

B-129874-O.M.

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Director, HRD

FOR

ELTON SUGGARD

General Counsel - Paul G. Dembling

Lobbying by Legal Services Corporation, HR8-144 -
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By letter dated August 21, 1978, Senator Maryon Allen, Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, requested a CAO audit of Legal Services Corporation activities to determine, among other things, whether appropriated funds have been expended for lobbying activities in violation of Federal anti-lobbying statutes. An investigation was initiated under Project No. HR8-144.

On September 6, 1978, _____ of your staff, audit manager of the project, met with _____ and _____ of my office, to discuss legal support for the project. During the meeting it was agreed that my office would initially review the statutory authority of the Legal Services Corporation and determine whether and to what extent that corporation has authority to expend appropriated funds for lobbying activities. The attached staff memorandum is for your use in answering these questions for the Chairman. We will be happy to provide any further assistance you may wish--for example, in applying the general principles explained in the memorandum to any specific fact situations you may uncover.

Attachment

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Application of Federal Anti-Lobbying Statutes to
the Legal Services Corporation

The primary Federal statutes dealing with lobbying activities are 18 U.S.C. § 1913 and the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270, both of which are penal statutes. The enforcement of penal statutes is a matter for the Department of Justice and the courts. As we have no authority in this area, our traditional policy has been to refrain from commenting. See B-164497(5), March 10, 1977. Questions as to the applicability of these statutes to the Corporation or any of its activities are for determination by the Justice Department. However, we note that the applicability of 18 U.S.C. § 1913 to the Legal Services Corporation is doubtful since the sanctions for violations of lobbying restrictions apply only to an "officer or employee of the United States or of any department or agency thereof." With a few exceptions, pertaining to health insurance and other Federal benefits and the Freedom of Information Act, the Corporation and its employees "shall not be considered a department, agency, or instrumentality of the Federal Government" (42 U.S.C. § 2996d(e)(1)).

There is also for consideration section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1978, Pub. L. No. 95-81 (July 31, 1977), 91 Stat. 341, 355, which provides:

"No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

We have generally viewed section 607(a) as prohibiting appeals to members of the public urging them to contact their representatives in support of or in opposition to pending legislation, and also as prohibiting, in certain circumstances, the use of appropriated funds to provide direct support of a known lobbying group. See, e.g., B-129874, September 11, 1978. Section 607(a) is directed at the use of appropriated funds and does not appear to be contingent upon the characterization of the entity to which the funds are appropriated. Therefore, it is arguably applicable to the Corporation. It is not necessary to decide this question, however, since legislation expressly applicable to the Corporation, discussed below, imposes essentially the same restrictions.

Based on our analysis of the relevant statutory authority, we find that the Legal Services Corporation has limited authority to engage in and expend appropriated funds for certain lobbying activities. Pursuant to 42 U.S.C. § 2996e(c)(2), officers and employees of the Corporation are prohibited from undertaking to influence the passage or defeat of any legislation

before a Federal, State, or local legislative body but may testify before and otherwise communicate with Federal, State, and local legislative bodies upon request, or may initiate contact with legislative bodies to express the views of the Corporation on legislation or appropriations directly affecting the Corporation. A related provision is 42 U.S.C. § 2996e(d)(4), which provides:

"Neither the Corporation nor any recipient shall contribute or make available corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums. However, an attorney may provide legal advice and representation as an attorney to any eligible client with respect to such client's legal rights."

Also, 42 U.S.C. § 2996f(a)(5) directs the Corporation to insure that funds made available by means of contract or grant to providers of legal services are not used to directly or indirectly influence the promulgation of Executive Orders or similar directives, or the enactment or defeat of legislation or initiative petitions. Exceptions are recognized when a governmental body requests a recipient to testify or provide other assistance, or when such representation is necessary to provide representation for a client with respect to such client's legal rights and responsibilities.

