ADVISORY OPINION

AO- 2010-001

Subject: Permissibility of Using LSC Funds to File an *Amicus Curiae* Brief

Date: March 5, 2010

This office was asked for an interpretive Advisory Opinion on whether an LSC recipient may use LSC funds to participate in filing an *amicus* brief in pending litigation in its institutional capacity and without representing a client in the matter.

Brief Answer

There is no categorical prohibition on a recipient's participation in the filing of an amicus brief in a litigated case without representing a client. Whether the filing of an amicus brief by a recipient in its institutional capacity is permissible as a "matter" depends, as with other "matters" activities, *on a case-by-case basis* on whether that particular amicus activity can be said to contribute to the overall delivery of that recipient's program services.

Background

Occasionally recipients of LSC funding have participated in the filing of an amicus curiae brief as institutional amici. As institutional amici, these recipients have sought and were granted leave by the respective courts to appear in their institutional capacity, directly as amicus and not as counsel representing an amicus client. The Office of Legal Affairs has been asked for an interpretive Advisory Opinion as to whether a recipient may use LSC funds to engage in the filing of amicus briefs in litigation in which the recipient is filing the brief in its institutional capacity and not on behalf of a client with an particular interest in the outcome of the litigation.

Analysis

Historically, LSC's position on whether recipients have been permitted to use LSC funds to support the filing amicus briefs in their institutional capacity appears to have been that although there was no legal prohibition, there was a policy position discouraging the filing of amicus briefs in a recipient's institutional capacity. A June 17, 1977 letter from the Office of General Counsel to California Rural Legal Assistance, addresses the question of "why the Corporation believes that legal services programs should not files amicus briefs on their own behalf." It is not at all clear from this, however, that the question being posed was addressing a previously issued legal opinion that grantees were not permitted to file amicus briefs or only addressing a then-prevailing policy position discouraging grantees from engaging in such

activity. The response provides one ostensible legal reason, namely that work done not on behalf of a client raises "a question as to whether the work was an authorized use of funds received" under the LSC Act. However, certain non-client "matters" type work has been referred to as authorized activity since the earliest days of the Corporation's existence. See, e.g., LSC Final Rule on Priorities in Allocation of Resources (and the preamble to that rule), 41 Fed. Reg. 51609, at 51610 (November 23, 1976). Thus it seems unlikely that the opinion intended to suggest that, as a legal matter, recipients were prohibited from doing any work not for a particular client. The other reason articulated in the letter is a policy rationale that the filing of amicus briefs on the recipient's own behalf "gives support to those critics who allege that legal services lawyers use money appropriated by Congress to advocate their own view of what is good for the poor instead of limiting themselves to representation of clients." There is also a March 15, 1979, opinion from the Office of General Counsel to Advocates for Basic Legal Equality (ABLE) which squarely finds that "nothing in the Corporation Act or Regulations would prohibit A.B.L.E. from filing [an] amicus brief . . . ." That opinion goes on, however, to caution the recipient that "the program should carefully scrutinize the effect that such activities will have on its ability to provide service to its eligible clients. The amount of program resources that are devoted to such activities should be strictly limited by the actual services needs of A.B.L.E.'s client community." Taken together, it appears that as of 1979, at least, the Corporation as a policy matter was opposed to recipients' filing amicus briefs in their institutional capacity, while recognizing no existing legal basis for prohibiting such activities.

The question turns next to whether there have been any statutory or regulatory changes that would affect the 1979 legal opinion. There have been no changes to the LSC Act since that time and the various appropriations riders under which LSC has been operating do not address the question at hand. There have, however, been pertinent regulatory changes. In 1984 LSC first adopted a regulation on Cost Standards and Procedures and in 1996, 1997 and 2007, LSC issued regulations addressing the definitions of "cases" and "matters." These regulations are addressed below.

LSC regulations provide that LSC funds may only be expended on activities which are allowable under and allocable to a recipient's grant. 45 CFR §1630.3(a). LSC regulations further provide that "all expenditures of funds for recipient actions are, by definition, for cases, matters, or supporting activities." 45 CFR §1635.3(a). The question, then, is whether the filing of an amicus brief in a recipient's institutional capacity qualifies as a "case" activity, a "matter" activity or is a "supporting activity."[1]

[1] "Supporting activities" are defined as "any action that is not a case or matter, including management in general and fundraising." 45 CFR §1635.2(d). "Supporting activities" are all activities "other than program services." 61 Fed. Reg. at 14262. The filing of an amicus brief is clearly a program service and, as such, not a "supporting activity."

Since the mid-90's LSC has defined the terms "case" and "matter" in its Priorities (1620) and Timekeeping (1635) regulations. The definitions, although not word for word identical, are intended to have the same meanings.[2] A "case" is a:

> form of program service in which an attorney or paralegal of a recipient provides legal services to one or more specific clients, including, without limitation providing representation in litigation, administrative proceedings, and negotiations, and such actions as advice, providing brief services and transactional assistance, and assistance with individual PAI cases.

45 CFR §1635.2(a). Whereas, a "matter" is an:

> Action which contributes to the overall delivery of program services but does not involve direct legal representation of more or more specific clients. Examples of matters include both direct services, such as, but not limited to, community education presentations, operating *pro se* clinics, providing information about the availability of legal assistance, and developing written materials explaining legal rights and responsibilities; and indirect services such as training, continuing legal education, general supervision of program services, preparing and disseminating desk manuals, PAI recruitment, referral, intake when no case is undertaken, and tracking substantive law developments.

45 CFR §1635.2(b).

Given that the definition of "case" involves the provision of legal assistance to an eligible client, it would appear clear that the filing of an amicus brief in a recipient's institutional capacity and not on behalf of an eligible client is not a "case" activity. As such, the heart of the inquiry appears to be whether a recipient's participation in the filing of an amicus brief in a litigated case without representing a client may properly be considered a "matter" and, thus, an allocable cost under LSC regulations.

The regulatory definition of "matter" does not provide an exhaustive list of permissible activities coming within the scope of the term and the filing of amicus briefs in a recipient's institutional capacity is not specifically addressed. Nor does the regulation or its regulatory history suggest the intended scope of the term "contributes to the overall delivery of program services." As such, the filing of amicus briefs by recipients in their institutional capacities is neither categorically permitted nor prohibited as "matters" for the purposes of the permissibility of the expenditure of LSC funds. Rather, it would appear that whether the filing of an amicus brief by a recipient in its institutional capacity is permissible as a "matter" depends, as it does with all other "matters" activities, *on a case-by-case basis* on whether that particular filing can

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[2] The terms were first regulatorily defined in the Timekeeping rule, adopted in 1996 (61 Fed. Reg. 14261 (April 1, 1996). When the Priorities rule was revised the following year, the definitions of "case" and "matter" were taken from the Timekeeping rule) "to assure consistency in the use of terminology throughout the regulations." 62 Fed. Reg. 19406 at 19407 (April 21, 1997). When the Timekeeping rule was revised in 2000, the definition of "matter" was clarified, without any intended change in meaning or application. 65 Fed. Reg. 41879 at 41881 (July 7, 2000).

be said to contribute to the overall delivery of that recipient's program services. Thus, for example, an amicus brief filed in a corporate securities case appears unlikely to contribute to the overall delivery of a program's services, while an amicus brief filed regarding a case involving the interpretation and application of an area of the law within a program's priorities (such as family law or landlord-tenant law, etc.) might reasonably be determined to contribute to the overall delivery of the program's services depending on the particular facts and circumstances. Such determinations are, as with other determinations of this kind, generally within the discretion of the Office of Compliance and Enforcement after consideration of all pertinent facts.

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