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RESTRICTIONS ON LOBBYING BY LEGAL SERVICES ATTORNEYS: REDEFINING PROFESSIONAL NORMS AND OBLIGATIONS

PAULA GALOWITZ*

The articulated ideal of government funding for legal services for indigent persons in this country is that the quality of legal representation should be equivalent to that which retained counsel provides to paying clients. That ideal is evident in the rhetoric surrounding the two parallel systems of legal services for indigent persons — the system of appointed counsel in criminal cases[1] and the network of civil legal services provided under the umbrella organization known as the Legal Services Corporation (LSC).[2]

In recent years, however, statutes and regulations have increasingly restricted the ability of legal services attorneys to lobby on behalf of indigent clients in legislative and administrative matters.[3] The change in Administration and the addition of new members to the LSC Board of Directors provides an important opportunity to re-examine these restrictions on lobbying by LSC attorneys. This article analyzes the effects of these restrictions and the ethical implications of a system of legal services that precludes indigent clients from taking advantage of legal remedies that are available to clients who can afford to retain counsel.

The restrictions on lobbying by legal services attorneys originate from three different sources. The first source is the legislation that created the Legal Services Corporation[4] in 1974 ("1974 LSC Act" or the "Act"). This legislation envisioned a certain model of legal services and imposed few limitations on lobbying activities by legal services attorneys. It specifically mandated that legal assistance must conform with the Code of Professional Responsibility and the Canons of Ethics,[5] and that legal services attorneys must be allowed to

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[1] *See* Strickland v. Washington, 466 U.S. 668 (1974); Gideon v. Wainwright, 372 U.S. 335 (1968).

[2] 42 U.S.C. §§ 2996-2996(1) (Supp. 1993).

[3] 42 U.S.C. § 2996 (Supp. 1993); Act of Nov. 5, 1990, Pub. L. No. 101-515, 104 Stat. 2138 (45 C.F.R. § 1612 (1992)).

[4] Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (Supp. 1993).

[5] Even if the ethical precepts were not mentioned specifically in the Act, legislation of this sort, which provides funding for legal services, should be read as contemplating

carry out their activities in a manner consistent with the attorney's professional responsibilities.[6] The second source of restrictions on lobbying originated in an appropriations rider passed by Congress in 1983 which significantly limited the ability of legal services attorneys to provide legislative and administrative representation.[7] The third source consists of additional LSC restrictions imposed by regulations adopted in 1987.[8] This article examines these restrictions on lobbying by legal services attorneys, and discusses the extent to which they are consistent with the ethical codes, canons of ethics and professional standards of conduct.

This article examines these three sources of restrictions on two levels. The first level is a statutory analysis which considers whether the relevant provisions in the appropriations rider, and those in LSC's regulations, are consistent with the 1974 LSC Act. This article will also analyze the 1974 LSC Act to determine whether it envisioned a quality of legal representation equivalent to that of retained counsel, and whether the lobbying restrictions dilute this original vision.

The second level of analysis involves a normative evaluation. The article will consider what restrictions are consistent with the quality of representation that is properly owed to indigent clients given the ethical norms and the nature of lawyering functions. The legislative history of the 1974 LSC Act is also pertinent because it illuminates the original conception of legal services and the

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legal services consistent with prevailing ethical concepts.

[6] 42 U.S.C. § 2996(6) provides that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." Section 2996e(b)(3) mandates that:

> The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this subchapter as "professional responsibilities") or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

42 U.S.C. § 2996e(b)(3) (Supp. 1993).

[7] In addition to the authorization of funds to run programs, substantive "amendments" have been included in appropriation bills. *See, e.g.*, Act of Nov. 5, 1990, Pub. L. No. 101-515, 104 Stat. 2138 (45 C.F.R. § 1612 (1992)).

[8] Some modifications were made by LSC to the 1987 regulations, effective October 2, 1993. 58 Fed. Reg. 21,403 (1993). For a discussion of these modifications see discussion *infra* at note 24. Although the regulations cover much more than lobbying, they are frequently labeled as "lobbying regulations" for simplicity. Other areas restricted in the regulation are administrative representation; training; organizing; participation in committees; and participation in public demonstrations, picketing, boycotts and strikes. 45 C.F.R. § 1612 (1992).

underlying purposes of the restrictions. An analysis of the nature of lawyering functions is critical to developing an understanding of what restrictions may be appropriate to impose on attorneys' activities.

Section I of this article describes the evolution of the current statutory and regulatory restrictions on lobbying by legal services attorneys. Section II examines the statutory and regulatory restrictions in detail, identifying the three different models of lawyering that emerge, and comparing the regulatory limitations with the 1974 LSC Act. Section II also examines the two conflicting legislative intentions in the 1974 LSC Act. The first legislative intent of the Act is to ensure competent, ethical representation.[9] The second is a policy, unrelated to the lawyering function and political in its origin and purpose, of restricting advocacy by legal services attorneys in the legislative and administrative process. The tension between these opposing legislative policies forces legal services attorneys to confront problems that private attorneys do not face. If a client retains a private attorney to resolve a legal problem, that attorney can select the best course of action from an unrestricted range of avenues for relief,[10] while a legal services attorney's options are limited.[11] Sec-

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[9] It is this policy that underlies the statutory mandate that LSC cannot interfere with legal services attorneys' "carrying out" their professional responsibilities to their clients. 42 U.S.C. § 2996e(b)(3) (Supp. 1993).

[10] There are, of course, some limits on this, such as the competence of the attorney and the financial resources of the client. For a discussion of these issues, see *infra* text accompanying notes 278-281.

[11] Two legal trends play an important part in the article's analysis of these issues. One is the changing nature of poverty law. Due to changes in the allocation of responsibility for defining the recipients and conditions of benefit programs, the forum for activity has shifted from the federal government to the states. *See* John Dooley & Alan Houseman, *Legal Services in the 80's and Challenges Facing the Poor*, 15 CLEARINGHOUSE REV. 704, 705-07 (1982). Not only has authority for making critical substantive decisions about poverty law shifted from the federal to local government, but the Supreme Court has restrictively interpreted the Due Process clause of the Fourteenth Amendment in recent years. *See, e.g.*, Davidson v. Cannon, 474 U.S. 344 (1986); Parratt v. Taylor, 451 U.S. 527 (1981). As a result, federal procedural rights have played a decreasing role in protecting the poor. To fill the void created by the withdrawal of federal protection, a number of commentators have begun looking to the states as the arena for enforcement and extension of rights. This changing direction makes a full range of representation tools, such as lobbying, administrative advocacy and grassroots organizing, crucial at the state and local levels.

The second trend is an increasing emphasis in American jurisprudence on alternatives to litigation. For example, arbitration, mediation, and community dispute resolution centers are being explored and proposed in place of or as supplements to the litigation model. *See, e.g.*, Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Edwin Greenebaum, *Lawyers' Agenda for Understanding Alternative Dispute Resolution*, 68 IND. L.J. 771 (1993); Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAVIORAL SCIENTIST 255 (1983). This trend will be studied against the backdrop of LSC restrictions which

tion III of this article evaluates the legislative and administrative restrictions in light of professional norms and values, highlighting the special issues that arise in the legal services context. Section IV proposes several remedies that would make it possible for indigent clients to receive legal representation equivalent to that which is provided to paying clients.

I. CURRENT STATUS OF RESTRICTIONS ON LOBBYING

Very few of the statutory restrictions on lobbying can be traced back to the 1974 LSC Act. The restrictions which are traceable to the 1974 LSC Act provide that legal services attorneys may not directly or indirectly attempt to influence legislation by Congress or by state or local legislative bodies. In addition, legal services attorneys may not "directly or indirectly . . . influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State, or local agency . . . ." unless necessary to the provision of "legal advice and representation" for an eligible client or unless requested by the governmental or legislative body.[12] Two exceptions created by Congress — lobbying on behalf of a client or at governmental request — substantially diluted the effect of the restrictions.[13]

In 1977, Congress reauthorized LSC and liberalized the restrictions imposed by the 1974 LSC Act.[14] Lobbying was allowed with respect to issues directly affecting LSC or local programs.[15] LSC funds could not be used for direct organizing activities, but could be used for advice and legal assistance to clients who themselves engaged in such activities.[16] The amendments modified the language of the 1974 LSC Act so it would be consistent with LSC's interpretation of the Act's restrictions.[17]

More significant statutory restrictions on lobbying came as part of the 1984 appropriation bill.[18] These 1984 provisions, the result of a congressional com-

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have the effect of forcing legal services attorneys to rely primarily on litigation.

[12] 42 U.S.C. § 2996f(a)(5) (Supp. 1993).

[13] Earl Johnson, Jr., the former President of the Office of Economic Opportunities (OEO) Legal Services Program, thought that the restrictions on advocacy performed a valuable function. "Each restriction amounts to an affirmation that a certain activity such as legislative advocacy, administrative policymaking advocacy, representation of the 'collective interests' of the poor, and the like, is an appropriate 'legal service' within the meaning of the Act." EARL JOHNSON, JR., JUSTICE AND REFORM at xx (2d ed. 1977). In addition, "most of the restrictions contained provisos that largely vitiated their effectiveness by referring to the Code of Professional Responsibility." *Id.*

[14] 42 U.S.C. § 2996 (Supp. 1993).

[15] 42 U.S.C. § 2996f(a)(5)(A) (Supp. 1993).

[16] *See* H.R. REP. No. 310, 95th Cong., 1st Sess. 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4516.

[17] John Dooley & Alan Houseman, Legal Services History, ch. 3, pp. 5, 13 (November, 1984) (on file with author).

[18] Act of Nov. 28, 1993, Pub. L. No. 98-166, 97 Stat. 1088. These provisions were passed by Congress in 1983 for the 1984 fiscal year. For simplicity, they will be identi-

promise in response to lobbying by legal services attorneys,[19] enhanced the severity of the restrictions on lobbying. The 1984 restrictions prohibited: (1) legislative lobbying to support or defeat legislation; (2) administrative lobbying[20] unless it was provided to an "eligible client on a particular application, claim, or case, which directly involves the client's legal rights or responsibilities" or was requested by an official; (3) any lobbying unless approved by the project director as necessary for the client and if appropriate judicial and administrative relief have been exhausted; and (4) lobbying to affect the funding or authority of LSC. However, the rider provided that none of these restrictions prohibit communications in response to a request from a federal, state or local official. In other words, Congress attempted to distinguish between two different techniques or processes of legislative advocacy. The first technique, direct lobbying, was permitted but the second technique, grassroots lobbying,[21] was sharply curtailed.

The regulations implementing the appropriations restrictions,[22] which became effective on August 28, 1987[23] and were modified in 1993,[24] further

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fied as the 1984 restrictions.

[19] For an extensive discussion of the circumstances surrounding the compromise and the restrictions, *see infra* section II.

[20] Administrative lobbying is participation in administrative rulemaking, and formal and informal negotiations with agency officials. This type of lobbying includes appeals addressed to the officials of administrative agencies to adopt or change the policies of their agency.

[21] Grassroots lobbying is an appeal addressed to the public suggesting that people contact their elected representatives to indicate support or opposition to pending legislation. *See* discussion of General Accounting Office Opinion B-202116 (May 1, 1981), *infra* note 81.

[22] These restrictions have been present since the 1984 appropriations rider and remain in effect today. The appropriation for fiscal year 1994 continued the restrictions by referring to Public Law 101-515, the appropriation rider for fiscal year 1991, and stating that those restrictions were applicable to 1994. *See* Act of Nov. 5, 1990, Pub. L. No. 101-515, 104 Stat. 2138 (45 C.F.R. § 1612 (1992)).

[23] For an extensive discussion of the history of the regulations, *see infra* section II.B.

[24] LSC proposed the 1993 amendments to the 1987 regulation on lobbying in order to "conform with a statutory provision in the Legal Services Corporation . . . appropriations act for the current fiscal year that limits the Corporation's ability to implement certain private funds provisions" 58 Fed. Reg. 21,403 (1993). The statutory provision included the Rudman Amendment which prohibited LSC from applying the private funds provisions in C.F.R. § 1612 (the lobbying regulation) "to lobbying restrictions in LSC's appropriations act that go beyond the lobbying restrictions in the LSC Act." 58 Fed. Reg. 21,404 (1993). The purpose of the 1993 amendments was to conform the lobbying regulation to the Rudman Amendment. *Id.*

There were a few other minor changes to the 1987 regulation. Two of these changes involved section 1612.6, the provision regulating permissible activities undertaken at the request of public officials. The first change deleted the limitation that the request from a public official had to be "on a specific matter;" because the LSC Board found that language too vague to enforce. 58 Fed. Reg. 21,404 (1993). The second change

restricted legislative and administrative lobbying. The two exceptions recognized by Congress — lobbying on behalf of a client and lobbying at governmental request — were substantially undermined. As to lobbying on behalf of a client, the regulations prohibit legislative lobbying unless a currently eligible client requests it "for the sole purpose of bringing that client's specific and distinct legal problems to the attention of such officials."[25] Furthermore, legal services attorneys may not assist existing clients in preparing the client's own communications to legislators.[26] In addition, when acting in a legislative capacity on behalf of clients, attorneys cannot communicate with elected officials unless the attorneys have exhausted the appropriate judicial and administrative relief.[27] In regard to government requests, the regulations only allow legal services attorneys to respond to requests from agencies or elected officials.

The 1987 regulations also extended many of the prohibitions on legislative representation to administrative representation. For example, the 1987 regulations only allow legal services attorneys to participate in administrative lobbying if it is used to provide legal assistance to a currently eligible client in proceedings "directly involving that client's legal rights or responsibilities with respect to a particular application, claim or case."[28] The attorneys cannot engage in direct or indirect efforts to get others to comment on rules, and they cannot send out analyses of rules to clients generally or to the public.[29]

The regulations also impose restrictions on the attendance of attorneys at political meetings and activities. If the principal purpose of the meeting is to discuss or engage in legislative or political activities, then attendance by legal services attorneys is absolutely prohibited.[30] Furthermore, all political activities, which are defined in the regulations as "those activities intended either to influence the making, as distinguished from the administration, of public policy or to influence the electoral process"[31] are prohibited. Under these regula-

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deleted the 1987 language that the attorney could only respond to the requesting party or agent or employee of such party. The LSC Board found that the 1987 limitation could in some situations prevent a recipient from responding at all because some governmental bodies require responses to be provided to various members of the body. *Id.* Instead, the LSC Board substituted a "reasonableness standard" so the response to the official could be distributed to other persons to the extent that it was reasonable and necessary to, *inter alia*, comply with the request of the public official. *Id.* at 21,405.

For clarity, the citation in this article to the current regulations are to 45 C.F.R. § 1612 (1992), unless the citation is to a provision that was modified by the 1993 amendments.

[25] 45 C.F.R. § 1612.5(c) (1992).

[26] Attorneys can only inform a client of the "client's right to communicate directly with an elected official." *Id.* § 1612.5(h)(5).

[27] *Id.* § 1612.5(c)(2).

[28] *Id.* § 1612.5(a).

[29] *Id.* § 1612.7(b).

[30] *Id.* § 1612.3(f).

[31] *Id.* § 1612.1(k).

tions, political activities include "favoring or opposing current or proposed public policy and also include administrative, legislative and grassroots lobbying."[32]

Lobbying by legal services attorneys has always been a controversial issue in Congress.[33] Presently, there is a reauthorization bill which maintains many of the restrictions on lobbying pending in the House of Representatives.[34] The

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[32] *Id.* Other provisions of the regulations are discussed in later sections of this article, and the regulations are compared with the statutory provisions in section II.C of this article. *See infra* pp. 39-44.

[33] As stated in 1983 by Dan Bradley, the then president of LSC: "In all of the years that I know I've been involved in Legal Services, there has been no matter — absolutely no matter — that has concerned more Members of Congress than the question of the Corporation and local programs involving themselves in "lobbying," grassroots lobbying political activity." *Oversight Hearings on S. 547 of LSC: Hearing Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 36 (1983) (statement of Dan Bradley, President, LSC).

Even in the OEO days, lobbying was an issue. Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231, 242 (1971). An Instruction was issued by the OEO program that prohibited any activity which disrupted the ordinary business of a legislature or which involved demonstrations, rallies, picketing or forms of direct action aimed at a legislature. The Instruction prohibited campaigns of advertising carried on through the media and mass letter-writing or visitations calculated to influence legislators. *Id.* The Instruction did not clarify the propriety of the most common lobbying activities since it had the ambiguous provision that the lobbying restrictions were not to be interpreted to forbid "purely informational and educational activities." *Id.* The Director of the OEO program, the Office of Legal Services, Terry Lanzner, saw a need for an improved directive, particularly in the gray area of the appropriateness of lobbying activity directed at legislation affecting the poor but not carried out on behalf of a particular client. *Id.* at 242 n.40.

Lobbying was seen as the "stepchild" of the OEO Legal Services Program. As warned by Mickey Kantor, "[l]egislative advocacy, the stepchild of the Legal Services Program, must soon achieve full kinship status with litigation as an advocacy tool or Legal Services will not be providing a comprehensive attack on the problems of the poor." Mickey Kantor, *Legislative Advocacy*, 5 CLEARINGHOUSE REV. 574, 578 (1972).

[34] The Legal Services Reauthorization Act of 1993, H.R. 2644, 103d Cong., 1st Sess. (1993). This bill is identical to H.R. 2039 which was passed by the House of Representatives in 1992. It permits legislative lobbying on behalf of an eligible client in the course of representation of that client, if the representation is to protect the client's existing legal rights or interests, or if the client is in need of relief that can be provided by the legislative body. Further requirements are that the project director approves it in accordance with established policy, and documentation authorizing the representation has been secured from the client. Lobbying on behalf of the Corporation or program is allowed if the project director determines that the legislative body is considering such authorization, appropriation or other measure. The Legal Services Reauthorization Act of 1993 was introduced into the House of Representatives on July 15, 1993, (139 Cong. Rec. E1797-01) and referred to the House Judiciary Committee. A hearing was held by the House Subcommittee on Administrative Law and

reauthorization bill introduced into the Senate in 1992 basically tracked the current restrictions which originated in the 1984 appropriations bill. A bill introduced in the House in 1991 would bar any kind of legislative lobbying, and most administrative lobbying.[35] Thus, almost twenty years after the enactment of the 1974 LSC Act, lobbying by legal services attorneys continues to be a contentious and politicized issue.[36]

II. Comparing Statutory and Administrative Restrictions: Competing Models of the Attorney's Role and Function

A. *The Congressional Conception of the Attorney-as-Lobbyist*

In order to examine the nature and purposes of Congress' restrictions on lobbying by legal services attorneys, it is useful to begin by briefly reviewing the history of legal services and the LSC. This historical context helps to illuminate certain assumptions and views which were widely shared by the legislators who created the LSC and which shaped the mandate of legal services attorneys.

