

January 17, 1984

Ms. Lynne M. Lester
Administrative Assistant for Divisions
D.C. Bar
1426 H Street, N.W.
Eighth Floor
Washington, D.C. 20005

Dear Lynne:

Division 5 (Criminal Law and Individual Rights) and the Public Service Activities Committee (PSA) of the D.C. Bar propose to join as co-signatories on an amicus brief (a draft copy of which is attached) that has been prepared by the Bar Association of San Francisco. It is being filed in the case of National Senior Citizens Law Center, et. al. v. Legal Services Corporation, Civil Action No. 83-3867 (United States District Court of the District of Columbia). We understand that other Bar Associations will also be joining as co-signatories.

The plaintiffs in the lawsuit are national support centers that receive funds under contract from LSC. Their goal is to enjoin enforcement by LSC of a recently published "instruction" (see 48 Fed. Reg. 54305 (December 1, 1983)) that would:

- (a) prohibit national support centers from using fiscal year 1984 LSC funds to operate branch offices; and
- (b) prohibit the centers from allocating more than ten percent of their funds to activities involving networking, direct representation as counsel, co-counsel, amicus counsel or of counsel in judicial, administrative and legislative forums, and written or oral legislative or administrative testimony.

Division 5 and the PSA committee seeks authorization to join as co-signatories on the amicus brief because we believe that the LSC instruction, if adopted, would have a very deleterious impact on the provision of quality, efficient and effective access to justice to the poor, for the reasons set forth in the brief.

Sincerely yours,


Stephen H. Glickman, Esquire
Chair, Division 5


Ronald A. Schechter, Esquire
Chair, Public Service Activities Committee

The Bar Association of San Francisco

220 Bush Street • Twenty-First Floor • Mills Tower • San Francisco, CA 94104 • (415) 392-3960

Judith G. McKelvey
ident

Jerome B. Falk, Jr.
President-Elect

David M. Balabanian
Treasurer

Dirks B. Foster
Secretary

Irving F. Reichert, Jr.
*Executive Director &
General Counsel*

Joan Evjenth
Deputy Director

Barbara Fanning
*Continuing Legal Education
and Publications*

Larry Long
*Assistant General Counsel
Lawyer Referral Service*

Tanya Neiman
*Director, Volunteer
Legal Services Program*

Board of Directors

J. Baneroff
Dianne K. Barry
Robert C. Friese
Clifton Jeffers
Edward E. Kallgren
Peter G. Keane
Charles W. Kenady
James H. McAlister
Peter Mezey
Diana Richmond
Teresa Tan
Robert A. Thompson
Tito Torres
William B. Turner
Paul Vapnek

January 11, 1984

Robert Sable, Esq.
National Consumer Law Center
11 Beacon Street, Room 821
Boston, MA 02108

Henry Freedman, Esq.
Welfare Law Center
95 Madison Avenue, Room 701
New York, New York 10016

Sheldon Rodman, Esq.
Legal Assistance Foundation
343 South Dearborn Street
Chicago, Illinois 60604

Sylvia Ivie, Esq.
National Health Law Program
2639 South La Cienega Boulevard
Los Angeles, California 90034

Kathy Massafferri, Esq.
Executive Director
District of Columbia Bar Association
733 15th Street, N.W.
Washington, D.C. 20005

Michael Milleman, Esq.
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

RE: Legal Services Corporation Support Center
Instruction

Dear Colleagues:

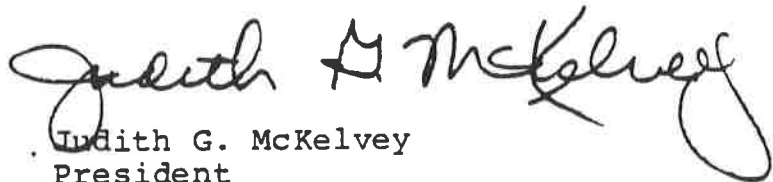
Enclosed is the brief approved by our Board of Directors today for filing in the U.S. District Court in Washington, D.C. A title page will be placed on this brief by Dewey Ballentine in Washington, D.C. who are acting as counsel for the support centers.

