AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association opposes the passage of legislation, such as H.R. 5336, which would amend the Legal Services Corporation Act to:

1. Restrict legal services and pro bono programs in their use of IOLTA funds, state and local government monies and private contributions;

2. Authorize the Corporation to discipline program attorneys for violations of state ethical codes;

3. Place program attorneys and attorney board members in conflict with their ethical responsibilities by providing for board involvement in the selection of specific individual cases for representation;

4. Create obstacles applicable only to low income persons in obtaining representation and access to the courts, administrative agencies, and other forums for the resolution of their disputes;

5. Deprive the poor of lawyers to assert basic statutory and constitutional rights;
6. Dismantle the local control structure and destroy the effectiveness of the current legal services delivery system of staff and pro bono programs; and

7. Cause the unwarranted diversion of resources by requiring excessive recordkeeping and subjecting programs to claims by disgruntled defendants.

RESOLVED FURTHER, that the American Bar Association urges state and local bar associations to adopt resolutions opposing H.R. 5336 and to communicate their opposition to this legislation to their Congressional delegations.
The American Bar Association has long been a stalwart supporter of a federally funded legal services program to provide equal access to our system of justice for low income people. The participation of the Association was critical in the passage of legislation creating the Legal Services Corporation (LSC) in 1974 and in resisting attempts throughout the 1980's to abolish the Corporation or destroy its effectiveness. The Association has also strived to ensure that this country's legal services program operates in an effective manner and that legal services lawyers have full freedom to protect the best interests of their clients in accordance with their professional responsibilities.

The House of Delegates has, over the years, considered many resolutions regarding how the legal services program is operated. For example, in 1986 the Association adopted the fourth version of Standards for Providers of Civil Legal Services to the Poor, a comprehensive explanation of how legal services can be appropriately and effectively provided. Most recently, the House of Delegates in 1989 unanimously resolved, inter alia:

That the American Bar Association strongly urges Congress to pass a reauthorization bill for the Legal Services Corporation which faithfully adheres to the original Act's mandate of providing "high quality legal assistance to those who would be otherwise unable to obtain adequate legal counsel" while insuring that the program remains "free from the influence of or use by it of political pressures" and that program attorneys "have full freedom to protect the best interests of their clients in keeping with the canons of ethics and the high standards of legal services."

The last authorizing legislation for the Legal Services Corporation expired in 1980 and since that time LSC has continued to operate through annual appropriations measures, containing many substantive provisions as riders. A bill to reauthorize the Corporation, H.R. 5271, was recently introduced in the House of Representatives. Another bill, titled the Legal Services Reform Act of 1990, H.R. 5336, was introduced on July 20 by Congressmen William McCollum (FL), Harley Staggers, Jr. (WVA), and Charles Stenholm (TX).

Many of the provisions of this latter bill were offered on the House floor last October as an amendment to the LSC appropriation. Although that amendment would have dramatically
altered the federal legal services program in harmful ways, it
failed only narrowly by a vote of 199-206. This year's bill
goes even further in eviscerating the legal services program
and creating a second class system of justice for the poor.

Its provisions apply not only to legal services staff programs
but also to bar association-sponsored pro bono programs and
would sharply restrict how both may use funds received from
Interest on Lawyer Trust Account (IOLTA) programs. It is
critically important that the American Bar Association and
state and local bar associations once again go strongly on
record to oppose such proposals and to urge Congress to defeat
H.R. 5336 and any similar proposals.

Restrictions on IOLTA and Other Funds

Section 9 of H.R. 5336 provides that IOLTA funds may be used by
legal services programs and pro bono programs that receive LSC
money only for the same activities permitted with LSC monies.
In effect, the boards of IOLTA programs will be stripped of
their ability to effectively utilize their monies to provide
important legal services not available through LSC funding.
For example, many programs have IOLTA grants to serve the
elderly or disabled who, while they do not meet LSC financial
eligibility guidelines, may still not have sufficient resources
to afford legal assistance. Financially eligible clients would
find out they would not be able to receive representation in
many areas.