We have researched the legislative history of these provisions in order to discern congressional intent regarding permissible lobbying activities. With regard to 42 U.S.C. §§ 2996e(c)(2) and (d)(4), the House-Senate Conference Committee Report, S. Rep. No. 93-845, 93d Cong., 2d Sess. 22 (1974), resolved differences in separate Senate and House provisions and explained the resulting conference version as follows:

"Both the House bill and the Senate amendment prohibit the Corporation from undertaking to influence the passage or defeat of any legislation by the Congress or by any State or local legislative body. The Senate amendment allowed the Corporation to testify and make appropriate comment in connection with legislation or appropriations directly affecting the activity of the Corporation. The House bill contained no comparable provision. The House recedes.

* * * * *

"The House bill and the Senate amendment prohibited the Corporation and any recipient from making available corporate funds, program personnel, or equipment for use in advocating or opposing ballot measures, referendums, or initiatives.

The Senate amendment contained an exception to this prohibition where such provision of legal advice and representation is necessary by an attorney, as an attorney, for any eligible client with respect to such client's legal rights and responsibilities. The House bill contained no comparable provision. The conference agreement prohibits advocating or opposing such measures, but provides that an attorney may provide legal advice and representation as an attorney to any eligible client with respect to such client's legal rights."

Thus, the Corporation appears to have the same latitude as do Federal agencies with respect to direct contact with Congress. By the same token, it appears that the Corporation is subject to the same restrictions on lobbying in its own behalf as are Federal agencies, i.e., it is prohibited from soliciting members of the public to urge their congressional representatives to support or defeat legislation or to expend appropriated funds in direct support of a known lobbying group. In one respect--restrictions on lobbying at the State and local level--the Corporation's legislation goes a bit farther than the other anti-lobbying laws, which are applicable only to lobbying at the Federal level.

With respect to 42 U.S.C. § 2996f(a)(5), discussed above, the conference report stated as follows:

"The House bill required that no funds available to recipients be used to influence an executive order or similar promulgation by a Federal, state, or local agency or to influence the passage or defeat of legislation by Congress or state or local legislative bodies, except that recipient personnel may (1) testify when requested to do so by a governmental agency, a legislative body, or committee or member thereof, or (2) in the course of providing legal assistance to an eligible client (pursuant to Corporation guidelines) make representations or testify only before local governmental entities. The Senate amendment also prohibited use of funds to influence the passage or defeat of legislation except when such representations are requested by a legislative body, a committee, or a member thereof, or when such representation by an attorney as an attorney is necessary to the provision of legal advice and representation for any eligible client with respect to such client's legal rights and responsibilities. The Senate prohibition did not apply to executive orders.

"The House recedes with the following amendments: the prohibition is extended, as in the House bill, to influencing the issuance, amendment, or revocation of any executive order or similar promulgation of any governmental body; the exception with respect to requested representations by attorneys is extended, as in the House bill, to include a request by a governmental agency; and the exception permitting attorneys to represent particular clients is qualified by stating that such exception shall not be construed to permit a recipient or an attorney to solicit a client for the purpose of making such representation possible, or to solicit a group with respect to matters of general concern to a broad class of persons as distinguished from acting on behalf of any particular client." S. Rep. No. 93-845, supra, at 24-25.

It is clear from the material quoted above that 42 U.S.C. § 2996f(a) (5) restricts the legislative advocacy activities of recipients. In one respect, requirements applicable to recipients are more restrictive than those applicable to the Corporation itself, since they prohibit lobbying directed at "any executive order or similar promulgation by any Federal, State, or local agency" as well as lobbying directed at legislation. However, it should be noted that, in another respect, recipients have somewhat more freedom than do officers and employees of the Corporation. Recipients may, on behalf of a client, engage in lobbying activities with legislative and administrative bodies, when the client's legal rights or responsibilities require such representation. However, the recipient may not solicit a client or clients for the purpose of enabling him to make such representation.

Section 2996f(a)(5), contains amendments made by the Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222 (December 28, 1977), 91 Stat. 1619. For the most part, these amendments did not substantially change existing restrictions but merely made them more explicit. The conference report on the 1977 amendments, H. R. Rep. No. 95-825, 95th Cong., 1st Sess. 13 (1977), provides the following clarification:

"3. Legislative and administrative advocacy

"A. Affected Actions

"The House bill changes present law by adding to the list of legislative and executive actions which the recipients are restricted from influencing, 'State proposals by initiative petition'.

"There is no comparable Senate amendment.

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"The Senate recesses.

