

# Race-Based Advocacy: The Role and Responsibility of LSC-Funded Programs

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This issue of CLEARINGHOUSE REVIEW makes a compelling case for increasing race-based advocacy strategies throughout the legal aid system. The intersection of race and poverty lies at the heart of much of the work that legal aid lawyers do, and addressing the problems of low-income communities of color requires going beyond traditional race and poverty strategies. It also calls for advocacy strategies that address the challenges that are unique to these communities.<sup>1</sup> As the articles in this issue make clear, legal aid lawyers must pay attention to racial discrimination and use the tools that are available from both civil rights and antipoverty arsenals.

The responsibility to examine race and racial discrimination in housing, employment, health care, public benefit programs, welfare-to-work initiatives, education, and consumer law does not fall solely on the 500 or so legal aid programs that the Legal Services Corporation (LSC) does not fund. The 170 programs that accept LSC funding have an equal responsibility to pursue strategies explicitly using civil rights and related laws. In states where few other legal aid programs exist, LSC-funded programs must take the lead. As LSC-funded programs plan and set priorities, engage in education and outreach,

and devote their resources to representation, litigation, and a range of community and economic development work, they must be explicitly aware of the effect of race on community dynamics and access to economic resources. LSC-funded programs must also work closely with, and use the skills and resources of, non-LSC-funded legal aid providers, pro bono programs, private lawyers, civil rights advocates, and community-based organizations in order to carry out their responsibility to represent low-income people and communities of color.

Staff of LSC-funded programs sometimes do not explore the full range of civil rights and antipoverty strategies because of a mistaken belief that LSC regulations preclude effective race-based advocacy. In this article we examine what LSC-funded programs *may* do under the regulatory framework within which they must operate, and we highlight examples of how the programs may pursue race-based advocacy strategies to protect the rights, advance the interests, and enhance the lives of the members of communities of color within the confines of the restrictions. Other articles in this special issue of the REVIEW include many other examples.

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<sup>1</sup> John A. Powell, *Race and Poverty: A New Focus for Legal Services*, 27 CLEARINGHOUSE REV. 299 (Special Issue 1993).

## I. The LSC Restrictions

In 1996 Congress imposed the latest round of restrictions on LSC-funded programs.<sup>2</sup> Although those restrictions, along with a 30 percent cut in funding, left LSC-funded programs with less capacity and flexibility to represent low-income clients effectively, most of the work that is necessary to address poor people's systemic problems, including problems that racial discrimination causes, is still permissible.

To be sure, the LSC restrictions are problematic and limit specific kinds of advocacy in ways that go far beyond previous limitations on legal aid activities.<sup>3</sup> Many of the new restrictions are inconsistent with fundamental notions of equal justice for all. Although these restrictions create many barriers, we must recognize that LSC-funded programs may still engage in effective and aggressive advocacy. Legal aid programs have found that they may still do most of the work that is essential to the low-income community within the confines of the framework Congress imposed in 1996.<sup>4</sup>

The full range of permissible advocacy is not explicitly set out in the LSC statute and regulations, where the focus is on the negative, that is, what activities are prohibited. Thus, the fundamental principle that must guide advocates is the following: *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.* While the restrictions may require a program to think carefully about how to address an issue, fear of violating the restrictions should not hamstring pursuit of issues that are important to the program's clients. In the case of communities of color, these issues include protection from discrimination on the basis of race, ethnicity, and language.

## II. Race-Based Advocacy

For the purposes of this article, race-based advocacy is that which actively challenges both current and historical barriers that impede equal access to opportunity and

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<sup>2</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 [hereinafter Omnibus Continuing Resolution]. See section 504(a). Subsequent appropriations acts have incorporated the restrictions set out in section 504(a) with only minor revisions.

<sup>3</sup> Since Congress passed the Legal Services Corporation (LSC) Act in 1974 and the Corporation was created in 1975, Congress has limited the activities of recipients of LSC funding. Although the 1996 restrictions were a watershed, federally funded legal aid programs have always operated within a web of legislative and regulatory restrictions that have constrained to some degree their ability to provide a full range of legal assistance to all eligible clients. The original LSC Act included, among other provisions, limitations on fee-generating cases, political activities, lobbying and rule making, training and organizing, class actions, representation of juveniles and defendants in criminal proceedings, and school desegregation, selective service, and certain abortion cases. In 1977 Congress eliminated the limitation on juvenile representation and relaxed some of the original Act's other limitations, including permitting expanded representation before legislative and rule-making bodies. Between 1979 and 1995 Congress acted through the appropriations process to impose additional restrictions on lobbying and rule making, grass-roots lobbying, training, class actions, abortion, and aliens. On several occasions the LSC board crafted new constraints on program activity through the regulatory process, including a restriction on cases involving redistricting and expanded limitations on lobbying and rule making.

<sup>4</sup> The 1996 restrictions addressed a range of issues. Some, such as the prohibition on participation in class actions, significantly expanded the scope of previous limitations. Others, such as the prohibition on attorney fees and prisoner representation, were imposed for the first time. Congress also, for the first time, restricted recipients' use of non-LSC public funds, including Interest on Lawyers Trust Account grants, and applied most of the 1996 restrictions to all of a program's activities, regardless of the source of funding. The statute included some exceptions. The Kennedy Amendment allowed use of non-LSC funds to represent aliens who were victims of domestic violence, and the Cohen-Bumpers Amendment permitted programs to use non-LSC funds to respond to requests by legislators and to comment in public rule making. Some of the other non-advocacy restrictions, including those on the payment of dues and fees, applied only to LSC funds.

advancement by people of color.<sup>5</sup> This approach encompasses two closely related but different strategies. The first is antidiscrimination work using the numerous civil rights statutes that prohibit racial, ethnic, or language discrimination in substantive areas that include housing, lending, contracts, property, federally funded programs, and employment.<sup>6</sup> State antidiscrimination statutes also create various causes of action and remedies for discrimination on the basis of race and ethnicity; those statutes provide valuable tools that legal aid programs may use effectively, within the restrictions, on behalf of their clients.

The second strategy is advocacy that identifies and prioritizes the concerns of communities of color and develops strategies that may not rely explicitly on antidiscrimination legal theories but nonetheless specifically address the effects of discrimination. Advocacy of this sort requires community involvement. Only a partnership between advocates and the community will make it possible to identify and overcome systemic discrimination and barriers to community empowerment, participation in democratic processes, and income generation and to promote opportunities for economic development and institution building.

For example, most low-income individuals and communities experience significant barriers to obtaining employment, social services, job training, child care,

housing, health care, quality education, and many other aspects of the American dream. The barriers are often higher for low-income individuals and communities of color because of their race or ethnicity. Legal aid programs advocating on behalf of low-income clients of color should raise additional legal questions to unearth potential discrimination claims on the basis of race, ethnicity, and language and pursue the claims when appropriate and possible. For example:

- The inability of welfare recipients of color to receive training and education as a part of welfare-to-work programs may be due to inadequate agency resources or misguided policies, or it may be due to race, ethnicity, or language discrimination.<sup>7</sup> Race-based advocacy strategies may range from filing a discrimination complaint under Title VI, to training welfare office workers, to filing articles of incorporation and providing other transactional services to grass-roots welfare rights organizations.

- A building owner's decision for business reasons to convert all of his Section 8 apartment units to market-rate units may have a disparate impact on black and Latino renters.<sup>8</sup> Race-based advocacy strategies may range from filing a discrimination complaint under Title VIII, to representing tenant groups in the purchase of an apartment development, to submitting comments on Section 8 regu-

<sup>5</sup> While we focus in this article on race-based advocacy, many of our points may also apply, in varying degrees, to antidiscrimination work in the areas of gender, age, sexual orientation, familial status, religion, disability, and other statuses. Antidiscrimination advocacy should not be limited to legal handles based explicitly on race but should include all strategies that would lead to positive change in communities of color.

