

AGGRESSIVE ADVOCACY IN TODAY'S PROGRAM ENVIRONMENT

*Remarks of Alan Houseman, Executive Director, CLASP
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Florence, that was terrific.

Florence has laid out an exciting, challenging and difficult agenda for us in order to address the legal problems of low-income persons, to end poverty and achieve equal justice.

This conference provides a range of workshops to help us focus on many of the problems. We are covering key substantive areas of the law, critical racial justice issues and the many procedural obstacles that prevent us from effectively advocating in the courts.

At the outset we - NLADA and CLASP - want to be clear that aggressive advocacy in all of its forms is what civil legal assistance is all about.

We cannot end poverty and achieve equal Justice for all without aggressive advocacy.

Legal aid lawyers – and I use the term legal aid with deliberation – should be engaged in four fundamental aggressive advocacy functions:

First, Legal aid lawyers should engage in affirmative major systemic litigation in the courts and other forums on behalf of individuals and groups.

Second, Legal Aid lawyers should be seeking to change policy, laws and regulations particularly at the state and local level.

Third, Legal Aid lawyers should be using the media to highlight systemic problems.

Fourth, Legal Aid lawyers should be engaged in aggressive outreach and education to low-income people and organizations.

However, the legal aid legal services community is going through two difficult changes – state planning and new restrictions.

These either could stand in the way of effective advocacy or be used to help us achieve aggressive advocacy. It is our challenge and responsibility to make sure they help us achieve aggressive advocacy.

First, within each state there is an effort that will continue for some time to create a comprehensive integrated statewide system of delivery of civil legal assistance to the poor. This initiative is required by LSC and supported by NLADA and CLASP.

This initiative will result in a fundamental change in how legal aid has been organized in this country. Instead of a group of individual programs funded by LSC, each state is now attempting to develop a statewide system that includes LSC and non-LSC providers, pro bono programs and initiatives, other service providers including human service providers, and key elements of the private bar and the state judicial system. The focus is no longer on what a individual program can do but on what a state system should be.

Regardless of what you think about this fundamental change, and some of you strongly agree with it and some of you strongly disagree with it, we in this room have an obligation to make sure that aggressive advocacy remains an essential and key component of any new system.

The system that emerges must be able to undertake fully and effectively all of the 4 aggressive advocacy functions laid out above: affirmative litigation; policy advocacy; media advocacy; and education and outreach. And it must have the full capacity to engage in the broad range of state level advocacy. This will require coordination and collaboration.

Second, the legal aid community is now faced with a critical set of programs funded by LSC that cannot undertake all of the advocacy activities that we would optimally like to have available to serve our clients. Obviously, we need to struggle to get rid of these restrictions. But we can't let these restrictions prevent us from doing our work.

We have a collective responsibility as leaders in aggressive advocacy to make sure that we all work with others lawyers, whether in the private bar or other entities, to ensure that aggressive advocacy continues for low-income people we serve.

Even if we work for an LSC-funded program and cannot do a particular task, we can coordinate and collaborate with non-LSC funded programs and others who can and we must do this to serve our clients.

And, those who work in LSC-funded programs have a responsibility to make sure that we take on aggressive advocacy to the full degree that we can. Too often we create barriers that are not there.

Let me turn to that topic for just a moment to make sure we are all on the same page and that we all understand how much of our aggressive advocacy work LSC-funded programs still can do.

We have provided three articles about what legal aid programs funded by LSC can do. Two are in your materials after TAB one and the other is later in your materials. The later article includes a number of key examples of systemic work by LSC-funded attorneys will be discussed at the racial justice session that my wonderful colleague Camille Holmes will facilitate.

Let me begin by reminding you that what can be done under the LSC restrictions is often not explicitly set out in the LSC regulations. These focus on what legal services programs cannot do, not on what they can do. Thus: **If an activity is not explicitly prohibited by statute or regulation, LSC-funded programs are permitted to engage in the activity as long as it is within the individual program's priorities.**

AGGRESSIVE SYSTEM ADVOCACY IN THE COURTS AND OTHER ADJUDICATORY BODIES

While all programs should engage in aggressive advocacy, LSC-funded programs and advocates can engage in effective advocacy in the courts and before other adjudicatory bodies and achieve individual relief and significant systemic effects.

LSC-funded attorneys can sue governmental entities.

LSC funded attorneys can seek injunctive and declaratory relief and sue to overturn state laws that violate federal law or the Constitution.

LSC-funded attorneys can also bring mandamus actions to force officials to take specific actions, and seek equitable relief that affects groups or categories of persons.