IOLTA has become a significant funding source for legal
services to the poor. Programs have been adopted in every
state and in the District of Columbia. This past year, $60
million was distributed in grants to programs providing legal
services for the poor. In some states, the amount of IOLTA
funds approaches the funding provided by LSC. These programs
developed in order to supplement LSC-funded services, not
merely to duplicate them.

The bill also restricts for the first time the use by programs
of state and local government funds and expands the current
restrictions on how private contributions may be used. Recent
legal needs studies have reported that 80-85% of the legal
needs of the poor are going unmet. The ability of local boards
to raise additional funds to serve the poor and disadvantaged
should not be hampered by restrictions on fund usage.
LSC Discipline of Attorneys

Section 12 of the bill, Attorney Accountability, gives LSC the authority to apply sanctions against program attorneys for violations of the applicable state code of professional responsibility. This power would be directly contrary to the current provision of the LSC Act, Section 1006(b)(3), 42 U.S.C. 2966(e)(b)(3), which directs the Corporation not to abrogate the authority of a state to enforce the generally applicable standards of professional responsibility.

While it is appropriate for the Corporation to continue to have the authority to impose sanctions against program grantees for violations of the LSC Act and regulations, it should not be authorized to interpret the rules of professional responsibility and punish individual attorneys based on those interpretations. Enforcement of these provisions must remain the sole province of the state disciplinary authorities.

Board Involvement in Case Selection

Section 8 of the bill, Authority of Local Governing Boards, would permit the boards of directors of local programs to decide what specific cases can be brought by program staff and pro bono attorneys affiliated with the program. It would also require that the boards decide what specific class actions may be brought. This section is unnecessary and impractical and would place attorney board members and program attorneys in conflict with their ethical responsibilities.

Local program boards, composed of lawyers and laypersons, already are required to establish priorities for the use of program resources and to determine the types of cases and matters that the program will handle. Adoption of this proposal would place both program attorneys and attorney board members in conflict with their ethical responsibilities as set forth in ABA Formal Opinion 334 and recognized in ABA Civil Standards 7.1-1 and 7.1-2.

The proposal is also entirely impractical. For example, The Denver Legal Aid Society, a mid-size program, represented more than 19,000 individuals in 1989. At least 3700 cases involved representation beyond brief advice. Moreover, the Society's board consists of 27 members and meets only six times a year. It would be virtually impossible for the board to review each of these matters, much less consider emergency matters in a timely fashion. The implications for larger programs, like Boston with 20,000 matters annually and Chicago with 35,000, are even more staggering to consider.
Obstacles to Representation

H.R. 5336 establishes in Sections 4, 5, 6 and 13 procedures, obstacles and limitations to be applied only to the activities of legal services programs and their representation of low-income clients. In stark contrast to the goal of increasing access to justice contained in the current LSC Act, these provisions would create a second-class system of justice applicable only to the poor.

For example, it is proposed in Section 4 that now superseded ethical provisions on the solicitation of clients be applied to legal services programs. Selective language taken from the 1970 Code of Professional Responsibility would prohibit program lawyers from providing representation to people who had been given unsolicited advice about their legal rights, such as migrant farmworkers, the homeless and victims of national disasters. Yet the 1970 Code provision is no longer in effect in most states; has been substantially modified in the remainder; and has been succeeded by Rule 7.3 of the Model Rules of Professional Conduct, which restricts solicitation only when it is driven by pecuniary gain for the lawyer. This proposal would greatly impede the ability of some of the most disadvantaged members of society to obtain legal help. Migrant farmworkers, who move frequently, who do not have access to phones, and who are housed in isolated rural areas will be particularly harmed.