<sup>6</sup> 42 U.S.C. §§ 3601-20, 3631 (1994 & Supp. III 1997), *as amended by* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988); 15 U.S.C. § 1691 (1994 & Supp. III 1997) (Equal Credit Opportunity Act lending); 42 U.S.C. § 1981 (1994) (contracts); 42 U.S.C. § 1982 (1994) (property); 42 U.S.C. § 2000(d) (1994) [hereinafter Title VI] (federally funded programs); and 42 U.S.C. §§ 2000e-2000e17 (1994 & Supp. III 1997) (employment).

<sup>7</sup> See Steve Savner, *Welfare Reform and Racial/Ethnic Minorities: The Questions to Ask*, POVERTY & RACE, July-Aug. 2000, at 3, available at [www.prrac.org/newslet.htm](http://www.prrac.org/newslet.htm); Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and While Welfare Clients*, 5 HARV. J. OF AFRICAN AM. PUB. POL'Y, 27 (1998); SCHOLAR PRACTITIONER PROGRAM OF THE DEVOLUTION INITIATIVE, W.K. KELLOGG FOUND., RACE AND ETHNIC DISPARITIES IN THE ERA OF DEVOLUTION: A PERSISTENT CHALLENGE TO WELFARE REFORM, A REPORT OF RESEARCH FINDINGS (2001).

<sup>8</sup> Florence Wagman Roisman, *Housing, Poverty, and Racial Justice: How Civil Rights Laws Can Redress the Housing Problems of Poor People*, in this issue.

lations published for public comment in the *Federal Register*.

■ Predatory lenders' fraudulent inducements into unfair lending arrangements may target all vulnerable individuals or they may be concentrated in communities of color.<sup>9</sup> Race-based advocacy strategies may range from a complaint that includes fair housing and credit discrimination claims under Title VIII and the Equal Credit Opportunity Act, to the formation of financial institutions in underserved communities, to establishing a credit counseling program for community residents.<sup>10</sup>

An aggressive advocacy agenda should include direct representation raising race discrimination claims; direct representation addressing the effects of race discrimination through non-discrimination-based causes of action; and outreach, education, community empowerment, and economic development activities that identify and address race discrimination and its effects. These activities should acknowledge the integral role of race in the development and maintenance of structural barriers to advancement. By employing innovative strategies that address economic barriers in communities of color and being vigilant regarding race and other forms of discrimination, legal aid programs can

simultaneously help communities build avenues to greater opportunity and protect individuals from discrimination.

Being alert to cases of discrimination not only protects the rights of those who experience discrimination but also holds the potential for identifying systemic problems affecting all poor people. *The Miner's Canary*, a recent book by Lani Guinier and Gerald Torres, posits that the difficulties that racial and ethnic minorities experience serve as the "miner's canary"—an alarm system that alerts us to the system's fundamental flaws affecting disfranchised people of all races.<sup>11</sup> Paying attention to circumstances where the system deliberately or inadvertently fails people of color offers opportunities to develop strategies across racial and ethnic groups to change the system so that it will work affirmatively for the benefit of the entire low-income community.

### III. Advocacy in the Courts and Other Adjudicatory Bodies

Legal aid programs that accept LSC funds may use race-based advocacy in the courts and before other adjudicatory bodies to achieve significant systemic effects. As Gary Bellow and others argue, individual representation can have long-term systemic effects if it focuses on particular issues and targets.<sup>12</sup> While LSC-funded

<sup>9</sup> Deanne Loonin, *Race Discrimination and Consumer Law: What Legal Services Can Do to Attain Justice in the Marketplace*, in this issue.

<sup>10</sup> *Id.*

<sup>11</sup> LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

<sup>12</sup> See Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA BRIEFCASE, Aug. 1977, at 106; Gary Bellow & Jeanne Charne, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633 (1995). A focused representation strategy involves careful review of existing cases to determine whether typical responses by adversaries, officials, or institutions need to be changed. The program would then analyze the importance of the change to clients; the number of clients seeking representation who face the same problem; possible results and the potential impact of change; and the broader strategies available to address the problem and still provide service in individual cases. Next the program would select one or two areas of focus and develop ways to increase both caseload (making it sufficiently large to have some chance of achieving the desired change) and the aggregate impact of a change in the way cases are handled. E.g., hearings at a particular welfare office may routinely be followed by conversations with the worker involved concerning the practice that has been challenged or by circulating appellate or hearing decisions touching on the agency's practice to the office's staff. Such low-key challenges can sometimes affect future behavior and strengthen the influence of welfare office staff more sympathetic to the legal aid position. The program should monitor the results of these strategies. It may face predictable reactions, many of which can be anticipated. Initial strategies will need to be adjusted as circumstances change or as efforts fail, succeed, or hit roadblocks that cannot easily be dislodged.

programs may not bring class action lawsuits, they may pursue single individual claims, multiple individual claims, and group representation, engaging in a variety of effective actions to address the concerns of communities of color.<sup>13</sup> Moreover, LSC-funded programs may, under the regulations, pursue discrimination cases by using statutes with fee-shifting provisions, as long as they do not request fees and attempt to refer the cases to private attorneys.<sup>14</sup>

#### A. Single and Multiple Individual Legal Claims

Legal aid providers may represent single individuals, multiple individuals in multiple cases with single plaintiffs, or multiple individuals as joint plaintiffs in a single case. Advocates may pursue racial, ethnic, or language discrimination claims in any of these cases. Special projects focused on identifying discrimination can leverage federal agency resources to investigate and successfully resolve cases of racial, ethnic, and language discrimination. The Legal Assistance Foundation of Metropolitan Chicago established broad relief for African Americans in Chicago through its Civil Rights Investigation

Project. The program brought an action on behalf of two African American employment discrimination testers.<sup>15</sup> The plaintiffs alleged racial discrimination in hiring by a Chicago car dealership that offered employment to white testers and gave only cursory review to and then

### *Advocacy activities should acknowledge the integral role of race in the development and maintenance of structural barriers to advancement.*

rejected African American testers who were comparable in skill, experience, and presentation. The foundation settled the case; it obtained a consent decree that required proactive recruitment of African American applicants, diversity training and reporting, and continued random testing for a three-year period.<sup>16</sup>

The Legal Aid Society of Albuquerque pursued discrimination complaints on behalf of Cuban tenants through its Fair Housing Project funded by the U.S. Department of Housing and Urban Development (HUD).<sup>17</sup> The project sent testers posing as potential renters into a

<sup>13</sup> Omnibus Continuing Resolution § 504(a)(7), *supra* note 2. See *infra* text accompanying notes 38–39 for a discussion of the restriction on class actions. The term does not include any action not specifically designated as a “class action” under court rule or statute. The restriction does not prohibit representation of individuals, even when the result would affect broad categories of people. LSC-funded programs are free to represent organized groups and multiple individual clients who have similar legal problems.

<sup>14</sup> Under the 1996 restrictions, LSC-funded programs are prohibited from claiming, collecting, or retaining attorney fees. An LSC-funded program may, however, take a case in which attorney fees are available as long as it does so consistent with the rules on representation in a fee-generating case and it does not request fees for its work. 42 U.S.C. § 2996(b)(1) (2001); 45 C.F.R. § 1609(2001). See *infra* text accompanying notes 35–37 for a discussion of the restriction on fee-generating cases.

<sup>15</sup> *Kyles v. J.K. Guardian Sec. Servs. Inc.*, 222 F.3d 289 (7th Cir. 2000).

