Legal Services Corporation
America's Partner For Equal Justice

OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2003-1004

To: Gerald R. Brennan
Senior Attorney
Warren County Legal Services
P.O. Box 900
30 Schuyler Place
Morristown, New Jersey 07963-0900

Date: March 7, 2003

Subject: Inquiry About Prohibited Political Activity Under 45 C.F.R. Part 1608

Dear Mr. Brennan:

I am writing in response to your recent letter in which you inquired whether it would be a violation of 45 C.F.R. Part 1608 for you to run for a town council position in a partisan political campaign. At the time of your inquiry, you were a senior staff attorney with the Legal Aid Society of Morris County (LASMC), which merged with other Legal Services Corporation (LSC) grantees to form Warren County Legal Services (WCLS), Inc. effective January 1, 2003. You indicated that you work full-time for your local LSC grantee. Of the salary you receive from the LSC grantee, approximately eleven percent (11%) comes from your program's LSC grant, with the majority of your position being funded by state money from the New Jersey Division of Mental Health and Hospitals.[1] Approximately eighty-seven percent (87%) of your gross professional income comes from the legal aid office for which you work.

Section 1006(e)(2) of the LSC Act prohibits LSC recipient staff attorneys from being candidates for any partisan elective public office.[2] 42 U.S.C. § 2996e(e)(2). This restriction is implemented on LSC grantees through Part 1608 of the LSC regulations. 45 U.S.C. § 1608.5(c).

"Staff attorney" is defined by the LSC Act as:

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[1] You indicated that your position would be funded in approximately the same amount by an LSC grant after the merger of LASMC with other programs.

[2] Section 1006(e)(2) applies Chapter 15 of the Hatch Act to LSC employees and recipient staff attorneys. This chapter of the Hatch Act generally prohibits certain partisan electoral activities by state and local employees.

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> an attorney who receives more than one-half of his annual professional income from a recipient organized solely for the provision of legal assistance to eligible clients under this title. 42 U.S.C. §2996a(7).

By regulation, LSC defines "staff attorney" as

> an attorney more than one-half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation or is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients under the Act.

45 C.F.R. §1600.1.

Based on the information that you provided, you do not fall within the first part of the definition of "staff attorney" articulated in LSC's regulations, as less than one-half of your position with WCLS is funded by your program's LSC grant. Whether you fall within the second part of the definition – i.e. an attorney who receives the majority of his income from a recipient that limits its activities to providing legal assistance to eligible clients – depends on whether your program is a program described in the LSC Act as a "recipient organized solely for the provision of legal assistance to eligible clients under [the LSC Act]."

LSC considers its basic field programs to be "recipient[s] organized solely for the provision of legal assistance to eligible clients under [the LSC Act]." Accordingly, any attorney employed by such a program who receives more than one-half of his income from the program's funds – whether they are LSC funds or non-LSC funds -- is considered to be a "staff attorney" for purposes of the LSC Act and thus for purposes of the prohibition contained in Part 1608.

LSC's Office of Legal Affairs[3] has previously opined that a program that accepts non-LSC funds to serve clients ineligible under the LSC Act does not qualify as a "recipient organized solely for the provision of legal assistance to eligible clients" under the LSC Act. It is the belief of this office that there is a better reasoned construction than that articulated in those prior opinions. The earlier opinions fail to consider the LSC Act as a whole, including its legislative history, and they render meaningless several significant sections of the Act.[4] It is a basic principle of statutory construction that whenever possible, statutes should be interpreted to avoid unreasonable results. Public Citizen v. Dep't of Justice, 491 U.S. 440, 454 (1989); Sierra Club v. EPA, 719 F.2d 436, 445 (D.C. Cir. 1983), cert. denied, Alabama Power Company v. Sierra Club, 468 U.S. 1204 (1984). See also, United States v. Bayko, 774 F.2d 516, 522 (1st Cir. 1985). "It has been called a golden rule of statutory interpretation that

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[3] This office was previously known as LSC's Office of the General Counsel (OGC).

[4] A prior OGC opinion issued to South Middlesex Legal Services, dated February 28, 1992, acknowledged the inconsistency in the earlier opinions interpreting this issue. The 1992 opinion, which carefully detailed the legislative history of the LSC Act, is appended hereto as Attachment 1. Much of the substance of that opinion is repeated herein.

unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Id.* at 522. Based on this principle, the language "recipient organized solely for the provision of legal assistance to eligible clients under [the LSC Act]" should be read in a way that produces a reasonable result relative to the LSC Act and its legislative history.