Likewise, Section 5 creates additional obstacles solely for migrant farmworkers seeking to vindicate their rights with representation provided by legal services lawyers. The section would require the exhaustion of applicable administrative remedies or mediation procedures before a lawsuit may be filed against any agricultural entity and would impose additional negotiation and pleading requirements. No justification has been established to place on migrant farmworkers special burdens which do not apply to any other groups of clients, rich or poor.

In addition, Section 6 of the bill would strip legal services lawyers of certain tools in achieving their clients' objectives. It would prohibit representation of an eligible client in both administrative rulemaking proceedings and in legislative forums.

The poor are the most bureaucratized segment of our society and a significant percentage of their legal problems arises from their extensive involvement with administrative agencies. Limiting their access to participation in the agencies'
activities would deny them equal access to justice. It also
often would result in expensive and time consuming litigation
which could be avoided. Prohibiting representation in the
legislature would deny the poor what may be the only
opportunity to resolve their problems and would deny
legislators the opportunity to obtain information on the
consequences to poor people of particular legislation.
Legislative and administrative representation have long been
formidable tools used by private attorneys to represent their
clients; they should also be available to legal services
clients and their lawyers.

Finally, in Section 13 the bill establishes a new set of rules
on the award of attorneys' fees applicable only to legal
services programs and their clients. Programs would be
prohibited from obtaining attorneys' fees from private parties
under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C.
1988, and other similar fee-shifting statutes. On the other
hand, despite the American rule on the award of fees, courts
would be required to assess attorneys' fees and costs, if more
than $5,000, against a losing legal services plaintiff and
would be permitted to assess them against a plaintiff
recovering less than 10 percent of the amount in controversy,
even though the plaintiff prevailed.

These awards would actually be paid by LSC and the local
program. Thus, this section not only would impose without
justification a new set of rules for the poor, it would divert
resources that could be used to provide additional legal
services to them.

Denial of Representation

The bill would prohibit representation by legal services
programs in certain types of cases regardless of the source of
the funds used. This Association has long supported the
principle, embodied in the existing Act, of local control of
programs. Program governing boards should have the flexibility
to use available funds to address the particular needs of their
communities.

Section 2 would prohibit any program, whether staff or pro
bono, which receives any LSC funds, from participating in any
Voting Rights Act representation involving redistricting or in
any representation involving the census. This new prohibition
denies poor persons the opportunity to preserve fundamental
civil rights under the Constitution and one of this country's
major civil rights acts. These cases are not partisan in
nature. Rather, they are frequently based on the effective denial of the right to vote because of discrimination based on race - cases involving, for example, county commissions with at-large districts resulting in no minority members despite their sizeable population in the community. The makeup of local government is also important for the profound effect it can have on the lives of poor people through decisions on how resources and services are distributed. Few legal services programs have actually provided representation in redistricting matters but when possible cases arise, local programs are best situated to determine whether they should be brought in the face of competing demands for services.

Programs would also be prohibited by Section 10 from providing representation, using any funding source, in any drug-related evictions from public or private housing or in the defense of any student accused in a school disciplinary proceeding of any drug-related activity in or near a school. This would prevent programs from, for example, being able to assist innocent tenants and occupants of housing, including children and family members, who were not directly involved in illegal drug activity, have limited or no knowledge of the drug activity and have no reasonable means of controlling the actions of those who were involved. Representation would be denied solely on the basis of allegations about apparent drug activity.

Without representation, tenants and students have no means to enforce due process protections. In the efforts to fight drugs, abuses can occur. For example, summary, no-notice evictions in public housing have already had to be enjoined by a federal court. Again, local governing bodies, controlled by bar associations, can best determine what program activity is appropriate in their communities by adopting policies in this area.

