivery system must have the capacity to regularly and effectively identify the most important and pressing legal needs of low income clients and identifiable client constituencies in consultation with the low income client community; there must be a corresponding commitment to deploy resources in a manner which maximizes the system’s ability to respond effectively and economically to those most important and pressing needs.

* **Ensure Equality of Access.** The system must be designed to foster real equality of access to justice. It must maximize its capacity to identify and address pressing legal issues unique to or disproportionately experienced by specific segments of the low income client community who experience physical, mental, developmental, cultural, linguistic, geographic, or other barriers that limit their ability to effectively assert their rights within the justice system.

* **Measure Effectiveness in Terms of Results Achieved for Clients.** The system should measure its effectiveness in terms of demonstrable differences attained for clients within areas of high priority client need.

* **Flexible and Responsive to Changing Environmental Circumstances.** The system must have the capacity to reconfigure, reallocate and redefine client needs and appropriate advocacy dictated by changing environmental, social and political dynamics.

* **Strategic Targeting of Limited Resources.** The system should be designed to ensure the ability to target resources on legal advocacy that will likely result in the longest term benefits on issues of the greatest significance to clients as identified in a legal needs assessment process.

* **Sensitive to Client Communities and Cultures.** A high priority must be placed on understanding the broad range of values, cultures, and aspirations represented within the various communities of clients being served, and on developing internal capabilities to provide effective legal representation that is sensitive to these values, cultures, and aspirations.
* **Balancing Individual Representation and Advocacy Enforcing Broader Rights of Low Income Communities.** The system must serve a dual commitment to asserting and enforcing the broader interests of the low income community as a whole and client constituencies within that whole, while maintaining accessibility to individual clients in need of legal representation on high priority matters.

* **Commitment to Interdisciplinary Advocacy.** The system must embrace a commitment to interdisciplinary advocacy on behalf of low income clients in order to achieve long term benefits for both individual and group clients.

* **Focus on Client Empowerment.** The legal services delivery system must effectively employ strategies (e.g. self-help programs, advice programs, community legal education, client outreach, hotlines, ADR programs, etc.) that support and enhance the ability of low income clients and client communities to control their own lives.

* **Commitment to Multi-Forum Advocacy.** The civil legal services delivery system must develop and maintain an institutional capacity to pursue high priority advocacy within non-judicial forums, including legislative, administrative, and quasi-judicial forums. As an institutional value, the system should emphasize the resolution of disputes in a non-adversarial manner where possible.

* **Strategic Utilization al All Components in Service of Mission.** The service delivery system must strategically utilize and integrate staff attorneys, private attorneys, volunteer attorney programs, specialized advocacy programs, public interest law firms, law school clinics, private law firms, other professional disciplines, social service providers, client groups and individual clients, to undertake and complete high priority legal advocacy.

* **Maximize Efficiency.** The system should avoid duplication of capacities and administration; should develop and maintain coordinated and accessible client intake, case evaluation and referral systems; and should strive to maintain organizational relationships and structures that maximize economies of scale and promote the effective use of existing and emerging technologies.

* **Maintain Standards of Advocacy and Program Performance.** Legal representation should be provided in a manner that is consistent with applicable ethical obligations to clients, and which conforms to the performance expectations established in the ABA Standards for Providers of Civil Legal Service to the Poor and the emerging ABA Standards for Providing Civil Pro Bono Legal Services to Persons of Limited Means.

* **Minimize Geographic and Institutional Parochialism.** Decisions about service delivery and resource allocation must be determined in the context of what will best serve client needs statewide. At the same time, the system must have the capacity to identify and respond to local and regional issues which affect clients and to encourage local identification with and ownership of the commitment to equal justice.

* **Assure Accountability.** The civil legal services delivery system must be structured in a
manner that demands and gets full accountability to its clients. Consistently with this value, it must also be accountable to the community at large, to the judiciary and to the organized bar for its performance in delivering high quality, efficient and appropriate services.

III. CORE CAPACITIES

The entire system (including both funding and service delivery components) must develop and maintain certain core capacities necessary to provide representation in service of the mission-and consistent with the overall advocacy philosophy. These include the capacities:

* To provide relatively equal levels of high quality client representation throughout the state of Oregon.

* To deploy resources to address high priority areas of representation, and to serve identifiable client constituencies with distinct needs (e.g. migrant farm workers, institutionalized persons, senior citizens, Native Americans, refugees, etc.) as identified through the needs assessment process.

* To carry out client advocacy in a manner consistent with attorneys’ professional codes, statutes and court rules generally applicable to the practice of law, including the capacity to pursue all forms of relief in all forums appropriate to the effective resolution of clients’ legal problems.

* To engage in a full range of formal and informal representation of clients and client interests before federal, state, regional and local legislative, administrative and quasi-judicial governmental and non-governmental bodies.

* To engage in culturally relevant client outreach, education and other self-help efforts free from inappropriate on the authority to provide representation to those who, as a result of such efforts, seek legal assistance.

* To provide training, coordination and support of legal advocacy for low income people on a statewide basis.

* To provide support, assistance, coordination and training for community organizations involved in provided legal, educational, health or human services to, or providing advocacy on behalf of, low income people.

* To engage in activities designed to expand and diversify the funding and resource base.

* To deploy restricted and unrestricted resources in a manner that maximizes the system’s ability to provide representation that is accountable to and in service of the mission.

* To secure high degrees of involvement and commitment on the part of all segments of
Oregon’s legal community, including attorneys in private, corporate, and governmental practice, the judiciary, and the community at large.

* To access and effectively employ technological resources on a system-wide basis.

IV. EXISTING SYSTEM

Oregon’s existing (December, 1995) legal services delivery system largely embodies the core values and capacities set forth above. The current configuration and activities of the four Oregon programs which currently receive federal funding from the Legal Services Corporation are described in the attached materials, which were prepared by the Consortium of Legal Services Programs. The programs estimate that, with current resources, they are able to serve no more than 34% of the eligible clients who apply to them annually for assistance. There is consensus that there are areas of legal need which are not being addressed, or are underaddressed, in the current system; as a partial list, we have identified consumer cases, immigration, bankruptcy, tort defense, wills, and especially domestic relations (including dissolution, custody, termination, and adoption cases). Client populations with particular access problems include migrant farmworkers, non-migrant Hispanics, and the Southeast Asian community. The following section of this report provides more detailed information, from the programs, on unmet needs.

Whatever modifications or reconfigurations are necessary to meet current political and financial realities, Oregon’s delivery system should have as a goal maintaining its current levels of service in all areas, and expanding where possible to meet identified unmet needs.

V. STATEMENT OF UNSERVED NEEDS

This statement is a compilation of unmet needs as identified by available sources. The information available to legal services programs to quantify unmet needs is limited. A greater pool of information is available with which to identify substantive areas of law where clients are underserved.

The sources of this information are: 1) a study done by legal services programs in 1989 during which each legal aid office recorded every call and the disposition of each; 2) the 1994 Lane County Legal Aid Service annual report; 3) the Multnomah County Legal Aid Focus Group priority setting report; and 4) Oregon Legal Services office evaluations which interview local social service agencies, private attorneys, members of the judiciary, and other “stakeholders” in served communities (evaluations are ideally conducted for each office every 18 months).

The quantifiable numbers developed by the 1989 study indicated that 2 of 3 (66%) of eligible clients were turned away. The 1994 Lane County statistics reflected a similar figure: 3 of 5 eligible clients were turned away (60%).

The information developed during the MCLAS focus groups and OLS evaluations identify unmet needs by subject matter. As noted, the information identified was provided by members of the
client community and social services offices throughout the state. This information tended to reflect the need for additional legal resources, not necessarily an absolute unavailability of legal aid. In other words, even though the local legal aid offices helper some individuals within a given problem area, many more were turned away.

The judiciary and members of the private bar perceive the greatest area of unmet need as falling within the general definition of "family law." Within that grouping, representation in custody matters, support enforcement, and domestic violence were most frequently identified. Not surprisingly, the degree of need directly reflected the priority assigned to family law by the local legal aid office. The next highest need identified by this group was consumer law questions.

Again, not surprisingly, social service agencies tended to identify as the greatest unmet legal needs those services their clients would be most likely to need. The SDSD (the state agency service senior citizen needs, among others) identified representation of institutionalized people (residents of nursing homes). Domestic violence groups identified representation in contested FAPA (Family Abuse Prevention Act) orders and custody battles. Interestingly, Mental Health providers had a broader picture of the overall needs of their clients and identified housing, health benefits, problems with CSD, and help in obtaining SSI benefits as the greatest client needs.

Ethnic groups also tended to have distinct issues relevant to their needs. Hispanic community organizations identified issues that were related to employment and civil rights. Native American groups identified family law help as an underserved area, as well as housing and child custody and CSD issues. African-American groups identified employment discrimination, police discrimination, and family law issues.

As would be expected, how highly an office prioritized a particular legal problem reflected whether or not it was likely to be strongly identified as an unmet need. This was true in every instance except custody cases, which were widely identified as an unmet need. This is true even though many of those that identified custody cases as a large unmet need did not identify those issues as ones that should be made a high priority by legal services.
Consortium of Legal Services Programs in Oregon

Native American Program
Mult. Co. Legal Aid
Hillsboro

McMinnville
Farmworker
Marion
Polk
Legal Aid
Lincoln County
Albany

Lane Co. Legal Aid
Bend
Coos Bay
Roseburg
Grants Pass
Center for Non-Profit Legal Services
Klamath Falls

Pendleton
Ontario

Offices outside shaded areas are Oregon Legal Services field offices.
LEGAL SERVICES PRIORITIES

Priorities for legal aid offices in the state are set annually by program boards. The composite priorities for the programs include the following:

**BASIC FIELD**

- Income Maintenance
- Housing
- Family Law
- Employment
- Health
- Consumer/Financial Matters
- Civil Rights
- Education/Juvenile
- Wills, Torts, Licenses (Senior Contracts and PBI referrals)

**MIGRANT**

- Employment
- Housing
- Health

**NATIVE AMERICAN**

- Sovereignty Issues/Treaty Rights/Jurisdiction
- Indian Child Welfare Act Cases
- Indian Health Care
- Sacred Sites/Archaeological Protection
- Religious Freedom
- Economic Development
- Tribal Infra Structure
- Natural resources Issues
SERVICES PROVIDED TO CLIENTS

INDIVIDUAL CASE REPRESENTATION

Types of cases: Consumer, Domestic Violence, Domestic relations, Housing Discrimination, Landlord-tenant, Consumer, Health Law, Public Entitlements (Social Security, Food Stamps, Unemployment Benefits, AFDC, General Assistance) and Senior, Migrant and Native American issues.

Scope of representation: Legal Aid representation ranges from brief advice to litigated cases. Legal aid has argued cases in lower state and federal courts, all levels of appellate courts and the U.S. Supreme Court.

One example is D.R. v. Concannon, which challenged the state's failure to provide adequate emergency mental health care to at-risk children. The case resulted in the infusion of several million dollars into providing better mental health care to children in desperate need. Another case was Ball v. FmHA sought relief for low-income applicants for FmHA home loan financing. The eligibility screen being used violated federal statutory and regulatory requirements and denied many Oregonians loans to purchase homes. As a result of Ball, millions of dollars in new Oregon loans were granted.

LEGISLATIVE LOBBYING

Legal Aid in Oregon has two lobbyist who represent a number of group clients and individual clients. Group clients include the Oregon Coalition Against Domestic and Sexual Violence (OCADSV), United Seniors, and the Oregon Human Rights Coalition (Welfare advocates). We are active in legislation affecting domestic violence, landlord-tenant law, and budget issues relating to public entitlements. Legal aid was instrumental in the original passage of the Oregon Tenant Act and the Family Abuse Prevention Act and the Residential Landlord Tenant Act.

ADMINISTRATIVE LOBBYING

Legal aid staff regularly comment on rules affecting our client population promulgated by various state agencies. We have been instrumental in working with the PUC on rules relating to utility cutoffs, with SDSD on rules relating to eligibility for General Assistance, rules relating to child support collection, adoptions, and a host of other issues. Staff regularly serves on various state committees on issues affecting clients.
Consortium of Legal Aid Program Support 1994

Program Support 1994
Legal Services Corp $4,074,767
Filing Fees $1,568,217
Campaign for Equal Justice $315,083
Oregon Law Foundation $165,000
Local & Senior Contracts $955,849
Attorney Fees $241,165
Other $685,655
TOTAL $8,006,036

- Legal Services Corp 50%
- Filing Fees 20%
- Local & Senior Contracts 12%
- Oregon Law Foundation 2%
- Campaign for Equal Justice 4%
- Attorney Fees 3%
- Other 9%
I. INCOME LESS THAN OR EQUAL TO 125%

A. Okay unless:
   1. Assets above allowable limits (see below)
   2. Anticipates increased income to above 125% or
   3. Can get free lawyer
   4. No significant consequences to client even if not represented

B. Okay, even if otherwise ineligible under A(1-4) above, if:
   1. Seeking public assistance; or
   2. Anticipates loss of income to below 125% within next 6 months or
duration of cases, whichever is shorter.

II. INCOME BETWEEN 125% AND 187.5% - Need to keep information in the file and
in a central office file documenting reasons.

A. Okay if:
   1. Seeking public assistance; or
   2. Expected income to be below 125% within 6 mo. or expected duration of
cases; or
   3. Medical expenses which reduce income to 125%; or
   4. Fixed debts [child support, alimony, taxes, etc.] reducing Inc. to 125%; or
   5. Work expenses [child care, transportation, etc.] reducing Inc. to
125%; or
   6. Expenses related to see or infirmity reducing income to 125%; or
   7. Other unusual factors reducing income to 125% - document circumstances.

III. INCOME ABOVE 187%

A. Okay if:
   1. Income primarily committed to medical or nursing home expenses

B. Executive Director can authorize representation if client's income above 187%. Non-LSC funds will be used and authorization must be in writing.

IV. GROUP, CORPORATION OR ASSOCIATION

A. Okay if*:
   1. Primarily composed of eligible clients; and
   2. No practical means of obtaining other counsel.

B. Okay with Non-LSC funds:
   1. Primary purpose of the group is to further the interest of persons in the
community who are unable to afford legal assistance; and
   2. No practical means of obtaining other counsel.

*Even for eligible groups offices usually use non-LSC funds. All group
representation should be discussed with your Director and group retainer is filled out

V. ASSETS

A. Liquid Assets - $6,000 plus $3,000 each addt. household member.
B. Non-liquid assets - $9,000 plus $3,000 each addt. household member,
but only if readily available.
C. Exclusions (Do not consider)
   1. Residence
   2. First Car & Second Car if needed for work, medical treatment or
handicap
   3. Household Goods
   4. Trust for education or medical needs
   5. Farmland essential to self-employment
   6. Work tools and equipment
   7. Retirement Accounts
   8. Assets excluded by food stamps, AFDC or SSI
   9. Non-available assets (see #2 above)

VI. OTHER CONSIDERATIONS

A. Does the case fit into priorities?
B. Available resources in office
C. Alternative resources available
D. Other counsel available

<table>
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<tr>
<th>Family Size</th>
<th>Monthly 125%</th>
<th>Monthly 187%</th>
<th>Annual 125%</th>
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** For each additional person add $3,200 at 125% or $4,650 at 187%**
APPENDIX 2

Report of Subcommittee on Structure and Organization
Delivery System

James T. Massey
Subcommittee Chair

Appendix 2A: CLASP summary of 1996 funding and restrictions
2B: Map and chart of Oregon legal aid resources, 5-96
2C: ABA Standards for Providers of Civil Legal Services
2D: LSC Performance Criteria
2E: Memo of Agreement re: Farmworker Mediation Program
I. Introduction, Context and a Little History.

The very existence of this Task Force evidences the enormous changes which have taken place at the federal level in connection with legal services funding and delivery. Federal funding cutbacks, which directly threaten the quantity of and eventual elimination of legal services delivery, are reported by the Finance Subcommittee. Restrictions imposed by Congress in the 1996 LSC legislation pose a parallel threat to the quality of legal services that may or will be delivered. Under the 1996 LSC legislation:

--- Class action litigation is banned:
--- LSC grantees will not be able to collect attorney fees;
--- Most legislative and administrative advocacy will be banned;
--- Welfare reform litigation is prohibited;
--- Outreach work is curtailed;
--- Certain "undeserving" clients will be prohibited from receiving assistance, including prisoners, undocumented aliens and some legal aliens;
--- Substantive areas of work are or will be prohibited;
--- Non-LSC funds are subjected to the same federal restrictions; and
--- National support centers are defunded.

These restrictions combined will have an enormous impact on the ability of LSC-funded programs to effectively and efficiently represent their clients and, in some cases, will eliminate the ability to represent low income persons altogether.

These federal restrictions strike at the heart of the historical vision and mission of legal services delivery in this country. That vision, and nearly three decades of legal services delivery, have been grounded in five fundamental values or elements now thrown over by the Congress. Those elements have been:
-- Responsibility to all poor people as the client community;

-- The right of clients to participate in and control decisions about legal services priorities, delivery and individual representation;

-- A commitment to redress historic inadequacies in enforcement of legal rights of poor people due to lack of access to the justice system;

-- Legal Services responsive to need, not just demand; and

-- A commitment to deliver a full range of service and adequate advocacy to poor clients, a range as full as that enjoyed by other income and identity groups.¹

The 1996 restrictions on LSC funding and substantive work threaten the historic commitment to these values. The subcommittee’s discussion, like that of the Client Need/Priorities/Delivery System Subcommittee, rested upon an explicit commitment to maintaining these values and elements in legal services delivery in Oregon.

II. Committee Process

The Structure and Organization Subcommittee of the Task Force was asked to address three questions:

-- Will existing legal entities and organizations be able to perform or facilitate the performance of the work identified by the Client Need/Priorities and Delivery System working groups;

-- Are there opportunities for resource savings through reconfiguration of existing programs; and

-- If the existing structure will not be able to perform the work, what other entities can be developed to perform it?

The Subcommittee met five times beginning in December, 1995. At those meetings, members:

-- Reported on projected impact of LSC funding cuts and restrictions in existing programs;

-- Explained structural/organizational responses and changes contemplated or underway in existing programs;

-- Discussed creation of new entities to continue restricted work;

-- Discussed cost-savings and efficiencies of prospective mergers or consolidation of services;

-- Listed and discussed specific means of expanded/more efficient delivery of services including technology, private Bar and volunteer lawyer enhancement, self-help programs and use of technology;

-- Debated funding and structure "dedications" or set-asides for difficult-to-serve populations;

-- Explored the role of the Bar in oversight, support and funding decisions; and

-- Identified possible new resources for legal services delivery, and how to develop/encourage.

The subcommittee reported its recommendations to the Civil Legal Services Task Force, May 4, 1996, which adopted the recommendations set out in this report.

III. Guiding Criteria and Standards for Quality

The committee discussed the need to ground its recommendation regarding structure and organization in recognized national standards and criteria for quality legal services delivery. Those standards recognized and adopted by the committee include:

-- The American Bar Association Standards for Providers of Civil Legal Services to the Poor (SCLAID Standards);

-- The LSC Performance Criteria; and

-- Lawyer's Code of Professional Responsibility.

These standards, coupled with the Vision/Mission Statement prepared and adopted by this Task Force, are to form the foundation for the organizational and structural recommendations made here to the Board of Governors. The Board is encouraged to explicitly incorporate these Standards for legal services programs in Oregon.

IV. Recommendations
A. Fundamental Premises

The Subcommittee identified three fundamental premises which should drive organizational and structural issues:

1. Quality and Independence

Legal services delivery in Oregon should not be driven by or be dependent on LSC funding or mandates. Legal services programs will continue to be an important and vital resource -- of many -- for providing access to the justice system for low income Oregonians.

2. Preservation of Funding Allocation

Funding levels for service to low-income client groups no longer eligible for LSC funded services, and for all other restricted forms of legal services representation, including welfare reform, class litigation, legislative and administrative advocacy, group representation and client education and training, must be maintained at levels sufficient to provide adequate representation to low-income clients.

3. Independence and Access

Planning and selection of substantive work, and prioritization of delivery to particular client groups or populations, should be based upon sound commitment to principles of equal access to justice consistent with DR 7-101 and EC 2-26, 27 and 28 of the Code of Professional Responsibility, and without regard to the disfavored social, political or economic status of any eligible client.

B. Consortium for Delivery of Services

There should be an ongoing independent consortium of Oregon legal aid providers. Membership would be open to any organization providing legal services to low income Oregonians, as well as any organization which sponsors the delivery of such services (e.g. the MBA). The consortium would provide a forum for ongoing identification of unmet client needs to which resources should be targeted, while avoiding duplication of efforts by member programs. The consortium would allow for coordination and integration of key functions across program lines, and facilitate communication among program funds sources.

The consortium should include:

Current LSC recipient programs,
Non-profit legal centers
Public Interest Law Firms
Law school clinics
Campaign for Equal justice
Bars, particularly OSB and MBA

C. Reorganization/Restructuring for Efficiency of Delivery

The existing legal services programs should continue the ongoing process of internal evaluation to identify means of streamlining, reducing costs and gaining new efficiencies. The programs should continue to evaluate, within the consortium context, whether program, mergers, consolidation or sharing of particular functions or services or development of new means or methods of access and delivery are appropriate. Areas of continued discussion and evaluation should be:

-- Merger;
-- Consolidation of programs/services/shared systems; and
-- Appropriate use of technology.
-- Intake and referral improvements;
-- Coordination among programs with the Bar;
-- Coordination with ADR programs.

The various programs should continue to inform and advise one another as this process continues.

D. Development of Non-Restricted Entities

In response to the imposition of restrictions (on and after April 26, 1996) on programs which receive Legal Services corporation funding, new entities have been and are being organized to provide critically important services to clients, which LSC recipients will no longer be able to provide. Oregon Law Center has been incorporated and will receive funding from OLF and other sources; the Lane County Law and Advocacy Center has been established in Eugene. The Task Force makes the following recommendations regarding these "Full Service Law Centers:"

Should be an entity or entities capable of performing legislative and administrative advocacy.

Should be an entity or entities capable of providing representation to underserved populations with cultural barriers, language barriers, or local access programs, e.g.
migrant workers. Should be capable of providing services all over the state.

Should develop pro bono capacities of the bar statewide -- not just as supplement (to take individual cases overflowing from legal services programs), but in such areas as class actions, legislative advocacy, policy development, low income housing development, etc.

Should include all LSC restricted work, particularly class actions, on issues affecting low income populations, such as welfare reform and administration of public benefit programs.

As indicated above, the question whether there should ultimately be one such program, with branch offices in key locations (e.g. Salem) was left for study by the OSB legal aid oversight group.

E. Development/Expansion of New Resources

The Subcommittee recommends development and expansion of new and non-legal services resources to complement consortium activities:

-- There are currently some regional hotlines operated by all legal services programs. Development of additional hotlines could be beneficial; a prime topic would be a (statewide) Child Support hotline.

-- Local and statewide bar groups should expand their pro bono efforts, working in cooperation with offices statewide. As a corollary, all programs should consider using emeritus attorneys in their area, on the model of the "ELVIS" program in Marion-Polk Legal Aid Service.