It is our understanding that your local bar association will join with us. As you know time is of the essence.

The Bar Association of San Francisco

Bob Sable will coordinate the signing of the brief with Rick Cotton at Dewey Ballentine.

Sincerely,

A handwritten signature in cursive script, reading "Judith G. McKelvey". The signature is written in dark ink and is positioned above the typed name.

Judith G. McKelvey
President
The Bar Association of
San Francisco

1 On December 1, 1983, the Legal Services Corporation
2 ("LSC") promulgated an instruction, to be effective
3 January 1, 1984, which, among other things, prohibited the
4 national support centers from allocating more than 10% of
5 their 1984 fiscal year funds for:

6 "... [N]etworking, direct representation (i.e.
7 sole counsel, co-counsel, amicus counsel and
8 of counsel in judicial, administrative, and
9 legislative forums) and written or oral
10 legislative or administrative testimony."

11 The alleged policy reasons for this instruction
12 were:

13 "... [T]o provide clarity about the actual
14 use of national and state support funding in
15 1984 such that the primary obligation to act
16 in support of the most important needs of
17 legal service programs are met and to set the
18 stage for development of long term policy."

19 This paragraph concludes with the statement that:

20 "The Corporation is committed to providing
21 adequate support to both staff and private
22 attorneys in the provision of quality,
23 efficient and effective access to justice."

24 The undersigned Bar Associations submit that,
25 contrary to the foregoing statements, the instruction dis-
26 regards the most important needs of legal services programs,
that the instruction reflects the LSC's recent approach of
ignoring and avoiding information from interested parties
prior to the making of major policy shifts in the delivery
services to the poor--and in fact the use of the instruction
rather than the regulation process is designed to avoid such

1 information--and that the LSC in adopting the instruction is
2 displaying a lack of commitment to providing adequate
3 support, not only to its own staff attorneys, but also to the
4 private bar, in the provision of "quality, efficient and
5 effective access to justice."

6 I. The National Support Centers As They Presently
7 Operate Provide Essential Support For The Legal
8 Service Programs And Private Attorneys

9 The cut-backs in funding and the increased restric-
10 tions on local legal service programs have severely decreased
11 the quantity of legal services to the poor. It has only been
12 through the dedication of the staff attorneys and the will-
13 ingness of many members of the private bar to undertake pro
14 bono programs that effective access to justice for the poor
15 has been anything but a hollow slogan.

16 The quality of the programs has been maintained in
17 many instances through the assistance of the national support
18 centers whose expertise is a national legal treasure. The
19 funding cut-backs have made many local programs unable to
20 undertake complex and time-consuming litigation, particularly
21 of the test case type, or to seek long term changes in
22 administrative processes or the law which would improve the
23 delivery of legal services to the poor.

24 The undersigned Bar Associations have all had a
25 long and proud history of provision of pro bono legal ser-
26 vices to the poor, but these Bar Associations early recog-

1 nized that lack of expertise, lack of time to acquire such
2 expertise, and limited availability of time restrict even the
3 most dedicated volunteers in producing effective service.
4 With this in mind, the major thrust of the programs of most
5 of these Bars' has been in providing direct service in
6 limited areas in cooperation with the local federally funded
7 programs.

8 Many of the members of these Bar Associations, par-
9 ticularly those in large firms, have been willing to under-
10 take occasional complex test case litigation, but even these
11 have relied heavily on the availability of co-counsel or
12 other relationships with legal services staffs, including the
13 national support centers, to provide the necessary expertise
14 and continuity.

15 The lack of expertise in the private bar is par-
16 ticularly marked in the administrative areas where members of
17 the private bar seldom deal with the agencies, let alone the
18 problems, from whom most of the legal issues of the poor
19 arise.