Destruction of Current Delivery System

One provision of the bill, Section 11, provides for the dismantling of the current system of staffed legal services programs directed by boards controlled by bar associations, working in partnership with bar-sponsored pro bono programs. It calls for the award of all future LSC grants by the process of competitive bidding. While the bill does not specify how this process would be carried out, under proposed draft regulations issued in 1989 by LSC staff, LSC would fund more than one competing provider for each geographic area; require competition every three years; choose providers that would not need to provide representation in a broad range of matters, nor
even be lawyers, nor have a board appointed by state and local bar associations; have LSC staff decide what types of cases and services would be provided under each contract and who the providers would be, without any consideration of locally identified needs; and not develop any criteria by which applicants or providers would be judged, other than cost-per-case.

There is no basis for concluding that competitive bidding would improve on the current approach to funding and providing civil legal services to the poor. In all likelihood, efficiency and cost, rather than quality of service, would become the most important criteria for rating a program. In the indigent criminal defense context, competitive bidding has generally proven to be problem-ridden and a failure. Studies of these attempts reveal that costs rose, quality of representation deteriorated and virtually every community abandoned the experiment as the basic delivery system.

Competitive bidding has not fared much better in the civil context. The limited experiments with competitive bidding by the Corporation in 1986 and 1987 demonstrated, from what we have been able to learn, that very similar problems occur.

The competitive bidding proposal also poses a grave threat to the continued success of the pro bono efforts of bar associations. Most pro bono activities are highly dependent on staff lawyer programs for intake, referrals, training and back-up, without which they could not operate. Further, if this proposal resulted, as apparently intended, in paying private law firms to handle cases, it would discourage the law firm down the hall or up the street from performing similar services for free. Thus, implementation of this proposal will lead to a withering of pro bono work.

Other provisions of Section 11 would also be destructive. One would require the immediate redistribution of funds so that each program is funded at the same amount per poor person. Currently, the great majority of program funding is provided at the rate of $8.94 per poor person. Funding to those programs which receive a greater per capita amount accounts for only 4% of total grant funds. The imposition of immediate equalization would cause tremendous disruption within those few, primarily urban, programs now funded at a higher level, while the amount available for redistribution, when spread across all programs, would have very little impact. A more reasonable approach to gradually equalizing funding without disruption has been adopted by Congress in each appropriation bill since 1981.
Another disruptive provision would change the participation of state and local bar associations in the selection of local governing boards. Currently, these associations appoint a majority of the members; this would be altered to provide that their authority is only to approve a majority of board members. This provision would, without any justification, weaken the role of bar associations in program governance.

**Diversion of Resources**

Section 7 of the bill requires programs to utilize part of their limited resources to establish unique and exceedingly detailed timekeeping systems. Every program employee, from the receptionist to the mail clerk to the attorneys and director, would have to maintain contemporaneous time records on their activities, detailing the name of the matter, the time spent and the source of funds.

This requirement is unnecessary and its implementation would cause a reduction in the resources available for serving clients. The Corporation already has the means to assure program accountability. It requires detailed recordkeeping and reporting of program activities and conducts in-depth monitoring to ensure compliance with a whole range of legal requirements. A functional accounting system of the type proposed is unprecedented; it is our understanding that it is not utilized by publicly funded providers of legal services, any federal or state government legal department, the Department of Justice, any state attorney general or any city corporation counsel. No justification for imposing a nationally mandated system of this sort has been established. To the contrary, a report of the General Accounting Office two years ago found this type of recordkeeping system for legal services programs was unjustified and did not provide benefits for improved program management. What it will do, however, is divert resources from client service.

It is also proposed, in Section 3 of the bill, that a private right of action be established for violations by LSC grantees of the Act and regulations and other federal statutes. Sufficient authority already exists to protect LSC grant funds from theft and fraudulent use, through both Corporation action and federal and state statutes. The need for an additional mechanism, through a private right of action, has not been demonstrated. However, such actions could be used for harassment purposes by disgruntled adverse parties and others opposed to program activities. The defense of such suits, of course, would divert resources from the needs of clients and impose an additional burden on our already overburdened justice system.
In short, these proposals would wreak havoc with the system by which the poor of this country receive legal services. They would further limit access to justice for the poor and would deny access completely to certain types of legal representation. These proposals are intolerable and the Association must voice its loud opposition to them. Our nation's poor deserve no less.