The word "recipient" appears in multiple contexts in the LSC Act, and is defined as "any grantee, contractee, or recipient of financial assistance described in . . . [§1006(a)(1)(A) of the LSC Act]." 42 U.S.C. § 2996a. Section 1006(a)(1)(A) of the LSC Act grants the Corporation authority to:

> provide financial assistance to qualified programs furnishing legal assistance to eligible clients, and to make grants to and contracts with (i) individuals, partnerships, firms, corporations, and nonprofit organizations and (ii) State and local governments [under certain limited situations] . . . for the purpose of providing legal assistance to eligible clients. . . .[5]

Fundamentally, a "recipient" is a §1006(a)(1)(A) program that provides direct legal assistance to eligible clients. Such work is generally done by LSC's "basic field programs."[6]

The phrase "organized solely for the purpose of providing legal assistance to eligible clients" appears in two places in the LSC Act as a modifier of the term "recipient." Section 1007(c) of the Act requires any recipient "organized solely for the purpose of providing legal assistance to eligible clients" to meet specific governing body requirements,[7] and §1002(7) defines "staff attorney" as "an attorney who is paid more than one-half of his annual

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[5] The legislative history of this section makes clear that the words "firms," "partnerships" and "corporations" refer "to entities of attorneys authorized to practice law in the State in question." S. Conf. Rep. 93 – 84 , at 19 (1974).

[6] A "basic field program" can be described as a law office that provides direct legal assistance to eligible clients at the local or state level. Each program serves a distinct geographic service area, with some programs serving very large cities and/or multiple counties in a given state, and other programs serving entire states. Each year Congress allots the majority of LSC's appropriation to basic field programs. *See, e.g.* Pub. L. 107-77, 115 Stat 748 (2001). Currently, LSC has approximately 170 basic field programs.

Although state and national support centers once provided some degree of direct legal assistance to eligible clients, LSC no longer funds such centers.

[7] Section 1007(c) requires that:

> In making grants or entering into contracts for legal assistance, the Corporation shall insure that any recipient organized solely for the purpose of providing legal assistance to eligible clients is governed by a body at least 60 percent of which consists of attorneys who are members of the bar of the State in which the legal assistance is to be provided . . . and at least one-third of which consists of persons who are, when selected, eligible clients. . . . 42 U.S.C. 2996f(c).

professional income from a recipient organized solely for the provision of legal assistance to eligible clients under this title[.]" 42 U.S.C. §2996a.

If the conclusion of the earlier opinions was correct -- i.e. if the only programs that fell within the category of recipients "organized solely for the purpose of the provision of legal assistance to eligible clients under [the LSC Act]" were those that exclusively served LSC eligible clients with LSC funds -- only a small number of LSC grantees would be subject to the governing body requirements of §1007(c) of the LSC Act, as it only applies to programs "organized solely for the purpose of providing legal assistance to eligible clients under [the LSC Act]."[8] Many basic field programs use, and have used since the inception of LSC, non-LSC funds to serve clients ineligible under the LSC Act. Congress was aware of this when it passed the LSC Act,[9] and it is unreasonable to conclude that Congress would have sought to regulate board makeup for a small number of programs, while providing no guidance on governing bodies for the vast majority of programs. Similarly, the legislative histories of the Hatch Act (Chapter 15 of which is applied to LSC grantees through §1006(e)(2)) and the LSC Act (and §1006(e)(2) in particular) do not suggest in any way that the prohibition on candidacy for partisan elective public office was intended to apply to the attorneys of some, but not all, LSC-funded programs.

The meaning of "organized solely for the purpose of providing legal assistance to eligible clients under [the LSC Act]" is further illuminated by the history of the transition of federally-funded legal services from the Office of Economic Opportunity (OEO) to LSC.[10] Under the Economic Opportunity Act administered by the OEO, local community action agencies (CAAs) were created as planning bodies that determined how to address poverty

[8] Reviews of the legislative history of the LSC Act in general, and of §1007(c) in particular, do not indicate that the governing body requirements enumerated therein were intended to apply to only a portion of LSC grantees as opposed to all LSC grantees.

