MEMORANDUM

TO: Peter Edelman

FROM: Alan Houseman and Linda Perle

DATE: February 6, 2009

RE: **RESTRICTIONS ON PROVIDING A FULL RANGE OF SERVICES**

While the lack of adequate funding is the most significant component of the "justice gap," many low-income persons do not have equal access to justice because legal aid attorneys are not permitted to provide the full range of services clients need. Access to justice for poor people is inherently unequal when it is subject to advocacy restrictions that are not imposed on clients who can afford to pay for their lawyers. Low-income clients should not be limited to second-class justice simply because they do not have the resources to pay for legal assistance and have to rely on LSC grantees to provide free legal services. In order for access to legal services for low-income people to be meaningful, it must be truly equal to the services that private attorneys who are paid by their clients can provide.

Although there have always been some restrictions on LSC programs under the LSC Act and a number of additional restrictions were imposed on LSC funds during the 1980s and early 1990s, a major sea change occurred in 1996 when Congress imposed on LSC grantees a large number of new restrictions. Congress limited the tools that would otherwise be available to attorneys who serve low-income clients, by imposing prohibitions such as the restrictions on claiming and retaining attorneys' fees and participating in class actions. Access to legal assistance was severely restricted for certain low-income populations and numerous administrative burdens were imposed on LSC recipients and their clients, many of which raised serious ethical issues and even endangered clients' safety.

Restrictions on Non-LSC Funds

Perhaps most significant, these restrictions, which were imposed as riders to the LSC appropriations bill, were made applicable not just to activities supported by funds appropriated by Congress, but were applied to all of an LSC grantee's activities, regardless of the source of the funds that supported them. All of a grantee's resources, whether they came from the LSC appropriation, other federal funds, state or local appropriations, IOLTA programs, contracts, private donations, foundation grants or other funding sources, were restricted. Some LSC grantees' have substantial non-LSC resources which include state appropriations, interest on lawyers' trust account (IOLTA) funds, contract funds, private foundation grants, bar association funding and private contributions. Under the current appropriations rider, these funds generally are subject to the same restrictions as LSC funds, regardless of the wishes of the funder or the purposes that are intended to be served by the funds. The non-LSC funds restriction and the other restrictions have been incorporated by reference in each of the appropriations bills passed

since 1996, including the recently passed Continuing Resolution which funds LSC and the rest of the federal government through March 6, 2009.

For example, under the non-LSC funds restriction, IOLTA funders cannot contract with LSC providers to do cases for exploited low-wage workers who do not fit within the categories of non-citizens whom LSC grantees are permitted to serve, despite the fact that many of these workers are in the US legally. LSC grantees cannot use funds they receive from state appropriations to claim attorneys' fees in consumer protection (or any other) cases, even when those fees could be requested were the same cases to be brought by private attorneys, and when Congress and state legislators intended attorneys' fees to be available to vindicate important rights. Private foundations cannot give LSC programs resources to conduct legislative advocacy on issues such as affordable housing that they determine are of importance to the low-income community. Faith-based groups cannot grant money to LSC recipients to provide legal assistance to prisoners who need assistance that requires civil litigation. Bar associations cannot provide funds to support class action litigation to address predatory lending and foreclosure scams that disproportionately affect the low-income community.

In some states, LSC grantees are ineligible to accept certain non-LSC legal resources because they are only available to entities that are permitted to engage in activities that are restricted to LSC grantees, such as legal assistance to certain non-citizens or policy advocacy. In some states, LSC grantees have been forced to set up totally separate corporate entities, with costly and duplicative administrative structures, to accept and use those non-LSC funds that are available for restricted activities.

If Congress were to permit non-LSC funders to provide funds to LSC grantees for whatever purpose a public or private funder determines meets the needs of the low-income client community and subject to whatever requirements the non-LSC funder concludes are appropriate. For those LSC grantees with significant non-LSC resources, this revision would significantly reduce the impact of the LSC restrictions on the ability of those programs to provide the full range of legal services necessary to meet the needs of low-income clients and expand access to legal assistance to many financially eligible members of the low-income community. This revision would also permit LSC grantees to directly accept funds that are now not available to them because the purposes to which the non-LSC funders wish the money to be used would violate the LSC restrictions.

Restrictions on LSC Funds

Nevertheless, even Congress were to eliminate the restriction on non- LSC funds, many LSC grantees would still be unable to provide the full range of legal assistance necessary to meet the needs of the low-income community because the grantee does not have significant non-LSC resources that can be used to engage in these activities. Therefore, it is essential for Congress to eliminate many of the other restrictions that were imposed on LSC grantees in 1996.

Attorneys' Fees: As an example of the importance of eliminating these restrictions on LSC funds in addition to the restrictions on non-LSC funds, the prohibition on LSC grantees seeking attorneys' fees severely limits the tools and strategies that would otherwise be available to legal

aid advocates to fully represent their clients, as well as reducing the resources that are potentially available to grantees to expand access to legal assistance to the low-income community. Prior to 1996, attorneys' fees were a considerable source of funding for many LSC grantees. Attorneys' fee awards enabled those grantees to serve many more individual clients with their day-to-day legal needs and to support a wide array of advocacy initiatives, including resource-intensive systemic litigation that the programs would otherwise not have had the funds to support. But perhaps more important, the ability of advocates for low-income persons to claim attorneys' fees--in individual as well as systemic cases-- had a significant deterrent effect on potential adversaries who did not want to risk having to pay a substantial attorneys' fee award if they were the losing party, and served as an effective advocacy strategy that encouraged quick and economical dispute resolution. The ability to claim fees is routinely and effectively used by attorneys in private practice on behalf of their paying clients and many statutes include them as a substantive right to enable aggrieved persons to enforce basic laws.