Respectfully submitted,

Joanne M. Garvey
Chair

August, 1990
GENERAL INFORMATION FORM
To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

No. (Leave Blank)

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Joanne M. Garvey, Chair, Standing Committee on Legal Aid and Indigent Defendants

1. Summary of Recommendation(s).
That the ABA opposes the passage of legislation such as H.R. 5336 which would amend the Legal Services Corporation Act in ways harmful to the effective operation of the program and the representation of low-income persons and urges state and local bar associations to adopt similar resolutions.

2. Approval by Submitting Entity.
Committee members indicated their approval through communications the week of July 30. This action was ratified at the Committee's meeting on August 4.

3. Previous submission to the House or relevant Association position.
The ABA has long been a stalwart supporter of a federally funded legal services program that would provide equal access to justice for low-income people. The House of Delegates has, over the years, considered many resolutions regarding how the legal services program is operated. For example, in 1986 the Association adopted the fourth version of Standards for Providers of Civil Legal Services to the Poor, a comprehensive explanation of how legal services can be appropriately and effectively provided. Most recently, the House of Delegates in 1989 unanimously resolved, inter alia:
That the American Bar Association strongly urges Congress to pass a reauthorization bill for the Legal Services Corporation which faithfully adheres to the original Act's mandate of providing "high quality legal assistance to those who would be otherwise unable to obtain adequate legal counsel" while insuring that the program remains "free from the influence of or use by it of political pressures" and that program attorneys "have full freedom to protect the best interests of their clients in keeping with the canons of ethics and the high standards of legal services."

4. Need for Action at This Meeting.

The last authorizing legislation for the Legal Services Corporation expired in 1980 and since that time LSC has continued to operate through appropriations measures containing many substantive provisions as riders. Two bills to reauthorize the Corporation were introduced on July 19 and July 20. One bill, H.R. 5336, introduced by Congressmen William Staggers (FL), Harley Staggers, Jr. (WA), and Charles Stenholm (TX), would make dramatic changes in the legal services program that would, inter alia, affect local bar association and community control of programs, restrict the use of IOLTA funds, institute a competitive bidding system for funding, restrict the type and breadth of representation provided and create ethical dilemmas for program attorneys and attorney board members. These provisions were offered and rejected by a close vote of a House Judiciary Subcommittee on August 2. It is anticipated that they will be offered again shortly before the full House Judiciary Committee and on the House floor. Similar damaging, but somewhat less restrictive, provisions were offered on the floor of the House of Representatives last October as an amendment to the LSC appropriation. Although that amendment would have altered the federal legal services program in harmful ways, it failed only narrowly by a vote of 199-206. Thus, it is critically important that the organized bar be in a position to speak forcefully on these proposals during the remainder of this year's Congressional session.

5. Status of Legislation. (If applicable.)

H.R. 5336 has been introduced in the House of Representatives. It was considered on August 2 by the House Judiciary Subcommittee on Administrative Law and Governmental Relations.
6. Cost to the Association. (Both direct and indirect costs.)
   N/A

7. Disclosure of Interest. (If applicable.)
   N/A

8. Referrals.
   Standing Committee on Ethics and Professional Responsibility
   Commission on Interest on Lawyer Trust Accounts

9. Contact Person. (Prior to the meeting.)
   Joanne M. Garvey, Chair, Standing Committee on Legal Aid
   and Indigent Defendants
   333 Bush Street
   San Francisco, CA  94104
   415/772-6729

10. Contact Person. (Who will present the report to the House.)
    Joanne M. Garvey, Chair, Standing Committee on Legal Aid
    and Indigent Defendants