Initially, legal services for the poor were provided by private groups.[37] The first was The Legal Aid Society, established in New York City in 1876. By 1917 there were 41 legal aid organizations, which were established by private charities, municipalities, bar associations and law schools.[38] These organizations were created to give only case-by-case individual representation to poor clients. There was no plan for law reform, administrative representation, lobbying or appeals.[39]

Prior to 1964 there was no federal involvement in funding legal services. In

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Governmental Relations on September 22, 1993.

[35] The proposed amendment would bar lobbying on behalf of an eligible client, even if requested by a government official. The only administrative lobbying that would be allowed is on behalf of an "eligible client on a particular application, claim, or case, which directly involves the client's legal rights or responsibilities and which does not involve the issuance, amendment, or revocation of any agency promulgation described [above]." H.R. 1345, 102nd Cong., 1st Sess. (1991).

[36] The 1992 congressional debate in the House of Representatives on amendments to House Report 102-512 regarding legislative and administrative representation by legal services attorneys reflects the continuing contentiousness of that issue. For example, Representative Gekas, in support of his amendment, stated that "[m]y amendment simply makes it clear once and for all that lobbying services will no longer be permitted or granted by or to Legal Services entities in our country." 120 Cong. Rec. H2981 (1992). Representative Synar opposed the Gekas amendment on the grounds that it would "perpetuate the dual system of justice and representation in this country for the poor . . . and would squeeze the poor out of full representation on the civil side." *Id.* at H2983.

[37] For an extensive discussion of the pre-LSC history and the events leading to the passage of the LSC Act, *see* Johnson, *supra* note 13.

[38] *Id.* at 6.

[39] Dooley & Houseman, *supra* note 17.

that year, the Director of the Office of Economic Opportunity (OEO) created a task force to analyze the role of lawyers in the attack on poverty.[40] During the following year, specific funding for legal services grants was provided in amendments to the Economic Opportunity Act.[41] The focus of the program shifted from purely individual service to services which included action for social change.[42] The first director of the Office of Legal Services in OEO stated that the program's purpose was to gather "the forces of law and the power of lawyers in the War on Poverty to defeat the causes and effects of poverty."[43] The OEO Legal Services Guidelines provided that programs should give a full range of representation, including the advocacy of reforms in statutes, regulations, and administrative practices.[44]

Under the OEO Legal Services program, threats of political interference convinced many that "if the program was to retain professional integrity, then it would need to be shielded from political pressure and interference."[45] In 1971, an American Bar Association (ABA) committee and a Presidential Council proposed that a new corporation be created, separate from the Executive Branch.[46] President Nixon stated that one of the purposes of his proposed bill was to fully protect the freedom of staff attorneys to defend the best interests of their clients.[47] The 1974 LSC Act was the result of a political consensus between Congress and the Nixon Administration that an independent federally funded corporation was needed "to protect the effectiveness,

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[40] *Id.* at 4.

[41] S. REP. NO. 599, 89th Cong., 1st Sess. 9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3501, 3509.

[42] Clinton Bamberger, *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME LAWYER 847, 852 (1966).

[43] *Id.*

[44] The Guidelines provided that:

> Advocacy of appropriate reforms in statutes, regulations and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program. This may include judicial challenge to particular practices and regulations, research into conflicting or discriminating applications of laws or administrative rules, and proposals for administrative and legislative changes.

Kantor, *supra* note 33, at 575 (quoting Office of Economic Opportunity Community Action Program, Guidelines for Legal Services Programs).

[45] Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 683 (1976). According to Earl Johnson, Jr., Director of the OEO Legal Services Program, it was important for both the Nixon Administration and legal services attorneys that there was an independent legal services corporation. "Politically, administration officials wanted to be absolved of responsibility for the actions of legal services lawyers just as legal services lawyers desired to be free from political interference by the Nixon administration." JOHNSON, *supra* note 13, at xiii.

[46] Dooley & Houseman, *supra* note 17, at 21-22.

[47] 119 CONG. REC. S15588-90 (1973).

independence, and integrity of federally funded legal services for the poor.[48]

The legislation which resulted in the enactment of LSC had a long and tortuous history in Congress. Two bills were introduced in 1971: one had bipartisan support,[49] the other was the a bill proposed by the Nixon Administration.[50] In 1971 the President vetoed a compromise bill, which had been passed after extended debates.[51] For the next three years, Congress struggled over legislation until finally enacting LSC in 1974.[52]

The House and Senate considered four different versions of the bill and numerous amendments which imposed a variety of restrictions.[53] The four bills had four different provisions on the issue of lobbying. The House bill permitted lobbying in the course of providing assistance to an eligible client or when legal services attorneys were formally requested by a government agency or legislator to make a statement or testify.[54] The Administration bill allowed attorneys to give testimony only when formally requested by a legislator.[55] The

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[48] New York Lawyers' Committee to Preserve Legal Services, Brief in Support of the Reauthorization and Continued Funding of the Legal Services Corporation, June 8, 1981, p. 10, *adapted and reprinted in, Special Project: The Legal Services Corporation: Past, Present, and Future*, 28 N.Y.L. SCH. L. REV. 593, 603 (1983).

As the court stated in *East Arkansas Legal Services v. LSC*, 742 F.2d 1472 (D.C. Cir. 1984), "Congress considered protection of the Corporation's independence to be a centerpiece of the Legal Services Corporation Act of 1974 . . . ." *Id.* at 1473. Note also *Grassley v. LSC*, 535 F. Supp. 818, 823 (S.D. Iowa 1982), in which the court stated that "Congress wanted to direct the finances and resources of the Corporation toward the provision of legal services to the poor and insulate the Corporation from the political influence, abuses, and criticisms that had characterized the previous OEO-administered program [citation omitted]." In that case, brought by five politicians alleging violations of the statutory prohibitions on lobbying and political activities, the court determined that the plaintiff's remedy was legislative oversight, rather than judicial review. *Id.* at 823.

[49] H.R. 6360, 92d Cong., 1st Sess. (1971); S.1305, 92d Cong., 1st Sess. (1971).

[50] H.R. 8163, 92d Cong., 1st Sess. (1971); S.1769, 92d Cong., 1st Sess. (1971).

[51] Veto Message—Economic Opportunity Amendments of 1971, 92d Cong., 1st Sess. (1971).

[52] Congress examined the legislation in great detail. As described by the Court in *Smith v. Ehrlich*, 430 F. Supp. 818 (D.C. Cir. 1976) (three-judge court), "[B]y the time an [LSC] act acceptable to the President was produced, the Congress had 'examined at great detail almost every specific provision that is now found,' 119 Cong. Rec. 20699, in the legislation." *Id.* at 821, n.7.

[53] For discussions of the legislative history, *see, e.g.*, JOHNSON, *supra* note 14; Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1980); Minna R. Buck, *The Legal Services Corporation: Finally Separate, But Not Equal*, 27 SYRACUSE L. REV. 611 (1976); Dooley & Houseman, *supra* note 11; Dooley & Houseman, *supra* note 17; George, *supra* note 45; Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734 (1976).

[54] 119 CONG. REC. H41072 (1973).

[55] *Id.*

Senate Labor and Public Welfare Committee bill permitted lobbying when necessary to the provision of legal advice and representation.[56] The Brock-Helms substitute bill in the Senate totally barred lobbying.[57]

The debates and congressional reports on these four proposals illuminate Congressional intent regarding the range of services which legal services attorneys may provide their clients, the role of lobbying, and the importance of ensuring competent, ethical representation. The guiding principle of LSC was to provide high quality legal assistance to those unable to afford adequate counsel. Yet at the time of the legislative debates over LSC, there were already differing views regarding the specific purposes and functions of LSC. One view held that legal services attorneys "must be free to represent their clients just as a good private attorney would represent a client . . . [and] legal services lawyers should be allowed to pursue all avenues of legal representation consistent with the Code of Professional Responsibility and other applicable ethical guidelines."[58] It was argued that clients eligible for legal services should get the same services as paying clients, not "second class justice."[59] Another view held that legal services attorneys should not be permitted to lobby on behalf of their clients because of concern that the attorneys would attempt to implement their personal agendas.[60] These controversies emanated, in part, from the differing activities of, and complaints about, the legal services programs that had been operating under grants from the OEO since 1965. During the congressional debates, Congresspersons Curtis and Green expressed concern about the programs being used as a base for social reform. In addition, Senators Javits and Pearson expressed concern that the independence of legal services attorneys would be compromised by political pressures.[61] Another debated issue was whether legal services attorneys should be solely concerned with individual representation of clients or if they should also be involved in law reform.[62]

In the legislative debates, supporters of the LSC bill cautioned against creating a double standard by restricting the activities of legal services attorneys more than the activities of private attorneys.[63] Senator Nelson, in commenting on the lobbying restriction contained in the Senate Committee bill, stated:

> [i]t does not prohibit necessary legal advice and representation because to do so would set up an artificial double standard prohibiting a legal ser-

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[56] *Id.*

[57] *Id.*

[58] 119 CONG. REC. S41084 (1973) (remarks of Sen. Jackson).

[59] *See, e.g.*, 119 CONG. REC. S40468 (1973) (remarks of Sen. Nelson).

[60] *See, e.g.*, 119 CONG. REC. S41072 (1973) (Brock-Helms proposal).

[61] 120 CONG. REC. S1383 (1974) (Curtis); 119 CONG. REC. H20717-18 (1973) (Green); 119 CONG. REC. S40475-77 (1973) (Javits); 120 CONG. REC. S1402 (1974) (Pearson). *See Depoliticizing Legal Aid*, *supra* note 52, at 735.

[62] *See* Dooley & Houseman, *supra* note 17, at 29-31.

[63] 119 CONG. REC. H20689 (1973) (remarks of Rep. Biester); *see also id.* at H20693 (remarks of Rep. Mitchell); *id.* at H20694-95 (remarks of Rep. Steiger).

> vices attorney for a poor person from doing what any other private attorney could do. No attorney shall be forced to violate the canons of ethics by providing less than the full range of legal services to eligible clients.[64]

Congressperson Meeds concurred, stating that legal services attorneys were to "provide legal representation to the same extent permitted lawyers for paying clients . . . . [G]uidelines [to be established by the Corporation were to] be consistent with the Canons of Ethics and the Code of Professional Responsibility, thereby assuring unhampered and effective representation of the poor in all legal, legislative and administrative forums."[65]

The House Report stated that the lobbying provisions in its bill were intended to limit legislative and administrative lobbying to representations on behalf of clients or upon invitation. The purpose was to restrict attorneys from advocating their own personal views.[66] Congressperson Ford stated that lobbying was fully expected and that legal services groups would be allowed to lobby in a reasonable manner, such as by having joint offices "at the places the legislatures and agencies work."[67]

In the course of the Senate debates, Senator Cranston stated that representation before legislative bodies, including testifying and drafting proposed legislation, was only permissible when done on behalf of an eligible client or client group on issues important to the clients and only when requested by a legislator or legislative body.[68] In presenting the conference report on the House floor, Congressperson Perkins stated that the restrictions and exceptions were carefully balanced and that the committee expected that no further restrictions on the activities of recipients of legal services grants would be established by the Corporation.[69]

In the end, Congress enacted a statute which imposed subject-matter and procedural restrictions on legal services attorneys' activities.[70] As explained in section I, the lobbying restrictions in the 1974 LSC Act are minimal and allow legal services attorneys to lobby if needed for "legal advice and representation"[71] for an eligible client. In addition, there is a ban on taking certain kinds

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[64] 119 CONG. REC. S40468 (1973); *see also* 120 CONG. REC. S1403 (1974) (remarks of Sen. Pearson).

[65] 119 CONG. REC. H20706 (1973).

[66] H.R. REP. NO. 247, 93d Cong., 1st Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 3872, 3879; *see also* 120 CONG. REC. H14996 (1974) (remarks of Rep. Perkins).

[67] 119 CONG. REC. H20703 (1973).

[68] 120 CONG. REC. S24037 (1974); *see also* 120 CONG. REC. S24056 (1974) (remarks of Sen. Kennedy).

[69] 120 CONG. REC. H14996 (1974).

[70] 42 U.S.C. §§ 2996(e)-(f) (Supp. 1993).

[71] In *Western Center on Law and Poverty, Inc. v. Legal Servs. Corp.*, 592 F. Supp. 338 (D.D.C. 1984), the court had to determine whether the terms "legal advice and representation" in the LSC Act should be read narrowly or broadly. The court reasoned that:

> The equation between legal assistance and legal advice and representation provides

of cases (e.g., cases involving selective service, school desegregation and non-therapeutic abortions, and some types of juvenile representation) and restrictions on an attorney's political activities[72] (in addition to those on lobbying) and on the activities that attorneys engage in on their own time.[73] The 1974 LSC Act uses ambiguous terms to modify some of the restrictions on attorneys' activities. This allows the attorney to provide adequate "legal assistance" to eligible clients.[74] However, defining "legal assistance" as "the provision of any legal services consistent with the purposes and provisions of this subchapter" is circular.[75]

Both the Senate and House Reports to the 1977 amendments to the 1974 LSC Act, which liberalized the 1974 restrictions,[76] acknowledged that when

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> a starting point for the meaning of legal advice and representation: such activities are provided for the benefit of eligible clients. In addition, the regulation and the statute both show that legal advice and representation includes all activities that lawyers perform on behalf of their clients. This conclusion follows from the absence of a more restrictive language in either the statute or the regulations. Thus, [President of LSC] Bogard's conclusion that the exception is a narrow one is unsupported by the statutory language and interpreting regulations.

Id. at 344. Moreover, the legislative history illustrated that Congress intended a completely different definition of these activities.

> The proposed Senate amendment to the bill provided that legal assistance is defined as legal advice and representation, and includes:
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> > the *full range and kind of professional services provided by attorneys* as attorneys in non-criminal proceedings or matters *to and on behalf of their clients*, as well as the kind of assistance in education relating to legal rights and responsibilities which lawyers are ordinarily called upon to provide.
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> S.Rep. No. 495 ("S.Rep."), 93d Cong., 1st Sess. 9 (1973) (emphasis added). This permissive definition is also confirmed by the remarks of one of the Senate floor managers of the bill. 119 Cong. Rec. 40, 476, 40, 478 (1973) (Senator Javits). Although the Senate definition of legal assistance was replaced by the House definition, the relevant language regarding legal advice and representation was not repudiated. Conf. Rep. No. 247 ("Conf.Rep."), 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad.News 3897, 3898. Thus, Bogard's conclusion that legal advice and representation should be narrowly construed lacks validity [cite omitted] and must be rejected.

Id. at 344-45. (In that case, a support center successfully challenged LSC's decision to deny refunding.)

[72] 42 U.S.C. § 2996f(a)(6) (Supp. 1993). Political activity is not defined. In that same subsection, legal services attorneys are to refrain from activity to provide voters with transportation to the polls and to refrain from voter registration activity. However, attorneys may provide "legal advice and representation" with regard to these services. *Id.* at §§ 2996f(a)(6)(B)-(a)(6)(C).

[73] *Id.*

[74] *See, e.g.*, 42 U.S.C. §§ 2996f(b)(6)-(b)(7) (Supp. 1993).

[75] 42 U.S.C. § 2996a(5) (Supp. 1993).

[76] With regard to lobbying activities, the amendments modified the language to be consistent with LSC's interpretation. *See* Dooley & Houseman, *supra* note 17, at ch. 3,

Congress enacted the Act, it recognized that legislative or administrative advocacy might sometimes be the most efficient method of resolving an issue affecting legal services clients.[77] The Senate Report specifically states that:

> [w]hen it enacted the 1974 LSC Act, Congress recognized that circumstances might arise in which legislative or administrative advocacy might sometimes be the most efficient method of resolving an issue affecting legal services clients, and it authorized legal services programs to engage in such activities on behalf of specific clients or organizations.[78]

In addition to these statutory restrictions, limitations on lobbying were also included in the Moorhead Amendment, which was added to the LSC appropriation bill in 1978 and continued until 1982. It provided that LSC funds could not be used "for publication or propaganda purposes designed to support or defeat legislation pending before Congress or any state legislature."[79]

The next congressional activity relating to lobbying was during the period from 1980 to 1983.[80] Congressional hearings were held regarding lobbying by

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pp. 5, 13.

[77] 1977 Senate Report on the Reauthorization Legislation, S. REP. NO. 172, 95th Cong., 1st Sess. 14-15. LSC funds could not be used directly for organizing activities but could be used for advice and legal assistance to clients who were themselves engaged in such activities. *See* H.R. REP. NO. 310, 95th Cong., 1st Sess. 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4503.

[78] *Id.*

[79] *See* 124 CONG. REC. H5544 (1978). The Moorhead Amendment is similar to the provisions of section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act of 1972 (known as the Treasury Rider). The legislative history of the Moorhead Amendment indicates that its purpose was to extend the Treasury Rider to legal services attorneys' activities. The initial position of LSC was that the Moorhead Amendment did not change the restrictions in the LSC Act. The LSC articulated its interpretation of the Act, the Moorhead Amendment, and the General Treasury Riders in a 1980 memorandum. Memorandum from the Office of General Counsel of LSC to Dan Bradley, President of LSC, "Legislative Advocacy and the Moorhead Amendment" (Sept. 12, 1980). LSC's position was that the Moorhead Amendment "neither narrowed nor broadened the existing restrictions on legislative advocacy." *Id.* at 3. This position was based, in part, on Senate Appropriations Committee language that the Amendment only restricted funding if it did not come within one of the three statutory exceptions: if it was necessary for the provision of legal advice and representation to a client, requested by a government agency or legislative body, or addressed to a government agency or legislative body considering a measure directly affecting the activities of the Corporation. *See* Dooley & Houseman, *supra* note 17, at 77 n.64.

[80] Ronald Reagan, upon his election to the presidency, attempted to eliminate LSC and was openly hostile to its continuation. In 1983, Senator Weicker commented on the "[t]hree years of administration attempts to zero [the LSC] out and/or bring about its internal collapse . . . ." 129 CONG. REC. S28,937 (1983). Partly in response to the attempts by the Reagan Administration to eliminate LSC, legal services attorneys created coalitions with various groups to lobby in support of LSC's survival; these activities are sometimes called the LSC survival activities campaign.

legal services attorneys, including opinions from the Comptroller General in the General Accounting Office (GAO), in response to complaints from a few congresspersons.[81] Oversight hearings before the Senate Committee on Labor

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[81] The sequence of events is important in understanding the present lobbying restrictions which were added to the appropriations acts by Congress in 1983 and 1984.

On April 14, 1980, the Office of the General Counsel issued a memorandum to the programs that the Moorhead Amendment "neither narrowed nor broadened the existing restrictions on legislative advocacy." Memorandum at p. 3. On September 12, 1980, in a lengthy memorandum from Mario Lewis, General Counsel of LSC, to Dan Bradley, then President of LSC, entitled "Legislative Advocacy and the Moorhead Amendment," the General Counsel explained how the Act and the Moorhead amendment were consistent. The legislative history of each both showed that the concern of Congress in the area of legislative advocacy was that "program lawyers espouse the legal needs of their clients, not their own ideological beliefs." 120 CONG. REC. H3951 (1974). The Moorhead Amendment was to have the same effect as the general provision in the Treasury, Postal Service and General Government Appropriations Act which, since 1972, has provided that "[n]o part of any appropriation contained in this or any other act or of 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." The Moorhead Amendment tracked that language and added "or state legislatures" at the end. The floor debate, according to LSC's General Counsel, indicated no intent to change existing law. Senator Moorhead's contention that the Amendment substantively changed the Act and created a complete ban on legislative advocacy was rejected.