[9] It is clear from the legislative history of the LSC Act that Congress was aware that existing staff attorney programs received other funds. 120 Cong. Rec. 15006 (1974) ("Legal Services programs get money from a variety of sources, many of them "public."). Indeed, had Congress not recognized that the programs were already receiving non-LSC funds, there would have been no need to include §1010(c), 42 U.S.C. §2996i(c), in the LSC Act, which requires separate reporting of non-LSC funds and prohibits the use of most non-LSC funds for purposes prohibited under the LSC Act. 120 Cong. Rec. S12923 (daily ed. July 18, 1974) "The [§1010(c)] restriction is designed to assure that legal services staff attorney programs will not contravene the other restrictions in the act by attributing them to the non-Federal share of funds contributed to such programs." *Id.*

Additionally, LSC was aware that basic field programs were already receiving non-LSC funds that could be used to serve clients ineligible for assistance under the LSC Act (e.g. Title III funds), and it acknowledged this in a report published shortly after its inception. See Legal Services Corporation Delivery Sys. Study, July 1977, 11-13. (Noting that staff attorney programs vary in funding levels and sources of funding, including funds from the Health, Education and Welfare Title III program, i.e. Older Americans Act, which could only be used for senior citizens., and that private foundation and United Way funds provided an estimated 22 percent of non-LSC funds.)

[10] A statute cannot be divorced from the circumstances existing at the time it was passed . . . . Benton v. United States, 488 F.2d 1017, 1021 (Ct. Cl. 1973), citing Atkins v. United States, 439 F.2d 175, 177 (Ct. Cl. 1971).

problems in given communities. A. Houseman & J. Dooley, Legal Services History, Ch. 1, 4-5 (1984). As a result of the fact that few CAAs chose to include legal services in the range of services they provided, the OEO began earmarking funds for legal services at the national level. *Id.* 5. This action created controversy among local bar associations, CAAs and the OEO about whether legal services funds were most effectively spent through judicare programs (i.e. programs through which private practice attorneys are paid for handling a specific number of cases for poor persons) or "staff attorney programs" (i.e. local legal aid offices staffed with salaried attorneys). *Id* at 1-10; Legal Services Corporation Delivery Sys. Study, July 1977, 3-4 & note 4. It was the OEO's refusal to fund judicare programs that prevented the judicare delivery system from being adopted by the majority of CAAs throughout the country. Houseman & Dooley, *supra* at 1-10.

When Congress transferred the function of funding legal services from the OEO to LSC in 1974, it chose to maintain the existing staff attorney delivery model rather than the judicare model or other, alternative delivery systems. 120 Cong. Rec. 15011-12 (1974); 120 Cong. Rec. S12141 (daily ed. July 10, 1974); 119 Cong. Rec. 522412 (daily ed. Dec. 10, 1973). Pursuant to this choice, Congress provided a definition of "staff attorney" in §1002(7) of the Act, and it provided for professional oversight of staff attorney programs by the legal profession in §1007(c). 120 Cong. Rec.14996-97, 15001, 15004 & 15012 (daily ed. May 16, 1974); 119 Cong. Rec. S22404 & S22412 (daily ed. Dec. 10, 1973); 120 Cong. Rec. S534-35 (daily ed. Jan. 28, 1974).[11]

Notwithstanding that Congress chose to continue the staff attorney delivery model through the LSC Act, it provided for consideration of the judicare delivery system and other alternatives. Section 1007(g) of the Act directed LSC to conduct an independent study of the "existing staff-attorney program" and to consider alternative and supplemental methods of delivering legal services. 42 U.S.C. §2996f(g). The use of "staff attorney" in §1007(g) to refer to a particular type of program suggests that Congress considered the existing staff attorney program to be what LSC has consistently referred to as a basic field program, i.e. a neighborhood law office staffed with salaried attorneys. Given this construction, it seems that Congress intended for the "organized solely" phrase to refer to the basic field program.[12]

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[11] Through §1007(a)(8), Congress also required local programs to seek advice from local bar associations before hiring staff attorneys.