-- There should be strategic, thoughtful reassignment of OLF resources, filing fee surcharge resources, and other available funds to provider programs.

-- Courts, Bar and OLF should continue to support efforts to increase ADR resources (e.g. farmworker mediation program) and self help mechanisms (Oregon Family Law Task Force is investigating the Maricopa County model).

-- The OSB should expand its existing Tel-Law program to cover new topics. Existing programs would be willing to work on scripts in key areas, as was done last year with landlord/tenant tapes. (Lane County estimates that it currently refers 45-50 callers per day to Tel-Law.)

-- The OSB Order Desk/Pamphlet distribution efforts could include legal aid brochures, which are already available from the programs.
OSB should expand its Modest Means program as far as possible.

F. OSB Oversight and Support

The Oregon State Bar should take on an expanded role in oversight and provision of technical assistance to legal aid programs. This oversight/technical assistance role should be assigned to a small group (not more than five persons) who would be directly accountable to the Board of Governors. Members of the group should be OSB members who are knowledgeable in the areas of law office management and legal services/pro bono delivery, and who are independent of the programs. The group should develop defined standards for ongoing assessment of the programs’ operations based on existing national standards (e.g., ABA’s SCLAID standards, LSC Performance Criteria). Their assessments should concentrate on outcomes, with the emphasis on achieving quality results for clients.

If the Oregon legislature is willing to delegate allocation of filing fee surcharge revenues to the Oregon State Bar Board of Governors, this group would be an appropriate entity to take on this task, or at least, to evaluate and make recommendations to the BOG. (A significant minority of subcommittee members believe that, while it is critically important that the OSB assume an oversight/technical assistance role with respect to civil legal services programs, this role should be separated from that of allocation of actual amounts of filing fee surcharge funding.)

V. Conclusion

The Subcommittee is passionate in its commitment to the preservation and growth of high quality, zealous representation of low income Oregonians. This commitment must transcend, and not be driven or limited by, decisions on funding or restrictions on practice dictated by the Congress. Rather, "high quality legal representation" of low income persons in this state should be defined and driven by the Lawyer’s Code of Professional Responsibility, the ABA SCLAID Standards and by the LSC Performance Criteria. The organization and structure of legal services delivery in Oregon must be independent, flexible and accountable, and must be driven by a mandate of quality adopted and expected by the Board of Governors.
SUMMARY OF THE FY 96 RESTRICTIONS ON RECIPIENTS OF LSC FUNDS

CENTER FOR LAW AND SOCIAL POLICY

APRIL 26, 1996

On Thursday, April 25, the Congress enacted and today the President signed into law HR 3019, the FY 96 appropriations bill that includes funds for the Legal Services Corporation (LSC). This legislation also incorporates a series of restrictions on what LSC-funded recipients can do. This memo provides an overview of those restrictions and gives some initial guidance to LSC recipients on how the restrictions will affect their work. CLASP is preparing a much more extensive memo for distribution to PAG member programs which will give more detailed guidance about what can and cannot be done under the new restrictions. This more detailed memo will be available shortly. If you have questions in the meantime, please contact Linda Perle (ext. 3) or Alan Houseman (ext. 1) at CLASP (202)328-5140.

Subject to a transition provision, these restrictions are now in effect. Unlike past appropriation provisions that were effective when the appropriated funds were distributed to LSC recipients, the provisions of HR 3019 are effective immediately upon enactment, i.e. today!

Transition: The new transition date is August 1, 1996. The restrictions on most of the cases and activities described below apply beginning on April 26, 1996. However, recipients have until August 1, 1996 to terminate their involvement in pending class actions and individual cases involving representation of prisoners and aliens (not covered by the exemptions described below) which were begun before April 26, 1996. Recipients must immediately terminate representation in all other categories of cases and activities that are covered by the restrictions.

LSC has initially interpreted the transition provision to require immediate termination of representation any case that involves a prohibited activity, such as welfare reform or redistricting, even if the case is a class action or involves aliens or prisoners.

Because LSC is required, within 60 days of enactment, to provide the appropriations committees a report setting forth the status of cases and matters that can continue until August 1, 1996, recipients must track any class actions or cases involving ineligible aliens and prisoners.

Non-LSC funds: All of a recipient’s funds from whatever source are now restricted. Recipients will no longer be able to use funds from non-LSC sources to undertake activities that are subject to the new restriction and cannot be done with LSC funds. This prohibition is effective immediately and is not dependent upon when LSC or non-LSC funds were received by the recipient or what restrictions originally came with the funds. Programs may use non-LSC funds to represent financially ineligible clients, so long as they do not represent them in prohibited cases or matters.
Legislative and Administrative Advocacy: With a few specific exceptions, recipients are precluded from advocacy and representation before legislative bodies and in administrative rulemaking proceedings. Recipients cannot represent clients or client interests before legislative bodies and, with one exception, cannot respond to requests of legislators for information that would affect pending or proposed legislation directly affecting clients. However, recipients can use non-LSC funds to respond to a written request for information or testimony from a legislative body or committee, or a member of such body or committee, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

Recipients cannot represent clients or client interests before administrative agencies when engaged in rulemaking and cannot respond to requests of administrative officials with regard to rules directly affecting clients. However, recipients can use non-LSC funds to: (1) respond to requests for public comment in a rulemaking process, and (2) respond to a written request for information or testimony from a government agency or a member of such agency, so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made.

Recipients are precluded from all self-help lobbying before agencies or legislative bodies, with two exceptions. Recipients can use non-LSC funds to contact, communicate with, and respond to requests of State or local legislative or administrative officials with regard to pending or proposed legislation or agency proposals to fund the recipient. Recipients can use non-LSC funds to contact, communicate with, and respond to requests of federal legislative or administrative officials with regard to pending or proposed legislation or agency proposals to fund the recipient so long as the response is made only to the parties that made the request and the recipient does not arrange for the request to be made. Grassroots lobbying is not permitted under either exception.

Class Actions: Recipients cannot initiate, participate or engage in any new class actions, but can continue work on pending class actions until August 1, 1996. Class actions are cases which are brought as a class action or otherwise seek class certification under Rule 23 of the Federal Rules of Civil Procedure or under equivalent state class action rules.

Attorneys' Fees: Recipients will be unable to claim, collect or retain attorneys' fees from adverse parties on cases initiated after April 25, 1996, even when the fees are permitted by statute. However, recipients can continue to claim, collect and retain attorneys' fees on pending cases initiated before April 26, 1996, except that recipients will not be able to collect attorneys' fees for any additional related claim made after April 25, 1996.

Welfare Reform: Recipients cannot challenge State or Federal welfare reform initiatives, policies or laws. For purposes of this new restriction, and until further notice, recipients should interpret the restriction to apply to cases which seek injunctive or declaratory relief to challenge a State welfare reform law, regulation or policy for AFDC or the state “general assistance.”
program, including laws, regulations or policies for which the state was granted waivers to AFDC requirements under Section 1115 of the Social Security Act. Generally, welfare reform would not include reforms enacted in Medicaid, food programs, child welfare programs, child care, job training, unemployment insurance or other public benefits programs, unless they were part of "welfare reform" legislation, policies or regulations or the waiver request that specifically included such reforms. Because this new provision is very difficult to understand and interpret, please contact Linda or Alan to discuss questions you have and before terminating representation in cases that are not seeking injunctive or declaratory relief to challenge State welfare reform.

Redistricting: Continued representation in redistricting cases is prohibited. To understand the scope of the redistricting prohibition, please review 45 CFR 1632. The provisions of Part 1632 will now govern all activities and funds of a recipient.

Abortion: Recipients cannot participate in any litigation with regard to abortion.

Aliens: Recipients can no longer serve certain aliens. However, aliens who fall into the following categories can be represented:

1. Lawful permanent resident aliens including those granted amnesty.
2. Lawful temporary resident aliens under the seasonal agricultural worker (SAW) program.
3. Any alien who is either married to a U.S. citizen, the parent of a U.S. citizen, or an unmarried child under the age of 21 of a U.S. citizen assuming such alien has filed an application for adjustment of status to permanent residency and such application has not been denied.
4. Aliens granted asylum.
5. Aliens granted refugee status.
6. Aliens granted conditional entrant status.
7. Aliens granted withholding of deportation.

To understand the scope of the alien prohibition, please review 45 CFR 1626. The provisions of Part 1626 will now govern all activities and funds of a recipient.

Prisoners: Recipients cannot participate in litigation on behalf of a person incarcerated in a Federal, State or local prison, including pre-trial detainees who are incarcerated in a jail. However, until further notice, this should not be interpreted to apply to a person who is not incarcerated at the time representation began but is later incarcerated for a short period of time. Contact Alan or Linda for clarification about this provision.

Drug evictions from public housing: Recipients can no longer represent persons convicted of, or charged with, drug crimes in public housing evictions when the evictions are
based on threats to health or safety of public housing residents or employees. For guidance, see the new LSC regulation Part 1633 which now applies to all funds of a recipient.

Solicitation: In-person solicitation of potential clients by recipients is prohibited (e.g., potential clients residing in a migrant labor camp). However, recipients can continue community legal education programs and can continue to notify low-income persons of their services and their rights under laws that affect them.

Client identification: Recipients will have to identify potential client plaintiffs by name and obtain a written statement of facts from any plaintiff client before they can file suit or engage in precomplaint settlement negotiations on the client’s behalf. This does not apply to existing cases where the negotiations have already taken place or suit has already been filed, or to brief advice and referral, including hotlines. Any statement of facts that a client signs should only include those facts upon which a complaint would be based. Further clarification will be provided shortly and recipients should not suddenly change their intake systems or begin requiring all clients to sign a statement of facts.

Training: Recipients cannot conduct training programs to advocate particular public policies or political activities and cannot do training on prohibited cases or advocacy activities (e.g., lobbying, rulemaking, attorneys’ fees). To understand what can and cannot be done, see 45 C.F.R. 1612.9 which will now apply to all funds.

Timekeeping: The timekeeping provisions will not be effective until May 31, 1996. See the new timekeeping regulation Part 1635, 61 FR 14251 (April 1, 1996) and the LSC Timekeeping Guide distributed to all LSC-funded recipients in mid-April.

Priorities: Recipient boards will have to set priorities including procedures for emergency cases; staff will be required to sign an agreement not to enter into cases or matters not within the priorities or covered by the emergency procedures; and the recipient will be required to report annually to LSC on non-priority cases or matters. However, recipients should not take any action under this new requirement until LSC provides guidance.

Federal laws relating to funds: Recipients will be subject to all federal laws affecting the expenditure of federal funds, including criminal laws on fraud and embezzlement. However, recipients should await further clarification from LSC about the scope of this provision.

Access to records: LSC monitors and auditors will have access to financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, unless they contain information protected by the attorney-client privilege. This new access requirement will affect how programs maintain these documents in order to protect client confidentiality, which in most states protects information that is not protected under the attorney-client privilege. Recipients should await further clarification before making changes in how they maintain client trust funds, retainer agreements, eligibility records and the like.
May 13, 1996

Ann Bartsch, Staff Liaison
OSB Civil & Legal Service Task Force
P. O. Box 1689
Lake Oswego, OR 97035-0889

Dear Ann,

Laurence passed a copy of your "access to justice" chart on to me. He also commented to me that the task force might be considering the issue of "minimum access" as part of their deliberations on civil legal services. I thought that information on the existing poverty population, delivery systems and funding levels would give you a baseline to work from. I met with the administrators of Oregon Legal Services and Marion Polk Legal Aid (Katie Danner and Karla Mikkelson), and incorporated information from Jackson County (Medford, Debra Lee) and Multnomah County, Mel Goldberg) to construct the attached chart and map.

"Population" figures were derived from the State of Oregon's 2-96 estimated poverty figures x 125% (LSC guidelines). The Salem office has already lost 1 attorney, Klamath Falls has closed, and 4 offices have Americorps attorneys (these are temporary positions). Sixty-eight attorneys serve 483,473 eligible clients (1 attorney per 7110). Cost to support the attorneys, offices, and support staff is slightly more than $6,800,000 per year. Average attorney salary is $35,000.

Karla, Katie and I also discussed alternative delivery systems including use of the Oregon Ed\Net and public library computer systems to do "on-line" client interviews and to provide advice.

I look forward to hearing about other options suggested through the task force.

Sincerely,

M. L. Church
Administrator

Voice Mail: 342-6056, Ext. 142
Enclosures

main\ml\bartsch.txt
Attached is a map that shows Legal Aid offices with the number of attorneys and area/poverty population served by each office.

<table>
<thead>
<tr>
<th>OFFICE(S)</th>
<th>ELIGIBLE POPULATION</th>
<th># OF ATTORNEYS</th>
</tr>
</thead>
<tbody>
<tr>
<td>McMinnville Hillsborough</td>
<td>57,039</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7.6</td>
</tr>
<tr>
<td>Portland Multnomah Co.</td>
<td>102,590</td>
<td>6*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8</td>
</tr>
<tr>
<td>Oregon City</td>
<td>26,617</td>
<td>4</td>
</tr>
<tr>
<td>Salem Woodburn</td>
<td>51,988</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.5</td>
</tr>
<tr>
<td>Albany Newport</td>
<td>38,710</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Eugene</td>
<td>54,720</td>
<td>8*</td>
</tr>
<tr>
<td>Coos</td>
<td>16,250</td>
<td>2</td>
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<tr>
<td>Roseburg Grants Pass</td>
<td>61,582</td>
<td>1</td>
</tr>
<tr>
<td>Medford</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7*</td>
</tr>
<tr>
<td>Klamath Falls</td>
<td>14,170</td>
<td>0**</td>
</tr>
<tr>
<td>Bend</td>
<td>26,433</td>
<td>2</td>
</tr>
<tr>
<td>Pendleton</td>
<td>22,604</td>
<td>3</td>
</tr>
<tr>
<td>Ontario</td>
<td>10,770</td>
<td>4*</td>
</tr>
</tbody>
</table>

7 | 483,473 | 68.1

* 1 Americorps attorney included in each

** Klamath office has closed.
STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR
Approved by the American Bar Association House of Delegates, August, 1986, as limited by the general introduction. The American Bar Association recommends appropriate implementation of these Standards by entities providing civil legal services to the poor.
INTRODUCTION

In a society based on law, justice is available only to those who can make the legal system work for them. A right is not a right unless it can be enforced; a remedy is not a remedy if it is available only in theory. For the poor, who lack the economic resources to hire a lawyer, justice historically has often been difficult or impossible to achieve. Lack of economic resources as well as dependence on public institutions and programs create a magnitude of legal problems for the poor that have been difficult to resolve.

The concept of public funding for entities providing legal services to the poor developed in direct response to this overwhelming need. Although public funding of civil legal services is a relatively recent development, these institutionalized efforts have become a fundamental part of the American system of justice. Their importance is affirmed by the sustained support they have received from clients, the organized bar, the judiciary, elected officials and the public.

The American Bar Association first adopted Standards for the operation of civil legal aid programs in 1961. Those Standards were reviewed and revised in 1966, and the Standards currently in effect were approved in 1970. The Standards for Civil Legal Aid have not been addressed by the American Bar Association since that date.

The past sixteen years have significantly increased the understanding of how to meet the legal needs of the poor most effectively, and have witnessed both a substantial growth in legal services efforts, and the emergence of a variety of delivery modes, involving both staff and private lawyers. These developments warrant the promulgation of a new set of Standards to apply to such practice. The continued evolution of systems for providing civil legal aid suggests the need for the continuing evolution of Standards to match new understanding.

The Purpose of the Standards

The Standards are written to serve several purposes. Indigent persons should receive legal representation of a quality as high as the client of any lawyer. The Standards are designed principally to guide organizations providing such civil legal assistance to the poor. Organizations representing the poor are confronted with a number of difficult operational and practice issues. The resources available to them to meet the legal needs of the poor are generally insufficient given the high level of demand that exists. Consequently, legal services providers are consistently faced with difficult choices regarding how to allocate scarce resources, while striving to assist practitioners to meet their professional obligation to their clients. The Standards are intended to provide guidance to such organizations by addressing issues that arise in the context of the competing demands for high quality legal work, efficiently produced within available resources.

The Standards may serve as a guide for civil legal aid organizations which are just being established. They may provide a basis for evaluating the effectiveness of legal aid organizations.
Definitions of Significant Terms Used in the Standards

Legal aid organizations are referred to throughout the Standards as "legal services providers." A legal services provider is an organization which regularly makes civil legal representation available to the poor without charge or at greatly reduced cost. The term does not include a private lawyer or law firm that accepts a referral from a legal services provider for representation of a client, or when they provide pro bono services.

The term "practitioner" as used in the Standards refers to an attorney who represents an indigent client under the auspices of a legal services provider or to a paralegal, law student, lay advocate or tribal advocate who is supervised by an attorney and engages in activities specifically authorized by federal, state or tribal law. In such circumstances the attorney is ultimately responsible for the work of the non-lawyers being supervised. In those circumstances where an activity requires a particular type of practitioner, such as an attorney, the Standards and commentary use the more appropriate descriptive term, rather than the term "practitioner".

Serving the needs of the poor for civil legal services involves the combined efforts of full time staff attorneys devoted to such work, and the substantial commitment of private lawyers' time, whether on a compensated or a pro bono basis. All such attorneys are included within the term "practitioner" as it is used in these Standards.

Application of the Standards

Some Standards focus principally on the responsibilities of legal services providers as organizations which serve the civil legal needs of the poor. Others address the role of the practitioner who represents an indigent client under the aegis of such an organization.

Many private lawyers represent poor clients free of charge, independent of any legal services organization. Because they are written as a guide for representation provided through legal services providers, many Standards are not appropriate for such individual efforts. Nevertheless, the Standards, particularly those pertaining to the responsibility of individual practitioners, may provide practical guidance to effective lawyering by those attorneys.

There is a wide diversity in the form and organization of legal services providers. Some organizations operate principally, or exclusively, to provide legal services to the poor. For others, representation of the poor is incidental to their central purpose. Many organizations operate with a core of staff attorneys, supplemented by components that include the substantial involvement of private attorneys working on a volunteer or compensated basis. Some programs which use the volunteer efforts of private lawyers are sponsored directly by bar associations, either as an integral part of the association or as a free-standing operation. Law school clinical programs provide legal services through law students working under the supervision of faculty or private attorneys. Some programs are operated by church groups, ethnic societies or charitable organizations.
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There are also many different funding sources for legal services providers. A majority of providers receive some portion of their funding from the Legal Services Corporation, the predominant source of funds for indigent civil legal assistance. Funds from this source are governed by a number of specific requirements created by statute, regulation, and grant conditions. There are a number of legal services organizations, however, which receive all or part of their funds from other sources, including: Interest on Lawyers' Trust Account (IOLTA) programs; bar associations; private philanthropic foundations; community charitable fund raising organizations; federal, state, and local governmental agencies; and gifts. Typically, these funding sources impose relatively fewer conditions on the expenditure of their funds.

The Standards are written to provide guidance to all organizations providing legal services to the poor, whatever their method of delivery, or source of funds. The Standards recognize, however, that the institutional structure and funding of the provider will affect whether, or how, a particular Standard might be applied. Some Standards will not be appropriate for certain legal services providers for legal, practical and institutional reasons. Some bar sponsored pro bono programs, for example, would encounter difficulty complying with some of the Standards related to governance. Other Standards, pertaining to ongoing involvement with clients, may be impractical and unnecessary for some programs and for individual private practitioners who participate in a private attorney component of a provider. Where application of a particular Standard is not reasonable or is impractical for some types of providers it need not be followed. However, the Commentary to the Standard acknowledges the limitation and suggests how the provider might seek to serve the underlying principles embraced by the Standard by alternative means.

Use of the Standards

All lawyers are bound by the ethical standards adopted by the appropriate authority in the jurisdiction in which they practice. The ethical standards in virtually every state are based in whole or part upon either the Model Rules of Professional Conduct or the former Model Code of Professional Responsibility. The American Bar Association historically has taken the lead in developing and articulating the ethical norms which govern the practice of law. These Standards do not impose any different ethical requirements than those already contained in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. In some instances, they touch upon issues that are governed by the accepted rules of professional conduct, and elucidate their application in the context of the special circumstances of providing civil legal services to indigents. In those instances the commentary may make appropriate reference to, but does not alter, the controlling ethical requirement.

All attorneys should review and abide by the appropriate rules of conduct which govern practice in their jurisdiction. These Standards do not, and are not intended to, provide references to all the Model Rules and Model Code provisions which may apply to the representation of an indigent person.

The Standards are intended only as guidelines. They do not create any mandatory requirements for the operation of any legal services provider or the actions of any practitioner. Failure to comply with a Standard should not give rise to a cause of action, nor should it create any presumption that a legal services provider or a practitioner has breached any legal duty owed to a client or to a funding source. Rather, the Standards represent the current combined and distilled judgment of a number of persons who have substantial experience in the area. Their adoption by the American Bar Association stands as a recommendation to legal services providers and practitioners regarding how they should operate in order to maximize their capacity to provide high quality legal services to their clients in the face of scarce resources.
The Standards themselves are set forth in bold face capitalized type. Each Standard is accompanied by extensive commentary to explain or illustrate the Standard, or to identify issues that might arise in its application. The commentary is not intended to expand any Standard beyond what is stated in the Standard itself.

The Underlying Principles of the Standards

A number of essential principles have guided the development of these Standards. These principles underlie all of the Standards and are basic to civil legal aid practice. Some are also specifically addressed by a separate Standard.

1. High Quality. The Standards are based on the competency standard which is stated as a minimum in the Model Rules of Professional Conduct (Rule 1.1) and the Model Code of Professional Responsibility (DR 6-101). They are also based on the belief that all practitioners should strive to provide representation of the highest possible quality, and therefore, they address issues of practitioner qualifications and training, supervision systems that support quality, specific quality assurance control mechanisms, and the fundamental elements of effective representation.

2. Zealous Representation of Client Interests. All lawyers have an ethical responsibility to pursue their clients' interests zealously within the confines of the law and applicable standards of professional conduct. This has particular implications for legal services providers which represent the poor.

When effective resolution of individual clients' problems is circumscribed by existing laws and practices, or when existing laws and practices result in the same or similar problems for many indigent clients, representation of a client may call for a practitioner to reach beyond the individual problem to challenge the law, policy or practice. The fact that such advocacy may be complex, difficult, or controversial should not be a barrier to a practitioner pursuing it. Furthermore, the range of legal problems that confront a provider's clients and the generally limited resources available to it to respond may call for a provider and its practitioners to use a variety of representational modes and innovative lawyering on behalf of clients.

3. Client Participation in the Representation. In all legal representation, clients should decide the objectives sought by the representation, within the limits imposed by law and the practitioner's ethical obligations, and should be consulted in determining the means used to pursue those objectives. (See Model Rules of Professional Conduct, Rule 1.2(c); Model Code of Professional Responsibility, DR 7-101.) Particularly in the representation of low-income clients, there is great potential for developing an unequal relationship between the client and practitioner. The Standards recognize this reality and emphasize the need for specific efforts at every stage of representation to assure that practitioners communicate with their clients consistent with ethical requirements.