<sup>16</sup> *Horton v. Metro Toyota Inc.*, No. 99-C-0012 (E.D. Ill. May 10, 2001) (approving consent decree); Two African American Employment Discrimination Testers, Represented by Legal Assistance Foundation of Metropolitan Chicago, Settle Race Discrimination Suit Against Metro Toyota, Brennan Ctr. for Justice Legal Servs. E-Alert (June 1, 2001), at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category). For more information, contact LeeAnn Lodder, [llodder@lafchicago.org](mailto:llodder@lafchicago.org).

<sup>17</sup> *United States v. Sunburst Mobile Home Village*, No. CIV-01-1202MV (D. N.M. filed Oct. 18, 2001); Legal Aid Society of Albuquerque’s Fair Housing Project Persuades U.S. Department of Justice to Sue Mobile Home Park in Albuquerque, Brennan Ctr. for Justice Legal Servs. E-Alert (Oct. 12, 2001), at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category); Guillermo Contreras, *Justice Dept. Suing City Home Park*, ALBUQUERQUE J., Oct. 25, 2001, at D1; Interview with Rich Weiner, Legal Aid Society of Albuquerque (Mar. 2002).

mobile home park to test for discrimination by the park owners. The Legal Aid Society filed discrimination complaints with HUD on behalf of two former tenants of Cuban descent who were allegedly evicted or threatened with eviction, based on their national origin, from the mobile home park. The investigation and complaints led HUD to file a federal discrimination lawsuit against the park owners.

Complaints to the civil rights office of any of several federal agencies on behalf of multiple individuals or groups can leverage federal resources and achieve widespread benefits for communities of color.<sup>18</sup> The Legal Aid Foundation of Los Angeles partnered with the Asian Pacific American Legal Center, the Western Center on Law and Poverty, and San Fernando Valley Neighborhood Legal Services (now Neighborhood Legal Services of Los Angeles County) to address the failure, in violation of Title VI, of the county welfare office to provide applications, notices, and translation services in languages spoken by significant portions of the local population.<sup>19</sup> Advocates filed a complaint with the U.S. Department of Health and Human Services Office for Civil Rights against the Los Angeles County Department of Public Social Services on behalf of individuals—one Asian, one Latino, and one anonymous claimant, each of whom had limited English proficiency—and the Asian Pacific American Legal Center. The complaint included allegations of racial steering away from better-paying jobs, education, and training.<sup>20</sup> The case is in settlement negotiations and can result in significant statewide welfare system

changes that will benefit racial and ethnic minorities.

Predatory lending practices grow out of a long history of racially discriminatory barriers to credit for people and communities of color in the United States.<sup>21</sup> Recognizing this background, the Legal Assistance Foundation of Metropolitan Chicago has actively challenged predatory lending in poor communities. A case brought on behalf of one individual both kept the client in her home and exposed the actions of a predatory lender. An older African American woman who was on the verge of losing her home to foreclosure approached the foundation. Advocates determined that she had been the target of successive sales pitches from subprime lenders and brokers who convinced her to enter loan agreements at exorbitant mortgage rates. By pursuing her case and combining it with effective media coverage, the foundation renegotiated the client's loan to a level she could afford; the foundation's involvement also ultimately led to the indictment of the broker for fraud against the client and several other elderly African American homeowners.<sup>22</sup> While the case did not include a specific claim of race discrimination, it helped stop illegal conduct that had targeted the elderly African American community in Chicago.

Farmworker issues are often at the nexus of race and poverty. Farmworker legal aid projects that target farmers' unfair and abusive practices recognize the need for specific strategies to address the circumstances of poor migrant workers who are disproportionately people of color and often have limited English proficiency.

<sup>18</sup> For a discussion of how to file an Office for Civil Rights complaint, see generally Randal S. Jeffrey et al., *Drafting an Administrative Complaint to Be Filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 35 CLEARINGHOUSE REV. 276 (Sept.–Oct. 2001).

<sup>19</sup> For a discussion of Office for Civil Rights complaints on behalf of clients with limited English proficiency, see Victor Goode & Phyllis Flowers, *Invisibility of Clients of Color: The Intersection of Language, Culture, and Race in Legal Services Practice*, in this issue.

<sup>20</sup> See *CalWORKs v. L.A. County Dep't of Pub. Soc. Servs.*, No. 09-00-3082 (U.S. Dep't of Health & Human Servs. Office for Civil Rights filed Dec. 16, 1999). The case is currently in settlement negotiations. For more information, contact Silvia Argueta, Legal Aid Foundation of Los Angeles, [sargueta@lafila.org](mailto:sargueta@lafila.org).

<sup>21</sup> See Ira Rheingold et al., *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America*, 34 CLEARINGHOUSE REV. 642 (Jan.–Feb. 2001).

<sup>22</sup> *Id.*

Claims on these workers' behalf may not be based explicitly on race, but a racial subtext is nonetheless present. For example, the Indiana Legal Services Migrant Farmworkers Project has achieved several victories for individual Latino farm workers cheated by their employers. Since 1998 the program has filed two lawsuits and settled at least eight cases against farmers involving issues such as unpaid wages and inadequate housing.<sup>23</sup>

Sometimes, however, discrimination is specifically at issue. Florida Rural Legal Services has brought several cases on behalf of Haitian workers who were subjected to discrimination in hiring on the basis of race and national origin. In one case the plaintiffs were thirty-nine Haitian workers who were paid less than their Latino coworkers and were fired when they complained about the disparity.<sup>24</sup> In another case the program's representation of multiple individuals led the Equal Employment Opportunity Commission to file a discrimination case against a vegetable packing plant when some forty Haitian workers were laid off in favor of Latino workers.<sup>25</sup> Clients received substantial judgments through settlement and mediation.

California Rural Legal Assistance helped residents recover against Riverside County when mobile home parks owned and occupied by Latinos were targeted for selective enforcement of health and safety codes.<sup>26</sup> The program filed housing discrimination complaints with HUD and achieved a \$21 million settlement for twenty-four Latino farmworker families. The settlement provided almost \$16.1 million in loans and grants for community-development and approximately \$747,000 to the families. The U.S. Department of Agriculture and the city of Coachella, where the incident took place, also promised to provide \$4.2 million in loans and grants to the farmworker community. In addition to economic remedies, the settlement, in an attempt to prevent future abuse, required changes in code enforcement and fair housing training for code enforcement staff.<sup>27</sup>

## B. Group Representation

Group representation is another effective way to address the concerns of members of low-income communities of color without filing a class action.<sup>28</sup> For example, the Legal Aid Service of Broward County, Florida, filed racial discrimination

<sup>23</sup> Four Texan Migrant Farmworkers, Represented by Indiana Legal Services Organization Sue Employer for Back Wages, Proper Wage Reporting and Adequate Housing, Brennan Ctr. for Justice Legal Servs. E-lert (July 9, 2001), at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category); Telephone interview with Roderick Bohannon, Migrant Farmworker Project, Indiana Legal Services (Mar. 2002).

<sup>24</sup> *Nazaire v. Sugar Farms Coop.*, No. 00-8348-CIV-ZLOCH (S.D. Fla. filed Apr. 25, 2000); Haitian Cane Planters File Bias Lawsuit Against Sugar Company, Brennan Ctr. for Justice Legal Servs. E-lert (Apr. 27, 2000), at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category). For more information, contact Sally Schmidt, Florida Rural Legal Services, [Sally.Schmidt@FRLS.org](mailto:Sally.Schmidt@FRLS.org).

<sup>25</sup> *EEOC v. Sunrich of Immokalee*, No. 00-CV-264-FTM-29b (M.D. Fla. filed July 19, 2000); Telephone interview with Lisa Butler, Florida Rural Legal Services (Mar., 2002). For more information, contact Sally Schmidt, Florida Rural Legal Services, [Sally.Schmidt@FRLS.org](mailto:Sally.Schmidt@FRLS.org).