Legislative Representation and Rulemaking: Similarly, under the 1996 restrictions, legal aid advocates are severely limited in the ways they can use LSC funds for participation in legislative representation and rulemaking on behalf of their low-income clients and the low-income community. Often an effective solution to a client's legal problem cannot be achieved without changes to the statutes or regulations governing the issue. In other instances, individual representation may solve a particular person's legal problem, but without changes in legislation or regulations the same issue will keep reoccurring and advocates will have to bring the same litigation over and over again. Paying clients can hire private attorneys to engage in legislative and administrative advocacy to further their interests and do so with great effect, often in ways that have a negative impact on the low-income community. Advocates for low-income persons should be able to use the same tools on behalf of their clients to ensure that poor people's needs and interests are considered by those who are crafting the laws and regulations that impact their lives.

Class Actions: The 1996 restrictions also prohibit LSC recipients from filing or participating in class actions. A class action is nothing but a procedural device that is available under federal and state court rules that allows many people with the same legal claim to join together in one lawsuit rather than filing hundreds of separate, identical claims. As with legislative or administrative advocacy, use of class actions to address systemic problems saves limited legal services resources by eliminating the need to litigate the same issue over and over again. A prohibition on class actions is unnecessary to address any perceived abuses by legal services lawyers because, under the rules of all state and federal courts, the court closely supervises and controls the class action process from beginning to end, and judges only certify the use of class actions in appropriate situations. Many legal problems of the poor, just like those of the affluent, are better resolved by proceeding as class actions. They provide an effective remedy where no others may exist; they are an economical means of obtaining relief; they assure effective enforcement of judicial decisions; and they deter unlawful conduct towards others similarly situated. To deny low-income clients the ability to file a class action against a private or governmental entity deprives the poor of access to the justice system and creates a second-class system of justice for them

Aliens: Another issue where the restrictions on LSC funds is a significant barrier to access to legal representation for a substantial segment of the low-income community is the prohibition on the provision of legal assistance to certain aliens, many of whom are in the US legally under a variety of special visa programs. Although once confined primarily to major urban area and agricultural regions, large concentrations of low-income immigrants are now also living in small cities and suburban areas throughout the country. Many areas with large immigrant populations are in states, particularly in the South and Southwest, where the LSC-funded programs are the only legal aid program in existence and where those programs have very limited non-LSC funds. So even if the restrictions were lifted on those programs' non-LSC funds, they would not have non-LSC resources to devote to the representation of those immigrants who cannot now be served by LSC grantees and who may make up a substantial percentage of the low-income population in the area. Undocumented workers are often the most vulnerable and exploited members of the work force, and their inability to receive free legal assistance from LSC-funded programs in cases such as wage and contract claims or improvement of the often intolerable conditions under which they may be forced to work makes it virtually impossible for many of them to find a source for help with their legal problems.

Access to Records

In addition to the restrictions described above, in 1996 Congress adopted a provision granting LSC access to client names and other confidential information, despite the existence of state ethics rules protecting that information from disclosure. Under the original LSC Act, LSC was not permitted to interfere with grantee attorneys' professional responsibilities to their clients or abrogate the authority of a State or other jurisdiction to enforce standards of professional responsibility applicable to such attorneys. This included compliance with ethical rules regarding client confidentiality and access by third parties to client records. Nevertheless, as part of the 1996 and subsequent appropriations riders, Congress included a provision giving LSC and the LSC Inspector General access to certain client records, including client names and eligibility records, except for those limited records that are subject to the attorney-client privilege. This provision explicitly overruled the provision in the LSC Act regarding the applicability of state rules of professional responsibility.

Since 1996, LSC and the LSC Inspector General have taken the position that the 1996 rider gives them virtually unfettered access to client names, eligibility and certain other client information, regardless of the applicable rules of professional responsibility for the jurisdiction where the program's attorneys practice. They have construed the attorney-client privilege very narrowly, arguing that client and eligibility names are almost never protected from disclosure under the privilege. They have sought and insisted on disclosure of client names and other information often without giving any reason or justification for why the information is needed, other than that they are entitled to it under the provision of the rider.

This provision imposes on LSC grantees' attorneys requirements with respect to the disclosure of confidential client information that are not applicable to any other attorneys who practice in the same jurisdictions. It undermines the traditional relationship between lawyers and the courts and organized bar entities that are charged with the authority to enforce professional responsibilities and attorney discipline. It puts legal aid attorneys in the untenable position of violating the

standards of practice in their communities. It might dissuade potential clients with serious problems, including those that threaten their safety such as domestic violence, from talking with a legal aid lawyer if there is a possibility that the person's identity or confidential communications might be disclosed. It severely weakens the protections for client confidentiality as well as the dignity of low-income clients that are inherent in the original LSC Act. Congress should eliminate this provision and return to the protections of the LSC Act.

Attachments: Attached are five documents that should be helpful in understanding the background of these restrictions and the arguments against them. The first is based on a document that was written shortly after the restrictions were put into place and gives the background of how they came to be, as well as some of the arguments used by proponents and opponents of the restrictions. The second is an argument sheet that is now being used by a coalition of allies who have been working for the last two years to eliminate the application of the restrictions on non-LSC funds. Then third is an updated version of an article on what can and cannot be done. Fourth are the actual appropriation provisions. Fifth is an old law review article about the restrictions.