4. Responsiveness to the Needs of Clients. Legal services providers represent the principal organized effort to respond to the civil legal needs of the poor. Typically, their resources are extremely limited in the face of overwhelming need. Providers, therefore, have an acute responsibility to assure that those resources are utilized in a way that maximizes the effectiveness of their legal work and is responsive to the most pressing client needs. Generally, not all clients can be represented, and not all legal problems can be addressed. Frequently, as well, a choice must be made regarding whether the commitment of substantial funds and attorney time to a potentially costly representation is prudent or even possible given the limitations imposed by severely limited resources.
The Standards seek to give guidance regarding the factors which are appropriate to consider in making such difficult choices. Prioritization of legal problems in terms of their importance to clients is acknowledged as one legitimate factor to be considered among others. The Standards recognize that determining which matters are most significant to clients is a task fraught with difficulty. Accordingly, the commentary to various Standards suggests a number of ways for a provider to seek input from the eligible client population regarding which problems are perceived by them to be most critical. In addition, providers are urged to consult with participating private attorneys, with the bar generally, and with agencies dealing with the poor.

Similarly, various policies regarding provider operation and delivery structure will affect its capacity to serve its clients effectively. The Standards espouse the principle that guidance from the clients to be served will assist the provider to make intelligent decisions about such matters.
# Standards for Providers of Civil Legal Services to the Poor

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I. STANDARDS FOR RELATIONS WITH CLIENTS

Standard 1.1 Establishing an Effective Relationship with the Client

A Legal Services provider and practitioner should strive to establish with each client an effective relationship which preserves client dignity and dispels any client fear or mistrust of the legal system.

Standard 1.2 Establishing a Clear Understanding

The Legal Services provider and practitioner should establish a clear mutual understanding regarding the scope of the representation, the relationships among the client, the provider and the practitioner, and the responsibilities of each.

Standard 1.3 Protecting Client Confidences

Consistent with ethical and legal responsibilities, a Legal Services provider and practitioner must preserve information relating to representation of a client from unauthorized disclosure.

Standard 1.4 Client Fees

A Legal Services provider should establish a policy governing any fees and costs for which a client is responsible. The policy should provide for the following:

1. The client should be fully informed at the initiation of representation of the provider policy regarding costs or fees.

2. A practitioner employed by the provider may not accept a client or an applicant for services as a private client for a fee, or otherwise receive a fee from such an individual.

3. A private practitioner representing clients referred by a provider on a PRO BONO or compensated basis may not accept a fee from the client for those services, except as agreed to by the provider prior to the initiation of representation.
4. A Legal Services provider and a private practitioner to whom it refers a client should establish an agreement prior to the initiation of representation regarding disposition of any attorneys fees which may be recovered from an adverse party.

**Standard 1.5 Client Participation in the Conduct of Representation**

Subject to the limitations imposed by law and ethical obligations, the practitioner must abide by the client's decision regarding the objectives of the representation, must consult with the client regarding the means used to achieve those objectives, and must keep the client reasonably informed of the status of the matter.

**Standard 1.6 Client Access**

A Legal Services provider should locate and operate its service facilities, extend the assistance of private practitioners, and structure its outreach and publicity efforts in a manner that facilitates access for clients.

**Standard 1.7 Communication in the Client's Primary Language**

To the extent practicable, Legal Services providers should have the capacity to communicate with clients directly in their primary language.

**Standard 1.8 Affirmative Action in Employment**

A Legal Services provider must avoid discrimination in employment. In addition, it will generally enhance the provider's ability to communicate with clients effectively if the extent practicable it employs personnel who reflect the general composition of the client population with respect to race, ethnicity, age, sex, and handicap.

II. **STANDARDS FOR INTERNAL SYSTEMS AND PROCEDURES**

**Standard 2.1 Eligibility Guidelines**

A Legal Services provider should establish written guidelines to determine an applicant's eligibility for legal assistance.
Standard 2.2 Case Acceptance Policy

A Legal Services provider should establish a policy governing the acceptance of representation which focuses resources on the identified priorities of the provider, considers the maximum number of legal matters the provider can reasonably handle and allocates available resources so that representation is of high quality.

Standard 2.3 Central Record Keeping

A Legal Services provider should adopt, implement, and maintain internal systems for the timely, efficient, and effective practice of law, including:

1. A uniform system for maintaining client files,
2. A system for noting and meeting deadlines in the representation,
3. A system for handling client trust funds separate from provider funds.

Standard 2.4 Standard Case Files

A file should be established for each client which:

1. Records all material facts and transactions,
2. Provides a detailed chronological record of work done on each matter,
3. Sets forth the planned course of action delineating key steps to be taken with a firm timetable for their completion, and
4. Minimizes disruption in the event the representation is transferred to another practitioner.

Standard 2.5 Policy Regarding Costs of Representation

A Legal Services provider should establish a clear policy and procedure regarding payment of costs in cases in which discovery, use of expert witnesses, and other cost-generation activities are appropriate. Where necessary, the provider should budget sufficient funds for such costs.
III. STANDARDS FOR QUALITY ASSURANCE

Standard 3.1 Characteristics of Personnel

A Legal Services provider should strive to assure that representation is provided by persons who are competent, sensitive to clients, and committed to providing high quality legal services.

Standard 3.2 Assignment of Cases and Work Load Limitations

A Legal Services provider should assign cases and limit individual work loads for its practitioners according to established criteria which include the following:

1. The practitioner's level of experience, training and expertise,

2. The status and complexity of the practitioner's existing caseload,

3. The practitioner's other work responsibilities,

4. The availability of adequate support for and supervision of the performance of the practitioner, and

5. Other relevant factors which directly affect the performance of legal work.

Standard 3.3 Responsibility for the Conduct of Representation

To the extent that the provider is responsible for representation, it should supervise the performance of the practitioner to assure that the client is competently represented. A provider is responsible for representation undertaken by its staff practitioners. When a provider delegates responsibility for representation to a private attorney, it should offer the practitioner appropriate support and training.

Standard 3.4 Review of Representation

To the extent that the provider is responsible for representation assigned to practitioners, it should review the representation using qualified attorneys. That review should:

1. Evaluate the quality of the representation,
2. Determine whether all pertinent issues have been identified and all remedies explored,

3. Ensure timely and responsive handling of all aspects of the representation,

4. Ensure that clients are appropriately involved in establishing objectives and the means to achieve those objectives and are kept reasonably informed of developments in the representation, and

5. Identify areas in which the provider should offer appropriate training and assistance.

**Standard 3.5 Training**

A Legal Services provider should provide systematic and comprehensive training of staff and private practitioners and other personnel appropriate to their functions and responsibilities.

**Standard 3.6 Providing Adequate Resources for Research**

The Legal Services provider should assure that availability of adequate resources for appropriate legal research and factual investigation.

**Standard 3.7 Periodic Evaluation of the Provider**

A Legal Services provider should periodically evaluate the effectiveness of its operation.

**IV. STANDARDS FOR GENERALLY APPLICABLE REPRESENTATION FUNCTIONS**

**Standard 4.1 Initial Exploration of a Legal Matter**

The practitioner should begin each instance of representation with an initial exploration of the client's problem which:

1. Begins development of an atmosphere of trust and confidence between the practitioner and the client,
2. Elicits known facts and circumstances pertinent to the client's problem;

3. Tentatively identifies the legal issues presented;

4. Establishes initial client objectives; and

5. Informs the client about the nature of the legal problem and the next steps to be taken by both the client and the practitioner.

**Standard 4.2 Information Gathering**

Each client problem should be investigated to establish accurate and complete knowledge of all relevant facts, favorable or unfavorable to the client's position.

**Standard 4.3 Legal Research and Analysis**

The practitioner should analyze each matter and research pertinent issues to determine the relationship between the client's problem and existing law, and whether there is a good faith basis to seek extension, modification, or reversal of existing law which is unfavorable to the client.

**Standard 4.4 Case Planning**

The practitioner should determine a course of action for handling each legal matter which:

1. Relates material facts to legal issues raised by the client's problem,

2. Identifies applicable law and available remedies; and

3. Enables the client and practitioner to make knowledgeable decisions about the means to pursue the client's objective at each stage of the representation, with full consideration of available resources and of the risks and benefits of each option.

**Standard 4.5 Counseling and Advice**

The practitioner should effectively counsel and advise the client throughout the representation:

1. To each a common understanding with the client of the nature of the legal problem and the client's objective in seeking legal assistance;
2. To identify and evaluate the means available for achieving the client's objective;

3. To assure the client understands the advantages, disadvantages and potential risks of each option and effectively participates in determining the means by which the client's objective is pursued.

V. STANDARDS FOR SPECIFIC REPRESENTATION FUNCTIONS

Standard 5.1 Nonadversarial Representation

A practitioner should pursue nonadversarial, informal representation when it may best accomplish the client's objective.

Standard 5.2 Negotiation

Negotiations should be planned and conducted according to a thorough analysis of the facts and law related to the matter and should be conducted with an adverse party so as to further the accomplishment of the client's objectives. A formal agreement with the adversary should be entered into only when the agreement is specifically authorized by the client.

Standard 5.3 Litigation

The conduct of litigation should meet the following specific standards:

**Standard 5.3-1 Strategy**

A clear, long-range strategy for prosecution or defense of the client's claim should be developed and should be periodically reviewed in light of new developments in the case and in the governing law.

**Standard 5.3-2 Pleadings**

Pleadings should be drafted so as to preserve and advance the client's claim in accord with the requirements of applicable law. The degree of specificity of pleadings, absent a mandatory requirement of applicable law, is a matter for tactical decision.
Standard 5.3-3  Motion Practice

Motions should be considered to promote the successful, expeditious and efficient resolution of the litigation in the client's favor.

Standard 5.3-4  Discovery

Formal discovery should be utilized when appropriate to the case, should be thoroughly prepared, and should seek to obtain necessary information in a timely manner and in a useful format.

Standard 5.3-5  Trial Practice

All matters should be presented in a manner that is appropriate to the rules, procedures and practices of the tribunal, and that reflects thorough and current preparation in the facts and the law.

Standard 5.3-6  Enforcement of Orders

When a favorable judgment, settlement, or order is obtained, necessary steps should be taken to ensure that the client receives the benefit thus conferred.

Standard 5.3-7  Preservation of Issues for Appeal

A lawyer should remain aware of possible factual and legal bases for appeal from an adverse judgment or ruling, and should make a deliberate decision with appropriate client participation as to the need to preserve such issues for appeal in light of the overall litigation strategy.

Standard 5.3-8  Appeals

If there is an adverse appealable judgment or order, a decision should be made whether an appeal is warranted. The decision should be based on:

- The merits of the client’s appeal;
- The potential benefits and risks of pursuing the matter, and
- Established criteria which reflect identified priorities and available resources of the provider or the willingness and ability of a private practitioner to undertake the appeal.
The client should be advised at the outset of the representation that prosecution or defense of an appeal by the provider is not automatic. If the appeal is pursued it should be prosecuted or defended with all due diligence.

**Standard 5.4 Administrative Hearings**

Representation of clients in adjudicatory administrative hearings should be effectively carried out in manner appropriate to the procedures and practices of the hearing tribunal.

**Standard 5.5 Administrative Rule-Making**

If representation before an administrative body regarding the adoption of rules, regulations, and orders of general application is appropriate to achieve client objectives, a Legal Services provider should strive to provide such representation unless prohibited by law or inconsistent with provider priorities.

**Standard 5.6 Legislative Representation**

If representation before a legislative body is appropriate to achieve client objectives, a Legal Services provider should strive to provide such representation unless prohibited by law or inconsistent with provider priorities.

**Standard 5.7 Community Legal Education**

When consistent with its priorities, a Legal Services provider may undertake community legal education which responds to client needs, advises clients of their legal rights and responsibilities, and enhances the capacity of clients to assist themselves collectively and individually.

**Standard 5.8 Economic Development**

When consistent with its priorities, a Legal Services provider may provide legal assistance to eligible clients in their creation and operation of entities designed to address their needs. Such representation should be provided by practitioners who have expertise in pertinent substantive law and the requisite skills to achieve client objectives.
VI. STANDARDS FOR PROVIDER EFFECTIVENESS

Standard 6.1 Identifying Client Needs and Objectives

A Legal Services provider should interact effectively with poor persons in its service area to be aware of their legal needs; and based on that interaction and other relevant information should engage in comprehensive planning to establish priorities for the allocation of its resources.

Standard 6.2 Delivery Structure

The provider should establish a delivery structure tailored to local circumstances which will effectively and economically meet identified client needs through high quality work.

Standard 6.3 Use on Non-attorney Practitioners

To maximize the efficient use of its resources the provider should explore the use of paralegals, tribal and lay advocates, law students and other legal assistants in the representation of clients. Representation of clients by non-attorney practitioners should be undertaken only as specifically authorized by state, federal or tribal law and appropriate ethical restrictions. The activities of such individuals should be supervised by an attorney who is responsible for the work performed.

Standard 6.4 Relations with the Private Bar

A Legal Services provider should maintain active and cordial relations with the organized Bar and should seek to involve the private Bar in its activities.

Standard 6.5 Results of Representation

A Legal Services provider should strive to achieve lasting results responsive to client identified needs and objectives.

Standard 6.6 Institutional Stature and Credibility

A Legal Services provider should achieve institutional stature and credibility which enhance its capacity to achieve client objectives.
VII. STANDARDS FOR GOVERNANCE

Standard 7.1 Functions and Responsibilities of the Governing Body

**Standard 7.1-1 General Policy and Review**

A Legal Services provider should have a Governing Body which established broad general policies consistent with client needs, which assures compliance with applicable laws governing the operation of non-profit corporations, and which regularly reviews provider operations.

**Standard 7.1-2 Prohibition Against Intrusion in Case Matters**

The Governing Body and its individual members shall not interfere directly or indirectly in the representation of any client by a practitioner.

**Standard 7.1-3 Fiscal**

The Governing Body should assure the financial integrity of the Legal Services Provider by:

1. Adopting a budget within available resources consistent with client needs and objectives and the needs of staff for reasonable working conditions and compensation;

2. Monitoring spending in relation to the approved budget; and

3. Providing for an annual independent financial examination.

**Standard 7.1-4 Relations with the Chief Executive**

The Governing Body should hold the chief executive accountable for program operations through the following:

1. The Governing Body should establish specific criteria to recruit and select as chief executive the most capable and effective person available to carry out the duties established by the Board to achieve provider goals, to implement provider policy and to manage provider operations.
2. The Governing Body and chief executive should establish a relationship of open, honest communication based on trust, mutual respect, and a common understanding of the areas of responsibility and authority assigned to each.

3. The Governing Body should conduct ongoing oversight and periodic evaluation of the performance of the chief executive.

4. When necessary, the Governing Body should take corrective action to improve performance by the chief executive. If corrective action does not result in the desired performance, employment should be terminated in a fair and timely manner.

**Standard 7.1-5 Client Grievance Procedure**

The Governing Body should establish a policy and procedure governing complaints by applicants relating to denial of service and complaints by clients relating to the quality and manner of service.

**Standard 7.1-6 Serving as a Resource to the Provider**

The Governing Body should serve as a resource for the Legal Services provider, assist in community relations and fundraising, and when appropriate, engage in forceful advocacy on behalf of the provider.

**Standard 7.2 Membership of the Governing Body**

**Standard 7.2-1 Representation of the Community**

To the extent practicable, membership of the Governing Body should be representative of the client and legal communities.

**Standard 7.2-2 Client Board Members**

To the extent practicable, the Governing Body should include members who, when selected, are financially eligible to receive legal assistance from the provider.

**Standard 7.2-3 Qualifications of Individual Members**

All members of the Governing Body should:
1. Be committed to the delivery of high quality legal services that respond to client needs;

2. Have a concern for the legal needs of clients;

3. Recognize the need for communication with clients and the legal community;

4. Be committed to open dialogue between attorneys and clients on the Board;

5. Be willing to commit adequate time to obtain the necessary understanding of provider operations to meet their Board responsibilities.

**Standard 7.2-4 Training of Members of the Governing Body**

The provider should strive to assure that all members receive orientation and training necessary for full, effective participation on the Governing Body.

**Standard 7.2-5 Conflicts of Interest**

Governing Body members should not knowingly attempt to influence any decisions in which they have a conflict with provider clients.

**Standard 7.2-6 Selection of Members**

To the extent practicable, members of the Governing Body should be selected in a manner that reflects the diverse interests of the client population. Members should not be selected by employees of the provider nor by any institution or agency which is in conflict with the provider or its clients.

**Standard 7.3 Communication with Clients**

The Governing Body should strive to communicate effectively with the client population.
LEGAL SERVICES CORPORATION
PERFORMANCE CRITERIA

PERFORMANCE AREA ONE: Effectiveness in identifying and targeting resources on the most pressing legal needs of the low-income community

The Performance Criteria acknowledge the central importance of strategic planning, and envision a dynamic model in which such planning is followed by and interwoven with implementation and evaluation, constantly adjusting objectives and strategies to better address the most critical legal needs of a low-income community. While much of a Legal Services program’s work is necessarily reactive, responding to major changes affecting the low-income population, it is important that such reaction occur within a well thought-out framework, designed to enable the program to be as effective as possible in staying focused upon and addressing the most pressing needs of the low-income community it serves.

It is to be emphasized that this performance area does not require one particular form or method of assessment, such as written surveys, nor does it require extensive documentation of the planning process. Rather, the program should be able to demonstrate that it has, through whatever approaches it uses, come to a reasoned, thorough assessment of its client community’s most pressing legal needs. Based on this assessment, the program should set out clearly how it is trying to address the identified needs.

Criteria

1. Periodic comprehensive assessment. The program periodically undertakes a comprehensive assessment of the most pressing legal problems and needs, both addressed and unaddressed, of the low-income population in its service area, including all major subgroups. These comprehensive assessments should be made frequently enough, in the light of their cost, to be reasonably calculated to identify new developments and opportunities affecting that population.

2. Ongoing Consideration of needs. The program is flexible and responsive enough to recognize and adjust to major new needs of its target population that emerge or develop in between the periodic, in-depth assessments described in Criterion One.

3. Setting priorities and allocating resources. In the light of its comprehensive and ongoing assessment of need, and its available resources, the program periodically sets explicit goals, priorities and objectives. Insofar as possible, these priorities and objectives should be expressed in terms of desired outcomes for the client community, and should articulate the general types of services which the program will provide and the kinds of cases or matters which will and will not be accepted. The program should then target its resources consistent with these goals, priorities, and objectives. To the extent that pressing needs have been identified which the program will not be able to address directly because
of resource limitations, the program should consider other methods that might be employed to provide some assistance to affected clients.

4. **Implementation.** The program then implements these priorities and works toward the desired outcomes, by considering, adopting and implementing comprehensive strategies which make use of available and appropriate approaches for legal representation, advocacy, and other program work.

5. **Evaluation and adjustment.** The program, in conjunction with the community that it serves, analyzes and evaluates the effectiveness of its work, in major part by comparing the results actually achieved with the outcomes originally intended, and then utilizes this analysis and evaluation to make appropriate changes as the program carries out future assessments and develops subsequent priorities, objectives, and strategies.

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**PERFORMANCE AREA TWO: Effectiveness in engaging and serving the client community**

A program must have effective relations with its clients, on both an individual and community-wide basis. Although the centrality of client relations and engagement is explicit or implicit throughout the criteria, this Performance Area sets forth the central values.

**Criteria**

1. **Dignity and sensitivity.** The program conducts its work in a way that affirms and reinforces the dignity of clients, is sensitive to clients' individual circumstances and is responsive to each client's legal problems.

2. **Engagement in the client community.** The program is in close touch with the community eligible for its services, and effectively engages that community in all appropriate aspects of its operations.

3. **Access and utilization by the community.** Once a program's priorities and objectives are defined, the program should, over time and within the limits of its resources and program priorities, be accessible to and facilitate effective utilization by the low-income population in its service area, including all major subgroups of that population, and all categories of people who traditionally have had difficulties in getting access to or utilizing Legal Services programs.
Area Three addresses the program’s implementation of its plans, priorities, and objectives. Of primary importance is Criterion 1, Legal representation, to which Legal Services programs allocate the greatest amount of resources. The fundamental question is whether the program is doing good legal work. Criterion 1 relies on the ABA Standards for Providers of Civil Legal Services to the Poor, which include in the referenced sections considerable detail concerning legal representation. The later criteria address other major areas of program activities.

Criteria

1. Legal representation. The program conducts its direct legal representation so that it comports with the relevant provisions of professional ethics, the ABA Standards for Providers of Civil Legal Services to the Poor, and other accepted guidelines applicable to the provision of legal assistance to low-income people.

   a. The program has in place adequate capacity and resources to carry out its work, insofar as its resources permit.

   b. The program utilizes systems, approaches, and techniques sufficient to insure the representation is carried out with maximum effectiveness.

   c. Taken as a whole, the program’s legal representation achieves as much as is reasonably attainable for the client, given the client’s objectives and all of the circumstances of the case. In addition, consistent with applicable rules and decisions governing professional responsibility, in its representation the program also achieves as much as reasonably possible for other low-income people similarly situated, and for the eligible population as a whole, commensurate with program priorities and objectives.

Criterion 2. Other program services to the eligible client population. To the extent such efforts further program priorities and objectives, the program provides other services which enable clients to address their legal needs and problems. Such services may include, but are not limited to, community legal education, telephone advice and hotlines, facilitation of self-help activities and pro se appearances, utilization of alternative dispute resolution, and other activities.

Criterion 3. Other program activities on behalf of the eligible client population. Consistent with its priorities and objectives, and within the limits of available resources and the terms of its funding, a program pursues other activities on behalf of its eligible client community which have a beneficial effect on systemic legal problems of the eligible client population, and also maintains communication with the judiciary, organized bar, government agencies, academic and research centers and other information sources, state and national Legal Services support centers and other organizations working on behalf of low-income people, and other entities whose activities have a significant effect on the eligible client population.
PERFORMANCE AREA FOUR: Effectiveness of administration and governance

The program should be led and managed effectively, with high quality administrative systems and procedures. While not a guarantee of effective services to clients, good leadership and strong internal operations increase the likelihood of such effective services, and decrease the risk that previously effective program services will be undermined by organizational problems.

This Area addresses program administration, apart from the systems related to legal representation and other program services and activities which are covered in Performance Area Three.

Criteria

1. **Basic administration.** The program maintains an effective management structure; has in place effective administrative procedures and personnel; allocates appropriate resources to management functions; and carries out periodic evaluations of administrative operations.

2. **Board governance.** The program has effective board oversight and involvement in major policy decisions, consistent with Standards 7.1 through 7.3.

3. **Financial administration.** The program has and follows financial policies, procedures and practices which comport with applicable requirements of the AICPA, OMB, and the program's funding sources, and conducts effective budget planning and oversight.

4. **Personnel administration.** The program maintains effective personnel administration.

5. **Internal communication.** The program maintains effective intra-staff and staff-management communications and relations that enhance service delivery.

6. **General resource development and maintenance.** To the extent possible, and consistent with the program's mission, the program maintains and expands its base of funding, with a goal of increasing the quality and quantity of the program's services to eligible clients. The program also coordinates with and where possible utilizes outside resources such as academic institutions, social service organizations, foundations, corporations, and other institutions and individuals to increase the community's overall resources devoted to the legal problems and needs of the eligible client population.