<sup>26</sup> *In re Hernandez*, No. 09-99-11-0007-300 (Title VI voluntary compliance agreement), No. 09-98-2574-8 (Title VIII enforcement agreement) (HUD Office of Fair Hous. & Equal Opportunity filed Sept. 22, 1998); LSC-Funded California Rural Legal Assistance Complaints Prompt \$21 Million Settlement for Hispanic Farm Worker Families Alleging Bias in Health and Safety Code Enforcement, Brennan Ctr. for Justice Legal Servs. E-lert, May 23, 2000, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category). For more information contact Ilene Jacobs, California Rural Legal Services, [ijacobs@crla.org](mailto:ijacobs@crla.org).

<sup>27</sup> *Supra* note 26.

<sup>28</sup> Group representation is permitted under 45 C.F.R. § 1611.5(c) (2001), the LSC regulation on financial eligibility. The group must be composed primarily of financially eligible members and must show that it cannot afford to pay for legal assistance. LSC recipients may use non-LSC funds to provide assistance to financially ineligible group clients.

claims against the U.S. Environmental Protection Agency, HUD, the Florida Department of Environmental Protection, and the City of Fort Lauderdale on behalf of two African American public housing tenant groups. The complaint alleged that these agencies segregated African American tenants in housing projects built next to a site known to be toxic and made insufficient efforts to clean up the area. The case was ruled premature because the cleanup was ongoing, but plaintiffs have appealed.<sup>29</sup>

South Brooklyn Legal Services has, within LSC restrictions, pursued several aggressive advocacy strategies on behalf of individuals and groups seeking significant impact for the benefit of communities of color.<sup>30</sup> In *Kent Avenue Block Association v. New York City Board of Standards and Appeals* the program represented a community association in its challenge to a city agency's approval of zoning regulations that allowed the development of condominiums in an area occupied by several manufacturing companies.<sup>31</sup> Plaintiffs alleged that the zoning and resulting construction would lead to the elimination of many existing jobs in the predominantly African American and Latino community and that the proposed construction of new housing was racially discriminatory because it would not be marketed to or financially available to community residents. Through its representation of the community association, the program was able to pursue a strategy intended to pro-

vide broad relief to members of a community affected by a common problem of racial discrimination.<sup>32</sup>

The Camden Regional Legal Services community and economic development unit followed the lead of its community organization client and developed an environmental justice practice after community leaders determined that environmental problems were a high-priority-action item threatening the health and safety of their community. Cocounseling with the Public Interest Law Center of Philadelphia and the Center on Race, Poverty and the Environment, the program filed a civil rights lawsuit on behalf of South Camden Citizens in Action against the state Department of Environmental Protection. The complaint alleged that the department's grant of a permit to a cement company discriminated against the African American and Latino residents of the community.<sup>33</sup> This case, which has encountered significant difficulty due to the U.S. Supreme Court's decision in *Alexander v. Sandoval*, is discussed in detail in this issue of the REVIEW.<sup>34</sup> While the disparate impact claims have been dismissed, the intentional discrimination claims remain, and the attorneys intend to continue their efforts to prevent further environmental degradation in this community.<sup>35</sup>

### C. Attorney Fees

Many of the cases discussed thus far rely on statutes that contain fee-shifting

<sup>29</sup> *Broward Garden Tenants Ass'n v. EPA*, No. 01-151-17-II (S.D. Fla. filed July 13, 2001); Legal Aid Service of Broward County Represents Public Housing Tenants in Lawsuit Challenging Inadequate Clean-Up of Toxic Dump, Brennan Ctr. for Justice Legal Servs. E-Alert, Oct. 5, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category). For more information contact Carol Anastasio, Legal Aid Society of Broward County, [CANastasio@legalaid.org](mailto:CANastasio@legalaid.org).

<sup>30</sup> See generally Raun J. Rasmussen, *Affirmative Litigation Under the Legal Services Corporation Restrictions*, 34 CLEARINGHOUSE REV. 428 (Nov-Dec. 2000).

<sup>31</sup> *Id.* at 432; *Kent Ave. Block Ass'n v. New York City Bd. of Standards and Appeals*, 280 A.D.2d 423 (N.Y. 2001).

<sup>32</sup> Plaintiffs won a preliminary injunction but the case was ultimately dismissed by the New York Appellate Division with leave to appeal denied by the New York Court of Appeals. E-mail from Raun Rasmussen, South Brooklyn Legal Services, to Camille D. Holmes (Feb. 2002).

<sup>33</sup> See generally Olga D. Pomar & Luke W. Cole, *Camden, New Jersey, and the Struggle for Environmental Justice*, in this issue.

<sup>34</sup> *Id.*; *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>35</sup> Pomar & Cole, *supra* note 33; E-mail from Olga D. Pomar, Camden Regional Legal Services, to Camille D. Holmes (Feb. 2002).



provisions. For example, Camden Regional Legal Services pursued discrimination claims with cocounsel but did not request attorney fees for its work. The complaint specifically requested the court to “[o]rder the defendants to pay plaintiff’s reasonable expert and attorney’s fees, except that no attorney’s fees are requested by Camden Regional Legal Services.”<sup>36</sup>

An LSC-funded program may take a case in which attorney fees are available as long as it does not request fees for its work and its involvement in the case is consistent with the rules on representation in a fee-generating case. The LSC restrictions generally require a program to make two attempts to refer a fee-generating case to the private bar before undertaking the representation. If the referral attempts are unsuccessful, the program may undertake the representation. Referrals are not required when recovery of damages is not the principal object of the case *and* when attorney fees are likely to be minimal or unavailable. Programs may undertake fee-generating cases without first attempting referrals when the program has determined *either* that, after consultation with private bar representatives, the case is not one of the sort that private attorneys in the area are willing to take without a fee *or* that, based on previous experience, attempts to refer the case would be futile.

No statutory or regulatory provision prohibits LSC-funded programs from cocounseling with private attorneys in fee-generating cases. As in the South Camden case, LSC-funded programs may also

cocounsel with, or refer cases to, private attorneys or other public interest organizations that undertake the representation on a pro bono basis, and those attorneys may seek fees for their work.<sup>37</sup> Thus attorney fees are preserved as a strategic tool for civil rights litigation undertaken with legal aid program participation. Attorneys in a private attorney involvement program may also claim and collect attorney fees for their representation of legal aid clients on a pro bono basis.<sup>38</sup>

#### D. Other Alternatives to Class Actions

A variety of approaches still may be used to represent clients effectively in court on systemic issues. LSC-funded legal aid programs may bring mandamus actions to force officials to take specific actions, seek equitable relief that affects

*LSC-funded programs may cocounsel with or refer cases to pro bono attorneys, who may seek fees for their work.*

groups or categories of persons, or undertake representative actions not designated as class actions—a procedural device available under the laws of certain states, including California and Florida. All these strategies can result in significant changes in law and policy extending beyond specific individual clients.

However, in some instances a class action filed under Rule 23 or a comparable state statute may be the only effective

<sup>36</sup> See *South Camden Citizens in Action v. N.J. Dep’t of Env’t*, 145 F. Supp. 2d 446 (D. N.J.), supplemented by 145 F. Supp. 2d 505 (D. N.J. 2001), rev’d, 274 F.3d 771 (3d Cir. 2001), petition for cert. filed, No. 01-1547 (U.S. Apr. 15, 2002) (Clearinghouse No. 53,759); Interview with Olga D. Pomar, Camden Regional Legal Services (Mar. 2002).

<sup>37</sup> In an August 7, 1997, program letter (Program Letter 97-1), LSC reiterated that private attorneys who cocounsel with a legal aid program on a pro bono basis may seek and recover attorney fees, but only for the portion of the work on the case actually done by the pro bono attorney. The letter also makes clear that LSC recipients may not assign their fees to the pro bono private cocounsel or assist the private cocounsel in claiming what would be the recipient’s share of the fees.