Thereafter, Representative Gilman requested an opinion from the GAO as to whether the April 14, 1980 opinion of the LSC Office of General Counsel was correct. The responsive GAO Opinion, dated November 24, 1980, basically agreed with LSC's memorandum (B-163762).

Congressperson Sensenbrenner subsequently notified the GAO of activities that he thought violated the Act. LSC had formed a coalition with various groups to direct a lobbying campaign in support of LSC's reauthorization, in response to then President Reagan's attempt to eliminate LSC, and had mailed out packets to people in the field on how to effectively lobby members of Congress (LSC's survival activities campaign). In the Opinion of the Comptroller General, dated May 1, 1981, the GAO concluded that LSC had engaged in grassroots lobbying prohibited by the statute but had not engaged in prohibited political activities (B-202116). According to the GAO, "[W]e have always construed other anti-lobbying restrictions as permitting officials to express their views on pending or proposed legislation as it affects their policies and activities directly to Congress or to the public," but not grassroots lobbying, which is defined as appeals addressed to the public at large or to selected individuals suggesting that they contact their elected representatives and indicate their support of or opposition to legislation being considered by Congress. *Id.* GAO did not find support for LSC's broad interpretation that it could engage in all activities necessary to influence legislation affecting LSC, including grass roots lobbying. The Opinion concluded that

> [i]n summary, through the use of recipient organizations and their contacts at the State and local level, LSC has developed an extensive lobbying campaign to support reauthorization legislation for the Corporation and related appropriation measures being considered by the Congress. This activity violates the anti-lobbying

and Human Resources, which started in July 1983, were to look at "certain activities of the Legal Services Corporation, focusing on policies at the Corporation and political activities."[82] According to Senator Hatch, the Committee Chair, the goal of the hearings was to return LSC programs to being "nonpolitical and client oriented."[83] At these hearings evidence was presented concerning lobbying activities by LSC attorneys in support of the Corporation's survival.[84] Partly as a result of these hearings, some limitations were added to the 1983 Appropriations Act and additional restrictions were placed on legislative and administrative representation in the 1984 Appropriations Act.[85]

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statutory and appropriation restrictions described above.
Id.

In response to this GAO Opinion, LSC, in a letter dated May 11, 1981, disagreed with the GAO interpretation, attributing the difficulty meshing riders attached to appropriation bills (the Treasury Rider and the Moorhead Amendment) with the authorization legislation. However, LSC decided to advise all personnel to stop all activities that came within the GAO definition of grassroots lobbying. (A subsequent GAO Opinion, dated September 19, 1983, in response to a request by Senator Hatch, found some violations of the restrictions on training, coalition building activities and opposing ballot measures in the LSC survival activities [B-210338/B-202116]).

[82] *Hearings on S. 547 Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. (1983).

[83] *Id.*

[84] The survival campaign by legal services staff, in response to the attempts by the Administration to defend legal services, is discussed *supra* at note 80.

[85] The 1984 Appropriations Rider, Pub. L. 98-166, provided:

That none of the funds appropriated in this Act made available by the Legal Services Corporation may be used—

(1) to pay for any publicity or propaganda intended or designed to support or defeat legislation pending before Congress or State or local legislative bodies or intended or designed to influence any decision by a Federal, State or local agency;

(2) to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or other device, intended or designed to influence any decision by a Federal, State, or local agency, except when legal assistance is provided by an employee of a recipient to an eligible client on a particular application, claim, or case, which directly involves the client's legal rights or responsibilities;

(3) to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or any other device intended or designed to influence any Member of Congress or any other Federal, State, or local elected official—

(A) to favor or oppose any referendum, initiative, constitutional amendment, or any similar procedure of the Congress, any State legislature, any local council or any similar governing body acting in a legislative capacity,

(B) to favor or oppose an authorization or appropriation directly affecting the authority, function, or funding of the recipient or the Corporation, or

(C) to influence the conduct of oversight proceedings of the recipient or the Corporation;

(4) to pay for any personal service, advertisement, telegram, telephone commu-

These provisions in the 1984 appropriations rider[86] were a result of a congressional compromise[87] which was offered by Senators Hatch, Rudman,

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nication, letter, printed or written matter, or any other device intended or designed to influence any Member of Congress or any other Federal, State, or local elected official to favor or oppose any Act, bill, resolution, or similar legislation, except that this proviso shall not preclude funds from being used to provide communication directly to a Federal, State, or local elected official on a specific and distinct matter where the purpose of such communication is to bring the matter to the official's attention if—

(A) the project director of a recipient has expressly approved in writing the undertaking of such communication to be made on behalf of a client or class of clients in accordance with policy established by the governing body of the recipient; and

(B) the project director of a recipient has determined prior to the undertaking of such communication, that—

(i) the client and each such client is in need of relief which can be provided by the legislative body involved;

(ii) appropriate judicial and administrative relief have been exhausted; and

(iii) documentation has been secured from each eligible client that includes a statement of the specific legal interests of the client, except that such communication may not be the result of participation in a coordinated effort to provide such communications under this proviso; and

(C) the project director of a recipient maintains documentation of the expense and time spent under this proviso as part of the records of the recipient; or

(D) the project director of a recipient has approved the submission of a communication to a legislator requesting introduction of a private relief bill:

except that nothing in this proviso shall prohibit communications made in response to a request from a Federal, State, or local official. . . .

Act of November 28, 1983, Pub. L. 98-166, 97 Stat. 1071 (1983).

[86] Pub. L. 98-411. In addition to the authorization of funds to run the program, substantive "amendments" have been included in the appropriation bills. The Appropriations Committee was "force[d] . . . into the role of a legislative committee." 129 CONG. REC. S28,937 (1983) (statements of Sen. Weicker). For a discussion of the relationship between LSC and Congress, *see infra* text accompanying notes 97-107.

[87] Senator Rudman, who according to Senator Hatch was *the* "guiding and intelligent voice on this particular issue," 129 CONG. REC. S28,934 (1983) (statements of Sen. Hatch), specifically stated that "the compromise amendment Senator Hatch and I are offering is the product of extensive and intensive negotiations over the last 2 days. It is a compromise in the truest sense of the word as it contains provisions which make everyone on every side of the issue unhappy." *Id.* at S28,935 (statement of Sen. Rudman).

While there is no written record of the intense negotiation that formed the basis of the compromise, it is instructive to compare the proposed reauthorization bills from the House and Senate (HR-2909 and S-1133) with the compromise legislation. There were seven items not found in either the House or Senate bill that were in the compromise bill. It can reasonably be inferred that at least some of the changes were part of the compromise. First, "propaganda" was added to the prohibition on using LSC funds to pay for publicity. Second, contrary to both the House and Senate bills, a prohibition

Grassley and Denton,[88] in an attempt to "refocus the direction of the Corporation away from the lobbying and propagandizing of the last few years back to the more important day-to-day delivery of legal services to this Nation's poor."[89] According to Senator Rudman, "[t]here is great difficulty putting in the controls many of us believe are necessary to effectuate the use of these funds for the purpose we all want to intend them — that is, to help poor people who cannot help themselves."[90] The language on lobbying was intended to "pretty much foreclose grassroots lobbying. The only lobbying allowed will very much fit the mold of traditional legal representation — coming to Con-

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was specifically added to bar using LSC monies to favor or oppose legislation affecting the Corporation. Interestingly, the House and Senate bills both specifically allowed such a use of LSC funds. Third, the project director was required to determine that appropriate judicial and administrative relief had been exhausted before communicating with a legislator. Fourth, the communication from the client "may not be the result of participation in a coordinated effort to provide such communications under this proviso." Act of November 28, 1983, Pub. L. No. 98-166, 97 Stat. 1071, 1090 (1983). Fifth, the project director must keep the documentation of the expense and time spent lobbying on behalf of a client. Sixth, the project director had to approve the submission of the communication to a legislator requesting introduction of a private relief bill. Last, LSC funds could not be used to pay any administrative or related costs of the prohibited activities.

[88] The text of the compromise is at 129 CONG. REC. S28,933-34 (1983).

[89] 129 CONG. REC. S28,934 (1983). Some Senators, such as Senator Kennedy, were concerned with the greater limitations placed on legislative activities. *See* 129 CONG. REC. H9561 (1983); 129 CONG. REC. S28,938-39 (1983). Senator Kennedy stated that:

> There have been concerns raised by some of my colleagues both during the labor committee's deliberation of the LSC authorization bill and during the floor consideration of this bill regarding lobbying activities by Legal Services attorneys. They seem to believe that these attorneys are not pursuing the interests of their clients, but rather a personal political agenda. They seem to believe that using public funds to lobby representatives of the public is somehow wrong. I cannot disagree with them more. A nation does not demonstrate its commitment to "equal justice for all" in the easy case, but in the hard one. To provide attorneys to the poor Americans in a divorce case is easy. The real challenge comes in providing an attorney for poor Americans opposing powerful governmental, social, or economic interests.

Id. In Senate Report Number 98-206, the recommendation was to retain the existing provisions relating to legislative and administrative advocacy but add two instances in which legislative advocacy would be permitted: (1) when expressly approved on behalf of an eligible client and (2) when expressly approved on matters directly affecting the authority, function or funding of the recipient or the Corporation. The alterations were made because of the belief that the "fiscal year 1983 restrictions may have interfered with the ability of legal services' attorneys to best represent the particular interests of the clients." The Committee report reiterated that publicity or propaganda efforts, which have been the source of past controversy, are flatly prohibited. S. REP. NO. 206, 98th Cong., 1st Sess. 49 (1983).

[90] 129 CONG. REC. S28,936 (1983).

gress, as individual attorneys on behalf of a particular client, only after other possible avenues have been tried and exhausted."[91]

Thus, the legislative history of the 1974 LSC Act distinguishes between generalized grassroots lobbying and lobbying on behalf of a client. The lobbying which Congress intended to sanction was that which fit the mold of traditional legal representation, that of lobbying on behalf of a client. Throughout the various legislative enactments, Congress remained firm in this commitment to lobbying on behalf of a client. There were also no limitations on a legal services attorney's counseling a client. This article will argue that these conceptions are essential to providing legal services comparable to those which a paying client can obtain.[92]

B. *The Executive Branch's Interpretation of Congressional Intent: Redefining the Model of Attorney-as-Lobbyist*

Pursuant to the provisions in the 1984 Appropriation Rider, LSC proposed new regulations on legislative and administrative representation by legal services attorneys.[93] The regulations, dated May 31, 1984, severely narrowed the two exceptions created by Congress for situations in which lobbying would be permissible — lobbying as part of client representation and lobbying at governmental request. The regulations only allowed an attorney to lobby on behalf of a client if the retainer agreement signed by the client had both a "statement by the client in the client's own words of the matter on which relief is sought"[94] and a "statement of the client's direct interest in a particular legislative or administrative measure."[95] As to governmental requests, the 1984 regulations required a

> written request directed to the recipient and signed by an official of the governmental agency or a member of the legislative body or committee making the request which states the type of representation or assistance requested and identifies the executive or administrative order or regulation, or legislation, to be addressed.[96]

These 1984 regulations received severe criticism from commentators, including Senator Rudman, as being more restrictive than Congress intended.[97] The

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[91] 129 CONG. REC. S28,937 (1983) (remarks of Sen. Grassley).

[92] *See infra* pp 78-32.

[93] 49 Fed. Reg. 22,651 (1984). Since 1984, LSC has issued two sets of proposed regulations on lobbying. 49 Fed. Reg. 6,943 (1984); 50 Fed. Reg. 501 (1985). During that same period LSC has issued three sets of final regulations. 49 Fed. Reg. 22,651 (1984) (codified at 45 C.F.R. § 1612 (1992)); 51 Fed. Reg. 27,539 (1986) (codified at 45 C.F.R. § 1612 (1992)); 52 Fed. Reg. 28,434 (1987) (codified at 45 C.F.R. § 1612 (1992)).

[94] 49 Fed. Reg. 22,651, 22,656 (1984).

[95] *Id.* at 22,656.

[96] *Id.*

[97] Senator Rudman, Chair of the Senate Appropriations Subcommittee, said that

legislative history of these regulations demonstrates that Congress intended the limitations on lobbying in the appropriations riders to be interpreted narrowly. In its comments on these lobbying regulations, the Committee expressed its dissatisfaction, noting that the regulations were not:

> an accurate reflection of the Legal Services Corporation Act, other applicable provisions of law including appropriations acts, and congressional intent. With regard to the statutory appropriations riders, the Corporation has stood statutory construction on its head. Instead of determining that the appropriations riders were exceptions to the Legal Services Corpora-

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"[m]any Senators felt that the portions of the proposed regulation far exceeded the scope of the statutory language and 18 Senators, including myself, wrote Robert McCarthy, chairman of the Corporation's Board on March 27 expressing that view." 130 CONG. REC. S19,530 (1984). Moreover, Senator Hatch expressed the view that:

> the report language accompanying H.R. 5712 states that the Appropriations Committee feels that the regulations promulgated by the Corporation implementing last year's statutory language on lobbying were not in keeping with the expressed language and intent of the lobbying provisions found in Public Law 98-166. Since the Senator from New Hampshire and I were the principal cosponsors of these provisions, I was most concerned with his apparent condemnation of the implementing regulations. This issue is perhaps the single most important aspect of last year's compromise because lobbying by the Corporation represents the heart of the controversy surrounding the legal services programs.

Id. at S8589 (remarks of Sen. Hatch).

In addition, a February 7, 1985 letter from Senators Rudman and Smith to LSC President Bogard detailed some of the Senators' concerns about the regulations, including that:

1. Under normal rules of statutory construction, the appropriations language on lobbying constitutes exceptions to the Legal Services Corporation Act and should be interpreted narrowly. While we recognize that the Corporation has previously been criticized for interpreting statutory language in this area too narrowly, we believe that problem has been resolved by the level of detail contained in the currently applicable provisions.
2. The revised regulations should not include restrictions or requirements which are not explicitly authorized by the statutory language. It is exceedingly likely that such restrictions or requirements were discussed during the congressional restrictions on the subject and rejected.
3. The regulations should be as clear as possible and track the statutory language. Some of the controversy surrounding the May 31 regulation resulted from the use of imprecise language and the introduction of new phrases and terms whose meanings were unclear.
4. The regulations should not interfere with the normal and legitimate activities and duties of legal services programs and their attorneys. For example, legal services attorneys need to be able to consult with experts in a field in order to decide what course of action to pursue. Neutral reporting on developments in legislation and administrative law is a proper function of the support centers.

Alan Houseman, Legislative and Administrative Representation, Organizing, Training and Demonstrations — Permissible Activity Under the LSC Regulations and Applicable Law (July, 1987) [hereinafter Houseman Manual] at 226-27.

> tion Act, and thus to be construed narrowly, it has determined that the riders were to be interpreted expansively and exceptions to the rider narrowly. Some of the requirements in the regulations, such as the one limiting responses to Federal, State or local officials to only those instances where the officials are willing to put their requests in writing, clearly have no statutory underpinning. In addition to those cases where the regulations are clearly invalid, there are a number of cases where they may be invalid.[98]

Partly as a result of congressional dissatisfaction with the 1984 regulations, a new requirement was added in Pub. L. 98-411 that LSC notify both congressional Appropriations Committees fifteen days before promulgating new regulations or implementing or enforcing regulations effective after April 27, 1984.[99] Both congressional Appropriations Subcommittees disapproved the reprogramming request on the May 31, 1984 regulation and asked LSC to rescind it.[100] LSC issued new regulations on August 1, 1986,[101] and again Congress refused to approve them.[102] Congress subsequently prohibited LSC and the Corporation's recipients from using 1987 funds or prior LSC funds to

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[98] S. REP. NO. 514, 98th Cong., 2d Sess. 57 (1984). The quotation was in the context of explaining one of the reasons for adding a new provision that subjected all LSC regulations adopted by LSC since April 27, 1984 to the reprogramming regulations; the April 28, 1984 lobbying regulations did not reflect the language of the statute, appropriations acts and congressional intent. *Id.*

[99] The provision, which was continued yearly and was in effect until recently, mandates:

> None of the funds appropriated in this Act for the Corporation shall be used, directly or indirectly, by the Corporation to promulgate new regulations or to enforce, implement or operate in accordance with regulations effective after April 27, 1984 unless the Appropriations Committees of both Houses of Congress have been notified fifteen days prior to such use of funds as provided for in section 606 of this Act.

Pub. L. No. 98-411, 98 Stat. 1574 (1984). *See, e.g.*, Pub. L. No. 101-515, 104 Stat. 2152 (1990).

This procedure of submitting new regulations to Congress before promulgating them is known as a reprogramming request. Reprogramming procedures are usually used in connection with budgetary issues. Section 509 is the normal reprogramming provision that prohibits shifting of budget categories without first notifying the congressional committees. *See* Dooley & Houseman, *supra* note 17, at 63, n.53. The application of reprogramming to policy issues was "unusual" and was done so that LSC would "reflect a little on what they have done and listen to comments from Congress." 130 CONG. REC. S8588-89 (1984) (remarks of Sen. Rudman).

[100] The denial of a reprogramming request does not void the regulation; it is up to LSC to revoke the regulation.

[101] Restriction on Lobbying and Certain Other Activities, 51 Fed. Reg. 27,539 (1986) (codified at 45 C.F.R. § 1612 (1986)).

[102] Letter of Chairperson of Project Advisory Group to Senator Hollings, Chair of the Senate Appropriations Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies (March 31, 1987).

implement the 1984 and 1986 regulations.[103]

In 1987, LSC approved another set of regulations restricting legislative and administrative representations by legal services attorneys. In August of 1987,[104] final regulations on legislative and administrative advocacy were implemented.[105] Those regulations, described in section I,[106] with the 1993 modifications are the ones currently in effect.[107]

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[103] Pub. L. No. 99-500, 100 Stat. 1783-69 provides in relevant part:

> [N]one of the funds appropriated by this Act may be used to implement or enforce the regulations issued by Legal Services Corporation regarding legislative and administrative advocacy (45 C.F.R. § 1612), printed for final publication in the "Federal Register" on May 31, 1984 (49 Fed. Reg. 22,651) and on August 1, 1986 (51 Fed. Reg. 27539).