7. **Coherent and comprehensive delivery structure.** Overall, the program maintains a delivery structure and approach which effectively utilizes and integrates staff, private attorneys, and other components, is well-suited to meeting the most pressing legal needs of the service area, comports with Standards 6.2 and 6.3, and given available resources constitutes an effective and economical balancing of expenditures on the various functions and activities described in the four Performance Areas.
March 25, 1996


Dear Members:

You may recall HB 3070 from the 1995 session related to certain activities involving non profit legal advocacy organizations. A hearing on that bill prompted two meetings among grower, farmworker and bar representatives resulting in an agreement to look first at mediation as a way to address grower-farmworker disagreements.

We are pleased to report that a statewide farmworker mediation program has been developed which we believe can mean substantial benefits for all parties to a dispute. Enclosed is a copy of that program’s guidelines.

Many work sessions were held among all of the interested groups. We involved the Oregon Department of Agriculture since that agency has an existing mediation program, the scope of which was expanded during the last session to include more than just credit issues.

Our agreement includes a voluntary mediation program that could be used when questions arise around possible illegal actions. Current mediators under contract with the Oregon Department of Agriculture would serve this new constituency. Dollars are now being sought in the private sector to fund the program.

An important part of this entire effort will be educational information for both growers and employees. Our hope is that an ongoing education program will prevent disputes in the first place.

We gratefully acknowledge the encouragement you have given this process. With the impetus provided by the legislature, all of us worked in a solution-oriented atmosphere that produced a quality product.

Please contact any of us for additional details.

Sincerely,

Michael Dale
Oregon Legal Services

John McCullough
Tree Fruit Growers

Don Schellenberg
Oregon Farm Bureau

Ann Bartsch
Oregon Law Foundation

cc: Sen. Brady Adams
    Sen. Cliff Trow
    Rep. Lynn Lundquist
    Rep. Peter Courtney
    Eric Lindauer
APPENDIX 3

Report of Subcommittee on Finance

Katherine O'Neil
Subcommittee Chair

Appendix 3A: ORS 21.480-.490 (filing fees statute), OR Laws 1995, chapter 658
CIVIL LEGAL SERVICES TASK FORCE
FINANCE SUBCOMMITTEE REPORT

Katherine O’Neil, Chair
May, 1996

The shortfall: Current FY ‘96 shortfall in Congressional funding is $1 million. The FY ‘97 it will be $1.5 million. By FY ‘98 Congress will phase out funding for the Legal Services Corporation putting all responsibility for civil legal services for the poverty community back in the hands of the states.

The BOG should remember that even before the Congressional cuts the poverty community was not adequately served. The BOG needs to be a leader in helping local legal communities and all of Oregon’s citizens put together a patchwork of funding and alternative strategies for serving the civil legal needs of the poor.

BOG Action: suggested funding sources:

1. **Filing fees:** The BOG should urge Chief Justice Carson to exercise his discretion to maintain the $22 filing fee for all courts after merger of Circuit and District courts in January, 1998. Alternately, the BOG should make its #1 Legislative agenda for the ‘97 Legislature a revision in the laws related to filing fees with the fees going to the OSB for distribution. The goal of support of legal aid by all those who use the court system will require BOG leadership against the credit bureau initiative petition which would reduce filing fees on their collections in the new merged court system.

2. **Assessment with OSB dues:** The FY ‘96 shortfall could be met by a $100 per attorney contribution made with the annual bar dues. Subsequent Congressional cuts would require a greater per attorney contribution.

The BOG should exercise its leadership and chose a method of per capita contribution among the following.

a. Voluntary contribution collected with OSB dues: “$100 or other.”

b. Voluntary first year or so and then make it compulsory: “$100”.

c. Compulsory contribution collected with OSB dues: “$100” FY ‘97, “$250” in subsequent years to make up for continued cuts in Congressional funding. With an option to do 40 hours (or another figure) of pro bono work in an OSB certified pro bono program.

Any compulsory contribution should first be approved by the new OSB House of Delegates with a referral to the general membership following the meeting at which it is approved.
3. **General Fund:** A carefully tailored request to the Legislature for funding to support the implementation of a specific hot button statute, e.g., related to battered women and children, could yield funding from the general fund. This is another item to be developed for the OSB Legislative agenda in conjunction with the legal aid office.

**BOG Action: leadership:**

1. **Greater OSB/local bar support for CEJ:** Both Karen Garst (OSB exec dir.) and Mona Buckley (MBA exec dir.) attended kick off meeting of CEJ this year and are open to assisting the campaign. The BOG has invited Linda Clingan, CEJ director, to meet with them at their July, 1996, meeting.

   The CEJ would greatly benefit from open, public, frequent support for CEJ from the BOG and other bar leaders. The BOG members can mention the campaign in stump speeches, write about it in all publications. Make CEJ the “lawyers’ charity,” a part of the legal culture. If BOG members and the county bar presidents did an hour of intake at a legal aid office, they would gain a perspective that would fire their support of the CEJ.

   Specifically, when the BOG meets in a county with a legal aid office, the BOG could host an open house at the legal aid office for all county attorneys. Could the BOG host an open house for all bar leaders at the Jackson County legal aid office during the 1996 annual meeting in Medford? Karen Allen (active in obtaining foundation support for that program) could talk to bar leaders about how to obtain foundation support for their local legal aid offices.

2. **Stop the slide in Congressional support:** If OSB is not already on record, need resolution at annual meeting to lobby congress to stop the slide in support of LSC. Also, see attached info from the ABA on some talking points. The BOG needs to develop the position of Oregon’s attorneys for continued Congressional support of legal services, get this material into the hands of OSB members and motivate them to contact Congressional candidates this election year.

3. **Public members:** The BOG should recruit public members who are sympathetic to legal aid and will also work for this cause.

4. **Oregon slots:** The Gaming Task Force appears to be about to recommend a switch from video poker to slot machines. Any enabling legislation should contain a provision for some of the proceeds to go to legal aid. Any legislation pushing citizens towards poverty should provide funds for legal assistance on arrival in poverty. Paul Bragdon is general counsel for the task force.

5. **Lawyers on charitable boards:** The BOG should ask lawyers who serve on charitable boards whose purpose could be interpreted to include contributions to civil legal services to identify themselves to the BOG. This would be a beginning of contributions from outside the lawyer community.
OLF Action: If the BOG thinks that it is appropriate it should:

1. **Sweep accounts.** Ask the OLF to consider the appropriateness of sweep accounts for IOLTA funds. And, if appropriate, negotiate with banks to develop or offer a new kind of attorney-client trust account. The mechanism is a cash management or sweep account which sweeps all or part of the IOLTA balance that is over a specified threshold amount from low-yield checking accounts into an investment in Treasury backed securities on a daily basis, producing higher yields for the IOLTA account.

2. **Higher interest rates.** Commend the OLF for negotiating higher interest rates from First Interstate and U.S.N.B. and publicize this fact to the OSB in general. Assist the OLF in locating counsel to banks which have not raised their IOLTA rates and, if needed, accompany OLF members on visits to these banks.

3. **Special escrow funds:** Confer with OLF on the possibility of legislation which would provide that the interest from the trust accounts of title insurance companies be directed to legal services via OLF.

4. **State abandoned property funds:** Confer with OLF on the possibility of legislation which would provide that a portion of the money the state collects through its abandoned property funds be directed to legal services via OLF.

5. **Abandoned client trust funds:** Confer with OLF on the possibility of legislation to create a mechanism by which unclaimed client trust funds are deemed abandoned and the funds are transferred to the OLF for the distribution to legal services providers.

Local legal aid offices:

1. **Bond issues for human services:** If the Jackson County bond issues for human services (including county legal aid) passes this month, bar should study this strategy. Debra Lee, director of Jackson County legal aid, is behind this.

2. **Retainer contracts for local legal aid offices:** Legal aid in Newport has contract with Siletz Indians which is part of its base budget. For example, could Oregon Women Lawyers be approached to sponsor the domestic violence attorney in Multnomah County legal aid? Any other groups which might be interested in sponsoring a legal aid attorney or program?

3. **Video Poker Money.** Current law provides distribution of video poker revenues through the county commissioners. Debra Lee got a portion for Jackson County legal aid.

4. **Indian Gaming.** Legal aid offices in counties with Indian gaming sites could approach the tribes for support of their offices. All the tribes are represented by OSB attorneys who could be enlisted in this effort.
county where the party to be served cannot be found.

(3) No mileage or commission shall be collected for service of any document or process but in any service involving travel in excess of 75 miles round trip an additional fee not to exceed $25 may be billed and collected. Mileage shall be measured from the location at which the service is made to the circuit court in that county. [Amended by 1969 c.620 §1; 1969 c.619 §6; 1969 c.652 §1; 1973 c.393 §1; 1975 c.607 §2; 1977 c.547 §1; 1979 c.833 §6; 1981 c.835 §2; 1981 c.833 §31; 1981 c.910 §1; 1981 c.1063 §1; 1991 c.894 §1]

21.420 Itemized statement of fees. The return on any summons, process, subpoena or other paper served by a sheriff shall be accompanied by a subjoined itemized statement of the charges made for the service thereof, including the mileage actually and necessarily traveled in making the service.

TRANSCRIPT FEES

21.490 [Amended by 1961 c.446 §1; 1975 c.607 §10; 1979 c.833 §10; 1981 s.s. c.3 §84, 85; repealed by 1985 c.496 §2]

21.470 Transcript fees. (1) The fees of the official reporter of the circuit court for preparing transcripts on appeal as provided in ORS 8.350 shall be not more than $2.50 per page for the original copy, such page to consist of 25 lines with margins of one and one-half inches on the left-hand side and one-half inch on the right-hand side, not more than 25 cents per page for one copy of the original, and not more than 25 cents per page for each additional copy. Except as otherwise provided by law, the fees for preparing a transcript requested by a party shall be paid forthwith by the party, and when paid shall be taxable as disbursements in the case. The fees for preparing a transcript requested by the court, and not by a party, shall be paid by the state from funds available for the purpose.

(2) Where the court provides personnel to prepare transcripts from audio records of court proceedings, the transcript fees provided in subsection (1) of this section to be paid by a party shall be paid to the clerk of the court. [Amended by 1959 c.446 §1; 1971 c.565 §15; 1973 c.195 §1; 1979 c.833 §11; 1981 s.s. c.3 §86; 1987 c.796 §1]

LEGAL AID FEES

21.480 Legal aid fees in circuit courts. In all counties wherein legal representation is provided for the poor without fee by a nonprofit legal aid program organized under the auspices of the Oregon State Bar, the county bar association or the Legal Services Corporation Act (Public Law 93-355 or successor legislation), there shall be collected by the clerk of the circuit court from the plaintiff or other moving party in each civil suit, action or proceeding in the circuit court at the time of filing the first paper therein, in addition to all other fees collected and in the same manner, the sum of $13 beginning on May 16, 1983, and $22 beginning July 1, 1989, to assist in defraying the operative costs of such legal aid program. [1977 c.112 §1; 1981 c.664 §1; 1983 c.114 §1; 1985 c.542 §5; 1989 c.385 §1]

21.485 Legal aid fees in district courts. In all counties where a district court is maintained, and in which fees are collected pursuant to ORS 21.480 by the clerk of the circuit court in civil cases to defray the costs of a nonprofit legal aid program organized under the auspices of the Oregon State Bar, the county bar association or the Legal Services Corporation Act or successor legislation, the clerk of the district court shall collect from the plaintiff or other moving party in each civil suit, action or proceeding in the district court at the time of filing the first paper therein, in addition to all other fees collected and in the same manner, the following sums to assist in defraying the operative costs of such legal aid program:

(1) The sum of $5.50 beginning on May 16, 1983.

(2) The sum of $8.50 beginning on July 1, 1989, in all civil suits, actions and proceedings except those civil suits, actions and proceedings commenced in the small claims department of the district court, in which cases the sum collected shall remain $5.50. [1977 c.112 §2; 1981 c.664 §2; 1983 c.114 §2; 1985 c.342 §6; 1989 c.385 §2]

21.490 Disposition of fees. All fees collected pursuant to ORS 21.480 and 21.485 shall be paid, in the manner determined by the State Court Administrator, to the director of the legal aid program in the county within the first 25 days of the month following the month in which collected. [1977 c.112 §3; 1983 c.763 §39]

REFEREE FEES

21.510 Referee fees. The fees of referees shall be fixed by the court, but the parties may agree in writing upon any other rate of compensation and thereupon such rate shall be allowed.

21.520 [1979 c.429 §1; renumbered 205.245]

21.530 [1979 c.429 §2; renumbered 205.255]

21.560 [Repealed by 1985 c.763 §24]

21.570 [Amended by 1985 c.619 §17; 1987 c.398 §6; repealed by 1993 c.765 §24]

LIABILITY FOR AND PAYMENT OF FEES

21.580 Exemption of state, county and city from certain fees. None of the fees prescribed in ORS 21.060 for services in the
judge of the judicial district [appointed under ORS 1.169] makes written application to the Chief Justice of the Supreme Court requesting that the family court department for that judicial district be abolished.

SECTION 127. ORS 1.169, 3.101, 3.227, 3.229, 7.125, 21.485, 46.019, 46.025, 46.026, 46.030, 46.050, 46.060, 46.064, 46.075, 46.080, 46.082, 46.084, 46.092, 46.094, 46.096, 46.099, 46.100, 46.130, 46.141, 46.150, 46.180, 46.190, 46.210, 46.250, 46.265, 46.270, 46.274, 46.276, 46.278, 46.280, 46.330, 46.335, 46.340, 46.345, 46.610, 46.620, 46.630, 46.632, 46.648, 46.655, 46.665, 46.680, 46.680, 46.810, 111.165, 292.422 and 453.992 are repealed.

SECTION 128. Notwithstanding any other provision of law, a circuit court judge who is serving a term of office on the operative date of sections 1 to 128 of this Act may decline assignment, for the remainder of the term to which the judge was elected, to any matter that was not within the jurisdiction of a circuit court before the effective date of this Act.

SECTION 129. Sections 1 to 128 of this Act and any amendments to and repeals of Oregon Revised Statutes contained therein become operative January 15, 1998.

SECTION 130. For purposes of harmonizing and clarifying the statute sections published in Oregon Revised Statutes, the Legislative Counsel:

1. May substitute for words designating the district courts from which jurisdiction, authority, powers, functions or duties are transferred by this Act, wherever they occur in Oregon Revised Statutes, other words designating the circuit courts into which such jurisdiction, authority, powers, functions and duties are merged and transferred.

2. Where words exist in statute sections designating the existence of both circuit and district courts, may delete language referring to district courts from the sections to reflect the merger of the jurisdiction, authority, powers, functions and duties thereof with the circuit courts.

3. Shall prepare and present to the Sixty-ninth Legislative Assembly legislation to remove references to the district courts from statute sections and substitute therefor references to circuit courts where the Legislative Counsel cannot remove and substitute the references under subsection (1) or (2) of this section.

SECTION 131. ORS 237.220 is amended to read:

237.220. (1) Prior to attaining 60 years of age, all judge members shall elect in writing to retire under either paragraph (a) or (b) of this subsection. The election shall be irrevocable after the judge member attains 60 years of age. Any judge member who fails to make the election provided for in this subsection prior to attaining 60 years of age shall be retired under the provisions of paragraph (a) of this subsection.

(a) Upon retiring from service as a judge at the age of 65 years or thereafter a judge member who has made contributions to the Public Employees' Retirement Fund during each of five calendar years shall receive as a service retirement allowance, payable monthly, a life pension (nonrefund) provided by the contributions of the judge member and the state in an annual amount equal to 2.8125 percent of final average annual salary multiplied by the number of years of service as a judge not exceeding 16 years of service as a judge and 1.67 percent of final average salary multiplied by the number of years of service as a judge exceeding 16 years of service as a judge, but the annual amount shall not exceed 65 percent of final average salary.

(b) Upon retiring from service as a judge at the age of 60 years or thereafter, a judge member who has made contributions to the Public Employees' Retirement Fund during each of five calendar years shall receive as a service retirement allowance, payable monthly, a life pension (nonrefund) provided by the contributions of the judge member and the state in an annual amount equal to [3] 3.75 percent of final average annual salary multiplied by the number of years of service as a judge not exceeding 16 years of service as a judge and 1.75 percent of final average salary multiplied by the number of years of service as a judge exceeding 16 years of service as a judge, but the annual amount shall not exceed [65] 75 percent of final average salary.

(c) Any judge member electing to retire under paragraph (b) of this subsection shall serve as a pro tem judge, without compensation, for 35 days per year for a period of five years. A judge who serves more than 35 days per year may carry over the additional days to fulfill the pro tem service obligation in future years. The five-year period shall commence on the judge member's date of retirement. Retired judge members may be reimbursed for expenses incurred in providing pro tem services under this paragraph. Upon certification from the Chief Justice that any judge member who retired under paragraph (b) of this subsection has failed to perform the pro tem services required under this paragraph, and has not been relieved of the obligations to perform those services in the manner provided by this paragraph, the board shall recalculate the service retirement allowance of the noncomplying judge member as though the judge member elected to retire under paragraph (a) of this subsection, and the noncomplying judge member shall receive only that recalculated amount thereafter. A judge may be relieved of the pro tem service obligation imposed by this paragraph if the judge fails for good cause to complete the obligation. A retired judge member who is relieved of the obligation to serve as a pro tem judge shall continue to receive the retirement allowance provided in paragraph (b) of this subsection.

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of reimbursement may not exceed the actual costs and expenses incurred by the unit.

(b) All moneys not expended under paragraph (a) of this subsection shall be distributed as otherwise provided by law for parking fines.

SECTION 147. Until the operative dates of the amendments to ORS 3.011 by sections 142, 143a and 144 of this Act, the Chief Justice of the Supreme Court shall ensure that a sufficient number of judges are available for the conduct of judicial proceedings in circuit and district courts by the appointment of judges pro tempore. The Chief Justice shall determine the need for judges pro tempore and, subject to availability of funding, shall appoint or authorize appointment of judges pro tempore for those courts in need of additional judges.

SECTION 148. In addition to any other appropriation to the Judicial Department, there is appropriated to the Judicial Department for the biennium beginning July 1, 1995, out of the General Fund, $186,116, for payment of expenses of providing pro tem judicial services as determined necessary by the Chief Justice of the Supreme Court under section 147 of this Act.

SECTION 148a. In addition to any other appropriation to the Judicial Department, there is appropriated to the Judicial Department for the biennium beginning July 1, 1995, out of the General Fund, $376,213, for payment of the expenses attributable to the new judicial positions created under sections 142 and 143a of this Act.

SECTION 148b. Notwithstanding any other law, the limitation on expenditures provided by section 3, chapter 88, Oregon Laws 1995 (Enrolled House Bill 5014), for the biennium beginning July 1, 1995, for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, excluding federal funds, collected or received by the Judicial Department, is increased by the sum of $394,397 to carry out the provisions of section 146 of this Act.

SECTION 149. (1) The Chief Justice of the Supreme Court shall conduct a study of the judicial districts of this state established under the provisions of ORS 3.011. The study shall review the existing districts and consider those changes that may be advisable by reason of conditions in the counties that make up those districts and by reason of sections 1 to 128 of this Act. In conducting the study, the Chief Justice shall give consideration to:

(a) Changes needed for the promotion of judicial efficiency;

(b) The effect of the changes on the convenience of parties to proceedings before the courts;

(c) The use of residency requirements for judges as a way of ensuring that judges will be elected from the communities in which they serve; and

(d) Any special conditions that may exist in the districts.

(2) The Chief Justice of the Supreme Court shall conduct a study of ways to train judges of the circuit and district courts in alternative dispute resolution. The study shall contain recommendations on implementation of programs for teaching methods of resolving disputes without litigation. The study shall provide a description of existing programs in the courts for alternative dispute resolution and recommendations for expansion of those programs or the establishment of new programs.

(3) The Chief Justice of the Supreme Court shall conduct a study to determine if and where presiding judges should be appointed to act as presiding judge for more than one judicial district established under the provisions of ORS 3.011, as amended by sections 6, 142, 143a and 144 of this Act. The study shall give consideration to increases in judicial efficiency that may be recognized by use of a single presiding judge for more than one district and to local conditions that may require the appointment of a presiding judge for a single district. The study shall consider changes in the authority of presiding judges as a way of increasing judicial efficiency.

(4) The Chief Justice of the Supreme Court shall study whether court fees should be changed by reason of consolidation of circuit and district courts under sections 1 to 128 of this Act. In addition, the Chief Justice shall study whether the laws relating to judgment liens should be adjusted by reason of the elimination of district courts under sections 1 to 128 of this Act.

(5) The Chief Justice of the Supreme Court shall make a report to the Sixty-ninth Legislative Assembly on the studies conducted under this section. The report shall contain recommendations of the Chief Justice for implementation of needed changes, and shall contain draft legislation for the implementation of those changes.

SECTION 150. Sections 1 to 128 of this Act and any amendments to and repeal of Oregon Revised Statutes contained therein become operative January 15, 1998.

SECTION 151. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor July 18, 1995
Filed in the office of Secretary of State July 19, 1995
Effective date July 18, 1995

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APPENDIX 4

Report of Subcommittee on Ethical Responsibility/Quality Assurance/Transition

Hon. Jack L. Landau
Subcommittee Chair

Appendix 4A: ABA ethics opinion 96-399
4B: OLS memo, "Implementing the Restrictions"
4C: Gardner memo re: 10th Amendment challenge to restrictions
CIVIL LEGAL SERVICES TASK FORCE
ETHICAL RESPONSIBILITY/QUALITY ASSURANCE/TRANSITION
SUBCOMMITTEE

Hon. Jack L. Landau, Chair
April, 1996

Impending reductions in LSC funding and the imposition of substantial practice restrictions raise serious questions concerning the manner in which legal services attorneys ethically may continue to engage in legal services representation. Although the precise nature of the restrictions have yet to be determined, at least as of this writing, the Task Force has assumed that a number of substantial restrictions are virtually certain to be imposed, including significant reductions in funding, constraints on permissible subjects of legal services representation and the imposition of new discovery or disclosure requirements on legal services clients. With those assumptions in mind, the Task Force has attempted to evaluate the ethical obligations of legal services lawyers to their existing and future clients and other transition issues that may confront legal services lawyers as the anticipated restrictions become effective.

I. Ethical Responsibility

As the Task Force began that effort, the American Bar Association Standing Committee on Ethics and Professional Responsibility released Formal Opinion 96-399, concerning "Ethical Obligations of Lawyers Whose Employers Receive Funds From the Legal Services Corporation to their Existing and Future Clients When such Funding Is Reduced and When Remaining Funding Is Subject to Restrictive Conditions." At approximately the same time, Oregon Legal Services Corporation prepared its own proposed response to the anticipated funding and practice restrictions. Rather than duplicate the foregoing efforts, the Task Force focused on a review of the analysis and recommendations of the ABA Standing Committee and the OLS.