LSC programs can undertake representative actions that are available under the laws of certain states including California and Florida but are not designated as class actions.

LSC-funded attorneys can also work to change agency practices. You can advocate with administrative officials and represent clients in efforts to change the practices of institutions and agencies so that they are more responsive to the needs of the poor.

For example, you may seek to improve access to government services for disabled persons or persons residing in isolated rural areas or institutions. LSC-funded attorneys can work on school reform or advocate to ensure that a publicly funded job-training program provides effective training to participants.

While legal services programs cannot bring class action lawsuits, LSC-funded programs can pursue individual claims, multiple individual claims and group representation and engage in a variety of actions that have impact and address the concerns facing low-income communities.

And legal services programs can be engaged in what Gary Bellow called focused case representation to target policies and practices for particular agencies or other offenders with repeated litigation.

Class Actions

While a variety of approaches can be used to effectively engage in systemic representation in the courts, there may be instances where the only effective tool to address a widespread problem is through the filing of class action litigation. Although LSC-funded legal aid programs are prohibited from representing the class or named plaintiffs or otherwise actively participating in such litigation, programs can still contribute to the effort.

First, an LSC program can transfer non-LSC funds - private, public or IOLTA funds - to a non-LSC funded program, a pro bono attorney or law firm or to a public interest law organization that engages in litigation to support a class action that the program could not bring itself.

In addition, LSC-funded legal aid programs can identify and refer individuals who might be appropriate class representatives to other lawyers or organizations that could bring the litigation.

Finally, LSC-funded programs can also provide information on patterns of illegal practices to government authorities that can bring class action lawsuits addressing the offending practices.

Attorneys' Fees

An LSC-funded program may take a case where attorneys' fees are available as long as it does not request fees for its work and it does so consistent with the rules on representation in a fee-generating case.

LSC-funded programs can co-counsel with private attorneys in fee-generating cases.

LSC-funded programs may also co-counsel with, or refer cases to, private attorneys or other public interest organizations who undertake the representation on a pro bono basis, and those attorneys may seek fees for their work on the cases, preserving attorneys' fees as a strategic tool for litigation undertaken with legal services program participation.

Representing Community Groups

As part of aggressive, systemic advocacy, all legal aid advocates can and should work with community groups and with organizers to help communities establish their own institutions and solve their own problems.

LSC funds may be used for group representation including welfare-rights and tenant groups.

Moreover, non-LSC funds can be used to represent any group, non-profit corporation or community development entity that does not fit within the LSC financial eligibility standards.

Although the LSC Act includes a restriction on organizing, LSC-funded programs and their employees are permitted to provide legal advice and assistance to eligible individuals and groups who desire to plan, establish or operate organizations.

Moreover, this prohibition does not apply to IOLTA or public funds. Thus, an LSC funded attorney could use public or IOLTA

funds to organize a labor union for factory workers or a tenants' association in a low-income housing project.

POLICY ADVOCACY

Legal services attorneys, including LSC-funded attorneys, may and should play a significant role before legislative and administrative bodies and other bodies that make law or policies affecting low-income persons to make sure that such low-income persons are at the table when decisions affecting them are made.

State and local level policy advocacy is critically important in an era of devolution and increased state discretion where key decisions affecting poor people are being made at the state and local levels.

Lobbying and rulemaking

While under the 1996 restrictions and the implementing regulations, there are restrictions on lobbying and rulemaking, the fact is that LSC-funded advocates can undertake much critical policy advocacy.

LSC-funded advocates are explicitly permitted to use non-LSC funds to respond to a request from a legislator or other government official to testify on a proposed bill or provide information, analysis or comments on such a bill.

If an LSC-funded program receives a written invitation from the chair of legislative committee that is considering a predatory

lending bill to testify on the lending practices of financial institutions in low-income communities, it may do so as long as the work is wholly supported by non-LSC funds.

LSC-funded attorneys can advise a client of the client's right to communicate directly with an elected official. Thus, an LSC-funded attorney could advise individual clients or community groups to speak to their state legislator or city councilman regarding measures that may affect them.

The general restriction on rulemaking only applies to participation in efforts to influence the formal process for the adoption of generally applicable rules, regulations or guidelines, including formal notice and comment rulemaking.

But, LSC-funded programs can use non-LSC funds to prepare and submit written or oral comments in such a rulemaking on the same terms as other members of the public. LSC-funded attorneys can participate in a wide range of advocacy around most agency rules, regulations, guidelines, policies and procedures, using either LSC or non-LSC funds, depending on the circumstances.