<sup>38</sup> 45 C.F.R. § 1642.4(b) (2001) states that the restriction applies to private attorneys who receive compensation from the recipient under its private attorney involvement program, a judicare program, contract, or other financial arrangement. However, the supplementary information that accompanied the publication of the final regulation clarifies that the prohibition does not apply to pro bono attorneys who receive no compensation from the recipient to handle the representation and that those attorneys may seek and collect attorney fees. 62 Fed. Reg. 25864 (May 12, 1997).

tool to address a widespread problem. Under the LSC regulations, “class action” is defined as “a lawsuit filed as, or declared by a court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rules of civil procedure applicable in the court in which the action is filed.”<sup>39</sup> Although LSC-funded programs may not represent the class or named plaintiffs or otherwise actively participate in such litigation, they may still contribute to the effort. First, even though an LSC-funded program may not bring such an action directly, it may transfer non-LSC funds to another lawyer or entity to enable that lawyer or entity to represent the class.<sup>40</sup> Thus an LSC-funded program may transfer private, Interest on Lawyers’ Trust Account, or other public funds to a pro bono attorney or to another organization that engages in civil rights litigation to support a class action that the program may not bring itself.

LSC-funded programs may identify and refer individuals who may be appropriate class representatives to other lawyers or organizations that may represent the class. LSC-funded programs may also give information on patterns of discrimination to government authorities that may bring class action lawsuits addressing the offending practices. After receiving several reports that a particular lender was targeting elderly African American homeowners in local neighborhoods, South Brooklyn Legal Services notified the New York attorney general, the New York State Banking Department, the U.S. attorney’s office, and the Federal Trade Commission. These referrals resulted in comprehensive

settlements that provided millions of dollars in relief to the targeted homeowners and proposed changes in banking regulations to address the lender’s practices.<sup>41</sup> This kind of attention to threats to local communities of color not only addresses serious problems but also demonstrates to the community the legal aid program’s concern and sensitivity to issues of race and ethnicity and thus helps build trust and strengthen long-term relationships.<sup>42</sup>

### E. Alien Representation

Because so many recent immigrants to this country are people of color, the LSC restriction on representing certain aliens has significant implications for race-based advocacy.<sup>43</sup> We must emphasize first that LSC-funded programs may still represent many aliens, including those who are lawful permanent residents; those who are married to a U.S. citizen, the parent of a U.S. citizen, or an under-21 unmarried child of a U.S. citizen (assuming they have applied for adjustment of status to permanent residency and such application has not been denied); and those granted asylum, refugee status, conditional entrant status, or withholding of deportation. LSC-funded programs may also provide representation on employment contract issues, but not on other issues, to migrant farmworkers with H-2A visas.

The following are two examples of legal aid program representation of aliens who have applied or are applying for permanent resident status. The Legal Assistance Foundation of Metropolitan Chicago joined with the Midwest Immigrant and Human Rights Center of Heartland Alliance to file a federal lawsuit against the Immigration and Natural-

<sup>39</sup> 45 C.F.R. § 1617.2(a) (2001). *See supra* note 13.

<sup>40</sup> See 62 Fed. Reg. 27697 (May 21, 1997) for a discussion of the effect of 45 C.F.R. § 1610 on the transfer of non-LSC funds.

<sup>41</sup> Rasmussen, *supra* note 30, at 439.

<sup>42</sup> Rheingold et al., *supra* note 21, at 653.

<sup>43</sup> Omnibus Continuing Resolution § 504(a)(11), *supra* note 2; 45 C.F.R. § 1626 (2001). As this article goes to press, LSC is engaged in a negotiated rule-making effort to clarify Part 1626, reduce administrative burdens on recipients, and incorporate changes that have been made in the law and various interpretations of the rules that LSC has issued since the rule was adopted in 1997. What is not clear is what impact any revisions LSC ultimately adopts will have on legal aid programs’ ability to undertake race-based advocacy affecting the rights of ineligible aliens.

ization Service (INS); the suit alleged fraud against nineteen immigrants.<sup>44</sup> The immigrants faced deportation because persons posing as immigration consultants prepared their permanent residency applications and submitted the applications before the immigrants were eligible for permanent residency. The Chicago INS office allegedly accepted the applications, kept the filing fees, and then used the information in the applications to start deportation hearings.<sup>45</sup> Such advocacy is critical to protecting the rights of immigrants seeking permanent status and can have wide-ranging effect.

California Rural Legal Assistance achieved a negotiated settlement with an employment service that refused to hire an immigrant with valid permanent alien documentation.<sup>46</sup> The program filed discrimination charges with the Office of Special Counsel for Immigration Related Unfair Employment Practices at the U.S. Department of Justice. Under the terms of the settlement, the temporary employment service admitted no wrongdoing but paid \$11,000 in civil penalties and back pay to the client.<sup>47</sup>

The LSC restriction bars LSC-funded programs from providing legal assistance “for or on behalf of” an ineligible alien.<sup>48</sup> Direct representation of individuals who

are victims of racial discrimination clearly may be undertaken only on behalf of citizens or eligible aliens. Nevertheless, LSC-funded programs may, in numerous circumstances, undertake representation affecting persons of color who are also ineligible aliens. Under the current rule, an LSC-funded program may provide legal assistance to an eligible client even if that assistance benefits an ineligible alien as long as the assistance affects a specific legal right or interest of the eligible client. Thus the program may represent a citizen child in an education discrimination case even if the child’s parents are ineligible aliens and will receive some benefit from a successful resolution of the issue. Similarly an LSC-funded program may represent a legal permanent resident alien who was denied credit in a credit discrimination case even though the client’s spouse is an ineligible alien who will also benefit from the representation.

Under current interpretations of Part 1626, programs receiving LSC funding may represent groups without regard to group members’ citizenship or alien status.<sup>49</sup> Thus an LSC-funded program may represent a financially eligible group whose membership includes ineligible aliens in a case that alleges racial or ethnic discrimination or that seeks, for exam-

<sup>44</sup> *Romas v. Ashcroft*, No. 01-C-263, 2002 U.S. Dist. LEXIS 1918 (Feb. 7, 2002); Legal Assistance Foundation of Metropolitan Chicago Files Suit Against INS, Brennan Ctr. for Justice Legal Servs. E-Alert, April 15, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>45</sup> *Id.*

<sup>46</sup> *California Rural Legal Assistance Settles Employment Discrimination Lawsuit*, Brennan Ctr. for Justice Legal Servs. E-Alert, Dec. 11, 1999, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>47</sup> *Id.*

<sup>48</sup> Under section 1626.2(e), “to provide legal assistance on behalf of an ineligible alien is to render legal assistance to an eligible client which benefits an ineligible alien and does not affect a specific legal right or interest of the eligible alien.” Ineligible aliens are those noncitizens who are not included within the categories of aliens who may be provided assistance under sections 1626.5 and 1626.10 of the LSC regulations.

<sup>49</sup> See Letter from Suzanne Glasow, senior assistant general counsel, to David B. Neumeyer, executive director, Virginia Legal Aid Society (Dec. 3, 1999) (on file with Camille D. Holmes) (“A group found to be financially eligible under Part 1611 is not disqualified from eligibility if members of or persons served by the group are not United States citizens or aliens eligible for legal assistance under Part 1626.”). According to the letter, group eligibility is determined solely by the financial status of the group since the client is the group rather than the individual members of the group, and citizenship is an attribute of an individual. As part of the pending negotiated rule making, LSC has indicated that it has reservations about the validity and wisdom of this opinion, but for now it remains the official LSC interpretation.

ple, to improve services or facilities in communities of color that government agencies or financial or other commercial institutions have underserved.