A. ABA Standing Committee Formal Opinion 96-399

The ABA Standing Committee's opinion is based principally on the Model Rules of Professional Conduct. It assumes a "worst-case scenario" of funding and practice restrictions, including substantial reductions in funding; prohibitions on types of representation permitted by lawyers receiving legal services funds, such as representation concerning abortion rights, redistricting, adjudicatory rulemaking, legislative lobbying or reform of the state or federal welfare system; and the imposition of disclosure requirements, concerning the identity of a client and the facts underlying a complaint. The ABA Standing Committee evaluated the obligations of legal services lawyers both as to existing clients and as to future clients.
As to existing clients, the ABA Standing Committee generally opined that legal services lawyers have an obligation to afford notice to their clients as to the funding and practice restrictions, to establish a system of priorities by which the lawyers may determine which cases may be retained and, if necessary, to withdraw from a matter and make arrangements for the acquisition of new counsel. As to future clients, the ABA Standing Committee opined that legal services lawyers must establish screening systems to ensure that undertaking new matters will not jeopardize continued legal services funding. The ABA Standing Committee further concluded that, before accepting new work, legal services lawyers generally have an obligation to advise the new client fully of the restrictions under which the lawyers are permitted to practice, along with the disclosures that may be required in the course of litigation, such as the client’s identity and the factual basis of the case. The ABA Standing Committee cautioned, however, that a legal services lawyer cannot ask a client to consent to such disclosures if the lawyer believes that the client’s representation would be adversely affected.

B. OLS Internal Response to Anticipated Practice Restrictions

In anticipation of significant funding and practice restrictions, OLS prepared a set of internal guidelines and policies. OLS assumed a worst case scenario that included essentially all of the restrictions contained in the ABA Standing Committee’s formal opinion. OLS then described specific procedures by which legal services lawyers are to respond to the anticipated restrictions.

As to funding restrictions, OLS identified a set of priorities and established a policy that new matters may be undertaken only in accordance with those priorities. As to practice restrictions, the OLS restrictions require that OLS and its employees are not to accept any new cases in any of the restricted categories or to allow the use of any OLS resources (such as phones, paper, postage and machines) in association with any restricted activity. OLS also developed a series of form letters to clients concerning funding and practice restrictions.

In general, the OLS policy appears to follow from, and is entirely consistent with, the formal opinion of the ABA Standing Committee.

C. Task Force Analysis and Recommendations

The ABA Standing Committee’s formal opinion is, of necessity, based on the Model Rules and not on the rules of professional responsibility governing any particular jurisdiction. So far as the Task Force is aware, however, the Oregon Code of Professional Responsibility is consistent with the Model Rules in all respects material to the questions before the ABA Standing Committee. The Task Force has little reason to believe that the ethical obligations of Oregon
legal services lawyers will be substantially different under the Oregon Code and, therefore, regards the ABA Standing Committee's formal opinion as a useful source of advice to legal services lawyers in this state. Nevertheless, the Task Force believes that it may be of value to Oregon lawyers to have the Oregon State Bar Legal Ethics Committee review the ABA Standing Committee's formal opinion in the light of the particular requirements of the Oregon Code, to determine the extent to which the obligations of Oregon legal services attorneys are anticipated to be different than those of lawyers generally in the context of the Model Rules. Accordingly, the Task Force has prepared an opinion request to that effect.

As to the OLS policy, given that it tracks the ABA Standing Committee's opinion, the Task Force concludes that it is a helpful starting point for dealing with the anticipated funding and practice restrictions.

II. Other Transition Issues: Litigation

The Task Force has considered, at least preliminarily, the possibility of other responses to the anticipated funding and practice restrictions than accommodation through modification of legal services policies and practices. Of particular note is the suggestion that the constitutionality of the restrictions be challenged in federal court. Although the Task Force expresses no opinion on the likelihood of success of such a challenge, it does recommend that the option be explored by the appropriate authorities.

In essence, the theory of the proposed lawsuit is that the imposition of federal restrictions on the provision of legal services violates the Tenth Amendment to the federal Constitution. The major premise of the argument is that the operation of state court systems is at the core of powers reserved to the states by the Tenth Amendment and that the operation of state court systems includes the promulgation and enforcement of rules of professional responsibility. The minor premise of the argument is that the anticipated restrictions on legal services practice will necessitate a modification of such rules of professional responsibility. The key, of course, is the minor premise, namely, whether the expected practice restrictions actually require a modification of state professional responsibility rules or other matters properly regarded as core areas of state sovereignty.

A more detailed outline of a potential Tenth Amendment challenge was prepared by James N. Gardner, in a memorandum that is attached.

Assuming the potential viability of a Tenth Amendment claim, the question arises: Who would be the proper plaintiff(s)? In all likelihood, the proper party plaintiff would be the State of Oregon, or the Chief Justice, or both; in all events, the matter
would be subject to the advice and representation of the Attorney General. The Task Force recommends that the Attorney General be requested to evaluate the possibility of initiating a lawsuit to challenge the constitutionality of the anticipated funding and practice restrictions.
Mr. George Reimer
General Counsel
Oregon State Bar
5200 SW Meadows Road
PO Box 1689
Lake Oswego, OR 97035

Re: Legal Ethics Committee Opinion Request

Dear George:

As you know, part of the charge of the Civil Legal Services Task Force is to evaluate the ethical obligations of legal services lawyers who are expected to be subject to substantial funding and practice restrictions contained in legislative proposals pending before Congress. The American Bar Association Standing Committee on Ethics and Professional Responsibility has issued a formal opinion concerning the ethical consequences of those anticipated changes. The ABA Standing Committee’s opinion, however, is based on the Model Rules of Professional Conduct. The Task Force requests that the Ethics Committee review the ABA Standing Committee’s formal opinion and render an opinion as to the extent to which the ethical obligations of Oregon legal services lawyers would be any different than those stated in the ABA Standing Committee’s opinion, assuming the imposition of the funding and practice restrictions outline in that opinion.
AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 96-399

January 18, 1996

Ethical Obligations of Lawyers Whose Employers Receive Funds From the Legal Services Corporation to Their Existing and Future Clients When Such Funding Is Reduced and When Remaining Funding Is Subject to Restrictive Conditions

Summary of the Opinion

Legislative proposals currently pending in Congress are expected to significantly reduce funding for the Legal Services Corporation. The legislation will also restrict whom an LSC funded lawyer may represent, the subject matter of such representation and the manner in which such representation may be pursued. Finally, in the case of contested matters, the legislation mandates disclosures the client is required to make. All of this presents serious ethical questions for the lawyers who work for agencies that receive this funding.

Duties to Existing Clients

The Obligation to Prepare: In order to prepare for the impending funding cuts and restrictions, LSC funded lawyers must give notice to their clients, establish a system of priorities for the retention of cases, and seek alternative funding and representation for their current clients. In setting the priorities for retention of existing cases, a legal services lawyer may not solely consider whether cases conflict with the funding restrictions. Legal services lawyers must explore the limits of continuing representation (e.g., the permissibility of co-counsel arrangements) as well as all avenues for obtaining replacement counsel for existing clients. In arranging for substitute counsel, both the legal services lawyer and the new counsel must work to ensure that the new counsel has or can acquire the needed expertise in the matter being referred.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.


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When An Existing Client's Representation Violates the Restrictions: Some legal services lawyers will be confronted with high priority representations that conflict with funding restrictions, and must choose between their obligations to ineligible clients and their obligations to eligible clients who will not be served if LSC funding is lost. Where retaining an ineligible client or representation would deprive the office of a substantial amount of funding, a legal services lawyer may, but is not required to, withdraw from the prohibited representation under Model Rule 1.16(b)(5).

Once a Lawyer Has Opted to Accept LSC Funding: legal services lawyers should advise all of their clients of the restrictions contained in the new funding legislation. A legal services lawyer may ask an existing client to agree prospectively to abide by the funding restrictions on what matters the lawyer may handle and what means may be used, as long as the lawyer does not believe that such restrictions will adversely affect the representation. However, a legal services lawyer may not ask a client to consent to limitations on the scope of representation that would in her judgment effectively preclude her from providing competent representation. A fortiori, a legal services lawyer cannot ask an existing client to agree to the future termination of her representation in the event that client becomes ineligible because, for example, of a change in immigration status or incarceration. If such a change in eligibility occurs, however, the lawyer may withdraw under Rule 1.16(b)(5) after balancing the interests of that client against the interests of those existing clients who will not be served if funding is lost.

Duties to Future Clients

Accepting New Matters: A legal services lawyer may not accept new clients except in cases of extreme need if staff reductions have caused an unacceptable increase in the lawyer's work load. A legal services lawyer is not obligated to find alternative counsel for a potential client who has been turned away.

Screening of New Clients: Before accepting a new client a legal services lawyer subject to LSC funding restrictions must inform the client about all of the restrictions that apply because that lawyer is funded by the LSC, must inform the client that such restrictions would not apply if the lawyer were not funded by the LSC, and must carefully screen the client to ensure that the representation will not endanger funding. A legal services lawyer must inform her new clients that they
must maintain their eligibility (i.e., avoid incarceration and maintain an acceptable immigration status) in order to continue the representation. With regard to the restrictions on what matters may be pursued and what means may be used, the lawyer may ask a new client to consent to those restrictions if the lawyer believes that the representation would not be adversely affected by the limitation.

**Mandated Pre-Litigation Disclosures**

The required disclosure of (a) the client’s identity, and (b) certain other facts relating to the representation, conflicts with the lawyer’s obligations under Model Rule 1.6, which prohibits revelation of any information relating to the representation without the client’s consent.

**Disclosure of the Client’s Identity:** With regard to a client accepted before January 1, 1996, who seeks or has received a Court’s permission to proceed anonymously, the legal services lawyer must inform the client of the new disclosure requirement, that the lawyer’s acceptance of LSC funding may make it more difficult for the client to proceed anonymously, that the client may refuse to reveal his or her identity or to seek the injunction required to protect anonymity, and whether the lawyer will be able to continue the representation if the client refuses to be governed by the LSC funding restrictions. A legal services lawyer cannot ask an existing client to consent to the imposition of the new standard under the funding legislation if that limitation would adversely affect the representation.

With regard to new clients who wish to proceed anonymously, a legal services lawyer must inform the client that it may be easier to proceed anonymously without an LSC-funded lawyer and ensure that the client understands the standard a Court or an agency will apply in deciding whether to permit the anonymity. The lawyer may not ask the client to agree to continue the representation after denial of a motion to proceed anonymously if the lawyer believes that the representation would be adversely affected.

**Required Statement of the Factual Basis of the Case:** A legal services lawyer may ask a new or existing client to consent to the preparation and disclosure of the required statement if the lawyer believes that there will be no adverse affect on the representation because of the requirement. If an existing client refuses, the lawyer may withdraw under Model Rule 1.16(b)(5) after balancing that client’s interest against the interest of those who will not be served if funding is
lost. In all cases, the lawyer should inform the client that the state-
ment could be regarded as a waiver of client-lawyer privilege, and
should take all steps reasonably necessary to protect the client from
any adverse effects that could result from the preparation of the
statement.

Conclusion

The responsibility for insuring that indigent clients are provided with
appropriate and competent representation falls upon the entire legal
community. Every member of the bar must work to provide needed
legal services to those whose representation will be prohibited or
curtailed by the new funding legislation.

Legislative proposals currently pending in the United States House of
Representatives and United States Senate seek to reduce funding to the
Legal Services Corporation ("LSC") for the 1996 fiscal year, which began
October 1, 1995, by at least 25% from the previous year, and to limit
the services that LSC funded lawyers may provide. Such decreased funding
will require many legal services offices to severely reduce their staff and
support services. In addition, in contrast to earlier proposals to limit LSC
funding, this legislation would subject the receipt of funds from the Legal
Services Corporation to a broad range of new restrictions on whom an
LSC grantee may represent, the subject matter of such representation, and
the manner in which such representation may be pursued, and would
require disclosures that conflict with the lawyer's duty of confidentiality.
Perhaps most importantly, it appears that these restrictions would apply to
all matters handled by an organization receiving LSC funds, even if non-
LSC funds would be available to support prohibited representations.

It appears virtually certain that the new LSC funding legislation will
include significant funding reductions and some, if not all, of the practice
restrictions contained in the proposed legislation. The inconvertibility of

1. H.R. 2076, 104th Cong., 1st Sess. (October 11, 1995); S. 1221, 104th Cong., 1st
Sess. (September 11, 1995).
2. The current Congressional efforts to direct funds away from the Legal Services
Corporation are not novel. In 1981, pending federal legislation expected to reduce
funding for the LSC spurred this Committee to address the ethical obligations of legal
services lawyers to their clients in the face of drastically reduced funding. The result-
ing opinion, ABA Formal Opinion 347 (1981), addressed those ethical problems
which arise when a legal services office must close down completely or reduce its
staffing or support services to such a level that the remaining staff lawyers cannot han-
dle all pending legal matters.
these changes has prompted members of the legal services community to request that the Committee provide guidance regarding legal services lawyers' obligations under the new funding regime.

While recognizing that no one can predict the final form of the legislation, the Committee believes that it is important to begin preparing immediately for the monumental changes in legal services funding for the indigent that seem inevitable at this point. Because of the great likelihood that the proposed changes will be enacted, because the legislation is drafted to be effective upon enactment, and perhaps to have retroactive effect, and because we have been requested to do so, we take the unusual step of opining upon the effect of legislation which is not yet enacted. We have therefore prepared this opinion to summarize the proposed legislation (Section I), address how legal services lawyers may fulfill their ethical obligations with regard to existing clients (Section II) and future clients (Section III), and address the particular issues raised by the mandatory disclosure provisions of the proposed legislation (Section IV).

I. The Proposed Legislation

Relevant provisions of the pending bill passed by the House of Representatives (H.R. 2076) and the Conference Committee Report provide a basis for understanding the potential problems a legal services office will face if it or similar legislation is enacted into law. First, a lawyer receiving funds from the Legal Services Corporation could be prohibited from representing a local, state or federal prisoner, an individual inspired to seek legal representation as a result of in-person unsolicited advice that such individual should obtain counsel or take legal action, a defendant in a public housing eviction proceeding (if the basis of the eviction is a charge that the individual was involved in the illegal sale or distribution of a controlled substance), and any alien, unless such alien is present in the United States and is legally entitled to maintain residence here under one of six statutory provisions.

A lawyer receiving funds from the Legal Services Corporation could also be prohibited from pursuing the following matters on behalf of any client: any representation with respect to abortion; representation chal-

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3. This Committee cannot express an opinion about the retroactivity or scope of the proposed legislation; we have framed this opinion in terms of the "worst case" scenario in order to provide the most complete guidance that is possible at this stage.

4. Thus, legal service lawyers currently representing clients or handling matters that would be prohibited under the proposed legislation may be ineligible for Legal Services Corporation funds if they are still handling those matters or representing those clients when the legislation is scheduled to take effect or after a short phase-in period has elapsed.
lenging the LSC, its conduct or oversight proceedings, or that of any LSC grantee; representation with regard to matters pending before any legislative body; representation that attempts to affect legislative, judicial, or elective districts at any level of government, including apportionment and the timing or manner of the taking of a census; representation with regard to administrative policy at any level of government; representation that attempts to influence any decision by a local, state, or federal agency except representation regarding a particular application, claim or case that does not attempt to affect agency policy; any representation that could reasonably be expected to result in a fee for legal services; or representation involving efforts to reform a state or federal welfare system, except where an individual is seeking specific relief from a welfare agency that does not involve an effort to amend or otherwise challenge existing law.

Finally, a lawyer receiving funds from the Legal Services Corporation could be prohibited from filing a class action, or training or encouraging people to advocate particular public policies or to engage in political activities. This latter provision specifically prohibits LSC-sponsored dissemination of information about such policies or activities.

II. Ethical Issues Regarding Existing Clients

The likely result of the proposed funding reductions is that some legal services offices will be forced to merge or close, and others will need to reduce their legal staff, thereby reducing the number of cases the office will be able to carry if its lawyers are to continue to provide competent representation. It is also likely that many of the restrictive conditions contained in the new legislation will apply to existing cases as well as future representations. What are the obligations to existing clients of legal services lawyers potentially facing a significant loss of funding and staff as well as significant practice restrictions?

The obligations these lawyers owe to their existing clients can be divided into three categories: (1) the duty to prepare and plan for the reduction of services; (2) the duty to provide for clients whose current representations will be prohibited; and (3) the duty to ensure that legal services lawyers fulfill their ethical obligations to remaining clients.

A. The Obligation to Prepare and Plan

In ABA Formal Opinion 347 (1981), this Committee examined the ethical obligations of legal services lawyers facing significant reductions in funding. The opinion emphasized the lawyers’ obligations, under the Model Code of Professional Responsibility to prepare adequately (DR 6-101(A)(1)) and to provide competent representation (DR 6-101(A)(1) and (3)).

These same obligations are found in the Model Rules of Professional Conduct (1983, as amended), particularly in Model Rule 1.1, which
requires a lawyer to devote the legal knowledge, skill, thoroughness and preparation reasonably necessary for every representation she undertakes. A lawyer's obligation not to take on matters for which she does not have the time necessary to provide adequate representation is also derived from the requirement in Model Rule 1.3 that a lawyer act with reasonable diligence and promptness in representing a client.

As the Committee observed in Formal Opinion 347, these obligations generally do not require a lawyer to speculate upon future events that may interfere with the representation. Indeed, were legal services lawyers to institute service restrictions whenever they anticipated a possible loss of funding, they would forever be preparing for the worst, with no time to perform legal services. Nonetheless, as we stated in Formal Opinion 347:

When it becomes apparent that clients currently represented cannot be represented throughout the duration of their legal matters, steps must be taken to prepare for that circumstance.

That opinion outlined three steps legal services lawyers must take in order to adequately prepare for a significant reduction in the availability of legal services:

1. Notice of the risk of disrupted services must immediately be given to existing clients.

2. A stringent system of priorities must be established for handling pending matters and accepting new clients.

3. Every reasonable effort should be made to arrange alternate funding, or, failing that, for substitution of lawyers to handle pending matters.

We believe the same steps are mandated under the Model Rules of Professional Conduct. Therefore, this Opinion should be read in conjunction with Formal Opinion 347. Our intention here is to expand upon, not to supersede, our discussion of the requirements set forth in our earlier opinion.

1. Notice to Clients of Impending Changes

The Model Rules, like the Model Code, require a legal services lawyer to give all clients adequate notice of the impending changes described above and how they may affect the clients' representations. Model Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of a matter. The Committee believes this Rule requires that a lawyer give clients advance notice of likely developments that may significantly affect the lawyer's ability to continue the representation. Likewise, the lawyer's obligation under Model Rule 1.4(b), to explain a matter to the extent reasonably necessary to enable a client to make informed decisions
regarding the representation, necessitates giving a client advance notice of imminent funding changes and how the legal services office intends to respond. This is true whether the lawyer anticipates being able to continue the representation, or whether he anticipates having to limit the scope of the representation, to refer the matter to alternative counsel, or to withdraw.

The Committee understands that the practical result of such notice may be a flood of telephone calls and visits from concerned clients who want further information about their representations. The duty under Rule 1.4(a) to comply with a client's reasonable requests for information will obligate legal services lawyers to attempt to respond as well as they can. Although this may temporarily increase the work load of the lawyers, that inconvenience is not an adequate basis for failing to notify clients of likely events which will affect their representation. As an administrative matter, legal services lawyers may wish to temporarily assign the duty of returning client telephone calls to nonlawyers, who can explain the situation to callers and thus reduce the lawyers' burden.

(2) Setting Priorities

Funding reductions may necessitate withdrawal from a large number of pending matters. As stated in Formal Opinion 347, lawyers in each legal services office will need to structure their own priorities for the retention of active matters. In doing so, legal services lawyers should consider the availability of alternative representation, any material adversity that will befall particular clients who are not served, and the particular problems faced by indigent people generally in each locality.

One cautionary note on the setting of priorities must be sounded. Although conflict with the proposed funding restrictions may be an adequate reason for refusing new clients (see Section III-C infra), it is not sufficient justification for abandoning existing matters. The lawyer owes her primary obligation to existing clients (see ABA Formal Opinion 347 (1981)) and has an obligation to use independent professional judgment in considering alternatives or foreclosing courses of action that reasonably should be available to a client (see Comment to Model Rule 1.7). The

5. The Model Rules govern the professional responsibilities of lawyers, not legal organizations. The Committee is aware that most legal services lawyers practice in the context of an organization where they are required to follow the policies and directives of a Board or other governing body. Some of the steps laid out in this opinion — particularly the setting of priorities for the retention of existing cases and the decision of whether or not to accept LSC funding — will be performed by the Board, with or without consultation with the staff lawyers. In the final analysis, however, a legal services lawyer is ethically responsible for her own decisions and actions.
obligation to maintain professional independence means that legal services lawyers cannot decide which clients to keep and which to let go simply on the basis of whether abandoning certain cases will facilitate future funding. Although staff reductions may force legal services lawyers to withdraw from many matters in order to comply with their obligation to provide competent representation, abandoning matters solely because they are prohibited under the new funding restrictions could raise ethical questions. The only ethical justification for withdrawing from representing existing clients who are ineligible under the new funding restrictions is that the loss of funding which would result from retention of ineligible clients would make the legal services lawyer unable to fulfill her ethical obligations to other existing clients. See discussion under Section II.B.

(3) Obtaining Alternate Funding and/or Representation

Finding competent substitute representation is the easiest way to resolve the conflicts that will arise between the new funding restrictions and existing representations, since withdrawal from a matter is always permitted if it can be accomplished without material adverse effect on the interests of the client. Model Rule 1.16(b). As we stated in Formal Opinion 347, the obligation to provide legal services for those who cannot afford it is the responsibility of every lawyer. Thus, members of the private bar may properly be requested, and should be expected, to take on cases for which legal services lawyers cannot continue representation.

In order to accomplish substitution of counsel without adversely affecting the client’s interests, new counsel must be able to handle the matter competently. It may be difficult to find competent replacement counsel for some matters that are within the particular expertise of legal services lawyers, such as landlord-tenant disputes and some types of prisoner litigation. As an ethical matter, both the legal services lawyer and the new counsel should work to ensure that the new counsel has or will develop the necessary expertise. See Comment to Model Rule 1.1. In some instances, legal services lawyers may need to provide training to the private bar in handling specific types of matters, or remain available for consultation on particular cases to the extent permitted under the funding restrictions.

A particularly difficult situation arises in the context of existing class actions, in which class certification is based in part on evidence that counsel for the class will fairly and adequately represent the class. See, e.g., Fed. R. Civ. P. 23(a). If a legal services lawyer must find substitute counsel for a class, rules of procedure will require notification to the court of the change in counsel, and because of the adequacy of counsel issue, may precipitate reconsideration of class certification. In some cases, ade-
quate substitute counsel may simply not be available. Where substitute counsel for a class action that does not otherwise violate the funding restrictions cannot be found, the legal services lawyer must consider whether the interests of the clients could be served by seeking decertification and proceeding with the action on behalf of one or more individual clients. Finally, as in all representations in court, the lawyer must secure leave of the court in order to withdraw. The Committee expresses no opinion on what happens if such leave is sought and not received.