[104] The process that preceded the implementation and the resultant delay in implementation was probably due to congressional dissatisfaction with the regulations being more restrictive than Congress had intended. On November 7, 1986, LSC published a notice of reconsideration of the final rule as published on August 1, 1986. Restriction on Lobbying and Certain Other Activities, 52 Fed. Reg. (1986) (codified at 45 C.F.R. § 1612 (1986)). Project Advisory Group (PAG), the national organization of legal services programs, was involved in negotiations with LSC on the changes to the regulations. While PAG reached a compromise on many of its major concerns and was under an obligation to support those portions of the regulation, it continued to believe that there were a "number of problems that remain with the regulation that should be considered in the legislative process or other forums." Letter of Chairperson of PAG, *supra* note 102, at 3. As stated in that letter:

> Our willingness to endorse the proposed regulation (subject to the above concerns) should not be interpreted as endorsing the LSC interpretations of the statute and rider. LSC continues to impose restrictions on valid program representation and activity that is unauthorized by the statute or rider or which may well be unconstitutional. Nor should our endorsement be interpreted as agreeing with the various additional restrictions on legitimate and proper program activity before administrative and legislative bodies. The rights and obligations of our clients are directly affected by these bodies. Legal Services should be able to provide full professional representation before such bodies to assure that the rights of eligible clients are protected and that obligations are imposed fairly and without discrimination.

Id.

[105] Restriction on Lobbying and Certain Other Activities, 52 Fed. Reg. 28,434 (1987) (codified at 45 C.F.R. § 1612 (1987)).

[106] *See supra* text accompanying notes 22-32.

[107] The fact that the regulations were ultimately enacted does not mean that Congress has approved them. Congress did not have veto power over the regulations. More importantly, the fact that an appropriations committee failed to expressly rebuke LSC's regulation in its entirety is not sufficient to alter the previous meaning behind any portion of the LSC Act or appropriations legislation. It is interesting to note that the appropriation acts for LSC prohibit it from "implementing any of the rule's private funds prohibitions that apply to restrictions in LSC's appropriations act that are not also included in the LSL Act." 54 Fed Reg. 21,404 (1983). It is a "cardinal rule" of statutory construction that courts do not favor repeals or amendments by implication. Morton v. Mancari, 417 U.S. 535, 549 (1974). This is particularly true if that implica-

C. *Comparing the 1974 LSC Act and the Regulations*

A comparison of the 1974 LSC Act and the regulations reveals that the Executive Branch's conception of permissible lobbying activity diverges from the congressional model in several important respects.[108]

The regulations add additional restrictions to four key areas of the legislation: legislative lobbying, administrative lobbying, the exception allowing lobbying where necessary for client representation, and the exception for responding to requests by a government agency. The regulations limit what the attorney can discuss with the client and what options the attorney has to assist the client. They also interfere with the counseling aspect of the relationship between the attorney and client.

The exception allowing for lobbying in the representation of a client is also narrowed. The legislative communication must be at the request of the client and the documentation must include a retainer which sets forth the specific legal interest "as identified by the client . . . ."[109] Communication that is designed to persuade an official or the public is prohibited.[110]

Congress also restricted grassroots lobbying, but did not completely prohibit it. The 1985 House Report repeated the frequently stated interpretation of the 1974 LSC Act: "The current restrictions in the Act on lobbying by recipients do not prohibit grassroots lobbying in the area of permitted legislative activity."[111] In that same report, LSC was admonished not to impose restrictions on grassroots lobbying that go beyond the statutory language:

> The Committee expects the Corporation to look to prior interpretations by the Government Accounting Office on the meaning of the language used here to determine the scope of the prohibitions on grassroots lobbying.

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tion is found in the approval of a Senate or House appropriations committee. In order for Congress to amend a statute through the use of an appropriations act, it must explicitly state its intention when passing that legislation; repeal of legislation will not be implied from a subsequent appropriation measure or the expression of an appropriations committee. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153, 189-90 (1978).

[108] While the inconsistencies do not rise to the level necessary for a judicial determination of invalidity of the regulations, a discussion of the inconsistencies is useful for later analyses in this article. *See infra* section III. For purposes of this comparative analysis, the two statutory restrictions (those in the Act and those in the appropriations rider) will be treated as one; the regulations implement the restrictions in the appropriations rider. The provisions in the LSC Act on legislative and administrative representation are still in effect. Appropriation riders do not repeal substantive legislation unless the rider specifically states that it is repealing the provisions of the Act. *See* United States v. Will, 449 U.S. 200 (1980); United States v. Vulte, 233 U.S. 509 (1913). Since there was no such repeal, the Act's provisions are still in effect, although the restrictions in the appropriations rider apply to monies appropriated in that fiscal year.

[109] 45 C.F.R. § 1612.5(e)(3) (1992).

[110] *Id.* at § 1612.7.

[111] H.R. REP. NO. 448, 99th Cong., 1st Sess. 25 (1985).

> The Corporation should fully restrict grassroots lobbying consistent with the statutory language but should not impose restrictions which go beyond the statutory language.[112]

However, implicit in the regulations is the notion that grassroots lobbying is not just restricted but is prohibited.[113] Furthermore, the regulations broadly define grassroots lobbying.[114]

In addition, the regulations confuse "permissible activities on behalf of a client which may involve advocacy that affects other poor people or poor people generally with impermissible activities done solely on behalf of poor people generally."[115] When advocating on behalf of a particular client, it can be effective lawyering to explain the full impact of a bill on the client as well as on poor people in general. This type of advocacy is different from representing poor people as a class.[116]

Finally, the regulations add a number of provisions that were not contained in the appropriations rider. For example, the regulations restrict "political activity."[117] However, political activity is not mentioned at all in the rider or defined in the 1974 LSC Act;[118] it is included in another section of the Act which refers to activities that influence the electoral process.[119] Another example of these additional restrictions is the provision in the regulations prohibiting the staff of legal services office from attending meetings of coalitions "if a principal purpose of the meeting is to discuss or engage in legislative or political activities."[120] Nothing in the appropriation rider or the Act limits the attendance or participation of legal services attorneys in coalition meetings.

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[112] *Id.* at 26.

[113] Although the regulations do allow for some lobbying on behalf of an eligible client, it is severely restricted. *See supra* pp. 78-82.

[114] 45 C.F.R. § 1612.1(d) (1992). Grassroots lobbying is defined for the first time in the regulations. The term "grassroots lobbying" is not mentioned or defined in the appropriations rider.

[115] Houseman Manual, *supra* note 97, at 230.

[116] *Id.*

[117] It is defined as "activities intended either to influence the making, as distinguished from the administration, of public policy or to influence the electoral process. Political activities include favoring or opposing current or proposed public policy and also include administrative, legislative and grassroots lobbying." 45 C.F.R. § 1612.1(k) (1992).

[118] Legal Services attorneys are to refrain from political activity, voter transportation to the polls and voter registration activity (other than legal advice and representations). 42 U.S.C. § 2996f(a)(6) (Supp. 1993). *See also* 42 U.S.C. § 2996f(b)(4) (Supp. 1993).

[119] The relevant provision provides that "[e]mployees of the Corporation or of recipients shall not at any time intentionally identify the Corporation or its recipient with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office." 42 U.S.C. § 2996(e)(1) (Supp. 1993).

[120] 45 C.F.R. § 1612.3(f) (1992).

Similarly, the regulations prohibit the use of funds to circulate publications regarding pending legislation to the public or to eligible clients, unless any reference to pending or proposed legislation is incidental to the publication topic.[121] There is no restriction in the rider or Act as to whom publications may be sent.

With regard to administrative lobbying, the regulations expand the definition of "administrative lobbying" to include communications with officials, commissions, authorities and government corporations.[122] Significantly, the regulation equates administrative representation with administrative lobbying.[123] In the area of legislative lobbying, the definition of legislation was expanded to encompass any action or proposals for action. Furthermore, the definition of a "legislator" has been expanded to include any elected non-judicial official, and any appointed official.[124] The regulations also include restrictions on bills, rules, regulations, treaties, intergovernmental agreements, approval of budgets, adoptions of resolutions not having the force of law, and approval or disapproval of the actions of the executive.[125] The term "similar procedure" is expanded to define not just legislative matters that require a vote of the electorate, but also matters relating to the structure of government itself, such as reapportionment.[126]

In conclusion, it is clear that in comparison to the appropriations rider, the expanded definitions of terms, phrases and concepts in the regulations present significantly more restraints upon the activities of legal services attorneys and interfere with the attorney-client relationship. The regulations also eviscerate the forms of legislative and administrative lobbying that are allowable.

D. *The Implications of the Conflict Between the Congressional and Administrative Models*

Whenever there is a conflict between agency regulations and the enabling legislation, there is inevitably a question as to whether the Executive Branch vitiated congressional intent. Because of the deference given by the courts to an agency's statutory interpretation,[127] the lobbying regulations would not be

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[121] *Id.* at § 1612.7(b)(5).

[122] *Id.* at § 1612.1(b).

[123] *Id.* at § 1612.1(c).

[124] *Id.* at § 1612.1(f).

[125] *Id.* at § 1612.1(h).

[126] *Id.* at § 1612.1(h)(2).

[127] In light of the Supreme Court's decision in Rust v. Sullivan, 500 U.S. 173 (1991), and the District of Columbia's Court of Appeals decision in Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991), it would be difficult to argue that due deference should not be accorded LSC's interpretation of the Act. However, the thrust of the argument in this article is not one addressed to the courts in a litigation posture but is rather one of public policy. In *Rust*, the Court upheld the regulations of the U.S. Department of Health and Human Services, even though the agency changed its interpretation and there was no intervening congressional action. In

found to be in direct conflict with the enabling legislation.[128] Although the legislative history indicates that the lobbying restrictions in the statute were to be narrowly interpreted[129] and that inconsistencies exist between the regulations and the statutory restrictions,[130] the agency's interpretation will be upheld unless "Congress has directly spoken to the precise question at issue" and has resolved it against LSC, or unless the regulation cannot be termed a "permissible construction" of the Act or is arbitrary or capricious."[131] Since that standard cannot be met, the regulation cannot be viewed as being in conflict with the statute and legislative intent.

Nonetheless, three very different models now exist: first, a congressional model exemplified by the 1974 LSC Act; second, a congressional model manifested in the restrictions in the appropriations rider;[132] and finally a model

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Texas Rural Legal Aid, the Court determined that the basic principles of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), applied to LSC and upheld LSC's interpretation of its statutory authority to issue the regulations that prohibited recipient programs from engaging in redistricting litigation or related activities.

[128] The only published article analyzing lobbying restrictions enacted by LSC found them to be consistent with the enabling statute and ethical norms. David A. Pierce, Comment, 9 HARV. J. L. & PUB. POL'Y 203 (1986). In that article, the 1984 regulations, which were more restrictive than those presently in effect, were applauded as serving important interests of both taxpayers and legal services clients, as consistent with the ethical obligations of attorneys to give zealous representation, and consistent with the Congressional intent in creating LSC. The analysis in that article was weak in that the author inadequately and superficially discussed the rules of professional conduct and the legislative history of the Act.

In some areas, such as applying the lobbying restrictions to private funds that legal services offices receive, there is a conflict with the statute. For example, section 1612.13 of the 1987 regulations restricted the use of private funds; the regulations were amended in 1993 to deal with this issue. *See* discussion *supra* note 24. However, that conflict is not central to the analysis in this article.

[129] *See supra* note 97.

[130] There are many ways in which the regulations are inconsistent with legislative intent. For example, permissible activities have been so narrowed as to comprise one section within a general condition of restrictions. The exception is to allow lobbying and the general rule is to prevent it. In section 1612.4 of the regulations, which is entitled "legislative and administrative lobbying," the word "lobbying" replaced "representation" which was used in an earlier draft of the regulations. This change is significant for two reasons. First, it leaves less perceptible ambiguous ground, using a rhetorical device to eradicate the gray area. Second, this section, in conjunction with the reorganization of the regulations, is a perfect example of what Senator Rudman had earlier called "turning legislative intent on its head." *See* 129 CONG. REC. S1446-47, *supra* note 91.

[131] Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 690 (D.C. Cir. 1991).

[132] The reauthorization bill submitted in the Senate last year basically tracks the restrictions in the appropriations rider. *See supra* note 85. The bill pending in the

based on the agency's 1987 regulations. Each model must be examined in light of Congressional intent and the professional norms and standards for attorneys.

From the analysis of Congress' original conception of LSC, as manifested in the 1974 LSC Act, it appears that Congress intended to establish an organization that would provide the same quality of legal assistance to the poor as that which is provided to other socio-economic classes by paid attorneys.[133] LSC was to provide the full range of legal services and "unhampered and effective representation of the poor in all legal, legislative and administrative forums."[134] However, Congress never fully resolved the conflicting views regarding the purposes and functions of LSC, creating an organization with inherent inconsistencies and tensions.

On one hand, Congress intended to provide the same representation to the poor as that which is provided to people who can afford to retain private counsel. Specifically, the attorney's would be able to use all lawful means to "zealously" advance their clients' interests. On the other hand, Congress wanted to restrict legal services attorneys' use of some legal remedies available to clients who can afford to retain private counsel. The reason for this distinction was that those remedies involve the expansion of legal rights, rather than the enforcement of existing legal rights and thus can become tools of an attorney's own political agenda.[135]

III. EVALUATING THE LEGISLATIVE AND ADMINISTRATIVE RESTRICTIONS ON LOBBYING IN LIGHT OF PROFESSIONAL NORMS AND VALUES

A. *Sources of Professional Norms and Values*

Since the regulations do not violate the LSC statute, it is necessary to determine whether the regulations are consistent with the role and function of an attorney. The attorney's role and function is defined by looking at ethical norms and at the profession's own definition of an attorney.

The 1974 LSC Act provides that legal assistance must conform with the Code of Professional Responsibility and the Canons of Ethics.[136] The legisla-

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House is less restrictive. *See* Pub. L. No. 98-166, *supra* note 18.

[133] *See, e.g.*, 119 CONG. REC. S40468 (1973) (remarks of Sen. Nelson); 120 CONG. REC. S1403 (1974) (remarks of Sen. Pearson); *see also* discussion *supra* notes 58-59 and accompanying text.

[134] 119 CONG. REC. H20706 (remarks of Rep. Meeds).

[135] *See* 119 CONG. REC. H20691 (1973).

[136] One question of statutory construction is whether the pertinent ethical norms are limited to those that existed at the time of the passage of the statute (i.e., Code of Professional Responsibility), or whether they include subsequently promulgated norms, such as the Model Rules. The norms to be consulted should not be considered static. LSC itself, in its brief to the District Court in Texas Rural Legal Aid v. Legal Services Corp., 740 F. Supp. 880 (D.D.C. 1990), acknowledged that the LSC Act recognized the plaintiff's duty to observe the applicable ethical rules, and then cited to the Model

tive history makes it clear that LSC was not to interfere with a legal services attorney carrying out his or her professional responsibilities.[137] Questions about ethical issues that might arise due to restrictions on legislative and administrative lobbying were raised in the floor debate over the Act.[138] For example, Senator Nelson stated:

> Legal services attorneys may not attempt to influence legislation . . . except as necessary to the provision of legal advice and representation for eligible clients. This provision would prohibit indiscriminate, nonclient-oriented lobbying, and would more beneficially channel the legal efforts of the attorney — whose primary duty is to provide the best possible legal assistance to the eligible poor. It does not prohibit necessary legal advice and representation because to do so would set up an artificial double standard prohibiting a legal services attorney for a poor person from doing what any other private attorney could do. No attorney shall be forced to violate the Canons of Ethics by providing less than the full range of legal services to eligible clients.[139]

The 1974 LSC Act mandates that legal services attorneys must be allowed to carry out their activities in a manner consistent with an attorney's professional responsibilities.[140]

The ethical directives pertaining to competence, zealousness, and independence are particularly relevant to this discussion.[141] As to competence,[142]

Rules and a 1981 Formal Opinion of the ABA, thereby implicitly acknowledging that ethical rules are not frozen as of 1974 (the date of the enactment of the LSC Act). *See* Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or in the Alternative in Opposition to Plaintiff's Motion for Summary Judgment at 41-42. Moreover, in a somewhat analogous area, the district court judge in Guam Society of Obstetricians and Gynecologists v. Ada, 776 F. Supp. 1422, 1427 (D. Guam App. Div. 1990), *aff'd.*, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 633 (1992), in blocking the enforcement of Guam's criminal ban on most abortions, rejected the Government's argument that the constitutional rights of Guamanians were "frozen in time" as of 1968, when Congress explicitly extended constitutional protections to Guam.

[137] *See supra* notes 58-69 and accompanying text.

[138] 119 CONG. REC. S22,404 (daily ed., December 10, 1973) (remarks of Sen. Nelson). *See also* 120 CONG. REC. H3962-3 (daily ed. May 16, 1974) (remarks of Rep. Steiger); 119 CONG. REC. S22,842 (December 13, 1973) (remarks of Sen. Humphrey). The Committee reports did not comment on this issue, but the 1973 Senate Report said that "[s]uch legal assistance (legislative and administrative representation) shall be provided in compliance with the highest professional standards as embodied in the Canons of Ethics and Code of Professional Responsibility of the American Bar Association." S. REP. NO. 495, 93rd Cong., 1st Sess. 15-16 (1975).

[139] 119 CONG. REC. S22,404 (daily ed. December 10, 1973) (remarks of Sen. Nelson).

[140] 42 U.S.C. § 2996e(b)(3) (Supp. 1993).

[141] There are also implications from attorneys being members of a profession. "The practice of law 'in the spirit of public service' can and ought to be the hallmark of the

Canon 6 of the Model Code of Professional Responsibility requires that attorneys act with "competence and proper care" in representing their clients. Under Model Rule 1.3,[143] the attorney must act with reasonable diligence and promptness in representing the client.[144] An attorney must explain matters to the client so that the client can make "informed decisions regarding the representation."[145] The initial prerequisite to preserving client dignity in the lawyering process is client enlightenment.[146] The attorney, as advisor, must provide

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legal profession." ABA Comm. on Professionalism, Formal Op. 2 (1986). The responsibilities of attorneys goes beyond what the law demands.

> Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to the State. Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations. Our judgment here does not suggest otherwise. To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession.

Mallard v. United States, 490 U.S. 296, 310-11 (1989) (Kennedy, J., concurring).

[142] According to Gerry Singsen, high quality representation is the standard required under the Act, thus placing a higher standard on work for the poor than the standard of "competent representation" of Model Rule 1.1. "This higher standard is appropriate to a situation in which clients lack the financial ability to choose among alternate lawyers based on their skills." Gerry Singsen, *High Quality Representation: The Fundamental Goal of Legal Services for the Poor*, NLADA, Apr. 1983, at 7. High quality also means offering clients the best kind of representation that is available to clients with sufficient money to hire private attorneys. *Id.* at 6.

[143] Provisions of both the Model Code of Professional Responsibility and Model Rules of Professional Conduct are cited and discussed as authority and guidance. Both are used since each is used in different jurisdictions. As of the fall of 1993, more than thirty-five states and the District of Columbia had adopted all or significant portions of the Model Rules. STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xi (1994).

[144] Competence and diligence are not synonymous (competence is used in Model Rule 1.1 and diligence is used in Model Rule 1.3.), although incompetence is often caused by lack of diligence. The definition of competence is circular since it is qualified by the words "reasonably necessary for representation," leading to each case being judged on its own facts.

