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**MEMORANDUM**

**TO:** All LSC Program Directors

**FROM:** John A. Tull, Director  
Office of Program Evaluation, Analysis and Review

**DATE:** November 21, 1995

**RE:** Recommended Actions Concerning the Disposition/Divestment of Cases Which  
Are Likely to Become Impermissible under FY 1996 Appropriations Legislation

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In this time of uncertainty one of the greatest challenges facing legal services programs concerns the disposition of pending cases that will be subject to restrictions beginning January 1, 1996. We do not yet know the exact nature and language of some of the restrictions that will be enacted into law or the precise way that restrictions will be applied to pending cases. We do know what some of the restrictions will be and are fairly clear about the general thrust of the rest on both LSC and non-LSC funds of recipients. We are making every effort to ensure that the legislation includes a reasonable period of transition to allow programs to divest themselves of pending cases that will be restricted, consistent with the best interests of your clients and with your attorneys' ethical obligations and professional responsibilities to those clients.

Nevertheless, programs may be faced with the possibility that they will have to divest themselves of restricted cases within a very short period of time after the appropriations bill is enacted and signed into law. Because of that very real possibility, we recommend that you take the following steps, if you have not already done so, in order to lessen the impact of the imposition of the new restrictions on current clients and your attorneys.

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You should note that most state ethical rules require withdrawal from ongoing representation when such representation will result in a violation of law, unless the attorney is ordered to continue the representation by a court or other tribunal. See Rule 1.16(a) of the Model Rules of Professional Conduct and the comparable rules of professional responsibility for your state.

**NEW CASES** – We strongly recommend that programs decline to accept any new cases of the kind that are restricted in either the Senate or House Appropriations bills. In the event that programs do accept such a case staff should be certain that: the particular case will be finished by January 1, 1996; or the case can be transferred to another entity or attorney; or the client can proceed pro se after January 1, 1996. For all such new cases, we recommend that programs include in their retainer agreements provisions whereby clients consent to the program's withdrawal from, and transfer of the case to another counsel or the client's proceeding pro se after January 1, 1996. If the client refuses to consent, the program should consider whether or not to decline the representation. Programs should also try now to identify outside attorneys or other entities who will be available to take these cases after January 1, 1996.

Programs should note, however, that under the transition section of Section 16 in the Senate version of the appropriation (the "Domenici Bill"), the prohibitions would apply to a case "if the recipient or employee [of the recipient] began to provide the legal assistance on or after the date of enactment of this Act", rather than on January 1, 1996, as would be true under the House Bill. Although the appropriation has not yet been enacted, and we do not yet know whether the Domenici provision will be included in the final act, programs should assume that the prohibitions will come into play sometime before January 1, 1996, depending on when the appropriation is finally signed into law by the President. Thus, any case that is subject to the prohibitions contained in the appropriation that a recipient undertakes between enactment and January 1, 1996, could be prohibited outright, and programs may be forced to give up those cases that were undertaken between enactment and January 1, 1996, even if a transition provision for pending cases is included in the final 1996 appropriations legislation. Since we do not know when the appropriation is likely to be enacted, programs are advised that they should not undertake any new cases that are potentially prohibited unless those cases can be either concluded or transferred before January 1, 1996.

**ONGOING CASES – appeals** – If, before January 1, 1996, a pending case that is likely to be restricted under the appropriations provisions comes to a new juncture, such as an appeal of a lower court or administrative agency decision which cannot be completed by January 1, 1996, the program should carefully consider whether or not to continue representing the client at the next stage. Before continuing representation at the next stage, you may wish to seek the client's consent to your withdrawal from and transfer of the case, as described above, consistent with your state's ethical rules. The steps outlined above are consistent with Formal Opinion 347, issued on December 1, 1981, by the ABA Standing Committee on Ethics and Professional Responsibility.

**OTHER ONGOING CASES -- notice to clients** -- In other potentially restricted cases, programs should consider informing clients that Congressional restrictions may prevent the program from continuing to represent the client after January 1, 1996. The program may wish to explain to the client that, in the event the program is required to withdraw from the case, the program will make every effort to secure alternate representation, consistent with the client's best interests.

**TRANSFER OF PENDING CASES** -- In addition to notification of clients, we recommend that programs, with the consent of clients, begin to make arrangements to line up co-counsel and to transfer potentially restricted cases to other counsel. If the transfer can be effected before January 1, 1996, programs will be well advised to do so, to minimize the trauma to both the client and the program that will result in having to secure replacement counsel and to transfer the case on very short notice.

We understand how difficult it will be for you to take these recommended actions. We recognize the close relationship that exists between legal services staff and the clients that you serve, the commitment of your staff members to their clients, and the degree to which clients depend on the services you so ably provide. Nonetheless, we believe that it is in our clients' best interests and the long term future of the federal legal services program, for you to take action to ensure the orderly completion and transfer of cases that will be restricted.

Attachments:           An Analysis of the Prohibitions Contained in the House and Senate Bills -- the Effect on Pending Cases

A Side-by-Side Comparison of the Text of the Restrictions Contained in the House and Senate Bills