The Committee also believes that legal services lawyers have an ethical obligation to explore the boundaries of continuing representation of existing clients under the new funding scheme. For instance, a lawyer subject to LSC practice restrictions may be able to maintain a representation as long as private co-counsel handles those aspects of the case that would violate the restrictions. Legal services lawyers may also have an ethical obligation when apparently faced with a requirement that they drop an existing representation to determine whether there is a basis for securing a different interpretation of restrictive legislative language. This could be attempted in the context of a lawyer's motion to withdraw, for example, by the lawyer advising the Court of the basis for the withdrawal and inquiring whether the Court agrees.

Similarly, legal services lawyers have an obligation to explore all possible avenues for obtaining alternative representation for their existing clients. This could include petitioning the local bar association and courts to assume some of the responsibility for finding representation for former legal services clients. Finally, if there is a mechanism available for obtaining court-appointed counsel for existing clients, as a last resort it should be fully utilized. If there is no such mechanism in existence, legal services lawyers could petition the local court to create one.

We emphasize the admonition of Formal Opinion 347 that preparatory steps are not optional. Appropriate preparation and notice to clients is necessary to protect the clients' interests, and is possibly a prerequisite to

6. See Nina Bernstein, 2,000 Inmates Near a Cut-off of Legal Aid, N.Y. TIMES, November 25, 1995, §1, at 8 (New Hampshire Legal Assistance will be forced to abandon prisoners' rights class action if LSC funding restrictions pass; no substitute counsel yet found).

7. Although participation of co-counsel generally suggests joint responsibility for the matter as a whole despite a division in duties, it may be permissible to structure an arrangement whereby each lawyer is solely responsible for a particular claim or defense. There is some precedent for such an arrangement in insurance litigation, where, in some jurisdictions, an insurer may provide a defense for claims against an insured which are arguably covered, but require the insured to hire private counsel for joined claims which fall outside the policy. See 14 Couch, INSURANCE 2d (Rev. ed. 1982 & Supp. 1992) §§ 51:47, 51:153, and accompanying annotations.
withdrawal. As we concluded in Formal Opinion 347, ethical obligations would not require legal services lawyers to maintain representation when they were no longer being paid, but would mandate that the lawyers exercise prudence in minimizing the number and effect of such withdrawals.

B. The Duty to Assist Clients Whose Representations are Prohibited by the Acceptance of LSC Funding

Existing clients will be affected by both the funding reductions and practice restrictions contained in the proposed legislation. In this section we offer guidance for the legal services lawyer who is faced with an increased caseload after staff reductions, or who has determined that a particular ongoing representation is forbidden under the new funding rules.

The Effect of Staff Reductions

Model Rule 1.16(a) requires that a lawyer withdraw from representation of a client if the representation will result in a violation of the Rules of Professional Conduct or other law. This provision will require the remaining program legal services lawyers to withdraw from some matters if funding and staff reductions greatly increase these lawyers’ workloads, since maintaining an unmanageable case load violates the lawyer’s duty under Model Rule 1.1 to provide competent representation. This situation was also addressed in Formal Opinion 347:

With respect to existing clients of the legal services office, the committee is of the opinion that only those matters that can be handled consistent with each lawyer’s duty of competent, non-neglectful representation should be continued. When faced with a work load that makes it impossible for the remaining lawyers to represent existing clients competently, legal services lawyers should withdraw from a sufficient number of matters to permit proper handling of the remaining matters.

Nevertheless we do not believe that a lawyer’s representation of existing clients who become ineligible or whose representations are prohibited under the new LSC Funding legislation may be terminated solely because such representations would violate the funding restrictions. Some legal services organizations will be financially able to decline LSC funding and still retain their current clients; a separate organization may be created for the purpose of continuing to represent LSC ineligible clients; and it is always possible that alternative replacement funding may be found. Thus, it would be incorrect to conclude that discontinuing representation of current clients is the only solution to the restrictions in every case.

The Effect of Proposed Practice Restrictions

A legal services organization that genuinely develops and adheres to a
system of priorities in retaining existing clients (see Section II.A.(2) of this opinion) may be faced with the undesirable choice between continuing representations that rate highly in that system of priorities, and accepting or applying for needed funds from the Legal Services Corporation. Finding alternate representation and withdrawing from the matter will be possible in some cases, but perhaps not in all. What are a lawyer's obligations in such a situation?

Where, despite every effort to obtain substitute representation, a legal services lawyer is confronted with high priority cases that violate new funding restrictions, the legal services lawyer must balance her obligations to the formerly eligible clients with her obligations to eligible existing clients who will be hurt if funding is lost. In the most extreme case, where the LSC is the sole source of the organization's funding, a loss of LSC funding might preclude representation of any clients, including those clients whose cases would not violate the funding restrictions. In such a circumstance, the lawyer's withdrawal from ineligible matters would be mandatory, since it would otherwise be impossible for the lawyer to fulfill her obligations to any of her clients, thus resulting in a violation of Model Rule 1.1.

The more difficult decisions will arise in those circumstances where the legal services office does not rely exclusively upon LSC funding. The Model Rules provide little guidance in the situation where a lawyer must choose between two or more existing representations. Nevertheless, the Committee believes that the loss of funding that would result from maintaining an ineligible representation may permit withdrawal under 1.16(b)(5), on grounds that the representation would result in an unreasonable financial burden on the lawyer.

We note that withdrawal under 1.16(b)(5) is permissive, not mandatory. Thus, where loss of LSC funding would not result in the closing of the office or the need to withdraw from all pending matters, each legal services office will have to make its own determination as to whether the greater good is served by foregoing LSC funding and maintaining restricted representations — undoubtedly at the cost of some services — or by

8. As stated in footnote 5, supra, the Committee recognizes that this decision may well be made by the organization as a whole, not by individual lawyers.

9. Although a lawyer's obligation to remain professionally independent forbids a lawyer to drop an existing client merely because a funding source does not like that client, a lawyer's obligation to provide competent representation may require a lawyer to drop the same client if the retention of the matter would prevent the lawyer from serving other existing clients. The end result for the client would be the same, but the ethical implications would not. The ethical issue is not whether the lawyer decides to withdraw from some matters, but what considerations — convenience or duty to other existing clients — motivate the lawyer's decisions.
withdrawing from prohibited matters and preserving those aspects of the practice that comply with the restrictions.

C. Legal Services Lawyers' Obligations to Remaining Clients After Acceptance of LSC Funding and Accompanying Practice Restrictions

As outlined above, the proposed legislation would restrict who may be a client, the subject matter of the representation, and the methods that may be used in pursuing the representation. This portion of our opinion will address the lawyer's obligations to existing clients after the decision is made to accept LSC funding and abide by the accompanying restrictions.

1. Restrictions on Who May Be a Client

A lawyer in a legal services office that has chosen to accept LSC funding and abide by the accompanying restrictions must communicate the new restrictions to every client, regardless of whether the client's situation appears to implicate them. Model Rule 1.4 requires such notice; this mechanism is also important because an LSC-funded lawyer has an obligation to protect that funding for the benefit of all of her clients, and thus to investigate whether any matter in her care would jeopardize that funding.

Moreover, the lawyer must notify clients that circumstances such as incarceration or a change in immigration status will likely make them ineligible for further legal services, and thus result in a termination of legal services. The lawyer should also request that clients keep her apprised of any changes that might affect their eligibility. In order to protect necessary funding, it may be advisable to provide the client with written notice of the eligibility requirements and have the client acknowledge in writing that she understands them. However, does not currently believe that the representation would violate any of them, and will keep the lawyer apprised of any changes.

Although it is permissible for a lawyer to ask a potential client to consent to termination of representation or proceeding pro se if she becomes ineligible under the funding restrictions (see discussion in Section III-C, infra), a lawyer cannot ask an existing client to agree to this new limitation on the representation if it would adversely affect the representation.\(^{10}\) See Model Rule 1.7(b)(1). Should a previously eligible client whose representation began before January 1, 1996, and who remains eligible as of January 1, 1996, become ineligible later in the representation, the legal

\(^{10}\) Such a restriction may not adversely affect the representation in the circumstance where the change in eligibility also forecloses the legal relief that is the goal of the representation: for example, a client's action for physical custody of her child may become moot as a result of incarceration, so the lawyer's inability to represent the client during her incarceration will not adversely affect that representation.
services lawyer will have to weigh the importance and urgency of that representation, the likelihood of obtaining and possible prejudice from a substitution of counsel, and the interests of other clients who would go unrepresented if LSC funding is lost. (See Section II-B(2), supra).

2. Restrictions on the Scope of the Representation

Difficult ethical issues may arise with regard to existing clients whose current representation is permitted, but whose cases may require future action that would violate the LSC practice restrictions.11 The likelihood of such future conflict may be difficult to predict, particularly with regard to the restrictions on methods that may be used. Yet it seems quite possible that a matter and client satisfying the funding statute at the inception of the representation could later run afoul of the various conditions. May a legal services lawyer ethically continue a representation where there is a chance that LSC funding restrictions will in the future preclude advisable or necessary action?

We believe this situation is governed by Model Rules 1.2, 1.7(b) and 2.1, all of which in different ways preclude a lawyer from undertaking a representation if the lawyer’s other obligations are likely to materially restrict avenues of relief that would otherwise be available to the client. While these rules generally allow for an otherwise prohibited representation where a client consents after consultation, a lawyer may not even ask for consent unless the lawyer reasonably believes that the representation will not be adversely affected. For example, under Rule 1.2 a lawyer may not ask a client to agree to limitations on the scope of representation that would effectively preclude the lawyer from providing competent representation.

In cases where it may fairly be anticipated that the funding restrictions will sooner or later be implicated, and if other competent services are available to the client, the lawyer should advise the client that she would be better off with another lawyer, rather than seek the client’s consent to continue. Where substitute counsel cannot be found, the lawyer must determine whether withdrawal may be appropriate in accordance with the considerations outlined in Section II-B of this opinion.

Where a legal services lawyer believes that there is only a small chance that practice restrictions will adversely affect a representation in the future, the lawyer may ask the client to agree prospectively to restrictions on the scope of representation. In doing so, the lawyer must inform the client of all of the practical implications of such an agreement and counsel

11. For example, the client’s immigration status could change, the client might find it beneficial to file a counterclaim arising under a fee-generating statute, or the lawyer may determine that it is in the client’s best interest to change the client’s claim into a class action.
the client about her options (which may be few). The lawyer must also inform the client of the option to refuse consent, and of any consequences that would follow from such a refusal. In order to fully advise the client as to the consequences of her decision, the lawyer must have already performed the balancing of interests described above, so that the lawyer will be able to inform the client whether the lawyer would need to withdraw from the matter if, at some future date, the lawyer cannot continue to provide competent representation without endangering the funding that supports other clients.

If a lawyer decides to seek consent, she must make every effort to ensure that the client fully understands the meaning and future implications of the lawyer's practice restrictions. Because legal services clients tend not to be experienced or sophisticated in legal matters, a lawyer should take particular care in seeking consent to assure that such clients:

- have a full understanding of what they are being asked to consent to and further that whether their consent is a completely voluntary matter with them, a consent which they can deny without a sense of guilt or embarrassment.

ABA Informal Opinion 1287 (1974). Moreover, as emphasized in ABA Formal Opinion 95-393, lawyers for the elderly or otherwise mentally infirm should be especially mindful of their duties under Model Rule 1.14 concerning communication with clients under a disability.

The Committee believes that a legal services lawyer who accepts LSC funding should inform all clients of the accompanying practice restrictions and obtain their written agreement to abide by those restrictions, even if it does not appear likely that a particular representation will run afoul of those restrictions. This is because the requirement under Model Rule 1.2 that a lawyer obtain a client's consent before limiting the scope of representation is not conditioned upon the lawyer's believing that such a limitation will materially or adversely affect the representation: consent is a prerequisite to any limitation upon the scope of the representation.

A lawyer must abide by a client's refusal to consent to limitations on the representation. And, because any situation in which client consent was properly sought in the first place is unlikely to pose an immediate conflict with the LSC funding restrictions, the lawyer does not have sufficient justification to withdraw from an otherwise permissible existing representation solely because a client refuses consent. The lawyer must continue the representation for as long as, and to the extent that, it is possible to do so without violating the funding restrictions.

In such cases, it is advisable to attempt to secure substitute representation or co-counsel. Private lawyers may be willing to serve as substitute
counsel or co-counsel on an emergency basis in situations where they are not willing to accept complete responsibility for a matter. Legal services lawyers should also explore the availability of court appointment of substitute counsel when an existing representation becomes impossible to sustain.

III. Impact of Legislation on Ethical Duties of Legal Services Lawyers to Future Clients

A. Declining New Representations Due to Increased Workload

Reduced LSC funding will undoubtedly force some legal services organizations to make staffing cutbacks. Because departing lawyers will almost certainly not take clients with them, responsibility for those cases "devolves upon the office as a whole, rather than upon [the] lawyer who leaves." See ABA Formal Opinion 347 (1981). Increased workloads of the remaining lawyers present ethical problems as to future and potential clients, as well as existing clients.

A lawyer’s obligations to provide competent and diligent representation under Model Rules 1.1 and 1.3 imposes a duty to monitor workload, a duty that requires declining new clients if taking them on would create a "concomitant greater overload of work." See ABA Formal Opinion 347 (1981). Only in "extreme cases" should the legal services lawyer, confronted with increased responsibilities as a result of funding and staff reductions, take on new matters. Id.

If a lawyer appropriately declines to represent a new client, the Model Rules do not impose any duty on the lawyer to locate alternative representation. Nevertheless, nothing prohibits legal services lawyers from making efforts to identify competent counsel for prospective clients whom they reject on the basis of these ethical considerations.

B. Scope of Representation Restrictions for Future Clients

Because practice restrictions will almost certainly accompany future LSC funding, legal services lawyers will have to implement screening devices for new representations to ensure that violations of the restrictions will not occur. Such precautions should operate both at the inception of the representation and during the life of the matter.

As discussed above, Model Rules 1.2 and 1.7 permit a lawyer to accept a representation that might conflict with practice restrictions by limiting the scope of that representation with client consent. For example, a potential conflict with practice restrictions might be avoided by executing an agreement with the client stipulating that the lawyer will withdraw from the matter if the client becomes ineligible (such as through incarceration), and that the lawyer will not pursue certain legal options, such as counterclaims that arise under fee-generating statutes. To ensure that no future
conflicts arise, the lawyer should see to it that an agreement limiting the scope of the representation is signed with each new client, even if the possibility of a statutory violation seems remote at best.

The agreement should explicitly identify those legal options, such as claims seeking reform of federal welfare statutes or claims arising under fee-generating statutes, which the lawyer will not pursue, and must clearly spell out any changes that would affect the client's eligibility for services. Such a limitation is similar to other status regulations, such as income level requirements, that legal services organizations currently have in force. If the client refuses to consent to such a scope limitation, the lawyer may decline the representation.

The possibility of a scope restriction agreement does not end the ethical inquiry, however, because a representation that is initially permitted under the funding restrictions may, at some later point, require action that would violate those restrictions. As we stated above, Model Rules 1.2 and 1.7 forbid a lawyer from seeking a client's consent (a) to a conflict that will adversely affect the client or (b) to a representation so limited that it effectively precludes competent representation.

A legal services lawyer should balance these competing interests in determining whether to ask a potential new client to consent to scope restrictions. If the legal services lawyer determines that foregoing specific legal options would seriously compromise his duties to the client, she should not ask the client to accept such a restriction, but should decline the representation pursuant to Rule 1.16(a)(1). We reiterate that where there is some likelihood that the legal services lawyer may have to withdraw from a matter or forego an available strategy in the future, it is advisable to arrange for "back-up" counsel from the beginning, and to keep that lawyer apprised of the progress of the matter.

IV. Mandated Pre-Litigation Disclosures

In addition to the restrictions discussed above, the proposed funding legislation would impose new administrative burdens that could impinge on the legal services lawyers' duty to protect client confidences. The proposed provision would prohibit a legal services lawyer from filing a complaint or otherwise pursuing litigation, or engaging in pre-complaint settlement negotiations with a prospective defendant, unless a) the plaintiff is identified by name in any complaint filed; and (b) a written statement is prepared and signed by the plaintiff that enumerates the particular facts known to the plaintiff on which the complaint is based. This mandated written statement is to be kept on file by the legal services office for review by any agency that may audit the activities of the LSC. In addition, of course, adversary parties may obtain access to the statement through
ordinary discovery after litigation has begun. A court is authorized to enjoin the disclosure of the client's identity only if the client can establish at a hearing that an injunction is reasonably necessary to prevent probable, serious harm to such client.

The required disclosure of a) the client's identity, and b) other facts relating to the representation, can conflict with the lawyer's obligations under Model Rule 1.6, which prohibits revelation of any information relating to the representation without the client's consent, except in narrow circumstances. A legal services lawyer may be able to comply with the disclosure requirement without violating Model Rule 1.6 by asking for the client's consent to reveal the required information. Before doing so, she must fully disclose and discuss the consequences of compliance with her client. As elsewhere in this opinion, we find that a lawyer's obligations to future clients and existing clients are not identical.

A. Disclosing the Identity of the Client

1. Existing Clients

The requirement that lawyers receiving LSC funds reveal their clients' identities may be applied to matters where an existing client is proceeding with pre-complaint negotiations, has decided to petition a court to proceed anonymously, or where permission to proceed anonymously has already been granted. This will raise some difficult ethical issues.

The lawyer must, of course, consult with existing clients concerning the new disclosure requirements, the fact that it may now be more difficult for the client to proceed anonymously with an LSC-funded lawyer, the client's right to refuse either to reveal his identity or to seek the required injunction, and the consequences of each available course of action to the client. In order to provide effective consultation, the lawyer must be able to tell the client whether the lawyer will be able to continue the representation and forego LSC funding, or whether the lawyer will have to withdraw from the representation because of her obligations to other clients to maintain the funding. As always, a lawyer cannot ask a client to consent to a limitation imposed by the lawyer's obligations to a third party if the lawyer believes that the client's representation would be adversely affected. See Model Rule 1.7(b).

2. Future Clients

The proposed legislation may erect a higher standard for proceeding anonymously than is generally applied. If the legal services lawyer believes this to be true, the lawyer must advise a prospective new client that he may more easily proceed anonymously if represented by a non-LSC-funded lawyer.
The required disclosure of the client's identity could materially limit the client's representation under Model Rule 1.7(b). Therefore, the lawyer may not ask for the client's consent to proceed with the litigation in the event that permission to proceed anonymously is denied, if the lawyer believes that to do so would adversely affect the client's representation. The lawyer who has decided to accept LSC funding and abide by the accompanying disclosure requirement should instead decline the representation.

If a prospective client makes an informed decision to accept representation and continue with litigation even if disclosure is required, revelation of the client's name in a complaint is permissible. This position is consistent with ABA Informal Opinion 1137 (1970), in which the Committee concluded that a lawyer for a legal aid society may reveal the current financial status of a client to a lawyer-audit committee of a local bar association if a knowing waiver is obtained from the client. Although not mandated by the Model Rules, the Committee strongly suggests that any consent obtained from the client be set forth in writing.

B. Disclosing the Facts Underlying a Complaint

Under Model Rule 1.6, a lawyer may make factual disclosures if they are "impliedly authorized in order to carry out the representation." The statement of facts required by the proposed legislation is information relating to the representation, and its release is not "impliedly authorized" simply by a client's decision to engage in litigation. Therefore, a legal services lawyer may not make such a statement available to federal auditors without the client's express consent. LSC-funded lawyers must use the same caution in deciding whether to seek consent as discussed above with regard to disclosure of the client's identity. As stated above, the ethical issues are more serious for existing than for potential clients.

In addition, the duty under Model Rule 1.1 to provide competent representation requires that the lawyer make every reasonable effort to protect the interests of his client, including:

1. preparing the statement with the client to assure that the information provided is not beyond the scope of what is required by the proposed legislation;

2. including a paragraph in the statement to the effect that the statement is being given pursuant to a statutory requirement and that nothing contained therein should be construed as a waiver of the attorney-client privilege;\(^\text{12}\) and

12. In this regard, a lawyer is obligated by Rule 1.4 to explain to the client that, notwithstanding such statement, a court may conclude that the client has waived the attorney-client privilege if the court views the signed statement as having been volun-
(3) including a paragraph in the statement to the effect that the information contained therein is true and correct to the best of the client's knowledge as of the date thereof.

A Final Word

Daunting ethical challenges face the legal services community in preparing for whatever legislation may be enacted. This opinion demonstrates the enormous ethical burden placed on lawyers in the legal services community, both in the short term and as they continue to represent indigent clients under the restrictions that are enacted. They will have to proceed with great care and caution as they negotiate an ethical and legal minefield.

The responsibility for delivering legal services to indigent clients, however, lies not only with legal services lawyers but with the legal profession as a whole. As the Committee observed in ABA Formal Opinion 347 (1981):

[If the] traditional principles of our profession are to be accepted as more than hollow rhetoric, lawyers in every jurisdiction acting through the organized bar should take all necessary actions to prevent the abandonment of indigent clients.

Unfortunately, in contrast to the situation that confronted the legal profession in connection with previous attempts to limit Legal Services funding, the profession cannot absolve itself of responsibility simply by writing a check to the local legal services office. Under the proposed funding legislation, agencies or individuals accepting any funding at all from the Legal Services Corporation will be absolutely prohibited from representing certain clients or pursuing certain matters no matter what other sources of funding may exist. In this context, then, until these restrictions are reversed and full funding is restored, it will fall upon the entire legal community to do the best we can to provide appropriate and competent legal representation for indigent persons who will no longer be able to avail themselves of this source of legal assistance.

The responsibility being thrust upon the legal profession is enormous and clearly more than the profession can fulfill, but it is one that under the present circumstances we must embrace. Legal services organizations not funded by the Legal Services Corporation must be supported where they exist, and established where they do not. Our courts must stand ready to

...tarily made. See 1 MCCORMICK ON EVIDENCE, § 93, at 342 (4th ed., 1992). The client should be made to understand the implications of such a waiver, and the lawyer may wish to obtain the client's written consent to making such a statement should the client decide to proceed with the case.
assign substitute counsel to the thousands of indigent clients who may find themselves without a lawyer. And lawyers throughout the nation must be prepared to give meaning to the principles of Model Rule 6.1 and perform extraordinary pro bono service in providing for those who are ineligible, those whose cases or strategies are prohibited, and those for whom reductions in funding will eliminate the availability of legal services they so desperately need. In the end the only real solution is for this country to recognize the need to fully fund lawyers for the poor, free from restrictions that hamper their ability to serve their clients. Until that occurs, however, there is much that we can and should do to ameliorate a very difficult situation.
April 1, 1996

The Honorable Jack L. Landau  
Court of Appeals  
300 Justice Building  
Salem, Oregon 97310

Dear Judge Landau:

I am sending along the OLS internal response to the proposed restrictions. Although not yet in effect, they have been approved by our Board. I hope they are helpful in framing questions to the Bar.

My cursory look at our responses indicates that we have adopted policies generally consistent with the ABA Ethics Opinions. I noticed that our sample letter to clients refers to the verbal disclosure of the impact of LSC restrictions as they relate to the clients case, but doesn’t set out the specific pros (at least you get a lawyer) and cons of representation by LSC funded lawyers in writing. Given that the impact of the restrictions will vary from case to case, this approach seems best, but we will have to see.