[145] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.4 (1994). The comments to Rule 1.2 in conjunction with Rule 1.4 discuss the "activist client." It explains that the reason for requiring communication from the attorney is to enable the client to make informed judgments about legal matters. Although most of the judgments a client makes concern the objectives of representation, a client also has a role in especially important tactical decisions. The comments state that a client who is perturbed about the tactical choices of his or her attorney can simply fire the attorney, with or without giving a reason. This analysis, however, does not take into account the indigent client who has very limited choices and usually must remain with his or her attorney or forfeit representation. The use of the legal system or an alternative is an important tactical decision that the client should partake in but only can if the alternatives are presented by the attorney.

[146] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1994).

the client with a full understanding of the legal framework. The attorney may refer to moral and ethical considerations in order to ensure the client's understanding of various actions and their consequences.[147]

Another relevant ethical consideration is the requirement of zealous representation. The Model Code states that "[a] lawyer should represent a client zealously within the bounds of the law"[148] and that "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ."[149] The Model Code of Professional Responsibility also instructs that an attorney must "seek any lawful objective through legally permissible means . . . ."[150] Legislative advocacy is plainly within the parameters of legally permissible means for representing paying clients. In fact, it is so common that the Code has special rules for attorneys appearing before legislative and administrative bodies.[151] Furthermore, the Code provides that "lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein . . . [and] should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients."[152] The Code

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[147] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1994); *see also* MODEL CODE OF PROFESSIONAL CONDUCT Rule 2.1 (1989).

[148] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1994).

[149] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1994); *see also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1994) (client is to make decisions in areas of legal representation affecting the merits of the case or substantially prejudicing the rights of a client); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1994) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so . . . . [T]he lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.") However, with the regulatory restrictions, the client never hears the alternatives and therefore does not make the ultimate decision. Instead, the client is making a decision based upon the limited alternatives a legal services attorney is allowed to present.

[150] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1994).

[151] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1994); *see also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4 (1994); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-5 (1994). Ethical Canon 8-4 provides that:

> Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

Implicit in this provision is the idea that it is appropriate for a lawyer to act in the legislative arena on behalf of the public and not for a client.

[152] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1994). Working to

thus calls upon attorneys to aid in making needed changes and improvements in the legal system.[153]

This requirement of zealousness as an attribute of the attorney's function indicates that mere competence is not sufficient; a certain intensity of effort is required. The Model Code suggests two explanations for this requirement. One is that diligence is rightfully demanded of a professional. The other involves the "legal rights" marketplace explanation of why an attorney must act in a zealous fashion. Ethical Consideration 7-1 states that this responsibility derives from "membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits . . . . [E]ach member of our society is entitled to . . . seek any lawful objective through legally permissible means . . . ."[154] One need not search hard within the ethical guidelines to find that administrative and legislative lobbying are considered "legally permissible means" available to attorneys.[155]

The third relevant ethical directive is the requirement of independence.[156] Both the Model Code and the Model Rules give the client ultimate authority to determine the purposes served by the representation and the right to consult about means.[157] The second part of the independence requirement relates to the attorney's independent judgment. For example, Disciplinary Rule 5-107(b) provides that "[a] lawyer shall not permit a person who recommends, employs

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change the law is an important part of the legal profession. As described in a report of the American Bar Association:

> There are few great figures in the history of the Bar who have not concerned themselves with the reform and improvement of the law. The special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration. Certainly it is the lawyer who has both the best chance to know when the law is working badly and the special competence to put it in order.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1217 (1958).

[153] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-9 (1994) provides that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements."

[154] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1994).

[155] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11 (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-15 (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-16 (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4 (1994); MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 3.9.

[156] ABA COMM. ON PROFESSIONALISM, Formal Op. 10 (1986) ("[l]awyers should exercise independent judgment as to how to pursue legal matters.") That report also addresses legislative advocacy as one of attorney's activities. "When not representing clients before legislative bodies, lawyers should put aside self-interest and should support legislation that is in the public interest." *Id.* at 13.

[157] MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 1.2(a) (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1994).

or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."[158]

The ABA has issued a much discussed Formal Opinion addressing restrictions on attorneys' activities in legal services offices as they affect the independence of professional judgment.[159] Activities on behalf of a client may be restricted or limited but

> only to the extent necessary to allocate fairly and reasonably the resources of the office and establish proper priorities in the interest of making maximum legal services available to the indigent, and then only to the extent and in a manner consistent with the requirements of the Code of Professional Responsibility.[160]

The Opinion states that a governing body of a legal aid society may limit what an attorney may do for a client, excluding such services as lobbying. However, there are three important restrictions on the limitations the governing body may set. First, the board of the legal services program must take affirmative action in order to implement a restriction. Second, any limitations upon the scope of services must be broad-based and must be established before representation of a particular client is commenced. Third, the reason for the limitation must be consistent with the basic tenet set forth in Ethical Consideration 5-1, which requires that attorneys exercise their professional opinions solely for the benefit of their clients, free of compromising influences and loyalties. The Opinion states that "[t]here can be no limitation on the availability of the staff lawyer to give advice in connection with such legislative means. Disciplinary Rule 5-107(B)."[161] The Opinion concludes: "[W]e stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist."[162]

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[158] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(b) (1994). *See also* MODEL CODE OF PROFESISONAL RESPONSIBILITY EC 5-21, EC 5-23, EC 5-24 (1994).

[159] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974) [hereinafter Formal Opinion 334]. The Opinion also addresses issues related to publicizing the services provided by a legal services office and supervision not interfering with the attorney's maintaining client confidences and secrets.

[160] *Id.* The Opinion also concludes with a significant caveat: "To say, as we have sometimes done, that a particular restriction upon the staff of a legal services office is not forbidden by the disciplinary rules is *not to say that such a restriction is wise or is consistent with applicable ethical standards.*" *Id.* (emphasis added). Thus, even though in a strict legal sense these restrictions may not be unethical, they may still create ethical dilemmas for the attorney in his or her relationship with his or her client. *See supra* section III.B.2.

[161] *Id.*

[162] *Id.* This Opinion was issued only a month after the enactment of the LSC, and was designed to deal with the problems of an earlier period (those arising out of self-restraints adopted by a legal services agency rather than restrictions imposed on such

Although lobbying is recognized as a part of the attorney's role, it is not clear that it is a necessary component of "diligence." There is no canon of ethics which prescribes when an attorney must lobby. However, there are at least three arguments which suggest that lobbying should be regarded as essential to the lawyering function, and an aspect of diligent legal services. First, lobbying might offer the only relief for a client or class of clients. Second, lobbying might be the most efficient way of achieving an end for a number of clients. Third, the lawyer might have an obligation to the legal system to lobby in certain instances.

There are circumstances where it may be necessary for a legal services attorney to lobby. These situations occur when reliance upon an adjudicatory forum will provide no relief because there is no existing law that provides a remedy, or worse, the existing law may explicitly deny relief. For example, this situation exists in the context of commenting on proposed regulations of an administrative agency. Although the proposed regulation may hurt the client community with which the legal services attorney works in the future, the clients have not yet been affected by the proposed regulation and therefore cannot pursue litigation. Furthermore, the regulation may be within the boundaries of statutory and constitutional review, thereby minimizing litigation possibilities.[163] The LSC regulation's absolute prohibitions on certain activi-

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an agency by its source of funding). Consequently, whether and how the Opinion speaks to restrictions on attorneys' activities ordained by the LSC statute and regulations are perplexing questions. For example, a question is raised by the requirement of affirmative action by the Board to validate restrictions on staff attorneys' lobbying, and whether this requirement has implications for the proper allocation of decisionmaking in such matters among Congress, the LSC, and the board of an agency. "There is a difference between a local board allocating resources on the basis of priorities and Congress or LSC making a decision that federal funds (and private funds as well) cannot be used for lobbying or administrative policy representation." Houseman Manual, *supra* note 97, at 260. Houseman concludes that the "difference may not provide a basis for an ethical distinction." *Id.* Presumably Congress could make the same decision as a local board that, as a matter of resource allocation, services should not be spent on administrative and legislative lobbying. There is some discussion in the legislative history that suggests that the restrictions were motivated, in part, by concerns about scarce resources. *See, e.g.*, 49 Fed. Reg. 22,654 (1984).

The Opinion is also inherently inconsistent in that it provides that any limitation on the right of a legal services attorney to file a class action would be unethical while limitations on lobbying are acceptable; both are remedies and should be treated equally. In short, the Opinion is full of ambiguities, occasioned partly by its age and partly by its focus on outmoded conditions.

[163] Formal Opinion 334 recognized this possibility. The relevant part of the Opinion provides that: "It has been urged that there are certain rights of indigent clients which can only be asserted through legislative means. There can be no limitation on the availability of the staff lawyer to give advice in connection with such legislative means." Although this statement refers only to advice and not to advocacy, it nonetheless asserts that the legislative process is the only forum for certain rights of clients.

ties[164] lessen the attorney's ability to deal with problems amenable only to those kinds of solutions.

As to the efficiency argument, although nothing in the ethical guidelines requires an attorney to provide efficient legal service,[165] it is clear from Formal Opinion 334 that this is an overriding concern for a legal services office.[166] Although the relevant part of the Opinion only discussed class actions, lobbying can be as effective as class action lawsuits in bringing about reform. The relevant inquiry is whether a class action lawsuit or lobbying is more efficient. The LSC regulations, which require a formal request by a currently eligible client[167] and exhaustion of remedies,[168] seem unduly burdensome and contrary to the notion of pursuing the most efficient solution to a client's problems. Finally, when considering whether there is an obligation to change the legal system by lobbying, an attorney may have a systemic responsibility to work for legislative or administrative change if the attorney believes the law unjust.[169]

Although the ethical rules require attorneys to provide zealous representation, this does not necessarily require attorneys to lobby in order to provide full representation. Even if some attorneys may participate in lobbying, the ethical rules do not require that an attorney provide legislative representation. It is ethical for an attorney to limit the scope of his or her representation.[170]

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[164] Section 1612 of the Code of Federal Regulations prohibits certain activities, such as participation in referenda (§ 1612.4(a)(2)), grassroots lobbying (§ 1612.7(a)), and publication of lobbying strategies (§ 1612.7(b)).

[165] The Model Rules require that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1994). Perhaps a part of expediting litigation is to decrease the number of cases on a court docket through the use of alternative measures such as lobbying; decreasing litigation in one area works to expedite litigation in another.

[166] In a discussion of whether resources should be devoted to "law reform" activities or "services to individuals", the Opinion stated that either could be the focus. Specifically, it noted that: "Services to individuals may be limited in order to use the program's resources to accomplish law reform in connection with a particular subject matter. The subject matter priorities must be based on a consideration of the needs of the client community and the resources available to the program." Formal Opinion 334, *supra* note 159.

[167] 45 C.F.R. § 1612.5(c) (1992).

[168] 45 C.F.R. § 1612.5(c)(2) (1992).

[169] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-2; *see also* ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1252 (1972) ("any lawyer, whether he drafted legislation for a client or not, may of course as a citizen, gratuitously engage in activities of a political nature in support of it.") (cited approvingly in Formal Opinion 334, *supra* note 159).

[170] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 4 (1994) provides that [t]he objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to

The LSC regulations, however, present a more difficult question. If an attorney believes that "a client's interests would be protected or enhanced by approaching a legislative body or agency policymaking authority, the ethical provisions provide some basis for an argument that such assistance must be provided to the client."[171] The effect of the LSC regulations is to limit the independence of the attorney and to change the nature of the lawyer-client relationship.[172]

In addition to the ethical rules, there are other standards that elaborate upon and refine the role of attorneys in legislative and administrative advocacy. Two such standards are the ABA's 1986[173] "Standards for Providers of Civil Legal Services to the Poor" ("Standards") and the "Statement of Fundamental Lawyering Skills and Professional Values, or the ABA's Task Force on Law Schools and the Profession: Narrowing the Gap" ("SSV").[174]

The Standards are designed to serve only as guidelines and are not binding. However, they are certainly relevant to a model of appropriate legal representation. They provide for "high quality" representation, "client participation in the representation," and "zealous representation of client interests."[175] They further provide that "[i]ndigent persons should receive legal representation of a quality as high as the client of any lawyer."[176] The Standards addressed an

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limitations on the types of cases the agency handles.

Moreover, while an attorney "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor," an attorney has professional discretion "in determining the means by which a matter should be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1994).

[171] Houseman Manual, *supra* note 97, at 258.

[172] *See infra* text accompanying notes 228-38.

[173] The first Standards were promulgated in 1961, with revisions in 1966 and then 1970. The 1970 Standards, which were the operating Standards at the time of the 1974 LSC Act, provided in the section entitled "Scope of Service" that "[a]ssistance furnished by the organization should encompass all legal work required by the case, including representation before administrative, judicial and legislative bodies." Standards and Practices for Civil Legal Aid, Standard 9. This Standard was amended in 1970:

> to make specific reference to representation before administrative and legislative bodies. Poverty clients often have as much contact with and need for representation before administrative and legislative bodies as more well to do citizens, including social security, welfare, housing authority and similar agencies. Equal justice requires that they should have access to lawyers in similar situations.

Supplemental Report of the Standing Committee on Legal Aid and Indigent Defendants, Annual Meeting of the American Bar Association at 729 (1970).

[174] "The Statement seeks to define the lawyering skills and professional values with which every lawyer should be familiar prior to assuming the full responsibilities of a member of the legal profession . . . ." *Statement of Fundamental Lawyering, Skills and Professional Values*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMIS. TO THE BAR 2 [hereinafter "SSV"].

[175] Standards, *supra* note 173, at v-vi.

[176] *Id.*

extremely controversial issue by providing that,[177]

> [w]hen effective resolution of individual clients' problems is circumscribed by existing laws and practices, or when existing laws and practices result in the same or similar problems for many indigent clients, representation of a client may call for a practitioner to reach beyond the individual problem to challenge the law, policy or practice . . . . Practitioners [may need] to use a variety of representational modes and innovative lawyering on behalf of clients.[178]

The Standards further provide that if representation before an administrative rulemaking or legislative body is appropriate to achieve the client's objectives, it should be provided unless prohibited by law or inconsistent with the provider's priorities.[179] Representation of clients in administrative rulemaking proceedings is recognized as "a more efficient way to address important issues than costly and complicated litigation."[180] In regard to lobbying, the Standards provide that:

> The legislative process is an essential part of the legal system. At times, it may present the most efficient way to represent the interests of clients. By representing clients before a legislative body while a law is being enacted, for example, a provider may be able to avoid repetitive litigation to interpret a statute which affects its clients. In some situations, only legislative action will resolve the client's problem.[181]

Thus, the Standards view lobbying as a critical part of the attorney's role.

Similarly, the SSV requires attorneys to have a "familiarity with the skills and processes required for effective advocacy in informal administrative or executive proceedings . . . ."[182] As described in the SSV:

> This section also recognizes that effective litigation (or effective consideration of the option of litigation) requires an understanding of appellate remedies, administrative remedies, and forms of alternative dispute resolution. A lawyer cannot effectively assess the advisability of initiating or maintaining litigation unless he or she has a general familiarity with alternatives to litigation . . . .[183]

In addition, attorneys have a responsibility to improve the legal system. One

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[177] Ellen Liebman, *ABA Committee Proposes New Standards for Providers of Civil Legal Services to the Poor and Solicits Comments from the Public*, 19 CLEARINGHOUSE REV. 1420, 1421 (1986).

[178] Standards, *supra* note 173, at v.

[179] *Id.*, at 5.5, 5.6.

[180] *Id.* at 5.5, Commentary.

[181] *Id.* at 5.6, Commentary.

[182] SSV, *supra* note 174, at 8. "Litigation and Alternative Dispute-Resolution Procedures." Although legislative lobbying is not specifically addressed in this section, it is discussed in the "fundamental values of the profession" of striving to promote justice, fairness and morality. *Id.* at 93-95.

[183] *Id.* at 74.

way for them to accomplish this is by proposing and supporting legislation designed to improve the system.[184] Thus, legislative and administrative advocacy are seen as appropriate functions in the ethical precepts and the critical standards examining attorneys' roles.

B. *Relevance of Lobbying to the Profession's Conception of Lawyering*

1. The extent to which lobbying is part of the professional functions

A critical question to examine is whether lobbying is a key function for attorneys. It has been recognized that "lawyers are among the most important lobbyists . . . ."[185] Yet despite the fact that many attorneys regularly and effectively engage in lobbying,[186] there is a paucity of literature within the profession regarding the roles that attorneys play in the legislative process.[187] It has been suggested that this is attributable to the historical ambivalence within the profession about attorneys' roles that go beyond the strict traditional notion of the attorney solely as the client's representative in adjudicatory proceedings.[188]

The increasing domination of the law by statute and regulation, and the decreasing sense of autonomy in the law are two trends which suggest that the conventional reluctance to acknowledge and address the attorneys' roles in the political, legislative arena is no longer founded in social reality.[189] First, laws

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[184] *Id.* at 95.

[185] DAVID LUBAN, LAWYERS AND JUSTICE 377 (1988).

[186] *See, e.g.*, William R. Bruce, *Professional Responsiblities of Lawyers*, 23 MEM. ST. U. L. REV. 547, 553 (1993).

[187] For some, lobbying is political activitism and not legitimate legal work. David M. Kennedy, Legal Services Corporation Under the Reagan Administration: (A) The Congress; (B) Sequel: The Senate; (C) The Reagan Board, John F. Kennedy School of Government, 1983 (C94-83-523). This is one of the reasons given by those opposed to lobbying by legal services attorneys.

[188] According to Richard B. Stewart, one reason that the bar has failed to formally examine its involvement and responsibilities in the legislative process is a disrespect for legislation in general as the "laying on of profane hands upon the law." Richard B. Stewart, *Foreword: Lawyers and the Legislative Process*, 10 HARV. J. ON LEGIS. 151, 156 (1978). (The article surveyed legislation passed in that most recent Congressional session; the goal of the survey was to stimulate awareness of the roles of attorneys in the legislative process.) However, argues Stewart, it is increasingly important for attorneys to be involved in the legislative process as the law becomes more statutory and regulatory in its foundation. *Id.*

[189] While beyond the scope of this article, one of the fundamental issues raised is the nature and purpose of law. This has been addressed by many others; only two will be mentioned in passing here, William Clune and William Simon. William Clune, *A Political Model of Implementation and its Implications for Public Policy, Research, and the Changing Roles of the Law and Lawyers*, 69 IOWA L. REV. 47 (1983); William Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984). According to Clune, the law should be seen as primarily the implementation of a political compro-

reflect society's compromise solutions to social problems. These solutions are implemented in statutes and regulations which provide for very specific ways of dealing with the various problems anticipated. If an attorney is seen only as a representative at adjudications, the attorney is reduced to being merely an expert in regulations. This leaves little room for creative advocacy and suggests that in order to be effective attorneys must be involved in the process of implementing mandated social policy and deciding how it is enforced through statutes and regulations. In cases where the statute sets out specific remedies for problems, activities such as lobbying may be necessary for the attorney to effectively advocate for the client population. The diminishing view of the autonomy of the law leads to a similar conclusion. Even though the law has a

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mise of the substantive purposes of social groups. Clune, *supra*, at 53. The purpose of the law is to solve social problems rather than to represent an autonomous norm; there is more emphasis on collectivism and legislation as opposed to the old view which saw the law's primary purpose as the securing of individual rights. The new view of the law, as espoused by Clune, recognizes the "renegotiability of the law whereas the old view clings to the notion of vested rights." *Id.* at 58. This new model of law implies new roles for attorneys in the process of legal and political interaction, including that of traditional representation, institutional litigation for law reform, legislative and administrative lobbying, and community education.