20 Finally, the private bar is unable to provide any
21 meaningful legislative support, most such activities being
22 outside the primary focus of individual lawyers and the
23 organized bar and beyond their resources. In short, from the
24 observation and experience of the undersigned Bar Associa-
25 tions, the restrictions on representation by the national
26 support centers strike at that precise area where the private

1 attorney is least able to provide meaningful legal assistance
2 and where the organized bar has the greatest difficulty in
3 creating and maintaining effective programs.

4 To further restrict access to the expertise of the
5 national support centers by relegating them to manual writers
6 and policy planners, will undercut what little assistance the
7 private bar can give when backed up by experienced counsel in
8 such support centers. Local staff attorneys cannot carry the
9 load especially when they too are effectively deprived of
10 their experts by this instruction.

11 II. The Use Of The Instruction Is Designed To Prevent
12 The Gathering And Development Of Information Which
13 Would Demonstrate The Need For The Continuation Of
14 The Present Activities Of The National Support Centers

15 Many of the undersigned Bar Associations have
16 commented on regulations of the LSC from time to time. The
17 Representatives of the Bar Association of San Francisco, the
18 Lawyers' Club of San Francisco, the Los Angeles County Bar
19 Association and the State Bar of California testified on
20 certain pending regulations at a meeting of the Board of the
21 LSC held on November 7, 1983 in San Francisco.

22 Most of the state and local bars have never been
23 asked directly for comments by the present staff of the LSC
24 although it has a long history of involvement with the
25 delivery of legal services to the poor. Accordingly, the
26 undersigned Bar Associations rely primarily on the notice

1 provisions of the regulatory process to alert them to possible
2 opportunities to comment on matters which may be of direct
3 interest or direct impact upon its various programs.

4 Recently, even the regulatory process has been kept to the
5 bare minimum of notice although representatives of the
6 private bar, in at least one instance, have asked for more
7 time in which to comment on certain regulations which
8 directly affect the private bar.

9 The use of the instruction prevents close scrutiny
10 of the reasons for the shift in policy. For example, the
11 instruction refers vaguely in its general policy statement to
12 the 1983 study of national support centers which no one has
13 seen and to input from the field which is not further
14 described as justification. The instruction infers a lack of
15 past support and responsiveness which necessitates a
16 "review":

17 "It is appropriate and timely that the Corpo-
18 ration review past policies and articulate
19 current policy that addresses the impact of
support and responsiveness to the field."

20 However, the instruction is already a major shift in policy,
21 and it is apparently based on little or no information. The
22 use of the instruction process prevents significant input
23 from at least one segment of the field--the private bar--to
24 whom the Corporation is allegedly committed in providing
25 adequate support.

26 Significant shifts in policy, such as represented

1 in this instruction, should be done only after full oppor-
2 tunity for comment, maximum scrutiny of objectives, and
3 adequate notice. None of these was given.

4 III. The Restrictions On The National Support Centers
5 Contained In The Instruction Demonstrate The Lack
6 Of Commitment By The LSC In Providing Adequate
7 Support To Both Staff And Private Attorneys In
8 The Provision Of Quality, Efficient And Effective
9 Access To Justice

10 If the poor are to have "equal access to the system
11 of justice," (42 U.S.C. Section 2996(1)) their counsel must
12 not be limited in available methods. Representation not only
13 in court, but also in administrative tribunals and before
14 legislatures have been time honored methods used by lawyers
15 on behalf of their clients. Efforts to change onerous poli-
16 cies or to correct problems through changes in administrative
17 regulations or through the legislative process have also been
18 means employed by counsel on behalf of their clients. By
19 limiting the national support centers who have the greatest
20 expertise in specialized areas of concern to the poor from
21 effective means of the changing processes and procedures for
22 large numbers of people, the LSC is depriving counsel for the
23 poor of some of their most effective advocates.