I find all this interesting and would be happy to talk about any issues your project raises. Also, if you want information about legal aid’s practices and procedures, please call me.

Warm regards,

[Signature]

Ira Zarov
TO: Regional Directors, Managing Attorneys and Ed Goodman
FROM: David Thornburgh
RE: Implementing New Restrictions
DA: December 27, 1995

As we discussed at the last managers' meeting, riders on the LSC appropriations bill providing money for 1996 impose new restrictions on our practice. Enclosed you will find a series of temporary policies to provide guidance. Although we must comply with the new restriction starting January 1, 1996, Oregon Legal Services will continue to provide high quality legal assistance to low-income clients in Oregon to improve living conditions for low-income people in Oregon.

The Legal Services Corporation will publish proposed rules and send written information to help us better understand these restrictions. We were forced to prepare the temporary policies with little guidance because of the short time lines and remaining uncertainty about final language. We will work to improve these policies over the next few weeks. Please make suggestions and encourage all employees to make suggestions for improving these policies over the next 30 days. If we identify new issues not covered in the temporary policies, we may send additional temporary policies during the 30 days. After considering input from OLS employees, getting more national information, and reviewing regulations, OLS will adopt permanent policies necessary to implement the restrictions. Until that time, please follow the temporary policies.

If you have not already done so, please review all open cases in your office. We have reviewed the case lists submitted earlier and determined that all administrative lobbying cases, all legislative lobbying cases, all appellate cases raising attorney fees issues, and all other cases

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1 The Legal Services Corporation, NLADA, John Tull, Alan W. Houseman, and Linda Perle recommended that OLS fully comply with the restrictions starting on January 1, 1996. Although the President vetoed the bill, and Congress is not likely to adopt the final version until the middle of January, we were told to expect a continuing resolution that contains the restrictions.
prohibited by the restrictions effective January 1, 1996, have already been closed or transferred. If your office has any open case that you think may not be permitted after January 1, 1996, please close the case immediately if appropriate under the Code of Professional Responsibility or call the Director of Litigation to discuss the case. Obviously, we should notify clients when cases are closed and get clients' permission when cases are transferred. If your office has open cases, other than farmworker or immigration cases, that are prohibited on January 1, 1996, or will be prohibited July 1, 1996, create a list and send that list to the Director of Litigation within 10 days. Individuals working on farmworker or immigration cases that will be prohibited by July 1, 1996, should work closely with the Director of the Farmworker Program to make plans for those cases. If the work has been completed on these cases, they should be closed immediately. We should continue our efforts to refer these cases or otherwise complete our work on these cases as soon as possible. We will be required to report to the national corporation and to Congress on the status of these cases every 60 days in 1996.

Please change case acceptance and case handling practices to bring your office's work into full compliance with the new restrictions on January 1, 1996. Oregon Legal Services employees should not accept new cases or handle any existing case in a manner that violates the restrictions. Please review standard pleadings used in your office to remove claims for attorney fees. Please use the case acceptance meetings to screen against cases that violate the restrictions.

Each attorney in the office should be given access to a copy of the LSC appropriations bill that was adopted by the conference committee. Each attorney and paralegal should sign the enclosed agreement related to priorities. Attorneys and paralegals should start keeping time records at this time.

Please call if you have any questions or concerns about these policies.
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Section 504(a)(1) of the LSC appropriations bill for FY 1996 prohibits funding an entity that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census.
ADMINISTRATIVE LOBBYING

Section 504(a)(2) of the appropriations bill for FY 1996 prohibits funding any entity that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency.

Oregon Legal Services and its employees cannot directly or indirectly engage in lobbying administrative agencies to attempt to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability. Oregon Legal Services and its employees cannot make verbal or written comments during agency rulemaking. Oregon Legal Services and its employees cannot attempt to influence public agencies at public meetings held by government agencies to seek public input on policy decisions. This restriction applies even when OLS employees are invited by the agency or questioned by agency employees.

Offices must carefully consider whether an entity is a government agency. All divisions of federal, state, county, and city governments are "agencies" within this restriction. Most nonprofit corporations are not covered by this restriction. However, certain nonprofit corporations established pursuant to statute, like housing authorities, are "local agencies" within these restrictions because they are state actors. Public utility districts are probably "local agencies."

This restriction does not prohibit Oregon Legal Services and its employees from providing legal representation in litigation or in an adjudicatory hearing on behalf of an eligible client. The language restricts attempts to "influence" and does not prohibit "litigation" as is done in Section 504(a)(15) and (16). It does not prohibit "negotiation" or "investigation." If a client has a legal claim against a government agency, attorneys may send a demand letter and if the case cannot be settled file a claim in an appropriate court or administrative forum. The legal claim presented by the client must satisfy the requirements of FRCP 11 and ORCP 17. We encourage attorneys to send demand letters and to engage in settlement negotiations prior to filing litigation whenever possible. In cases against a government agency, attorneys attempting to settle a case should focus on what agency practices must be changed to comply with the law. Agencies may decide to change rules, policy, or practices to avoid litigation when such changes are necessary to comply with the law. OLS employees are required to identify the clients by name and have a statement of facts signed by the client before starting negotiations. Employees may contact government agencies to investigate potential claims without identifying the client as long as this is done prior to starting negotiations.

Nothing in this restriction prohibits an employee from communicating with a government agency for the purpose of obtaining information, clarification, or interpretation or an agency's rules, regulations, practices, policies, a statute, executive order, or proposed changes to the same. Attorneys and paralegals must account for all work time. (See timekeeping policy on page 14.)

Page 2 - RESTRICTIONS EFFECTIVE 1/96
ADJUDICATORY RULEMAKING

Section 504(a)(3) of the LSC appropriations bill for FY 1996 prohibits funding any entity that attempts to influence any part of any adjudicatory proceeding of any federal, state, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect.

Oregon Legal Services and its employees shall not influence adjudicatory rulemaking (e.g. administrative rulemaking). In certain adjudicatory proceedings, the administrative agency may consider both an individual claim and modification of agency policy. Oregon Legal Services and its employees may appear in proceedings where both are under consideration, but must limit our representation to seeking benefits for our client and must refuse to participate in any part of the proceeding designed to formulate or modify an agency policy of general applicability.

This restriction does not prohibit Oregon Legal Services and its employees from providing legal representation in court on behalf of an eligible client, subject to the welfare reform restrictions on page 25.)
LEGISLATIVE LOBBYING

Section 504(a)(4) of the LSC appropriations bill for FY 1996 prohibits funding any entity that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body.

Oregon Legal Services and its employees cannot participate directly or indirectly in legislative lobbying. This restriction applies to the legislative process in Congress, the Oregon Legislature, the county commissions, city councils, and other local legislative bodies.

Offices should be aware that some local governments act as a legislative and adjudicatory forum at different times. For example, a city council or local land use planning commission may act as an adjudicatory body or as a policy maker depending on the matter before the body on any given day. This prohibition applies to policy makers working as a legislative body, not to boards acting adjudicators.
OVERSIGHT

Section 504(a)(5) of the appropriations bill for FY 1996 prohibits funding an entity that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation.
USING PHONES, PAPER, POSTAGE AND MACHINES

Section 504(a)(6) of the LSC appropriations bill for FY 1996 prohibits funding an entity that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written material, administrative expense, or related expense, associated with an activity prohibited in this Section 504.
CLASS ACTIONS

Section 504(a)(7) of the appropriations bill for FY 1996 prohibits funding an entity that initiates or participates in a class action suit.

Oregon Legal Services and its employees shall not begin to provide legal assistance related to a class action suit after January 1, 1996. Oregon Legal Services and its employees shall not provide legal assistance on any additional related claim in a class action on behalf of an existing client after January 1, 1996. Beginning July 1, 1996, Oregon Legal Services and its employees shall not initiate or participate in any class action suit. Work by OLS employees shall be completed on all existing class action cases prior to July 1, 1996.
STATEMENT OF FACTS

Section 504(8) of the LSC appropriation bill for FY 1996 requires that a plaintiff sign a statement of facts "that enumerates the particular facts known to the plaintiff on which the complaint is based" prior to engaging in any precomplaint settlement negotiation with a prospective defendant and prior to initiating or participating in litigation against a defendant.

These statements of facts must be kept on file by the recipient, and made available to any federal department or agency that is auditing or monitoring the activities of the Legal Services Corporation or Oregon Legal Services Corporation. These statements of facts shall be available through the discovery process after litigation has begun. These statements may or may not be treated like work product for the purposes of discovery.

The Oregon Code of Professional Responsibility requires that attorneys avoid damaging client’s cases while still complying with the applicable federal regulations. Other attorneys are likely to argue that releasing this document is a complete waiver of the attorney-client privilege since there is no partial waiver. All signed statements received by other parties will be used when possible to impeach witnesses based on prior inconsistent statements. Attorneys must discuss this risk with clients and get informed consent to continue with representation. Attorneys can minimize the damage done by these statements by using simple language that the client feels comfortable with and by not providing more details than necessary to comply with the federal restriction. Keep it simple. Consider using information already given to the other side, like parts of the complaint or a demand letter, to form the basis of the statement of facts. ORCP 18 requires that pleadings contain a plain and concise statement of the ultimate facts constituting a claim for relief; this should be enough detail in most cases to comply with this restriction. ORCP 17 and FRCP 11 already require that our pleadings be well grounded in fact. As a result, a copy of a part of the complaint that enumerates the "particular facts known to the plaintiffs on which the complaint is based" will be adequate to comply with this requirement. For the purpose of this policy, do not have the plaintiff sign a demand letter or complaint mailed to the other side or filed with the court. (There may be other reasons for a client to sign a complaint, such as UCIA requires a sworn statement for the client in the first pleading.) If you use a complaint or demand letter, remove the top part of the first page of the demand letter or complaint, insert a new heading "Statement of Facts Required by 504(8)," remove the attorney’s signature, and add a place for the client to sign. Keep this statement as a separate document in the client file.

The Legal Services Corporation is likely to issue regulations to guide recipients on this issue in the near future. The State Bar will probably also provide guidance.

This requirement does not apply to defendants. This requirement does not prohibit calling the other party to investigate a potential claim as long as the investigator refuses to discuss negotiation until after the statement of facts has been completed. For example, a lawyer may call to better identify the owner of a farm, identify the name of the employer, or to determine the stated rate of pay, without attempting negotiation.
(SAMPLE)

STATEMENT OF FACTS REQUIRED BY 504(a)(8)

This statement was prepared to comply with Congressional restrictions imposed by federal law on all programs receiving funds from the Legal Services Corporation. Nothing in this statement should be construed as a waiver of the attorney work product privilege. The court should apply discovery standards applicable to requests for work product before releasing this document through discovery.

Nothing in this statement should be construed as a partial or complete waiver of attorney client privilege protected by law and the Code of Professional Responsibility. The person signing this statement does not intend to waive or reduce any right to attorney-client privilege.

Plaintiff, John Jones, complained about the car he bought from Mark Smith, the owner of Smith’s Dodge Inc., located at 1029 G Street, in Grants Pass, Oregon. He purchased the car on December 22, 1995. Mr. Smith said it was in good condition and that the odometer registered all of the miles. The car, a green, 1962 Dodge Valiant, stopped running one block from the dealership on December 22, 1995. Mr. Jones was told by his mechanic that the green 1962 Valiant was not in good condition and that the odometer had been tampered with or disconnected. Mr. Smith refused to refund the purchase price or take any action to assist Mr. Jones.

John Jones

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IDENTIFYING A CLIENT BY NAME IN NEGOTIATION & LIT.

Section 504(8) of the LSC appropriation bill for FY 1996 prohibits funding an entity that engages in precomplaint settlement negotiation with a prospective defendant, or initiates or participates in litigation, unless each plaintiff has been specifically identified by name in any compliant filed for the purposes of such litigation or prior to the precomplaint settlement negotiation.

Oregon Legal Services and its employees will identify the name of the plaintiff(s) in the complaint and in the precomplaint settlement negotiation (In the first letter or phone call related to settlement negotiations).

Oregon Legal Services and its employees may seek an order from a court of competent jurisdiction enjoining the disclosure of the identity of any potential plaintiff pending the outcome of litigation or negotiations. The court will hold a hearing to determine whether reasonable cause has been established.

This policy does not apply to representing defendants.
Section 504(a)(9) of the LSC appropriations bill for FY 1996 prohibits funding an entity unless the Board of Directors adopts specific priorities, the staff signs an agreement to accept cases pursuant to the priorities adopted by the Board, the entity reports to the Board quarterly on compliance, and the entity reports on compliance annually to the national corporation.

Oregon Legal Services and its employees shall not accept cases beyond the scope of the priorities adopted by the Board of Directors of Oregon Legal Services. These priorities are reviewed at least annually and a copy of the most recent priorities shall be delivered to each office to be retained in the administrative policy manual.
AGREEMENT TO FOLLOW PRIORITIES

I understand that Section 504(a)(9)(ii) of the Legal Services Appropriations Act of 1995, providing funding for FY 1996, requires that the staff of Oregon Legal Services Corporation sign a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by the Board of Directors of Oregon Legal Services Corporation. A copy of the current specific priorities is attached to this agreement. I understand that the Board of Directors of Oregon Legal Services reviews the priorities at least annually and may change these specific priorities in the future. When the Board changes priorities, a copy of the new priorities will be sent to each office.

I hereby agree that I will not undertake cases or matters as an employee of Oregon Legal Services Corporation other than in accordance with the specific priorities set by the Board of Directors of Oregon Legal Services.

Type in Employee's Name & Title
PRIORITY 1995

BASIC FIELD

Income Maintenance
Housing
Family Law
Employment
Health
Consumer/Financial Matters
Civil Rights
Education/Juvenile
Wills, Torts, Licenses - (Senior Contracts and PBI Referrals)

MIGRANT

Employment
Housing
Health
Other

NATIVE AMERICAN

Sovereignty Issues/Treaty Rights/Jurisdiction
Indian Child Welfare Act Cases
Indian Health Care
Sacred Sites/Archaeological Protection
Religious Freedom
Economic Development
Tribal Infra Structure
Natural Resources Issues

APPROVED AND ADOPTED BY OLS BOARD OF DIRECTORS, APRIL 8, 1995

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DAILY TIME KEEPING

Not effective January 1, 1996. We will update this before it is effective.

Section 504(10)(A) of the LSC appropriations bill for FY 1996 requires that "prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged."

Starting 30 days after the effective date in the final regulation (approved for publication at the December 18, 1995 board meeting) or 30 days after signing the grant, whichever is later, each attorney and paralegal employed by Oregon Legal Services Corporation shall document by time records the amount of time spent on each case, matter or activity. "Case" means the provision of advice to representation of one or more clients. "Matter means the provision of other program services that do not involve advice to or representation of one or more clients. "Activity means all other actions of or by a recipient, including fundraising and administrative and general, which are not cases or matters. We will have to create an identification of the category of action on which the time was spent for all matters or supporting activities. For example, giving training, receiving training, public education, divorce class, case intake meeting, case review meeting, task force meeting, managers' meeting, travel not assigned to a case matter, etc.

The timekeeping system implemented must be able to aggregate time record information on both closed and pending cases by legal problem type.

Time records shall be created contemporaneously and must account for time in increments not greater than one-quarter of an hour which aggregate to all of the efforts of the attorneys and paralegals for which compensation is paid. The attached timekeeping form was distributed by the Oregon State Bar Association. We will be reviewing computer timekeeping options.

Time records required by this section shall be available for examination by auditors and representatives of Oregon Legal Services Corporation, and auditors and representatives of the Legal Services Corporation. Time keeping records should be maintained in a manner consistent with the attorney-client privilege and the rules of professional responsibility applicable in Oregon.
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on its recipients, especially those who currently do not have the capacity to maintain the time records required by this proposed rule. Timkeeping is time consuming, and record keeping systems have real costs. Nevertheless, despite the possibility that implementation of this proposed rule will reduce a recipient's LSC-funded capacity for client services by one- or two-percent or more, the Corporation has concluded that timekeeping by attorneys and paralegals will materially improve recipient accountability for Corporation funds.

If adopted, this part shall be effective January 1, 1996.

A section-by-section discussion of the proposed rule is provided below.

Section 1635.1 Purpose

This section sets out the purpose of the proposed rule to improve recipient accountability for the use of funds provided by the Corporation. This section also sets out the manner in which the proposed rule achieves its stated purpose: by assuring supporting documentation of allocations of expenditures of Corporation funds, by enhancing recipients' ability to determine costs, and by increasing the information available to the Corporation for assuring recipient compliance.

Section 1635.2 Definitions

This section defines "case," "matter," and "activity," the functions of a program for which time records are required to be kept. The definitions are framed so as to cover all allocations of recipients. Some examples of "matters" are education of eligible clients and development of written materials explaining legal rights and responsibilities. "Administrative and general" is a catchall category within "activity." It is designed to encompass everything that does not fall within cases or matters or fund-raising activities, and would include, for example, skills training and professional activities.

Section 1635.3 Timekeeping Requirement

This section sets out the timekeeping requirement. It is intended to require all recipients to account for the time spent on all cases, matters and other activities by their attorneys and paralegals, whether funded by the Corporation or by other sources. Recipients must account for one hundred percent of attorney and paralegal time spent in the course of their employment, even if the time is spent outside normal business hours. Allocation of costs based on time and other records continues to be governed by 45 C.F.R. part 1630, which requires a reasonable basis for allocations of expenses to all funds.

The Corporation does not prescribe either manual or automated timekeeping systems, nor specific report formats or contents. Each recipient will need to determine the appropriate matters and activities for which time will be kept, keeping in mind its particular service patterns. In order to assist recipients, the Corporation plans to make available this fall a manual of forms and operating systems already in use by some recipients.

Section 1635.4 Administrative Provisions

This section advises recipients of the Corporation's access to the time records required by this part. Since these records will be available for examination by auditors and representatives of the Corporation, they should be maintained in a manner consistent with the attorney-client privilege and all applicable rules of professional responsibility. As a practical matter, this may mean that client names should not appear in time records.

List of Subjects in 45 CFR Part 1635

Legal services, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, LSC proposes to amend 45 CFR chapter XVI by adding part 1635 as follows:

PART 1635—TIMEKEEPING REQUIREMENT

Sec.

1635.1 Purpose.

1635.2 Definitions.

1635.3 Timekeeping Requirement.

1635.4 Administrative Provisions.

Authority: 42 U.S.C. 2996(d)(1)(A), 2996(d)(2), 2996(d), 2996(g), 2996(g).

§ 1635.1 Purpose.

This part is intended to improve recipient accountability for the use of funds provided by the Corporation by:

(a) assuring that allocations of expenditures of Corporation funds pursuant to 45 C.F.R. part 1630 are supported by accurate and contemporaneous records of the cases, matters and activities for which the funds have been expended;

(b) enhancing the ability of recipients to determine the cost of specific functions; and

(c) increasing the information available to the Corporation for assuring recipient compliance with federal law and Corporation rules and regulations.

§ 1635.2 Definitions.

As used in this part—

(a) "Activity" means all other actions of or by a recipient, including fund-raising and administrative and general, which are not cases or matters.

(b) "Case" means the provision of advice to representation of one or more clients.

(c) "Matter" means the provision of other program services that do not involve advice to or representation of one or more clients.

§ 1635.3 Timekeeping Requirement.

(a) All expenditures of funds for recipient actions are, by definition, for cases, matters or activities. The allocation of all expenditures must be carried out in accordance with 45 C.F.R. part 1630.

(b) Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter or activity. Time records must be created contemporaneously and must account for time in increments not greater than one-quarter of an hour which aggregate to all of the efforts of the attorneys and paralegals for which compensation is paid.

§ 1635.4 Administrative Provisions.

Time records required by this section shall be available for examination by auditors and representatives of the Corporation, and should be maintained in a manner consistent with the attorney-client privilege and the rules of professional responsibility applicable in the local jurisdiction.

Date: September 18, 1995.

Suzanne B. Glase, Senior Counsel for Operations & Regulations.[FR Doc. 95-23489 Filed 9-20-95; 8:45 am] BILLING CODE 7010-41-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64
[CC Docket No. 91-35; FCC 95-574]
Operator Service Access and Payphone Compensation
AGENCY: Federal Communications Commission.
ACTION: Proposed rule.
SUMMARY: The Commission adopted a Notice of Proposed Rulemaking ("Notice") seeking comment on tentative proposals for implementing a per-call system of compensation for the largest operator services providers.
ASSISTANCE FOR ALIENS

Section 504(a)(11) of the appropriations bill for FY 1996 prohibits funding entities that provide legal assistance for or on behalf of any alien, unless the alien is present in the United States and is --

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who --
   (i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and
   (ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity.

Oregon Legal Services and its employees shall not begin to provide legal assistance on behalf of any ineligible alien after January 1, 1996. Oregon Legal Services and its employees shall not provide legal assistance on any additional related claim for any ineligible alien after January 1, 1996. Beginning July 1, 1996, Oregon Legal Services and its employees shall not provide legal assistance for or on behalf of any ineligible alien. OLS employees shall complete work on behalf of ineligible aliens in existing cases prior to July 1, 1996.
PROHIBITED TRAINING

Section 504(a)(12) of the LSC appropriations bill for FY 1996 prohibits funding an entity that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity.

Oregon Legal Services and its employees are asked to conduct or support trainings for attorneys, paralegals, specific interested groups, and the public. We cannot conduct, provide trainers, prepare materials, or otherwise support a training program for the purpose of advocating a particular policy or encouraging a political activity.

This policy does not prohibit Oregon Legal Services and its employees from conducting or supporting legal training for attorneys, paralegals, specific interested groups, or the public when the purpose is to increase an understanding of current law. Legal training usually includes information about applicable statutes, regulations, cases, and the legislative policy underlying the statute. Oregon Legal Services and its employees cannot provide legal training as part of a broader training program designed for the purpose of advocating a particular public policy. For example, we cannot provide a two hour section on health law when the overall purpose of the two day training event is to encourage health care workers to contact legislators to adopt a better health care statute in Oregon. If there is any question about the goals of the training organizers, document the purpose of the training prior to participation.
ATTORNEY FEES

Section 504(a)(13) of the appropriations bill for FY 1996 prohibits funding an entity that claims (or whose employee claims), or collects and retains, attorneys’ fees pursuant to any Federal or State law permitting or requiring the awarding of such fees. The use of the word "awarding" excludes modest means where clients pay a retainer or pursuant to a contract.

Oregon Legal Services Corporation and its employees shall not file or send complaints, answers, or other writings claiming attorneys’ fees after January 1, 1996. Oregon Legal Services Corporation and its employees shall not deposit checks for attorneys’ fees, send writings demanding attorneys’ fees, file claims for attorneys’ fees pursuant to ORCP 68 or FRCP 54, or take any similar action after January 1, 1996. Any office that has a check after December 31, 1995, that contains some money for attorneys’ fees should contact the Director of Litigation or the Executive Director for directions. (This includes checks written from our client’s trust account or any other check.)