In addition, agency policies or procedures that are not adopted through such a formal procedure are not covered by the restriction, and LSC-funded programs may work to influence such policies and practices.

Thus, an LSC-funded attorney can use non-LSC funds to submit written comments or testify in a public hearing before a state's consumer protection agency on regulations to implement the

predatory lending bill passed by the legislature, and could use any funds to work with agency officials to develop procedures to ensure that the regulations are appropriately implemented once they are promulgated.

SYSTEMIC MEDIA ADVOCACY

All legal aid programs, including LSC-funded legal aid programs, may and should make effective use of print and broadcast media to help represent the interests of their clients and the low-income community that they serve.

Much systemic media advocacy, does not involve controversial activities. But some does.

LSC-funded attorneys can analyze legislation or regulations, explain the problems or issues addressed by the measure, the changes that it would make in existing law, who the measure would affect, or the impact of the measure on the low-income community.

LSC-funded attorneys can use the media to inform the client community about pending or proposed legislation and regulations, and can advise clients about their rights to communicate directly with an elected official.

Programs can publish and disseminate newsletters, reports or other written materials that track and analyze legislative developments, talk to reporters about the impact of legislation or regulations on their clients, write letters to the editor or op-ed

pieces about problems in the low-income communities that can be addressed by changes in the law.

However, programs receiving LSC funding are prohibited from using any funds to engage in grassroots lobbying.

In order for a communication to be considered grassroots lobbying, it must either explicitly urge the recipient to contact a legislator or agency about the measure or include some other information or device that is designed to encourage the recipient to make the contact, such as the address, telephone number or e-mail for a legislator, or a petition, postcard or other means for the reader to communicate support or opposition for the measure to the decision-maker.

But, I want to stress again, the grassroots lobbying restriction is not a bar to communicating with the public about pending legislations or regulations.

EDUCATION AND OUTREACH

All legal aid programs, including LSC-funded programs, may and should engage in outreach and community legal education.

LSC funded attorneys may educate and inform low-income persons of their legal rights and responsibilities and the options and services available to solve their legal problems and promote their legal interests.

LSC-funded attorneys may represent an eligible client who seeks legal assistance as a result of information gleaned from those activities.

The restriction on solicitation, is very narrow and only prohibits representation of a client when that representation results from a legal services program's unsolicited advice to the potential client (through a face-to-face or personal communication) to obtain counsel or take legal action.

In practice, the restriction applies only to the unusual situation where a staff member makes a personal appeal to a specified individual urging that individual to become a client of the LSC-funded program.

COORDINATION, COLLABORATION AND PARTNERSHIPS

A central theme of this talk and of this conference is that LSC and non-LSC funded programs and organizations, must work together as partners – must coordinate and collaborate.

There is no question that coordination, collaboration and working in partnership with non-LSC funded entities that engage in restricted work can be done, even though some in our community believe it cannot.

LSC-funded legal aid programs may coordinate their activities and collaborate with non-LSC funded entities and develop effective partnerships with a variety of community-based organizations.

All advocates, including LSC-funded legal aid staff, may train clients, human service organizations and community organizations about existing laws and regulations and about pending or proposed laws or regulations.

All advocates, including LSC-funded staff, may participate in associations, federations, coalitions, networks, alliances or similar entities and may participate on local governmental or private sector task forces and collaborative initiatives.

For example, staff could participate in cooperative efforts to enforce the housing code, the Community Reinvestment Act, fair housing laws, civil rights laws and other laws enacted to protect low-income persons, so long as they do not engage in prohibited lobbying or rulemaking.

With regard to joint advocacy efforts, LSC-funded program staff may communicate about problems of clients with the non-LSC funded entities.

Staff may analyze the impact on their clients of existing policies or pending or proposed legislation or regulations and share analysis with the non-LSC funded entity.

Staff may participate in discussion and task forces with the non-LSC funded entities and discuss legislative and regulatory issues.

Staff may advise the non-LSC funded entities about the most important issues facing their clients and how legislative or regulatory change could address such critical issues, so long as

they don't themselves engage in lobbying or rulemaking in a way that runs afoul of the restriction.

Staff may work with non-LSC funded entities on comments to proposed rules using non-LSC funds. If asked to testify or provide information to a legislative or administrative official, staff may coordinate testimony or information with non-LSC funded entities.

CONCLUSION

Legal Aid attorneys who work for LSC-funded programs can effectively engage in all four key aggressive advocacy activities : affirmative litigation; policy advocacy; media advocacy; and aggressive outreach and education.

Now lets turn out attention for the remainder of this conference to what areas of work we need to pursue to end poverty and bring equal justice to all low-income persons in this country.