Like Clune, Simon departs from traditional ideas of the law by advocating an approach that takes into account current social realities. Simon contrasts the traditional view with that of the critical legal theorists, who view the system as unavoidably indeterminate and regard the specific activities traditionally identified as "law practice" as arbitrarily limited. Simon, *supra*, at 469. Simon distinguishes between "law" (which concerns itself with the operation of exisiting rules), and "politics" (which includes the legislature and involves the creation of new rules). Under this scheme, an activity such as lobbying, which is designed to *change* (and not merely enforce) the rules, is considered outside the appropriate scope of legal representation. Simon calls this view the "pre-realist" vision.

The "post-realist" vision, on the other hand, accepts that the rules to which attorneys appeal in adjudicatory settings are indeterminate. However, this vision continues to draw a distinction between "legal" and "political" activity. The difference is that the post-realists accomplish this by distinguishing between what they call "ultrasystemic" and "extra systemic" activity. *Id.* at 491. Conventional legal activity is intrasystemic because it works within the system in an ordered manner. Political activity, on the other hand, is extrasystemic because it is disordered, disruptive, and involves fighting outside the system. In addition, the post-realist view acknowledges the necessity of some political activity, such as lobbying, but considers such activity peripheral to legal practice. *Id.* at 492. In this way, the post-realist view accepts lobbying as within the scope of an attorney's responsibilities; whereas the pre-realist approach would separate the attorney from the lobbyist.

Moreover, the critical vision challenges the professional notion that it is possible to make a distinction between intrasystemic and extrasystemic activity. According to Simon, "the range of . . . practices that professionals conventionally understand as legal or intrasystemic are an arbitrarily limited subset of the universe . . . of practices that in fact constitute the system." *Id.* at 497.

certain amount of autonomy, it does not exist in a vacuum. Rather it is largely the product of the interaction of a number of political and social forces. Refusing to address essential forces that shape the laws affecting clients' lives denies clients effective representation.

Examining the advantages and disadvantages of lobbying may also help in determining its role in effective representation. There are five main advantages to lobbying. First and foremost, it is often the most effective way to resolve a client's problem.[190] Second, lobbying provides benefits to society. Timely and effective intervention may prevent the adoption of an impermissible or problematic statute or agency rule. This would spare judges and government attorneys from participating in needless litigation. Even more important are the indirect costs resulting from the "adoption of policies to address intractable social needs, when such policies are adopted without benefit of a full understanding of the effects on all citizens, including the poor."[191] Third, since legislative and administrative advocacy are traditionally part of the attorney's responsibilities, it is beneficial to have lobbying available as an option for solving the client's problem.[192] Fourth, lobbying is valuable to the legal profession because "[e]mpowering the powerless is one of the responsibilities of the profession."[193] Finally, lobbying is consistent with client preferences as shown by John Dooley and Alan Houseman's observation that "when poor people are given the option of how to use legal services, they often select impact litigation, legislative and administrative representation, and interest advocacy."[194]

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[190] The legislative history of the 1977 Amendments to the Act and a 1981 Opinion of the Comptroller General each recognized that legislative or administrative advocacy could sometimes be the most effective way to resolve an issue affecting legal services clients. H.R. REP. NO. 310, 95th Cong., 1st Sess. 11 (1977); 60 Op. Comp. Gen. 423 (1981).

[191] John Tull, *Implications for Emerging Substantive Issues for the Delivery System for Legal Services for the Poor*, 24 CLEARINGHOUSE REV. 17, 28 n.47 (1990). "While limiting costs is a legitimate governmental goal, when coupled with ignorance of or indifference to the needs of a significant portion of the population, it can lead to irrational policies that compound social ills, and increase the long term costs to society." *Id.* at 25.

[192] Ongoing interaction between legislators and legal services attorneys is necessary for good communication and is beneficial to both. It is difficult for a legal services attorney to pick up the telephone on an ad hoc basis to attempt to influence a legislator on a matter affecting a client. Tull, *supra* note 191, at 29.

[193] Phillip Heymann, *A Law Enforcement Model for Legal Services*, 23 CLEARINGHOUSE REV. 254, 257 (1989). Mr. Heymann was not specifically referring to lobbying in his discussion of why it was not necessary to provide legal services for the middle-class while it was required for the poor. However, his empowerment notion is equally imperative as applied to lobbying.

[194] John Dooley & Alan Houseman, *Refine, Don't Destroy Legal Services*, A.B.A. J., May 1983, at 606, 607. "Throughout society, people choose to use lawyers to advance social, political, and economic interests. Any system of rationing should leave poor people free to make the same choice." *Id.*

Most objections to lobbying by legal services attorneys are the same as those raised about impact work by publicly funded attorneys. The four objections, as described by David Luban, are the taxation objection;[195] the equal access objection;[196] the client control and dirty hands objection;[197] and the objection from democracy.[198] Professor Luban responds to each of these objections. He concludes that lobbying is an essential political mode, that legal services attorneys perform an important service to democracy when they lobby for their clients, and that, in fact, pressure group politics would be in danger of undemocratic legislative failures if public interest attorneys did not lobby.[199]

Other objections to lobbying are that: 1) the attorneys may have to decide among competing needs of clients; 2) particular legislation could hurt some people while helping others; and 3) there are difficult tradeoffs in the "kind of social policy decisions that legislation embodies."[200] However, similar conflicts have arisen in other situations, such as conflicts between class members in class actions,[201] and have been dealt with successfully, thus demonstrating that

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[195] LUBAN, *supra* note 185, at 304, 306. According to this objection, it is improper to use tax monies to redistribute wealth. Luban states that this argument mirrors the position that government funded agencies should not take sides in a hotly contested political issue and that impact litigation does take sides. *Id.*

[196] The essence of this argument is that lobbying takes attorneys away from doing work for individuals. The problem arises from inadequate resources. *Id.* at 306-07. Luban characterizes this objection as "individualism versus group rights." *Id.*

[197] The basis of this objection is that when attorneys do impact work, they usurp the prerogatives of the clients, "using the legal system to achieve ends that the lawyers have chosen independently of the wishes of the people they ostensibly represent." *Id.* at 316.

[198] The essence of this objection is that it is improper for groups who cannot get what they want through ordinary democratic means to frustrate the democratic system by getting into court. *Id.* at 358. The same argument applies to groups frustrating the will of the majority by getting what they want through lobbying by attorneys.

[199] *Id.* at 379. Luban responds to these objections by pointing out that the "taxation objection" is actually the "democracy objection" in disguise, while the "equal access objection" is really the "client control objection". Thus, there are only two objections. *Id.* at 306, 316. Luban's response to the client control objection is that it is really an attack on political action itself; he argues that there is nothing wrong with attorneys recruiting clients as plaintiffs for law reform (or lobbying) or with putting the interests of the cause above those of the clients. (Luban attaches many conditions to his acceptance of attorney control. For instance, the client must be willing, well-informed of the implications and risks, and committed to the cause. *Id.* at 339-40.) As to the democracy objection, he reasons that classical theory and pressure-group theory are flawed. Lobbying is an essential political mode and legal services attorneys perform an important service to democracy by lobbying. *Id.* at 379-80.

[200] JOHN DOOLEY, PHILOSOPHICAL HISTORY (Center for Law and Social Policy, 1984).

[201] *See, e.g.*, Derrick Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

this is not an insurmountable problem.

Lobbying by legal services attorneys appears to be disfavored by Congress due to its predisposition against federally funded organizations that engage in lobbying. The organizations are perceived as attempting to shape public opinion to reflect the beliefs of the agency.[202] This problem is compounded by the public perception that lobbyists are not trustworthy.[203] These two perceptions have led to a misunderstanding of legislative representation.[204] "The fundamental difference between an agency engaging in general grassroots lobbying and an advocate representing a client before a legislative or administrative body has too often been unclear to either friends or critics of legal services."[205]

The old view that lobbying is political, and therefore, outside the sphere of appropriate legal activity is not persuasive since a great deal of legal activity is necessarily political. This is particularly true for attorneys who represent the poor. As stated by the Court in *Texas Rural Legal Aid v. Legal Services Corp.*, much legal work on behalf of poor clients has "political implications."[206] Since poor people are increasingly affected by statutes and regulations, representation of the poor necessarily includes challenges to legislation and regulations and has the "potential for stirring up controversy."[207]

Although lobbying is an important part of the attorney's role, it is not essential because attorneys can refer the lobbying aspects (or the case) to another attorney or can counsel the client about the option of lobbying on his or her own. This raises the question of whether it is critical that legal services attorneys be permitted to counsel clients about lobbying.

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[202] For an extensive discussion of congressional attitudes toward lobbying by legal services attorneys, *see supra* text accompanying notes 49-92.

[203] Tull, *supra* note 191, at 27.

[204] The aversion to legislative representation has been extended to administrative rulemaking, without thoughtful analysis. However, the limitations on administrative rulemaking are less stringent than those on legislative representation. *See supra* text accompanying notes 25-32.

[205] Tull, *supra* note 191, at 27. According to Tull, there are three other aspects to lobbying restrictions. First, some opposition to lobbying is motivated by the desire to prevent the interests of the poor from being effectively represented before legislative and administrative institutions. Second, in the early years of legal services, there was indifference by legal services attorneys toward some of the restrictions; this lent credibility to the criticism of legal services. Lastly, LSC itself has violated the congressional restrictions while seeking to restrict or eliminate legislative and administrative advocacy by legal services programs. *Id.*

[206] 740 F. Supp. 880, 887 (D.D.C. 1990), *rev'd*, 940 F.2d 685 (D.C. Cir. 1992) (circuit court upheld power of LSC to promulgate a regulation that prohibited legal services programs from participating in redistricting litigation); *on remand*, 783 F. Supp. 1426 (D.D.C. 1992) (regulation not facially unconstitutional).

[207] *Id.*

2. The extent to which the professional functions include being able to advise and counsel a client about lobbying

Attorneys have always been one part counselor and one part advocate. Recently, however, there has been a greater focus on the attorney's role as advisor: It is widely accepted in the legal profession that "the skill of counseling is generally perceived to be one of the fundamental skills required for competent legal practice."[208] In fact, it has been said that "counseling is the heart and soul of lawyering."[209] A significant body of literature has addressed the significance of the attorney's counseling role.[210]

The attorney's advice-giving role was originally limited to giving advice about how to proceed in litigation.[211] However, attorneys have increasingly assumed the role of counselors in non-litigious and non-adversarial lawyering. While the Model Rules of Professional Responsibility refer to the lawyer's counseling function,[212] the Rules have been criticized for not paying adequate attention to this role.[213] "[N]onadversarial counseling . . . comprises a public function of the legal profession,"[214] yet the Model Rules perpetuate the focus

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[208] SSV, *supra* note 174, at 62.

[209] THOMAS SHAFFER & JAMES ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 2 (2d ed. 1987).

[210] *See, e.g.*, ROBERT BASTRESS & JOSEPH HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION (1990); DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991).

[211] In the 1980 Discussion Draft of the Model Rules, the introduction to the section which was then entitled "Attorney as Advisor" (now section 2 of the Model Rules entitled "Counselor") stated that:

> The lawyer's professional function historically originated as attorney and advocate, that is, appearing on behalf of a party to litigation. Giving legal advice evolved from giving advice about how to proceed in litigation. Today, serving as advisor is the lawyer's predominant role.
>
> As advisor, a lawyer informs clients of their legal rights and obligations and their practical implications. Giving advice is ordinarily an incident of other functions a lawyer performs on behalf of a client, such as advocacy or negotiation. However, in many matters giving advice may be the lawyer's sole function. Legal advice may be given orally or in writing. It may be reflected in documents effectuating courses of action by the client, such as wills, articles of organization of an enterprise, by-laws, contracts, formal opinions, and *draft legislation or government regulations*. In giving advice, a lawyer should consider not only the literal terms of the law but also its purposes and changing course. A lawyer should also take into account equitable and ethical considerations and problems of cost and feasibility.

Model Rules Of Professional Conduct Rule 2 (Discussion Draft 1980).

[212] *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1994) (the attorney as advisor).

[213] Louis Brown & Edward Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, AM. B. FOUND. RES. J., 519 (1982).

[214] *Id.* at 520.

on litigation as opposed to "preventive lawyering."[215] However, in other contexts, such as the SSV, emphasis is given to counseling in non-litigatory contexts as well as client-centered decisionmaking.[216]

Client-centered counseling is a "legal counseling process designed to foster client-decisionmaking."[217] David Binder and Susan Price formalized these concepts in their 1977 text[218] and have set forth the following explicit standard in their most recent book[219] which:

> encourages lawyers to engage clients in counseling dialogues during which clients' decisions are preceded by joint examination of objectives, options, and likely consequences. Since the state of a client's "actual awareness" is unknowable, and the extent of counseling typically varies according to each client's unique circumstances, we think that our process standard is best suited to helping clients become active and knowledgeable participants in the resolution of their problems.[220]

While client-centered decisionmaking has been criticized,[221] it is still the predominant method of decisionmaking.[222] Client-centered decisionmaking does

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[215] *Id.* at 532. This absence of preventive lawyering is compounded by the passive role of the attorney envisioned by the Model Rules. According to Model Rules of Professional Conduct comment 5 to Model Rule 2.1, "[i]n general, a lawyer is not expected to give advice until asked by the client." The Model Rules have been criticized for this passivity. Brown & Dauer, *supra* note 213, at 520-23.

[216] SSV, *supra* note 174, at 51-59.

[217] Robert Dinnerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 507 (1990). Dinnerstein prefers the term "client decisionmaking" instead of "client-centered decisionmaking" since it emphasizes the client as the decisionmaker. *Id.* at n.22.

[218] DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). The model of client-centered decisionmaking arose out of a poverty law practice in the 1960s and 1970s that focused on increased client participation and empowerment. A key proponent was Gary Bellow. Dinnerstein, *supra* note 217, at 520-21. *See* Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Gary Bellow, *Turning Solution into Problems: The Legal Aid Experience*, NLADA Briefcase, Aug. 1977, at 106; Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

[219] DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT APPROACH (1990).

[220] David Binder et al., *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y.L. SCH. L. REV. 29, 30 (1990). The article is an abridged version of two chapters of their book. The authors acknowledge that in their earlier book they may have overreacted to attorneys telling their clients what to do and now recognize that sometimes "it is both proper and desirable for lawyers to give advice about what clients ought to do." *Id.* at 30.

[221] Dinnerstein examines the arguments against client-centeredness and concludes that the Binder and Price model is "a useful model for appropriate client-centered lawyering" and proposes a variation on one aspect of it (how client alternatives are discussed). Dinnerstein, *supra* note 217, at 556-84.

[222] *See, e.g.*, SSV, *supra* note 174, at 51-59; MODEL CODE OF PROFESSIONAL

not mean that the attorney is passive nor that the attorney fails to fully disclose information. The attorney should be able to perceive issues or options which the client has failed to perceive and so counsel the client.[223]

Full disclosure is a critical aspect of the professional counseling relationship.[224] "Precisely because of the threat to autonomy presented by the dependent and captive nature of counseling, virtually all ethical standards governing professional counseling require the provision of full information and forbid the suppression of relevant information about lawful options."[225] David Cole suggests that the importance of government neutrality is particularly important in the counseling sphere. "A government-funded counseling relationship raises particular captive audience concerns because it is frequently directed to an indigent population."[226] According to Cole, "at a minimum, the First Amendment should bar a government-funded counselor from suppressing relevant information in order to guide a counselee to a pre-ordained choice."[227]

Applying the standards of the profession to the LSC lobbying restrictions yields two different results. The 1974 LSC Act, which has a model of an attorney who can initiate discussion with the client and counsel the client concerning available remedies, including lobbying, results in a model that conforms to the standards of the profession. However, the model in the 1983 appropriations rider and the 1987 agency regulations of an attorney who is passive[228]

RESPONSIBILITY EC 7-7 (1994). According to one commentator, the Model Code and Model Rules "support client-centeredness at a level of generality that is essentially meaningless. At worst, they are consistent and perpetuate fairly traditional conceptions of the lawyer-client relationship." Dinnerstein, *supra* note 217, at 507.

[223] The SSV recognizes the need for attorneys to

> perceive issues or options which the client has failed to perceive or appreciate . . . [and to] determine whether it is appropriate (within the bounds of ethical rules, professional values, and the nature of the relationship with the particular client) to counsel the client about any such issues *or options which he or she has failed to perceive or appreciate* . . . .

SSV, *supra* note 174, at 52 (emphasis added).

[224] *See, e.g.*, Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

[225] David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 744 (1992).

[226] *Id.*

[227] *Id.* at 747. Cole's analysis is based on medical counseling in the context of the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). However, he extends it to all fiduciary counseling relationships. He specifically discusses legal counseling; the First Amendment would be violated if legal services attorneys were barred from telling their clients about divorce or giving referrals for a divorce. While legal services attorneys can be statutorily limited in providing certain type of legal services, they cannot be barred from giving basic information about services and providing referrals. Cole, *supra* note 225, at 747, n.285.

[228] For a discussion of how the rider and regulations result in a passive attorney, *see infra* section III.D.

fails to conform to the applicable standards.[229]

The most serious problem with the appropriations rider and the regulations is that they interfere with the attorney-client relationship by limiting what the attorney can discuss with the client and what options the attorney has to assist the client. Lobbying as an option can only be discussed if specifically raised by the client. Even if the client does somehow know enough to suggest lobbying, the attorney cannot lobby until several prerequisites are met: all other appropriate judicial and administrative relief must be exhausted and prior written approval of the project director or chief executive must be obtained.[230] Thus, there are significant limitations placed on the counseling process. To the extent that the lobbying restrictions limit what attorneys can discuss with their clients, a question is raised as to whether these regulations impair the attorney's ability to meet the professional responsibility of competence.[231]

Similarly, to the extent that the regulations limit the communication of lobbying strategies, they may hinder attorneys' ability to conform with their ethical obligations. The Comments to the Model Rules of Professional Conduct provide that "[b]oth lawyer and client have authority and responsibility in the objectives and means of representation."[232] Moreover, the attorney has an affirmative duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[233] As part of the advisor role, the attorney is to refer not only to the law "but to other considerations such as moral, economic, social and political factors that

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[229] Even though the regulations are even more restrictive and problematic than the appropriations rider, both are seriously deficient.

[230] 45 C.F.R. § 1612.5(c) (1987).