Often cases involve representation of numerous individual clients who have similar legal problems. To the extent that these individuals are ineligible aliens, LSC-funded programs are not permitted to represent them. However, in cases with multiple individual plaintiffs, legal aid attorneys may represent the individuals who are citizens or eligible aliens as co-

solve their legal problems and to protect low-income people's legal rights and promote their legal interests. Educating low-income people of color about their legal rights and changes in laws and policies that directly affect them can help potential clients understand their options and responsibilities, prevent future legal difficulties, and enable low-income persons of color to seek legal assistance at a time when it can be most valuable.

In particular, LSC-funded programs must engage in aggressive, coordinated, systematic, and comprehensive outreach targeted to all segments of the low-income population within their service areas, including hard-to-reach groups, racial and ethnic groups, existing and emerging communities of color, and groups with language or cultural barriers. Such outreach should offer information about legal rights and responsibilities of low-income persons and communities and about the options and services available from legal providers and their partners, particularly in discrimination cases that a program is not able to handle. LSC-funded programs should, through varied means and in varied community settings, provide coordinated, systematic, and comprehensive community legal education that is targeted at critical legal issues. Such initiatives should educate and inform constituencies that have distinct, unique, or disproportionately experienced legal needs, and groups that are hard to reach. Advocates should endeavor to make sure that the education and information are culturally relevant.

For example, the Immigration Law Project of Legal Services of Eastern Missouri developed a response to the needs of the immigrant and refugee communities in the St. Louis area after September 11 by sponsoring a series of "listening programs." The forum gave Afghani, Somali, and Iraqi Americans an opportunity to speak about the challenges they face as Muslims in America; to highlight some of the particular legal problems their communities face; and to develop strategies for building support

*An LSC-funded program may provide legal assistance to an eligible client even if that assistance benefits an ineligible alien.*

counsel with other attorneys who represent the ineligible aliens.

The Kennedy Amendment permits LSC-funded programs to use non-LSC funds to provide legal assistance to certain otherwise ineligible aliens who are victims of domestic abuse to help them escape from abusive situations, ameliorate the effects of abuse, or protect against future abuse.<sup>50</sup> For example, programs may use non-LSC funds to work with abuse victims who are aliens to increase the availability of domestic violence services or challenge law enforcement's failure to respond to domestic violence calls in neighborhoods with large immigrant populations, to increase the availability of emergency shelter and financial assistance to aliens, or to improve access to interpreter services in family court. Any of the outreach programs mentioned in the next section can provide assistance to otherwise ineligible aliens on issues regarding domestic violence.

#### IV. Education and Outreach

LSC-funded programs must engage in outreach to educate low-income persons about their legal rights and responsibilities and the options and services available to

<sup>50</sup> Sec. 502(a)(2)(C) Departments of Commerce, State, Justice and the Judiciary and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

for these communities.<sup>51</sup> This kind of outreach is particularly important in addressing the needs of marginalized communities of color.

Giving people information about their legal rights and responsibilities and the program's services and intake procedures through community legal education, outreach, public service announcements, courthouse clinics, group presentation, and other similar activities is *explicitly permitted* under the LSC regulation that implements the solicitation restriction.<sup>52</sup> An LSC-funded program may represent an eligible client who seeks legal assistance as a result of information gleaned from those activities. The older African American woman who triumphed over her predatory lender asked for help from a legal aid program after learning about her rights at a community education seminar.

The restriction on solicitation, although it has caused significant concern among LSC-funded programs, should have very little actual effect on a program's ability to engage in race-based advocacy.<sup>53</sup> The restriction is very narrow and prohibits representation of a client only when the representation is the result of a legal aid program's unsolicited advice to the potential client (through a face-to-face or personal communication) to obtain counsel or to take legal action. In practice, the restriction applies only to the unusual situation in which a staff member makes a personal appeal to a specific individual urging the person to become a client of the LSC-funded program.

Many legal aid programs have established outreach programs to address the needs of communities of color. The following are only a few examples:

- Philadelphia Legal Assistance conducts outreach to Latinas and Asian women experiencing domestic violence.
- Atlanta Legal Aid's Hispanic Outreach program focuses on domestic violence, children, education, and consumer issues.
- Lane County (Oregon) Legal Aid Service partners with a local Latino organization to provide legal aid outreach to the Spanish-speaking community.
- The Maryland Legal Aid Bureau's Baltimore City office coordinates with a coalition of organizations serving the Latino community to organize monthly intake at a local church.
- The Legal Aid Foundation of Los Angeles has an Asian and Pacific Islander Community Outreach Unit that works closely with that community to identify and meet the legal needs of its members.
- Migrant farmworker projects in several programs provide broad outreach services to communities of color.

These outreach activities serve the important function of developing and maintaining relationships with communities of color and educating individuals and communities about their rights and the resources available to enforce those rights.

## V. Community Groups and Economic Development

Subject to the regulation on group eligibility, programs may use LSC funds for group representation.<sup>54</sup> Moreover, programs may use non-LSC funds to represent any group, nonprofit corporation, or community development entity that does

<sup>51</sup> Legal Services of Eastern Missouri Launches Program Series Addressing Issues of Concern to St. Louis' Immigrant and Refugee Communities, Brennan Ctr. for Justice Legal Servs. E-lert, Nov. 9, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>52</sup> 45 C.F.R. § 1638 (2001).

<sup>53</sup> Omnibus Continuing Resolution § 504(a)(18), *supra* note 2.

<sup>54</sup> 45 C.F.R. § 1611.5(c) (2001) permits legal assistance "to a group, corporation or association if it is primarily composed of persons eligible for legal assistance under the Act and if it provides information showing that it lacks, and has no practical means of obtaining, funds to retain private counsel."

not fit within the LSC financial eligibility standards.<sup>55</sup> Programs may represent eligible groups in transactional activities involved in economic development and may use non-LSC funds for such representation when the groups do not meet the LSC financial eligibility guidelines.

The LSC Act includes a restriction on organizing that prohibits the use of LSC and private funds to initiate the formation or act as an organizer of any association, federation, labor union, coalition, network, alliance, or similar entity.<sup>56</sup> Although the language of the restriction is broad, both the statute and the implementing regulation clarify that LSC-funded programs and their employees may provide legal advice and assistance to eligible individuals and groups that desire to plan, establish, or operate organizations.<sup>57</sup> Moreover, this prohibition does not apply to Interest on Lawyers' Trust Account or public funds. Thus, while a legal aid attorney may not use LSC or private funds to organize a labor union for factory workers or a tenants' association in a low-income housing project, the attorney may advise and represent such a group if it wishes to incorporate, apply for a tax exemption, obtain a loan or a grant, or seek other legal assistance.

Representing community development organizations, tenant associations, and other entities created to help protect the rights of low-income individuals is an essential part of legal aid programs' role in improving the lives of individuals in low-income communities of color. Such representation often does not raise a specific race discrimination claim but addresses community problems that originate from a history of racial discrimination and segregation. For example, the Maryland Legal

Aid Bureau represented the Cherry Hill Development Corporation in partnership negotiations with a national developer to acquire and develop a large, run-down apartment complex in a predominantly African American community. The benefits of the new housing development include housing for 151 families, employment as subcontractors to 25 members of the community, and the wider community benefit of increased safety, jobs, community involvement, and resources.<sup>58</sup> In another example, the Legal Aid Foundation of Metropolitan Chicago helped a community economic development group apply for a credit union charter to meet the financial needs of two African American communities that commercial institutions did not adequately serve.

Similarly the Legal Aid Foundation of Los Angeles represented the Holiday Venice Tenant Action Committee in an attempt to preserve housing for predominantly African American and Latino residents of a Section 8 housing development.<sup>59</sup> When the development was put up for sale, the program educated the tenants about their options to purchase the property, and when the tenants' attempt to buy the building failed, legal aid attorneys provided technical assistance to the tenant group in its efforts to block sale to a developer who had investigated eliminating the use of Section 8 housing subsidies upon completing the purchase. Although the sale was ultimately approved, the tenants were successful in securing commitments to renew the Section 8 subsidies as long as they were available, thereby preserving 246 units of affordable housing. Confronted with several problems since the sale, including harassment and threatened loss of the

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<sup>55</sup> *Id.* § 1611.3(e).