"B. Representation by Employees of Recipients

"(1) The House bill provides that an employee of a recipient may represent a client in an administrative or legislative proceeding.

"The Senate amendment provides that an attorney, or a recipient employee supervised by an attorney, may represent clients in such proceedings.

"The Senate recesses.

"(2) The Senate amendment explicitly states that the ABA Code of Professional Responsibility is applicable to legal services programs and employees with respect to the solicitation of clients.

"The House bill has no comparable provision.

"The House recesses.

"C. Appropriate Representations

"(1) The House bill specifies examples of the types of representations (testifying, drafting, or reviewing measures, or making representations to an agency, body, committee or member) that may be made by legal services programs in response to a request from a legislative or administrative body or member thereof.

"There is no comparable Senate amendment.

"The Senate recesses.

"The conferees agree that the representations enumerated by the House bill are those which are already implicit in current law. This provision in no way precludes a recipient from responding to a request directed to a recipient by a governmental agency, legislative body, a committee, or a member thereof to make representations of a general nature.

"(2) The House bill provides that a legal services program may engage in legislative and administrative advocacy with respect to a measure directly affecting the activities of the recipient program, the Corporation, or (if the local Board votes to take a position on a particular subject) eligible clients.

"There is no comparable Senate amendment.

"The Senate recedes with an amendment providing that a recipient may make representations on a measure directly affecting the activities under this title of the recipient or the Legal Services Corporation. This amendment does not permit, without request, the type of advocacy on matters of general concern to poor persons, which would have been authorized under the deleted House language."

The legislative history of the amendment highlights the fact that the amendment was designed to clarify those activities that are permitted and those that are not. Indeed, the legislative history indicates that Congress, by approving the conference committee action, rejected language in the House bill that would have significantly expanded permissible legislative advocacy activities by recipients.

The Legal Services Corporation has recently amended its regulations governing legislative and administration representation contained in 45 C.F.R. § 1612.4 (43 Fed. Reg. 32775 (1978)). These regulations implement 42 U.S.C. § 2996f(a)(5) and provide as follows:

"§ 1612.4 Legislative and administrative representation

"(a) No funds made available to a recipient by the Corporation shall be used, directly or indirectly, to support activities intended to influence the issuance, amendment, or revocation of any executive or administrative order or regulation of a Federal, State or local agency, or to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body or State proposals by initiative petition.

"(1) An employee may engage in such activities in response to a request from a governmental agency or a legislative body, committee, or member made to the employee or to a recipient; and

"(2) An employee may engage in such activities on behalf of an eligible client of a recipient, if the client may be affected by a particular legislative or administrative measure but no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation possible; and,

"(3) An employee may engage in such activities if a governmental agency, legislative body, committee, or member thereof is considering a measure directly affecting the activities under the Act of the recipient or the Corporation.

"(b) Nothing in this section is intended to prohibit an employee from

"(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies; or

"(2) Informing a client about a new or proposed statute, executive order, or administrative regulation; or

"(3) Communicating with the Corporation for any purpose."

These regulations appear to be consistent with the requirements contained in 42 U.S.C. § 2996f(a)(5). However, we note that 45 C.F.R. § 1612.4 (a) permits an "employee" to engage in certain activities that the statute restricts to recipients. Yet 45 C.F.R. § 1600.1 defines "employee" as a person employed by the Corporation or by a recipient. Although the context of the regulations appears to indicate that they were intended to apply only to recipient employees, the above definition would permit the regulations to be interpreted as covering Corporation employees as well as recipient employees. Under this interpretation, the regulations would be inconsistent with 42 U.S.C. § 2996e(c), inasmuch as the regulations would permit Corporation employees to engage in activities prohibited by the statute. Accordingly, you may wish to consider recommending that the Corporation amend its regulations contained in 45 C.F.R. § 1612.4(a) to more clearly specify which restrictions apply to Corporation employees as well as recipient employees.

In summary, we are of the opinion that officers and employees of the Legal Services Corporation are restricted in their lobbying activities to about the same extent as are officers and employees of Federal agencies. On the other hand, employees of recipients of Legal Services Corporation grants and contracts, while subject to many of the same restrictions, have authority to engage in lobbying activities when necessary to properly represent an eligible client.