[231] The regulations do not provide for recipients being allowed to assist existing clients in preparing their own communications to legislators. 45 C.F.R. § 1612.5(c) (1987). These limitations on advice raise serious ethical problems relating to third-party interference with professional judgment and attorney competence. Other limitations on advice that a legal services attorney can give a client include limitations on: counseling a client on lobbying strategy; advising a client to take action on legislative and administrative matters; and advising clients on legislative matters when the clients did not seek assistance on the matter related to the legislation. Houseman Manual, *supra* note 97, at 264.

[232] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2, cmt. 1 (1983). The Rule itself does allow the attorney to limit the objectives of the representation "if the client consents after consultation." *Id.* at Rule 1.2(c).

[233] *Id.* at Rule 1.4(b) (1983). Comment 1 to this Rule provides that "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are pursued, to the extent the client is willing and able to do so." *Id.* Similarly, the Model Code of Professional Responsibility focuses on the decisions being made by the clients. EC 7-8 states that the attorney "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983).

may be relevant to a client's situation."[234]

In addition, the appropriations rider and LSC regulations require attorneys to play a totally passive role. The client must initiate the discussion of lobbying while the attorney is the passive, restricted recipient. While there are historical justifications for limitations on lobbying by attorneys, this system limits attorneys' abilities to counsel their clients. Relegating attorneys to a passive role prevents them from fulfilling their responsibilities as advisors and from taking preventative action on behalf of future clients and their foreseeable problems.[235]

In a somewhat analogous area, the Supreme Court has determined that the Title X regulations that prohibited abortion-related counseling did not significantly impinge on the doctor-patient relationship.[236] Although that decision would make it quite difficult to make a First Amendment argument about the lobbying regulations,[237] it does not affect the position, discussed in section III.D of this article, that the lobbying regulations are an unwise interference with the attorney-client relationship.[238]

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[234] MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983). The 1980 discussion draft of the Model Rules contained an introduction to that section which stated that legal advice "may be reflected in documents effectuating course of action by the client, such as wills, articles of organization of an enterprise, by-laws, contracts, formal opinions, and draft legislation or government regulations." MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (Discussion Draft 1980). This seems to suggest that proposed legislation drafted by an attorney might constitute a form of legal advice.

[235] The concept of the attorney's responsibility including preventative actions is not new. The 1958 Report of the Joint Conference provided that:

> The obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and fearful of the ways of the law that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1216 (1958).

[236] Rust v. Sullivan, 500 U.S. 173 (1991).

[237] There are some ways in which the lobbying regulations are more intrusive than those at issue in *Rust*. There is also some open-ended language in the decision. For example, the Court determined that the Title X program regulations did not "significantly impinge" on the doctor-patient relationship. *Id.* at 176. It gave as an example that the doctor-patient relationship established by the program was not "sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.* It could certainly be argued, by the nature of the program and by ethical precepts, that a client would expect a legal services attorney to advise on all options to resolve the client's problem.

[238] Any argument that the lobbying regulations are an unconstitutional condition to the receipt of a public benefit would be unsuccessful, in light of the Supreme Court's decision in *Rust* and its prior decisions in the lobbying area. In *Cammarano v. United States*, 358 U.S. 498 (1959), the Court upheld Treasury Department regulations that forbid deductions as ordinary and necessary business expenses for monies expended to

C. *Special Issues in the Legal Services Context*

1. The Legal Services program

In order to illuminate the special issues that arise in the context of lobbying by legal services attorneys, it is useful to briefly examine the goals and principles of the legal services movement.[239]

John Dooley has written a history of the philosophy of legal services, dividing it into four[240] different eras.[241] The first began with the creation of the

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"promote or defeat legislation" (which included influencing the public as well as influencing the legislature directly). *Id.* at 513. The Court described the government's position as one of neutrality since the taxpayer was simply being required to pay for such activity out of his own pocket "as everyone else engaging in similar activities is required to do." *Id.*

The decision to subsidize lobbying activity is seen by the Court as neutral. In *Reagan v. Taxation with Representation*, 461 U.S. 540 (1983), the Court upheld the denial of tax exempt status under Internal Revenue Code section 501(c)(3) since a substantial part of the activities would involve influencing legislation. The fact that Congress allowed veteran's organizations to lobby and be incorporated under 501(c)(3) was irrelevant since "Congressional selection of particular entities or persons for entitlement to this sort of largesse 'is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.' " *Id.* at 549 (citations omitted).

[239] A significant amount of writing has been done in this area. *See, e.g.*, Bellow, *supra* note 53; Buck, *supra* note 53; Roger C. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670 (1976); Dooley & Houseman, *supra* note 17; Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29 (1984); Allen Redlich, *A New Legal Services Agenda*, 57 ALB. L. REV. 169 (1993).

[240] Gerry Singsen, formerly Vice-President of LSC and presently Director of the Program on the Legal Profession at Harvard Law School, has written about three periods in the history of legal services — 1965, 1975 and 1981. Gerry Singsen, The Future of Legal Services: Moving the Rock of Poverty (draft) (Mar. 1, 1988). These three periods roughly correspond to the four described by John Dooley. In 1965, there was an explicit social change agenda with the lowest priority given to routine casework. "Legal aid to the poor was transformed by conscious redirection into legal services." *Id.* at 5. The increasing consciousness of legal rights combined with the War on Poverty to change not just legal work but society. *Id.* In 1975, legal services was reconceptualized on a law firm model, taking care of legal business for poor clients. It removed legal services from the political arena and reduced the political activity of the program. The language of social change was muted and concerns with management and efficiency were emphasized. *Id.* at 6. In 1981, the professional vision of the program allowed for a closer relationship with the bar and congressional leadership. "Congress, the bar and legal services professionals now perceive the legal services program as a permanent part of the legal establishment, working together with all other lawyers to find ways of meeting all the important legal needs of the poor." *Id.* The legal services program was no longer isolated from the profession. (It is interesting to note that it was around 1981 that President Reagan was attempting to eliminate the legal services program. *See supra* note 78. The organized bar, particularly the American Bar Association, was very

OEO legal services, where there was an interrelationship between legal assistance and the social and economic conditions of the clients.[242] As stated by John Dooley:

> [T]he emphasis in legal services was not on "justice" as an abstract and neutral concept, but instead on which injustices legal services would cure — the possible and intended result of representation. Attorney General Katzenbach caught the essence with this statement that a new breed of lawyers was emerging "dedicated to using the law as an instrument of orderly and constructive social change."[243]

The second spanned the period during which the OEO programs operated. The OEO espoused a philosophy of law reform.[244] The third era occurred soon after the passage of LSC, around 1976. The goal of this period was to provide minimum access to high-quality legal services.[245] This "minimum access" goal blended the theory of equal access to justice, which was the old legal aid philosophy, with universal entitlement.[246] Professionalism was emphasized, and the goal was for legal services attorneys to provide the same services as private attorneys.[247]

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influential in helping to save the legal services program.)

[241] Dooley, *supra* note 200, at 3.

[242] There were four major philosophies during that time: 1) the civilian perspective of Edgar and Jean Cahn, in which the poor were actively involved in creating and shaping their own program, *see* Jean C. Cahn & Edgar S. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); 2) the philosophy of legal services as one of the available tools in a many-sided attack on poverty, DOOLEY, *supra* note 200, at 2-12; 3) a philosophy similar to the concept of legal services attorneys representing a client as do private attorneys, but with a broadened definition of a client so the attorneys represent an economic class of poor people and not just people who happened to be poor, *id.*; and 4) the philosophy representing groups of poor persons as part of overall strategy controlled by poor persons to deal with social and economic conditions, *id.*

[243] *Id.* at 3.

[244] Dooley describes this as a period of introduction and implementation and not one of adding to the philosophies; all of the theoretical thinking had already been done earlier. *Id.* at 21.

[245] The problem with the equal access philosophy, which was created to defend against political changes, was that it did not define how legal services attorneys should work. *Id.*

[246] *Id.*

[247] Because funding was increasing during the period from 1977-79, the fact that "minimum access" was not tied to a philosophy of any kind of delivery of service was not a major problem. However, as funding started to decrease, there was an attempt to look at options which abandoned or de-emphasized the concept of minimum access. *Id.* at 28.

Singsen compared minimum access, which carries the "assumption that having a lawyer defines a complete objective," with the OEO philosophy of tying funding to "substantive and programmatic objectives." Gerry Singsen, Resources for Legal Services: Developing Strategies for the Nineties at 50-54 (unpublished manuscript) (Nov.

The final era began in the early 1980s. After the election of Ronald Reagan in 1980, there followed a period of relative scarcity of funding.[248] Planning was the central theme of that era, and continuing the program was the primary concern.[249]

The issue of how "political" legal services attorneys should be is a recurrent theme in the debates about the purposes and goals of legal services. This issue is obviously a crucial factor in the determination of whether, and under what circumstances, legal services attorneys should lobby. It also manifests itself in many of the other critical issues surrounding legal services. One such area involves the debate between proponents of two differing models for providing legal services for the poor — the equal access model and the law reform model. Equal access advocates believe that LSC should provide access to the courts for as many people as possible. They contend that consideration of any impact on the group as a whole is a violation of the rights of individual clients who may not receive service.[250] Professor Marshall Breger, a leading proponent of the equal access rights theory,[251] contends that a person is entitled to free legal aid when necessary for the enforcement of a legal claim, regardless of the claim's moral or social value. He contrasts this with what he terms the more commonly accepted utilitarian framework, in which free legal aid is provided because of the benefit that will accrue to the indigent community from the enforcement of the particular claim.[252] Breger's theory of access rights advocates a shift in the involvement of the client, the indigent community, and the attorney in the determination of how resources are to be distributed. It also sets different limits on the nature and extent of the government's obligation to subsidize legal aid activity.[253]

6, 1988).

[248] Dooley adds a postscript for the Reagan era, a time in which he saw no one philosophy but rather an attempt to return to a legal aid model of individual services; there was no plan of how to provide legal services but only restrictions that prohibited the things that attorneys could do. DOOLEY, *supra* note 200, at 34-35.

[249] Minimum access continues to be a critical element in congressional funding.

[250] Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982).

[251] Breger's model of a client has been criticized by John Dooley: "In Breger's view, the client is the person who has voluntarily sought service — resource allocation decisions involve choices between only those persons. The broad sense of responsiblity to the poor is rejected. Also rejected is the idea one can weigh legal needs as the planner must do." DOOLEY, *supra* note 200, at 33.

[252] In his analysis of a right to counsel as a civil or juridical right, as opposed to a welfare right, Breger discusses Dworkin's theory of rights and Rawls' theory of justice and concludes that the theoretical justification for government subsidy of legal aid will control the method by which legal aid should be distributed. Breger, *supra* note 250, at 291-95.

[253] *Id.* at 360-62. In his discussion of a related area, John Tull analyzes a negative side effect of priority setting. When priority setting occurs, a particular client may not designate something that is of a general or persuasive nature because the client may

On the other hand, advocates of law reform believe that case selection procedures which focus on group impact, and are aimed at eradicating poverty to the greatest extent possible, are compatible with equal access concerns.[254] In addition, the legal services attorney has an important obligation of public service which often dictates group-oriented decisions on case selection and strategy.[255] Questions surrounding law reform are not limited to legal services attorneys. These questions affect various public interest attorneys, including those not publicly funded. Law reform issues affect all attorneys who attempt to serve a clientele that is broader than the individual client who retained the attorney.[256]

2. Effect of the client's indigency

There is a question as to whether lawyering functions and attorneys' roles are, or should be, any different when the clients are indigent. Differences necessarily exist because of the needs of the indigent clients. As stated by Alan Houseman:

> Legal services is primarily a service program. However, because the services provided are legal services and because of the role of legal services and the courts in our system of government, legal services does become involved in many social problems of the poor. It cannot solve those problems, but it can protect the rights of the poor that existing laws prescribe, assert new rights and remedies, and assist the poor in becoming self-sufficient and gaining greater control over the environment in which they work and reside.[257]

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not see it as "their" legal problem. Furthermore, the need for a legal services office to address it may arise before any client encounters it as a legal problem, such as when it relates to the adoption of state and local policies to implement new federal policies. Tull, *supra* note 191, at 20. A "delivery system cannot truly identify the 'legal needs' of clients without being alert to the interplay of social, economic and political factors in its community." *Id.*

[254] Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1 (1984). Failinger and May interpret the Model Code of Professional Responsibility and current professional practice as implying a partnership between the attorney and client in legal services. *Id.* at 33. In the partnership model, the attorney and the client negotiate the parameters of their relationship based on mutual respect for their individual interests and the obligations they may have. The attorney-client relationship must combine an attorney's professional obligations and personal interests with a client's interests in being respected and in controlling the goals of the litigation. *Id.* at 34.

[255] *Id.* Legal services operates on the statutory goal of equal access, as opposed to legal services based solely on the client's expressed desire for them. *Id.*

[256] CHARLES WOLFRAM, MODERN LEGAL ETHICS 939-41 (1986). Law reform raises questions about who makes the decision and changes the traditional attorney-client relationship because the attorney may go beyond the point where the client's interest are being advanced. *Id.*

[257] Alan Houseman, *A Short Review of Past Poverty Law Advocacy*, 24 CLEARING-

Moreover, indigent clients may have an increased need for attorneys. As stated in the House Report in support of the Legal Services Reauthorization Act of 1991, "[U]nlike many other citizens, eligible clients may require the use of legal services programs to express views on legislative matters to protect existing legal rights or obtain relief that can best be provided by legislative bodies."[258]

There is support for changing the nature of the attorney-client relationship.[259] For example, Paul Tremblay contends that, due to scarce resources, the legal services attorney is unable to allow his or her client to dominate decision-making and must maintain an active, perhaps dominant, role in the decision-making process.[260] According to this argument, the legal services attorney must engage in two stages of decision-making that are virtually absent in the private sector. The first is choosing which case to accept from the unlimited pool of possibilities, and the second involves deciding what degree of limited resources to put into the case once it is accepted.[261] Since decisions concerning a case must be made in light of the attorney's limited resources, a different standard of informed consent and zeal must be applied to legal services attorneys.[262] Tremblay argues that legal services attorneys have ethical obligations to the poor community as a whole as well as to their individual clients.[263] He concludes that legal services attorneys should not be held to the traditional "individual zeal" model of ethics which is reflected in the Model Rules, but rather a different standard which focuses on community norms.[264]

There is also some sentiment that legal services attorneys should pursue a goal of empowering their indigent clients.[265] Anita Hodgkiss advocates the encouragement of individual and collective empowerment through lawyering.[266] The empowerment theory, which rests on a premise of developing an individual's sense of personal self-worth and responsibility, ultimately results in the democratization of economic and political decision-making.[267] The

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HOUSE REV. 1514, 1515 (1990).

[258] H. REP. NO. 476, 102nd Cong., 2d Sess. 2 (1992).

[259] *See, e.g.*, Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987); Paul Tremblay, *Toward A Community-Based Ethic for Legal Services Practice*, 37 U.C.L.A. L. REV. 1101 (1990).

[260] Tremblay, *supra* note 259, at 1102. Others believe that legal services attorneys should be held to the same standards as private attorneys, even in a time of scarcity of resources. *See* Bellow & Kettleson, *supra* note 218, at 337.

[261] Tremblay, *supra* note 259, at 1103-04.

[262] *Id.* at 1117-24.

[263] *Id.* at 1130.

[264] *Id.*

[265] *See, e.g.*, Hodgkiss, *supra* note 259. Although at first glance it might seem that the LSC regulations empower the clients, since it is the client who must initiate the discussion of lobbying as an alternative, it is quite the opposite. A client is not empowered if unaware and not advised of the options. *See supra* section III.B.2.

[266] Hodgkiss, *supra* note 259, at 570.

[267] *Id.* at 583. Empowerment does not refer to a group as a whole gaining greater

restrictions imposed by the government on lobbying, community organizing, and attempting to influence administrative agencies limits an attorney's ability to carry out those types of practices. Furthermore, these activities are protected elements of the right to petition and should not be constrained.[268] However, there is a significant limitation on the potential of the empowerment approach to reach poor clients. This is due to the constraints on legal services attorneys and the dominant role that government-funded legal services programs play in representing poor people throughout the United States.

In addition to differences in legal needs, client perceptions may also have an impact on the attorney's role. The attitudes toward attorneys may be impacted by the fact that the poor have little contact with attorneys and the law is frequently perceived as a system designed to exclude the impoverished, particularly poor people of color.[269] Since poor people are increasingly caught in the web of statutes and government regulations, legislative and administrative representation are even more important.[270]

An additional issue is whether a legal services client will receive adequate representation if certain activities such as lobbying are proscribed.[271] If legal

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influence; rather, it involves a change in consciousness and social relations so that people join in the decision-making process.

[268] *Id.* at 580.

[269] *Special Project: The Legal Services Corporation: Past, Present, and Future?*, 28 N.Y.L. SCH. L. REV. 593, 676 (1983) (adapted from the "Brief in Support of the Reauthorization and Continued Funding of the Legal Services Corporation," submitted to Congress by the New York Lawyer's Committee to Preserve Legal Services).

> [T]he legal interests of the poor are circumscribed when they are denied representation with respect to issues for which the rich can and do procure counsel. This disparity in access to the legal system alienates a large segment of our society who feel aggrieved. It also discourages them from "working within the system," for justice is perceived to be beyond their grasp.
>
> This perceived double standard has the further side effect of "reinforcing the belief among both clients and lawyers" and perhaps the general public "that the practice of publicly supported legal services law is a second class practice."

Id.

[270] In his article about the future of poverty law advocacy, Alan Houseman reasons that administrative advocacy representation is, and will continue to be, very important in a number of poverty areas, such as welfare and housing. Alan Houseman, *Poverty Law Developments and Options for the 1990s*, 24 CLEARINGHOUSE REV. 2 (1990). Houseman contends that legal services advocates need to seek out remedies that will help the poor achieve their full human capacities, which promote self-sufficiency and self-reliance, and preserve human dignity and cultural identity.

> [T]oday's social and political environment, with growing concern about welfare dependency, teen pregnancy, school dropouts, the basic skill level of the workforce, the 'underclass', and the homeless, offers a unique opportunity to direct advocacy toward issues, rights and remedies that may provide the poor with the kind of legal support they need to overcome their poverty.

Id. at 4.

[271] There has been a significant body of literature examining the attorney's role and

services attorneys are precluded from offering the range of services that a private attorney could offer, then perhaps equal access to justice is not being provided. Two issues complicate this analysis. The first is that as a practical matter, the resources of legal services offices are limited. As a result, attorneys must choose which clients to serve and how to serve those clients. However, if it were simply a matter of resource allocation, then lobbying would not be limited. After all, lobbying is often the most expedient way to resolve a client's problem. The restrictions on legislative lobbying and administrative lobbying are not ones of resources; they are the products of political philosophy and congressional compromise.[272] As a result, the resource question is irrelevant.