<sup>56</sup> Section 1007(b)(7) of the LSC Act, 42 U.S.C. § 2996(f)(b)(7). Because this restriction derives solely from the LSC Act itself, rather than from the 1996 appropriations act, it applies only to LSC and private funds, not to Interest on Lawyers' Trust Account or other public funds.

<sup>57</sup> 45 C.F.R. § 1612.9 (2001).

<sup>58</sup> Interview with Hannah Lieberman, litigation director, Legal Aid Bureau of Maryland (Feb. 2002). See also [www.mdlab.org](http://www.mdlab.org).

<sup>59</sup> Elena Popp & Francisca Gonzalez Baxa, *Creating, Preserving, and Improving Housing Through Community Economic Development*, 33 CLEARINGHOUSE REV. 668 (Mar.-Apr. 2000).

Section 8 subsidy, the tenant group formed a legal team and an organizing assistance team. The Los Angeles program continues to represent the tenants' group as it develops a legal strategy to address short-term and long-term problems.

Many innovative and important community economic development projects are discussed in other issues of the REVIEW.<sup>60</sup> The ability of such programs to address the stated needs of communities of color is critical to achieving sustainable change.

## VI. Policy Advocacy

Legal aid programs should help ensure that low-income persons are at the table when legislative, administrative, and other bodies adopt laws or policies that affect low-income communities. Such participation by low-income persons of color is an integral part of a system of equal justice. LSC-funded programs do face some barriers to engaging in policy advocacy, although much of what needs to be done may still be done with either LSC or non-LSC funds.

### A. Lobbying and Rule Making

Under the 1996 restrictions and the regulations implementing them, LSC-funded programs may not affirmatively lobby on most legislative matters or engage in any grassroots lobbying.<sup>61</sup> They may not participate in or influence certain rule-making proceedings. However, many advocacy activities that relate to legislation or rule making are specifically exempt from the restrictions; others are not addressed at all and thus are permissible.

The lobbying restriction relates to

attempts to influence the passage or defeat of any legislation or constitutional amendment. Thus an LSC-funded program may not directly lobby a state legislature to enact a bill on predatory lending or to oppose a city ordinance that would permit an incinerator to be built in an African American community. However, the program may litigate the validity of such an ordinance once enacted. For example, the Legal Assistance Foundation of Metropolitan Chicago, along with other advocacy groups such as the Chicago Lawyers Committee for Civil Rights Under Law, filed an amicus brief supporting antipredatory lending regulations being challenged in litigation by the Illinois Association of Mortgage Brokers. The federal district court rejected the mortgage brokers' claims and upheld those regulations.<sup>62</sup>

Under the Cohen-Bumpers Amendment, programs 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 give information, analysis, or comments on such a bill.<sup>63</sup> If the chair of a legislative committee that is considering a predatory lending bill extends a written invitation to an LSC-funded program to testify on the lending practices of financial institutions in low-income communities of color, program staff may testify as long as the work is wholly supported by non-LSC funds. LSC-funded programs, being careful that all requests to testify be made in writing, should respond when members of legislative bodies seek testimony from staff members with substantial expertise on the subject covered by pro-

<sup>60</sup> See, e.g., William C. Kennedy et al., *Cultural Changes and Community Economic Development Initiatives in Legal Services: What Happened in Two Programs*, 33 CLEARINGHOUSE REV. 340 (Nov.–Dec. 1999); Nona Liegeois et al., *Helping Low-Income People Get Decent Jobs: One Legal Services Program's Approach*, 33 *id.* 279 (Sept.–Oct. 1999); Stephanie Upp et al., *Child Care and Community Economic Development: Critical Roles for Legal Services*, 34 *id.* 3 (May–June 2000); Mario Salgado, *Building a Community Economic Development Unit*, 28 *id.* 981 (Jan. 1995).

<sup>61</sup> Omnibus Continuing Resolution § 504(a)(2)–(6), *supra* note 2; 45 C.F.R. § 1612.

<sup>62</sup> Ill. Ass'n of Mortgage Brokers v. Office of Banks & Real Estate, 174 F. Supp. 2d 815 (N.D. Ill. 2001); see U.S. District Court Upholds Illinois' Anti-Predatory Lending Regulations, Brennan Ctr. for Justice Legal Servs. E-Alert, Dec. 14, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>63</sup> Omnibus Continuing Resolution § 504(e), *supra* note 2; 45 C.F.R. § 1612.6.

posed legislation. The rules also specifically permit a program to advise clients of their right to communicate directly with elected officials.<sup>64</sup> Thus an LSC-funded program may advise individual clients or community groups to speak to their state legislator or city council member regarding measures that may affect them.

The general restriction on rule making applies only to participation in efforts to influence the formal process for adopting generally applicable rules, regulations, or guidelines, including formal notice and comment rule making. An exception to the restriction permits LSC-funded programs to use non-LSC funds to prepare and submit written or oral comments in rule making on the same terms as other members of the public.<sup>65</sup> Thus LSC-funded programs may, depending on the circumstances, participate—using either LSC or non-LSC funds—in a wide range of advocacy on most agency rules, regulations, guidelines, policies, and procedures. For example, LSC-funded programs may submit comments to federal departments' policy guidance, recently republished in the *Federal Register*, on Title VI's prohibition against national-origin discrimination affecting limited-English-proficient persons.<sup>66</sup> The restriction does not cover agency policies that are not adopted through such a formal procedure, and LSC-funded programs may work to influence these policies. Thus an LSC-funded program may, for example, 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 a predatory lending bill passed by the legislature and may use funds from any source to work with agency officials to develop procedures to ensure that the regulations are fully implemented once they are promulgated.

## B. Media and Grass-Roots Lobbying

LSC-funded programs should make judicious use of print and broadcast media to help represent their clients and the low-income communities they serve. We must get the word out to the public generally and to the client community in particular about the impact of government action on communities of color and racial ethnic minorities. A growing number of legal aid attorneys are using the media effectively to protect and promote the rights of their clients. Here are just a few examples of media work promoting support for communities of color:

- Memphis Area Legal Services welcomed a proposed fair housing ordinance designed to combat discrimination based on “race, color, religion, national origin, sex, familial status, source of income, or handicap/disability.”<sup>67</sup>
- California Rural Legal Assistance highlighted the challenges for Latinos of a weak economy in Ventura, California.<sup>68</sup>
- Central California Legal Services spoke out on the importance of legislative efforts to support reasonable working conditions for California farmworkers; the

<sup>64</sup> 45 C.F.R. § 1612.5(c)(6) (2001).

<sup>65</sup> *Id.* § 1612.6(c)(6).

<sup>66</sup> Although all federal agencies issued guidance policies on limited English proficiency in 2000, the policies are being republished in response to the U.S. Department of Justice Civil Rights Division memoranda reaffirming federal departments' Title VI obligations despite the *Alexander v. Sandoval* decision. See memo from the National Immigration Law Center and the National Health Law Program (available from Camille D. Holmes et al.). The Justice Department and the U.S. Department of Health and Human Services have already republished their guidelines. Also republishing their guidelines are the Department of Education, Department of Labor, Department of Transportation, HUD, and the Environmental Protection Agency. *Id.*

<sup>67</sup> Memphis Area Legal Services Litigation Director Welcomes Proposed Fair Housing Ordinance for Memphis City, Brennan Ctr. for Justice Legal Servs. E-lert, July 17, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>68</sup> California Rural Legal Assistance Attorney Says Latinos in Ventura County Face Inequities, Brennan Ctr. for Justice Legal Servs. E-lert, Apr. 1, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?elert\\_id=&s\\_date=04-01-2001&e\\_date=04-30-2001&category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?elert_id=&s_date=04-01-2001&e_date=04-30-2001&category).



ranching industry challenged the legislation.<sup>69</sup>

■ West Texas Legal Services praised a proposed statewide expansion of legislation to protect low-income, non-English-speaking home buyers in Texas from unfair purchase contracts.<sup>70</sup>

■ Farmworker Legal Services in Michigan, along with the Michigan Migrant Legal Assistance Project, spoke out against the Michigan secretary of state's proposal to deny drivers' licenses to undocumented immigrants; they described it as bad policy and unconstitutional.<sup>71</sup>

Media statements keep the public eye on efforts to confront discrimination in low-income communities. However, certain LSC restrictions may influence how programs disseminate some information.