24 As mentioned earlier, it is unrealistic to assume
25 that the private bar can effectively participate in areas
26 where they have little expertise and no contacts, or that

1 staff attorneys with cut-backs, restrictions on legislative
2 participation, and overwhelming workloads, can make anything
3 but the most token of efforts. The national support centers
4 fill that very necessary gap.

5 Similarly, the poor must not be barred from access
6 to high quality legal services. High quality legal services
7 has, in the past, been demonstrated by the expertise of
8 counsel in a particular area of the law, a concept reinforced
9 by the Code of Professional Responsibility which limits the
10 right of a lawyer in undertaking representation to areas in
11 which he or she is competent or has undertaken to become
12 competent--the latter usually involving a commitment not only
13 of time in learning the substantive law but also in acquiring
14 the practical knowledge of the ramifications and procedures
15 of such particular areas.

16 The national support centers already possess such
17 expertise in those major areas of the law which are of par-
18 ticular concern to the poor. Staff attorneys have some
19 expertise, but most deal with a myriad of problems and an
20 increasing workload, so that they do not have the time, or
21 the overview, to acquire true expertise. Private attorneys
22 do not, for the most part, practice in these areas of the law
23 and do not have the time or realistic opportunity to become
24 truly expert. This is particularly true when unfamiliarity
25 with substantive areas of the law is combined with extensive
26 and complex litigation, especially if the litigation is a

1 class action.

2 Even the undertaking of complex litigation is par-
3 ticularly difficult. The recent cut-backs in funding have
4 forced many local programs to make difficult choices in
5 allocation of resources: undertaking complex litigation is a
6 major commitment of resources which, although it may be bene-
7 ficial to a greater number of people in the long run can
8 limit the ability to serve clients in the short term. The
9 cut-backs further make it impossible for staff to devote the
10 time to develop expertise especially as special units dis-
11 appear and senior staff leaves.

12 The private bar is particularly ill-suited to
13 undertake complex and lengthy litigation: most lawyers do
14 not have the expertise and such suits require economic com-
15 mitments that are beyond those members of the bar who may
16 have some expertise. The availability of volunteers often
17 depends upon their own time commitments, and in many cases
18 litigation cannot wait. However, some private lawyers may be
19 willing to undertake limited commitments as co-counsel or
20 even greater responsibility if they have the assurance that
21 experienced and responsible counsel in the national support
22 centers will assist.

23 Thus, the role of national support centers in
24 direct representation, whether alone, as co-counsel or as
25 amicus becomes particularly important. Development of liti-
26 gation strategy falls far short of the mark if there are no

1 lawyers to litigate.

2 Finally, national support centers have the only
3 effective overview of their areas of the law because of their
4 ability to participate creation of such law through legisla-
5 tive activity, in implementation of such law through adminis-
6 trative activity, and in enforcement and clarification of the
7 law through litigation. This overview and the expertise it
8 generates will quickly dissipate if the support centers no
9 longer have the full opportunity to maintain their skills as
10 all lawyers do--by directly dealing with real problems.

11 The undersigned Bar Associations, speaking as
12 representatives of the private bar, recognize the importance
13 of these support centers, as they presently operate, as
14 effective mechanisms giving realistic support to both the
15 staff attorney and the private bar. To dismantle--and that
16 is the effect of the instruction--the national support center
17 raises serious questions of the commitment of the LSC, not
18 only to such support, but more basically to quality access to
19 justice--for the national support center lawyers are the
20 experts; to efficient access to justice--because these are
21 the lawyers most familiar with the most effective procedures
22 for dealing with specified problems of the poor on an ongoing
23 basis; and to effective access to justice--because the
24 centers have a track record of success. To destroy what has
25 been effective, without any demonstrated need to do so and
26 without solid information as the basis for such a major

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

policy shift seems an act contrary to the intended purpose of
the law.

Respectfully submitted,

THE BAR ASSOCIATION OF SAN FRANCISCO

BY Judith G. McKelvey
Judith G. McKelvey