COMMENTS CONCERNING
LEGAL SERVICES CORPORATION'S
PROPOSED REGULATIONS ON CLIENT ELIGIBILITY

September 20, 1983

DIVISION V: CRIMINAL LAW AND INDIVIDUAL RIGHTS

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The Steering Committee Would Also Like To Thank Ellen Vargyas And Burton D. Fretz For Their Contributions In Compiling These Comments

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THE VIEWS EXPRESSED HEREIN REPRESENT ONLY THOSE OF DIVISION V: CRIMINAL LAW INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR AND NOT THOSE OF THE D.C. BAR OR OF ITS BOARD OF GOVERNORS.

Summary of Comments

Proposed Regulations on Client Eligibility,
Legal Services Corporation
48 Fed. Reg. 39086 (Aug. 29, 1983)

The attached comments respond to proposed LSC rules on client eligibility referenced above. Each comment raises concerns about the harsh effect of the proposals on client populations which are presently being served by legal services programs. Specific concerns include the following:

(1) Violation of an attorney-client privilege by requiring disclosure of financial information and imposing retainer agreements;

(2) Complicating eligibility determinations through use of discretionary and mandatory factors;

(3) A bar on legal assistance for non-profit organizations serving the poor;

(4) Elimination of the present rule which disregards income received from a governmental income maintenance program in determining eligibility;

(5) Inclusion of the assets of a household whether or not the people in it budget jointly;

(6) Imposing a home-equity limit of $15,000, which would disqualify many present SSI recipients;

(7) Effect of the vehicle equity limit of $4,500 on handicapped persons who need special customized vans;

(8) Use of a "joint assets test" which unrealistically affects separated spouses.

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Re: Proposed Rule on Eligibility
45 C.F.R. Part 1611.

The Legal Services Corporation has proposed substantial alterations of its existing regulations at Title 45 C.F.R. Part 1611 governing the determination of eligibility for legal representation provided by recipient programs of the Legal Services Corporation. We submit these comments because such proposals, if adopted, will have a significant and adverse effect on persons in need of legal assistance. We urge that the Corporation reject the proposals and retain current regulations.

The proposed regulation states that "the lack of increase in Corporation appropriations has prompted a reexamination of eligibility criteria so as to focus resources on those most in need." 48 Fed. Reg. 39086. This is not a convincing basis for revisions which fundamentally alter the standards and procedures which have been used by the Legal Services Corporation (LSC) over the past years. Furthermore, Congress is appropriating to the LSC as much as or more than the $257 million asked for FY 1984. The Corporation cannot now assert a lack of a funding increase as the primary grounds for proposing restrictive eligibility criteria.

Our concerns with specific areas of the proposed revisions are as follows:

1. Infringement on the Attorney-Client Privilege

The proposed changes infringe on the attorney-client privilege in two areas. Section 1611.7(c) would require a recipient to supply the Corporation on request with information relating to financial eligibility of the client. This information may be furnished to the Corporation without the express written consent of the client. According to the Preamble of the proposed regulations, the burden would be on the client to seek legal redress if the client believes the information is privileged. This is unrealistic and violative of an attorney's ethical obligations to the client. Both LSC and the recipient program must be allowed to protect a client's privileges to the maximum.

Another troublesome interference in the attorney-client relationship is posed by the provisions regarding retainer agreements. Section 1611.8. The proposed regulations would require each program to execute a written retainer agreement with each client in a form approved by the Corporation. In our view, the relation between the attorney and client which is described in the retainer agreement should be individually determined by that attorney and client without outside interference. There is no recitation of past abuses or reason why LSC now should interfere in the structuring of the relationship between attorney and client. Given that fact, it is our view that the retainer agreement should not be subject to LSC review in any form at all.

2. Determination of Eligibility

Proposed section 1611.5 would set up an exceedingly complicated system of certain factors which may be used to permit representation of persons over maximum income levels and others which must be considered in denying assistance to otherwise eligible persons. While its purpose appears to be to introduce some flexibility into the determination of eligibility, it only succeeds in thoroughly confusing the situation. The current regulations, which are based on clearly-defined standards to be implemented by local boards, ensure a flexible and responsible system of eligibility determination. There is absolutely no reasonable basis to alter them.

3. Restrictions on Representation of Groups

The proposed regulations would eliminate the category in the current regulations which permits the representation of groups which have as their primary purpose the "furtherance of the interests of persons in the community unable to afford legal assistance." They would only allow recipients to represent groups composed "primarily of persons eligible for legal assistance." The Supplementary Information offers a rather confusing explanation for the deletion, which is apparently based on the notion that such groups will necessarily not be controlled by eligible clients and that the representation of such groups is not within the purpose of the Legal Services Act.

Both observations are unfounded in reality. Many of these groups are controlled by low-income persons. In addition, the statute and legislative history are replete with references to the importance of the representation of groups seeking to improve opportunities for low-income persons. See, e.g., the Statement of Findings and Declaration of Purpose, §1001(3).