Under the regulations implementing the 1996 LSC restrictions, programs receiving LSC funding may not use *any* funds to engage in grass-roots lobbying, defined as activities such as oral and written communications, advertising, letter writing, or telephone or e-mail campaigns that make a specific call to action designed to influence members of the public to contact legislators or public officials to support or oppose pending or proposed legislation, regulations, executive decisions, or ballot measures.<sup>72</sup> For a communication to be considered grass-roots lobbying, it must either explicitly urge the recipient to contact a legislator or agency about the measure or include some other information or device designed to encourage the recipient to make the contact, such as the address, telephone number, or e-mail address of a legislator, or a petition, postcard

or other means for the reader to communicate support of or opposition to the measure to the decision maker.

The grass-roots lobbying restriction by no means prohibits LSC-funded programs from communicating with the public about pending legislation or regulations. In fact, the regulation explicitly permits programs to explain or report on pending or proposed legislation or regulations.<sup>73</sup> Recipients of LSC funds may analyze a proposed statute or regulation and explain its anticipated effect on clients, the changes it would make in existing law, whom it would affect, and its

***The grass-roots lobbying regulation explicitly permits programs to explain or report on pending or proposed legislation or regulations.***

particular impact on a low-income community of color. The rules explicitly allow LSC-funded programs to inform clients about pending or proposed legislation and regulations and advise them of their right to communicate directly with elected officials.<sup>74</sup> Programs may publish and disseminate newsletters, reports, or other written material that track and analyze legislative developments, talk to reporters about the impact of legislation or regulations on their clients, and write letters to the editor or opinion pieces about problems in communities of color that changes in the law can address. However, these communications must not include explicit calls to action or material that can reasonably be interpreted as such an effort.

<sup>69</sup> Central California Legal Services Attorney Criticizes Ranching Industry's Opposition to Legislation That Would Address Harsh Employment Conditions for Shepherders, Brennan Ctr. for Justice Legal Servs. E-Alert, July 13, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>70</sup> LSC-Funded West Texas Legal Services Praises Proposed Legislation to Expand Protection for Low-Income Homebuyers, Brennan Ctr. for Justice Legal Servs. E-Alert, Jan. 12, 2001, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>71</sup> *Id.*, Oct. 12, 2001.

<sup>72</sup> 45 C.F.R. § 1612.4, 1612.2(a)(2) (2001).

<sup>73</sup> *Id.* § 1612.2(a)(2).

<sup>74</sup> *Id.* § 1612.5(c)(3), 1612.5(c)(6).

## VII. Coordination, Collaboration, and Partnerships

To pursue race-based advocacy effectively, LSC-funded programs should coordinate their activities and collaborate with non-LSC-funded entities and civil rights organizations. Where possible, they should develop effective partnerships with a variety of community-based and civil rights organizations. We have described examples of coordination, collaboration, and partnerships that LSC-funded programs have successfully developed. Some LSC-funded program directors, managers, and staff have been reluctant, particularly since the 1996 restrictions, to embrace necessary coordination and collaboration under the mistaken belief that such activities are no longer permitted. Nothing can be further from the truth. *No restriction directly prohibits such collaboration and coordination.*

LSC-funded legal aid staff may train clients and staff of human service, civil rights, and community organizations about existing, pending, or proposed laws and regulations. For example, Jacksonville Area Legal Aid trained over 150 landlords, maintenance workers, and other employees of public housing complexes about the fair housing rights of tenants and detailed the race and other discrimination cases that the program had pursued and successfully settled.<sup>75</sup>

LSC-funded program staff may belong to associations, federations, coalitions, networks, alliances, or similar entities and may participate in local governmental or private-sector task forces and collaborative initiatives. For example, staff may 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 individuals of color, so long as they do not engage in prohibited lobbying or rule making.

LSC-funded programs may coordinate their services with other entities so that LSC recipients perform only permitted services while other organizations provide restricted services. Thus LSC-funded staff may work with other providers to ensure that a full range of legal assistance is available to low-income persons of color in all civil justice forums.

With regard to joint advocacy efforts, LSC-funded program staff may communicate about clients' problems with non-LSC 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 non-LSC-funded entities and discuss legislative and regulatory issues. Staff may advise non-LSC-funded entities about the most important issues facing their clients and how legislative or regulatory change can address such critical issues. Using non-LSC funds, staff may work with non-LSC-funded entities, including civil rights groups, on comments on proposed rules. If asked to testify or give information to a legislative or administrative official, staff may coordinate testimony or information with non-LSC-funded entities.

## VIII. Planning Program Priorities

LSC-funded programs cannot engage in effective race-based advocacy unless they specifically plan to do so and seek out engagement with communities of color. Developing program priorities with extensive participation from community groups is the one way to ensure that the needs of communities of color are incorporated into overall program activities. The 1996 restrictions explicitly require that all matters undertaken by LSC-funded programs, regardless of funding, must fall within the priorities that the program establishes under the procedures set forth in the LSC regulations.<sup>76</sup>

<sup>75</sup> LSC-Funded Jacksonville (Fl.) Area Legal Aid Director Provides Training on Housing Discrimination and Offers Breakdown of His Docket, Brennan Ctr. for Justice Legal Servs. E-lert, July 14, 2000, at [www.brennancenter.org/programs/lse/pages/view\\_elerts.php?category](http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category).

<sup>76</sup> Omnibus Continuing Resolution § 504(a)(9), *supra* note 2; and 45 C.F.R. § 1620 (2001).

Examples of LSC-funded programs that have incorporated the needs of communities of color into their priorities are California Rural Legal Assistance and the Legal Aid Foundation of Los Angeles. Both undertake extensive community consultation that involves significant interaction with a wide variety of community members.<sup>77</sup> By specifically identifying advocacy that is important to communities of color or including, in statements of program priorities, broad language that encompasses the goals of such advocacy, priorities can have the flexibility and stated commitment that allow programs to address the needs, as they arise, of communities of color. The priorities regulation should not impede race-based advocacy, as long as LSC-funded programs are careful in planning and preparing their statements of program priorities.

ADVOCACY ON BEHALF OF COMMUNITIES OF color should address individual cases of discrimination; target the systemic and structural discrimination that severely disables communities of color and all low-income communities; and build economic opportunities in neighborhoods where such opportunities have been systematically denied. In this article we offer a few examples of race-based advocacy that legal aid programs are pursuing within the confines of LSC restrictions. Using multiple and innovative strategies, legal aid lawyers can and must address the effects of racism and discrimination as an integral part of legal aid advocacy. Antipoverty and antidiscrimination advocacy are inextricably linked in the United States and elsewhere. Paying attention to those linkages and aggressively pursuing antidiscrimination strategies serve our clients well.

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<sup>77</sup> Charles Elsesser & JoNel Newman, *Encouraging Race-Based Advocacy in Legal Services Practice*, in this issue; Interview with Bruce Iwasaki, executive director, Legal Assistance Foundation of Los Angeles (Aug. 2001); Interview with Jose Padilla, executive director, California Rural Legal Services (Aug. 2001).