In pending cases that were filed before December 31, 1995, where the pleadings contain allegations related to attorneys’ fees, attorneys should notify clients of the new attorney fee restrictions in writing as soon as possible to give clients an opportunity to seek alternative representation. We have been advised that it is not necessary to send a letter to the other side at this time, unless required to do so by state law. Attorneys should take no action in pending cases to claim fees, collect fees, or to retain fees after January 1, 1996.

Prior to signing retainers with new clients, employees should strike parts of the second to the last paragraph in the standard retainer forms eliminating the lines "I want OLS to try to get attorney’s fees if they are available from someone other than me," and "any attorney’s fees." A copy of a retainer with these lines struck appears on the page following this page.
January 2, 1995

John Jones
555 Main Street
Klamath Falls, Oregon

Dear Mr. Jones:

I write to inform you of recent changes in our program mandated by the United States Congress. The lawyers working for Oregon Legal Services Corporation may not claim or collect and retain an award of attorneys' fees after January 1, 1996.

The retainer agreement that you signed when we first accepted your case said that you wanted Oregon Legal Services to get attorney fees from the other party if we could. The complaint or answer in your case stated that attorneys' fees are available to the prevailing party. Because of the new law, we will not take any action in the future to claim, collect, or retain attorney fees. Our services remain free to you.

If you can afford to get another attorney or if you can get another attorney without charge, you may want to consider getting an attorney who can claim attorneys' fees because the threat of paying attorneys' fees to the other party sometimes increases the value given in settlement or increases the likelihood of settlement. If you get another attorney, please call so we can help transfer the case. Unless you contact me to ask for a change, I will continue working on your case, but will not take any action to claim, collect or retain attorneys' fees in your case after January 1, 1996.

Very truly yours,
RETAINER AGREEMENT

I, ____________________________, request and authorize Oregon Legal Services to assist me with the matter discussed during my initial interview(s). I understand Oregon Legal Services agrees to provide the following assistance and representation: __________________________

CLIENT RIGHTS AND RESPONSIBILITIES

There are some things which I have a right to expect of Oregon Legal Services, (OLS), and some things which they have a right to expect of me.

I have a right to receive correct legal advice and quality help. To make this possible, I must tell what I know about the problem and bring or send in any papers that may help the case. I can expect that my case will be handled as quickly as possible. If I am unhappy with the service I receive, I can make a complaint by following the steps listed on the back page of this agreement. I understand that OLS does not promise to help me with any other legal problem unless we agree. I also understand if OLS files a case in court for me or represents me at a hearing and I lose, they will not handle an appeal unless OLS and I both agree.

OLS will let me know what is happening with my case. I will be able to talk with the person helping me if I need to. I understand that sometimes OLS employees are very busy and I may have to wait.

I will answer all letters and phone calls from OLS. I will let them know right away if I move or get a new phone number. I understand OLS cannot continue helping me if they do not know how to find me, or if I do not help with my case. If OLS thinks there are decisions about my case which I should make, then they will ask me to make them.

I do not have to pay OLS for helping me. Even though I do not have to pay OLS, I understand I may have to pay court fees or other costs if a judge says I have to. I also understand in some types of cases I may have to pay for the other party's attorney's fees and costs. I have talked with an OLS attorney about whether this is possible in my case.

I understand OLS can only help people with little income. I know I must tell OLS the truth about how much money I make, the value of things that I own, and my family size. I believe that all of the blanks filled in on my application are correct. I will tell OLS if any of these things change.

I want OLS to try to get attorney's fees if they are available from someone other than me. I also want OLS to try to get costs or other expenses which have been paid for my case. I agree OLS may keep any attorney's fees or other costs which they pay.

I understand OLS will tell me about any offers to settle my case, and I may decide to accept or reject any such offers.

Client: ____________________________ Date: _____________

Page 21 - RESTRICTIONS EFFECTIVE 1/96
(Sample Letter that could be used for Client at Time of Retainer)

January 5, 1996

John Jones
542 Red Rock St.
Bend, OR

Dear Mr. Jones:

This will confirm that Oregon Legal Services agreed to provide free legal representation in your potential suit against the city water company. You promised to help us work on your case by providing a list with the names and addresses of witnesses by next Monday.

As I explained, Oregon Legal Services Corporation is funded by Congress and other sources to provide free legal representation to low-income clients. The scope of our legal services is limited by federal law. We cannot file a complaint seeking attorney fees from another party or attempt to collect and retain attorney fees from another party. Clients must sign a statement of facts related to their case before we can negotiate with a defendant or file a complaint against a defendant. We cannot engage in lobbying or class actions. I explained the advantages and disadvantages of these limitations may have on your specific case. After our discussion, you decided to accept our services, signed a retainer and directed me to start representing you in this matter.

I look forward to working with you to resolve this matter.

Very truly yours,
ABORTION

Section 504(a)(14) of the LSC appropriations bill for FY 1996 prohibits funding an entity that participates in any litigation with respect to abortion.
CASES ON BEHALF OF PRISONERS

Section 504(a)(15) of the LSC appropriations bill for FY 1996 prohibits funding an entity that participates in any litigation on behalf of a person incarcerated in a federal, state or local prison.

Oregon Legal Services and its employees shall not begin to provide legal assistance on behalf of a person incarcerated in a federal, state, or local prison after January 1, 1996. During the provision of legal services on an existing case on behalf of a prisoner, Oregon Legal Services and its employees shall not provide legal assistance on any additional related claim to such a person after January 1, 1996. Beginning July 1, 1996, Oregon Legal Services and its employees shall not participate in any litigation on behalf of a person incarcerated in a federal, state, or local prison. OLS work shall be completed on all existing cases prior to that time. Cases that may continue beyond that date will be transferred to another attorney outside Oregon Legal Services.
Section 504(a)(16) of the LSC appropriations bill for FY 1996 prohibits funding an entity that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a federal or state welfare system, except a recipient may represent an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation.

Oregon Legal Services and its employees cannot initiate representation or participate in litigation, administrative lobbying, or administrative rulemaking related to AFDC waivers or block granted welfare programs.

Oregon Legal Services and its employees may represent individual eligible clients seeking AFDC benefits under waivers or welfare benefits under block grants as long as the representation does not involve an effort to amend or otherwise challenge existing waivers. This restriction probably does not prevent challenging Oregon Administrative Rules that violate the terms of the federal waivers. Please contact the administrative law support attorneys (Jim Young or Ellen Gradison) or the Director of Litigation to review the facts prior to accepting a case challenging an OAR based on this theory.
DRUG EVICTION CASES

Section 504(a)(17) of the LSC appropriations bill for FY 1996 prohibits funding entities that defend persons in a proceeding to evict the person from a public housing project if the person has been charged with the illegal sale or distribution of a controlled substance and the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency.

Oregon Legal Services employees shall comply with this requirement. In addition, employees of Oregon Legal Services shall get permission from the Director of Litigation or the Executive Director of Oregon Legal Services before providing specific legal advice, accepting a case for representation, or negotiating on behalf of a client, in any case where the eviction notice alleges the use or sale of a controlled substance. Employees will also contact the Director of Litigation or the Executive Director prior to providing legal representation in eviction cases where the landlord makes a specific factual allegation indicating that the tenant is using, selling or distributing a controlled substance.
UNSOLICITED ADVICE TO SEEK COUNSEL OR TO TAKE ACTION

Section 504(a)(18) of the LSC appropriations bill for FY 1996 prohibits funding an entity unless the entity agrees that the entity and employees of the entity will not accept employment resulting from in-person unsolicited advice that a nonattorney should obtain counsel or a nonattorney should take legal action.

The language of this restriction is taken selectively from solicitation prohibition contained in the 1970 Code of Professional Responsibility which is no longer in effect in most states and has been substantially modified in the states where it is still in effect. This provision prohibits a recipient or its employees from representing any person whom they advised regarding the need for legal assistance unless that person specifically solicited that advice. It also prohibits a recipient or its employees from referring any client to whom they have given unsolicited advice to another recipient.

OLS employees doing in-person outreach to domestic violence shelters, nursing homes, farmworker camps, homeless shelters, mental health institutions, and the like, should be careful to avoid offering unsolicited in-person advice to obtain counsel or advising a nonattorney to take legal action. If an employee offers such advice, Oregon Legal Services cannot accept the case or refer it to another LSC funded organization.
SUPPORT FOR LSC

Section 504(a)(4) and (12) of the LSC appropriations bill for FY 1996 and existing LSC regulations prohibit using recipient funds to support Congressional funding for legal services.

Recipient funds cannot be used directly or indirectly to lobby a member of Congress or staff on measures affecting LSC. This prohibition applies to staff members, private attorneys, board members and clients using any recipient funds. For example, a staff member who is also a member of a union cannot take union release time paid for with recipient funds to work on measures affecting LSC pending in Congress.

Recipient funds cannot be used to communicate a position on measures affecting LSC to a member of Congress or staff. This means that client members and board members cannot send letters using a computer, paper, or ink paid for with recipient funds.

Recipient funds cannot be used for any grassroots lobbying on measures affecting LSC. Grassroots lobbying is defined in Part 1612 of the existing regulations as any written or oral communication which contains a direct suggestion, or when taken as a whole, amounts to a direct suggestion to anyone outside of the recipient program, including the public at large, to contact public officials, in support of or in opposition to any pending or proposed legislation. For example, staff cannot contact supportive organizations and ask them to contact key members of Congress.
RESTRICTIONS APPLY TO WORK AND WORK RELATED ACTIVITIES

The restrictions contained in appropriations bill apply to all work and work related activities. The restrictions apply to all staff completing work on behalf of Oregon Legal Services or Oregon Legal Service's clients. The restrictions also apply to all funding received by Oregon Legal Services. Employees cannot engage in restricted activity while on official travel which is being paid for with Oregon Legal Services' funds. No computers, phones, stationary, office supplies, office equipment, offices, or other resources of Oregon Legal Services can be used to engage in any restricted activity. Timekeeping restrictions apply to all work and work related activities regardless of where or when the activities are completed.

Oregon Legal Services has a limited ability to control the activities of employees on their own time when the activities are not work related and are not supported with Oregon Legal Services funds. However, extreme care must be used to ensure that personal time for any restricted activity is adequately documented so there can be no question that the activity was taken on the staff's own time (e.g. vacation time, other leave time as permitted by the recipient, off-duty time). Treat this activity like political activity, creating a clear separation between work and this activity. Staff must make clear to others that they are acting on their own time and working as individuals, not as representatives of Oregon Legal Services. Do not identify the employer, provide a work address, or provide a work phone number. Do not accept calls at work. This would be using equipment.

Work related activity includes working on behalf of OLS clients, trying to help an OLS client, attempting to achieve goals set at work, or working under the supervision of OLS managers. The outside practice of law is restricted.

Outside Practice of Law

Pursuant to the OLS policies regarding the Outside Practice of Law and Malpractice Insurance for Outside Practice of Law, OLS attorneys may engage in the practice of law that is outside their employment with OLS only if:

1) the attorney participates in the PLF fund; or
2) the attorney participates in a pro bono program that provides professional liability coverage on referred cases to participating lawyers;
and 3) the attorney has obtained the permission of the OLS Executive Director.
Prohibited Political Activity

No OLS employee shall ever:

a) intentionally identify LSC or OLS with any partisan or non-partisan political activity, with the campaign of any candidate for public or party office; or
b) intentionally identify or encourage others to identify LSC or OLS with any political activity, any activity to provide voters with transportation to the poll, or other assistance in connection with an election or any voter registration activity; or
c) use any OLS funds for any political activity, the transportation of voters, or any voter registration activities.

No OLS attorney shall ever:

a) use official authority or influence in order to interfere with or affect the result of a partisan or non-partisan nomination or election for public office; or
b) coerce, command, or advise an employee of OLS or LSC to provide anything of value to a political party or other entity for political purposes; or
c) be a candidate for partisan, elective public office.
USE OF AAA FUNDING

Section 504(19)(d)(2)(B) provides that a recipient may use funds "received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Act." This provisions means that OLS may receive and use AAA funds, so long as they are not used for activities prohibited in the Appropriations Bill. The financial eligibility provisions of 45 C.F.R. 1611 are still in effect. Section 1611.3(e) provides that we may provide legal assistance "to a client whose annual income exceeds the maximum income level established here, if the assistance provided the client is supported by funds from a source other than the Corporation."
TO:       Ira R. Zarov  
          Executive Director  
          Oregon Legal Services Corporation  

FROM:    James N. Gardner  

DATE:    January 9, 1996  

The purpose of this memorandum is to outline a potential  
10th Amendment challenge to the conditions and restrictions  
recently imposed on the Legal Services Corporation and its  
grantees by Congress.  

I. Introduction  

As Professor Kathleen M. Sullivan wrote recently in the  
Harvard Law Review:  

We are in the midst of an antifederalist  
revival of uncertain scope and consequence.  
The dueling formalisms in Term Limits [U.S.  
Term Limits, Inc. v. Thornton, 115 S.Ct. 1842  
(1995)] are best understood as responses to  
this background political upheaval. The  
rules set forth by the majority and dissent  
do not merely reflect the Justices’  
respective approaches to jurisprudence or  
their respective views of term limits’  
infringement of individual rights. Rather,  
they stake out opposite views of the needs  
for judicial intervention in the balance of  
state and federal power--and of the dangers  

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of leaving this balance to functional analysis. To the majority, judicial intervention is needed to protect the federal government from the states; to the dissent, it is needed to protect the states from the federal government. Justice Kennedy alone would intervene to protect each side from encroachment by the other.¹

As Professor Sullivan also noted, this antifederalist revival—exemplified not only by the 4-vote Term Limits dissent but, more significantly, by the Supreme Court's stunning decision to invalidate the Gun-Free School Zones Act² on the ground that Congress had exceeded the limits of its Commerce Clause power—is "best read as a preview of the Court's response to other coming controversies over the relative reach of state and federal power."³

The antifederalist revival builds on legal concepts articulated by Chief Justice Rehnquist in his short-lived majority opinion in National League of Cities v. Usery⁴ as well as older cases involving unusual fact patterns—federal attempts

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³ Sullivan, supra note 1, at 81.
to relocate a state capital, for instance— and on a recent
U.S. Supreme Court decision holding that Congress may not compel
the promulgation of state regulations or the enactment of state
statutes "even where Congress has the authority under the
Constitution to pass laws requiring or prohibiting certain
acts..." New York v. United States, 505 U.S. 144, 166
(1992). (A copy of the New York decision is attached.)

As the Supreme Court held in New York:

The allocation of power contained in the Commerce
Clause, for example, authorizes Congress to
regulate interstate commerce directly; it does not
authorize Congress to regulate state governments' 
regulation of interstate commerce.

505 U.S. at 166.

Playing a supporting role in the antifederalist revival are
a host of other U.S. Supreme Court decisions containing dicta
indicating that the Tenth Amendment harbors a vast range of
implicit restrictions on the exercise of Commerce Clause power.
These decisions and their doctrinal implications were summarized
by Professor Tribe as follows:

It is clear... that the Constitution does
presuppose the existence of the states as entities
independent of the national government. This
presupposition lies just below the surface of many

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5 Coyle v. Oklahoma, 221 U.S. 559 (1911) (invalidating a
federal attempt to relocate Oklahoma's capital as a condition of
statehood).
constitutional provisions; it manifests itself most expressly in the language of the tenth amendment, which puts the states on an equal footing with "the people" as holders of the powers which the Constitution neither grants to the national government nor prohibits to the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions and the tacit postulates of the Constitution as a whole.

The question, though, is what Congress must do in order to treat the states in a manner inconsistent with their independent status. In answering that question, at least the core content of state sovereignty seems fairly clear. In Coyle v. Smith, the Supreme Court held that Congress cannot tell a state where to locate its capitol. Language in Helvering v. Gerhardt suggests that a state may claim an immunity from federal taxation if the federal tax clearly imposes an "actual and substantial, not conjectural" burden upon peculiarly governmental activities--publishing enacted laws, for instance--that are "indispensable to the maintenance of a state government." Murdock v. Memphis, although on its face a decision construing a federal jurisdictional statute, has been thought to have a constitutional resonance: even if the commerce clause, for example, would otherwise justify it, Congress may not have the power to authorize the Supreme Court to supplant state courts as the authoritative declarers of law within their jurisdictions by functioning as a court of last resort with respect to questions of state common law and state statutory law. Dicta in Griffin v. Breckenridge appear to go even further: Congress
may not have the power to use its commerce clause or thirteenth and fourteenth amendment authority wholly to federalize such traditional areas of common law as the law of torts or of contracts. Similarly, it seems clear that Congress could not, under its power to regulate commerce or to protect individual rights, insist that a state alter its basic governmental structure—that it replace a bicameral with a unicameral legislature, for example, or shift from city managers to elected majors. In sum, Congress cannot deny the states some symbolic corollaries of independent status, some revenue with which to operate, some sphere of autonomous lawmaking competence, and some measure of choice in selecting a political structure.

Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

The full body of the Constitution—not only its tenth amendment and other explicit provisions, but also, in Justice Rehnquist's felicitous phrase, its "tacit postulates"—suggests that the states should find their protection in doctrines which place a combination of internal and external limits on the power that the Constitution grants Congress. Such limits should indirectly guarantee that there are in fact "powers not delegated to the United States" which are as "reserved to the States" as to "the People," or ways in which powers that are "delegated to the United States" may not be exercised so as to destroy the essence
of a state's semi-autonomous character as a polity in its own right. 4

II. Recent Congressional Restrictions on the Activities of the Legal Services Corporation and Its Grantees

The recently enacted appropriation measure for the Legal Services Corporation ("LSC") imposes the following restraints, among others, on LSC and LSC's grantees:

1. The legislation prohibits use of the funding appropriated by the measure to provide financial assistance to persons or entities that engage in one or more proscribed activities, including:

   (a) reapportionment litigation;
   (b) executive branch lobbying with respect to federal, state or local agency regulations;
   (c) attempting to influence any part of any adjudicatory proceeding of a federal, state or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;
   (d) legislative lobbying or attempting to influence the passage or defeat of

initiatives or referenda at the state, local or federal levels;

(e) initiation or participation in class action litigation;

(f) initiation of litigation against a defendant or negotiating with a prospective defendant unless (i) each plaintiff has been specifically identified by name in the complaint and (ii) a statement enumerating the facts on which the complaint is based has been signed by plaintiff, is kept on file by the recipient and is "made available to any federal department or agency that is auditing or monitoring the activities of the corporation or of the recipient";

(g) supporting or conducting a training program for the purpose of advocating a particular public policy or encouraging a political activity;

(h) claiming or collecting and retaining attorneys' fees pursuant to any federal or state law permitting or requiring the awarding of such fees;
(i) participating in any litigation with respect to abortion; or

(j) participating in any litigation on behalf of a person incarcerated in a federal, state or local prison.

2. The legislation enacts a collateral source prohibition which provides:

The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept from any source other than the corporation, unless the corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

Section 504(d)(1).

3. In an attempt to thwart challenges to the constitutionality of the aforementioned restrictions, the measure provides as follows in Section 506:

None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or entity receiving financial assistance from the corporation to file or pursue a lawsuit against the corporation.

III. The Potential Constitutional Infirmitry of the Restrictions Listed Above

The operation of state court systems is at the core of the powers reserved to the states by the Tenth Amendment. See
generally Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 633 (1874). A corollary proposition is that the power of state courts to promulgate and enforce attorney disciplinary rules falls within the zone of residual sovereignty protected by the Tenth Amendment.

In addition, there are indications that the Supreme Court would rule in an appropriate case that Congress does not "have the power to use its commerce clause or thirteenth and fourteenth amendment authority wholly to federalize such traditional areas of common law as the law of torts or of contracts." It appears that the prospects for obtaining such a ruling would be maximized in situations where the federalization attempt had the collateral effect of intruding into the process of state court administration in the same manner that the federal statutory provisions invalidated in New York v. United States, supra, intruded impermissibly into the "legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" 505 U.S. at 161 (emphasis added).

The restrictions imposed by the LSC appropriation measure appear to intrude into core areas of state sovereignty protected by the Tenth Amendment. The restrictions would, for instance,

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7 Tribe, supra note 6, at 380.
implicitly require substantial modification of state-promulgated attorney disciplinary rules. The restrictions would also appear implicitly to require modification of state-promulgated rules of civil procedure.

These implicit requirements appear to run afoul of the Tenth Amendment. As the Supreme Court held in the New York case:

[N]o Member of the Court has ever suggested that [even] a [particularly strong] federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate it must do so directly; it may not conscript state governments as its agents.

505 U.S. at 178.

In addition, the restrictions would partially preempt certain key provisions of tort reform measures recently enacted in Oregon, including provisions in SB 385 creating a new right to attorney fees on appeals from arbitration awards in instances in which the appealing party fails to improve his or her position following a post-arbitration trial de novo. Attorney fee awards would be available under SB 385 to all Oregon litigants except those represented by LSC grantees. This federally mandated
loophole to an important state tort reform policy would undercut the efficacy and uniformity of application of SB 385.

The LSC appropriation measure will undoubtedly be defended on the ground that Congress has broad authority under its spending power to attach conditions to the receipt of federal funds, even in situations where the objectives sought to be advanced by Congress fall outside of "Article I's 'enumerated legislative fields.'" South Dakota v. Dole, 483 U.S. 203, 207 (1987).

The answer to this defense is that, except in rare instances, the states--whose judicial systems and attorney disciplinary regimes will be disrupted by the restrictions imposed by the LSC appropriation measure--will not have consented to these restrictions. Only the "recipients" of federal LSC funding--which are typically neither states nor state agencies--will have "consented" to the federal conditions on LSC funding.

In short, this federal intrusion into a zone of sovereignty traditionally reserved to the states under the Tenth Amendment will be unaccompanied by any form of state consent. The intrusion thus raises novel Tenth Amendment issues that would undoubtedly be of interest to the United States Supreme Court's emerging antifederalist majority.
APPENDIX 5

OSB Civil Legal Services Task Force
Roster of Participants
CIVIL LEGAL SERVICES TASK FORCE
Subcommittee #1 (Client Needs, Priorities, Delivery System)

Hon. David V. Brewer (Subcommittee Chair)
Lane County Courthouse
125 E 8th Avenue
Eugene, OR 97401

Edward L. Clark, Jr. (Subcommittee Member)
1070 Heather Lane SE
Salem, OR 97302

Hon. Jack L. Landau (Subcommittee Member)
300 Justice Building
1162 Court Street NE
Salem, OR 97310

Stephen S. Walters (Task Force Chair)
Stoel Rives
900 SW 5th Ave., Suite 2300
Portland, OR 97204

Tod Alexander Bassham (LILS Committee)
1617 SE Salmon Street
Portland, OR 97214

James Casby, Jr. (LILS Committee)
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Salem, OR 97310

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Leslea Smith
Oregon Legal Services
421 High Street, Suite 110
Oregon City, OR 97045

Louis D. Savage (MBA)
Garvey, Schubert & Barer
121 SW Morrison St.
Portland, OR 97204
CIVIL LEGAL SERVICES TASK FORCE
Subcommittee #2 (Structure and Organization)

James T. Massey (Subcommittee Chair)
PO Box 1689
Sisters, OR 97759

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