By restricting representation of organizations to groups primarily composed of eligible clients, the rule would permit group representation only on a nominal basis. This rule would prevent representation through groups of nursing home residents or institutionalized people who cannot always act to protect their own interests. It would bar a program from advising community development corporations and non-profit organizations which serve the poor. No justification for this exclusion appears. Given the fact that the regulations properly retain the requirement that any group which is to obtain representation must be without resources to obtain private counsel, there is no reason to deprive the many groups which have done major service to poor people in this country of representation. The current regulation should be retained.

4. Treatment of Governmental Assistance

The proposed regulations would eliminate the provision in the current regulations which permits legal services programs to

represent persons who are receiving benefits from other needs-based government benefit programs such as Aid to Families with Dependent Children (AFDC), Medical Assistance (MA), or Supplemental Security Income (SSI). Instead the proposal would treat such income as merely one more element to be included in the eligibility process. We believe that the consequences of this change have not been fully considered.

The existing regulations properly recognize that persons receiving benefits from a needs-based program are by definition persons who are "needy" within the meaning of the Legal Services Act. The proposed regulation will substantially complicate the eligibility process by forcing programs to perform a complex eligibility calculation for all applicants. This appears to be a costly and inefficient revision, since nearly all of these individuals would eventually be found eligible for legal services.

The proposal does retain the provision at Section 1611.4(b) permitting legal assistance to a person seeking to secure benefits provided by a government program for the poor. This exception is sound; it allows assistance to a person in dealing with a governmental needs-based program on which that person is largely (but not exclusively) dependent for subsistence. However, the proposal would not permit representation to that same person who is seeking to secure benefits from some other program in

order to avoid future dependence on a governmental program for the poor. This restrictive change appears unnecessary.

5. Household Asset Test

A significant change from current law arises in the provision at Section 1611.6 that "both liquid and nonliquid assets of all members of the applicant's household" must be counted in determining the applicant's eligibility. Many poor people live in large households where individuals have no obligation to support each other and do not, in fact, make their resources available to each other. Others, particularly the elderly and the handicapped, live with friends or family although there is no obligation to support them and the actual level of support varies widely. The proposed practices of looking at total household assets to determine eligibility will assume the availability of resources which are not actually available to the applicant for legal assistance. It will discourage poor people from living with others although that may be the most economical or otherwise appropriate living arrangement. It will also serve to deny legal assistance to genuinely needy people. Only assets actually available to the applicant should be considered in determining eligibility.

6. Home Equity Test

The new regulations would exempt only up to $15,000 of equity in an applicant's residence. This provision would sharply

contrast with Congressional policy in other need-based federal programs -- SSI, AFDC, Food Stamps -- of protecting a principal residence from an assets test.

The limit on home equity will particularly affect the elderly and the unemployed who may have bought a home in better times. Now their home may be all they have.

The proposed change also ignores the enormous rate of inflation of recent years. Today equity values of extremely modest homes often exceed $15,000. In 1977, 42 percent of the elderly receiving public assistance who owned homes had a net equity value in those homes in excess of $15,000. Doubtless after six years of increasing home values, the proportion under $15,000 has decreased dramatically.

The proposition that intake workers for legal services programs should engage in real estate appraisal also appears unrealistic and cumbersome.

7. Vehicle Value Test

The proposed regulations would exclude from computation of assets equity up to $4,500 in "one or more licensed vehicles." We believe this restriction is unrealistic and discriminates against the working poor, including older couples who need one or more vehicles to maintain employment. Ironically, the proposal

would favor poor people who have extended their credit in order to obtain a vehicle and disfavor poor people, including many older persons, who have not.

The LSC proposal contrasts sharply with SSI rules which totally exclude a vehicle if it is necessary for employment or for medical treatment of a regular or specific medical problem or if it is modified for operation by or transportation of a handicapped person [20 C.F.R. §416.1218(b)(1)(i)-(iii)].

8. Joint Assets

Section 1611.6(b) of the proposed rules would require assets held jointly by separate households to be considered available in their entirety to that household. The rule would not apply only if the asset is "inaccessible" because it is incapable of subdivision and the joint owner's agreement is necessary for access to it. No provision is made for eligibility decisions affecting a spouse seeking a divorce where joint ownership is involved, other than a narrowly drawn exception for "persons residing in shelters for battered women and children."

As a practical matter, such shelters generally are available to provide shelter only for a short period of time. Thus, a woman may be eligible for legal services for a few days during

this period but ultimately she will lose her eligibility if she jointly owns assets with the abusive husband after she leaves the shelter. Jointly-owned resources of any woman seeking assistance as a battered wife should be exempt if that woman does not have actual access to the resources.

Conclusion

In this era of economic recession, unemployment and cuts in domestic programs the Corporation is moving in exactly the wrong direction with the proposals at issue. The need, if any, is to expand rather than contract eligibility of individuals and groups acting on their behalf.

The proposed regulations do nothing to expedite or rationalize an eligibility system which by all accounts has worked exceedingly well. There has been no public concern over the determination of eligibility; Congress has been silent on the issue. Given the harm which the proposed regulations would do both to needy persons and to the integrity of the legal services program, it is our strong view that these regulations should not be adopted.