The second issue concerns whether the paying client, used as the comparative standard, is assumed to be middle-class or upper-class. As noted by Dooley and Houseman:

> The issue of full professional representation is loaded with ambiguities and conflicting perspectives both within legal services and more importantly within the broader legal and political community. For example, whether legal services lawyers should be able to engage in lobbying on behalf of their clients or in administrative rulemaking activities has always been controversial. On these issues, judicare advocates argue that the poor are entitled to the type of services provided to the middle class by general practitioners. Judicare opponents argue that poor people are entitled to the type of services provided by large private firms to those individuals and corporations that can afford to pay the fees charged. The staff attorney and support structure of the program assumes that specialization of a large firm practice should be replicated within legal services. Opponents of the structure see no reason for providing the poor with a level of representation that the middle class cannot afford or could not obtain from the general practitioner. The issues are rarely addressed directly by either side in the debate.[273]

Legal services attorneys should not be treated differently than private attorneys.[274] That lobbying is seen as diverting legal services from their mission of day-to-day legal services is due to incorrect assumptions about the role of legal

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the nature of legal representation. *See, e.g.*, David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637; Stephen Pepper, *A Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 Am. B. Found. Res. J. 613; Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1 (1975).

[272] *See supra* text accompanying notes 53-92.

[273] Dooley & Houseman, *supra* note 17, at 40-41, n.50.

[274] Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, Cong. Dig. at 155 (May 1981) (testimony of William Reece Smith, Jr., then President of the American Bar Association on March 31, 1985). "We believe that legal services attorneys should be free to represent their clients as fully as do private attorneys, subject to ethical restrictions." *Id.*

services attorneys and the role of lobbying in providing services to indigent clients.[275] Poor clients should not be given services inferior to clients who can afford private representation. Legislative and administrative representation are a part of the services which legal services attorneys can and should provide to their clients.

D. *Comparing the 1974 LSC Act and Regulations with Professional Norms and Values*

In enacting the LSC, Congress envisioned an attorney-client relationship consistent with the profession's norms. It allowed legal services attorneys to lobby on behalf of clients when necessary for legal advice and representation or when requested by a government or legislative body.[276] There were no restrictions on counseling, and legal services attorneys were not forced into a passive role. In addition, grassroots lobbying was allowed if performed on behalf of a client.

However, the view of legal representation articulated by Congress in the appropriations rider is inconsistent with the profession's norms and standards. Congress created a program which provides too limited a role for attorneys. The appropriations rider limits certain activities which are included within the responsibilities the profession imposes on all attorneys.[277] The standards of the profession, quite simply, require a broader conception of a legal services attorney's obligations to a client than Congress has recognized.

There are many ways in which the appropriations rider and the regulations[278] are inconsistent or in conflict with professional norms. First, the appropriations rider seems to be based on attorney authorization, within carefully proscribed legislative limits. It does not account for the professional trend toward client-centered decision-making.[279] The restrictions on legal services attorneys erode the informed client's right of choice by obstructing the client's (and the attorney's) ability to command as many options for the resolution of the case as possible. "Forcing legal services attorneys to provide their clients with more limited information or options than those available to non-poor cli-

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[275] *See* Breger, *supra* note 250, at 310-11. Breger suggests that restrictions are not unethical since an attorney is not required to accept all cases or to pursue all possible strategies on behalf of a client. He implies that statutory restrictions on legal services attorneys simply take away unnecessary options which private attorneys may eschew by choice. However, the fallacy in Breger's argument is that while an attorney may not be able to pursue all channels, the ability to choose the most effective strategy of all possible options should be decided by the attorney and client, and not be artificially restricted. *Id.*

[276] *See supra* text accompanying notes 66-78.

[277] Although this limitation may have been a matter of political expediency and compromise, as the only way to get the program started and maintained, it still has a view of attorneys that is too limiting.

[278] 45 C.F.R. § 1612 (1992).

[279] *See supra* text accompanying notes 214-223.

ents constitutes the kind of denial of client participation which the Code prohibits."[280] The previous quote was in the context of the restrictions on class actions by legal services attorneys, but is equally applicable to the lobbying restrictions. The restrictions prevent the client from being heard, not due to overreaching by the attorney but because they deprive the client of any opportunity to argue that a particular case should be accepted, or that a particular strategy should be employed. The restrictions limit the attorney's ability to exercise independent judgment on the client's behalf.

Second, the regulations seem to prohibit grassroots lobbying, rather than simply circumscribing the conditions under which such lobbying is permissible. The regulations appear to confuse permissible activities on behalf of a client, which may involve advocacy that affects other poor people, with impermissible activities done solely on behalf of the general class of poor people. Third, the regulations limit the attendance and participation of legal services attorneys in meetings of coalitions.[281] In essence, the appropriations rider and regulations virtually prohibit lobbying rather than imposing more appropriate restrictions.

In 1983, Senator Grassly, speaking on behalf of the lobbying compromise in Congress, stated that only lobbying that fits the mold of traditional legal representation (coming to Congress as individual attorneys on behalf of a particular client, after all other possible avenues have been tried and exhausted) would be allowed.[282] Although the Senator's statement articulates the reasons for the restrictions, it is not a correct portrayal of traditional legal representation. First, in "traditional" legal representation, there is no requirement of exhaustion. In many situations, legislative or administrative lobbying may be the first and only action an attorney needs to undertake. Second, part of "traditional" legal representation is preventive, which might require that an attorney identify the need for legislative or administrative representation before the client does. Third, in "traditional" legal representation, attorneys often represent groups and group interests.

Moreover, as a matter of public policy, Congress and LSC improperly limited the role of the legal services attorney. Congress appears to have misunderstood "political activity" and overstepped the necessary bounds. Perhaps congressional concerns about lobbying were valid, given the political climate at that time and the dialogue within OEO. However, the appropriations rider sweeps too broadly. It interferes with legitimate attorney-client relationships and, in particular, client-centered decision-making. As discussed in section IV, there are ways to address congressional concerns[283] while maintaining a proper role for attorneys.

This article concludes that the restrictions on lobbying in the appropriations rider and the 1987 LSC regulations are not unethical. Rather, they place legal

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[280] Failinger & May, *supra* note 254, at 49.

[281] 45 C.F.R. § 1612.5; 58 Fed. Reg. 21,405 (1993).

[282] *See supra* text accompanying notes 80-92.

[283] One problem is that there were many congressional concerns, some contradictory. *See supra* text accompanying notes 53-92.

services attorneys in an ethical dilemma.[284] Moreover, they are inconsistent with the professional norms. The restrictions in the statute strike a balance which LSC is unable to alter by regulation. Since Congress itself, in the 1974 LSC Act, has drawn certain lines to accommodate two competing principles — honoring the ethical obligations of attorneys and limiting the kinds of activities in which legal services attorneys can engage — LSC regulations can go no further in restricting LSC-funded attorneys' activities.

IV. REMEDIES

The obvious response to the problems caused by the recent restrictions on lobbying by LSC attorneys is to amend either the statute, the regulations, or both. However, in order to determine what amendments are appropriate, it is necessary to resolve two threshold issues. The first is to define the concept of a client's "legal need"; the second is to define a vision of legal services. These inquiries are central to the resolution of the ultimate issue: whether legal services attorneys should be permitted to engage in legislative and administrative representation.

A. *A Concept of Legal Need*

OEO had a broad view of legal need, including "ascertain[ing] what rules of law affecting the poor should be changed to benefit the poor and to achieve such changes, whether through the test case and appeal, statutory reform or changes in the administrative process."[285] This broad formulation of legal need was rooted in two theories: (1) legal services attorneys should be able to give indigent clients the same opportunities that attorneys give paying clients; and (2) the neighborhood law firm should implement the "civilian perspective" of Edgar and Jean Cahn, in which the neighborhood law office represented the needs and grievances of the neighborhood.[286]

It has often been said that the legal needs of poor people cannot be separated from the problems that contribute to poverty. The attorney, however, is simply concerned with legal rights:

> The lawyer is an advocate and a partisan. The poor need this kind of partisan that can advise them not only about rights but also about responsibilities, that can deal with the law as it is, but can also be an advocate for a change. The rich have lobbyists and if we are to eliminate this condition rather than grant relief simply by way of economic handouts, then

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[284] A particular restriction may not be forbidden by disciplinary rules but it may still be unwise or inconsistent with applicable ethical considerations. Formal Opinion 334, *supra* note 159, at 10.

[285] JOHN DOOLEY, LEGAL NEEDS OF THE POOR 70 (Proceedings of the Conference; Research on Legal Services for the Poor and Disadvantaged; Lessons for the Past and Issues for the Future, Working Paper 1983-11, 1983).

[286] *Id.*

the services of professional lawyers are a prerequisite.[287]

According to John Dooley, "legal need" concerns things not necessarily related to representation. It is a "consequence of the social organization of the legal system and the organization of a larger society — including shifting currents of social ideology, the available legal machinery, and the channels for bringing perceived injustices to legal agencies."[288]

A client may not necessarily be aware that he or she has a legal need. There are also situations in which the need for legal intervention occurs before a "problem" arises for a particular client.[289] In some instances, the attorney first needs to analyze the problem to see if there is, in fact, a legal need. The "delivery system cannot truly identify the legal needs of clients without being alert to the interplay of social, economic and political factors in its community."[290] Legal need, therefore, cannot be defined simply by what the client presents.

Legal services generally have come to be understood as a political resource.

> If having legal service is access to legal process, and access to legal process is participation in shaping major social premises, then to ask whether particular people or particular interests need lawyers may be to ask whether those people or those interests have a fit amount and kind of political power.[291]

The need for attorneys is a reflection of societal values. In our society, "contests over what can and cannot be done are far more likely to take place among the boundaries of the legal, requiring the aid of lawyers in counseling and litigation and making the crucial political choices regarding the amount of indeterminacy, abstruseness, and novelty in our laws."[292]

The second interrelated issue is a vision of legal services.[293] A critical under-

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[287] Dean Page Keeton, *The Need for Legal Services to the Poor*, 19 TEX. B.J. 351, 393 (1966), cited in Dooley, *supra* note 285, at 71.

[288] DOOLEY, supra note 200, at 71 (quoting Leon H. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 401 LAW & SOC'Y REV. 40 (1975)).

[289] For example, a client would not be aware of a proposed regulation by the Department of Social Services. However, intervention by an attorney, before the proposed rule is adopted by the agency, might well have an impact on the agency's policy and result in a different final rule that does not negatively affect the client when the rule becomes effective. The attorney's intervention might take many forms, such as written comments to a proposed regulation during the comment period or a telephone call to an agency administrator.

[290] Tull, *supra* note 191, at 20.

[291] GEOFFREY HAZARD, LAWYERS — WHO NEEDS THEM?: AN ANALYTIC INQUEST (PLP Monograph Series 1983).

[292] PETER HEYMANN, LAW, LAWYERS AND LITIGATION (PLP Monograph Series 1987).

[293] In looking to the future of legal services, three visions have been set forth for the year 2000: the staff attorney model, with only limited legislative advocacy; the empowerment vision, with the poor being empowered with legislative and administrative advo-

lying requirement is that high quality representation must exist. There are three elements to high quality legal representation: (1) every client and client group is entitled to the most effective representation possible; (2) both representation of individual clients and the total volume of representation should be the most economical possible; and (3) representation must be based on full and careful recognition of the client's needs.[294] The most effective representation is that which produces the best possible outcome for the client. In this regard, "[c]lass actions and legislative solutions are often able to produce outcomes that are not available through individual litigation."[295] Legal services attorneys should provide a full range of legal tools, including legislative representation and proposing policies in local, state and federal government. The attorneys must be able to identify the full range of legal needs of their clients, based on client needs and client priorities.[296]

B. *Criteria for Statuory and Regulatory Modification*

There are eight criteria that should provide a framework for statutory modifications. First, it is critical that the legal services attorney act on behalf of a client[297] when he or she provides legislative and administrative representation. Legal services attorneys should represent their clients' interests, rather than their own. They should espouse the legal needs of their clients and not their own ideological beliefs. A line can be drawn between political activity[298] which is related to client representation and that which is not. The attorneys should stay out of partisan or non-partisan electoral politics and other political activities unrelated to client representation.

If the attorney's actions are related to client representation and the needs of the client community, political activity, such as legislative and administrative lobbying, can be an effective and important means of assisting poor clients. As a result, restrictions on the provision of these services have a negative effect on the legal representation provided to poor clients by legal services attorneys. The congressional findings contained in the 1974 LSC Act recognize that LSC

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cacy and test case litigation; and, the professional responsibility model, with most of the lawyering done by *pro bono* attorneys. Singsen, *supra* note 240, at 3-4.

[294] *Id.* at 4.

[295] *Id.* at 7.

[296] *Id.* at 6.

[297] According to Michael Zander, legal aid attorneys are difficult to control, often dominate their clients, or act without clients as roving and unaccountable advocates of the public good. "[S]uch actions make their legitimacy suspect, leaving them vulnerable to politically motivated attacks, and they thereby undermine the access reform itself." Austin Sarat, Book Review, 94 HARV. L. REV. 1911, 1922 (1981) (reviewing ACCESS TO JUSTICE (Mauro Cappellatti ed., 1978)).

[298] Much of the appropriate legal work done on behalf of poor people is political activity. *See* Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991). *See also supra* note 128. It seems that much of the concern about political activity is a smokescreen for those opposed to effective legal services.

has an important role to play in legitimating the government.[299] Restrictions can prevent those people who are eligible for legal services from being heard by their government, thus exacerbating the social marginalization which can and often does occur as a result of economic poverty.[300]

Second, the legal services attorney must be allowed to initiate the discussion with the client about legislative and administrative representation, without waiting for the client to request it. Good lawyering requires an attorney to perceive issues or options of which a client is not aware. An attorney should anticipate issues that could potentially affect clients and advise them of the consequences.

Third, there should not be a requirement that an attorney cannot lobby before administrative and judicial relief is exhausted. Legislative representation may well be the most appropriate and efficient way to solve a client's problem. Not only are there benefits to the client and the attorney, but there are both direct and indirect advantages to society which result from timely and effective intervention in the adoption of a statute or rule. The direct benefits are the time and money saved in litigating the statute or rule. The indirect benefits result when legislators or regulators are prevented from adopting policies which reflect a lack of understanding of the policies' impact on the poor.

Fourth, consistent with the vision of legal services articulated above, legal services provided to the poor should be of high quality. This is consistent with the mandate of the 1974 LSC Act,[301] as well as good lawyering. This standard is "generally interpreted to involve determining all of a client's needs, identifying a full range of potential remedies, and zealously seeking the best outcome for the client."[302] The quality of representation for poor people should be equivalent to that which is provided to paying clients.

Fifth, legal services attorneys should not be restricted from lobbying on their own time. In fact, Congress has recognized, in other contexts, that the government does not have a substantial interest in regulating the outside activ-

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[299] The first finding provides that "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances." 42 U.S.C. § 2996 (1) (Supp. 1993). The fourth finding states that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws." 42 U.S.C. § 2996(4) (Supp. 1993).

[300] People living in poverty often experience a subordination and degradation which is made more acute by the social marginalization that can occur as a result of poverty. One way that this erosion of dignity occurs is through the devaluation of speech of individuals who are members of marginalized groups. *See, e.g.*, Lucie White, *Paradox Piece - Work and Patience*, 43 HASTINGS L.J. 853 (1992). Poverty can be psychologically debilitating, which can lead to political and social disenfranchisement. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

[301] In the Act, Congress found that "there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel." 42 U.S.C. § 2996(2) (Supp. 1993).

[302] Singsen, *supra* note 240.

ities of its employees.[303]

Sixth, the restrictions should only affect federal funding and not funds from private or other government sources. Seventh, attempts by legal services attorneys to persuade members of the public to support or oppose proposed legislation ("public lobbying") should not be restricted if such legislation would affect the client or the community concerns of the client. Even when a measure does not directly affect a particular client, it may still have a profound, albeit indirect, impact upon a client's legal interests. For example, proposed legislation to increase or decrease public assistance grants has an obvious impact upon the client community even if it has not yet directly affected a particular client. Accordingly, lobbying should be permitted when it affects the individual client or the concerns of the client group.

Finally, there should not be any special restrictions on the solicitation of clients by legal services attorneys. These attorneys are already subject to the general ethical rules on solicitation.[304] There is no principled basis for singling out legal services attorneys for additional restrictions which do not apply to other members of the bar.

With these criteria as a framework, it is possible to develop some remedies. One remedy is to repeal or modify the statutory restrictions in the appropriations rider. This would allow legal services attorneys to provide the same kind of services as private attorneys. The provisions in the 1974 LSC Act meet the necessary standards and are consistent with ethical precepts and the profession's norms. Therefore, the statutory provisions in the 1974 LSC Act, as modified by the 1977 amendments, should be separated from the restrictions in the Act.

LSC could also modify its regulations so as to be consistent with the standards articulated in this article.[305] If LSC does not do that, then Congress could have the regulations modified by eliminating the restrictions in the appropriations rider. This would delete the statutory authorization for the restrictive and improper regulations.

A second option is for bar committees to redefine their views of the professional and ethical obligations of attorneys, and to promulgate standards which

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[303] The Hatch Act was recently amended so that federal employees can participate as private citizens in the political process. However, the restrictions on running for partisan elective office and soliciting political contributions were retained. 5 U.S.C. § 7324 (Supp. 1993).

[304] *See In re* Primus, 436 U.S. 412 (1978) (holding South Carolina's application of its Disciplinary Rules to appellant's solicitation by letter on ACLU's behalf unconstitutional); NAACP v. Button, 371 U.S. 415 (1963) (holding that solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression are entitled to First Amendment protection).

[305] In light of the deference given by the courts to an agency's interpretation of a statute, the regulations would not be struck down as violative of the statute. *See supra* note 128.

clarify the lobbying function of legal services attorneys.[306] For example, local bar communities could issue opinions stating that legal services attorneys, like all members of the bar, should consider the full range of potential legal remedies, which includes lobbying.

The most reasonable, although perhaps not the most feasible, remedy is to modify the statutory and regulatory restrictions on lobbying. As section IV of this Article has demonstrated, there are ways to structure the legal services program which would prevent legal services attorneys from pursuing their own agendas while still meeting the needs of individual clients and society.[307]

V. CONCLUSION

Congress created a coherent scheme of legal services in the 1974 LSC Act and the 1977 amendments. The Act and the 1977 Amendments created a model of lawyering which conformed to the ethical guidelines and professional norms for legal services attorneys. However, the restrictions on legislative and administrative lobbying were watered down in the appropriations rider. As a result, poor clients have not received all of the services that they need. The agency regulations went a substantial step further. They diminish the options for legal services attorneys in the context of client representation. Due to the deference given to agency regulations, nothing can be done in the courts to strike down the regulations. The most plausible and effective solution would be for Congress to reaffirm the model set out by the 1974 LSC Act. As a matter of sound policy and legislative interpretation, the original intent of the Act should be implemented. This would ensure a system of legal services that does not preclude indigent clients from taking advantage of all legal remedies available to clients who can afford to retain private counsel.

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[306] There is some precedent for this. After the Supreme Court's decision in *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York withdrew its prior opinion which had found it unethical for government attorneys to negotiate simultaneously on the merits and on attorneys' fee issues in civil rights cases.

[307] *See supra* text accompanying notes 297-304.