[12] Although subsequently-passed appropriations acts cannot be used to discern Congress' intent when it enacted the LSC Act, it is worth noting that provisions in recent appropriations acts support the idea that Congress intended for the "organized solely" phrase to refer to basic field programs. Section 504(a) of LSC's 1996 appropriations act, for example, prohibits LSC from funding any recipients that engage in activities prohibited by that act, regardless of the funding source(s) for the prohibited activities. Pub. L. No. 104-134, 110 Stat. 1321 (1996). In essence, this suggests that a recipient must be "organized solely for the provision of legal assistance to eligible clients" in order to receive LSC funding. Additionally, §504(d)(1) of the same statute requires LSC recipients to notify other funders that funds received from non-LSC sources may not be used for purposes prohibited by the LSC Act or LSC appropriations acts. *Id.* These requirements have been carried forth in all LSC appropriations acts since 1996. *See*, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Pub. L. No. 105-119, 111

Generally, the Corporation's actions over the course of its existence have been consistent with this interpretation. In the first report it presented to Congress on the study of alternative programs mandated by §1007(g), for example, LSC clearly identified its basic field programs as staff attorney programs and stated that of its 289 local programs, 287 were "staff attorney programs" and two were "judicare projects." Legal Services Corporation Delivery Sys. Study, July 1977, 9.[13] The Corporation has consistently interpreted the "organized solely" phrase in §1007(c) of the Act to refer to its basic field programs, and it has for that reason required all basic field programs to comply with governing body requirements enumerated in that section, regardless of whether such programs use non-LSC funds to provide legal services to ineligible clients. Similarly, the Corporation has required all basic field programs to comply with other requirements of the Act relating to staff attorneys (such as §1006(d)(5), which restricts certain class actions suits, and §1007(a)(8), which sets out attorney hiring restrictions), regardless of whether those programs use non-LSC funds to provide services to clients ineligible under the LSC Act.

The one exception to LSC's otherwise consistent interpretation of the phrase "organized solely" to refer to its basic field programs has been the issuance of some legal opinions interpreting Part 1608 of LSC's Regulations. Although many of the 1608 opinions do not address this issue at all, and two of the prior opinions reach the same conclusion set forth herein,[14] a number of prior opinions on this subject have held that programs that accept non-LSC funds to serve clients ineligible under the LSC Act do not qualify as recipients "organized solely for the provision of legal assistance to eligible clients" under the LSC Act. As stated on page 2 above, this office believes that the better reasoned and more justified construction of the prohibitions on political activities contained in the LSC Act and regulations is that LSC's basic field programs are recipients "organized solely for the provision of legal assistance to eligible clients," regardless of whether those programs use non-LSC funds to provide services to clients ineligible under the LSC Act.

In light of the conclusion stated in the preceding paragraph, it is the opinion of this office that any attorney employed by one of LSC's basic field programs who receives more than one half of his salary from that program is considered a "staff attorney" and is prohibited by §1006(e)(2) of the LSC Act and §1608.5(c) of the LSC regulations from being a candidate for any partisan political election. Based on the information that you provided (i.e. that you receive 87% of your professional income from an LSC grantee that is considered a basic field

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Stat. 2440 (1997); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. 106-553, 114 Stat. 2762 (2000); and Pub. L. 107-77, 115 Stat 748 (2001).

[13] Additionally, the report noted that "the primary method of delivering legal services to the poor since the creation of the federal Legal Services program has been through the use of staff attorney offices serving the poor." *Id.* at 2.

[14] In addition to the 1992 opinion referenced in footnote 4 *supra*, an OLA opinion issued to Wayne County Neighborhood Legal Services on February 2, 1987, reaches this same conclusion.

program), you fall within this category and are therefore prohibited by the LSC Act and Regulations from running for the proposed town council position in a partisan election.

To the extent that prior legal opinions issued by LSC conflict with the conclusion herein, the Office of Legal Affairs would like to emphasize that those opinions are hereby overruled and should hereafter be disregarded.[15]

I hope that this opinion is fully responsive to your inquiry. If you have any questions regarding this matter or if you would like to further discuss these issues, please feel free to contact me directly at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

[15] The prior 1608 opinions that are hereby overruled are as follows: Opinion issued to undisclosed recipient on June 4, 1976; Opinion issued to undisclosed recipient on July 20, 1976; Opinion issued to undisclosed recipient on October 5, 1976; Second opinion issued to undisclosed recipient on October 5, 1976; Opinion issued to undisclosed recipient on October 8, 1976; Opinion issued to Northwestern Legal Services on January 22, 1979; Opinion issued to Southern Minnesota Regional Legal Services on March 27, 1979; Opinion issued to Stark County Legal Aid Society on March 27, 1990; Opinion issued to Bronx Legal Services on August 13, 1996; and Opinion issued to Legal Services of New York on September 12, 1997.